

RWANDA / JUDGMENT

NIYIGENA v ECOBANK RWANDA PLC ET. AL.

RLR V.2-2025

COURT

Supreme Court

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Text

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NIYIGENA v ECOBANK RWANDA PLC ET. AL. [Rwanda SUPREME COURT – RS/INJUST/RCOM 00005/2023/SC (Mukamulisa, P.J., Hitiyaremye and Kazungu, J.) June 28, 2024] Civil Procedure – Contracts – Suretyship Contracts – Provision of Security – A security may be provided to guarantee an existing debt; it may also be used to secure a debt or future debts. However, in the security agreement, it must be clearly stated that the security is intended to guarantee a specific debt or any debts, specifying their amount, purpose, and other relevant details. Facts: Kantarama Felicie sued Niyigena Eraste before the Commercial Court for his refusal to repay a loan he had borrowed from Ecobank Rwanda Plc, for which she had acted as a guarantor. As a result, the collateral she had mortgaged was eventually sold through a public auction. Ecobank was forced intervened in the case. The Court rendered a judgment declaring that Kantarama's claim was justified and ordered Niyigena to pay her 261,173,067 Frw, equivalent to the value of the property she had lent her, identified by UPI: 5/04/03/01/2936. The Court also ordered him to pay her damages. Niyigena was not satisfied with the decision, appealed to the Commercial High Court,

arguing that the loan he borrowed had been repaid and, therefore, he should not be ordered to pay Kantarama Félicie the amount of 261,173,067 Frw for the collateral that was sold by Ecobank, nor the damages. The Commercial High Court rendered a judgment by upholding the decision of the Commercial Court. Niyigena wrote to the President of the Court of Appeal requesting a review of the case on grounds of injustice. After examining the grounds for the request and finding them justified, the President of the Court of Appeal wrote to the President of the Supreme Court requesting that the case should be reviewed who approved the review and ordered it to be retried by the Supreme Court. In his submissions in the case under review on grounds of injustice, Niyigena argues that the Commercial High Court misinterpreted the facts by ruling that the agreement between him and Kantarama regarding the lending of the collateral was not respected, simply because the property he had lent him was sold through a public auction after the issuance of the certificate of RDB. He argues that the sale of the property was not due to a breach of the loan agreement related to the initial advance (avance de démarrage), which had been guaranteed by Kantarama and was already repaid meaning Ecobank's rights over that collateral should have ended there. Rather, he attributes it to Ecobank's negligence in granting subsequent loans without registering the collateral again. This would have required Kantarama's prior consent for her collateral to cover the new loans, along with a new registration. Since this was not done, Ecobank's rights over the collateral provided by Kantarama Félicie to Niyigena Eraste applied only to the loan of 284,747,744 Frw. Ecobank Rwanda Plc, in its defense, argues that Niyigena's claim that Kantarama Félicie only guaranteed the advance payment guarantee loan is unfounded. The Bank states that Kantarama had agreed that the collateral would continue to secure all future loans granted to Niyigena by the Bank.

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It further adds that the sale of the collateral through public auction was a result of Niyigena's failure to repay the loans he had been granted. Kantarama, on her part, argues that since Ecobank admits that the loan she guaranteed had already been repaid, and sold his collateral, it should bear the consequences and she denies ever authorizing Ecobank to use her collateral to guarantee any other future loans that Niyigena might take. She further states that the collateral was registered only once and was not meant to secure any additional loan, and that there is no evidence proving that it was registered as security for any other loan. She therefore requests that Ecobank should be held accountable for all the errors it committed. Held: A security is provided to guarantee an existing debt; it may also guarantee a future debt or debts. However, the security agreement must clearly state that the security is intended to cover a specific future debt or debts, specifying their amount, purpose, and other relevant details. A claim is justified. Statutes and statutory referred to: Law of 30/07/1888 of the civil code, article 555; Law n° 10/2009 of 14/05/2009 on mortgages, article 4 and 11. Case laws referred to: RS/INJUST/RCOM 00011/2022/SC; Bugingo Jean Claude, Ecobank vs KADOGI Jean Paul decided by the Supreme Court on 08/03/2024. RCOMA 0138/12/CS; GAJU Cyinthia vs Access Bank Ltd decided by the Supreme Court on 16/05/2014. Doctrines referred to : Patrick Tafforeau, Droit des sûretés, sûretés personnelles et réelles, Edition Bruylant, Bruxelles, 2020. Manuella BOURASSIN na Vincent BREMOND, Droit des sûretés,

7ème Edition Dalloz, 2019. Philippe MALAURIE, Laurent AYNES, Droit des Sûretés, 15 éditions, 2021.

Judgment

I. BACKGROUND OF THE CASE

This case started in the Commercial Court, where Kantarama Félicie sued Niyigena Eraste for refusing to repay a loan he owed to Ecobank, which led to the collateral she had mortgaged to secure that loan being sold at auction, along with various damages arising from the breach of contract. Ecobank was forced intervened in the case.

