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ICYEGERANYO CY'IBYEMEZO BY'INKIKO

Icyegeranyo V. 1 - 2020 Mutarama, 2020



RWANDA LAW REPORTS

Law Report V. 1 - 2020 January, 2020





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IKINYARWANDA

ISHAKIRO

ABAGIZE KOMITE Y'UBWANDITSIiii
KOMITE YEMEZA IMANZAiv
IRIBURIROvii
IBIKUBIYE MURI IKI CYEGERANYOviii
INYITOviii
AMATEGEKO YASHINGIWEHOix
IMANZA ZIFASHISHIJWExiii
AMAGAMBO MPINExv
Re. MURANGWA1
MPORANYI v. USENGIMANA63
PASSAG COMPANY Ltd v. GTBANK Ltd N'UNDI79
TUYISENGE v. MUKARONI97
DEVELOPMENT BANK OF RWANDA LTD (BRD Ltd) v. SPLENDID KALISIMBI Ltd115
IKIGO CY'UBWITEGANYIRIZE MU RWANDA (RSSB) v. TWAGIRAMUNGU129
UBUSHINJACYAHA v. NSENGIYUMVA N'ABANDI155

ABAGIZE KOMITE Y'UBWANDITSI

ITSINDA RY'ABANYAMATEGEKO BATEGUYE IMANZA

KAGABO U. Stephanie

KAVUTSE M. Claude

KUBWIMANA Jean Claude

MUJABI K. Naphtal

NINAHAZWA Roselyne

KOMITE YEMEZA IMANZA

Prof. Dr. NGAGI M. Alphonse	: Perezida wa Komite, Umucamanza mu Rukiko rw'Ubujurire			
Dr. MUHIRE G. Yves	: Visi Perezida wa Komite, Umwalimu muri Kaminuza y'u Rwanda			
BUKUBA Claire	: Umwanditsi wa Komite, Umugenzuzi w'Inkiko			
Dr. KARIMUNDA M. Aimé	: Perezida w'Urukiko rw'Ubujurire			
RUKUNDAKUVUGA F. Regis	: Umucamanza mu Rukiko rw'Ikirenga			
NDAHAYO Xavier	: Perezida w'Urukiko Rukuru			
RUTAZANA Angeline	: Umugenzuzi Mukuru w'Inkiko			
KALIWABO Charles	: Umucamanza mu Urukiko rw'Ubujurire			
Dr. KAYIHURA Didas	: Umuyobozi wa ILPD			
BWIZA N. Blanche	: Umugenzuzi w'Inkiko			
KIBUKA Jean Luc	: Umucamanza w'Urukiko Rukuru rw'Ubucuruzi			

HABARUREMA Jean Pierre	: Umushinjacyaha ku Rwego rw'Igihugu
BUNYOYE Grace	: Umushinjacyaha ku Rwego rw'Igihugu
KABIBI Specioza	: Intumwa ya Leta
MUREREREHE Saouda	: Umucamanza mu Rukiko Rukuru
Lt. col. MADUDU A. Charles	: Umucamanza mu Rukiko rwa Gisirikare
UWANTEGE Yvette	: Umwanditsi Mukuru mu Rukiko rw'Ubujurire
GIRANEZA Clémentine	: Umucamanza mu Rukiko Rwisumbuye
BAGABO Faustin	: Avoka mu Rugaga rw'Abavoka

IRIBURIRO

Basomyi bacu,

Urwego rw'Ubucamanza runejejwe no gutangaza Volime ya mbere y'Icyegeranyo cy'Ibyemezo by'Inkiko mu mwaka wa 2020.

Dukomeje kubashimira, ko mudahwema kutugezaho ibitekerezo byanyu, munatwereka aho mwifuzako hanozwa kurushaho. Ibi bizatuma turushaho kubagezaho Icyegeranyo gikozwe neza kandi gifitiye akamaro abantu b'ingeri zitandukanye bahura n'ibibazo by'amategeko mu mwuga wabo.

Muri iyi Volime y'Icyegeranyo cy'Ibyemezo by'Inkiko murasangamo, imanza zirindwi (7) zirimo ebyiri (2) zerekeranye n'imiburanishirize y'imanza, mu gihe izindi eshanu (5) zaburanishijwe mu mizi ari izi zikurikira: urubanza rumwe (1) rw'imbonezamubano, urubanza rumwe (1) rw'ubucuruzi, urubanza rumwe (1) rw'ubutegetsi, urubanza rumwe (1) nshinjabyaha n'urundi rumwe (1) rurebana n'ikirego gisaba kwemeza ko itegeko rinyuranye n'Itegeko Nshinga.

Tuboneyeho kubibutsa ko imanza ziri muri iki cyegeranyo ziboneka no kurubuga rwa murandasi rw'Urukiko rw'Ikirenga munyuze kuri <u>http://decisia.lexum.com/rlr/kn/nav.do.</u>

Dukomeje gushishikariza abantu bose bifashisha amatageko mu kazi kwitabira gukoresha iki cyegeranyo.

Dr NTEZILYAYO Faustin Perezida w'Urukiko rw'Ikirenga akaba na Perezida w'Inama Nkuru y'Ubucamanza

IBIKUBIYE MURI IKI CYEGERANYO

Iki cyegeranyo gikubiyemo imanza zaciwe n'Urukiko rw'Ikirenga n'Urukiko rw'Ubujurire zikoreshwa hakurikijwe inyito ivugwa hasi.

INYITO

Imanza ziri muri iyi volime zikoreshwa muri ubu buryo: [2020] 1 RLR

AMATEGEKO YASHINGIWEHO

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 1649
Itangazo ry'Umuryango w'Abibumbye ku burenganzira bwa muntu ryo mu mwaka wa 1948, ingingo ya 7 n'iya 179
Amasezerano Mpuzamahanga ku burenganzira Mbonezamubano n'ubwa Politiki yo mu mwaka wa 1966, ingingo ya 269
African Charter on Human and Peoples' Rights, ingingo 149
Amasezerano yerekeye icuruzwa rikorerwa hagati y'ibihugu ku bwoko bw'inyamaswa n'ibimera mu gasozi byenda gucika yabereye i Washington ku wa 3/03/1973, ingingo ya 1,2 n'iya 3
Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo, ingingo ya 200 (d) (i) (ii)
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 281
ingingo ya 1 n'iya 154158
ingingo ya 12
ingingo ya 111117
Itegeko N° 35/2013 ryo ku wa 29/05/2013 rihindura kandi ryuzuza Itegeko N° 12/2009 ryo ku wa 26/05/2009 ryerekeye izahura ry'ubucuruzi n'irangiza ry'ibibazo biturutse ku gihombo,

ingingo ya 4......117

x _____

Itegeko N°22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'Urwunge rw'Amategeko mbonezamubano kandi rishyiraho igice cya gatatu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingingo ya 37, 38, 40100
Itegeko ryo ku wa 30 Nyakanga 1888 ryerekeye ibyerekeye imirimo nshinganwa cyangwa amasezerano, ingingo ya 259
Itegeko – Teka ryo ku wa 22/8/1974 rigena ubwiteganyirize bw'abakozi, nk'uko ryahinduwe kandi ryujujwe kugeza ubu, ingingo ya 22 n'iya 23132
Iteka rya Minisitiri N° 1931 bis/06 ryo ku wa 08/12/1987 rishyiraho uburyo bwo kumenyesha impanuka n`indwara zikomoka ku kazi, ingingo ya 6 igika cya 4132.
Code Civil Français, ingingo ya 956100
American Convention on Human Rights, ingingo. 21
European Convention on Human Rights, Protocol No. 1, ingingo ya 19

IMANZA ZIFASHISHIJWE

Association Momentanée SOBETRA SARL & SOBTRA (U) Ltd v Office Rwandais des Recettes (RRA), RCOMA 0064/11/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 28/11/2012, igika cya 16.
Communication N° 172/1984 S.W.M. Broeks v The Netherlands (views adopted on 9 April 1987) in UN Doc. GOAR, A/42/40 P.1509
Free Zone, Co, Ltd v Association Momentanée (Joint Venture) «H3E»RCOMA 0064/12/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 03/06/2016, igika cya 3965
Julia Shop v Ecobank Rwanda Ltd, RCOMAA 0042/14/CS, rwaciwe n'Urukiko rw'Ikirenga ku wa 18/03/2016 igika cya 19 na 2265
Madden v. Kentucky, 309 U.S. 83, 87-88 (1940)
ReAKAGERABUSINESSGROUP(ABG),RS/SPEC/0001/16/CSrwaciwen'Urukikorw'Ikirengakuwa23/09/2016
Supreme Court of United States, BELL'S GAP RAILROAD COMPANY v. PENNSYLVANIA, 134 U.S. 232 (1890)9
Supreme Court of the United States, Nordlinger v. Hahn, June 18, 1992, 112 S. Ct. (1992)9
Supreme Court of the United States, Regan v. Taxation with Representation of Wash., 461 U.S. 540
Ubushinjacyaha vs Mukashema na Bihimana, RPA 0176/11/CS rwaciwe n'Urukiko rw'Ikirenga, Icyegeranyo cy'ibyemezo by'inkiko, V.1-2017, P147-160159

Ubushinjacy	aha vs CPL	Ngabonz	ziza	na SGT	Biziya	remye,	RPAA
<i>0117/07/CS</i>	rwaciwe	n'Uruki	ko	rw'Ikir	enga,	Icyege	eranyo
cy'ibyemezo	by'inkiko,	Igitabo	суа	kabiri	2011,	Nº 9,	P.57-
62							159

Ubushinjacyaha vs Uwamurengeye, RPAA 0110/10/CS rwaciwe n'Urukiko rw'Ikirenga, Icyegeranyo cy'ibyemezo by'inkiko V.1,

AMAGAMBO MPINE

Amategeko agenga amasezerano – Amasezerano y'impano – Gusesa amasezerano – Iyo uwahawe impano agahabwa n'inshingano akazemera no ariko ntiyuzuze izo nshingano, n'impamvu ihagije y'iseswa ry'amasezerano y'impano kuko aba ahindutse amasezerano magirirane

TUYISENGE v. MUKARONI......97

Gusesa amasezerano – N'ubwo amategeko ateganya ko iseswa ry'amasezerano rigomba kuregerwa inkiko, ntibiba bikiri ngombwa kuyaregera iyo abayagiranye bemeranya kuyasesa no kwirengera ingaruka yabyo

TUYISENGE v. MUKARONI......97

Amategeko agenga amasosiyete – Umunyamigabane – Ububasha bwo kuregera inyungu za sosiyete – Umunyamigabane ushaka kurengera inyungu za sosiyete agomba kubanza kubiherwa uruhushya n'Urukiko – Umunyamigabane wabyemerewe n'Urukiko kuregera inyungu za sosiyete, ntatanga ikirego mw'izina rye bwite ahubwo agitanga mw'izina rya sosiyete abereye Umunyamigabane.

PASSAG COMPANY Ltd v. GTBANK Ltd N'UNDI......97

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Izina ry'ubucuruzi – Ububasha bwo kurega mu Rukiko – Izina ry'ubucuruzi ntirigira ubuzimanagatozi ku buryo ryatanga ikirego mu rukiko, ahubwo ikirego gitangwa na nyir'ubucuruzi mw'izina rye kuko ari we ufite ubuzimagatozi bumuhesha ububasha bwo kurega arengera inyungu z'ubucuruzi bwe akorera muri iryo zina.

MPORANYI v. USENGIMANA......63

Amategeko agenga umurimo – Impanuka y'akazi – Ubumuga bwo mu mutwe – Ibarwa ry'indishyi zihabwa uwagize ubumuga bwo mu mutwe bukomoka ku mpanuka y'akazi, rikorwa kimwe n'izishingiye k'ubumuga bw'umubiri bwatewe n'impanuka y'akazi ziteganywa n'Iteka rya Perezida.

IKIGO CY'UBWITEGANYIRIZE MU RWANDA (RSSB) v. TWAGIRAMUNGU......129

Amategeko mpanabyaha – Gucuruza amahembe y'inzovu – Gucuruza amahembe y'inzovu no kuyashakira isoko ntibigize icyaha cyo gushimuta, kwica, gukomeretsa cyangwa gucuruza inzovu nta n'ubwo bigize kuba icyitso mu gushimuta, kwica, gukomeretsa cyangwa gucuruza inzovu ahubwo bigize icyaha cyo kwakira, gutunga, guhisha cyangwa gutanga ngo bahishe ibicuruzwa bazi neza ko bibujijwe cyangwa bisabirwa uruhushya byatumijwe cyangwa byinjijwe mu buryo bunyuranije n'amategeko – Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo, Ingingo ya 200 (d) (i) (ii).

Amategeko yerekeranye n'imanza z'ubucuruzi – Sosiyete – Igihombo – Iyo hamaze kwemezwa ikurikirana ry'igihombo cya sosiyete, nta mutungo wayo wakurwa mu yindi mbere y'igabana ry'ababerewemo imyenda nubwo waba waratanzweho ingwate. Itegeko № 35/2013 ryo ku wa 29/05/2013 rihindura kandi ryuzuza Itegeko №12/2009 ryo ku wa 26/05/2009 ryerekeye izahura ry'ubucuruzi n'irangiza ry'ibibazo biturutse ku gihombo, ingingo ya 4.

DEVELOPMENT BANK OF RWANDA LTD (BRD Ltd) v. SPLENDID KALISIMBI Ltd.....115

Itegeko Nshinga – Gutandukanya abantu – N'ubwo abantu bagomba kureshya imbere y'amategeko, kubatandukanya cyangwa kubashyira mu byiciro ntabwo buri gihe biba ivangura, kuko iyo hari impamvu zumvikana zishingiye ku ntego ifite ireme (legitimate or rational purpose) gutandukanya abantu cyangwa ibyiciro by'abantu bishobora kuba ngombwa.

Re. MURANGWA.....1

Ikirego gisaba kwemeza ko ingingo cyangwa Itegeko rinyuranye n'Itegeko Nshinga – Uwatanze ikirego mu manza zisaba kuvanaho ingingo z'itegeko zinyuranye n'itegeko nshinga, agomba kugaragaza ko itegeko cyangwa ingingo binyuranye n'Itegeko Nshinga mu buryo buziguye cyangwa butaziguye.

Re. MURANGWA.....1

IKIREGO GISABA KWEMEZA KO ITEGEKO RINYURANYE N'ITEGEKO NSHINGA

Re. MURANGWA

[Rwanda URUKIKO RW'IKIRENGA – RS/INCONST/SPEC 00001/2019/SC – (Rugege, P.J., Nyirinkwaya, Cyanzayire, Hitiyaremye, Rukundakuvuga, J.) 29 Ugushyingo 2019]

Itegeko Nshinga – Gudatandukanya abantu – Nubwo abantu bagomba kureshya imbere y'amategeko, kubatandukanya cyangwa kubashyira mu byiciro ntabwo buri gihe biba ivangura, kuko iyo hari impamvu zumvikana zishingiye ku ntego ifite ireme (legitimate or rational purpose) gutandukanya abantu cyangwa ibyiciro by'abantu bishobora kuba ngombwa.

Itegeko Nshinga – Ikirego gisaba kwemeza ko ingingo cyangwa Itegeko rinyuranye n'Itegeko Nshinga – Uwatanze ikirego mu manza zisaba kuvanaho ingingo z'itegeko zinyuranye n'itegeko nshinga, agomba kugaragaza ko itegeko cyangwa ingingo binyuranye n'Itegeko Nshinga mu buryo buziguye cyangwa butaziguye.

Incamake y'ikibazo: Nyuma yaho hatangarijwe mu Igazeti ya Leta N° 44 yo ku wa 29/10/2018, Itegeko N° 75/2018 ryo ku wa 07/09/2018, rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, Murangwa yatanze ikirego mu Rukiko rw'Ikirenga avuga ko ingingo zaryo za 16, iya 17, iya 19 n'iya 20, zinyuranyije n'ingingo za 15, 16, 34 n'iya 35 z'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe mu mwaka wa 2015. Urukiko rw'Ikirenga mbere y'uko ruburanisha rwasabye abifuza gutanga ibitekerezo muri uru rubanza nk'inshuti z'urukiko (Amicus Curiae) kandi babifitiye ubumenyi ko babisaba; nyuma Urukiko rwemereye Ishuli ry'Amategeko rya Kaminuza y'u Rwanda

(School of Law), Transparency International Rwanda, Me Dieudonne Nzafashwanayo, Me Twiringiyemungu Joseph na Ntibaziyaremye Innocent kuba' inshuti z'urukiko.

Ingingo ziregerwa zikaba ziri mu byiciro bitatu:

Iki cyiciro cya mbere kigizwe n'ingingo ebyiri, iya 16 na 17, aho urega agaragaza ko ibyo ingingo ya 16 iteganya binyuranyije n'Itegeko Nshinga kuko uretse no kuba ikandamiza icviciro kimwe cyiswe icy'inyubako zo guturamo, avuga ko iyo ngingo iteganya umusoro munini kandi aricyo kidafite ubushobozi ukigereranyije n'icyiciro cy'ubucuruzi, n'inganda, cyo gishyirirwaho umusoro muto kandi abanyenganda aribo bafite ubushobozi ku buryo ibyo bishobora kubangamira gahunda ya Leta yo gutuza neza abanyarwanda, akomeza avuga ko niba nk'igihe umuntu yiyemeje kubaka amazu yo guturamo, undi akubaka amazu y'ubucuruzi naho undi akubaka amazu y'inganda, bose bagombye gufatwa nk'abashoramari ku buryo kubazanamo ibice ugamije kubasoresha nta kintu na gito bisobanuye kandi abantu bareshya imbere y'amategeko, ahubwo ko buri wese yagombye gusora hagendewe ku cyo yinjiza. Yongeraho ko ingingo ya 17 mu bika byayo byose yuzuzanya n'iya 16, nayo ikavangura abantu ishingiye ku byiciro by'ubukungu n'umutungo, ku buryo izo ngingo zombi zitareshyeshya abantu imbere y'amategeko ndetse zitanabarengera kimwe nk'uko Itegeko Nshinga ribiteganya mu ngingo zaryo za 15 na 16.

Ishuri ry'Amategeko rya Kaminuza y'u Rwanda risobanura ko ibiteganywa n'ingingo ya 16 binyuranye n'ihame ryo kubaka Leta iharanira imibereho myiza y'abaturage no gushyiraho uburyo bukwiye kugira ngo bagire amahirwe angana mu mibereho yabo, kuko iyo ngingo iteganya gusoresha umusoro munini inzu yo guturamo aho gusoresha umusoro munini inzu

2

z'ubucuruzi ari nazo zitanga inyungu nyinshi kandi ko kuba iyo ngingo iteganya umusoro munini ku mazu yo guturamo bizaca intege abayubaka kandi hari abantu benshi bagikeneye amacumbi, ubwabyo bikaba bitanajyanye na gahunda ya Leta yo gukemura ikibazo cy'amacumbi.

Transparency International Rwanda ivuga ko izo ngingo zigaragaramo ivangura kandi ko iyo usomye ingingo ya 16 usanga umushingamategeko yaratekerezaga ku guteza imbere ishoramari, ariko ko bitari ngombwa gutandukanya inzu z'ubucuruzi n'izo guturamo, kuko yirengagije imibereho y'abanyarwanda benshi bakeneye gutura ndetse n'inshingano za Leta zo gutuza buri munyarwanda, aho Leta yiyemeje korohereza buri muntu gutunga inyubako.

Inshuti y'Urukiko Ntibaziyaremye Innocent, ivuga ko umusoro ku nzu ikodeshwa utagombye gutandukana n'umusoro ku nzu y'ubucuruzi, kuko buri wese ariyo "business" aba yarahisemo. Akomeza avuga ko umusoro wagombye kugenda ugabanuka hakurikijwe gusaza kw' inzu (amortissement), kandi uwo musoro ukabarwa nyuma y'uko nyiri iyo nzu arangije kwishyura imyenda yafashe agura ikibanza cyangwa acyubaka, cyangwa se agaciro k'umutungo kakagenwa nyuma yo gukurwamo umwenda nyiri umutungo yafashe yubaka kugeza urangiye.

Leta y'u Rwanda ivuga ko nta vangura rishingiye ku bukungu kuko icyashyizwe mu byiciro n'imitungo (inyubako) atari abantu kandi ko inyubako imwe nyirayo yagenewe guturamo nk'icumbi rye, hamwe n'inyubako ziyunganira mu kibanza cyagenewe guturwamo n'umuryango umwe zisonewe umusoro, mu gihe izindi nyubako z'ubucuruzi n'inganda nta n'imwe isonewe, ariyo mpamvu izindi nyubako zo guturamo umuntu yaba afite zafatwa nka prestige/luxury.

3

Inshuti y'Urukiko Me Twiringiyemungu Joseph avuga ko umusoro wose washyizweho uba wubahirije amategeko kuko uba washyizweho n'Itegeko riteganya uzawakwa n'uburyo azawakwa, ku buryo kunenga umusoro ko udakurikije Itegeko Nshinga bigoye kuko ujyaho ku bw'Itegeko Nshinga. Avuga ko amategeko atari ngombwa ko buri gihe areba abantu bose.

Icyiciro cya kabiri kigizwe n'ingingo ya 19 ivuga ku bijyanye n'igipimo cy'umusoro utangwa ku butaka burenga ku bipimo fatizo bw'ikibanza urega avuga ko inyuranyije n'ingingo ya 15 y'Itegeko Nshinga. Kuri iyi ngingo avuga ko hagendewe ku kuba ubutaka bw'u Rwanda buhererekanywa mu buryo bwinshi butandukanye bigaragara ko hari ukutareshyeshya ababonye ubutaka mbere na nyuma y'uko Itegeko riregerwa rijyaho.

Ishuli ryigisha amategeko muri Kaminuza y'u Rwanda rivuga ko ingingo ya 19 inyuranyije n'Itegeko Nshinga mu ngingo yaryo ya 15 kuko gusoresha ku buryo butandukanye ibibanza hashingiwe gusa ko igihe usora yakiboneye atari impamvu ifatika yatuma habaho iryo tandukaniro. Naho ku birebana n'ikibanza cyabonetse mbere cyangwa nyuma y'ikurikizwa ry'Itegeko, bavuga ko ihame ryo kudasubira inyuma kw'itegeko (nonrétroactivité de la loi) nk'impamvu zo gutandukanya ba nyir'ibibanza, itareberwa igihe ikibanza cyaguriwe cyangwa cyatangiwe gukoreshwa ahubwo yareberwa igihe uburenganzira ku kibanza bwatangiriye (igihe ubwo butaka bwatangiye gukoreshwa).

Transparency International Rwanda, ivuga ko ibiteganywa niyo ngingo biteye ikibazo ku baturage, cyo kumenya uko bizajya bigenda ku waguze cyangwa uwazunguye ubutaka n'uwari usanzwe abutunze, niba azajya abanza kubugabanya; ndetse hakibazwa n'impamvu umushingamategeko avangura utunze ubutaka n'uzabutunga ejo, ufite bunini n'ufite buto. Ko uyu musoro bawufata nk'umusoro gihano unyuranye n'amahame y'amategeko.

Me Twiringiyemungu Joseph avuga ko kuba iyo ingingo igena umusoro ku bipimo by'inyongera ari ibintu bisanzwe, atanga urugero rw'umusoro ku mushahara aho uhembwa 100.000 Frw no munsi asora 20%, naho urengeje agasoreshwa 30%, ko rero urengeje ibipimo biteganywa n'itegeko aba agomba kwirengera ingaruka kuri uwo murengera. Ku birebana nuko ingingo ya 19 ivuga ko uwo musoro utareba abari basanganywe ibibanza mbere y'uko itegeko rijyaho, avuga ko ibyo bijyanye n'ihame ry'uburenganzira umuntu aba yarabonye mbere y'uko itegeko rijyaho budashobora guhungabanywa, ko itegeko rishya ridashobora kwambura umuntu ibintu yari atunze mbere y'uko rijyaho.

Leta y'u Rwanda ivuga ko kuba harabaye gutandukanya ibyiciro by'abantu barebwa n'ibipimo bitandukanye by'umusoro bitafatwa nko kwica ihame ry'uko abantu bareshya imbere y'amategeko, mu gihe hari impamvu ifatika kandi ifitiwe ibisobanuro (legitimate and rational purpose). Yongeraho ko kuvuga kandi ko ihame ryo kureshya imbere y'amategeko rishamikiyeho andi mahame nko kuba abantu bagomba gufatwa kimwe iyo bari mu bihe bimwe (equal treatment in equal circumstances), kudafatwa byanze bikunze mu buryo bumwe (Preferential treatment), cyangwa se ibyiciro bitandukanye by'abantu bigira amategeko yihariye (Specificity and special rules).

Icyiciro cya gatatu kigizwe n'ingingo ya 20, ivuga ku birebana n'igipimo cy'umusoro utangwa ku kibanza kidakoreshwa, uwatanze ikirego avuga ko iyo ngingo ibangamiye ibiteganywa n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga kuko iteganya umusoro w'inyongera ya 100% ku butaka bwitwa ko budakoreshwa hatitawe ku kureba niba nyirabwo abifitiye ubushobozi, bityo asanga uyu musoro ari umurengera kandi ko uzananira benshi. Akomeza avuga ko hashingiwe k' uburenganzira ku mutungo utimukanwa n'uburenganzira ku butaka ari ntavogerwa (fundamental rights), ndetse hanashingiwe no ku mahame agenderwaho mu gushyiraho umusoro, asanga ingingo ya 20 inyuranije n'uburenganzira bugenwa n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga.

Ishuli ryigisha amategeko muri kaminuza y'u Rwanda rivuga ko ingingo ya 19 n'iya 20 zimeze nk'aho zirimo guhana kuko imwe yongeraho 50%, indi ikongeraho 100%, ibi bikaba binyuranye n'amahame rusange agenga amategeko kuko umuntu ahanwa kuko atakoze ibyo amategeko amutegeka cyangwa yakoze ibyo amategeko amubuza, hakibazwa icyo umuturage yaba yakoze cyangwa atakoze mu biteganywa n'itegeko kugira ngo ahanwe. Ko kandi ibyo binyuranyije n'amahame agenga imibereho myiza y'abaturage, kandi ko umuturage ariwe uzikorera umutwaro w'umusoro, kuko uwasoreye ikibanza najva kugurisha azawongeraho ndetse n'ukodesha azongeraho uwo musoro, bitume ubuzima buhenda kandi ko Leta idashobora kugeza abantu kuri "social justice" abaturage badafite uburenganzira ku mutungo, badahabwa amahirwe angana, batanareshya imbere y'amategeko.

