

RWANDA / JUDGMENT

TUYISENGE ET Al v. RWANDA MOTOR S.A**RLR V.4-2020****COURT**

Supreme Court

DECIDED

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TUYISENGE ET Al v. RWANDA MOTOR S.A [Rwanda SUPREME COURT– RS/REV/INJUST/RC 00041/2017/SC (Rugege, P.J., Mutashya and Kayitesi E.J.) February 22, 2020] Civil procedure – Execution of a judgment when an object is no longer in existence – Judgment enforcement is conducted on the subject matter of the litigation or another thing of the similar nature, if it's not possible it's compensated in its current monetary value. Facts: This case started before the Court of First Instance of Kigali in 1995 whereby Tuyisenge and Uzamukunda sued Rwanda Motor for having failed to deliver the car bought in 1993 or compensating them for it. The Court rendered the judgment holding that their case is with merit and ordered Rwanda Motor to offer a car of the same type. Rwanda Motor appealed to the Court of Appeal of Kigali, and that Court sustained the rulings of the Court of First Instance of Kigali. Rwanda Motor was not again contented with the rulings of the judgment, consequently, It applied for quashing of a judgment, but after the judicial reform, the case was transferred to the High Court and the case was removed from the court register because Rwanda Motor did not follow up on its case. Thereafter, Tuyisenge and Uzamukunda filed different cases before the High Court, first, they wanted the Court to interpret the judgment rendered by the Court of Appeal of Kigali, they prayed to the Court to handle issues

of the execution of that judgment, the High Court hold that there is no ground of the interpretation and decided that the judgment be executed as it was rendered. The execution of the judgment was not performed because the type of car which was bought was no longer on the market, and also, Rwanda Motor refused to offer a similar car. Hence, Tuyisenge and Uzamukunda applied for the review of the case on grounds of injustice, then, the President of the Supreme Court ordered that the case be reviewed. In the hearing, Tuyisenge and Uzamukunda requested to be given the money equivalent to the current value of the car. Rwanda Motor stated that their claim lacks merit because the judgment was not executed because that type is no longer on the market. Held: Judgment enforcement is conducted on the subject matter of the litigation or another thing of the similar nature, if it's not possible it's compensated in its current monetary value. The claim has merit; The judgment RCA 0081/HC/KIG is quashed; The accused has to compensate for the car which was bought but not delivered; Court fees to the public treasury. Statute and statutory instruments referred to: Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 9 and 10 Law No 22/2012 of 14/07/2012 relating to the civil, commercial, labour and administrative procedure, article 195

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Law No 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, article 192 Case laws referred to: Nyirabugungo Isabelle v Etablissement Mironko Plastic Industries, RCAA 0116/11/CS rendered on 08/02/2013 by the Supreme Court Author cited: Ephrem Gasasira, Procédure civile et commerciale, 1993, P. 260

Judgment

I. BACKGROUND OF THE CASE

This case originates from the agreement of 15/02/1994 for the purchase of the car MAZDA E2000 with 15 or 18 seats, that agreement was concluded between Tuyisenge Zabuloni and Uzabumwana Dorothee and Rwanda Motor, when the former wanted to pick the car, Rwanda Motor informed them that the car was stolen like other products which were in its possession.

Tuyisenge Zabuloni and Uzabumwana Dorothee filed a claim before the First instance Court of Kigali claiming to be given or be compensated with its value, their claims were combined and the case was recorded on No RC 23.394/95/S1-RC 23.742/95/S1.

On 30/06/1997, the Court rendered the judgment finding Tuyisenge Zabuloni and Uzabumwana Dorothee's claim with merit, It ordered Rwanda Motor S.A to give them the car bought which is MAZDA E2000 with 15 or 18 seats, Rwanda Motor was also ordered to pay court fees equivalent to 3,500Frw.