On 08/02/2022, the Commercial Court rendered the judgment in case RCOM 01291/2021/TC, ruling that the claim filed by Kantarama Félicie was founded in parts. The Court held that Ecobank would not have been forced intervened in the case, and ordered Niyigena Eraste

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to pay Kantarama Félicie 261,173,067 Frw as the equivalent of her property with UPI: 5/04/03/01/2936, which she had lent him. He was also ordered to pay her 600,000 Frw made of procedural and counsel's fees, along with deposit court fees. Additionally, he was ordered to pay Ecobank 500,000 Frw of counsel's fees.

Niyigena Eraste appealed the judgment to the Commercial High Court, arguing that he had not requested for forced intervention of Ecobank in the first instance, but rather intended for the bank to be brought into the case to be held accountable for its errors committed in selling the collateral that had been provided as security for the money Niyigena Eraste received from WDA, a loan which was repaid without Ecobank's involvement. He further argued that the loan amounting to 284,747,744 Frw was not granted by Ecobank, and that such loan had already been repaid. Therefore, he contended that he should not be ordered to pay Kantarama Félicie the amount of 261,173,067 Frw for the mortgage that was sold by Ecobank and damages.

The Commercial High Court examined the following three issues:

- i. Whether Niyigena Eraste had not requested the forced intervention of Ecobank in the first instance; ii. Whether the loan in dispute was not granted by Ecobank and whether it had been repaid; iii. Whether the appellant would not have been ordered to pay Kantarama Félicie 261,173,067 Frw.

On 25/11/2022, the Commercial High Court rendered judgment in case RCOMA 00190/2022/HCC, uphold the decision of the appealed case. However, it found that Niyigena Eraste's appeal was only valid with regard to the fact that he had not requested the forced intervention of Ecobank in the first instance, but had instead requested that the bank should be summoned as a guarantor to be held liable for the claims made against it. The Court ordered him to pay both Ecobank and Kantarama Félicie damages of 300,000 Frw for each, as counsel's fees at the appeal level.

In reaching this decision, the Court based on the following reasons:

- a. The fact that in the first instance, Niyigena Eraste did not request the forced intervention of Ecobank, but rather requested that it should be summoned as a guarantor to be held liable for the claims made against it, and that he did not request it to appear in the hearing through the ordinary procedure of forced intervention;
- b. The fact that Niyigena Eraste failed to provide the Court with evidence proving that the loan amounting to 284,747,744 Frw was not granted by Ecobank and that it had been repaid.

Niyigena Eraste wrote to the President of the Court of Appeal requesting a review the case RCOMA 00190/2022/HCC on grounds of injustice, which had been decided by the Commercial High Court on 25/11/2022. After examining the request, the President of the Court of Appeal forwarded a report to the President of the Supreme Court recommending that the case should be reviewed who also approved the request, and the case was registered under RS/INJUST/RCOM 00005/2023/SC.

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During the pre-trial conference, the parties agreed that the guarantee provided by Ecobank covered only the initial advance (avance de démarrage) granted by WDA, and that this advance had been repaid without Ecobank's involvement, thus it did not constitute a debt owed by Niyigena Eraste to Ecobank. The issue arose from the fact that Niyigena Eraste took additional loans from Ecobank using the same collateral that had been lent to him by Kantarama Félicie when Ecobank initially guaranteed the aforementioned initial advance (avance de démarrage). The question was whether Ecobank could transfer that collateral to guarantee new loans without informing Kantarama Félicie and obtaining her consent, as had been applied for the case of the initial advance (avance de démarrage).

The case was heard in public on 15/05/2024. Niyigena Eraste assisted by Counsel Bayingana Janvier, Ecobank was represented by Counsel Bimenyimana Eric, while Kantarama Félicie was represented by Counsel Ngendakuriyo Célestin. The issues to be analysed in the present case include whether Ecobank had the right to transfer the collateral lent by Kantarama Félicie to Niyigena Eraste initially provided to guarantee the initial advance (avance de démarrage) to guarantee other loans without informing her, and the determination of the amount of damages to be paid to Kantarama Félicie, and other claims for damages raised in the case. II. ANALYSIS OF LEGAL ISSUES

- i. Whether Ecobank had the right to transfer the collateral lent by Kantarama Félicie to Niyigena Eraste initially provided to guarantee the initial advance (avance de démarrage) to guarantee other loans without informing her.

Counsel Bayingana Janvier, counsel for Niyigena Eraste, argued that the injustice which led to the request for review of the case stemmed from the fact that the Commercial High Court misinterpreted the facts, resulting in a wrongful decision on a non-existent issue as the Court

wrongly assumed that the loan guaranteed by Kantarama Félicie's collateral had not been repaid, which led it to conclude that the mortgage agreement between Kantarama Félicie and Niyigena Eraste had been breached. He further stated that Ecobank took other debts owed to it by Niyigena Eraste which were entirely unrelated to the loan for which Kantarama Félicie had provided her collateral and used that as a basis to request RDB to authorize the sale of her collateral, despite the fact that the collateral had not been properly registered. He added that, in case reviewing the permit to sale issued by RDB, it is evident that the only loan for which the collateral had been mortgaged was the initial advance.

