

Analysis on Respect of Consumer Rights during Conclusion of Loan Agreements with Financial Institutions in Rwanda

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Abstract

Rwandan legal framework on human rights protection comprises numerous provisions describing measures to be applied in ensuring that human rights are effectively protected. The constitution of the republic of Rwanda of 2003 revised in 2015, displays a number of human rights protected under Rwandan law. Unlike other jurisdictions that consider consumer rights as human rights in their national supreme law, consumer rights are not recognised as human rights as per the Rwandan constitutional act, thus practices that infringe consumer rights which include being mistreated by financial institutions are realised.

This paper urges that consumers being the weaker party, have been exploited by producers or service providers in various aspects due to lack of legal protection, especially during the transactions with financial institutions which include mobile money services. This article further recommends on measures that should be taken in ensuring that consumer rights are effectively protected.

Key words: Banking law, Consumer Protection, Constitution, Mobile Money

1. Introduction

A law that governs the organization of banking, management and supervision of banks operating within the Republic of

Rwanda has been adopted. The law also sets standards and prudential rules to which banks are subject with a view to maintaining a safe

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and sound banking system in the interests of depositors and other bank customers.² Practically however, much as bankers do their best in ensuring that the laws are upheld and cherished, there are practices that indicate the exploitation of consumers by service providers in financial institutions such as banks. One of the main practices has to do with the respect of consumer rights in conclusion of a loan agreement between Clients and Financial Institutions. Under normal circumstances various financial institutions in Rwanda possess an already drafted loan contract in English language and it is very rare to have a translated copy of the contract in either Kinyarwanda or any other language that a consumer understands evidently. Another concern is related to circumstances where in opening an account on mobile money to facilitate borrowing, transfer and saving money on one's cell phone, is done through a chaotic manner yet one can even save millions on the account. That is, there is no detectable contract between an account holder and a Telecommunication Company providing financial services, which is likely to cause disputes especially during the time of

succession when for instance the account holder dies in an accident and probably the phone gets lost. Successors might have to seek evidence from the adversary while trying to recover the property of the deceased which evidently might lead to the loss of both the case and the possessions.

2. Banking System in Rwanda

Currently there are 11 commercial banks in Rwanda as well as a number of microfinance institutions and rural savings and credit cooperatives. The sector is overseen by the National Bank of Rwanda. Growth potential remains strong with only 42 percent of the population engaged in the formal financial system.³ Banks wishing to establish a presence in Rwanda must apply for a license from the National Bank of Rwanda by presenting a business model displaying that there is a gap in the market and demonstrating a minimum share capital of approximately 8 million US dollars. In order to improve access to credit, a private credit reference agency has been set up, of which all banks and other financial institutions must be

² See article one of the law n° 47/2017 of 23/9/2017 governing the organization of banking. Official gazette n° 42 of 16/10/2017

³ Rwanda Financial services published on 7th November 2019. Available at <https://www.export.gov/article?id=Rwanda-Financial-Services>

members.⁴ Telecommunication companies in Rwanda like MTN and Airtel also provide financial services such as saving, lending and transferring money. For effective operation of financial institutions, there is a need of decent partnership with the clients whom without, there is no sustainable development of financial institutions.

Rwanda has a microfinance sector which is young. The first microfinance existed in 1975 with the establishment of the First Banque Populaire at NKAMBA (former KABARONDO commune). After the 1994 Genocide in Rwanda, the microfinance sector has experienced a tremendous progress through the support of relevant international and non-government organizations especially for humanitarians. The NGOs helped the population with support of daily equipment and foods but had a microcredit teaching program too. During the emergency period, in some cases loans did not differ from grants or donations which sowed confusion among the population. Thus, the culture of not paying normal bank loans rose up causing non-performing loans up to the

rate of around 45%. The average ratio of Non-Performing Loans (NPLs) to total gross loans in the EAC region was 7.8% at end of June 2014, Burundi and Tanzania recorded the highest NPL ratio in the EAC region with 12.7% and 8.2%. In Rwanda, Non-Performing Loans for banks was 6.6% by end June 2014. For microfinance, the NPL ratio was 7.6%⁵. There are various factors that definitely cause Non-performing loans and some of which have already been mentioned