Inshuti y'Urukiko Me Dieudonne Nzafashwanayo, avuga ko ibiteganywa n'iyo ngingo ya 20 binyuranye n'Itegeko Nshinga, kuko ivangura umuntu ufite ikibanza gikoreshwa n'ufite ikibanza kidakoreshwa usabwa kwishyura umusoro w'inyongera kandi ko inazitira uburenganzira buteganyijwe mu ngingo ya 34 n'iya 35 z'Itegeko Nshinga kuko umuntu ashobora kwamburwa ubutaka mu gihe ananiwe kwishyura umusoro, ko rero ishyirwaho ryayo rititaye ku ngaruka izagira ku batunze ubutaka badakoresha.

6

Akomeza avuga ko bitari ngombwa gushyiraho iyo ngingo mu rwego rwo gukemura ikibazo cy'abatunga ibibanza byinshi bagamije kuzabigurisha ku giciro kinini (speculation), kuko icyo kibazo gikemurwa n'ingingo ya 58 y'Itegeko ry'Ubutaka.

Inshuti y'urukiko Transparency International Rwanda, ivuga ko ingingo ya 20 ibangamiye amahame y'uburenganzira ku mutungo bwite w'ubutaka, kuko umusoro uteganywa n'iyo ngingo uteye ikibazo ku muturage ufite amikoro make, bavuga ko basanga umubera umusoro gihano ku kibanza cyangwa ubutaka adakoresha bitewe no kubura amikoro, kandi ko natabasha kwishyura uwo musoro ibyo atunze birimo n'ubwo butaka bizatezwa cyamunara hishyurwa umusoro, bityo akaba yambuwe uburenganzira ku mutungo buteganywa n'Itegeko Nshinga.

Ntibaziyaremye Innocent avuga ko bidakwiye guca umusoro wa 100% ku kibanza cyose kidakoreshwa kuko hari impamvu nyinshi zishobora gutuma kitarubatswe, cyane cyane kubura amikoro. Akomeza avuga ko hari igihe umuntu ufite ubutaka bumutunze bugashyirwa mu miturire ahita abusorera kandi butakivamo ibimutunga ndetse agahita agira n'umutwaro wo kubusorera ku buryo ashobora no kugera ubwo aburaga abana bakabwanga kuko buriho imisoro batashobora kwishyura.

Leta y'u Rwanda ivuga ko ingingo ya 20 itabangamiye uburenganzira ku mutungo utimukanwa n'uburenganzira ku butaka buteganywa n'Itegeko Nshinga, kuko iyo ngingo yaje gutandukanya abantu bakoresha ubutaka icyo bwagenewe n'abatabukoresha, bugakomeza kubaho butanahawe ufite ubushake n'ubushobozi bwo kubukoresha, mu gihe igihugu gikeneye gutera imbere kibyaza umusaruro ubutaka buto gifite. **Incamake y'icyemezo:** 1. Uwatanze ikirego mu manza zisaba kuvanaho ingingo z'itegeko zinyuranye n'itegeko Nshinga, agomba kugaragaza ko itegeko cyangwa ingingo zinyuranye n'Itegeko Nshinga mu buryo buziguye cyangwa butaziguye.

2. Nubwo abantu bagomba kureshya imbere y'amategeko, kubatandukanya cyangwa kubashyira mu byiciro ntabwo buri gihe byakwitwa ivangura, kuko iyo hari impamvu zumvikana zishingiye ku ntego ifite ireme (legitimate or rational purpose) gutandukanya abantu cyangwa ibyiciro by'abantu bishobora kuba ngombwa.

3.Nubwo ingingo ya 20 y'Itegeko N° 75/2018 itanyuranye n'Itegeko Nshinga, imyandikire yayo ikwiye kuzuzwa hagashyirwamo ibirebana n'igihe ubutaka bwamara budakoreshwa bukabona gusoreshwa umusoro w'inyongera, no kuba umusoro w'inyongera utatangwa igihe bigaragara ko hari impamvu yumvikana ituma budakoreshwa.

Ingingo ya 16 n'iya 17 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, ntizinyuranyije n'ingingo ya 15 n'iya 16 y'Itegeko Nshinga rya Repubulika y'u Rwanda. Ingingo ya 19 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, inyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda. Ingingo ya 20 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage,

ntinyuranyije n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga.

Amategeko yashingiweho:

Ayo mu Rwanda :

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 164 Itangazo ry'Umuryango w'Abibumbye ku burenganzira bwa muntu ryo mu mwaka wa 1948, ingingo ya 7 n'iya 17 Amasezerano Mpuzamahanga ku burenganzira Mbonezamubano n'ubwa Politiki yo mu mwaka wa 1966, ingingo ya 26

African Charter on Human and Peoples' Rights, ingingo 14.

Ayo mu mahanga:

European Convention on Human Rights, Protocol No. 1, ingingo ya 1 American Convention on Human Rights, ingingo. 21

Imanza zifashishijwe:

Re AKAGERA BUSINESS GROUP (ABG), RS/SPEC/0001/16/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 23/09/2016

Izo mu mahanga:

Supreme Court of the United States, Regan v. Taxation with Representation of Wash., 461 U.S. 540. Madden v. Kentucky, 309 U.S. 83, 87-88 (1940) Supreme Court of United States, BELL'S GAP RAILROAD COMPANY v. PENNSYLVANIA, 134 U.S. 232 (1890).

- Supreme Court of the United States, Nordlinger v. Hahn, June 18, 1992, 112 S. Ct. (1992).
- Communication N° 172/1984 S.W.M. Broeks v The Netherlands (views adopted on 9 April 1987) in UN Doc. GOAR, A/42/40 P.150.

Inyandiko zabahanga:

- Erwin Chemerinsky, In Defense of Equality: A Reply to Professor Westin, 81 MICH. L. REv. 575, 578 n.17 (1983)
- Levell, P., Roantree, B., & Shaw, J.). Mobility and the Lifetime Distributional Impact of Tax and Transfer Reforms, 2016, p32.,

Urubanza

I. MITERERE Y'URUBANZA

[1] Murangwa Edward yatanze ikirego mu Rukiko rw'Ikirenga avuga ko nyuma y'uko hatangarijwe mu Igazeti ya Leta N° 44 yo ku wa 29/10/2018, Itegeko N° 75/2018 ryo ku wa 07/09/2018, rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, yarisomye agasanga ingingo zaryo za 16, iya 17, iya 19 n'iya 20, zinyuranyije n'ingingo za 15, 16, 34 n'iya 35 z'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe mu mwaka wa 2015. Avuga ko yatanze ikirego yisunze ingingo ya 43 y'Itegeko Nshinga rya Repubulika y'u Rwanda igira iti: "Ubutegetsi bw'Ubucamanza ni bwo murinzi w'uburenganzira n'ubwisanzure bwa muntu".

10

[2] Ingingo Murangwa Edward aregera ko zinyuranyije n'Itegeko Nshinga ni enye (4), ziri mu byiciro bitatu: icyiciro cya mbere kigizwe n'ingingo ebyiri (2): iya 16 na 17 z'Itegeko N° 75/2018 ryavuzwe haruguru. Ingingo ya 16 iteganya ko: igipimo cy'umusoro ku nyubako gishyizweho kuri rimwe ku ijana (1%) by'agaciro ku isoko k'inyubako yagenewe guturwamo, zeru n'ibice bitanu ku ijana (0,5%) by'agaciro ku isoko k'inyubako ku nyubako z'ubucuruzi, zeru n'igice kimwe ku ijana (0,1%) by'agaciro ku isoko k'inyubako zagenewe inganda, iz'ibigo by'ubucuruzi bito n'ibiciriritse n'izagenewe ibindi bikorwa bitavuzwe muri iyi ngingo. Naho ingingo ya 17 iteganya ko: uretse igipimo cy'umusoro cya zeru n'igice kimwe ku ijana (0,1%), ibipimo by'umusoro bigenwa n'ingingo ya 16 y'iri tegeko bigenda bizamuka mu buryo bukurikira:

1° ku nyubako zo guturamo, igipimo cy'umusoro kigenda kizamuka mu buryo bukurikira:

- a) zeru n'ibice makumyabiri na bitanu ku ijana (0,25%) kuva ku mwaka wa mbere nyuma y'uko iri tegeko ritangiye gukurikizwa;
- b) zeru n'ibice mirongo itanu ku ijana (0,50%) kuva ku mwaka wa kabiri nyuma y'uko iri tegeko ritangiye gukurikizwa;
- c) zeru n'ibice mirongo irindwi na bitanu ku ijana (0,75%) kuva ku mwaka wa gatatu nyuma y'uko iri tegeko ritangiye gukurikizwa;
- d) rimwe ku ijana (1%) kuva ku mwaka wa kane nyuma y'uko iri tegeko ritangiye gukurikizwa;

2° ku nyubako z'ubucuruzi, igipimo cy'umusoro kigenda kizamuka mu buryo bukurikira:

- a) zeru n'ibice bibiri ku ijana (0.2%) by'agaciro k'inyubako ku isoko gikoreshwa ku mwaka wa mbere nyuma y'uko iri tegeko ritangiye gukurikizwa;
- b) zeru n'ibice bitatu ku ijana (0.3%) ku mwaka wa kabiri iri tegeko ritangiye gukurikizwa;
- c) zeru n'ibice bine ku ijana (0.4%) ku mwaka wa gatatu iri tegeko ritangiye gukurikizwa;
- d) zeru n'ibice bitanu ku ijana (0.5%) ku mwaka wa kane iri tegeko ritangiye gukurikizwa.

Inyubako zigeretse zo guturwamo zifite kuva ku magorofa ane, habariwemo n'ari munsi y'ubutaka, zigabanyirizwa ibipimo by'umusoro ku kigero cya mirongo itanu ku ijana (50%) by'igipimo gisanzwe".

[3] Murangwa Edward avuga ko ibyo ingingo ya 16 iteganya binyuranyije n'Itegeko Nshinga kuko uretse no kuba ikandamiza icyiciro kimwe cyiswe icy'inyubako zo guturamo, iyo ngingo igiteganyiriza umusoro munini kandi aricyo kidafite ubushobozi n'icyiciro cy'ubucuruzi, ukigereranyije n'inganda. cyo gishyirirwaho umusoro muto kandi abanyenganda aribo bafite ubushobozi. Avuga ko n'ingingo ya 17 n'uduka twayo twose yuzuzanya n'iya 16, nayo iyangura abantu ishingiye ku byiciro by'ubukungu n'umutungo, ku buryo asanga izo ngingo zombi abantu imbere y'amategeko ndetse zitareshyeshya zitanabarengera kimwe nk'uko Itegeko Nshinga ribiteganya mu ngingo zaryo za 15 na 16.

Icyiciro cya kabiri cy'ikirego kigizwe n'ingingo ya 19 [4] y'Itegeko N° 75/2018 ryavuzwe haruguru, iteganya ko: "Igipimo cy'umusoro cyagenwe n'Inama Njyanama y'Akarere kuri buri metero kare y'ubutaka hashingiwe ku biteganywa mu ngingo ya 18 y'iri tegeko¹ cyiyongeraho mirongo itanu ku ijana (50%) asorerwa ubutaka burenga ku bipimo fatizo by'ikibanza cyagenewe inyubako. Ibipimo fatizo by'ikibanza cyagenewe inyubako bigenwa n'iteka rya Minisitiri ufite imiturire mu nshingano ze. Igipimo cy'umusoro cy'inyongera kivugwa mu gika cya mbere cy'iyi ngingo ntikireba ikibanza gitunzwe n'uwakibonye mbere y'uko iri tegeko ritangira gukurikizwa". Murangwa avuga ko ibyo ingingo ya 19 iteganya mu gika cya mbere n'icya gatatu binyuranyije n'ingingo ya 15 y'Itegeko Nshinga iteganya ko abantu bose bareshya imbere y'amategeko kandi ko Itegeko ribarengera ku buryo bumwe, kuko hagendewe kukuba ubutaka bw'u Rwanda buhererekanywa mu buryo bwinshi butandukanye nko mu mpano, mu izungura, mu kuraga, mu kugura no kugurisha, bigaragara ko hari ukutareshyeshya ababonye ubutaka mbere na nyuma y'uko Itegeko N° 75/2018 riregerwa rijyaho.

[5] Icyiciro cya gatatu kigizwe n'ingingo ya 20 y'Itegeko N° 75/2018 ryavuzwe haruguru, ivuga ku birebana n'igipimo cy'umusoro utangwa ku kibanza kidakoreshwa, iteganya ko: "Ikibanza cyose kidakoreshwa gicibwa umusoro w'inyongera

¹ Ingingo ya 18 ivuga ku birebana n'igipimo cy'umusoro ku kibanza, muri aya magambo: "Igipimo cy'umusoro ku kibanza kiri hagati ya zeru (0) n'amafaranga y'u Rwanda magana atatu (300 FRW) kuri metero kare. Inama Njyanama y'Akarere igena umusoro wishyurwa kuri metero kare y'ubutaka ishingiye ku bipimo fatizo n'ibindi bikurikizwa bigenwa n'iteka rya Minisitiri ufite imisoro mu nshingano ze".

w'ijana ku ijana (100%) urenga ku gipimo cy'umusoro kivugwa mu ngingo ya 18 y'iri tegeko". Murangwa avuga ko ibyo ingingo ya 20 iteganya bibangamiye ibiteganywa n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga, ziteganya ko uburenganzira ku mutungo utimukanwa n'uburenganzira ku butaka ari ntavogerwa, kandi abanyarwanda ari wo mutungo wa mbere w'Igihugu, uwa kabiri ukaba ubutaka batuyeho, bakoreraho, kandi bukaba bubatunze, ko rero kuba iyo ngingo iteganya umusoro w'inyongera ya 100% ku butaka bwitwa ko budakoreshwa hatitawe ku kureba niba nyirabwo abifitiye ubushobozi, agasanga uyu musoro ari umurengera kandi ko uzananira benshi.

[6] Ingingo ya 34 iteganya ko: "buri muntu afite uburenganzira ku mutungo bwite, waba uwe ku giti cye cyangwa uwo asangiye n'abandi. Umutungo bwite, uw'umuntu ku giti cye cyangwa uwo asangiye n'abandi ntuvogerwa. Uburenganzira ku mutungo ntibuhungabanywa keretse ku mpamvu z'inyungu rusange kandi hakurikijwe ibiteganywa n'amategeko". Naho ingingo ya 35 igateganya ko: " Umutungo bwite w'ubutaka n'ubundi burenganzira ku butaka bitangwa na Leta. Itegeko rigena uburyo bwo kubutanga, kubuhererekanya no kubukoresha".

[7] Uhagarariye Leta y'u Rwanda avuga ko ibivugwa ko ingingo ya 16 n'iya 17 z'Itegeko N° 75/2018 ryo ku wa 07/09/2018, ryavuzwe haruguru, bibangamiye ihame ryo kurindwa ivangura riteganywa n'Itegeko Nshinga, ataribyo kuko uyu musoro ari umusoro ku mutungo kandi icyashyizwe mu byiciro akaba ari imitungo (inyubako) atari abantu, kandi ko kuba inyubako zashyirwa mu byiciro kugira ngo zisoreshwe, atari ivangura rishingiye ku bukungu.

[8] Ku ngingo ya 19, avuga ko itabangamira ihame ryo kureshya imbere y'amategeko riteganywa n'ingingo ya 15 y'Itegeko Nshinga ndetse n'ihame ryo kurindwa ivangura riteganywa n'ingingo ya 16 y'Itegeko Nshinga kuko ingingo ya 19 yaje gushimangira andi mahame y'amategeko, cyane cyane ihame ry'uburenganzira ku butabera buboneye ndetse n'uko itegeko ridashobora gusubira inyuma (La non-rétroactivité de la loi).

[9] Uhagarariye Leta y'u Rwanda akomeza avuga ko ingingo ya 20 itabangamiye uburenganzira ku mutungo utimukanwa n'uburenganzira ku butaka (fundamental rights) buteganywa n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga nkuko Murangwa abivuga, kuko iyo ngingo ya 20 yaje gutandukanya abantu bakoresha ubutaka icyo bwagenewe n'abatabukoresha, bugakomeza kubaho butanahawe ufite ubushake n'ubushobozi bwo kubukoresha, mu gihe igihugu gikeneye gutera imbere kibyaza umusaruro ubutaka buto gifite.

[10] Mbere yo gukomeza iburanisha mu mizi, Urukiko rwasanze, kubera uburemere bw'ibibazo bizasuzumwa muri uru rubanza, ari ngombwa ko abantu n'ibigo cyangwa imiryango itegamiye kuri Leta bifuza gutanga ibitekerezo muri uru rubanza nk'inshuti z'urukiko (Amicus Curiae) kandi babifitiye ubumenyi, babisaba binyujijwe ku Bwanditsi bw'Urukiko rw'Ikirenga, bakanatanga n'imyanzuro yabo.

[11] Nyuma yo kubona inyandiko zinyuranye z'abashaka kuba muri uru rubanza nk'inshuti z'urukiko (Amicus Curiae) mu rwego rwo gutanga ibitekerezo, Urukiko rwarazisesenguye maze rwemeza ko aba bakurikira aribo bujuje ibisabwa akaba aribo bagomba kwitaba urukiko mu iburanisha ry'uru rubanza nk'inshuti z'urukiko (Amicus Curiae), aribo: Ishuri ry'Amategeko rya Kaminuza y'u Rwanda (School of Law), Transparency International Rwanda, Me Dieudonne Nzafashwanayo, Me Twiringiyemungu Joseph na Ntibaziyaremye Innocent, maze bakora imyanzuro ikubiyemo ibitekerezo ku kirego cya Murangwa Edward nkuko biri bugaragazwe.

[12] Urubanza rwaburanishijwe ku wa 1/11/2019, Murangwa Edward yunganiwe na Me Rugemintwaza Jean Marie Vianney na Me Bahati Vedaste, Leta ihagarariwe na Me Cyubahiro Fiat na Me Ntarugera Nicolas, Ishuri ry'Amategeko rya Kaminuza y'u Rwanda (School of Law) rihagarariwe na Turatsinze Emmanuel, Bagabo Faustin na Habimana Pie, Transparency International Rwanda ihagarariwe n'Umuyobozi wayo Ingabire Marie Immaculée yunganiwe na Me Habumuremyi Anglebert, hari kandi Me Dieudonne Nzafashwanayo, Me Twiringiyemungu Joseph na Ntibaziyaremye Innocent.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

Kumenya niba ingingo ya 16 n'iya 17 z'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, zinyuranyije n'ingingo ya 15 n'iya 16 z'Itegeko Nshinga rya Repubulika y'u Rwanda.

[13] Murangwa Edward n'abamwunganira bavuga ko Itegeko Nshinga rya Repubulika y'u Rwanda, mu ngingo ya 10, igika cya 5, handitse amagambo akurikira: "Leta y'u Rwanda yiyemeje kubaka Leta iharanira imibereho myiza y'abaturage no gushyiraho uburyo bukwiye kugira ngo bagire amahirwe angana

16 ____

mu mibereho yabo", naho mu gika cya 6 bandika ko: "Leta y'u Rwanda yiyemeje gushaka buri gihe umuti w'ibibazo binyuze mu nzira y'ibiganiro n'ubwumvikane busesuye". Bavuga ko ibyo aya mahame ateganya bishimangirwa n'ibiteganywa n'ingingo ya 15 y'Itegeko Nshinga ivuga ko abantu bose bareshya imbere y'amategeko kandi barengerwa ku buryo bungana, naho ingingo ya 16 ikavuga ko abanyarwanda bavuka kandi bagakomeza kugira uburenganzira n'ubwisanzure bingana, nta vangura iryo ari ryo ryose².

[14] Basobanura ko ibiteganywa n'ingingo ya 16 n'iya 17 z'Itegeko N° 75/2018 ryo ku wa 07/09/2018 ryavuzwe haruguru binyuranyije n'amahame remezo ateganywa n'Itegeko Nshinga, mu ngingo ya 15 n'iya 16 zavuzweharuguru, kuko uretse no kuba izo ngingo ziregerwa zikandamiza icyiciro kimwe cyiswe icy'inyubako zo guturamo, inagiteganyiriza umusoro munini kandi icyo cyiciro kigizwe n'abadafite ubushobozi ugereranyije n'abagize icyiciro cy'ubucuruzi n'inganda, bafite ubushobozi, ariko cyo kigashyirirwaho umusoro muto, ku buryo ibyo bishobora kubangamira gahunda ya Leta yo gutuza neza abanyarwanda.

[15] Bavuga ko niba umuntu yiyemeje kubaka amazu yo guturamo, undi akubaka amazu y'ubucuruzi naho undi akubaka amazu y'inganda, bose bagombye gufatwa nk'abashoramari ku buryo kubazanamo ibice ugamije kubasoresha nta kintu na gito

² Abanyarwanda bose bavukana kandi bagakomeza kugira uburenganzira n'ubwisanzure bingana. Ivangura iryo ari ryo ryose cyangwa kurikwirakwiza byaba bishingiye ku bwoko, ku muryango cyangwa ku gisekuru, ku nzu, ku ibara ry'umubiri, ku gitsina, ku karere, ku byiciro by'ubukungu, ku idini cyangwa ukwemera, ku bitekerezo, ku mutungo, ku itandukaniro ry'umuco, ku rurimi, ku bukungu, ku bumuga bw'umubiri cyangwa ubwo mu mutwe no ku rindi vangura iryo ari ryo ryose, birabujijwe kandi bihanwa n'amategeko.

bisobanuye kandi abantu bareshya imbere y'amategeko, ahubwo ko buri wese yagombye gusora hagendewe ku cyo yinjiza, kuko uwubatse umudugudu munini wo guturamo yakunguka kurusha uwubatse uruganda rwe ruto.

[16] Murangwa Edward n'abamwunganira bakomeza bavuga ko mu ngingo ya 17, umushingamategeko yerekanye uburyo umusoro uzagenda wiyongera buri mwaka, ariko ko atigeze agaragaza impamvu azaheraho yongera umusoro, ko icyari kuba cyiza cyari kugaragaza ayo umuntu azunguka ku mwaka wa mbere no ku mwaka wa kabiri, ku buryo iyo nyungu ariyo yaherwaho umusoro wongerwa, naho ubundi ibyo yakoze ntaho bitaniye no gukenesha abaturage.

[17] Turatsinze Emmanuel, Bagabo Faustin na Habimana Pie, mu izina ry'Ishuri ryigisha amategeko muri Kaminuza y'u Rwanda (University of Rwanda/ School of Law) bavuga ko ibyo Leta yakora byose bitubahirije ihame ryo kubaka Leta iharanira imibereho myiza y'abaturage byaba binyuranye n'Itegeko Nshinga.

[18] Basobanura ko ibiteganywa n'ingingo ya 16 binyuranye n'ihame ryo kubaka Leta iharanira imibereho myiza y'abaturage no gushyiraho uburyo bukwiye kugira ngo bagire amahirwe angana mu mibereho yabo, kuko iyo ngingo iteganya gusoresha umusoro munini inzu yo guturamo aho gusoresha umusoro munini inzu z'ubucuruzi ari nazo zitanga inyungu nyinshi. Bavuga ko kuba uwubatse inzu yo guturamo aba yarubatse kugirango igire icyo imwinjiriza, n'inzu y'ubucuruzi nayo ikaba yarubatswe kugirango ikodeshwe, basanga nta mpamvu zihari zifatika mu gusoresha ku buryo butandukanye ayo mazu cyane cyane ko abayubaka baba bagamije ko hari icyo azabinjiriza. Bavuga kandi ko kuba iyo ngingo iteganya umusoro munini ku mazu yo guturamo bizagabanya/ bizaca intege abayubaka kandi hari abantu benshi bagikeneye amacumbi, ubwabyo bikaba bitanajyanye na gahunda ya Leta yo gukemura ikibazo cy'amacumbi.

Bavuga ko ubusanzwe uburyo bwo gusoresha bugomba [19] guhura n'uburenganzira bw'abasoreshwa aribo abaturage, n'uko igihugu gisaranganya umutungo wacyo, ku buryo umusoro utagombye kuremerera abaturage, ariko ko mu busesenguzi bakoze basanze umusoro w'inzu yagenewe inyubako yo guturamo ukubye inshuro ebyiri uw'ubucuruzi, ugakuba inshuro 10 uw'inganda, ku buryo ihame ryo kuba abaturage bafite amahirwe angana, bahabwa uburenganzira bungana ridahura n'iryo tegeko; ko rero umusoro utagombye kumvikana nk'uburyo bwo gushaka amafaranga gusa ahubwo wagombye kuba uburyo Leta vifashisha mu kubungabunga imibereho myiza v'abaturage. Bavuga kandi ko kuba mu isobanura mpamvu ry'iryo tegeko bavuga ko ari ugushyigikira iterambere ry'imijyi n'inganda, iyo mpamvu yaba idahagije kuko uyu musoro n'ubwo uzaremerera abubaka amazu akodeshwa, utazabuza bake kubaka maze ahubwo bikazabera umutwaro abakodesha, kandi ko inyubako z'ubucuruzi n'inganda zitateza imigi imbere mu gihe abantu badafite aho batuye.

[20] Bavuga ko ikindi kiboneka mu isobanura mpamvu ari uko icyatumye uwo musoro ushyirwaho ari uko mu Karere u Rwanda ruherereyemo, arirwo rufite umusoro uri hasi, ugereranyije n'ibindi bihugu; ibi akaba nta kuri kurimo kuko mu bihugu byo mu karere u Rwanda ruza ku mwanya wa kane mu bukungu n'ibyinjizwa n'umuturage (GDP), ku buryo kuzamura umusoro kandi bigaragara ko ibyo umuturage yinjiza ari bike bituma atakaza ubushobozi bwo kugira ibyo ahaha. Batanga urugero rw'Igihugu cya Kenya aho umuturage yinjiza 1507 USD ku mwaka mu gihe mu Rwanda ari 780 USD ku mwaka, bivuze rero ko isobanura mpamvu y'iri tegeko itari ukuri.

[21] Bakomeza bavuga ko abantu bari mu cyiciro kimwe cyangwa bafite icyo bahuriyeho bagomba gucibwa umusoro ungana, ndetse ko bidakwiye gucibwa umusoro umwe ku bantu batari mu rwego rumwe, mu gihe usoresha atagaragaje impamvu ikomeye yo gutandukanya abantu.

[22] Ku biteganywa n'ingingo ya 17, bavuga ko ari ishyira mu bikorwa ibiteganywa n'ingingo ya 16, ku buryo kuba ibiri muri iyo ngingo ya 16 binyuranye n'Itegeko Nshinga, n'ingngo ya 17 yavaho kuko ibyo ishyira mu bikorwa bidahwitse. Banzura bavuga ko izo ngingo zombi zinyuranye n'ingingo ya 15 n'iya 16 z'Itegeko Nshinga kuko zivangura abasoreshwa, kandi ibyo ziteganya bikaba bihabanye n'ihame ry'uko Leta ifite inshingano yo guteza imbere imibereho myiza y'abaturage.