He further explains that when the collateral mentioned above before being mortgaged, on 13/01/2014, between ECOTRAP/Niyigena Eraste, Kantarama Félicie, and Ecobank, there has been an agreement concerning a loan amounting to 284,747,744 Frw, after which the collateral was registered. He argued that once this loan had been repaid, Kantarama Félicie's obligations came to an end. Therefore, for any additional loans that Ecobank claims to have granted to Niyigena Eraste using Kantarama Félicie's collateral, it was necessary for her to first consent to the continued use of her collateral for those other loans, and a new registration of the collateral should have taken place. Since this was not done, Ecobank's rights over the collateral lent to Niyigena Eraste by Kantarama Félicie were exclusively limited to the loan of 284,747,744 Frw.

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Regarding Ecobank's claim that, in the collateral loan agreement of 07/01/2014, Kantarama Félicie authorized Niyigena Eraste to continue using her collateral for a period of ten years, Counsel Bayingana Janvier argued that this interpretation was incorrect. He explained that the collateral loan agreement in question referred to any future agreements that Niyigena Eraste might enter into with any financial institutions, and was not specifically limited to loans from Ecobank.

He concluded by stating that the court, in the judgment that was requested to be reviewed on grounds of injustice, unfairly punished Niyigena Eraste for mistakes committed by Ecobank. He therefore requests this present Court to correct the error and hold Ecobank itself liable for the consequences of its own acts, and to order that the amounts imposed in that judgment be charged to Ecobank, since it was the one that wrongly sold Kantarama Félicie's collateral despite the loan it had guaranteed having already been repaid.

Counsel Bimenyimana Eric, Counsel for Ecobank, argues that Niyigena Eraste's claim that Kantarama Félicie only guaranteed the advance payment guarantee loan is unfounded because in the agreement of 13/01/2014 on which Kantarama Félicie signed, under its article 3, paragraph 3 explicitly states that she authorized Ecobank to allow her collateral to be used for other loans by agreeing a change in the mode of utilization. It is on that basis that her property continued to serve as collateral for all loans granted to Niyigena Eraste. He added that, in addition to this, the agreement of 07/01/2014 concluded before a land notary in Kayonza District, where the mortgaged property is located, it was for granting Niyigena Eraste the right to use Kantarama Félicie's property as collateral for a period of ten (10) years, without restricting him from using it to guarantee future loans.

He further explained that, based on the aforementioned, it is in that context from 14/01/2015, Niyigena Eraste took out various loans assuring the Bank that the property he was lent by Kantarama Félicie would serve as collateral. Among the requirements imposed was to subscribe for fire insurance for the property, which he consistently fulfilled as long as the property remained under mortgage. He stated that the loan granted on 20/05/2015, amounting to 250,000,000 Frw, failed to repay, leading to a restructuring of the loan agreement, and the debt increased to 308,909,333 Frw which ultimately led to the auction sale of the collateral.

When asked why the collateral belonging to Kantarama Félicie was sold, despite acknowledging that a debt of 284,747,744 Frw had been repaid and no other permit to sale had been issued for the remaining debt he mentioned, Counsel Bimenyimana Eric responded that the collateral was sold based on the invoice discounting of 28/07/2016, which changed the nature of the guaranteed loan. He explains that before the Bank proceeds with the sale of collateral, some procedures must first be followed, including reminding the debtor of their repayment obligations, and the same to Niyigena Eraste was followed.

Regarding the issue of whether the disputed debt was the same for all parties, since they seem as they mention various debts, he explains that Ecobank had granted various loans to Niyigena Eraste. They had agreed that among the properties to serve as collateral for those loans was the house belonging to Kantarama Félicie, which was already registered as such, and that is why it was not registered again. He added that the aforementioned are consistent with the agreement concluded between Kantarama Félicie, Ecobank, and Niyigena Eraste under article 3

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of their contract, where they authorized the Bank to transfer the registration of the collateral to secure another loan which is the basis where Ecobank proceeded with the auction of the mortgaged property after determining that Niyigena Eraste had defaulted on the loan secured by that collateral.

Counsel Ngendakuriyo Célestin, Counsel for Kantarama Félicie, stated that since Ecobank acknowledges that the loan amounting to 284,747,744 Frw which Kantarama Félicie had secured with her property was fully repaid, yet it proceeded to sell her collateral, the Bank should bear the consequences of that act. He argued that the claim by Ecobank's Counsel that Kantarama Félicie had agreed to secure all future loans granted to Niyigena Eraste is false, as article 2, paragraph 2 of the mortgage agreement concluded by both parties on 13/01/2014 clearly specifies the way her collateral would be used. Since Kantarama Félicie never guaranteed the other loans granted to Niyigena Eraste, therefore, that Ecobank should be held liable for all consequences resulting from the sale of the collateral.