The Association of Micro-finance Institutions in Rwanda (AMIR), was created in June 2007. It is an umbrella body for microfinance institutions in Rwanda. It seeks to build a flourishing microfinance sector in Rwanda through different areas of Advocacy and Information, research and development, responsible finance, performance monitoring and capacity building. Currently, AMIR has active members.⁶ In ensuring development of both financial institutions and their clients at national, regional and international level, there is a need for effective service delivery through considerations of various products offered and procedures embraced.

⁴ Rwanda Financial services published on 7th November 2019. Available at <https://www.export.gov/article?id=Rwanda-Financial-Services> accessed on 12th January 2020

⁵ 2015 Research: Causes of non-performing loans in Rwanda microfinance sector. For Quality and sustainability Microfinance services p 3

⁶ 2015 Research: Causes of non-performing loans in Rwanda microfinance sector. For Quality and sustainability Microfinance services. Op cit

3. Loan Agreements

Loan agreements are under normal circumstances binding contracts between two or more parties to formalize a loan process. There are many types of loan agreements, ranging from simple promissory notes between friends and family members to more detailed contracts like mortgages, auto loans, credit card and short- or long-term payday advance loans.⁷ Each type of loan agreement and its conditions for repayment are governed by adopted laws on banking designed to prevent illegal or excessive interest rate on repayment. Loan agreements typically include covenants, value of collateral involved, guarantees, interest rate terms and the duration over which it must be repaid. Default terms should be clearly detailed to avoid confusion or potential legal court action. In case of default, terms of collection of the outstanding debt should clearly specify the costs involved in collecting the debt. This also applies to parties using promissory notes as well.⁸ Most of financial institutions in Rwanda have

preexisting loan agreements to which any client in need of money will have to adhere to. This affects many clients due to the fact that the urgent need for money and preexisting bank contracts in English lead to the conclusion and signing of loan agreements that are clearly understood by one strong party herein referred to as the financial institution and not the weaker party herein referred to as the client.

Access to credit is widely recognized as an important engine of firm growth, individuals also may attain progress through effective use of credit obtained from various financial institutions. So is the fact that small and medium enterprises (SMEs) are credit constrained, especially in developing countries. One of the most commonly cited explanations for the existence of credit rationing is adverse selection. It implies that changes to the contract terms affect the composition of borrowers.⁹ Both structure and clauses of loan contract also affect the efficiency of effective payment modalities. Loan agreement between banks and borrowers mostly contain clauses which if defined accurately, will benefit the former at

⁷ Definition of a loan agreement available at <https://www.debt.org/credit/loans/contracts/> accessed on 27th January 2020

⁸ Definition of a loan agreement op cit.

⁹ SELIM GULESCI† ANDREAS MADESTAM‡MIRI STRYJAN§ CHRISTIAN AHLIN. Loan Contract Structure and Adverse Selection: Survey Evidence from Uganda. November 2018. Published article p 2

the expense of the latter. It is in this context that issues related to non-performing loans as a result of misinterpreting clauses in loan agreement start to appear.

3.1. Potential Causes of Non-Performing Loans

At national, regional and international level, there are many factors which are responsible for increasing NPL such as GDP, Credit appraisal, Interest rate, Improper lending disbursement to agriculture sector and so forth.¹⁰ In Rwanda particularly, there are a lot of advertisements on various radio stations, televisions and other social Medias regarding auctioning properties of clients who totally failed to comply with the loan agreements concluded with financial institutions. The researcher conducted a survey based research with an intention of finding out whether the clients of banks in Rwanda understand clearly all clauses provided in the loan agreements, and the research proved beyond reasonable doubt that actually more than 70% of the interviewees who had applied loans don't evidently understand the language in which the loan agreement was drafted in, but due to urgent need for money, they

alternatively adhered the clauses and signed the contracts.