[23] Ingabire Marie Immaculée n'umwunganira mu izina rya Transparency International Rwanda, bavuga ko ingingo ya 16 n'iya 17 z'Itegeko N° 75/2018 ryavuzwe haruguru, zaregewe ko zigaragaramo ivangura hagati y'abafite inyubako zitwa izo guturamo n'abafite inyubako z'ubucuruzi, basanga ari iby'ukuri, kuko zinyuranyije n'amahame y'Itegeko Nshinga. Basobanura ko iyo usomye ingingo ya 16 usanga umushingamategeko yaratekerezaga ku guteza imbere ishoramari, ariko ko bitari ngombwa gutandukanya inzu z'ubucuruzi n'izo guturamo, kuko yirengagije imibereho y'abanyarwanda benshi bakeneye gutura ndetse n'inshingano za Leta zo gutuza buri munyarwanda, aho Leta yiyemeje korohereza buri muntu gutunga inyubako. Ko rero umusoro uteganywa n'iyo ngingo ari mwinshi ku buryo ubangamiye imibereho myiza y'abaturage na politiki y'Igihugu y'imiturire yagiyeho mu mwaka wa 2015³, bikaba binyuranye n'ingingo ya 10,50 y'Itegeko Nshinga.

[24] Bavuga kandi ko ibiteganywa n'ingingo ya 17 bihuje n'ibivugwa mu ngingo ya 16 yavuzwe mu gika kibanziriza iki, bivuze ko nayo igaragaramo ivangura kandi ibangamiye imibereho myiza y'abaturage kuko igaragaza uko uwo musoro uzatangwa, ariyo mpamvu basaba ko mu gihe ingingo ya 16 yaba ivanyweho, n'iya 17 yavaho kuko ntacyo yaba ishingiyeho, ariyo mpamvu zombi zigomba kuvanwaho. Bavuga kandi ko kuba Umushingamategeko yarateganyije ko umusoro uzajya wishyurwa mu byiciro, ubwabyo ari ikimenyetso ko nawe yabonye ko ari munini ugereranyije n'amikoro y 'abanyarwanda, ibyo bakaba ntacyo byafashije abanyarwanda, icyiza kwari ukureka kuwuca.

[25] Ntibaziyaremye Innocent avuga ko umusoro ku nzu ikodeshwa utagombye gutandukana n'umusoro ku nzu y'ubucuruzi, kuko buri wese ariyo "business" aba yarahisemo. Akomeza avuga ko umusoro wagombye kugenda ugabanuka hakurikijwe ubwisazire bw 'inzu (amortissement), kandi uwo musoro ukabarwa nyuma y'uko nyiri iyo nzu arangije kwishyura imyenda yafashe agura ikibanza cyangwa acyubaka, cyangwa se agaciro k'umutungo kakagenwa nyuma yo gukurwamo umwenda nyiri umutungo yafashe yubaka kugeza urangiye. Avuga kandi ko umusoro ku nzu wagombye kujyana n'ubwisazire bwayo "amortisement", kuko nko mu myaka 100, umuntu ashobora kuba yishyuye umusoro uruta agaciro k'inzu asorera, ariyo mpamvu abona ko uwo musoro ari umurengera wagora abaturage.

³ Reba Ministry of Infrastructure, National Housing Policy, 2015

[26] Avuga kandi ko umutungo umwe utagombye kubarirwa imisoro myinshi (umusoro ku butaka, umusoro ku nyungu z'ubukode, umusoro ku mutungo, kuko imisoro myinshi yica umusoro (beaucoup d'impôts tuent l'impôt). Asanga inzu ubwayo ari umutwaro (charges) itari ikwiye kubarirwa umusoro mu buryo buteganywa n'Itegeko N°75/2018, ahubwo hasoreshwa icyo yinjiza, dore ko hari n'inzu ya kabiri ishobora kubakwa mu rwego rwo gufasha abatishoboye, nk'iy'umwana yubakiye ababyeyi nyuma yo kurangiza amashuli barimazeho utwabo bamwishyurira, nawe akabubakira inzu nziza nk 'inyiturano ariko ntibadikweho kugira ngo itazazungurwa n'abandi.

[27] Uhagarariye Leta y'u Rwanda avuga ko ibivugwa ko ingingo ya 16 n'iya 17 z'Itegeko N° 75/2018 ryo ku wa 07/09/2018, ryavuzwe haruguru, zibangamiye ihame ryo kurindwa ivangura riteganywa n'Itegeko Nshinga, ataribyo kuko uyu musoro ari umusoro ku mutungo kandi icyashyizwe mu byiciro ari imitungo (inyubako) atari abantu, kandi ko kuba inyubako zashyirwa mu byiciro kugira ngo zisoreshwe, atari ivangura rishingiye ku bukungu. Avuga kandi ko n'ubwo byafatwa nko gushyira abantu mu byiciro (kuko aribo bishyura uwo musoro) nanone bitafatwa nko kuvangura, cyane cyane iyo ibyo byiciro byashyizweho hagamijwe kugera ku ntego yumvikana, igaragarira buri wese, ishingiye ku mategeko kandi ibyashingiweho bikaba bifite ireme mu nyungu rusange.

[28] Avuga kandi ko ibivugwa ko inyubako zo guturamo zasoreshejwe umusoro munini ugereranyijwe n'inyubako z'ubucuzi ndetse n'iz'inganda kandi abafite inyubako zo guturamo aribo bafite amikoro make nabyo bidakwiye guhabwa ishingiro kubera impamvu zikurikira: a) Nta bushakashatsi ubivuga yakoze bwerekana ko abafite inzu zo guturamo bafite amikoro make ugereranyije n'abafite inyubako z'ubucuruzi. b) Kabone n'ubwo abafite inyubako zo guturamo baba aribo bafite amikoro make koko, nabyo ntibyaba impamvu yo kuvuga ko iri soresha rivangura kubera ko habaho uburyo bwinshi bw'isoresha (proportional, progressive and regressive) hakurikijwe politike y'imisoro, ubukungu n'iterambere igihugu cyifuza.

[29] Uhagarariye Leta y'u Rwanda yibutsa ko inyubako imwe nyirayo yageneye guturamo nk'icumbi rye, hamwe n'inyubako ziyunganira mu kibanza cyagenewe guturwamo n'umuryango umwe zisonewe umusoro (ingingo ya 12), mu gihe izindi nyubako z'ubucuruzi n'inganda nta n 'imwe isonewe, ariyo mpamvu izindi nyubako zo guturamo umuntu yaba afite zafatwa nka *prestige/luxury*, ikimenyetso kigaragaza ko ari umukungu, ku buryo atafatwa nk'ufite amikoro make.

[30] Me Twiringiyemungu Joseph avuga ko umusoro wose washyizweho uba wubahirije amategeko kuko uba washyizweho n'Itegeko riteganya uzawakwa n'uburyo azawakwa, ku buryo kunenga umusoro ko udakurikije Itegeko Nshinga bigoye kuko ujyaho ku bw'Itegeko Nshinga. Avuga ko amategeko atari ngombwa ko buri gihe areba abantu bose, atanga urugero rw'Itegeko ry'umurimo ko ritareba abantu bose ahubwo ko rireba abakora umurimo wa Leta gusa.

[31] Avuga ko amategeko y'umusoro agena ibyiciro hagendewe kuri politiki ishaka kugerwaho, ko urebye nk'ingingo ya 21 y'Itegeko N° 16/2018 rishyiraho umusoro ku musaruro, ivuga ko umusaruro w'ubuhinzi utazasorerwa kugera kuri 20.000.000Frw, ariko nka Avoka iyo abonye umusaruro wa 12.000.000Frw awusorera mu gihe umuhinzi atawusorera, kandi ibyo bikaba bitafatwa nk'ivangura, bityo akaba abona ingingo ya 16 n'iya17 itanyuranyije n'Itegeko Nshinga.

UKO URUKIKO RUBIBONA

Mu gusesengura ikibazo cyo kumenya niba ingingo ya 16 [32] y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 inyuranye n'Itegeko Nshinga mu ngingo yaryo ya 15 n'iya 16, hagomba guzusumwa mbere na mbere uko izo ngingo zumvikana n'itandukaniro hagati yazo. Nk'uko byavuzwe mu rubanza RS/SPEC/0001/16/CS rwaciwe n'uru Rukiko kuwa 23/09/2016⁴, ingingo ya 15 n'iya 16 z'Itegeko Nshinga zifitanye isano ku buryo gusobanura icyo zishatse kuvuga uzitandukanyije, bigoye. Nk'uko byasobanuwe kandi muri urwo rubanza, ingingo ya 15 ivuga ko abantu bose bareshya imbere y'amategeko kandi bakarengerwa n'amategeko mu buryo bumwe. Ni ukuvuga ko hatagomba kubaho ivangura rituma abantu batarengerwa mu buryo bumwe cyangwa kutagira uburenganzira aho bakabugize. Naho ingingo ya 16 ikomerezaho ivuga uburyo gutandukanya abantu bifatwa nk'ivangura kandi ko bitemewe n'Itegeko Nshinga. Izi ngingo zombi zafatwa nk'izikubiyemo ihame rimwe ririmo uduce tubiri dufitanye isano.

[33] Ingingo z'amasezerano mpuzamahanga u Rwanda rwashyizeho umukono, nazo zigaragaza ko ihame ryo kureshya imbere y'amategeko no kurindwa ivangura zigize ihame rimwe. Hari ingingo ya 7 y'Itangazo ry'Umuryango w'Abibumbye ku burenganzira bwa muntu, Universal Declaration of Human

 $^{^4}$ Urubanza RS/SPEC/0001/16/CS AKAGERA BUSINESS GROUP (ABG), para 15.

Rights, ryo mu mwaka wa 1948, igira iti: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination". Hari kandi n'ingingo ya 26 y'Amasezerano Mpuzamahanga burenganzira ku Mbonezamubano n'ubwa Politiki (International Covenant on Civil and Political Rights, 1966) igira iti: "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status".

[34] Mu buryo bworoshye, ihame ry'uko abantu bareshya imbere y'amategeko rivuze ko abantu bafatwa kimwe imbere y'itegeko, nta busumbane cyangwa ivangura. Ndetse n'itegeko rigiyeho rigafata kimwe abo rireba. Uwitwa Erwin Chemerinsky abisobanura mu magambo akurikira : "*Things that are alike should be treated alike, and things that are unalike should be treated unalike in proportion to their unalikeness*⁵. Ibintu bimeze kimwe bifatwa kimwe, naho ibintu bitandukanye bifatwa ku buryo butandukanye hakurikijwe itandukaniro ryabyo.

[35] Nubwo abantu bagomba kureshya imbere y'amategeko, kubatandukanya cyangwa kubashyira mu byiciro ntabwo buri gihe biba ivangura. Gutandukanya abantu cyangwa ibyiciro by'abantu bishobora kuba ngombwa bitewe n'ikigambiriwe, hari impamvu zumvikana zishingiye ku ntego ifite ireme (legitimate

⁵ Erwin Chemerinsky, In Defense of Equality: A Reply to Professor Westin, 81 MICH. L. REv. 575, 578 n.17 (1983)

or rational purpose). Muri icyi cyerekezo, Akanama k'Umuryango w'Abibumbye (Human Rights Committee) kavuze ko: "*The right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26⁶". Mu kinyarwanda bisobanuye ko uburenganzira bwo kureshya imbere y'amategeko no kurengerwa n'amategeko mu buryo bungana nta vangura, ntibivuze ko gufata abantu mu buryo butandukanye buri gihe biba ari ivangura. Gutandukanya abantu bishingiye ku mpamvu zumvikana kandi zisobanutse ntabwo ari ivangura ribujijwe n'ingingo ya 26 y'Amasezerano Mpuzamahanga ku burenganzira Mbonezamubano n'ubwa Politiki.*

[36] Nubwo gufata abantu mu buryo butandukanye byemewe nk'uko bivugwa mu gika kibanziriza iki, kubatandukanya hashingiwe ku mpamvu ziteganywa n'ingingo ya 16⁷ y'Itegeko ntibyemewe. Akanama k'Umuryango Nshinga byo w'Abibumbye nako, ntikemera ko gutandukanya abantu byashingira ku mpamvu zivugwa mu ngingo ya 26 Mpuzamahanga y'Amasezerano ku burenganzira Mbonezamubano n'ubwa Politiki. Ibyo byavuzwe mu rubanza Muller and Engelhard v Namibia aho kagize kati: "A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of

26

⁶ Communication No 172/1984 S.W.M. Broeks v The Netherlands (views adopted on 9 April 1987) in UN Doc. GOAR, A/42/40 P.150, para 13

⁷ Ku bwoko, ku muryango cyangwa ku gisekuru, ku nzu, ku ibara ry''umubiri, ku gitsina, ku karere, ku byiciro by''ubukungu, ku idini cyangwa ukwemera, ku bitekerezo, ku mutungo, ku itandukaniro ry''umuco, ku rurimi, ku bukungu, ku bumuga bw''umubiri cyangwa ubwo mu mutwe no ku rindi vangura iryo ari ryo ryose.

Article 26. A different treatment based on one of the specific grounds enumerated in Article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation⁸".

Ingingo ya 16 y'Itegeko N° 75/2018 ryo ku wa [37] 07/09/2018, ishyiraho igipimo cy'umusoro ku nyubako yagenewe guturwamo gitandukanye n'igipimo cy'umusoro ku z'ubucuruzi, ndetse kinatandukanye n'igipimo nyubako inganda. nvubako zagenewe iz'ibigo cv'umusoro ku by'ubucuruzi n'izagenewe ibindi bikorwa bitavugwa muri iyo ngingo. Urukiko rusanga hakurikijwe imiterere y'ingingo ya 16 ivugwa muri iki gika, hari itandukaniro ku gipimo cy'umusoro ku nyubako rishingiye ku cyo inyubako igenewe gukorerwamo (guturamo, ubucuruzi, inganda n'ibindi). Uburanira Leta yavuze ko iri tandukaniro rishingiye ku kuba Leta ishaka guteza imbere inyubako z'ubucuruzi kurusha uko bimeze ku nyubako zo guturamo.

[38] Nk'uko byasobanuwe mu rubanza RS/SPEC/0001/16/CS⁹ rwaciwe n'uru Rukiko kuwa 23/09/2016, kureshya imbere y'amategeko no kutavangura ntibivuze ko gutandukanya abantu ubwabyo mu bihe byose ari ivangura. Gutandukanya abantu cyangwa gushyiraho ibyiciro by'abantu bishobora kuba ngombwa bitewe n'ikigambiriwe, hari impamvu zumvikana zishingiye ku ntego ifite ireme (legitimate or rational purpose). Muri uru rubanza, gutandukanya igipimo cy'umusoro bishingiye ku kuba Leta ishaka guteza imbere inyubako

⁸ HRC, Muller and Engelhard v Namibia (Communication No. 919/00), para 6.7

 $^{^9}$ Urubanza No RS/SPEC/0001/16/CS AKAGERA BUSINESS GROUP (ABG

z'ubucuruzi kurusha inyubako zo guturamo nk'uko uyihagarariye yabivuze mu iburanisha.

Mu birebana n'imisoro, umushingamategeko afite [39] ubwisanzure bwo gushyira abasoreshwa mu byiciro cyane cyane ko ari mu mwanya mwiza kurusha inkiko, wo kumenya ibyo abaturage na Leta bakeneye akabiheraho ashyiraho ibyiciro n'igipimo cy'isoresha, ibyo akaba abyemerewe, keretse bigaragaye ko byakozwe hashingiwe ku ivangura rigamije gukandamiza bamwe. bisa n'ibyavuzwe n'Urukiko Ibi rw'Ikirenga rwa Leta Zunze Ubumwe z'Amerika mu rubanza Regan v. Taxation with Representation of Wash, aho rwavuze ko: "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions Court cannot have. the presumption of which this constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it^{"10}. Ku

¹⁰ Supreme Court of the United States, Regan v. Taxation with Representation of Wash., 461 U.S. 540. See also Madden v. Kentucky, 309 U.S. 83, 87-88 (1940)

birebana n'impamvu yo guteza imbere inyubako zagenewe ubucuruzi n'inganda, Urukiko rusanga yumvikana kandi ntaho inyuranye n'amategeko cyane ko uwatanze ikirego n'inshuti z'Urukiko zishyigikiye ibitekerezo bye, batagaragaza ko icyari kigamijwe ari ukuvangura abasoreshwa hagamijwe gukandamiza abafite inyubako zagenewe guturwamo.

Mu nyungu rusange, Leta ishobora gutandukanya [40] abasoreshwa igamije kugira icyiciro iteza imbere, no guca intege ibidakenewe bigakorwa hirindwa ariko ivangura no gutandukanya abantu hatsikamirwa bamwe. Ibi byagarutsweho n'Urukiko rw'Ikirenga rwa Leta Zunze z'Amerika mu rubanza BELL'S GAP RAILROAD COMPANY V. PENNSYLVANIA mu magambo akurikira: "It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products: it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our might be obnoxious to the constitutional governments. prohibition¹¹. Ibi bigaragaza ko gushyiraho itandukaniro cyangwa ibyiciro mu gusoresha bisanzweho kandi ubwabyo bikaba bitanyuranyije n'Itegeko Nshinga, keretse bikozwe hashingiwe

¹¹ Supreme Court of United States, BELL'S GAP RAILROAD COMPANY v. PENNSYLVANIA, 134 U.S. 232 (1890)

ku ivangura rivugwa mu ngingo ya 16 y'Itegeko Nshinga mu buryo bugaragara.

[41] Ku birebana n'ibyo Murangwa Edward n'inshuti z'Urukiko zishyigikiye ibitekerezo bye bavuze ko gushyiraho igipimo cy'umusoro kinini ku nyubako zo guturamo hari abo bizabangamira mu buryo butandukanye, Urukiko rusanga iki cyakemurwa hagenzurwa ko amategeko ikibazo atari atanyuranyije n'Itegeko Nshinga, ahubwo byareberwa mu rwego rwo gushyiraho gahunda (politiki) rusange bikaba biri mu bubasha bwa Leta. Ibitekerezo kuri iyo gahunda, ibigomba kunozwa kuriyo, ibitameze neza n'ibindi bijyanye nayo bigashyikirizwa urwego rwayishyizeho kuko arirwo rufite ububasha bwo kuyifataho umwanzuro. Inkiko zifite ububasha bwo guca imanza, n'izindi nzego za Leta zikagira ububasha bwazo zihabwa n'Itegeko Nshinga n'andi mategeko.

Mu rwego rwo kubahiriza ihame ry'uko inzego [42] z'Ubutegetsi Leta butatu (Ubutegetsi uko bwa ari Nshingamategeko, Nyubahirizategeko n'Ubutegetsi bw'Ubucamanza) butandukanye kandi buri butegetsi bwigenga (separation of powers)¹², Urukiko ntirushobora gufata icyemezo cv'uko itegeko rinyuranyije n'Itegeko Nshinga rushingiye gusa ko hari imyumvire itandukanye, hari ibyo abantu banenga, cyangwa ibitanoze mu itegeko cyangwa mu ngingo zaryo zisabirwa kuvanwaho. Utanga ikirego, agomba kugaragaza ko itegeko cyangwa ingingo zaryo ziteganya ibyiciro zinyuranye n'Itegeko Nshinga mu buryo buziguye cyangwa butaziguye. Ku birebana n'uru rubanza, Urukiko rusanga igipimo cy'umusoro ku nyubako cyarashyizweho mu rwego rwo gushyira mu bikorwa

 $^{^{12}}$ Ingingo ya 61 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo muri 2003 ryavuguruwe muri 2015

gahunda rusange ya Leta (public policy). Ibi ni nabyo byavuzwe n'Urukiko rw'Ikirenga rwa Leta Zunze Ubumwe z'Amerika mu rubanza *Tax Commissioners v. Jackson: "It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified*"¹³.

[43] Ku birebana no kuba ingingo ya 16 y'Itegeko N°75/2018 ryo ku wa 07/09/2018 yaba igaragaramo ivangura, Itegeko Nshinga mu ngingo yaryo ya 16 rigaragaza urutonde rw'impamvu zishobora gutuma habahoivangura. Muri rusange, ivangura ni ugutandukanya abantu hagamijwe kuvutsa amahirwe bamwe no gutonesha abandi. Ku birebana n'uru rubanza, hari umusoro ku nzu zo guturamo, iz'ubucuruzi n'inganda. Muri ibi byiciro, nta na kimwe gishingiye kuri imwe mu mpamvu ivangura rishobora gushingiraho nkuko zivugwa mu Itegeko Nshinga.

[44] Nubwo ingingo ya 16 igaragaza urutonde rw'icyo ivangura rishobora gushingiraho, yongeraho amagambo "no ku rindi vangura iryo ariryo ryose". Murangwa Edward ntagaragaza ko hari ikindi kintu cyaba cyarashingiweho hashyirwaho ibyo byiciro ku buryo byaba ivangura. Nk'uko byavuzwe, ivangura ni ugutandukanya abantu hagamijwe kuvutsa amahirwe bamwe no gutonesha abandi. No ku birebana n'uru rubanza, ntabwoingingo ya 16 yashyizweho hagamijwe kuvutsa amahirwe bamwe no gutonesha abandi. Nk'uko byasobanuwe hejuru, habayeho gushyiraho igipimo cy'umusoro gitandukanye ku byiciro

¹³ U.S. Reports: Tax Commissioners v. Jackson, 283 U.S. 527 (1931)

by'inyubako, hagamijwe guteza imbere iz'ubucuruzi n'inganda. Ibyo bikaba atari ivangura ku buryo hafatwa umwanzuro ko ingingo ya 16 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 inyuranye n'Itegeko Nshinga mu ngingo yaryo ya16.

[45] Urukiko ruhereye ku bisobanuro byatanzwe mu bika bibanziriza iki, rusanga ingingo ya 16 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 ishyiraho igipimo cy'umusoro ku byiciro by'inyubako, igaragaramo itandukaniro ku gipimo cy'umusoro rishingiye ku cyo inyubako igenewe. Nk'uko byasobanuwe hejuru, iryo tandukaniro rishingiye ku mpamvu yumvikana ijyanye no guteza imbere inyubako zagenewe ubucuruzi. Ingingo ya 16 kandi nta vangura iryo ariryo ryose riyigaragaramo. Bityo, Urukiko rusanga itanyuranye n'ingingo ya 15 n'iya 16 z'Itegeko Nshinga rya Repubulika y'u Rwanda.

[46] Nubwo Urukiko rudafite inshingano n'ububasha bwo gusuzuma ibyashingiweho hashyirwaho igipimo cy'umusoro ku nyubako zagenewe guturwamo nk'uko byasobanuwe, byaba byiza Leta yongeye gusuzumana ubushishozi imbogamizi zitandukanye zishobora guturuka ku ishyirwa mu bikorwa ry'ingingo ya 16 nk'uko zagaragajwe na Murangwa Edward n'inshuti z'Urukiko zishyigikiye ibitekerezo bye. Mu mbogamizi zasuzumwa harimo ibirebana no kuba igipimo cya 1% cy'agaciro k'inyubako kiri hejuru, ibirebana no kuba agaciro k'inzu gashingirwaho mu gusoresha kagizwe n'agaciro k'inzu ubwayo n'agaciro k'ubutaka yubatseho nyamara hari umusoro w'ubukode bw'ubutaka wihariye, ibirebana n'inzu zubatswe ku nguzanyo itaramara kwishyurwa, inzu zubakiwe ababyeyi, ibirebana n'inzu zubatswe ariko zidakoreshwa cyangwa zidashobora gukoreshwa biturutse ku mpamvu zihariye bikaba byagorana kubona amafaranga yo kuzisorera, ikibazo kirebana no kuba umusoro ku nyubako wakwa hashingiwe ku gaciro kari ku isoko hatitawe ku busaze bwayo (depreciation).

[47] Murangwa Edward asaba ko ingingo ya 17 ivaho kuko ishyira mu bikorwa iya 16 kandi nayo avuga ko inyuranye n'Itegeko Nshinga. Urukiko rurasanga kuba ibikubiye muri iyo ngingo byagumaho cyangwa byavaho bitewe nuko ingingo ya 16 ishyirwa mu bikorwa inyuranye n'Itegeko Nshinga, ibyo byareberwa mu rwego rw'imyandikire y'amategeko, ntabwo ari ikibazo cyo kunyuranya n'Itegeko Nshinga.

[48] Ibyo ingingo ya 17 iteganya birebana nuko ibipimo by'umusoro ku nyubako bizagenda bizamuka mu byiciro, nta na hamwe binyuranye n'Itegeko Nshinga, ahubwo ni uburyo umushingamategeko yashyizeho bworohereza abasoreshwa gutanga umusoro mushya, bagatangira batanga uri ku rugero rwo hasi, bikazamuka nyuma hakurikijwe uko byagenwe n'iyo ngingo. Urukiko rusanga umusoro ku nyubako washyirwaho hubahirijwe ihame ryo gufata abantu ku buryo bumwe riteganywa n'ingingo ya 15 y'Itegeko Nshinga, ntacyabuza ko utangwa mu buryo bwagenwe n'ingingo ya 17 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage.

Kumenya niba ingingo ya 19 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, inyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda.

[49] Murangwa Edward n'abamwunganira bavuga ko ingingo ya 19 ivuga ku gipimo cy'umusoro utangwa ku butaka burenga

ku bipimo fatizo by'ikibanza, iteganya ko: "Igipimo cy'umusoro cyagenwe n'Inama Njyanama y'Akarere kuri buri metero kare y'ubutaka hashingiwe ku biteganywa mu ngingo ya 18 y'iri tegeko¹⁴ cyiyongeraho mirongo itanu ku ijana (50%) asorerwa ubutaka burenga ku bipimo fatizo by'ikibanza cyagenewe inyubako. Ibipimo fatizo by'ikibanza cyagenewe inyubako bigenwa n'iteka rya Minisitiri ufite imiturire mu nshingano ze. Igipimo cy'umusoro cy'inyongera kivugwa mu gika cya mbere cy'iyi ngingo ntikireba ikibanza gitunzwe n'uwakibonye mbere y'uko iri tegeko ritangira gukurikizwa".

[50] Bavuga ko ibiteganywa n'iyo ngingo binyuranyije n'ingingo ya 15 y'Itegeko Nshinga iteganya ko abantu bose bareshya imbere y'amategeko kandi ko itegeko ribarengera ku buryo bumwe, cyane cyane ko bizwi ko ubutaka bw'u Rwanda buhererekanywa mu buryo bwinshi butandukanye nko mu mpano, mu izungura, mu ndagano, mu kugura no kugurisha, ku buryo bigaragara ko hari ukutareshyeshya ababonye ubutaka mbere na nyuma y'uko hajyaho Itegeko N° 75/2018 riregerwa.