Counsel Ngendakuriyo Célestin further explained that, based on article 4 of the Law on Mortgages, a mortgage is registered only once for a single debt. Therefore, since the mortgage granted by Kantarama Félicie was for a single loan of 284,747,744 Frw and was registered only once for that loan, it could not be used to secure another debt especially given that there is no evidence indicating that it was registered for any other loan. DETERMINATION OF THE COURT

Article 555 of the Civil Code of 30/07/1888, which was in force at the time the contract referred to in this present case was signed, provided that suretyship cannot be presumed, and must be expressly accepted and it cannot be extended beyond the obligations that the guarantor has undertaken. Article 576 of the same law provided that a guarantor cannot be compelled to pay if they can no longer exercise their right of subrogation namely, the right to recover from the principal debtor through the debtor's rights, mortgaged property, or other securities due to the creditor's fault.

Article 4 of Law n° 10/2009 of 14/05/2009 on Mortgages as amended and supplemented to date, provides that a mortgage is considered to be valid when recorded in the mortgage register in the office of the Registrar General.

Article 11 of the aforementioned law provides that a mortgagor shall be entitled to restitution of his/her security whenever he/she has fully refunded the loan in accordance with the terms agreed on in the mortgage contract.

The provisions of the aforementioned article were clarified by the Supreme Court in the case decided on 19/06/2020 between Kayombya Robert, I&M Bank Rwanda Plc v. IMEX Sarl where it referred to explanations provided by legal scholars, the Court explained that a mortgage is an accessory right, meaning on the secured debt, of one of the implications of this is that the mortgage is extinguished along with the debt it guarantees. Therefore, once the debt has been fully repaid, the mortgage securing it is automatically released unless otherwise stipulated in the mortgage contract.¹

¹ Case n° RCOMAA0026/2016/SC decided by the Supreme Court on 19/06/2020, Paragraph 39 and 40.

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The parties to this case agree that the loan secured by the property of Kantarama Félicie, with UPI: 5/04/03/01/2936, under the mortgage agreement of 13/01/2014 was fully repaid without the intervention of Ecobank. They also agree that after the payment of the loan, Niyigena Eraste, who had been lent the mortgage, used it to secure additional loans, one of which was not repaid, leading to the sale of the mortgage at auction. They disagree on the issue of that Niyigena Eraste and Kantarama Félicie argue that the mortgage would not have been sold since the loan it initially secured had been repaid, while Ecobank maintains that since Niyigena Eraste continued using the mortgage to secure other loans, one of which defaulted, nothing would prevent the mortgage from being sold.

The documents in the case file indicate that on 23/12/2013, Ecobank and ECOTRAP, represented by Niyigena Eraste, entered into a loan agreement for 284,747,744 Frw intended to secure an advance payment granted to ECOTRAP after winning a tender in WDA2. Those documents indicate that on 13/01/2014, a mortgage agreement was signed between Ecobank, Niyigena Eraste and Kantarama Félicie to secure the loan Niyigena Eraste had been granted by Ecobank. Under that agreement, the person who provided the mortgage as collateral for the loan was Kantarama Félicie.

Based on the two aforementioned agreements and article 4, paragraph one of Law n0 10/2009 of 14/05/2009 mentioned above, on 13/01/2014, Ecobank registered the mortgage provided by Kantarama Félicie at the Office of the Registrar General which consists of property registered under UPI: 5/04/03/01/2936, located in the Eastern Province, Kayonza District, Kabarondo Sector, and valued at 261,173,067 Frw, as security for the loan of 284,747,744 Frw mentioned above.

The documents in the case file also indicate that Ecobank and ECOTRAP, represented by Niyigena Eraste, entered into additional loan agreements, in which the property of Kantarama Félicie, registered under UPI: 5/04/03/01/2936, was included as among collateral for those loans. The agreements are as follow : i. A loan agreement referred to as invoice discounting for 109,000,000 Frw, concluded on 16/04/2014; ii. A loan agreement referred to as invoice discounting for 125,000,000 Frw, concluded on 26/08/2014; iii. A loan agreement referred to as invoice discounting for 250,000,000 Frw, concluded on 14/01/2015; iii. A loan agreement referred to as invoice discounting for 250,000,000 Frw, concluded on 20/05/2015; iv. . A loan agreement referred to as extension of invoice discounting for 276,302,945 Frw, concluded on 28/07/2016.

However, the Court finds that although the aforementioned loan agreements indicate that the property of Kantarama Félicie, registered under UPI: 5/04/03/01/2936, was listed among the collateral for the mentioned loans, there is no evidence that the Bank re-registered the property as a mortgage with the Office of the Registrar General, as it had done for the initial loan of 284.747.744 Rfw to secure the tender won with WDA for the ward of the contract to construct and rehabilitate ESTB Busogo.

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284,747,744 Frw. Yet, such registration is required for the mortgage to be valid for a specific loan, as provided under article 4, paragraph one, of Law n0 10/2009 mentioned above.

In its submissions, the Counsel for Ecobank told the Court that when the mortgage agreement was signed, under article 3, paragraph 3, Kantarama Félicie authorized Ecobank that her collateral should continue being used for other loans (she agreed to a change in the mode of use) that Niyigena Eraste might take in the future, and that it was on this basis that her property continued to serve as collateral for all the loans granted. However, the Court finds that Kantarama Félicie did not give such consent in that clause. What is actually stated in that clause is that the Bank reserved the right to change the intended use of the loan (translated as: "La Banque se réserve cependant le droit au terme d'un mode d'utilisation du crédit de le remplacer

par un autre mode d'utilisation").