Rwanda Motor was not contented with the judgment and appealed to the Court of Appeal of Kigali, the claim was recorded on No, RCA 12206/KIG-RC3742/92, Rwanda Motor stated that Tuyisenge Zabuloni and Uzabumwana Dorothee paid for the car in three installments, the last one was paid on 15/02/1994, Rwanda Motor S.A showed them their car SG 28 with chassis number

SRYOEZ 622110, engine number 930156 of the white color, they failed to pick it due to their reasons till the cars were stolen with other cars during Genocide perpetrated against Tutsi in 1994.

The Court of Appeal of Kigali motivated that Rwanda Motor S.A should not invoke force majeure since it agrees that Tuyisenge Zabuloni and Uzabumwana Dorothee paid purchasing price of the car as per the order of 15/02/1994, the war started on 07/04/1994, Rwanda Motor does not explain why it did not deliver that car to the owners within two months while they already paid. The Court explained that the car was not shown to Tuyisenge Zabuloni and Uzabumwana Dorothee because it was not yet identified and the buyers did not sign on the invoice to certify that the car was handed over.

The Court also motivated that there is not warehouse agreement between Tuyisenge Zabuloni and Uzabumwana Dorothee and Rwanda Motor S.A because they would not have put in the warehouse the car which was not delivered, that the damages for the productivity of that car in

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5 years are baseless. After all, the car did not work so that the productivity may be considered accordingly, the Court ordered Rwanda Motor S.A to offer to Tuyisenge Zabuloni and Uzabumwana Dorothee the car Minibus MAZDA E2000 with 15 or 18 seats since they paid for it knowing that Rwanda Motor S.A still sells cars.

Rwanda Motor S. A was not contented with the rulings of the judgment and applied for that judgment to be quashed, its claim was recorded on RCP 1000, after judicial reform in 2004, the case was transferred to the High Court and recorded on RCAA 0597/06/HC/KIG, on 02/11/2007, the Court decided that the claim be removed from the court register because Rwanda Motor did not follow up on its case.

Thereafter, Tuyisenge Zabuloni and Uzamukunda Dorothee filed a claim before the High Court, first, they wanted the Court to interpret the judgment RCA 12.206/KIG-RC 3742/92, the case was recorded on No RC 0030/09/HC/KIG, on 12/05/2009, the Court held that there is no ground of the interpretation because the judgment is clear.

Tuyisenge Zabuloni again filed a claim praying to the Court to handle issues of the execution of the judgment RCA 12.206/KIG-RC 3742/92 basing on the fact that when they wanted the judgment to be executed, Rwanda Motor S.A told them that the type of the car which was bought was no longer on the market, she then asked to be given the equivalent of the car's value or another car of the same value, the claim was recorded on No RCA 0081/09/HC/KIG. On 14/02/2011, the Court decided that Tuyisenge Zabuloni's claims intent to reverse the decision of the Court while the judgment acquired the force of res judicata, It ordered that the judgment be executed as it was rendered.

Tuyisenge Zabuloni and Uzamukunda Dorothee hired a court bailiff for the execution of the judgment, the court bailiff told them that a compulsory execution was not possible because he found nothing to be seized. After all, Rwanda Motor S.A does not possess the cars of MAZDA E2000 which were ordered by the Court and nothing else can be seized while the judge did not decide so, also, the court bailiff asked Rwanda Motor S.A to offer similar car but it refused.

After those court cases, Tuyisenge Zabuloni and Uzamukunda Dorothee wrote to the Office of Ombudsman seeking justice. After analyzing the judgment RCA 12206/KIG-RC 3742/92, the Office of Ombudsman found that though the rulings of that judgment were clear, the object ordered by the Court cannot be executed because the car MAZDA E2000 with 15 or 18 seats for which the Court ordered Rwanda Motor S.A to give Tuyisenge Zabuloni and Uzamukunda Dorothee, no longer exists.