[51] Bakomeza batanga ingero zigaragaza uburyo iyo ngingo inyuranyije n'Itegeko Nshinga, nk'urugero rw'umwana wahawe impano y'ubutaka akabwandikwaho mu mwaka wa 2018, iyi ngingo itarakurikizwa, na mugenzi we wabuhawe akabwandikwaho mu mwaka wa 2019, iyi ngingo imaze gutangira gukurikizwa. N'ubwo ubutaka babuhawe n'ababyeyi

¹⁴ Ingingo ya 18 ivuga ku birebana n'igipimo cy'umusoro ku kibanza, muri aya magambo: "Igipimo cy'umusoro ku kibanza kiri hagati ya zeru (0) n'amafaranga y'u Rwanda magana atatu (300 FRW) kuri metero kare. Inama Njyanama y'Akarere igena umusoro wishyurwa kuri metero kare y'ubutaka ishingiye ku bipimo fatizo n'ibindi bikurikizwa bigenwa n'iteka rya Minisitiri ufite imisoro mu nshingano ze".

babo ndetse bungana mu buso, aba bana bombi ntibuzasora kimwe, ku buryo uwabuhawe mu mwaka wa 2019 azajya asora hiyongereyeho 50% ivugwa mu gika cya kabiri cy'ingingo ya 19, bikaba byumvikana ko iri tegeko ritabarengera mu buryo bumwe nk'uko bisabwa n'ingingo ya 15 y'Itegeko Nshinga.

[52] Bavuga ko urundi rugero rurebana n'umutungo wacungwaga n'umuntu urera abana batari bageza ku myaka y'ubukure, umutungo wanditswe kuri uwo urera abo bana (guardian), ku buryo igihe nikigera buri mwana akandikwaho umutungo we (nyuma ya 2019), iri tegeko ryaratangiye gukurikizwa, buri mwana azaba agomba gutanga umusoro wa 50% ubarwa ku buso burenga ku bwagenwe ku kibanza, mu gihe bagenzi babo bari bafite imyaka y'ubukure mbere y'uko iri tegeko rikurikizwa, 50% y'umusoro w'inyongera utabareba, ku buryo bigaragara ko iri tegeko ritabareshyeshya kandi ritabarengera mu buryo bumwe nk'uko ingingo ya 15 y'Itegeko Nshinga yavuzwe haruguru ibiteganya.

[53] Basoza bavuga ko ibyo ingingo ya 19 iteganya, bijyanye no kuvuga ko itegeko ritareba uwabonye ubutaka mbere yaryo kandi iyo risohotse rireba buri wese, umuntu yakeka ko kuvuka mbere biguha uburenganzira buruta ubw'abandi banyarwanda.

[54] Turatsinze Emmanuel, Bagabo Faustin na Habimana Pie, mu izina ry'Ishuri ryigisha amategeko muri Kaminuza y'u Rwanda (University of Rwanda/ School of Law) bavuga ko ingingo ya 19 yasabiwe kuvanwaho inyuranyije n'Itegeko Nshinga mu ngingo yaryo ya 15 kuko gusoresha ku buryo butandukanye ibibanza hashingiwe gusa ko igihe usora yakiboneye atari impamvu ifatika yatuma habaho iryo tandukaniro. [55] Ku birebana n'ikibanza cyabonetse mbere cyangwa nyuma y'ikurikizwa ry'Itegeko, bavuga ko ihame ryo kudasubira inyuma kw'itegeko (rétroactivité de la loi) ishingirwaho n'Intumwa ya Leta nk'impamvu zo gutandukanya ba nyir'ibibanza, itareberwa igihe ikibanza cyaguriwe cyangwa cyatangiwe gukoreshwa ahubwo yareberwa igihe uburenganzira ku kibanza bwatangiye (igihe ubwo butaka bwatangiye gukoreshwa).

[56] Ingabire Marie Immaculée n'umwunganira mu izina rya Transparency International Rwanda, bavuga ko ibiteganywa n'ingingo ya 19, biteye ikibazo ku baturage, cyo kumenya uko bizajya bigenda ku waguze cyangwa uwazunguye ubutaka n'uwari usanzwe abutunze, niba azajya abanza kubugabanya; ndetse hakibazwa n'impamvu umushingamategeko avangura utunze ubutaka n'uzabutunga ejo, ufite bunini n'ufite buto.

[57] Bavuga ko iyi ngingo igaragaza ivangura hagati y'abatunze ubutaka buto n'ubunini, kandi ko gutunga ubutaka bunini bitaba ikibazo, hatarebwe uko nyirabwo yabubonye, aho guca umusoro ubutunze. Ko rero uyu musoro bawufata nk'umusoro gihano unyuranye n'amahame y'amategeko kuko umuntu ahanwa iyo hari icyo ategetswe gukora atakoze cyangwa yakoze icyo abujijwe.

[58] Uhagarariye Leta y'u Rwanda avuga ko ingingo ya 19 itabangamira ihame ryo kureshya imbere y'amategeko riteganywa n'ingingo ya 15 y'Itegeko Nshinga ndetse n'ihame ryo kurindwa ivangura riteganywa n'ingingo ya 16 kuko ingingo ya 19 yaje gushimangira andi mahame y'amategeko, cyane cyane ihame ry'uburenganzira ku butabera buboneye ndetse n'uko itegeko ridashobora gusubira inyuma (La non-rétroactivité de la loi).

36 _____

[59] Asobanura ko kuba harabaye gutandukanya ibyiciro by'abantu barebwa n'ibipimo bitandukanye by'umusoro bitafatwa nko kwica ihame ry'uko abantu bareshya imbere y'amategeko, mu gihe hari impamvu ifatika kandi ifitiwe ibisobanuro (legitimate and rational purpose). Avuga kandi ko ihame ryo kureshya imbere y'amategeko rishamikiyeho andi mahame nko kuba abantu bagomba gufatwa kimwe iyo bari mu bihe bimwe (equal treatment in equal circumstances), kudafatwa byanze bikunze mu buryo bumwe (Preferential treatment), cyangwa se ibyiciro bitandukanye by'abantu bigira amategeko yihariye (Specificity and special rules).

[60] Me Twiringiyemungu Joseph avuga ko kuba ingingo ya 19 igena umusoro ku bipimo by'inyongera ari ibintu bisanzwe, atanga urugero rw'umusoro ku mushahara aho uhembwa 100.000 Frw no munsi asora 20%, naho urengeje agasoreshwa 30%, ko rero urengeje ibipimo biteganywa n'itegeko aba agomba kwirengera ingaruka kuri uwo murengera. Ku birebana nuko ingingo ya 19 ivuga ko uwo musoro utareba abari basanganywe ibibanza mbere y'uko itegeko rijyaho, avuga ko ibyo bijyanye n'ihame ry'uburenganzira umuntu aba yarabonye mbere y'uko rijyaho budashobora guhungabanywa, ko itegeko rishya ridashobora kwambura umuntu ibintu yari atunze mbere y'uko rijyaho.

UKO URUKIKO RUBIBONA

[61] Ingingo ya 19 ikubiyemo ibitekerezo bikurikira:
(1)hazajyaho igipimo fatizo cy'ikibanza cyagenewe inyubako¹⁵;
(2) abafite ubutaka butarenga icyo gipimo fatizo bazajya basora

¹⁵ Kizashyirwaho n'Iteka rya Minisitiri

hagati ya 0- 300Frw kuri metero kare imwe; (3)igice cy'ubutaka burenga ku gipimo fatizo kizajya gisoreshwa nk'ikibanza gifite ubuso butarenga igipimo fatizo hiyongereyeho (50%); (4) inyongera ya 50% ntireba ababonye ibibanza mbere y'uko itegeko N°75/2018 ryo ku wa 07/09/2018 risohoka mu igazeti ya Leta ku wa 29/10/2018.

[62] Hakurikijwe ibivugwa na Murangwa Edward watanze ikirego, igice cy'ingingo ya 19 giteje ikibazo ni ikirebana no kuba igice cy'ubutaka burenga ku gipimo fatizo kizajya gisoreshwa hiyongereyeho (50%), no kuba iyo nyongera ya 50% itareba ababonye ibibanza mbere y'uko Itegeko N°75/2018 ryo ku wa 07/09/2018 risohoka mu igazeti ya Leta. Aha niho urega ahera avuga ko iyi ngingo idafata abantu kimwe kuko asanga iteganya umusoro utandukanye ku bibanza binganya ubuso, no kuba iteganya ko ababonye ibibanza biruta ibiteganywa n'igipimo fatizo mbere y'uko Itegeko N°75/2018 rijyaho batazatanga umusoro w'inyongera ya 50%, naho abazabibona nyuma bakazasabwa gutanga uwo musoro w'inyongera.

[63] Ikibazo kibazwa hano ni icyo kumenya niba iryo tandukaniro ryafatwa nk'aho rinyuranye n'ihame ryo kureshya imbere y'amategeko riteganywa n'ingingo ya 15 y'Itegeko Nshinga. Ni ukuvuga, niba gusoresha abafite ibibanza birengeje igipimo fatizo cyagenwe 50 % y'umusoro w'inyongera ku usoreshwa ibibanza bitarengeje igipimo no kuba ababonye ibibanza mbere y'Itegeko badasora uwo musoro w'inyongera binyuranyije n'ingingo ya 15 y'Itegeko Nshinga.

[64] Nk'uko byagarutsweho mu bika byo hejuru, gutandukanya abantu byakozwe ku mpamvu yumvikana, isobanutse kandi ishingiye ku mategeko ntibifatwa nko kudafata abantu kimwe imbere y'amategeko. Haba mu ngingo ya 19, no mu

38 ____

Itegeko N° 75/2018 ryo ku wa 07/09/2018 muri rusange nta mpamvu n'imwe igaragara yaba yarashingiweho hashyirwaho umusoro w'inyongera ku bibanza birengeje igipimo fatizo. Ibyo uhagarariye Leta mu rubanza yavuze ko iryo tandukaniro ryashyizweho hagamijwe gukangurira abantu kubaka ku butaka butarengeje igipimo fatizo kizaba cyashyizweho no kubahiriza ihame ry 'uko itegeko ridasubira inyuma, nta gaciro byahabwa kuko kudasubira inyuma kw'itegeko bivuze kutishyuza imisoro uhereye mbere yuko itegeko risohoka. Kuba abantu basoreshwa imisoro mishya ku mitungo bari basanganywe mbere y 'uko itegeko risohoka ntabwo binyuranyije n'ihame rusange ry 'uko itegeko ridasubira inyuma.

[65] Ingingo ya 10 y'Itegeko N° 43/2013 ryo kuwa 16/06/2013 rigenga ubutaka mu Rwanda iteganya ko: "ubutaka bw'umuntu ku giti cye bugizwe n'ubutaka atunze ku buryo bw'umuco cyangwa ubw'amategeko yanditse. Ubwo butaka abutunze y arabuhawe n'ubuyobozi bubifitiye ububasha, ubwo yaguze, yahaweho impano, umurage, izungura, umunani, ingurane cyangwa isaranganya. [...]". Iyi ngingo igaragaza inzira umuntu anyuramo kugirango abone ubutaka. No ku birebana no kubona ubutaka bwagenewe inyubako, inzira zivugwa mu ngingo ya 10 nizo zifashishwa. Igihe habaye ihererekanya ry'ikibanza kirengeje ibipimo fatizo rishingiye kuri imwe mu mpamvu zivugwa muri iyi ngingo kandi rigakorwa nyuma yuko itegeko N° 75/2018 ryo ku wa 07/09/2018 risohoka, nibwo habaho umusoro w'inyongera ya 50%.

[66] Ingingo ya 19 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 iteganya ko ibipimo fatizo by'ikibanza cyagenewe inyubako bigenwa n'iteka rya Minisitiri ufite imiturire mu nshingano ze. Iri teka rivugwa mu ngingo ya 19 rishobora kugena

ibipimo fatizo by'ikibanza cyagenewe inyubako biri hasi y'ibyari byaragenwe mbere y 'uko rijyaho. Ibi bivuze ko ubusumbane ku bipimo fatizo by'ikibanza cyo kubakamo, bwaba butewe n'uburyo amategeko yagiye ahinduka kuri iyo ngingo. Ihererekanya ryose ryakorwa ku kibanza gifite ibipimo biruta ibiteganywa n'iryo teka, kandi bikurikije amategeko yakoreshwaga igihe nyiracyo yakibonaga, ryatuma ubonye ikibanza yishyura inyongera ya 50% biturutse ku mpamvu atagizemo uruhare, ahubwo byaba bitewe n'ukuntu amategeko yagiye asimburana.

[67] Naho ku bazabona ibibanza hakurikijwe ibipimo bizashyirwaho n'Iteka rya Minisitiri rivugwa mu ngingo ya 19 y'Itegeko N°75/2018 ryo ku wa 07/09/2018, byaba binyuranye ku buryo bugaragarira buri wese n'ihame ry'uko abantu bareshya imbere y'amategeko, igihe hari ibibanza binganya ibipimo, biherereye mu gace kamwe, byegeranye, bigasoreshwa ku buryo butandukanye, bimwe bisabwa kwishyurirwa inyongera ya 50% ku buso burenga ku bipimo fatizo biturutse gusa ku kuba nyir'ikibanza yarakibonye nyuma cyangwa mbere y'uko Itegeko N° 75/2018 ryo ku wa 07/09/2018 risohoka mu igazeti ya Leta.

[68] Mu rubanza Nordlinger v. Hahn rujya kumera nk'uru rwaciwe n'Urukiko rw'Ikirenga rwa Leta Zunze Ubumwe z'Amerika, uwareze yasabaga kuvanaho itegeko rigena ko ababonye inzu nyuma y'iryo tegeko bazajya bazisorera umusoro wo hejuru ugereranije n'abari bazisanganywe, umubare munini w'Abacamanza baciye urwo rubanza bemeje ko ibyo bitafatwa nk'aho itegeko ritareshyeshya abantu. Umucamanza John Paul Stevens, we yitandukanije na bagenzi be avuga ko gusoresha abantu ku buryo butandukanye ushingiye gusa ku gihe baboneye amazu asoreshwa bidakwiye. Yagize ati: "[...] *it is irrational to*

treat similarly situated persons differently on the basis of the date they joined the class of property owners. [....] Similarly, situated neighbors have an equal right to share in the benefits of local government. It would obviously be unconstitutional to provide one with more or better fire or police protection than the other; it is just asplainly unconstitutional to require one to pay five times as much in property taxes as the other for the same government services. In my opinion, the severe inequalities created by Proposition 13 are arbitrary and unreasonable and do not rationally further a legitimate state interest¹⁶ [...]". Uru Rukiko, rwemeranya n'ibyavuzwe n'Umucamanza Stevens, mu gusoresha ibibanza byagenewe inyubako, igipimo cy'umusoro kigomba kuba kimwe ku bibanza bingana, biherereye ahantu hamwe hatitawe ku gihe ababifite babiboneye. Ibi nibyo byaba byubahirije ihame ry'uko abantu bareshya imbere y'amategeko.

[69] Urukiko rusanga kuba Itegeko N° 75/2018 ryo ku wa 07/09/2018 ryarashyizeho umusoro ku bibanza byagenewe inyubako, nta kibazo kibirimo kuko nk'uko biteganywa mu ngingo ya 3 n'iya 18 z'iryo Tegeko, umusoro ku bibanza byagenewe inyubako ari hamwe mu haturuka imari n'umutungo bikoreshwa n'inzego z'ibanze zegerejwe abaturage. Urukiko rusanga igipimo cy'umusoro kigomba kuba kimwe, uwarengeje igipimo fatizo ku kibanza agasora menshi kuko n'ubuso busoreshwa ari bunini. Ibi kandi bijyanye n'ihame rikoreshwa mu gusoresha rivuga ko ingano y'umusoro ijyana n'ubwinshi cyangwa ubunini bw'igisoreshwa. (*Vertical equity, is the*

¹⁶ Supreme Court of the United States, Nordlinger v. Hahn, June 18, 1992, 112S. Ct. (1992).

principle that those with higher income, or higher ability to pay, should pay a greater amount of tax)¹⁷.

[70] Urukiko ruhereye ku bisobanuro byatanzwe mu bika bibanziriza iki, rusanga ishyirwaho ry'umusoro w'inyongera uteganywa n'ingingo ya 19 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, ridafata abantu ku buryo bumwe nta mpamvu zisobanutse, ibyo bikaba binyuranye n'ihame ry'uko abantu bose bareshya imbere y'amategeko riteganywa n'ingingo ya 15 y'Itegeko Nshinga, bityo iyo ngingo ikaba nta gaciro ifite hashingiwe ku ngingo ya 3 y'Itegeko Nshinga ivuka ko itegeko ryose rinyuranyije n'Itegeko Nshinga nta gaciro rigira.

Kumenya niba ingingo ya 20 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, inyuranyije n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga rya Repubulika y'u Rwanda

[71] Murangwa Edward n'abamwunganira bavuga ko ingingo ya 20 ivuga ku birebana n'igipimo cy'umusoro utangwa ku kibanza kidakoreshwa, iteganya ko: "Ikibanza cyose kidakoreshwa gicibwa umusoro w'inyongera w'ijana ku ijana (100%) urenga ku gipimo cy'umusoro kivugwa mu ngingo ya 18 y'iri tegeko"; inyuranye n'ibiteganywa n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga, ziteganya ko buri muntu afite uburenganzira ku mutungo utimukanwa n'uburenganzira ku butaka, kandi ko ubwo burenganzira ari ntavogerwa, ikaba ikwiye kuvaho.

¹⁷ Levell, P., Roantree, B., & Shaw, J.). Mobility and the Lifetime Distributional Impact of Tax and Transfer Reforms, 2016, p32.

[72] Basobanura ko abanyarwanda ari wo mutungo wa mbere uwa kabiri ukaba ubutaka batuveho. w'Igihugu, naho bakoreraho, kandi bukaba bubatunze, ko rero kuba iyo ngingo iteganya umusoro w'inyongera wa 100% ku butaka bwitwa ko budakoreshwa hatitawe ku kureba niba nyirabwo abifitiye ubushobozi, bigaragara ko uwo musoro ari umurengera kandi ko uzananira benshi. Bavuga ko kuba Murangwa Edward yaratanze ikirego bitavuze ko ashyigikiye ko uwo musoro utajyaho kuko yemera ko umusoro ariyo nkomoko y'Iterambere ry'Igihugu, nk'uko bigaragara mu ngingo ya 18 y'Itegeko ryavuzwe haruguru rigena inkomoko y'umutungo w'inzego z'ibanze, kandi ko kuba umusoro muri iri tegeko warazamuwe kuri 0-300Frw kuri metero kare mu gihe mu Itegeko ryahozeho wari kuva kuri 0-80 Frw kuri metero kare, nabyo nta kibazo abifiteho, ahubwo ko ikibazo agifite ku nyongera ya 100% ku butaka bwitwa ko budakoreshwa hatitawe ku mpamvu yatumye nyirabwo atabukoresha, niba yari abifitiye ubushobozi, kuko hari uba afite ikibanza ariko yarabuze uko acyubaka.

Bakomeza bavuga ko kuba umusoro wari wazamuweho [73] 300%, bitari ngombwa ko wongera kuzamukaho 100%, hatitawe mpamvu umuntu adakoresha ikibanza. Ku birebana ku n'ibisobanuro by'uburanira Leta atanga ko uwo musoro wagiyeho mu rwego rwo kurwanya abigwizaho imitungo, Murangwa Edward n'abamwunganira bavuga ko atari bwo buryo bubereye abanyarwanda bwagombaga gukoreshwa, cyane cyane ko hari amabwiriza avuga ko utazakoresha ubutaka icyo bwagenewe azabwamburwa, ibyo ubwabyo bikaba bikumira ukwigwizaho cyane imitungo, cyane ko amikoro y'abanyarwanda azwi.

[74] Bakomeza bavuga ko abantu bari muri izo ngero zitanzwe hejuru, bazageraho bakabura ubwishyu bw'uwo musoro, noneho hagakurikizwa ingingo ya 44 y'Itegeko rigenga ubutaka mu Rwanda irebana no guhagarika amasezerano y'ubukode burambye, iteganya ko : "mu gihe ukodesha ubutaka ku buryo burambye atubahirije inshingano ze zikubiye mu masezerano y'ubukode burambye, zitandukanye n'ibivugwa mu ngingo ya 38 y'iri tegeko¹⁸ umukode ashobora, nta yindi mihango akurikije, guhagarika amasezerano y'ubukode abanje gutanga integuza yanditse y'iminsi cumi n'itanu (15) y'akazi"; bityo abo baturage bose bakazisanga ubutaka bwabo babwambuwe bitewe n'igihe bazaba bamaze batishyura umusoro.

Basobanura ko ibyo bavuga bishimangirwa [75] n'ibiteganywa n'Itegeko Nshinga, aho riteganya ko uburenganzira ku mutungo ari ntavogerwa kandi burengerwa n'Itegeko Nshinga mu ngingo yaryo ya 34 n'iya 35. Iya 34 iteganya ko : "buri muntu afite uburenganzira ku mutungo bwite, waba uwe ku giti cye cyangwa uwo asangiye n'abandi. Umutungo bwite, uw'umuntu ku giti cye cyangwa uwo asangiye n'abandi ntuvogerwa. Uburenganzira ku mutungo ntibuhungabanywa keretse ku mpamvu z'inyungu rusange kandi hakurikijwe ibiteganywa n'amategeko". Naho ingingo ya 35 igateganya ko: " Umutungo bwite w'ubutaka n'ubundi burenganzira ku butaka

¹⁸ Ingingo ya 38 irebana n'inshingano yo gutanga inzira ku butaka bw'undi bukomoka ku miterere y'ahantu, iteganya ko: "Nyir'ubutaka ntagomba kubangamira uburenganzira bw'abandi. Kubera iyo mpamvu ntashobora: 1° kwima abaturanyi be inzira y'amaguru igera mu kwabo mu gihe nta handi bashobora kunyura. Icyakora, ku zindi nzira, bikorwa ku bwumvikane hagati y'impande zombi; 2° kubuza ko amazi y'amasoko atemba ku bwa kamere anyura mu butaka bwe; 3° kubuza abandi kuvoma ku iriba riri ku butaka bwe, keretse ashoboye kwerekana ko iryo riba ari we ubwe waryifukuriye.

bitangwa na Leta. Itegekorigena uburyo bwo kubutanga, kubuhererekanya no kubukoresha".

Bavuga kandi ko amahame ashingirwaho mu gusoresha [76] (fundamental principles of taxation) harimo ubushobozi bw'usoreshwa, ukubasha gusora (ability to pay), n'umusoro usobanutse (tax certainty), ibyo akaba ari ingenzi mu rwego rwo kugira ngo abasora babashe gusora babishoboye kandi babikunze. Ko rero hashingiwe ko uburenganzira ku mutungo utimukanwa n'uburenganzira ku butaka ari ntavogerwa (fundamental rights), hagashingirwa no kuri ayo mahame agenderwaho mu gushyiraho umusoro, basanga gushyiraho ingingo ya 20 y'Itegeko ryavuzwe haruguru, yongera umusoro wa 100% ku butaka bwitwa ko budakoreshwa, hatitawe ku mpanvu zitera kutabukoresha, ibangamiye kandi inyuranije n'uburenganzira bugenwa n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga, ndetse n'uburenganzira uko buvugwa mu masezerano mpuzamahanga u Rwanda rwashyizeho umukono (universal declaration of human rights, art.17 1. Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property). Bityo, akaba asaba Urukiko rw'Ikirenga ko mu bushishozi bwarwo n'ububasha ruhabwa n'Itegeko, rwakuraho iyo ngingo ya 20 bitewe n'uko ibangamiye ibiteganywa n'Itegeko Nshinga.

[77] Basoza basaba Urukiko rw'Ikirenga ko mu gusuzuma ikirego Murangwa Edward yatanze, mu bushishozi bwarwo, rwazahuza ingingo zaregewe, n'imibereho bwite y'umuryango nyarwanda, uruhare rw'umutungo utimukanwa mu muryango nyarwanda, uko umuryango nyarwanda wafataga umutungo w'ubutaka amategeko yanditse atarajyaho, n'ibishushanyo mbonera bitarakorwa, ndetse n'ingaruka zo kwakwa ubutaka cyangwa umutungo utimukanwa byagira ku mbaga y'abanyarwanda yananirwa gutanga 100% by'umusoro wiyongera ku musoro usanzwe utangwa.

Turatsinze Emmanuel, Bagabo Faustin na Habimana Pie, [78] mu izina ry'Ishuri ryigisha amategeko muri Kaminuza y'u Rwanda (University of Rwanda/ School of Law) bavuga ko Itegeko Nshinga mu mahame yaryo rigusha cyane ku mibereho myiza y'abaturage, cyane cyane ingingo ya 10 ivuga ku kubaka Leta iharanira imibereho myiza y'abaturage kandi bakagira amahirwe angana, Leta ikaba ifite inshingano zo kugira ngo abaturage babeho neza nk'uko biteganyijwe mu mategeko no mu masezerano mpuzamahanga. Bavuga kandi ko raporo ya Politiki y'imiturire yagaragaje ko 83% batunzwe no gukodesha, hakibazwa igihe umusoro uzaba uzamutse ingaruka bizagira ku banyarwanda kuko buri wese ufite inzu ikodeshwa azongera ibiciro, hatirengagijwe ko iyo umusoro uremereye umuturage biremerera na Leta kuko hatangira kubaho guhisha umutungo, kandi bikaba bizwi ko iyo umusoreshwa yorohewe n'umusoro bimworohera kuwutanga.

[79] Bavuga ko ingingo ya 19 n'iya 20 zimeze nk'aho zirimo guhana kuko imwe yongeraho 50%, indi ikongeraho 100%, ibi bikaba binyuranye n'amahame rusange agenga amategeko kuko umuntu ahanwa kuko atakoze ibyo amategeko amutegeka cyangwa yakoze ibyo amategeko amubuza, hakibazwa icyo umuturage yaba yakoze cyangwa atakoze mu biteganywa n'itegeko kugira ngo ahanwe. Ko kandi ibyo binyuranyije n'amahame agenga imibereho myiza y'abaturage, kandi ko umuturage ariwe uzikorera umutwaro w'umusoro, kuko uwasoreye ikibanza najya kugurisha azawongeraho n'ukodesha azongeraho uwo musoro, bitume ubuzima buhenda. [80] Bavuga ko imisoro iri mu bifasha Leta kugira ngo yuzuze inshingano yo kwita ku mibereho myiza y'abaturage, ariko ko idashobora kugeza abantu kuri "social justice" abaturage badafite uburenganzira ku mutungo, badahabwa amahirwe angana, batareshya imbere y'amategeko.