Regarding whether Kantarama Félicie agreed to guarantee future loans stated under article 5 of the above-mentioned mortgage agreement, where it is stated that the mortgagor agreed to guarantee loans owed to the Bank both at present and in the future. This was written in French as follows: "A la sûreté et garantie du remboursement de toutes sommes en principal, intérêts, commissions, débours et frais dont il se trouve actuellement ou à l'avenir débiteur envers la Banque, par suite de l'utilisation de l'ouverture de crédit qui lui est consentie aux termes du chapitre I des présentes, le Constituant déclare expressément affecter et hypothéquer pour le compte du Client au profit de la Banque qui accepte les immeubles suivant avec les constructions y érigées ou qui y seront érigées ultérieurement et les biens qui y sont ou y seront attachés par destination ou incorporation."

Regarding whether a security can guarantee future debts, legal scholars provide the following explanations: i. Patrick Tafforeau, in his Book called « Droit des sûretés, sûretés personnelles et réelles », explains that it is possible for a security to guarantee both present and future loans. However, with regard to the future Loans, the debts must be certain. For that reason, the mortgage agreement must include a clause clearly specifying the type of debt being secured. ([...] l'hypothèque peut désormais garantir une ou plusieurs dettes actuelles mais aussi futures ; pour ces dernières, à condition cependant que qu'elles soient déterminables. Il faut donc rédiger une clause déterminant avec le plus de précision possible le type de créances ainsi couvertes par la sûreté)³ [...]. ii. Manuella BOURASSIN na Vincent BREMOND, in their Book « Droit des sûretés », They state that, in order for future debts to be secured, such debts must be certain. This means that one must be able to easily determine their nature, its cause as well as the amount. (Les créances futures doivent être « déterminables », c'est-à-dire qu'il doit être possible relativement aisément d'en déterminer la nature, la cause et le montant)⁴. iii. Philippe MALAURIE and Laurent AYNES state that the law allows a security to be provided to guarantee a debt or debts that currently exist or that will arise in the future. Regarding future debts, they explain that such debts must be certain, not only in terms of their amount, but also specified in the agreement, in addition the cause of the debt must

³ Patrick Tafforeau, Droit des sûretés, sûretés personnelles et réelles, Edition Bruylant, 2020, Bruxelles, §

⁹¹⁵. ⁴ Manuella BOURASSIN na Vincent BREMOND, Droit des sûretés, 7ème Edition Dalloz, 2019, § 2030.

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also be included in the agreement. They emphasize that this is necessary to ensure that, when the creditor seeks to exercise their rights in relation to the security, there will no ambiguity in determining whether a particular debt was secured. ([...] D'une part, les créances futures doivent être « déterminables » : non seulement leur montant, puisque l'acte doit indiquer un montant déterminé en capital indépendamment du montant de la créance. De plus les éléments de

détermination requis s'ajoutent à la cause de la créance, qui doit, créance présente ou créance future, être déterminée dans l'acte. Bien que la loi ne précise pas quels sont les éléments permettant la détermination, on peut penser qu'il s'agit de la désignation du créancier, de celle du débiteur, de la nature de l'opération d'où naîtra la créance... L'objectif est d'éviter que, le moment venu (spécialement lorsque le créancier prétendra exercer son droit hypothécaire), il puisse y avoir un doute sur le point de savoir si telle créance est garantie)⁴. [...]

The Court finds the opinions of legal scholars indicate that, although a security is generally provided to guarantee an existing debt, it may also secure a future debt or debts. However, the security agreement must clearly states that the security is intended to cover a specific future debt or debts, specifying their amount, purpose, and other relevant details. It is thus clear that one cannot provide a security for an unknown or uncertain debt to fully understand the extent of the obligation taken. This aligns with the interpretation given by the Supreme Court in the case involving Bugingo Jean Claude, Ecobank v. Kadogi Jean Paul, where the Court held that a security must explicitly indicate the amount of the debt the guarantor agrees to secure; otherwise, the security shall be deemed to have never existed.⁵

Regarding this case, the Court finds that by the time Kantarama Félicie signed the mortgage agreement of 13/01/2014, the loan she explicitly guaranteed amounted to 284,747,744 Frw, as that was the amount appeared in the agreement and it was the specific loan that she authorized Ecobank to register her property as its collateral, as provided under article 5 of the mentioned agreement⁶. That loan was fully repaid as all parties to the case agreed. Although the signatories to the mortgage agreement agreed that the guarantor secured debts owed to the Bank both at present and in the future, with regard to future debts, the Court finds that such debts needed to be clearly specified in the agreement so that Kantarama Félicie would have full knowledge of the obligations secured by her property. Since this was not done, she cannot be held liable for the loan that Ecobank claims to have granted to Niyigena Eraste of which Kantarama Félicie was not informed.

