

RWANDA / JUDGMENT

TOP TOWER HOTEL LTD N'ABANDI v. BPR ATLAS MARA PLC

RCOM 00003/2022/CA (

COURT

Court of Appeal

DECIDED

11 May 2022

CASE / FILE NUMBER

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TOP TOWER HOTEL LTD N'ABANDI v. BPR ATLAS MARA PLC

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Text

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TOP TOWER HOTEL LTD N'ABANDI v. BPR ATLAS MARA PLC [Rwanda URUKIKO RW'UBUJURIRE – RCOM 00003/2022/CA (Kanyange, P.J) 11 Gicurasi 2022] Amategeko agenga imiburanishirize y'imanza z'ubucuruza – Irangizarubanza – Guhagarika irangizarubanza – Kugirango irangiza ry'urubanza rihagarare ni ngombwa ko urisaba agaragaza impamvu zishingiye ku bwihutirwe butuma hafatwa icyemezo cy'agateganyo. Amategeko agenga imiburanishirize y'imanza z'ubucuruza – indishyi – indishyi mu rubanza rw'ikirego cyihutirwa – Nta ndishyi zishobora gutangwa mu rubanza rw'ikirego cyihutirwa kuko urwo rubanza ruba rushamikiye ku rundi ruba rugomba kuzaburanishwa, ku buryo icyemezo gifatwa kiba ari icy'agateganyo mu gihe hategerejwe icyemezo cya burundu. Incamake y'ikibazo: TOP TOWER HOTEL Ltd n'abishingizi bayo batanze ikirego mu Rukiko rw'Ubucuruza basaba gukurirwaho inshingano zo kwishyura umwenda kubera impamvu ntarengwa kandi zitunguranye, naho Banque Populaire du Rwanda Ltd itanga ikirego isaba kwishyurwa umwenda iberewemo n'abareze. Habayeho kujurira kugera mu Rukiko rw'Ubujujire, urwo Rukiko ruca urubanza

rwemeza ko urubanza rwajuririwe ruhindutse ku bijyanye n'igihe TOP TOWER HOTEL Ltd igomba kwishyura umwenda wose yari isigaje ungana na 1.598.605.762 Frw. Nyuma y'urwo rubanza, Urega n'abishingizi be batanze ikirego muri uru Rukiko, banatanga ikirego cyihutirwa basaba ko irangiza ry'urubanza rwaciwe n'Urukiko rw'Ubujurire ryaba rihagaritswe. Mu miburanire y'abarega ku kibazo cyasuzumwaga n'Urukiko rw'ubujurire kijyanye no kumenya niba hari impamvu zatuma irangizwa ry'urubanza rwaciwe n'urukiko rw'ubujurire ryaba rihagaritswe, bavugako ko hashingiwe ku biteganywa n'ingingo ya 173 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, bitarubuza kurangizwa, ko ahubwo yumvikanisha ko urukiko ari rwo rwonyine rufite ububasha bwo kuba rwahagarika irangizwa ryarwo rushingiye cyane cyane ku byo ababuranyi baba berekanye; bavuga kandi ko imitungo itimukanwa ntaho ijya ku buryo itagurishijwe byatera igihombo kidasubirwaho ndetse ko urubanza ruramutse rurangijwe uko rwaciwe nyuma rugahinduka kubera ikirego cyo kurusubirishamo ingingo nshya, bishobora kuzateza izindi manza. Ku ruhande rw'uregwa we avuga ko ibisabwa n'abarega nta shingiro bifite, kuko kuba baratanze ikirego gisubirishamo urubanza ingingo nshya bidahagarika irangizwa ryarwo, bavuga kandi ko kurangiza urubanza nta gihombo byateza abarega, ko kandi hashize imyaka itandatu Banki idahabwa amafaranga yayo ngo iyabyaze umusaruro, ikaba kandi ifite ubushobozi ku buryo n'iyi abarega batsinda urubanza itabura ubwishyu, ko kandi kuvuga ko hashobora kuvuka izindi manza bitashyingirwaho nk'impamvu yatuma irangizwa ry'urubanza rihagarikwa. Ku bijyanye n'ikibazo cyo kumenya niba hari amafaranga uregwa yagenerwa asaba, urega avugako yashowe mu manza z'amaherere bityo ubusabe bwe akaba abushingira ku ngingo ya