The Office of Ombudsman wrote to the Supreme Court on 23/05/2016 praying that the judgment RCA 0081/09/HC/KIG be reviewed. After considering the report of the Inspectorate of courts on that judgment, in the order dated 01/07/2017, The President of the Supreme Court decided that judgment RCA 12.206/KIG-RC 3742/92 between Rwanda Motor S.A and Tuyisenge Zabuloni and Uzamukunda Dorothee, rendered on 04/06/2001 by the Court of Appeal of Kigali, be reviewed on the ground of injustice.

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The public hearing was conducted on 21/01/2019, Rwanda Motor S.A appeared to be represented by Counsel Rutembesa Phocas, whilst Tuyisenge Zabuloni and Uzamukunda Dorothee were represented by counsel Kazeneza Théophile.

Before the hearing of the case in merit, Rutembesa Phocas, Counsel for Rwanda Motor S.A requested to adjourn the hearing stating that they want to resort to mediation for settling the issue amicably, whereas Kazeneza Théophile counsel for Tuyisenge Zabuloni and Uzamukunda Dorothee stated that mediation should not suspend the case, that the hearing should proceed and in case they come to settle the matter, they will inform the Court and that the case would end when they reach a certain agreement before the pronouncement.

The Court immediately decided against proceeding with the hearing, that when the parties reach an agreement, they will inform the Court before the pronouncement of the case.

Counsel Rutembesa Phocas representing Rwanda Motor S.A raised an objection stating that he bases on article 86 paragraph 2, litera 1 and 2 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning, and jurisdiction of the Supreme Court, the finds Tuyisenge Zabuloni and Uzamukunda Dorothee's claim to the Office of Ombudsman should not be admitted because the request was brought late. His argument bases on the fact that the judgment for which the review on the ground of injustice is sought, was rendered on 04/06/2001, the case does not fall in those rendered after 2003, thus the request should have been addressed to the Office of Ombudsman within a period of six months from the date of promulgating the organic law mentioned above is the official gazette of the Republic of Rwanda. That the fact that

Rwanda Motor S.A was contacted by the Office of Ombudsman in 2015, Counsel Rutembesa Phocas states that though he is not aware of the date the issue was addressed to the Office of Ombudsman, he considers that year as the one in which the issue was addressed to that organ, therefore, the request should have not been admitted because the period provided by the law has already elapsed.

Counsel Kazeneza Théophile pleading for Tuyisenge Zabuloni and Uzamukunda Dorothée states that he does not find the rationale of this objection because if it is irregularities of the decision of the Office of Ombudsman, one should not sue to this Court and that the review of the judgment was ordered by the President of the Supreme Court, Counsel Kazeneza Théophile states that he does not find if the one who raises the objection intends to appeal against the order, thus that ground of objection raised by Rwanda Motor S.A has no merit.

The Supreme Court decision on that objection raised by Counsel Rutembesa Phocas on behalf of Rwanda Motor S.A holding that it lacks merit because the judgment for which the review was requested is RCA 0081/09/HC/KIG rendered on 14/02/2011 and not the judgment RC

1 Final decisions made before the publication of this Organic Law in the Official Gazette of the Republic of Rwanda shall be subject to an application for review due to injustice in accordance with the provisions of Article 81 of this Organic Law. Such decisions shall be the following: 1° final decisions alleged to be unjust made after the establishment of the Office of the Ombudsman in 2003, whether executed or not which shall be referred to the Office of the Ombudsman within one (1) year as of the publication of this Organic Law in the Official Gazette of the Republic of Rwanda; 2° final decisions of ordinary, commercial and military courts alleged to be unjust that has been referred to various organs which shall be referred to the Office of the Ombudsman within six (6) months as of the publication of this Organic Law in the Official Gazette of the Republic of Rwanda.

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23.394/95/S1-RC23.742/95/S1 rendered on 04/06/2001 as stated by Counsel Rutembesa, that his statement that there was a delay to resort to the Office of Ombudsman, he does not prove it, The Court ordered to proceed with the hearing of the case in merit.