The Court also finds that, in addition to the requirement that other loans Ecobank claims to have granted to Niyigena Eraste after the initial loan if secured by the collateral provided by Kantarama Félicie would have been clearly specified in the mortgage agreement, the bank also had a duty to provide her with full information regarding all debts granted to Niyigena Eraste that were secured by her property especially in situations whereby the debts were not being repaid as

4 Philippe MALAURIE, Laurent AYNES, Droit des Sûretés, 15 éditions, 2021, LGDJ, § 405. 5 Case n° RS/INJUST/RCOM 00011/2022/SC decided by the Supreme Court on 08/03/2024, BUGINGO Jean Claude, Ecobank v. KADOGI Jean Paul, paragraph 41. 6 ...La Banque est autorisée par le Client et les propriétaires constituants à obtenir auprès du Registraire Général une inscription hypothécaire sur les biens immeubles ci-dessus énumérés et à concurrence de : 1° En principal deux cent quatre vingt quatre millions sept cent quarante sept mille sept cent quarante quatre francs rwandais (284.747.744 Frw)...

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agreed or when the collateral was at risk of being sold, so that she could take appropriate measures if necessary. This was upheld by this present Court in its judgment of 16/05/2014 in the case between Gaju Cynthie v. Access Bank Ltd⁷, as well as in the judgment of 08/03/2024 in the case between Bugingo Jean Claude, Ecobank v. Kadogi Jean Paul⁸.

Regarding Ecobank's submissions that the agreement signed by Kantarama Félicie on 07/01/2014 before the land notary granted Niyigena Eraste the right to use her property as collateral for a period of ten (10) years, and that she never restricted him from taking additional loans, the Court finds this argument unfounded as the explanations provided above, mention that such agreement does not relieve the bank of its obligation to provide the guarantor with sufficient information concerning the loans granted to the person s/he guaranteed, such information is essential for the guarantor to assess the situation and, if necessary, terminates the agreement. Moreover, as explained above, the fact that, such loans that Ecobank claims to have granted to Niyigena Eraste after the initial one are not mentioned in the mortgage agreement signed by Kantarama Félicie and therefore should not be secured by collateral she granted to him especially since it was not re-registered in relation to those subsequent loans, as required by law for a mortgage to be valid in respect of a specific debt.

Based on the legal provisions and all the explanations provided above, since Ecobank failed to produce any evidence proving that Kantarama Félicie was informed about the loan of 250,000,000 Frw granted to Niyigena Eraste which later increased to 308,909,333 Frw due to non-repayment, the Court finds no basis to declare that she guaranteed that loan, such that her property could be subject to sale due to its non-repayment.

Furthermore, based on article 11 of Law n° 10/2009 of 14/05/2009 mentioned above, since Ecobank failed in its obligation to handle the collateral to its owner after the repayment of the loan it was intended to secure as previously explained and instead sold it due to the loan granted later, the owner of the collateral had not been informed about the loan, the Ecobank that must pay damages instead of Niyigena Eraste as was decided by the previous Courts because they assumed that the loan of 284,747,744 Frw, had been guaranteed by Kantarama Félicie's collateral, had not been repaid. ii. To determine the amount of damages that Ecobank Rwanda Plc should pay Kantarama Félicie.

Counsel Bayingana Janvier assisting Niyigena Eraste, states that Kantarama Félicie filed a claim before the Commercial Court, requesting the court to order Niyigena Eraste to pay her damages for breach of a collateral loan agreement, civil damages and procedural fees. He avers that in ruling on case RCOM 01291/2021/TC, the Commercial Court ordered Niyigena Eraste to pay Kantarama Félicie a total of 261,173,067 Frw equivalent to the value of her property with UPI : 5/04/03/01/2936 which she had lent him as collateral, along with various damages. He argues that in making this decision, the Court ignored that Niyigena Eraste did not breach the agreement as he had voluntarily paid WDA 284,747,744 Frw equivalent to 20% of the total value of the tender awarded to him by WDA without Ecobank's involvement.

7 Case n° RCOMA 0138/12/CS decided on 16/05/2014, GAJU Cyinthia v. Access Bank Ltd, paragraph 16. 8 Case n° RS/INJUST/RCOM 00011/2022/SC decided by the Supreme Court on 08/03/2024, BUGINGO Jean Claude, Ecobank v. KADOGI Jean Paul, paragraph 35.

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Regarding the fact that the Commercial High Court ordered that Kantarama Félicie should be awarded 261,173,067 Frw, equivalent to the value of her collateral, while Ecobank claimed that this amount was excessively high compared to the value of the collateral at the time it was registered, Counsel Bayingana Janvier argues that when someone applies for a loan, the bank has the duty to verify whether the value of the collateral provided corresponds to the value indicated in the valuation report. He further states that from the time the collateral was provided until the time it was sold, its value might have been changed, and therefore, a new valuation should be conducted to accurately reflect its current value as it is surprising that in this case, the houses were valued at 261,173,067 Frw when they were offered as collateral, yet after 10 years, Ecobank claims that their value have decreased.