Furthermore, there are various court cases in the judiciary of Rwanda predominantly in both commercial and high commercial court that have a lot to do with non-performing loans and most of them are caused by misunderstanding the provisions in the concluded and signed contract of loan agreement. What actually happens is that the lack and urgent need for money causes the clients to inaccurately sign the contract which sooner or later lead to litigation cases that might eventually cause serious problems to the society and the country in general. This of course has a negative impact specifically to the client and his or her family as some or all of his movable or immovable properties might be auctioned as the last option.

4. Case law(s)

In a court decision N^o RCOM 00936/2018/TC decided on 30th November 2018 by the commercial Court in Rwanda and whose decision was sustained at an appellate level, one of the two claims of the plaintiff is deletion of article 8 in the loan

¹⁰ European Journal of Business and Management ISSN 2222-1905 (Paper) ISSN 2222-2839 (Online) Vol.9, No.4, 2017. Kiran Azeem, Bushra Khan, Fatima Aziz Warraich, Iqra Khadim, Noorulain

Zahoor and Zoha Ashraf. Reasons and Effects of Non Performing Loans in the Banking Industry of Pakistan. P 41

agreement with Access Bank.¹¹ On the other hand the bank requested that the article remains valid on ground that the plaintiff signed the loan agreement and was not forced to do so, therefore must comply with all provisions of the loan agreement as provided by article 109 of the law of contract.¹² The article clearly stated that “*Each of the Borrowers is liable for all of the obligations of the other under this Agreement in addition to its own obligations. One of the borrowers may elect to recover from the other the full amount of the liability under this agreement, in one or more action, and will be required to join in an action to be entitled to recover the full amount of the liability owed by one of them*”¹³ in analyzing the case the court basically found that the above mentioned article was laying an obligation to the third party yet the loan agreement was between creditor and debtor alone. Article seventy three of the law of contract clearly states that *if a contract or clauses thereof contain a lesion at the time the contract is made, the*

*aggrieved party may request the court to order the nonperformance of the contract, or decide to perform the remainder of the contract excluding the clauses with lesion.*¹⁴

It is in the context of this article that the court ordered the nonperformance of the contract in regard to that provision. This case and others which are similar noticeably indicate that in conclusion of loan agreement financial institutions exploit clients by pre-establishing clauses for their benefits as the stronger party at the expenses of the customers. When the mistake is realized even before the execution of the contract, strong measures are taken like in the above case, unfortunately however this is realized in most cases when it is too late to address the matter.

5. Digital Financial Service Sector in Rwanda

Mobile money in Rwanda was first introduced into the market in 2010 by MTN. TIGO and Airtel introduced their own mobile money products not long after MTN, in 2011 and 2013 respectively.¹⁵ On

¹¹ See commercial court decision RCOM 00936/2018/TC between SOHAIL LATIF GHAURI and Access Bank rendered on 30th November 2018. P 1

¹² Article 109 of the law n° 45/2011 of 25/11/2011 governing contracts stipulates that “Where two or more parties to a contract promise the same performance to the same promisee, each shall be bound for the whole performance” Official Gazette n° 04bis of 23/01/2012

¹³ Commercial court decision RCOM 00936/2018/TC between SOHAIL LATIF GHAURI and Access Bank rendered on 30th November 2018. P 5

¹⁴ See article 73 of of the law n° 45/2011 of 25/11/2011 governing contracts. Official Gazette n° 04bis of 23/01/2012

¹⁵ See Digital financial service sector in Rwanda available at <http://finclusion.org/country/africa/rwanda.html> accessed on 20th February 2020

December 18, 2017, Bharti Airtel, a leading global telecom services provider with operations in 16 countries across Asia and Africa, announced it had signed an agreement with Millicom International Cellular S.A to takeover Tigo Rwanda operations, the second biggest telecom firm in the country by market share.¹⁶ After the acquisition of Tigo by Airtel, the two telecommunication companies providing mobile money as well as other financial services are MTN and Airtel.