The issue which is disputable between the parties is to know whether an object subject to the execution no longer exists, the winning party shall be given the value of the object in money. II. ANALYSIS OF LEGAL ISSUES Whether when an object subject to the execution no longer exists, the winning party shall be given the value of the object in money.

Counsel Kazeneza Théophile pleading for Tuyisenge Zabuloni and Uzamukunda Dorothée states that since the moment of the sale of the car with Rwanda Motor S.A in 1994, there was payment but till now, the car was not delivered, the reason being raised by Rwanda Motor S.A is that the car was among those stolen in Genocide, and now, the car cannot be found because those cars are no longer on the market.

He state that though those cars are no longer manufactured, Rwanda Motor S.A had an alternative of payment but it refused, such as offering the similar car or its value in money, that it failed to make one of both, rather, it kept clients' money while the latter did not receive the car.

He further argues that even if they wanted a car of the same value as that they bought, they have changed this position because that car is old fashioned and cannot fit in Rwanda while his clients bought it for transport business, they now want its value in money taking into account the current value, he prays the refund of the price of current value for that car equivalent to forty-one million and five hundred thousand(41,500,000Frw), basing on the fact that in 1993 exchange rate of 1USD was 80Frw, while now the exchange rate is 850Frw, and at the time they paid 3,900,000Frw.

Counsel Rutembesa Phocas pleading for Rwanda Motor S.A states that what adversary parties pray to be executed, differ with the decision of the Court because the Court ordered to be given the car which they bought in Rwanda Motor S.A. He adds, he finds that the fact that the judgment is brought before the Court, Rwanda Motor S.A should be given justice because it justified why the car was not delivered to those who bought it but the Court disregarded it, whereby Rwanda Motor S.A explained that the car was bought as agreed between parties and the car was even put in its warehouse but the buyers failed to instantly pick it for their reasons, he concludes that also, the buyers have some liabilities in the failure of delivery.

He lets it be known that the judgment was not executed because the type of the car is no longer produced, that Rwanda Motor S.A cannot find a similar car, that in such circumstances, they should have agreed the price paid worth 3,900,000Frw but they complicated matters stating that they need current value whereas Rwanda Motor S.A is not responsible for not delivering the car.

DETERMINATION OF THE COURT

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Concerning the principles of laws related to the procedure, the law of procedure comes into force with immediate effect on the date of its publication.

Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure which is in force today, does not provide what shall be done in case an object subject to the execution of a judgment no longer exists. However, the Court finds, the fact that there is no provision on that matter, does not mean that the will of the legislator was that those issues should not be addressed so that the winning party may lose the equivalent when what she/he gained from a judgment no longer exists, rather, it implies that it is an oversight, this cannot prevent the Court to rule on the matter basing on the fact that the law in force has that gap, rather, the Court shall render the judgment basing on the article 9 paragraph one and two of that law² which provides that a judge cannot refuse to decide a case on any pretext of silence, obscurity, or insufficiency of the law.

The grounds for which, the Court finds that there was an oversight in law to address issues in relation to the disappearance of an object subject to the execution of a judgment, is that in Law No 22/2012 of 14/07/2012 relating to the civil, commercial, labour and administrative procedure which was in force at the time the Office of Ombudsman applied for the review to the Supreme Court in article 195 provided that the execution of judgments and acts are intended to provide their beneficiary with the privileges of his/ her right, either in kind or the equivalent³, the provisions of that article are also provided in article 192 of Law No 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure that was in force when the case on that matter was being heard. (in 2011)⁴.