On this issue, Counsel Bimenyimana Eric, Counsel for Ecobank, states that the valuation of the property at the time the loan was being granted as well as the valuation conducted at the time of the sale, were both conducted by experts. He explains that during the sale process, the property belonging to Kantarama Félicie was valued at 76,070,000 Frw, but the highest bidder offered 42,100,000 Frw. This means that this is the actual value of the property and the amount that should be awarded to Kantarama Félicie, if necessary.

Regarding the value indicated at the time the disputed property was offered as collateral, Counsel Bimenyimana Eric states that, actually, when applying for a loan, there is often a tendency to increase the value of the collateral since it serves as the basis for granting the loan.

Counsel Ngendakuriyo Innocent states that Kantarama Félicie pursued Niyigena Eraste because she believed he had failed to fulfill his obligations related to the initial advance (avance de démarrage) for which Ecobank was the guarantor. He adds that once it is established that Niyigena Eraste did not fail to fulfill his obligations, Ecobank shall be held liable as it sold the guarantor's collateral while the loan that had been guaranteed was properly repaid.

Regarding the value of the collateral indicated in the valuation conducted at the time of the sale, Counsel Ngendakuriyo Innocent argues that it was conducted by Ecobank's valuer with the intention of decreasing the value of the property. He maintains that the actual value was 261,173,067 Frw, as previously determined by a property valuer at the time the loan was guaranteed. He asserts that, the fact that Ecobank deliberately decreased the value of the collateral, such mistakes should be held accountable by the person who disregarded the actual value of the property, therefore Kantarama Félicie should have been awarded compensation based on the current actual value of her collateral at the time of the auction. DETERMINATION OF THE COURT

Article 10 of the mortgage agreement signed between Ecobank, Niyigena Eraste and Kantarama Félicie stipulated that once the entire loan granted to the client had been repaid, the Bank committed to release the collateral by de-registering the mortgage (Lors de l'extinction des obligations en principal, intérêts et frais, contractées par le client, la Banque s'engage à renoncer à la première demande du client à la garantie constituée en sa faveur en faisant procéder à la radiation de l'hypothèque). This aligns with the provisions of article 11 of Law n0 10/2009 of 14/05/2009 on mortgages as mentioned above.

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Kantarama Félicie filed a lawsuit in the Commercial Court, suing Niyigena Eraste for damages for breach of contract and refusal to pay a debt secured by a mortgage that she had lent him which led to its sale. The Court ordered him to pay Kantarama Félicie 261,173,067 Frw, equivalent to the mortgage at the time of its registration, stating that the mortgage was sold to pay the debt that Niyigena Eraste owed to the Bank. That decision was also upheld in the case that was reviewed on grounds of injustice. In making that decision, the previous courts erred in holding that the debt of 284,747,744 Frw secured by Kantarama Félicie's mortgage which was granted to Niyigena Eraste was unpaid.

The analysis made in the first article examined in this present case indicated that the debt secured by Kantarama Félicie's mortgage had been repaid, therefore, based on the explanations provided above and the provision of article 10 of the mortgage agreement of 13/01/2014 concluded between Ecobank, Niyigena Eraste and Kantarama Félicie, Kantarama Félicie's mortgage should have been immediately returned as soon as the debt was repaid as agreed, because other debts that Ecobank granted to Niyigena Eraste later claimed to be secured by that mortgage, the Court finds untrue because those debts did not appear in the agreement signed by Kantarama Félicie.

The court finds the fact that Ecobank sold the collateral which has been given stating that there was another debt it had granted to Niyigena Eraste secured by that collateral that had not been repaid, but as explained above, the agreement of that debt does nothing with mortgage owner who is Kantarama Félicie, because she was not informed about it for reaction if necessary.

As explained in the above-mentioned paragraph, the previous courts held that it was Niyigena Eraste who breached the contract and ordered him to pay Kantarama Félicie 261,173,067 Frw, equivalent to the value of the collateral he had lent her. As confirmed above, Ecobank erred in selling the collateral Niyigena Eraste had lent Kantarama Félicie and the debt she had secured had been repaid. For this reason, the Court finds that the compensations amounting to 261,173,067 Frw that Niyigena Eraste was ordered to pay must be paid by the Bank instead.

Regarding Ecobank's claim that the value of Kantarama Félicie's collateral was 42,100,000 Frw because it was sold, the Court finds that the issue relating to the value of the collateral has not been raised in previous cases, and therefore should not be examined for the first time at this instant through the process of review the case on grounds of injustice because it would be unlawful. The same, court legal positions have been established in various cases decided by this instant Court.⁹ iii. Regarding whether the damages claimed in this case should be awarded.

Niyigena Eraste and his counsel argue that Kantarama Félicie dragged him into the lawsuits believing that he had not paid WDA 284,747,744 Frw that she provided for the mortgage. They claim that Kantarama Félicie's mortgage was sold and the amount she had mortgaged had been repaid, and that Ecobank should have taken back Kantarama Félicie's mortgage, that Ecobank sold it without realizing that the loan had been repaid, and he requests that Ecobank should pay him

⁹ See case n° RS/INJUST/RC 00024/2018/CS decided on 21/02/2020, Ngizweninshuti Albert v. Muhima Giovanni, paragraph 21 ; Case n° RS/INJUST/RC 00007/2018/SC decided on 13/03/2020, Nditiribambe Samuel, Gatera Jason

v. Nyamaswa Faustin, paragraph 66 ; Case n° RS/ INJUST/RC 00004/2019/SC decided by the Supreme Court on 28/07/2020 MUKAMANA Mamique, others v. CANDALI Véréne, paragraph 23.C; case n° RS/INJUST/RC 00009/2022/SC, SANLAM AG Plc v. UWIHANGANYE Jean, paragraph 35.