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111 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, amabwiriza ya Perezida w'Urukiko rw'Ikirenga hamwe n'inyandiko z'abahanga mu mategeko. Uregwa we avugako amafaranga asabwa n'uwo baburana nta shingiro afite, Avuga kandi ko usibye ko hagombye kugaragazwa ko amafaranga asabwa ahuye koko n'ibyakoreshejwe mu rubanza, nta n'ubwo ku birebena n'ibirego byihutirwa hateganyijwe iby'indishyi cyangwa amafaranga agenda ku rubanza, ko byagombye kuregerwa ku rubanza rw'ikirego cy'iremezo. Incamake y'icyemezo: 1. Kugirango irangiza ry'urubanza rihagarare ni ngombwa ko urisaba agaragaza impamvu zishingiye ku bwihutirwe butuma hafatwa icyemezo cy'agateganyo.

2. Nta ndishyi zishobora gutangwa mu rubanza rw'ikirego cyihutirwa kuko urwo rubanza ruba rushamikiye ku rundi ruba rugomba kuzaburanishwa, ku buryo icyemezo gifatwa kiba ari icy'agateganyo mu gihe hategerejwe icyemezo cya burundu. Ikirego nta shingiro gifite. Amategeko yifashishijwe: Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 173 n'ya 185. Imanza zifashishijwe: Urubanza RCOM 00003/2019/SC ; SHEMA Charles Vs I&M Bank Rwanda Ltd rwaciwe n'Urukiko rw'Ikirenga ku wa 18/11/2019, Urubanza RCOM 00001/2019/SC ; UMURUNGI Umwizerwa Vs Ikigo cy'Imisoro n'Amahôro

(Rwanda Revenue Authority) rwaciwe n'Urukiko rw'Ikirenga ku wa 22/02/2019. Inyandiko z'abahanga zifashishijwe: Pierre MARCHALL, les Référés, Larcier, Bruxelles, 1992, p.47. Urubanza IMITERERE Y'URUBANZA [1] TOP TOWER HOTEL Ltd n'abishingizi bayo batanze ikirego mu Rukiko rw'Ubucuruzi basaba gukurirwaho inshingano zo kwishyura umwenda kubera impamvu ntarengwa kandi zitunguranye, naho Banque Populaire du Rwanda Ltd itanga ikirego isaba kwishyurwa umwenda iberewemo n'abareze. [2] Habayeho kujurira kugera mu Rukiko rw'Ubujurire, urwo Rukiko ruca urubanza RCOMAA 00006/2019/CA ku wa 19/02/2021, rwemeza ko urubanza rwari rwajuririwe ruhindutse ku bijyanye n'igihe TOP TOWER HOTEL Ltd igomba kwishyura umwenda wose yari isigaje ungana na 1.598.605.762 Frw.