This position is emphasized by the legal scholar Gasasasira Ephrem in his book *Procédure civile et commerciale*, 1993, page 260 whereby he states that the execution is done on the object which was in litigation or on a similar object, when execution is impossible, the equivalent shall be offered in money.⁵

However, the beneficiary is not entitled to choose whether, in the execution of a judgment, he/ she is given those objects or their equivalent, the equivalent shall be given in case the execution on the object was impossible, and also, the equivalent shall be given considering the current value.⁶

2 A judge adjudicates a case based on relevant rules of law. In the absence of such rules, the judge adjudicates according to the rules that he/she would establish if he/she had to act as legislator, relying on precedents, customs, general principles of law and doctrine. A judge cannot refuse to decide a case on any pretext of silence, obscurity, or insufficiency of the law. 3 The execution of judgments and acts are intended to provide their beneficiary with the privileges of his/ her right, either in kind or the equivalent. 4 The execution of judgments and acts are intended to provide their beneficiary with the privileges of his/ her right, either in kind or the equivalent. 5 L'exécution est directe ou en nature, lorsque c'est la prestation même qui consiste l'objet de l'obligation qui est fournie au créancier. L'exécution par équivalent a lieu lorsque l'exécution directe est impossible, soit que l'objet du litige ne s'y prête pas, soit qu'il y ait mauvaise volonté du débiteur, 6 Judgment RCAA 0116/11/CS rendered on 08/02/2013 by the Supreme Court, Nyirabugungo Isabelle vs Etablissement Mironko Plastic Industries.

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Concerning this case, the Court finds, all parties agree that the car MAZDA E2000 with 15 or 18 seats is the one bought by Tuyisenge Zabuloni and Uzamukunda Dorothée from Rwanda Motor S.A in 1994, it is also the same car for which Rwanda Motor S.A was ordered by the Court of Appeal of Kigali to give Tuyisenge Zabuloni and Uzamukunda Dorothée in the judgment RC 23.394/95/S1-RC 23.742/95/S1 rendered on 04/06/2001.

The Court also finds, all parties agree on the fact that factories that used to manufacture that type of cars, no longer produce them, this implies that execution on that car cannot be possible since the object no longer exists, therefore, based on what stated in previous paragraphs, Tuyisenge Zabuloni and Uzamukunda Dorothée have to be given by Rwanda Motor S.A, the equivalent of that car in money taking into account the current value.

The Court finds that on 15/02/1994 when Tuyisenge Zabuloni and Uzamukunda Dorothée paid the last installment for the car, the exchange rate of 1USD was 145,0248Frw⁷ as found on website of National Bank of Rwanda,thus they paid 26,896USD because they paid 3,900,000 Rwandan francs($3,900,000\text{Frw} : 145,0248\text{Frw}=26,896\text{USD}$).

The Court finds, at the moment, the exchange rate of 1USD in Rwandan francs is 875Frw⁸ which is also found on the website of the National Bank of Rwanda, this implies that by basing on that exchange rate, Tuyisenge and Uzamukunda have to be given by Rwanda Motor S.A, the equivalent worth $875\text{ Frw} \times 26.896=23.534.000\text{ Frw}$. Whether Tuyisenge Zabuloni and Uzamukunda Dorothée should be awarded the interests of their payment for the car which was not delivered.

Counsel Kazeneza Théophile pleading for Tuyisenge Zabuloni and Uzamukunda Dorothée states that his clients would not have justice if they are only given what they bought or it is equivalent without being granted interests for which the car should have produced. For those reasons, they claim the interests calculated on 18% in the period of 10 years.

Counsel Rutembesa Phocas pleading for Rwanda Motor S.A states that those damages are baseless because the issue of interests is examined when its origin existed. THE DETERMINATION OF THE COURT

Article 10 of Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that a judge may not decide more than he/she has been asked to.

The Court finds that the ground of the claim, in this case, is not the interests from the loan or a payment to be done every year or a period below of a year as provided by article 657of the

⁷ <https://www.bnr.rw/index.php?id=89> , the website of National Bank of Rwanda visited on 14/02/2019 at 10h55 ⁸ <https://www.bnr.rw/index.php?id=89> , the website of National Bank of Rwanda visited on 14/02/2019 at 10h55

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civil code book(contracts and obligations)⁹, rather, the claim concerns the execution of the final decisions of courts by requesting the equivalent.