[81] Dieudonne Nzafashwanayo, Inshuti y'Urukiko, avuga ko ibiteganywa n'ingingo ya 20 y'Itegeko N° 75/2018, ryavuzwe haruguru, binyuranye n'ibiteganywa n'ingingo ya 15 n'iya 16 z'Itegeko Nshinga, ko iyo ngingo ivangura umuntu ufite ikibanza gikoreshwa n'ufite ikibanza kidakoreshwa usabwa kwishyura umusoro w'inyongera ungana na 100%. Avuga kandi ko iyo ngingo ya 20 izitira uburenganzira buteganyijwe mu ngingo ya 34 n'iya 35 z'Itegeko Nshinga kuko umuntu ashobora kwamburwa ubutaka mu gihe ananiwe kwishyura umusoro, ko rero ishyirwaho ryayo rititaye ku ngaruka izagira ku batunze ubutaka badakoresha.

Asobanura ko Leta ibinyujije mu gushyiraho amategeko, [82] kuzitira cyangwa gukumira uburenganzira vemerewe buteganijwe mu ngingo ya 15, 16, 34 n' iya 35 z'Itegeko Nshinga binyuze mu kwaka abaturage umusoro kugirango ibashe gukora, ariko ko asanga ingingo ya 20 ataricyo igamije kuko iyo iza kuba aricyo igamije, yari guteganya uwo musoro bijyananye n'ubushobozi bw'abasora. Akomeza avuga ko bitari ngombwa gushyiraho iyo ngingo mu rwego rwo gukemura ikibazo cy'abatunga ibibanza byinshi bagamije kuzabigurisha ku giciro kinini (speculation), kuko icyo kibazo gikemurwa n'ingingo ya 58 y'Itegeko ry'Ubutaka iteganya ko umuntu yamburwa ubutaka iyo atabukoresha nta mpamvu yumvikana.

[83] Akomeza avuga ko ikibazo cyo kugena umusoro kiri mu byakemuwe n'Urukiko rw'Afrika rushinzwe kurengera

uburenganzira bwa muntu, kandi ibyo rwemeje bigahura n'ibitekerezo by'Umuhanga Adam Smith mu gitabo yise *An Inquiry into the Nature and Causes of the Wealth of Nations*¹⁹, bemeje ko umusoro ujyaho kugira ngo ubutegetsi bubashe gukora ibyo abaturage bakeneye kandi umusoro ukagenwa hagendewe ku bushobozi bw'abaturage; ariyo mpamvu asanga umusoro uteganywa mu ngingo ya 20 hatarakurikijwe ibyo bitekerezo.

[84] Avuga kandi ko ufite ubutaka bushobora kwitwa ko budakoreshwa kubera amabwiriza ya "master plan" ariko bidaturutse kuri nyirabwo, kandi ko ingingo ya 20 itagombaga guteganya ibyo kuvuga ko ufite ubutaka budakoreshwa azabwamburwa, mu gihe ingingo ya 58, agace ka 3 na 4 igaragaza ubutaka umuntu atamburwa kubera kutabukoresha ndetse n'aho bugomba kuba buherereye. Avuga kandi ko umushingamategeko ashobora gukoresha umusoro mu kurwanya imyitwarire ariko ko umusoro udashobora kugira *caractere confiscatoire* cyangwa ngo ube umutwaro ku musoreshwa.

[85] Avuga ko Leta ishobora gushyiraho umusoro ifite icyo igamije gikurikije amategeko, kandi igakoresha uburyo bugereranije kugirango intego igamijwe igerweho. Ko Urukiko ruramutse rwitaye kuri ayo mahame rwazasanga ingingo ya 20 isabirwa kuvanwaho, yatuma hari abatakaza uburenganzira ku mutungo bitewe no kunanirwa kwishyura umusoro.

[86] Ingabire Marie Immaculée mu izina rya Transparency International Rwanda nk'inshuti y'urukiko, avuga ko muri rusange umusoro awemera kuko ugarukira abaturage, ariko ko utagomba kubangamira imibereho myiza yabo. Avuga ko

¹⁹ Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, Lausane, 2007, p. 639

ingingo ya 20 y'Itegeko N° 75/2018, ryavuzwe haruguru, ibangamiye amahame y'uburenganzira ku mutungo bwite w'ubutaka, kuko umusoro uteganywa n'iyo ngingo uteye ikibazo ku muturage ufite amikoro make, aho umubera umusoro gihano ku kibanza cyangwa ubutaka adakoresha bitewe no kubura amikoro, kandi ko natabasha kwishyura uwo musoro ingaruka zizaba ko ibyo atunze birimo n'ubwo butaka bizatezwa cyamunara hishyurwa umusoro bityo akaba yambuwe uburenganzira ku mutungo buteganywa n'ingingo ya 34 y'Itegeko Nshinga.

[87] Asobanura ko umusoro uteganyijwe mu ngingo ya 20 umushingamategeko yawugize nk'igihano gihanitse cya 100% atitaye ku mpamvu ubutaka butubatswe, ku buryo ibyo iyo ngingo iteganya bibangamiye imibereho myiza y'abaturage, cyane cyane urubyiruko kuko iyo umuntu abonye amafaranga agura ikibanza agategereza ko abona andi akubaka, uyu musoro rero ukaba uzatuma atubaka kuko n'ayo yabitse azayishyura umusoro. Bavuga kandi ko uwo musoro uzakenesha abaturage kuko umuntu naramuka atawutanze, ubutaka bwe bukagurishwa, azasubira mu badatunze, bigatuma abaturage batakaza imitungo yabo, ku buryo abenshi bazisanga mu cyiciro cya mbere cy'ubudehe.

[88] Akomeza avuga ko abantu badafite inzu yo guturamo kenshi biterwa n'uko baba badafite amikoro, ko rero Umushingamategeko ashyiraho iyi ngingo atigeze abatekerezaho, cyangwa ngo atekereze ku muntu waguze ikibanza, aho *master plan* igiriyeho ikahashyira inzu zigeretse (etages), umuturage akabura ubushobozi bwo kubaka iyo isabwa, bivuze ko icyo kibanza kizaguma aho agisorera 100%, kandi ko byazageraho bigatanga icyuho cya ruswa mu nzego z'ibanze.

Avuga kandi ko umushingamategeko atitaye ku mpamvu zituma umuntu atubaka kandi ari nyinshi cyane, zigiye ziterwa n'ibibazo binyuranye. Asoza asaba ko ingingo 20 yaregewe yavanwaho.

[89] Inshuti y'Urukiko, Ntibaziyaremye Innocent avuga ko umusoro wa 100% ucibwa ikibanza cyose kidakoreshwa ataribyo kuko hari impamvu nyinshi zishobora gutuma kitarubatswe, cyane cyane kubura amikoro. Akomeza avuga ko hari igihe umuntu ufite ubutaka bumutunze bugashyirwa mu miturire ahita abusorera kandi butakivamo ibimutunga ndetse agahita agira n'umutwaro wo kubusorera ku buryo ashobora no kugera ubwo aburaga abana bakabwanga kuko buriho imisoro batashobora kwishyura.

Uhagarariye Leta y'u Rwanda avuga ko ingingo ya 20 [90] itabangamiye uburenganzira ku mutungo utimukanwa n'uburenganzira ku butaka buteganywa n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga, kuko iyo ngingo ya 20 yaje gutandukanya abantu bakoresha ubutaka icyo bwagenewe n'abatabukoresha, bugakomeza kubaho butanahawe ufite ubushake n'ubushobozi bwo kubukoresha, mu gihe igihugu gikeneye gutera imbere kibyaza umusaruro ubutaka buto gifite. Avuga kandi ko iyo ikibanza gikoreshwa (cyubatswe), cyacibwa umusoro muke bitewe nuko kigenda gita agaciro (recognition of depreciation), bitandukanye n'ikibanza kitubatse kuko bizwi ko kidata agaciro (depreciated), ahubwo gishobora kongererwa agaciro, ariyo mpamvu ibi byiciro byombi bidashobora gucibwa umusoro ungana.

[91] Asobanura ko ingingo ya 20 itabangamiye uburenganzira ku mutungo utimukanwa n'uburenganzira ku butaka, buteganywa n'Itegeko Nshinga, kuko kuba abantu bacibwa umusoro bitavuze ko bambuwe uburenganzira ku mutungo bwite, ko umutungo wabo wavogerewe cyangwa ko se wahungabanyijwe. Avuga ko n'ubwo byafatwa gutyo, iryo hame ubwaryo rivuga ko « umutungo bwite ushobora guhungabanywa n'inyungu rusange mu buryo bukurikije amategeko», kandi bizwi ko umusoro ubereyeho inyungu rusange kuko ariwo uteza imbere igihugu, bityo, kuba umutungo w'umuntu wasoreshwa umusoro uteganyijwe n'amategeko kugira ngo igihugu kigere ku iterambere, kibone ibikorwa remezo n'ibindi, abanyagihugu bose bafitemo inyungu, bidakwiye gufatwa nko kubangamira uburenganzira ku mutungo bwite cyangwa umutungo bwite w'ubutaka. Yanzura avuga ko hashingiwe kuri ibyo bisobanuro atanze, asanga ingingo ya 20 yaregewe itanyuranyije n'Itegeko Nshinga.

UKO URUKIKO RUBIBONA

[92] Ikibazo gisuzumwa muri iki gice kijyanye no kumenya niba umusoro w'inyongera w'ijana ku ijana (100%) uteganijwe ku kibanza kidakoreshwa waba ubangamiye cyangwa unyuranye n'ihame ry'uko umuntu afite uburenganzira ku mutungo muri rusange akanagira uburenganzira ku mutungo w'ubutaka by'umwihariko.

[93] Ingingo ya 34 y'Itegeko Nshinga ivuga iti: "buri muntu afite uburenganzira ku mutungo bwite, waba uwe ku giti cye cyangwa uwo asangiye n'abandi. Umutungo bwite, uw'umuntu ku giti cye cyangwa uwo asangiye n'abandi ntuvogerwa. Uburenganzira ku mutungo ntibuhungabanywa keretse ku mpamvu z'inyungu rusange kandi hakurikijwe ibiteganywa n'amategeko". Naho iya 35 ikavuga ko: "umutungo bwite w'ubutaka n'ubundi burenganzira ku butaka bitangwa na Leta. Itegeko rigena uburyo bwo kubutanga, kubuhererekanya no kubukoresha". Izi ngingo zombi zishyiraho amahame abiri yuzuzanya. Irya mbere rirebana n'uburenganzira ku mutungo bwite, irya kabiri rikavuga ku burenganzira ku mutungo w'ubutaka.

[94] Aya mahame agarukwaho n'amasezerano mpuzamahanga atandukanye, hari Universal Declaration of Human Rights, art. 17 (Everyone has the right to own property, alone as well as in association with others and no one shall be arbitrarily deprived of his or her property)²⁰, European Convention on Human Rights, Protocol No. 1, art. 1^{21} ; American Convention on Human Rights, art. 21, African Charter on Human and Peoples' Rights, art. 14^{22} .

[95] Ingingo ya 20 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage ivuga ako: "*ikibanza cyose kidakoreshwa gicibwa umusoro w'inyongera w'ijana ku ijana (100%) urenga ku gipimo cy'umusoro kivugwa mu ngingo ya 18 y'iri tegeko*". Iyo ngingo iteganya igipimo cy'umusoro ku kibanza kiri hagati ya zeru (0) n'amafaranga y'u Rwanda magana atatu (300 FRW) kurimetero kare.

52

²⁰ Article 17, Universal Declaration of Human Rights

²¹ Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties ²² Everyone has the right to property. No one shall be deprived of his property except in the public interest and in accordance with the law (and upon payment of just compensation).

[96] Ingingo ya 39 igika cya mbere y'Itegeko N° 43/2013 ryo kuwa 16/06/2013 rigenga ubutaka mu Rwanda iteganya ko: "Umuntu wese utunze ubutaka, agomba kubukoresha neza kandi mu buryo bwongera agaciro kabwo no kububyaza umusaruro akurikije kamere yabwo n'icyo bwagenewe. [...]". Iyi ngingo ya 39 igaragaza ko utunze ubutaka afite inshingano zo kubukoresha neza no kububyaza umusaruro. Mu gihe utunze ikibanza ariko atagikoresha aba anyuranyije n'ibiteganywa n'iyi ngingo ya 39 kuko ubutaka buba bugomba gukoreshwa keretse hari impamvu yumvikana, isobanutse kandi ishingiye ku mategeko.

[97] Urukiko rusanga umusoro w'inyongera w'ijana ku ijana (100%) urenga ku gipimo fatizo cy'umusoro, uturuka ku kuba abafite ubutaka baba batubahirije iyo nshingano. Gukoresha ubutaka no kububyaza umusaruro bishingiye ku mpamvu z'inyungu rusange igamije iterambere nyaryo mu by'ubukungu n'imibereho myiza y'imbaga y'Abanyarwanda bose. Ibi bihuye n'ibiteganywa n'ingingo ya 3 y'Itegeko Nº 43/2013 ryo kuwa 16/06/2013 rigenga ubutaka mu Rwanda iteganya ko: "Ubutaka buri mu murage rusange w'imbaga y'Abanyarwanda bose: abakurambere, abariho ubu ndetse n'abazavuka mu gihe kiri imbere. Uretse uburenganzira abantu bemerewe, Leta ni yo yonyine ifite ububasha bw'ikirenga mu gucunga ubutaka bwose buherereye mu mbibi z'umupaka w'Igihugu, ubwo burenganzira ibukoresha ku mpamvu z'inyungu rusange igamije iterambere nyaryo mu by'ubukungu n'imibereho myiza hakurikijwe uburyo buteganywa n'amategeko. [...]".

[98] Igisobanuro cya Leta ko ikigamijwe hashyirwaho umusoro w'inyongera ku bibanza bidakoreshwa ari uguca intege abagura ibibanza badakoresha, bashaka kubibika ngo bazabonemo inyungu yo hejuru, Urukiko rusanga iyo mpamvu

53

yumvikana kandi itanyuranye n'Itegeko Nshinga, ijyanye na politike yo gukoresha neza ubutaka buke igihugu gifite no kububyaza umusaruro mu nyungu rusange

[99] Ku birebana no kuba hari abatazabasha kwishyura umusoro w'inyongera w'ijana ku ijana (100%) bigatuma ubutaka butezwa cyamunara ku girango hishyurwe uwo musoro nk'uko byavuzwe na Murangwa na bamwe mu nshuti z'Urukiko, icyo kibazo cyareberwa mu buryo bwa rusange uko bigenda mu gihe umusoreshwa atabashije kwishyura umusoro. Nk'uko biteganywa n'ingingo ya 63 na 64 z'Itegeko N° 026/2019 ryo ku wa 18/09/2019 rigena uburyo bw'isoresha, iyo umusoreshwa atishyuye mu gihe giteganywa n'iryo tegeko, Ubuyobozi bw'imisoro bushobora gufatira umutungo wimukanwa cyangwa utimukanwa w'umusoreshwa, uri mu maboko ye cyangwa y'undi muntu ugatezwa cyamunara. No mu gihe hari utishyuye ku neza umusoro ku butaka mu gihe kigenwa n'itegeko, hashobora kwifashishwa inzira yo kwishyuza uwo musoro hatezwa cyamunara umutungo w'umusoreshwa ushobora no kuba ubutaka busoreshwa. Ibi, Urukiko rusanga atari ukubangamira uburenganzira bw'umusoreshwa ku mutungo we ahubwo ari uburyo bwo kwishyuza umusoro busanzwe bukoreshwa.

[100] Icyangombwa nuko guteza cyamunara atari ikintu kigomba kuba byanze bikunze (inevitable consequences) bitewe n'ibiteganywa n'ingingo ya 20 iregerwa. Nta n'ubushakashatsi bwakozwe bugaragaza ko abadakoresha ibibanza batunze abenshi muri bo babiterwa no kubura ubushobozi cyangwa se niba babibitse bagamije kuzunguka cyane mu gihe kizaza (speculation).

[101] Ingingo ya 31 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego

z'imitegekere y'Igihugu zegerejwe abaturage iteganya ko: "Inama Njyanama y'Akarere bireba ntishobora kuvanaho umusoro ku mutungo utimukanwa uretse mu bihe bikurikira: 1°umusoreshwa atanze inyandiko y'ibarura ry'umutungo we igaragaza ko yazahajwe n'imyenda ku buryo kugurisha umutungo asigaranye mu cyamunara ntacyo byatanga; 2°umusoreshwa agaragaje ko adafite ubushobozi bwo kwishyura umusoro ku mutungo utimukanwa. Usaba kuvanirwaho umusoro ku mutungo utimukanwa yandikira urwego rusoresha. Iyo urwo rwego rusanze icvifuzo cy'umusoreshwa gifite ishingiro, rukorera raporo urwego rw'imitegekere y'Igihugu rwegerejwe abaturage bireba, narwo rukayishyikiriza Inama Njyanama y'Akarere kugira ngo ibifateho icyemezo. Gusiba umusoro ku mutungo utimukanwa ntibikorwa ku musoreshwa wagaragaweho kunyereza imisoro". Ibikubiye muri iyi ngingo, bigaragaza ko Leta yatekereje k'udafite amikoro yo kwishyura umusoro ku mutungo utimukanwa. N'ufite ubutaka buvugwa mu ngingo ya 20 utabasha gutanga umusoro biturutse ku mpamvu ziteganywa n'ingingo ya 31 y'Itegeko N° 75/2018 ryavuzwe haruguru, nawe yasaba kuwusonerwa. Ibi biravanaho impungenge zagaragajwe n'urega na bamwe mu Nshuti z'Urukiko, ko hari abatazabasha kwishyura uwo musoro umutungo wabo ugatezwa cyamunara biturutse ku kubura amikoro.

[102] Ku bivugwa na Murangwa ko umusoro w'inyongera w'ijana ku ijana (100%) uteganywa mu ngingo ya 20, waba uri ku gipimo cyo hejuru, Urukiko ruributsa ibyo rwavuze mu rubanza RS/SPEC/0001/16/CS rwaciwe n'uru Rukiko ku wa 23/09/2016 aho rwagize ruti: "Urukiko ntirwavuga ko itegeko rinyuranyije n'Itegeko Nshinga rushingiye gusa ku kuba mu myumvire yarwo icyo itegeko ryari rigamije cyagerwaho hakoreshejwe ubundi buryo. Umuburanyi unenga itegeko

agomba kugaragaza ko inzira umushingamategeko yahisemo itumvikana, idasobanutse cyangwa se ko, ushyize mu gaciro, iyo nzira ntaho ihuriye n'intego itegeko ryashyiriweho. Ibi bijyanye n'ihame ry'uko inzego z'ubutegetsi bwa Leta zitandukanye kandi ko zigenga zikanubahana"²³. Uyu murongo wafashwe, Urukiko rusanga wakomeza gutyo no muri uru rubanza, rukaba rutasuzuma niba icyo gipimo cy'umusoro ari umurengera cyangwa kiri hasi nk'uko byagarutsweho n'urega na bamwe mu Nshuti z'Urukiko, ngo rubihuze no kunyuranya n'Itegeko Nshinga kuko ibirebana n'ingano y'igipimo cy'umusoro biri mu bubasha n'ubushishozi bw'Inteko Ishinga Amategeko²⁴.

[103] Muri rusange, utunze ikibanza cyagenewe inyubako afite uburenganzira busesuye bwo kugikoresha. Mu gihe yasabwa kwishyura umusoro w'inyongera kuko atagikoresheje, ntawishyure ku neza, ukishyuzwa ku ngufu, ntibyafatwa nko kubangamira uburenganzira buri muntu afite bwo gukoresha ubutaka bwe hakurikijwe ibiteganywa n'itegeko. Ibiteganywa n'ingingo ya 1 ya Protocol No 1 to the European Conventionon Human Rights, ni urugero rwiza rugaragaza ko kwishyuza umusoro bitagomba kwitiranywa no kubangamira uburenganzira bw'umuntu ku mutungo. Iyo ngingo igira iti: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to

²³ Urubanza RS/SPEC/0001/16/CS, AKAGERA Business, p.29.

²⁴ Reba ingingo ya 164 y'Itegeko Nshinga iteganya ko: Umusoro ushyirwaho, uhindurwa cyangwa ukurwaho n'itegeko. Nta sonerwa cyangwa igabanywa ry'umusoro rishobora gukorwa mu gihe bidateganywa n'itegeko.

control the use of property in accordance with the general interest or <u>to secure the payment of taxes or other contributions or</u> <u>penalties</u>".

[104] Nk'uko byasobanuwe hejuru, ishyirwaho ry'umusoro w'inyongera w'ijana ku ijana (100%) ku kibanza kitubatse, bijyanye no kuba utunze ubutaka aba atubahirije inshingano yo kububyaza umusaruro no kubukoresha ibyo bwagenewe. Kuba hari abatabasha kwishyura uwo musoro, basaba kuwusonerwa mu gihe bujuje ibisabwa n'ingingo ya 31 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage. Naho kuba uwo musoro waba uri ku gipimo kiri hejuru, ntibyafatwa nk'aho Itegeko riwushyiraho rinyuranye n'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage. Nshinga. Kubera izi mpamvu, Urukiko rusanga ingingo ya 20 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage itanyuranye n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga.

[105] Nubwo ingingo ya 20 y'Itegeko N° 75/2018 rimaze kuvugwa itanyuranye n'Itegeko Nshinga nkuko byasobanuwe, Urukiko rusanga imyandikire yayo yakuzuzwa hagashyirwamo ibirebana n'igihe ubutaka bwamara budakoreshwa bukabona gusoreshwa umusoro w'inyongera, no kuba umusoro w'inyongera utatangwa igihe bigaragara ko hari impamvu yumvikana ituma budakoreshwa nk'uko bimeze ku ngingo ya 58 y'Itegeko N° 43/2013 ryo kuwa 16/06/2013 rigenga ubutaka mu Rwanda ivuga ku birebana n'ubutaka bushobora kwamburwa nyirabwo.

III. ICYEMEZO CY'URUKIKO

[106] Rwemeje ko ikirego cyatanzwe na Murangwa Edward gifite ishingiro kuri bimwe.

[107] Rwemeje ko ingingo ya 16 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, itanyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda.

[108] Rwemeje ko ingingo ya 16 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage itanyuranyije n'ingingo ya 16 y'Itegeko Nshinga.

[109] Rwemeje ko ingingo ya 17 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage, itanyuranyije n'ingingo ya 15, n'iya 16 z'Itegeko Nshinga rya Repubulika y'u Rwanda.

[110] Rwemeje ko ingingo ya 19 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'igihugu zegerejwe abaturage, inyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda, bityo iyo ngingo ya 19 ikaba nta gaciro igifite nk'uko biteganywa n'ingingo ya 3 y'Itegeko Nshinga.

[111] Rwemeje ko ingingo ya 20 y'Itegeko N° 75/2018 ryo ku wa 07/09/2018 rigena inkomoko y'imari n'umutungo by'inzego z'imitegekere y'Igihugu zegerejwe abaturage itanyuranyije n'ingingo ya 34 n'iya 35 z'Itegeko Nshinga.

[112] Rutegetse ko uru rubanza rutangazwa mu igazeti ya Leta.

IMANZA ZEREKERANYE N'IMIBURANISHIRIZE Y'IMANZA

IMANZA ZEREKERANYE N'IMIBURANISHIRIZE Y'IMANZA Z'IMBONEZAMUBANO, IZ'UBUCURUZI, IZ'UMURIMO N'IZ'UBUTEGETSI

MPORANYI v. USENGIMANA

[Rwanda URUKIKO RW'IKIRENGA – RCOMAA 0014/15/CS (Kayitesi, P.J., Karimunda na Ngagi, J.) 23 Kamena 2017]

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Izina ry'ubucuruzi – Ububasha bwo kurega mu Rukiko – Izina ry'ubucuruzi ntirigira ubuzimanagatozi ku buryo ryatanga ikirego mu rukiko, ahubwo ikirego gitangwa na nyir'ubucuruzi mw'izina rye kuko ari we ufite ubuzimagatozi bumuhesha ububasha bwo kurega arengera inyungu z'ubucuruzi bwe akorera muri iryo zina.

Incamake y'ikibazo: Entreprise Usengimana Richard yaguze imigabane muri SORAS Group Ltd, nyuma iza kurega umuyobozi wayo Mporanyi Charles mu Rukiko rw' Ubucuruzi rwa Nyarugenge ivuga ko yamuhenze ubwo yamugurishaga imigabane muri SORAS Group Ltd, inasaba Urukiko kumuhatira kwishyura ikinyuranyo cy'igiciro yaguriyeho imigabane. Uru Rukiko rwabanje gusuzuma ibijyanye no kumenya niba Entreprise Usengimana Richard ifite ububasha bwo kurega, rusanga atari sosiyete y'ubucuruzi cyangwa ikigo gifite ubuzimagatozi ku buryo yakwemererwa kurega cyangwa kuregwa, ahubwo ari izina ry'ubucuruzi rihesha nyiraryo ububasha bwo kurega ku giti cye, kubwibyo, Urukiko rwemeza ko ikirego kitakiriwe.

Entreprise Usengimana ntiyishimiye imikirize y'urubanza maze ijurira mu Rukiko Rukuru rw'Ubucuruzi ivuga ko Urukiko rubanza rwanze kwakira ikirego cyayo kubwo kwirengagiza amategeko n'ibimenyetso yarushyikirije ivuga ko iyo *entreprise* yanditswe muri *Rwanda Development Board* kandi ikaba ifite ubuzimagatozi. Mporanyi nawe yatanze inzitizi yo kutakira ubujurire bwa Entreprise Usengimana avuga ko itujuje ibisabwa kugirango yitwe umuburanyi.

Urukiko Rukuru rw'Ubucuruzi rwemeje ko ubujurire bwa Entreprise Usengimana bukwiye kwakirwa kuko rwasanze ntakigaragaza ko iyo entreprise itandukanye na nyirayo, Urukiko rwemeza ko ikirego cya Entreprise Usengimana cyagombaga kwakirwa kuko Usengimana ari izina akoresha mu bucuruzi bwe, akaba afite ubuzimagatozi, bityo ko adakwiye kwangirwa gutanga ikirego akoresheje izina ry'ubucuruzi bwe, bityo ko ikirego kigomba gusubira mu Rukiko rw'Ubucuruzi rwa Nyarugenge maze rukaburanishwa.