Mobile money has many potential benefits, particularly for the low-income and rural population. It offers safe storage, deposit, withdrawal and transfer of funds at lower cost and more convenience than banks; and facilitates domestic remittances at much low cost. Further capabilities are developing quickly for example remote payments for services like electricity and batch payments of salaries for firms.¹⁷ However the issue is that the mobile money account holder does not have a detailed or written contract with a telecommunication company regarding management, ownership and functioning of the account as well as the successor's details in case the account holder is incapacitated or

loses his or her life especially during the accident.

The mobile money service contract between an account holder and the telecommunication company providing such services is concluded in form of secrecy whereby the former merely keeps a password issued and the latter retains the electronic recording of the transactions. Apart from potential arguments resulting from lack of proper proof of ownership of the account which might have millions saved on it, this may as well cause loss of property of a family in case the account holder dies and no written documents indicating the property of the deceased during succession proceedings. In case MTN or Airtel as the telecommunication companies providing mobile money services want to retain the money of the deceased, it will be very difficult for heirs to prove to competent courts that the deceased left certain amount of money on mobile money account and therefore be brought back to the family's properties subject to succession. The only tangible evidence which is also not fully convincing, is the cell phone. However, the matter becomes worse in case the account holder died in an accident which eventually

¹⁶ See airtel takeover of Tigo brings new dynamics to telecom market- experts. Available at <https://www.newtimes.co.rw/section/read/228285> accessed on 20th February 2020

¹⁷ Jonathan Argent James A. Hanson Maria Paula Gomez. August 2013. The Regulation of Mobile Money in Rwanda. Working paper p1

also led to the loss of the cell phone. Such circumstances might direct the plaintiff to search the evidence from the opponent in order to win the case which categorically never sounds appropriate.

6. Conclusion and Recommendations

Within states, a constitution describes the principles upon which the public is based, the process in which laws are made as well as by whom. An ordinary law must not contain a provision that is not constitutional. Fundamental rights are the basic rights of people and if a state does not recognize consumer rights as fundamental rights and clearly incorporate them in the constitution, it is a clear indication that the country does not recognize consumer rights as fundamental rights, hence inadequacy in consumer protection. Rights to form trade unions and employers' association are recognised by the constitution of Rwanda¹⁸. It is in this context that the constitution of the republic of Rwanda of 2003 revised in 2015 should undergo amendments and lawmakers also incorporate provisions that recognise consumer rights, as it is equally done to trade unions and employer's associations. This shall provide green light to other laws especially laws governing financial

institutions to also include provisions that fully ensure consumer rights protection, particularly when it comes to conclusion of loan agreements.

The law regulating financial institutions must be amended and incorporate articles that make it compulsory for financial institutions to draft loan agreements as well as other forms to be filled in the national language which is Kinyarwanda whenever the agreement to be concluded and signed is between a financial institution and a Rwandese. However, some exceptions may be allowed when one of the parties does not clearly understand the language. This must be done in order to safeguard the parties in the agreement, that is, for the loan agreement to be concluded all parties must understand distinctly all provisions in the agreement, and one of the ways to achieve this is through using the language that is understood by all parties.

Telecommunication companies that offer financial services such as mobile money must do it in a manner that provides comprehensive security to both account holders and their successors or inheritors. This should be done for example by

¹⁸Article 31 of the constitution of the Republic of Rwanda of 2003 revised in 2015 *official gazette n° special of 24/12/2015*.

recording detailed information of the parties. On the side of an account holder, information regarding himself, spouse or any other person that can act on his behalf is crucial. There must also be soft and hard copies of contracts for filing purposes and submission upon request specifically during succession proceedings.

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