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- [3] Nyuma y'urwo rubanza, TOP TOWER HOTEL Ltd n'abishingizi bayo MUSONI NDAMAGE Thaddée, KANZAYIRE Epiphane na MUSONI Hubert, batanze ikirego muri uru Rukiko cyanditswe kuri RS/REV/RCOM 00001/2022/CA, banatanga ikirego cyihutirwa basaba ko irangiza ry'urubanza RCOMAA 00006/2019/CA rwaciwe n'Urukiko rw'Ubujurire ku wa 19/02/2021 ryaba rihagaritswe. [4] Iburanisha ry'ikirego cyihutirwa ryabaye ku wa 09/05/2022, TOP TOWER HOTEL Ltd, Musoni Ndamage Thaddée, Kanzayire Epiphane na Musoni Hubert bahagarariwe na Me Abasa Fazili, BPR ATLAS MARA Ltd ihagarariwe na Me Rwabigwi Augustin. [5] Muri uru rubanza harasuzumwa niba hari impamvu zatuma irangirwa ry'urubanza RCOMAA 00006/2019/CA rwaciwe n'Urukiko rw'Ubujurire ku wa 19/02/2021 rihagarikwa, runasuzume niba BPR ATLAS MARA Ltd yahabwa amafaranga isaba. IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO Kumenya niba hari impamvu zatuma irangizwa ry'urubanza RCOMAA 00006/2019/CA rwaciwe n'Urukiko rw'Ubujurire ku wa 19/02/2021 ryaba rihagaritswe [6] Uburanira TOP TOWER HOTEL n'abishingizi bayo, avuga ko yatanze ikirego cyo gusubirishamo ingingo nshya urubanza RCOMAA 00006/2019/CA, ko hashingiwe ku biteganywa n'ingingo ya 173 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, bitarubuza kurangizwa, ko ahubwo yumvikanisha ko urukiko ari rwo rwonyine rufite ububasha bwo kuba rwahagarika irangizwa ryarwo rushingiye cyane cyane ku byo ababuranyi baba berekanye. [7] Avuga ko ku birebana n'ubwihutirwe, budashidikanywaho kuko irangizwa ry'urubanza basaba ko ryaba rihagaritswe rigeze hagati, indi mpamvu ikaba iy'uko inkiko zemeje ko TOP TOWER HOTEL Ltd n'abashingizi bayo bagomba kwishyura gusa umwenda remezo, ariko bikaba bigaragara ko hari amafaranga yishyuwe BPR abarwa nk'inyungu kandi byaragombaga guhinduka nyuma y'ibyemezo by'inkiko. [8] Avuga kandi ko imitungo itimukanwa ntaho ijya ku buryo itagurishijwe byatera igihombo kidasubirwaho, ko rero basaba Urukiko gushingira ku mategeko no ku nyungu z'ubutabera rugahagarika irangizwa ry'urubanza RCOMAA 00006/2019/CA hakabanza kucyemurwa ikibazo TOP TOWER HOTEL Ltd yagaragaje. [9] Asobanura kandi ko ubwihutirwe ku birebana n'iki kirego, bunashingiye ku kuba urubanza ruramutse rurangijwe uko rwaciwe nyuma rugahinduka kubera ikirego cyo kurusubirishamo ingingo

nshya, bishobora kuzateza izindi manza. Byongeye kandi cyamunara izafungurwa ku nshuro ya gatatu ku wa 10/05/2022. [10] Uburanira BPR ATLAS MARA Ltd avuga ko ibisabwa na TOP TOWER HOTEL Ltd n'abishingizi bayo nta shingiro bifite, kuko kuba baratanze ikirego gisubirishamo urubanza ingingo nshya bidahagarika irangizwa ryarwo nk'uko ingingo ya 173 y'Itegeko N° 22/2018 ryo