Mporanyi Charles ntiyanyuzwe, maze ajurira mu Rukiko rw'lkirenga avuga ko Urukiko Rukuru rw'Ubucuruzi rwatandukiriye ruvuga ko Entreprise Usengimana itagomba gutandukanywa na nyirayo, kubera ko izina ry'ubucuruzi ritarega kuko riba ridafite ubuzima gatozi, ahubwo harega nyiraryo. Entreprise Usengimana Richard yisobanura ivuga ko isanga nta kiyibuza nka *institution* kugira ubuzima gatozi kuko ari izina ry'ubucuruzi ryatanzwe n'urwego rwa Leta rubifitiye ububasha.

Mporanyi charles yasabye indishyi zo gushorwa mu manza nta mpamvu, naho Entreprise Usengimana yo ikavuga ko nta shingiro zifite kuko icyo avoka ahemberwa ari ugukurikirana urubanza.

Incamake y'icyemezo: 1. Izina ry'ubucuruzi ntirigira ubuzimanagatozi ku buryo ryatanga ikirego mu Rukiko, ahubwo ikirego gitangwa na nyir'ubucuruzi mw'izina rye kuko ari we ufite ubuzimagatozi bumuhesha ububasha bwo kurega arengera inyungu z'ubucuruzi bwe akorera muri iryo zina.

64

Ubujurire bufite ishingiro. Ikirego cyatanzwe na Entreprise Usengimana Richard nticyagombaga kwakirwa; Urubanza rwajuririwe ruvanyweho; Amagarama aherereye kuri Entreprise Usengimana.

Amategeko yashingiweho:

Itegeko N° 21/2012 ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 2. Itegeko N° 07/2009 ryo ku wa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi, ingingo ya 375.

Imanza zifashishijwe:

- Julia Shop v Ecobank Rwanda Ltd, RCOMAA 0042/14/CS, rwaciwe n'Urukiko rw'Ikirenga ku wa 18/03/2016 igika cya 19 na 22.
- Association Momentanée SOBETRA SARL & SOBTRA (U) Ltd v Office Rwandais des Recettes (RRA), RCOMA 0064/11/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 28/11/2012, igika cya 16.
- Free Zone, Co, Ltd v Association Momentanée (Joint Venture) «H3E»RCOMA 0064/12/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 03/06/2016, igika cya 39.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko rw'Ubucuruzi rwa Nyarugenge, Entreprise Usengimana Richard isaba ko Mporanyi Charles ahatirwa kwishyura 318.433.000Frw y'ikinyuranyo cy'igiciro cy'imigabane yayo yaguze muri SORAS Group Ltd, kubera ko Entreprise Usengimana Richard ivuga ko yahenzwe ubwo yagurishwaga imigabane 4.260.

[2] Urwo Rukiko rwabanje gusuzuma ibijyanye no kumenya niba Entreprise Usengimana Richard ifite ububasha bwo kurega, rusanga atari sosiyete y'ubucuruzi cyangwa ikigo gifite ubuzimagatozi ku buryo yakwemererwa kurega cyangwa kuregwa, ahubwo ari izina ry'ubucuruzi rihesha nyiraryo ububasha bwo kurega ku giti cye, rwemeza ko ikirego cya Entreprise Usengimana Richard kitakiriwe.

[3] Entreprise Usengimana Richard yajuririye Urukiko Rukuru rw'Ubucuruzi ivuga ko Urukiko rubanza rwanze kwakira ikirego cyayo kubwo kwirengagiza amategeko n'ibimenyetso yarushyikirije kuko nubwo ari iya Usengimana Richard, iyo «entreprise» yanditswe muri *Rwanda Development Board* kandi ifite ubuzimagatozi.

[4] Mporanyi Charles yabanje gutanga inzitizi yo kutakira ubujurire bwa Entreprise Usengimana Richard avuga ko itujuje ibisabwa kugirango yitwe umuburanyi hashingiwe ku biteganywa n'ingingo ya 18 y'Itegeko N° 07/2009 ryo ku wa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi ryariho ikirego gitangwa, n'ingingo ya 2, iya 142 n'iya 355, agace ka 10, z'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.

Urukiko Rukuru rw'Ubucuruzi rwasanze ntakigaragaza [5] ko Entreprise Usengimana Richard itandukanye na nyirayo, kuko atari ishyirahamwe, umuryango cyangwa ikigo bisabwa inyungu, ububasha n'ubushobozi bwo kurega nk'uko biteganywa n'ingingo ya 2 y'Itegeko Nº 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, bityo ko itagomba no gusabwa ibiteganywa n'ingingo ya 18 y'Itegeko Nº07/2009 ryo ku wa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi kugirango igire ububasha n'ubushobozi byo gutanga ikirego, rwanzura ko ntakibuza Entreprise Usengimana Richard cyangwa Usengimana Richard ubwe kugira ububasha n'ubushobozi bwo kurega no kuregwa kuko ari izina ry'ubucuruzi ry'umuntu ku giti cye, ubujurire bwe bukaba bukwiye kwakirwa, bukaburanishwa mu mizi.

[6] Urukiko Rukuru rw'Ubucuruzi rwakomereje iburanisha ku kibazo cy'ububasha (qualité), mu cyemezo RCOMA 500/15/HCC cyafashwe ku wa 31/10/2014, rusanga Entreprise Usengimana Richard ari izina Usengimana Richard akoresha mu bucuruzi bwe, bityo ko mu gihe Usengimana Richard ubwe afite ubuzimagatozi adakwiye kwangirwa gutanga ikirego akoresheje izina ry'ubucuruzi bwe, rwemeza ko ikirego cyagombaga kwakirwa, rutegeka ko urubanza rusubira mu Rukiko rw'Ubucuruzi rwa Nyarugenge kugira ngo ruburanishwe.¹

¹ Urukiko rwashingiye ku ngingo ya 171 y'Itegeko N^O 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.

[7] Mporanyi Charles ntiyanyuzwe n'icyo cyemezo akijuririra mu Rukiko rw'Ikirenga avuga ko:

a) Urukiko Rukuru rw'Ubucuruzi rwibeshye ruvuga ko Entreprise Usengimana Richard ari izina ry'ubucuruzi ryakoreshwa nk'izina bwite nyamara Entreprise Usengimana Richard yaravugaga ko ifite ubuzima gatozi butandukanye n'ubwa nyirayo kuko yanditswe muri *Rwanda Development Board*.

rw'Ubucuruzi b) Urukiko Rukuru rwavuze ko Richard adakwiye Usengimana gutandukanywa n'ibikorwa bye by'ubucuruzi akora mu izina rya Entreprise Usengimana Richard nyamara iyo « entreprise » atari izina ry'ubucuruzi rifite ubuzima gatozi nkuko urwo Rukiko rwabivuze ku buryo ryagira ububasha bwo kurega mu mwanya wa nyiraryo kuko urega agomba no kugira umwirondoro wuzuye ugaragaza ko ari umuntu (personne morale ou physique dotée de personnalité juridique), kandi ibyo bikaba bidafitwe na Entreprise Usengimana Richard.

[8] Iburanisha mu ruhame ryabaye ku wa 04/10/2016, Mporanyi Charles aburanirwa na Me Ruzindana Ignace naho Entreprise Usengimana Richard iburanirwa na Me Idahemuka Tharcisse.

[9] Urukiko rwabanje gusuzuma inzitizi y'iburabubasha yazamuwe na Me Idahemuka Tharcisse wavugaga ko nta gaciro k'ikiburanwa ka nibura 50.000.000Frw kagenwe n'Inkiko zibanza cyangwa se ngo kabe karagiweho impaka, ariko ko niyo ubujurire bwaba buri mu bubasha bw'uru Rukiko butakwakirwa kuko hajuririwe icyemezo cy'agateganyo ku nzitizi kandi bene ibyo byemezo bijuririrwa hamwe n'urubanza mu mizi.

[10] Mu rubanza rubanziriza urundi rwaciwe ku wa 11/11/2016, Urukiko rwasanze inzitizi zatanzwe nta shingiro zifite, rwemeza ko iburanisha mu mizi rizakomeza ku wa 21/01/2017. Uwo munsi ugeze, Me Mugabonabandi Jean Maurice yabwiye Urukiko ko yasimbuye Me Idahemuka Tharcisse wivanye mu manza zose za Entreprise Usengimana Richard kandi ko, uretse kuba aribwo akibona dosiye, Urugaga rw'aba Avoka rutaramwemerera kuburana urwo rubanza, asaba ko rwimurwa kugirango yitegure iburanisha ariko anabone uruhushya rwo kuburana.

[11] Iburanisha ryimuriwe ku wa 21/03/2017. Uwo munsi usanga inteko ituzuye, rwimurirwa ku wa 23/05/2017. Kuri uwo munsi, iburanisha ribera mu ruhame, Mporanyi Charles aburanirwa na Me Ruzindana Ignace naho Entreprise Usengimana Richard iburanirwa na Me Mugabonabandi Jean Maurice wabanje kumenyesha Urukiko ko yasubiye ku rwandiko rwe rwageze ku Rukiko ku wa 17/03/2017 aho yavugaga ko yivanye mu rubanza kubera ko atari gushobora kubahiriza ibyo yasabwaga n'Urugaga rw'Abavoka kugirango aruburane.

II. IKIBAZO KIGIZE URUBANZA N'ISESENGURWA NGURWA RYACYO

II.1. Kumenya niba Entreprise Usengimana Richard yari ifite ububasha bwo kuregera Urukiko

[12] Me Ruzindana Ignace, uburanira Mporanyi Charles, avuga ko Urukiko Rukuru rw'Ubucuruzi rwatandukiriye ruvuga ko Entreprise Usengimana Richard itagomba gutandukanywa na nyirayo aho kwemeza cyangwa gutesha agaciro ibyavugwaga n'ubu bikivugwa na Usengimana Richard ko Entreprise Usengimana Richard ari «société» cyangwa «institution». Asobanura ko izina ry'ubucuruzi ritarega kuko riba ridafite ubuzima gatozi ahubwo ko harega nyiraryo, uyu akaba ari nawo murongo uru Rukiko rwatanze mu rubanza *Rwanda Free Zone, Co, Ltd yaburanaga na Association momentanée (joint-venture),* akaba arusaba gushingira kuri uwo murongo no ku ngingo ya 2 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, rukemeza ko Entreprise Usengimana Richard idafite ububasha bwo kurega, rugatesha agaciro urubanza rwajuririwe hakagumaho imikirize y'urubanza rwaciwe n'Urukiko rw'Ubucuruzi rwa Nyarugenge.

Me Mugabonabandi Jean Maurice, uburanira Entreprise [13] Usengimana Richard, avuga ko Urukiko Rukuru rw'Ubucuruzi rutatandukiriye kuko rwaciye urubanza ku kibazo cy'ububasha (qualité) rwari rwashikirijwe, rukaba rutari rutegetswe kugendera ku mvugo z'ababuranyi gusa. Asobanura ko yasobanuje muri Rwanda Development Board bamubwira ko ibyangombwa bihabwa za «entreprises» ari «certificats», ko nubwo byamuteye urujijo kuko bamubwiye ko bihabwa abacuruzi baciriritse, asanga nta kibuza Entreprise Usengimana Richard nka «institution» kugira ubuzima gatozi kuko ari izina ry'ubucuruzi ryatanzwe n'urwego rwa Leta rubifitiye ububasha, ariko ko uru Rukiko ruramutse rubibonye ukundi, rwakwemeza ko «certificat» yahawe Entreprise Usengimana Richard, nk'izina ry'ubucuruzi, iyihesha ububasha bwo gukora amasezerano, kugura no kugurisha imigabane ikwiye no kuyihesha ububasha bwo kurega mu Rukiko nk'uko byemejwe mu gika cya gatanu cy'urubanza rujuririrwa.

UKO URUKIKO RUBIBONA

[14] Ingingo ya 2 y'Itegeko N°21/2012 ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko ikirego kitemerwa mu Rukiko iyo urega adafite ububasha, inyungu n'ubushobozi bwo kurega.

[15] Ingingo ya 375 y'Itegeko N° 07/2009 ryo ku wa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi ryakurikizwaga ikirego gitangwa, iteganya ko ibyerekeye iyandikisha, imiterere n'imikorere by'ibikorwa by'ubucuruzi bukorwa n'abantu badashobora kwinjiza nibura ibihumbi icumi ku munsi (10.000 Frw) bigenwa n'Iteka rya Minisitiri ufite ubucuruzi mu nshingano ze.

[16] Ingingo ya 2 y'Iteka rya Minisitiri N°02/09/MINICOM ryo ku wa 08/05/2009 ryerekeye ubucuruzi bukorwa n'abantu badafite ubushobozi buhagije, ivuga ko igikorwa cy'ubucuruzi hakurikijwe iri teka ni igikorwa cy'umuntu wese yaba umugore cyangwa umugabo ukora ibikorwa by'ubucuruzi, byanditswe hakurikijwe ibiteganywa n'iri teka harimo kugura no kugurisha, gutanga serivisi cyangwa se ikindi gikorwa icyo aricyo cyose mu buryo buhoraho gikorwa hagamijwe kubona inyungu.

[17] Inyandiko zigize dosiye y'urubanza zigaragaza ko ku wa 17/03/2014, mu izina ry'umuyobozi wayo, Entreprise Usengimana Richard ibaruwe kuri *«Enterprise code »* 100058249, yareze uwitwa Mporanyi Charles mu Rukiko rw'Ubucuruzi rwa Nyarugenge, isaba ko rumuhatira kwishyura 318.433.000Frw akomoka ku kinyuranyo cy'igiciro cya

276.900.000Frw cy'imigabane 4260 yamugurishije akishyura 595.335.000Frw n'indishyi zitandukanye (cote 6).

[18] Inyandiko zigize dosiye y'urubanza zigaragaza kandi ko ku wa 10/07/2011, Ikigo gishinzwe Iterambere mu Rwanda (RDB), gishingiye ku ngingo ya 10 y'Iteka rya Minisitiri No 02/09/MINICOM ryo ku wa 08/05/2009 ryerekeye ubucuruzi bukorwa n'abantu badafite ubushobozi buhagije,² cyahaye Entreprise Usengimana Richard icyemezo cy'iyandikishwa "*Certificate of Entreprise Registration*", yandikwa kw'izina (Enterprise Name) rya Usengimana Richard, igomba gukorera kw'izina ry'ubucuruzi (Business Name) rya Usengimana Richard (cote 62).

[19] rurasanga Iteka Minisitiri No Urukiko rya 02/09/MINICOM ryo ku wa 08/05/2009 ryibukijwe hejuru ryashingiweho Entreprise Usengimana Richard ihabwa icyemezo cy'iyandikishwa ryerekeye ubucuruzi bukorwa n'abantu ku giti cyabo, ingingo ya mbere y'iryo Teka ikaba isobanuye neza ko rireba iyandikisha, imiterere n'imikorere bv'ibikorwa by'Ubucuruzi bukorwa n'abantu badashobora kwinjiza nibura amafaranga ibihumbi cumi (10.000frw) ku munsi, ingingo yaryo ya 10 ikaba ivuga ko mu kwandika bene aba bacuruzi mubyo bagaragaza harimo amazina y'uwiyandikisha, izina ry'ubucuruzi igikorwa cy'ubucuruzi gikorerwamo n'iry'umucuruzi,

² Iyo ngingo iteganya ko «Icyemezo cy'iyandikwa kigomba kugaragaza ibi bikurikira : a) - Inimero y'iyandikwa ry'igikorwa cy'ubucuruzi; b) Amazina y'uwiyandikisha; c) Izina ry'ubucuruzi, igikorwa cy'ubucuruzi gikorerwamo n'iry'umucuruzi d) - Isobanura rigufi kandi ryumvikana ry'igikorwa cy'ubucuruzi cyandikishijwe; e)Icyicaro y'ubucuruzi n'aho bukorerwa; f) Itariki igaragaza igihe icyemezo gitangiwe; g) Umukono na kashe by'Umwanditsi Mukuru cyangwa abamuhagarariye; h)Urwego igikorwa cy'ubucuruzi kibarirwamo.»

byumvikanisha ko umucuruzi wiyandikishije muri ubu buryo atafatwa ko aba yandikishije sosiyete y'ubucuruzi ahubwo abikora agamije gushyira ku mugaragaro (formaliser) ibikorwa bye by'ubucuruzi.

Urukiko rurasanga rero kuba Enterprise Usengimana [20] Richard ari izina ry'ubucuruzi bivuze ko yo ubwayo nta buzimagatozi ifite ku buryo yatanga ikirego mu Rukiko, ariyo mpamvu ikirego kigomba gutangwa na nyir'ubucuruzi cyangwa nyiri «entreprise » ariwe Usengimana Richard kuko ari we ufite ubuzimagatozi bumuhesha ububasha bwo kurega arengera inyungu z'ubucuruzi bwe akorera muri iryo zina. Uyu murongo kandi niwo uru Rukiko rwakomeje gushimangira mu manza zitandukanye nko mu rubanza Julia Shop yaburanaga na Ecobank Rwanda Ltd,³ urwo Association Momentanée SOBETRA SARL & SOBTRA (U) Ltd yaburanaga na Office Rwandais des Recettes (RRA)⁴ n'urwo Rwanda Free Zone, Co, Ltd yaburanaga na Association Momentanée (Joint Venture) «H3E»,⁵ aho rwagiye ruvuga ko izina ry'ubucuruzi cyangwa ishyirahamwe ry'igihe gito ridafite ubuzimanagatozi bitagira uburenganzira cyangwa inshingano imbere y'amategeko, bivuze ko bidashobora kurega mu Inkiko ahubwo ko nyir'ubucuruzi ari we ushobora kurega mu mwanya w'izina rye ry'ubucuruzi cyangwa w'ishyirahamwe rye kandi ko iyo bitakozwe bityo Urukiko

³ Reba urubanza RCOMAA 0042/14/CS hagati ya Julia Shop na Ecobank Rwanda Ltd rwaciwe n'Urukiko rw'Ikirenga ku wa 18/03/2016 igika cya 19 na 22.

⁴ Urubanza Nº RCOMA 0064/11/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 28/11/2012, igika cya 16.

⁵ Urubanza N^o RCOMA 0064/12/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 03/06/2016, igika cya 39.

rukwiye gufata ko rwaregewe n'udafite ububasha rukemeza ko ikirego kitakiriwe.

[21] Urukiko rurasanga kandi uyu murongo ari nawo ushimangirwa n'abahanga mu mategeko y'ubucuruzi aho bavuga ko ubucuruzi bw'umuntu ku gite cye budashobora kugira ubuzimagatozi butandukanye n'ubw'ubukora kandi ko «*entreprise*» y'umuntu yandikishijwe nk'izina ry'ubucuruzi idafite ububasha bwo kwitangira ikirego ubwayo ahubwo ko harega nyirayo mu izina rye, nabyo bishimangira ko Entreprise Usengimana Richard itari ifite ububasha bwo kurega,⁶⁷ bityo ikirego cyayo kikaba kitaragombaga kwakirwa.

[22] Urukiko rurasanga Urukiko Rukuru rw'Ubucuruzi rwaribeshye aho rwavuze, mu gika cya gatanu cy'urubanza rujuririrwa, ko Usengimana Richard "*adakwiye kwangirwa gutanga ikirego akoresheje iryo zina [Entreprise Usengimana Richard], yemerewe kwitwa mu bikorwa bye by'ubucuruzi [...] kuko iryo zina ari iry'umuntu ufite ubizima gatozi [...]," kubera*

⁶ « L'entreprise individuelle est donc celle exploitée par un commerçant physique seul, c'est-à-dire sans associé. [...] une telle entreprise individuelle n'a pas de personnalité juridique distincte de celle de la personne physique qui l'exploite. L'entreprise individuelle, à la différence de la société n'a donc pas la personnalité morale. » Jean-Pierre BERTREL et Marina BERTREL, Droit des sociétés, in Droit de l'Entreprise, Paris, Wolters Kluwer France SAS, 2010, p.382. « [....] l'entreprise individuelle ne possède pas de la personnalité juridique et n'est pas sujet de droit. En conséquence, elle ne peut pas être titulaire de droits réels et fait partie du patrimoine personnel de l'entrepreneur. Elle ne peut également pas ester en justice. Les actions en justice sont intentées par l'entrepreneur. » Reba Le commerçant, entrepreneur individuel « traditionnel http://www.distripedie.com/distripedie/spip.php » kuri [byasomwe ku wa 20/06/2017].

ko, nk'uko byasobanuwe haruguru kandi byemejwe n'Urukiko rw'Ubucuruzi rwa Nyarugenge, iryo zina ubwaryo nta buzimagatozi rifite ku buryo ryaregera Urukiko, hagombaga kurega Usengimana Richard nyir'ubucuruzi, bivuze ko hashingiwe ku biteganywa n'ingingo ya 2 igika cya 1 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi hareze udafite ububasha ariyo mpamvu ikirego kitagombaga kwakirwa.

[23] Hashingiwe ku ngingo z'amategeko n'ibisobanuro byatanzwe haruguru Urukiko rurasanga, urubanza RCOMA 500/14/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 31/10/2014 rugomba guteshwa agaciro rukavaho, Usengimana Richard yazifuza kurega akazatanga ikirego mu izina rye aho gutanga ikirego mu izina ry'umuyobozi wa Entreprise Usengimana Richard.

II.2. Kumenya niba Mporanyi Charles yahabwa indishyi asaba.

[24] Me Ruzindana Ignace avuga ko Mporanyi Charles yashowe mu manza nta mpamvu akaba abisabira amafaranga y'ikurikiranarubanza ya 1.000.000Frw n'igihembo cya Avoka kingana na 2.000.000Frw mu Rukiko Rukuru rw'Ubucuruzi no mu Rukiko rw'Ikirenga.

[25] Me Mugabonabandi Jean Maurice avuga ko amafaranga y'ikurikiranarubanza Mporanyi Charles asaba nta shingiro afite kuko icyo Avoka ahemberwa ari ugukurikirana urubanza, ahubwo ko asaba uru Rukiko kuvuga ko Entreprise Usengimana Richard yari ifite ububasha bwo kurega nk'uko Urukiko Rukuru rw'Ubucuruzi rwabibonye, rukagenera Entreprise Usengimana Richard igihembo cya Avoka cya 1.000.000Frw.

UKO URUKIKO RUBIBONA

[26] Urukiko rurasanga amafaranga y'ikurikiranarubanza n'igihembo cya Avoka asabwa na Mporanyi Charles ayakwiriye kuko yagombye gukurikirana iby'uru rubanza kandi yiyambaza Avoka uhembwa, cyakora kuba atagaragaza ibimenyetso by'uko ayo asaba ariyo akwiriye, mu bushishozi bw'Urukiko, akaba agenewe amafaranga ibihumbi magana atatu (300.000Frw) y'ikurikiranarubanza n'ibihumbi magana atanu (500.000Frw) y'igihembo cya Avoka, yose hamwe akaba ibihumbi magana inani (800.000Frw).

III. ICYEMEZO CY'URUKIKO

[27] Rwemeje ko ubujurire bwatanzwe na Mporanyi Charles bufite ishingiro;

[28] Rwemeje ko ikirego cyatanzwe na Entreprise Usengimana Richard kitagombaga kwakirwa;

[29] Rwemeje ko urubanza RCOMA 500/14/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 31/10/2014 rwajuririwe ruvuyeho;

[30] Rutegetse Entreprise Usengimana Richard guha Mporanyi Charles amafaranga y'ikurikiranarubanza angana n'ibihumbi magana atatu (300.000Frw) n'ay'igihembo cya Avoka angana n'ibihumbi magana atanu (500.000Frw), yose hamwe akaba ibihumbi magana inani (800.000Frw); [31] Rutegetse Entreprise Usengimana Richard gusubiza Mporanyi Charles amafaranga ibihumbi ijana (100.000Frw) y'ingwate y'amagarama yishyuye aregera uru Rukiko.

PASSAG COMPANY Ltd v. GTBANK Ltd N'UNDI

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA 00050/2018/CA (Karimunda, P.J., Munyangeri na Ngagi, J.) 26 Mata 2019]

Amategeko agenga amasosiyete – Umunyamigabane – Ububasha bwo kuregera inyungu za sosiyete – Umunyamigabane ushaka kurengera inyungu za sosiyete agomba kubanza kubiherwa uruhushya n'Urukiko – Umunyamigabane wabyemerewe n'Urukiko kuregera inyungu za sosiyete, ntatanga ikirego mw'izina rye bwite ahubwo agitanga mw'izina rya sosiyete abereye Umunyamigabane.

Incamake y'ikibazo: Sosiyete PASSAG COMPANY Ltd hamwe na sosiyete ECOMIL zakoranye amasezerano yo kwishyira hamwe (*joint venture*) maze zibyara sosiyete nshya yitwa ECOMIL-PASSAG Ltd, nukuvuga ko izi sosiyete ebyiri zahujwe zabaye abanyamigabane b'iyi sosiyete nshya. Nyuma yo kwishyira hamwe, batsindiye isoko bahawe na Minagri, bazafatanya kurikora, bafungura na konti muri FINA BANK SA ubu yitwa GTBANK RWANDA Ltd, bashyiraho abashyira umukono kuri iyo konti (*signatories*) harimo n'uwitwa Gatarayiha Augustin.

Ikibazo cyavutse ubwo Minagri yaje kwishyura imirimo yakozwe, amafaranga ashyirwa kuri konti ya ECOMIL-PASSAG Ltd muri GTBANK RWANDA LTD, maze ayo mafaranga abikuzwa n' umwe mu bashyira umukono kuri iyo konti (signatories) witwa Gatarayiha. PASSAG COMPANY Ltd nk'umunyamugabane yareze GTBANK mu Rukiko rw'Ubucuruzi ivuga ko ayo mafaranga yagombaga gukurwa kuri konti ari uko habonetse imikono y'abantu batatu muri bane bari bafite ububasha bwo kuyakuraho, asaba GTBANK kuyasubiza kuri konti ya sosiyete ECOMIL-PASSAG Ltd. Muri uru rubanza hagobokeshwamo Gatarayiha.

GTBANK RWANDA Ltd yazamuye inzitizi yo kutakira ikirego ivuga ko nta masezerano bafitanye ajyanye no gukoresha konti nk'umukiriya wayo, naho Gatarayiha we akavuga ko nta nyungu n'ububasha iyi sosiyete ifite bwo gutanga ikirego. Uru rukiko rwaciye urubanza rwemeza ko ikirego kitakiriwe kuko iyo sosiyete nta nyungu n'ububasha ifite bwo gutanga ikirego. PASSAG COMPANY Ltd ntiyishimiye imikirize y'urubanza ijurira mu Rukiko Rukuru rw'Ubucuruzi ivuga ko Urukiko rubanza rwafashe icyemezo rushingiye ku mpamvu zitigeze zigibwaho impaka maze uru Rukiko rwemeza ko ubujurire nta shingiro bufite.