In light of the above motivations, the Court finds with no merit, Counsel Kazeneza Théophile's request on behalf of Tuyisenge Zabuloni and Uzamukunda Dorothée, that they should be given the interests calculated on 18% per year for the current value that the car would have in a period of 10 years, rather, they have deprived the chance of using that car.

The Court finds as it was the position of courts, whether before this Court or International Courts¹⁰, deprivation of chance cannot be considered as a loss contrary to Counsel Kazeneza Theophile's statement, rather, it is a ground of being granted damages for not using an object for which someone was supposed to possess, those damages are awarded at the discretion of the Court.

In light of the above motivations, the Court finds without merit, the interests claimed by Counsel Kazeneza Theophile on behalf of his clients. Concerning damages requested.

Counsel Kazeneza Théophile on behalf of Tuyisenge Zabuloni and Uzamukunda Dorothée, claims to be given moral damages for unnecessary lawsuits, for not executing the judgment worth 5,000,000Frw, they also claim procedural fees and counsel fees of 5,000,000Frw, all amounting to 10,000,000Frw.

RUTEMBESA Phocas counsel for Rwanda Motor S.A states that the damages requested are groundless because they are the ones to introduce the lawsuits. THE DETERMINATION OF THE COURT

The Court finds, concerning damages requested by Tuyisenge Zabuloni and Uzamukunda Dorothée which stated in 38 and 39 paragraphs of this judgment for being deprived of the chance of using the car buying, they waited for it for a long time but they didn't find it while they paid for it, in its discretion, the Court awards them 2,000,000Frw.

The Court finds with no merit, moral damages requested by Counsel Kazeneza Théophile on behalf of Tuyisenge Zabuloni and Uzamukunda Dorothée for unnecessary lawsuits because they are the ones to file a case and not Rwanda Motor S.A, thus, the latter did not drag them into unnecessary lawsuits.

Regarding procedural and counsel fees, the Court finds, Tuyisenge Zabuloni and Uzamukunda Dorothée deserve them, because they were represented in hearings, they also made expenses for procedural reasons, however, damages should be awarded indiscretion of the Court

⁹ The article provides that money which is paid periodically, rent of a house or a field to be cultivated, interests of the money borrowed and all payments to be done every year or a period below of a year when a period of five(5) elapses without being claimed, there shall be the prescription of rights over all that money. ¹⁰ Comme en responsabilité délictuelle, le juge du fond apprécie souverainement le préjudice dès l'instant qu'il a caractérisé la perte de chance. Cf. Civ. 1ère, 10 juillet 2002, Bull.civ. I, n° 197;

- the judgment RCOMAA 0008/12/CS rendered on 06/06/2008 by the Supreme Court, Bank of Kigali vs Kampire and Sibomana.

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because those requested are excessive, the Court awards them 300,000Frw for procedural fees and 500,000Frw for counsel fees, all amounting to 800,000Frw. III. THE DECISION OF THE

COURT

Finds with merit, Tuyisenge Zabuloni, and Uzabumwana Dorothee'claim for the review due to injustice the judgment RCA 0081/HC/KIG rendered on 14/02/2011 by the High Court/Kigali;

The judgment RCA 0081/HC/KIG rendered on 14/02/2011 by the High Court/Kigali is quashed;

Orders Rwanda Motor S.A for payment of 23,534,000Frw to Tuyisenge Zabuloni and Uzabumwana Dorothee as compensation of the car, type of MAZDA E2000 which they bought in Rwanda Motor S.A but the car was not delivered;

Orders Rwanda Motor S.A to give Tuyisenge Zabuloni and Uzabumwana Dorothee damages worth 2,000,000Frw, 300,000Frw for procedural fees, 500,000Frw for counsel fees, all amounting to 2,800,000Frw.

Orders that the court fees be charged to the public treasury.

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