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ku wa 29/04/2018 ryavuzwe haruguru ibiteganywa. Avuga kandi ko Banki atari yo ishinze kurangiza imanza kuko bikorwa n'umuhesha w'inkiko. [11] Akomeza avuga ko kuba bamaze imyaka itandatu baburana, urubanza rwa nyuma rukaba rwaraciye ku wa 19/02/2021, nyuma yumwaka akaba ari bwo basaba guhagarika irangizwa ryarwo nabwo ntibagaragaze icyo bashingiraho, bigaragaza ko bashaka guhagarika irangizwa ryarwo mu buryo bwose, kuko nta bwihutirwe buhari, ko rero kuba urubanza rwarabaye itegeko, rugomba kurangizwa. Na none kandi, ngo kuvuga ko hari amafaranga y'inyungu yishyurwe Banki, nta shingiro bifite kuko historique igaragaza ingano y'umwenda remezo wa 1.598.605.762 Frw. [12] Avuga na none ko kurangiza urubanza nta gihombo byateza abarega, ko kandi hashize imyaka itandatu Banki idahabwa amafaranga yayo ngo iyabyaze umusaruro, ikaba kandi ifite ubushibozi ku buryo n'iyi batsinda urubanza itabura ubwishyu, ko kandi kuvuga ko hashobora kuvuka izindi manza bitashingirwaho nk'impamvu yatuma irangirwa ry'urubanza rihagarikwa, naho ku birebana na cyamurana iteganyijwe ku wa 10/05/2022, avuga ko irebana n'umutungo ufite agaciro ka 323.225.225 Frw, ni ukuvuga 1/5 cy'amafaranga abarega bafitiye Banki. UKO URUKIKO RUBIBONA [13] Ingingo ya 173 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru, abarega bashingiraho ikirego cyabo, iteganywa ko gusubirishamo urubanza ingingo nshya bitarubuza kurangizwa, keretse iyo iryo rangizwa ryahagaritswe n'Urukiko rwaregewe gusubirishamo urubanza ingingo nshya. [14] Iyo ngingo yumvikanisha ko ihame ari uko urubanza rwasabiwe gusubirishwamo ingingo nshya rurangizwa, kuko ruba rwabaye itegeko, irangizwa ryarwo rikaba ryahagarikwa gusa n'Urukiko rwaregewe mu gihe bitangiye mpamvu zumvikana, bivuze ko kuba urubanza rwarasabiwe gusubirishwamo ingingo nshya, ubwabyo bidahagije kugira ngo hemezwe ko irangizwa ryarwo rihagarara. [15] Ingingo ya 185 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganywa ko : Iyo hari ikirego cy'iremezo, ariko hagomba kugira icyemezwa by'agateganyo mu buryo bwihuta ku rubanza rwaregewe urukiko rutaraburanishwa, ikirego cyihutirwa gishyikirizwa umucamanza ushinze kurangiza impaka zihutirwa w'aho zigomba gukemurirwa hakurikijwe uburyo busanzwe bw'ihamagara. Ikirego cya TOP TOWER HOTEL Ltd nacyo cyatanzwe mu buryo buteganywa n'iyi ngingo, kuko gishamikiye ku rubanza rw'iremezo rw'ikirego cyo gusubirishamo urubanza ingingo nshya. [16] Iyo ngingo yumvikanisha ko mu byo ikirego cyihutirwa kigomba kuba cyujuje harimo ubwihutirwe butuma hafatwa icyemezo by'agateganyo kugira ngo hagire icyo kiramira ku buryo bitinze haba igihombo kitagira igaruriro. Abahanga mu mategeko nabo bavugaga ko ubwihutirwe 1 Reba urubanza n° RCOM 00003/2019/SC rwaciye n'Urukiko rw'Ikirenga ku wa 18/11/2019 haburana SHEMA Charles na I&M Bank Rwanda Ltd, igika cya 16

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butuma umucamanza asuzuma niba kurekera ibintu uko byari bimeze byatera uwareze igihombo kuruta icyavuka ku ruhande rw'uregwa mu gihe ikirego cyaba gihawe ishingiro.² [17] Nk'uko bigaragara mu mwanzuro w'abarega no mu bisobanuro byatangiwe mu Rukiko, TOP TOWER HOTEL Ltd n'abishingizi bayo basaba ko irangiza ry'urubanza RCOMAA 00006/2019/CA riba rihagaritswe, kubera ko :

- irangizwa ryarwo rigeze hagati, cyamunara izafungurwa ku nshuro ya gatatu ku wa 10/05/2022 ;
- hari amafaranga yishyuwe Banki nk'inyungu mu gihe inkiko zategetse ko hagomba kwishyurwa umwenda remezo gusa ;
- imitungo itimukanwa (irangirizwaho urubanza) ntaho ijya;
- mu gihe urubanza rwahinduka bishobora kuzateza izindi manza zitari ngombwa.