Nanone, PASSAG COMPANY Ltd ntiyishimiye icyo cyemezo ijuririra Urukiko rw'Ikirenga. Urubanza rwimuriwe runaburanishwa mu Rukiko rw'Ubujurire nyuma yamavugurura y'inkiko.

Ivuga ko inkiko zibanza zavuze ko nta bubasha bwo kurega yari ifite, nyamara yari ibufite bushingiye kw'Itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi kandi ko idakwiye kuvutswa uburenganzira bwayo kuko igifite inyungu muri "joint venture".

GT Bank Ltd yo ivuga ko PASSAG COMPANY Ltd nta bubasha yari ifite bwo kuregera Urukiko kuko itandukanye na PASSAG ECOMIL Ltd kandi ko kuba PASSAG COMPANY Ltd ari umunyamigabane wa PASSAG-ECOMIL bitayiha ububasha bwo gutanga ikirego mu izina rya PASSAG ECOMIL. Gatarayiha avuga ko nta munyamigabane waregera ku giti cye ibya sosiyete abereye umunyamigabane, nawe akaba asanga nta bubasha iyo sosiyete ifite bwo kuregera ibintu bitari ibyayo.

Incamake y'icyemezo: 1. Umunyamigabane ushaka kuregera inyungu za sosiyete agomba kubanza kubiherwa uruhushya n'Urukiko

2. Umunyamigabane wabyemerewe n'Urukiko kuregera inyungu za sosiyete, ntatanga ikirego mw'izina rye bwite ahubwo agitanga mw'izina rya sosiyete abereye Umunyamigabane.

Ubujurire nta shingiro bufite; Imikirize y'urubanza rwajuririwe ntihindutse.

Amategeko yashingiyeho:

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 2, Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 2, Itegeko N° 07/2009 ryo ku wa 27/04/2009 ryerekeye amasosiyete, ingingo ya 223 n'iya 224.

Nta manza zifashishijwe.

Ibitekerezo by'abahanga:

J. Héron, Droit judiciaire privé, Paris, Montchrestien, 1991, p. 51.

Urubanza

I.IMITERERE Y'URUBANZA

[1] PASSAG COMPANY Ltd na Misigaro Louis ukorera imirimo ye y'ubucuruzi ku izina rya ECOMIL bagiranye amasezerano yo guhuza sosiyete zabo (*Joint venture*), bashyiraho sosiyete nshya yitwa ECOMIL-PASSAG Ltd, bemeranywa ko bazafatanya isoko bahawe na MINAGRI i Nyamugali, Akarere ka Kirehe, nyuma bafungura konti muri FINA BANK S.A, ubu yitwa GT BANK RWANDA Ltd, bashyiraho n'abasinyateri (*signataires*) barimo uwitwa Gatarayiha Augustin.

[2] Ikibazo cyavutse ubwo ku wa 16/02/2013, hari 72.534.548 Frw, MINAGRI yishyuye ECOMIL-PASSAG Ltd, GT BANK RWANDA Ltd ikayaha Gatarayiha Augustin, PASSAG COMPANY Ltd ivuga ko ayo mafaranga yagombaga gukurwa kuri konti ari uko habonetse imikono y'abantu batatu muri bane bari bafite ububasha bwo kuyakuraho, bituma igana inkiko.

[3] Urubanza rwatangiriye mu Rukiko rw'Ubucuruzi rwa Nyarugenge, PASSAG COMPANY Ltd irega GT BANK RWANDA Ltd yahoze yitwa FINA BANK Ltd isaba ko Urukiko ruyitegeka gusubiza kuri konti ya ECOMIL-PASSAG Ltd amafaranga yavuzwe haruguru, urubanza rugobokeshwamo Gatarayiha Augustin. Mu iburanisha ry'urubanza, GT BANK RWANDA Ltd yatanze inzitizi isaba ko ikirego cyatanzwe na PASSAG COMPANY Ltd kitakirwa kuko nta masezerano ajyanye no kugira no gukoresha konti nk'umukiriya wayo bafitanye, Gatarayiha Augustin nawe avuga ko nta nyungu n'ububasha iyi sosiyete ifite bwo gutanga ikirego ndetse ko nta n'ikimenyetso igaragaza cy'uko ari sosiyete iriho mu buryo bukurikije amategeko yo mu Rwanda.

[4] Ku wa 19/07/2016, Urukiko rw'Ubucuruzi rwa Nyarugenge rwaciye urubanza RCOM 00445/2016/TC/NYGE, rwemeza ko ikirego cya PASSAG COMPANY Ltd kitakiriwe kuko nta nyungu n'ububasha ifite bwo gutanga ikirego, ruvuga ko icyo iregera atari uburenganzira bwite yavukijwe, ahubwo ari umutungo wa ECOMIL-PASSAG Ltd, kandi ko nk'uko biteganywa mu mategeko y'u Rwanda, umunyamigabane ushaka gutanga ikirego agomba kubanza kubisaba Urukiko. Urukiko rw'Ubucuruzi rwa Nyarugenge kandi, rwemeje ko icyemezo cyo gufatira amafaranga aburanwa cyari cyafashwe gikuweho.

[5] PASSAG COMPANY Ltd ntiyishimiye imikirize y'urubanza, ijuririra Urukiko Rukuru rw'Ubucuruzi ivuga ko Urukiko rubanza rwafashe icyemezo rushingiye ku mpamvu zitigeze zigibwaho impaka mu iburanisha ry'urubanza, ku wa 02/02/2018, urwo Rukiko ruca urubanza N° RCOMA 00461/2017/CHC/HCC, rwemeza ko ubujurire bwa PASSAG COMPANY Ltd nta shingiro bufite, ruyitegeka guha GT BANK RWANDA Ltd na GATARAYIHA Augustin, buri wese, 500.000 Frw y'ikurikiranarubanza n'igihembo cya Avoka, ruhamishaho imikirize y'urubanza rwajuririwe.

[6] PASSAG COMPANY Ltd ntiyishimiye icyemezo cyafashwe n'Urukiko Rukuru rw'Ubucuruzi, ijuririra Urukiko rw'Ikirenga ivuga ko idakwiye kuvutswa uburenganzira bwayo kuko igifite inyungu muri "*joint venture*" kandi ko itemera inyandikomvugo iha Gatarayiha Augustin uburenganzira bwo kuba "*signataire*" kuri konti ya ECOMIL-PASSAG Ltd, inavuga ko itigeze ihabwa uburenganzira bwo kuyisobanuraho.

[7] Nyuma y'ivugururwa ry'inkiko ubujurire bwayo bwoherejwe mu Rukiko rw'Ubujurire hashingiwe ku biteganywa n'ingingo ya 105 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko.

Urubanza rwaburanishijwe mu ruhame [8] ku wa 05/02/2019, PASSAG COMPANY Ltd ihagarariwe na Me Gabiro David, Gatarayiha Augustin ahagarariwe na Me Pierre Claver Zitoni hamwe na Me Mbarushimana Jean Marie Vianney, GT BANK RWANDA Ltd ihagarariwe na Me Bimenyimana Eric, habanza gusuzumwa inzitizi y'iburabubasha bw'Urukiko rwajuririwe yatanzwe na GT BANK RWANDA Ltd ivuga ko PASSAG COMPANY Ltd yatsinzwe ku mpamvu zimwe ku rwego rwa mbere n'urwa kabiri, ariko Urukiko ruyisuzumye rusanga nta shingiro ifite, rwemeza ko urubanza ruzaburanishwa mu mizi ku wa 27/03/2019. Iyo tariki igeze, urubanza rwaburanishijwe mu ruhame, PASSAG COMPANY Ltd ihagarariwe na Me Muhirwa Ngabo Audace, abandi bahagaririwe nka mbere.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

1. Kumenya niba PASSAG COMPANY Ltd yari ifite ububasha bwo kurega

[9] Me Muhirwa Ngabo Audace, uburanira PASSAG COMPANY Ltd, avuga ko Urukiko Rukuru rw'Ubucuruzi rwavuze ko PASSAG COMPANY Ltd nta bubasha bwo kurega yari ifite, nyamara yari ibufite bushingiye ku ngingo ya 2 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi,

iz'umurimo n'iz'ubutegetsi¹ ryakurikizwaga ubwo PASSAG COMPANY Ltd yatangaga ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge. Avuga ko Urukiko Rukuru rw'Ubucuruzi rutagombaga gushingira gusa ku Itegeko rigenga amasosiyete, ahubwo ko rwagombaga no gushingira ku itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.

[10] Me Bimenyimana Eric, uburanira GT Bank Ltd, avuga ko PASSAG COMPANY Ltd nta bubasha yari ifite bwo kuregera Urukiko kuko itandukanye na PASSAG-ECOMIL Ltd. Avuga ko kuba PASSAG COMPANY Ltd ari umunyamigabane wa PASSAG-ECOMIL bitayiha ububasha bwo gutanga ikirego mu izina rya PASSAG-ECOMIL nk'uko inkiko zibanza zabibonye zishingiye ku ngingo ya 223 y'Itegeko ryagengaga amasosiyete, akaba asanga nta kosa Urukiko Rukuru rw'Ubucuruzi rwakoze rwemeza ko PASSAG COMPANY Ltd nta bubasha yari ifite bwo kuregera Urukiko rw'Ubucuruzi rwa Nyarugenge.

[11] Me Zitoni Pierre Claver uhagarariye Gatarayiha Augustin, avuga ko yemeranya n'ibyo Me Bimenyimana Eric avuga, akongeraho ko ashingiye ku ngingo ya 23 y'Itegeko rigenga amasosiyete y'ubucuruzi, nta munyamigabane waregera ku giti cye ibya sosiyete abereye umunyamigabane. Me Mbarushimana Jean Marie Vianney nawe uhagaririye Gatarayiha Augustin, avuga ko yemeranya na bagenzi be kuko asanga nta bubasha PASSAG COMPANY Ltd yari ifite bwo kuregera ibintu bitari ibyayo.

¹ Iyi ngingo yahindutse iya 3 mu Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.

UKO URUKIKO RUBIBONA

[12] Ingingo ya 2, igika cya mbere, y'Itegeko N^o 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi yakurikizwaga ubwo PASSAG COMPANY Ltd yatangaga ikirego iteganya ko: "*Ikirego nticyemerwa mu nkiko iyo urega adafite ububasha, inyungu n'ubushobozi bwo kurega*".

[13] Naho ingingo ya 2, agace ka 7°, y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi isobanura ububasha nk'uburenganzira umuntu ahabwa n'amategeko akabukoresha arengera inyungu iye n'iyi mu rukiko cyangwa yumvikanisha ibyo asaba cyangwa arwanya ibisabwa n'undi.

[14] Abahanga mu mategeko nabo basobanura ububasha nk'uburenganzira bwo kuregera inkiko buhabwa umuntu wese ubona ko uko ahagaze bishobora guhungabanywa n'ishyirwa mu bikorwa ry'ingingo runaka y'itegeko². Bivuze ko kugira ngo ikirego cyakirwe mu rukiko urega agomba kuba afite inyungu aharanira ku giti cye, itaziguye kandi irengerwa n'amategeko.

[15] Ku birebana n'uru rubanza, inyandiko zigize dosiye zigaragaza ko MINAGRI yakoranye amasezerano na ECOMIL-PASSAG Ltd, mu rwego rwo gushyira mu bikorwa ayo masezerano, ku wa 16/02/2013 iyishyura 72.534.548Frw, bukeye

 $^{^2}$ (.... que soit habilitée à former une demande toute personne dont la

situation est susceptible d'être affectée par l'application d'une règle de droit), J. Héron, *Droit judiciaire privé*, Paris, Montchrestien, 1991, p. 51.

bwaho aya mafaranga atwarwa na Gatarayiha Augustin ayahawe na ECOMIL-PASSAG Ltd. Ibi nibyo byatumye PASSAG COMPANY Ltd iregera Urukiko rw'Ubucuruzi rwa Nyarugenge irusaba ko rwategeka FINA BANK (GT BANK RWANDA Ltd) gusubiza amafaranga yavuzwe kuri konti ya ECOMIL-PASSAG Ltd.

[16] Urukiko rurasanga, amafaranga aburanwa yari umutungo wa ECOMIL-PASSAG Ltd, kandi ari nayo yafashe icyemezo cyo kuyaha Gatarayiha Augustin, bivuze ko ari yo yari ifite ububasha bwo kuba yarengera (droit d'agir) umutungo wayo igihe haba hari impamvu cyangwa umuntu uwo ari wese waba agiye kuwuhungabanya. Urukiko rurasanga nk'uko inkiko zabanje zabibonye, PASSAG COMPANY Ltd nta bubasha yari ifite bwo gutanga ikirego ku giti cyayo kandi umutungo yaregeraga wari uwa ECOMIL-PASSAG Ltd, ikaba rero nta burenganzira bwite bwayo yavukijwe.

Urukiko rurasanga nanone, nk'uko inkiko zibanza [17] zabibonye, ingingo ya 223 y'Itegeko Nº 07/2009 ryo ku wa ryerekeye amasosiyete ryakurikizwaga ubwo 27/04/2009 PASSAG COMPANY Ltd yatangaga ikirego iteganya ko : "I sosiyete, umwe mu bagize Inama y'ubutegetsi cyangwa umwe mu banyamigabane ashobora gusaba urukiko gutanga ikirego mu nyungu z'isosiyete cyangwa no z'isosiyete izina mu iyishamikiyeho", iyi ngingo yumvikanisha neza ko umunyamigabane (PASSAG COMPANY Ltd) ashobora gutanga ikirego mu izina rya sosiyete (ECOMIL-PASSAG Ltd) ariko yabanje kubisaba urukiko rukabimwemerera, bikaba bigaragara ko PASSAG COMPANY Ltd itubahirije ibiteganywa n'ingingo yibukijwe haruguru kuko yatanze ikirego mu izina ryayo bwite, aho kugitanga mu izina rya ECOMIL-PASSAG Ltd.

[18] Urukiko rurasanga nanone, ingingo ya 224 yemerera umunyamigabane w'isosiyete cyangwa uwahoze ari we gutanga ikirego arega sosiyete, abagize Inama y'Ubutegetsi cvangwa bayigize cyangwa umukozi mukuru kubera umwe mu inshingano kutubahiriza kurengera inyungu ZO z'abanyamigabane, PASSAG COMPANY Ltd nabyo ikaba itarabyubahirije, kuko aho kurega abateganywa muri iyi ngingo kubera kutubahiriza inshingano ZO kurengera inyungu z'abanyamigabane, yareze GT BANK RWANDA Ltd isaba kugira uruhare ku mutungo wa ECOMIL PASSAG Ltd.

Urukiko rurasanga ibyo uburanira PASSAG COMPANY [19] Ltd avuga ko Urukiko Rukuru rw'Ubucuruzi rutagombaga gushingira gusa ku Itegeko rigenga amasosiyete, ahubwo rwagombaga gushingira ku Itegeko ryerekeye no imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi nta shingiro byahabwa, kuko usibye ko nta cyarubuzaga kurishingiraho igihe ritanga igisubizo, n'iyo ruza gushingira ku Itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi nta cyari guhinduka, kuko n'ubundi PASSAG COMPANY Ltd nta bubasha ihabwa n'iryo tegeko bwo kuregera umutungo wa ECOMIL-PASSAG Ltd.

[20] Urukiko rurasanga kandi ibyo uburanira PASSAG COMPANY Ltd avuga ko bitari ngombwa ko iyi sosiyete, yanditse mu gihugu cya Kenya, isaba uburenganzira bwo kurega undi munyamigabane, nabyo nta shingiro bifite kuko ingingo ya 223 y'Itegeko N° 07/2009 ryo ku wa 27/04/2009, ryibukijwe haruguru nta rengayobora (exception) ishyiraho kuri sosiyete z'inyamahanga.

[21] Hashingiwe ku biteganywa n'ingingo z'amategeko no ku bisobanuro bimaze gutangwa, Urukiko rurasanga PASSAG COMPANY Ltd itarubahirije ibisabwa n'amategeko kugira ngo yemererwe gutanga ikirego mu izina rya ECOMIL-PASSAG Ltd, bityo akaba nta kosa Urukiko Rukuru rw'Ubucuruzi rwakoze rwemeza ko imikirize y'Urukiko rw'Ubucuruzi rwa Nyarugenge yo kutakira ikirego cya PASSAG COMPANY Ltd idahindutse.

2. Kumenya ishingiro ry'amafaranga asabwa muri uru rubanza

[22] Me Muhirwa Ngabo Audace, uburanira PASSAG COMPANY Ltd, asaba ko PASSAG COMPANY Ltd yahabwa 10.000.000Frw kubera gukomeza kwimwa uburenganzira bwayo ku mafaranga yavukijwe, 3.000.000Frw y'igihembo cya Avoka ziyongera ku yo bari basabye mbere, yose hawe akaba 6.000.000Frw na 2.000.000Frw y'ikurikiranarubanza. Avuga ko indishyi abo baburana basaba nta shingiro zifite, kandi ko nta mpamvu yazo kuko ari bo bashoye PASSAG COMPANY Ltd mu manza. Akomeza

[23] Me Bimenyimana Eric, Me Zitoni Pierre Claver na Me Mbarushimana Jean Marie Vianney bavuga ko indishyi PASSAG COMPANY Ltd isaba nta shingiro zifite, kuko n'ibyo iregera zishingiyeho nta shingiro bifite.

[24] Me Bimenyimana Eric avuga ko mu gihe Urukiko rwagumishaho urubanza rwaciwe n'Urukiko Rukuru rw'Ubucuruzi, rwagenera GT BANK Ltd 1.000.000Frw y'igihembo cya Avoka. [25] Me Zitoni Pierre Claver, uburanira Gatarayiha Augustin, nawe avuga ko mu gihe Urukiko rwagumishaho urubanza rwaciwe n'Urukiko Rukuru rw'Ubucuruzi, rwagenera uwo aburanira 5.000.000Frw y'igihembo cya Avoka, bikaba bikosora ibyo bari basabye mbere.

UKO URUKIKO RUBIBONA

[26] Ingingo ya 111 y'Itegeko Nº 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko: "Ikirego cy'amafaranga y'ikurikiranarubanza ni ikirego gishamikira ku kirego cy'iremezo kigamije kwishyuza ibyakoreshejwe mu rubanza. Ikirego cy'amafaranga v'ikurikiranarubanza kiburanishirizwa n'ikirego rimwe cv'iremezo. Gishobora kandi kwakirwa kikanaburanishwa n'iyo ikirego cy'iremezo cyaba kitakiriwe".

[27] Urukiko rurasanga indishyi zitandukanye PASSAG COMPANY Ltd isaba itazihabwa kuko itsinzwe uru rubanza.

[28] Urukiko rurasanga GT BANK RWANDA Ltd na Gatarayiha Augustin hari ibyo batanze kugira ngo urubanza barezwemo ruburanwe bitewe n'ubujurire bwa PASSAG COMPANY Ltd, kuba rero ubu bujurire nta shingiro bufite, PASSAG COMPANY Ltd igomba guha GT BANK RWANDA Ltd 1.000.000Frw y'igihembo cya Avoka n'ikurikiranarubanza yasabye kuri uru rwego kuko akwiye, ikanaha Gatarayiha Augustin 1.000.000Frw y'igihembo cya Avoka n'ikurikiranarubanza kuri uru rwego, akaba agenwe mu bushishozi bw'Urukiko, kuko 5.000.000Frw asaba atagaragaza ko ariyo yagiye kuri uru rubanza.

90

III. ICYEMEZO CY'URUKIKO

[29] Rwemeje ko ubujirire bwa PASSAG COMPANY Ltd nta shingiro bufite;

[30] Rwemeje ko imikirize y'urubanza RCOMA 00461/2017/CHC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 02/02/2018 idahindutse;

[31] Rutegetse PASSAG COMPANY Ltd guha GT BANK RWANDA Ltd na Gatarayiha Augustin 1.000.000Frw y'igihembo cya Avoka n'ikurikiranarubanza, buri wese, kuri uru rwego;

[32] Ruvuze ko amagarama y'urubanza ahwanye n'ibyakozwe.

IMANZA ZACIWE MU MIZI

URUBANZA RW'IMBONEZAMUBANO

Ø

Ω

TUYISENGE v. MUKARONI

[Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RC00008/2018/SC (Rugege, P.J., Kayitesi R, Kayitesi Z, Hitiyaremye na Cyanzayire J.) 28 Kamena 2019]

Amategeko agenga amasezerano – Amasezerano y'impano – Gusesa amasezerano – Iyo uwahawe impano agahabwa n'inshingano akazemera no ariko ntiyuzuze izo nshingano, n'impamvu ihagije y'iseswa ry'amasezerano y'impano kuko aba ahindutse amasezerano magirirane

Amategeko agenga amasezerano – Gusesa amasezerano – N'ubwo amategeko ateganya ko iseswa ry'amasezerano rigomba kuregerwa inkiko, ntibiba bikiri ngombwa kuyaregera iyo abayagiranye bemeranya kuyasesa no kwirengera ingaruka yabyo.

Incamake y'ikibazo: Kabaziga yahaye umwuzukuru we Bizimana kumucungira umutungo we wose, akawubyaza ibyo azajya amutungisha kuko yaramaze gusaza, hanyuma amuha n'impano y'umurima umwe, bakorana amasezerano mu nyandiko maze abagize umuryango wabo bayashyiraho umukono.

Nyuma yaho Kabaziga abonye umwuzukuru we atabyitwayemo neza nkuko babyumvikanye, asesa amasezerano bagiranye amwambura gucunga iyo mitungo ye yose yamuhaye hamwe n'umurima yari yaramuhaye nk'impano, ayiha umwe mu bagore ba Bizimana babanaga batarasezeranye witwa Mukaroni, nawe bakorana amasezerano, amuha n`inshingano zo kubicunga no kubimutungisha neza, amuha na wa murima yambuye umwuzukuru we, Mukaroni awibaruzaho abona ndetse n'amasezerano y'ubukode burambye kuri ubwo butaka.

Bizimana yaje gushyingiranwa byemewe n'amategeko n'umugore we wakabiri witwa Tuyisenge bari basanzwe babana nk'umugore n'umugabo, nyuma agabanya abagore be babiri imitungo ye uretse imirima ibiri yari ifitwe na Mukaroni.

Tuyisenge yatanze ikirego mu nteko y'Abunzi yo mu kagari ka Kabeza arega Mukaroni na Bizimana asaba ko bagabana imirima ibiri, Mukaroni yari atunze, Inteko y'Abunzi y'Akagari yemeje ko umurima uburanwa ari uwa Mukaroni. Tuyisenge yajuririye uwo mwanzuro mu Nteko y'abunzi bo mu murenge wa Cyuve maze iyi nteko yemeza nanone ko imirima ibiri iburanwa ari iya Mukaroni.

Tuyisenge yaregeye umwanzuro w'Inteko y'Abunzi mu Rukiko rw'Ibanze rwa Muhoza, rwemeza ko uwo mwanzuro uvanyweho, rwemeza ko imirima yose uko ari ibiri iburanwa igomba kugabanywamo kabiri, ½ cya buri murima kikajya mu mutungo Tuyisenge asangiye na Bizimana, ikindi ½ kikaba ari icya Mukaroni, rwemeza ko inyandiko yo ku wa 01/02/2000 isesa impano y'umurima Bizimana yari yarahawe na nyirakuru iteshejwe agaciro kuko itubahirije ibiteganywa n'amategeko.

Mukaroni yatanze ikirego cyo gusubirishamo urubanza ingingo nshya mu Rukiko rw'Ibanze rwa Muhoza, avuga ko hari bimwe mu bimenyetso yari yatanze mu Rukiko birimo ibyangombwa by'ubutaka bigaragaza ko uwo murima aruwe bitasuzumwe. Avuga kandi ko Bizimana na Tuyisenge batigeze batambamira icyo cyemezo cyangwa ngo nabo biyandikisheho uwo murima. Urukiko rwemeza ko ikirego cya Mukaroni cyo gusubirishamo urubanza ingingo nshya gifite ishingiro kuri bimwe, rutegeka ko urubanza rwaciwe n'Urukiko rw'Ibanze rwa Muhoza ruhindutse ku bijyanye n'umurima N°1, rwemeza ko umurima N°2 ubaruye kuri Mukaroni ari uwe, rutegeka Tuyisenge guha Mukaroni amafaranga y'igihembo cya Avoka, rutegeka Tuyisenge na Bizimana gufatanya gusubiza Mukaroni amafaranga yari yatanzeho ingwate y'igarama.

Tuyisenge yandikiye Urwego rw'Umuvunyi asaba kurenganurwa kuko asanga urubanza rwo gusubirishamo ingingo nshya rwaciwe n'Urukiko rw'Ibanze rwa Muhoza rwaramurenganyije. Nyuma yo gusuzuma icyo kibazo, Urwego rw'Umuvunyi rwandikiye Perezida w'Urukiko rw'Ikirenga rumusaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane. Nyuma yo gusuzuma raporo y'Ubugenzuzi Bukuru bw'Inkiko, Perezida w'Urukiko rw'Ikirenga yemeje ko urwo rubanza rwongera kuburanishwa.

Mu Rukiko rw'Ikirenga, Tuyisenge avuga ko asaba kurenganurwa kuko asanga amasezerano y'impano yari yarakozwe hagati ya Bizimana na Kabaziga yasheshwe mu buryo bunyuranije n'amategeko kuko iseswa ryayo ryagombaga gukorwa n'urukiko ariko akaba ataruko byagenze.

Mukaroni yiregura avuga ko ibivugwa na Tuyisenge ko amasezerano y'impano yasheshwe mu buryo bunyuranije n'amategeko nta shingiro bifite kuko uwatanze impano nta mpamvu yari kujya mu Rukiko kubisaba mu gihe uwo bayagiranye yemeye ko bayasesa.

Incamake y'icyemezo: 1. Iyo uwahawe impano agahabwa n'inshingano akazemera no ariko ntiyuzuze izo nshingano, n'impamvu ihagije y'iseswa ry'amasezerano y'impano kuko aba ahindutse amasezerano magirirane.

2. N'ubwo amategeko ateganya ko iseswa ry'amasezerano rigomba kuregerwa inkiko, ntibiba bikiri ngombwa kuyaregera iyo abayagiranye bemeranya kuyasesa no kwirengera ingaruka yabyo. Bityo iseswa ry'impano ntaho rinyuranyije n`amategeko, hakaba nta mpamvu amasezerano yateshwa agaciro.

Ikirego cyo gusubirishamo urubanza ku mpamvu z akarengane nta shingiro gifite.