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5,000,000 Frw of damages for putting him and Kantarama Félicie in conflicts which unnecessary made their relationship doubtful, 5,000,000 Frw for the procedural and counsel's fees he had paid since the beginning of the case up to this level, and 40,000 Frw paid for the appeal.

Counsel Bimenyimana Eric, Counsel for Ecobank, states that the damages claimed by Niyigena Eraste are unfounded because his claims are also unfounded, but instead Ecobank is asking for 1,000,000 Frw of counsel's fees and 200,000 Frw for procedural fees.

Counsel Ngendakuriyo Innocent, Counsel for Kantarama Félicie, also requested damages, arguing that in making its decision in the case under review on grounds of injustice, the Court stated that she should not be granted damages for the rent of her house that was sold through auction, on the basis that there was no evidence proving that the property with UPI : 5/04/03/01/2936 was the one being rented to justify a claim for economic damages resulting from the rental income of that property.

He adds that in that case, he had presented evidence made of various lease contracts, but the Court disregarded. He now requests that, in the present case, that evidence should be taken into consideration and that be awarded economic damages amounting to 35,000,000 Frw for the period during which she was deprived of the rights to her property. He also requests that these damages should be added to those awarded in case RCOM 01291/2021/TC. Additionally, he asks

that, at this level, the losing party should be ordered to reimburse her 3,000,000 frw as the counsel's fees paid to her counsel. DETERMINATION OF THE COURT

The Court finds that the money related to the case claimed by Niyigena Eraste to Ecobank should be awarded to him because he wins the case. However, regarding the 5,000,000 Frw of procedural and counsel's fees from the beginning of the case, the Court finds to be excessive and does not provide evidence to justify that he actually incurred such expenses using its discretion, the Court awards him 500,000 Frw for counsel's fees and 300,000 Frw for procedural fees at each of the three levels at which the case was tried, totaling 2,400,000 Frw, in addition to 40,000 Frw deposited when filing the appeal.

Regarding moral damages claimed by Niyigena Eraste, in order for such damages to be awarded, the claimant must demonstrate a wrongful act committed by the party from whom the damages are sought, the emotional damage (*préjudice moral*), resulting from that wrongful act, and a direct causal link between the wrongful act and the alleged damage. Based on those explanations, the Court finds that the moral damages claimed by Niyigena Eraste should not be awarded because he failed to prove any wrongful act committed against him by Ecobank, because the Court found that the person who was actually wronged was Kantarama Félicie, whose collateral was sold despite the fact that the debt she had guaranteed had already been repaid.

Regarding the damages claimed by Ecobank, the Court finds that it is not entitled to them because it is the losing party in this case.

Regarding Kantarama Félicie, the Court finds that the counsel's fees she is claiming at this level must be awarded to her because she wins the case. However, since the 3,000,000 Frw she is

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claiming is excessive, the Court, using its discretion, awards her 500,000 Frw in addition to the 600,000 Frw previously awarded by the Commercial Court and the 300,000 Frw awarded by the Commercial High Court, bringing the total to 1,400,000 Frw. This amount is to be paid by Ecobank, as it is the losing party in the case.

Regarding the economic damages claimed by Kantarama Félicie, the Court finds that she is not entitled to such damages because she cannot base her claims on an application filed by another party for case review, merely to request that matters from that case which did not satisfy her should also be examined because it would be contrary to the law. This position has been established in various cases decided by the Supreme Court¹⁰. III. DECISION OF THE COURT

Declares the application for review the case RCOMA 00190/2022/HCC decided by Commercial High Court on 25/11/2022 filed by Niyigena Eraste, founded;

Declares the case RCOMA 00190/2022/HCC decided by Commercial High Court on 25/11/2022, changed in its all parts;

Orders Ecobank Rwanda Plc to pay Kantarama Félicie 261,173,067 Frw;

Orders Ecobank Rwanda Plc to pay Kantarama Félicie 1,400,000 Frw made of counsel's fees at this level and other amounts awarded by the previous courts;

Orders Ecobank Rwanda Plc to pay Niyigena Eraste 2,440,000 Frw made of counsel's fees, procedural fees, and deposit court fees.

10 Case RS/INJUST/RSOC 00001/2018/SC decided on 02/07/2021, BPR Bank Rwanda v. Ukwibishaka; Case n° RS/INJUST/RC 00002/2018/SC decided on 21/02/2020, Uwimana Marine v. Kagitare Dancille; Case n° RS/INJUST/RC 00004/2018/SC decided on 21/02/2020, Nicyabera Espérance v. Mukagatare Mariane.

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