[18] Urukiko rurasanga izo mpamvu TOP TOWER HOTEL n'abishingizi bayo batanga, zidashingiye ku bwihutirwe nk'uko bwashobanuwe haruguru, ahubwo ari ingaruka z'urubanza batsinzwe rurangizwa kuko rwabayeho itegeko. Byongeye kandi, kuvuga ko urubanza rushobora guhinduka bikazateza izindi manza, usibye kuba itaba impamvu yareberwa mu bwihutirwe, n'ababivugaga ntacyo babishingiraho usibye kuvuga ko bishobora kuzaba, kandi nta n'ikibazo bagombye kubigiraho kuko banki baburana ifite umutungo, ikaba itabura ubwishyu mu gihe urubanza rwahinduka nyuma y'icyemezo ku kirego cyo gusubirishamo urubanza ingingo nshya. [19] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rurasanga nta mpamvu ihari yatuma irangizwa ry'urubanza RCOMAA 00006/2019/CA rihagarikwa.

Kumenya niba BPR ATLAS MARA Ltd yagenerwa amafaranga isaba. [20] Uburanira BPR ATLAS MARA Ltd, ayisabira kugenerwa 10.000.000 Frw yo gushorwa mu manza ku maherere na 3.000.000 Frw y'igihembo cya Avoka. Asobanura ko amafaranga asaba ashingiye ku ngingo ya 111 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru, amabwiriza ya Perezida w'Urukiko rw'Ikirenga hamwe n'inyandiko z'abahanga mu mategeko (iby'o byombi ntabwo yagaragajye). [21] Uburanira TOP TOWER HOTEL LTD n'abishingizi bayo avugaga ko amafaranga asabwaga n'uwo baburana nta shingiro afite, kuko ikirego cyabo gifite ishingiro. Avugaga kandi ko usibye ko hagombye kugaragazwa ko amafaranga asabwaga ahuye koko n'ibyakoreshejwe mu rubanza, nta n'ubwo ku birebana n'ibirego byihutirwa hateganyijwe iby'indishyi cyangwa amafaranga agenda ku rubanza, ko byagombye kuregerwa ku rubanza rw'ikirego cy'iremezo. 2 (...) Elle (l'urgence) amène le juge des référés à rechercher si le fait de laisser les choses en l'état entraînerait, pour le demandeur, un préjudice plus grand que celui provoqué, au détriment du défendeur, par l'accueil de la demande: Pierre MARCHALL, les Référé, Larcier, Bruxelles, 1992, p.47

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UKO URUKIKO RUBIBONA [22] Urukiko rurasanga n'ubwo ntacyo Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi rivuga ku birebana n'ibishobora gusabwa mu rubanza rw'ikirego cyihutirwa, icyumvikana ari uko urwo rubanza ruba rushamikiye ku rundi ruba rugomba kuzaburanishwa, ku buryo icyemezo gifatwa kiba ari icy'agateganyo mu gihe hategerejwe icyemezo cya burundu, bivuze ko nta ndishyi zishobora gutangwa muri uru rubanza nk'uko byanemejwe n'Urukiko rw'Ikirenga mu rubanza RCOM 00001/2019/SC rwaciwe ku wa 22/02/2019. ICYEMEZO CY'URUKIKO [23] Rwemeje ko ikirego cya TOP TOWE HOTEL Ltd n'abishingizi bayo Musoni Ndamage Thaddée, Kanzayire Epiphane na Musoni Hubert, gisaba guhagarika irangizwa ry'urubanza RCOMAA 00006/2019/CA rwaciwe n'Urukiko rw'Ubujurire ku wa 19/02/2021, nta shingiro gifite; [24] Rwemeje ko amagarama y'urubanza asubitswe.

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