Amategeko yashingiweho:

Itegeko N°43/2013 ryo ku wa 16/06/2013 rigenga ubutaka mu Rwanda, ingingo ya 10; Itegeko N°22/00 ryo ku wa 12/11/1000 ryazuza Igitaba aya

Itegeko N°22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'Urwunge rw'Amategeko mbonezamubano kandi rishyiraho igice cya gatatu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingingo ya 37, 38, 40;

Code Civil Français, ingingo ya 956.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Mu gihe Bizimana Daniel yabanaga na Mukaroni Xaverine batarasezeranye mu buryo bwemewe n'amategeko, Nyirakuru Kabaziga ubwo yari atagishoboye guhinga, yamuhaye imitungo ye n'inshingano yo kuyicunga akayibyaza ibyo azajya amutungisha, by'umwihariko, amuha n'impano y'umwe mu

100

mirima ye uherereye kwa Ndagozera. Ibyo yabishyize mu nyandiko yo ku wa 04/4/1999 hari nabagize umuryango wabo bayishyiraho umukono. Kabaziga abuze ubufasha yari amutezeho kandi abonye atangiye gutagaguza ibye kubera imyitwarire ye mibi, byatumye asesa ayo masezerano, amwambura inshingano yari yaramuhaye zo gucunga ibye no kubitubura ndetse amwambura n'umurima yari yaramuhaye. Ibintu bye yabihaye Mukaroni amuha n`inshingano zo kubicunga no kubimutungisha neza, kandi amuha na wa murima yambuye Bizimana. Ibi nabyo yabishyize mu masezerano yo ku wa 01/2/2000, kandi abikorera nanone imbere y'Umuryango. Mukaroni yibarujeho wa murima, ahabwa icyangombwa cy'ubutaka gifte UPI 4/03/02/04/2883.

[2] Igihe Bizimana Daniel yashyingiranwaga na Tuyisenge Françoise, imbere y'Inzego z'Ubutegetsi ku wa 15/8/2006, (ariko nawe bari basanzwe babana nkuko yabanaga na Mukaroni), uwo munsi, yagabanyije imitungo ye abagore be Tuyisenge na Mukaroni, uretse imirima ibiri yari itunzwe na Mukaroni. Umurima umwe Bizimana avuga ko yawuhawe n'ababyeyi be akibana na Mukaroni. Umurima wa kabiri Bizimana na Mukaroni, buri wese avuga ko yawuhawe na Kabaziga. Tuyisenge umugore w'isezerano yatangije imanza asaba kugira uruhare kuri iyo mirima yombi.

[3] Tuyisenge yabanje kurega Mukaroni na Bizimana mu Nteko y'Abunzi b'Akagari ka Kabeza, asaba ko bagabana ya mirima ibiri (2) Mukaroni atunze, agasigarana 1/2 cya buri murima, naho Tuyisenge na Bizimana nabo bagahabwa ½ cya buri murima. Avuga ko iyo mirima igizwe n'igitari kiri ku Kalinzi hamwe n'umurima wadikanyijwe no kwa Ntaganzwa, Bizimana yari yarahawe na nyirakuru Kabaziga ngo awumucungire ashobore kuwubyaza ibimutunga. Mukaroni we yaburanye agaragaza ko uwo murima Bizimana yari yarawuhawe koko na nyirakuru Kabaziga mu masezerano yo ku wa 04/4/1999, ariko aza kuwumwambura mu iseswa ry'ayo masezerano, Mukaroni aba ariwe uwuhabwa mu nyandiko yo ku wa 01/02/2000, ko rero ari umutungo we bwite atawugabana nabo.

[4] Inteko y'Abunzi yemeje ku wa 01/03/2006, ko umurima uburanwa ari uwa Mukaroni yahawe na nyirakuru wa Bizimana, naho umurima wa mbere (igitari) kikazagabanywa abana bose bakomoka kuri Bizimana.

[5] Tuyisenge yajuririye uwo mwanzuro mu Nteko y'Abunzi b'Umurenge wa Cyuve, ifata icyemezo ku wa 21/10/2011, yemeza ko ihaye imirima yombi uko ari ibiri yaburanwaga Mukaroni Xaverine.

Tuyisenge yaregeye umwanzuro w'Inteko y'Abunzi mu [6] Muhoza, Rukiko rw'Ibanze rwa ruca urubanza RC1017/011/TB/MUH ku wa 20/11/2013, rwemeza ko uwo mwanzuro uvanyweho, rwemeza ko imirima yose uko ari ibiri iburanwa igomba kugabanywamo kabiri, 1/2 cya buri murima kikajya mu mutungo Tuyisenge asangiye na Bizimana, ikindi 1/2 cya buri murima kikaba ari icya Mukaroni, rwemeza ko inyandiko yo ku wa 01/02/2000 bavuga ko Bizimana vamburiweho impano y'umurima yari yarahawe na nyirakuru, iteshejwe agaciro ku bijyanye n'impano ya burundu y'umurima wari warahawe Bizimana, kuko itubahirije ibiteganywa n'amategeko.

[7] Mukaroni yatanze ikirego mu Rukiko rw'Ibanze rwa Muhoza asaba gusubirishamo ingingo nshya urwo rubanza RC 1017/011/TB/MUH rwaciwe ku wa 20/11/2011, avuga ko hari

bimwe mu bimenyetso yari yatanze mu Rukiko birimo ibyangombwa by'ubutaka yibarujeho uwo murima bitasuzumwe. Avuga kandi ko Bizimana na Tuyisenge batigeze batambamira icyo cyemezo cyangwa ngo nabo biyandikisheho uwo murima.

[8] Urukiko rwaciye urubanza RC 0741/13/TB/MUH ku wa 25/04/2014, rwemeza ko ikirego cya Mukaroni cyo gusubirishamo urubanza RC 1017/011/TB/MUH ingingo nshya, gifite ishingiro kuri bimwe, rutegeka ko urubanza RC 1017/011/TB/MUH rwaciwe n' Urukiko rw'Ibanze rwa Muhoza ku wa 20/11/2013 ruhindutse ku bijyanye n'umurima n° 1, rwemeza ko umurima N°2 883/MUS/CYU ubaruye kuri Mukaroni ari uwe, rutegeka Tuyisenge guha Mukaroni 150.000Frw y'igihembo cya Avoka, rutegeka Tuyisenge na Bizimana gufatanya kwishyura amagarama y'urubanza angana na 3.500Frw, Mukaroni agasubizwa 2000Frw yari yatanzeho ingwate y'igarama.

[9] Tuyisenge yandikiye Urwego rw'Umuvunyi asaba kurenganurwa kuko asanga urubanza RC0741/13/TB/MUH rwaciwe n'Urukiko rw'Ibanze rwa Muhoza kuwa 25/04/2014, rwaramurenganyije.

[10] Nyuma yo gusuzuma icyo kibazo, Urwego rw'Umuvunyi rwasanze urubanza RC 0741/13/TB/MUH rukwiriye gusubirwamo ku mpamvu z'akarengane, maze, rwandikira Perezida w'Urukiko rw'Ikirenga ku wa 21/03/2016, rumusaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane. Nyuma yo gusuzuma raporo y'Ubugenzuzi Bukuru bw'Inkiko, Perezida w'Urukiko rw'Ikirenga yemeje ko urwo rubanza rwongera kuburanishwa.

[11] Urubanza rwaburanishijwe ku wa 03/06/2019, Tuyisenge na Bizimana bahagarariwe na Me Kanyarugano Cassien, Mukaroni ahagarariwe na Me Nyirabera Josephine.

Ikibazo cy'ingenzi cyasuzumwa muri uru rubanza ni ukumenya niba iseswa ry'amasezerano y'impano hagati ya Kabaziga n'umwuzukuru we Bizimana Daniel ryarakurikije amategeko.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

1. Kumenya niba iseswa ry'amasezerano y'impano yo ku wa 04/04/1999 ryarakurikije amategeko.

Me Kanyarugano Cassien uhagarariye Tuyisenge [12] Françoise na Bizimana Daniel avuga ko akarengane muri uru rubanza gashingiye ku makosa yakozwe n'Urukiko rw'Ibanze rwemeje rubanza Muhoza, rwa aho mu rusabirwa gusubirishwamo ku mpamvu z'akarengane ko amasezerano y'impano ya Bizimana yo ku wa 04/4/1999 yasheshwe, akaba asanga ibyakozwe binyuranije n'ibiteganywa n'amategeko kuko byagombaga kubanza kuregerwa mu Rukiko (iseswa ry'amasezerano).

[13] Me Kanyarugano Cassien avuga ko Itegeko N°22/99 ryo ku wa 12/11/1999 ryuzuza igitabo cya mbere cy'Urwunge rw'Amategeko mbonezamubano kandi rishyiraho igice cya gatatu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura ryakoreshwaga uru rubanza ruburanishwa, *yateganyaga ko* ``*uwatanze impano, iyo afite impamvu zatuma iseswa, abanza gushyikiriza ikirego Urukiko rubifitiye ububasha akaba arirwo rwemeza ko iseswa*``. Avuga ko Umucamanza

104

yashingiye ku ngingo ya 37 y'Itegeko N°22/99 ryo ku wa 12/11/1999 ryavuzwe haruguru, bituma impano iseswa, akaba asanga ibyakozwe bitarubahirije ibiteganywa n'amategeko cyane ko na Bizimana atigeze agaragara mu nyandiko yo ku wa 01/02/2000 bavuga yamwambuye impano yari yarahawe na nyirakuru ku wa 04/04/1999.

[14] Me Kanyarugano Cassien mu izina ry'abarega yongeraho ko umurima uburanwa muri uru rubanza wari waragabanyijwemo kabiri, Tuyisenge na Bizimana bahabwa igipande cyawo, ikindi gihabwa Mukaroni, ariko ko nyuma y'igabana ryawo, Mukaroni ngo yakomeje kuwikubira wenyine.

[15] Ku byerekeye iseswa ry'amasezerano y`impano yo ku wa 04/04/1999, Me Nyirabera Josephine uhagarariye Mukaroni avuga ko ibivugwa n'uhagarariye Tuyisenge ko iseswa ry'amasezerano ryagombaga kuregerwa Urukiko, nta shingiro bifite kuko uwatanze impano nta mpamvu yari kujya mu Rukiko kubisaba mu gihe uwo bagiranye ayo masezerano y'impano yemeye ko bayasesa, ko kandi ikibishimangira ari uko n'inyandiko yayo y'umwimerere yo ku wa 04/04/1999, Bizimana yayihaye Kabaziga arayica, akaba ariyo mpamvu umwimerere wayo utanagaragara muri dosiye y`izi manza. Ikindi kibishimangira ni ukuba byarabaye Bizimana akicecekera ntagire icyo avuga kuri iryo seswa ry'amasezerano, bivuze ko yabyemeraga.

[16] Naho ku kibazo cy'uko umurima uburanwa wari waragabanyijwe ababuranyi, Me Nyirabera Josephine avuga ko ibivugwa n'uhagarariye abaregwa ataribyo, kuko mu gihe Bizimana yagabanyaga imitungo abagore bombi, ntabwo umurima uburanwa wigeze ugabanwa, ko ibyo binagaragazwa n'uko mu gihe cy'ibarura rusange, uwo murima Mukaroni yawibarujeho ijana ku ijana (100%). Avuga ko iyo aza kuba awusangiye na Bizimana, yari gutambamira iryo baruza agaragaza ko bawufiteho amakimbirane, akaba asanga kuba atarabikoze ari uko yemeraga ko uwo murima ari uwa Mukaroni wose.

UKO URUKIKO RUBIBONA

[17] Tuyisenge Françoise na Bizimana Daniel bavuga ko akarengane bagiriwe muri uru rubanza rusubirishwamo gashingiye ku makosa yakozwe n'Urukiko rw'Ibanze rwa Muhoza, aho rwemeje ko amasezerano y'impano y`umurima Bizimana yagiranye na nyirakuru Kabaziga ku wa 04/4/1999 yasheshwe hagati yabo, bidakozwe n'Urukiko.

[18] Ku byerekeye ibimenyetso, dosiye y'urubanza igaragaza inyandiko yo ku wa 04/4/1999, Kabaziga yahereyeho Bizimana ibye ngo abimutungemo, amuha n'impano y'umurima, Bizimana nawe abyemera byombi. Dosiye igaragaza nanone inyandiko yo ku wa 01/2/2000, Kabaziga yakoze yambura Bizimana inshingano zo gucunga ibye no kubimutungisha, asubirana ya mpano y'umurima, maze abyegurira Mukaroni, uyu nawe yemera impano n'inshingano arazubahiriza. Mu nyandiko yo ku wa 01/2/2000, Kabaziga asobanura ko ahinduye amasezerano yari yahereyeho Bizimana imitungo n'impano yo ku wa 04/4/1999, kubera ko ntacyo yamufashije ngo amufate neza no kuba yabinyereza kubera imyifatire ye mibi (ari mu busambanyi), ko abimunyaze, abiragije Mukaroni, ko uyu nawe aramutse atabimufashemo neza, yazabiragiza undi. Muri ayo masezerano, avuga ko yeguriye Mukaroni wa murima yambuye Bizimana, n'umuryango we urabyemera. Iyi nyandiko kimwe n'iya mbere, Kabaziga yagiye azikorera imbere y'umuryango we, zishyirwaho

106

imikono. Dosiye ikagaragaza n'icyemezo cy'umutungo N° 4/03/02/04/2883 cyo ku wa 19/12/2011 cyerekana ko Mukaroni yahise yibaruzaho uwo murima.

[19] Imwe mu mpamvu zitangwa n'Itegeko rigenga impano n'izungura, zituma amasezerano y`impano aseswa, ni ukutubahiriza inshingano ziyaturutseho k'uwayihawe, kandi bigakorwa mu gihe cy'umwaka umwe uhereye ku munsi ikosa ryakoreweho cyangwa ku munsi uwatanze yarimenyeyeho.

Ku byerekeye impamvu y'iseswa ry'Amasezerano [20] y'impano yabaye hagati ya Kabaziga n'umwuzukuru we Bizimana ku wa 4/4/1999 yerekeye inshingano zo kumucungira ibye, kubimutungamo neza hamwe n'impano y'umurima uburanwa nkuko byagaragajwe haruguru, Urukiko rusanga Kabaziga yaragaragaje mu masezerano mashya impamvu zatumye asesa aya mbere. Izi mpamvu n'uko Bizimana atamucungiye ibye neza ngo anabimutungemo neza, ko ahubwo yashoboraga no kuwutagaguza kubera imyitwarire ye mibi. Urukiko rusanga iyo ari impamvu ihagije y`iseswa ry`impano Kabaziga yari yarahaye Bizimana kubera inshingano atubahirije, hashingiwe ku biteganywa n'ingingo ya 38, agace ka 3 y'Itegeko N° 22/99 ryo ku wa 12/11/1999¹ ryakoreshwaga igihe ikirego cyatangwaga. Iryo seswa ryakozwe ku wa 01/02/2000, aho bigaragariye ko Bizimana atubahiriza inshingano yahawe, mu gihe kitarenze umwaka, ibi bikaba byubahirije ingingo ya 40 y'Itegeko rimaze kuvugwa. Ibi kandi ninako bimeze mu mategeko y'ahandi nko mu Bufaransa, aho impano zimwe na

107

¹ Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'Urwunge rw'Amategeko mbonezamubano kandi rishyiraho igice cya gatatu cyerekereye imicungire y'umutungo w'abashyingiranywe, impano n'izungura.

zimwe zishobora gutangwa, uzihawe akagira ibyo ategekwa kubahiriza: urugero: umukecuru uhaye umuturanyi we inyubako ariko akamusaba kumuha ibimutunga no kumwitaho ubuzima bwe bwose. Muri icyo gihe, buri wese agomba kubahiriza inshingano ze. Amasezerano y`impano ahinduka magirirane, iyo rero umwe mu mpande zombi atubahirije inshingano ze, urundi ruhande rushobora gusaba gusesa amasezerano² (Certaines donations peuvent être consenties en demandant au gratifié de'exécuter certaines charges: par exemple, une dame âgée donne son immeuble ā un voisin en lui demandant, en-contrepartie, de la nourrir et de l'entretenir sa vie durant. Dans ce cas, chacun doit executer une obligation [......]. La donation devient un contrat réciproque, et si l'une des parties ne respecte pas ses obligations, l'autre aura la possibilité de demander l'annulation de la convention).

[21] Urukiko rusanga ariko n'ubwo amategeko ateganya ko iseswa ry'amasezerano rigomba kuregerwa inkiko, ntibiba bikiri ngombwa kujya imbere y'umucamanza iyo ba nyirayo bemeranya kuyasesa no kwirengera ingaruka yabyo.

[22] Ku birebana n'uru rubanza, n'ubwo iri seswa ry'impano ritaregewe ngo rikorwe n'inkiko nkuko ingingo ya 40 y'Itegeko N°22/99 ryo ku wa 12/11/1999 rivuzwe haruguru ibiteganya, bihuje neza n'ibivugwa n'amategeko y'ahandi nk'ingingo ya 956 CC Français, ntaho rinyuranyije n'amategeko kuko ryakozwe na ba nyiri kugirana amasezerano babyumvikanyeho nkuko bigaragazwa n'imyitwarire ya buri wese. Kabaziga washeshe amasezerano yabitangiye impamvu mu nyandiko abigaragariza Umuryango we na Bizimana ubwe, nkuko byagarajwe haruguru

² https://www.notaire.be/donations-successions/les-donations/une-donation-est-irrevocable

ntiyavuga ko atabyemeye. Byongeye kandi kuba imitungo n'inshingano yari yahaye Bizimana kimwe n'impano y'umurima by'umwihariko yarabimwambuye akabyegurira umugore we Mukaroni, Bizimana akabyakira nta mpaka ateje habe no guhakana amakosa ye, ni ikimenyetso cyuko yabyemeye.

[23] Urukiko rusanga ikindi kigaragaza ko iyo mpano Bizimana yemeye kuyamburwa, ni uko Mukaroni wayihawe yayibarujeho abibona, ariko Bizimana ntagire icyo akora ngo ayitambamire, kugeza ubwo Mukaroni ahawe icyemezo cy'uwo mutungo gifite N°2883/MUS/CYU nkuko kigaragara muri dosiye. Uko kwifata kwa Bizimana kugaragaza ko yemeye ko nta burenganzira yari agifite kuri uwo murima, ko weguriwe Mukaroni. Rusanga kandi ari nayo mpamvu no mu gihe cy'igabana ry'imirima ryabaye hagati y'abo bagore bombi Mukaroni na Tuyisenge, uwo murima utarashyizwe ku rutonde rwiyo Bizimana yabagabanyije, nkuko bigaragazwa n'inyandiko yo ku wa 15-06-2006 Bizimana agabira abo bagore be bombi isambu ikomoka kuri se Rwanuburi igizwe n'imirima 4, nabo bakabisinyira.

[24] Hashingiwe ku ngingo z'amategeko, ibimenyetso n'ibisobanuro byatanzwe hejuru, Urukiko rusanga iseswa ry'impano yo ku wa 4/4/1999 ryabaye ku wa 1/02/2000, ntaho rinyuranyije n'amategeko, hakaba nta mpamvu amasezerano yo ku wa 01/2/2000 yateshwa agaciro. Umurima uburanwa Mukaroni atunze agomba kuwugumana kuko awutunze nk'impano yahawe na Kabaziga hashingiwe ku ngingo ya 10 y'Itegeko N°43/2013 ryo ku wa 16/06/2013 rigenga ubutaka mu Rwanda iteganya ko ``ubutaka bw'umuntu ku giti cye bugizwe n'ubutaka atunze ku buryo bw'umuco cyangwa ubw'amategeko yanditse. Ubwo butaka abutunze yarabuhawe n'ubuyobozi

bubifitiye ububasha, ubwo yaguze, yahaweho impano, [.....]". Imikirize y'urubanza RC 0741/13/TB/MUH/TB/MUH rwaciwe n'Urukiko rw'Ibanze ku wa 25/04/2014 rwasabiwe gusubirishwamo ku mpamvu z'akarengane igomba kugumaho kuko nta karengane kayigaragaramo.

[25] Ku kibazo cyuko uyu murima uburanwa waba wari waragabanyijwe abagore ba Bizimana, Urukiko rusanga nta mpamvu yo kugisuzuma.

2. Kumenya niba indishyi zisabwa muri uru rubaza zatangwa.

a. Ku byerekeye indishyi Tuyisenge Françoise na Bizimana Daniel basaba.

[26] Me Kanyarugano Cassien uhagarariye abarega muri uru rubanza avuga ko Mukaroni ahinga ubutaka bwa Tuyisenge guhera muri 2006, akaba abumaranye imyaka cumi n'ibiri (12ans), ko icyatamurima cya buri mwaka kingana na 90.000Frw, mu imyaka icumi ahahinze, akaba amaze kuvanamo angana na 1.000.000Frw akaba ariyo agomba kumusubiza na 200.000Frw yahaye Umuhesha w'Inkiko Irakiza Elie warangije urubanza.

[27] Me Nyirabera Josephine mu izina rya Mukaroni avuga ko ibisabwa na Tuyisenge atabihabwa kuko umurima aburana atari uwe, uwo yunganira akaba atatanga indishyi ku mutungo byagaragaye ko ari uwe.

110

UKO URUKIKO RUBIBONA

[28] Urukiko rw'Ikirenga rurasanga indishyi zisabirwa Tuyisenge na Bizimana nta shingiro zifite kuko nta burenganzira bafite ku murima uburanwa, n'ibiwushingiyeho bakaba atabihabwa.

b. Ku byerekeye ubujurire bwuririye ku bundi bwatanzwe na Mukaroni Xaverine

[29] Mu bujurire bwuririye ku bundi, Me Nyirabera Josephine uhagarariye Mukaroni amusabira indishyi zo kuba akomeje gushorwa mu manza zingana na 2.500.000Frw, zikubiyemo igihembo cya Avoka kingana na 1.000.000Frw, 500.000Frw y'ikurikiranarubanza no gusiragizwa, n'indishyi z'akababaro zingana na 1.000.000Frw.

[30] Me Kanyarugano Cassien avuga ko indishyi zisabwa na Mukaroni atazikwiye kubera ko asanga uru rubanza rurimo akarengane.

[31] Urukiko rw'Ikirenga amafaranga rusanga y'ikurikiranarubanza n'igihembo cya Avoka Mukaroni yasabye yayahabwa, kubera ko yagombye gukoresha Avoka umuburanira, agira n'ibindi atanga bijyanye no gukurikirana urubanza, ariko kubera ko ayo asaba ari menshi, rukaba rumugeneye mu bushishozi bwarwo 500.000Frw y'igihembo cya Avoka, 300.000Frw y'ikurikiranarubanza, yose hamwe akaba 800.000Frw. Naho indishyi z'akababaro, akaba atazihabwa, kuko atashoboye kukagaragaza, ndetse akaba atagenerwa indishyi zo gushorwa mu manza kuko ari uburenganzira bw'abarega mu gihe bumva ko hari akarengane bagiriwe mu mikirize y'urubanza rwasabiwe gusubirishwamo ku mpamvu z'akarengane.

III. ICYEMEZO CY'URUKIKO

[32] Rwemeje ko ikirego cyatanzwe na Tuyisenge Francoise gisaba gusubirishamo ku mpamvu z'akarengane urubanza RC 0741/13/TB/MUH, rwaciwe n'Urukiko rw' Ibanze rwa Muhoza ku wa 25/04/2014, Bizimana akarugobokeshwamo, nta shingiro gifite.

[33] Rwemeje ko imikirize y'urubanza RC0741/13/TB/MUH rwaciwe n'Urukiko rw'Ibanze rwa Muhoza ku wa 25/04/2014, rudahindutse, uretse amafaranga y'ikurikiranarubanza n'igihembo cya Avoka.

[34] Rutegetse Tuyisenge Françoise guha Mukaroni Xaverine 800.000Frw akubiyemo igihembo cya Avoka n'ikurikiranarubanza.

IMANZA Z'UBUCURUZI

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DEVELOPMENT BANK OF RWANDA LTD (BRD Ltd) v. SPLENDID KALISIMBI Ltd

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA 00058/2018/CA (Mukanyundo, P.J., Munyangeri na Mukandamage, J.) 10 Gicurasi 2019]

Amategeko yerekeranye n'imanza z'ubucuruzi – Sosiyete – Igihombo – Iyo hamaze kwemezwa ikurikirana ry'igihombo cya sosiyete, nta mutungo wayo wakurwa mu yindi mbere y'igabana ry'ababerewemo imyenda nubwo waba waratanzweho ingwate. Itegeko N° 35/2013 ryo ku wa 29/05/2013 rihindura kandi ryuzuza Itegeko N° 12/2009 ryo ku wa 26/05/2009 ryerekeye izahura ry'ubucuruzi n'irangiza ry'ibibazo biturutse ku gihombo, ingingo ya 4.

Incamake y'ikibazo: BRD Ltd yahaye sosiyete Splendid inguzanyo, nayo iyiha ingwate, iyo sosiyete ntiyabashije kwishyura nkuko byumvikanyweho, nyuma yaje kugwa mu gihombo, byemezwa n'Urukiko, maze rushyiraho umucungamutungo w'agateganyo.

Mu gihe BRD Ltd yari yaratangiye gusaba kugurisha ingwate yahawe, umucungamutungo wa Splendid yaje kuyimenyesha ko gukurikirana umwenda yayihaye bibaye bisubitswe, kubera gahunda yo gutangiza ikurikirana ry' igihombo, ibyo bituma BRD Ltd iyirega mu Rukiko rw'Ubucuruzi rwa Nyarugenge isaba gukuraho icyemezo gisubika ikurikiranwa ry'umwenda kugirango ibashe kugurisha ingwate. Urukiko rwemeje ko ikirego nta shingiro gifite kuko Splendid yari yaguye mu gihombo kandi ingwate ikaba itakurwa mu mitungo wa Splendid ngo igurishwe mbere yuko habaho gahunda y'igabana nk'uko itegeko ribitegenya.

BRD Ltd yajuririye mu Rukiko Rukuru rw'Ubucuruzi ivuga ko umucamanza mu rukiko rubanza yaruciye ku bitarasabwe ivuga ko yarusabaga gukuraho icyemezo cy'isubikwa ryo gukurikirana no kugurisha ingwate, Urukiko ntirwabisuzuma ahubwo rusuzuma gusa irebana n'igihombo, ivuga kandi ko umucungamutungo w'agateganyo atubahirije amategeko ubwo yangaga kuvana ingwate mu mutungo wa Splendid kugirango igurishwe. Uru rukiko rwemeza ko imikirize y'urubanza rwo mu Rukiko rw'Ubucuruzi rwa Nyarugenge idahindutse, rutegeka ko umutungo watanzweho ingwate utavanwa mu mitungo igomba kugurishwa.

BRD Ltd yongeye ijurira mu Rukiko rw'lkirenga, nyuma y'ivugururwa ry'inkiko, urubanza rwimurirwa mu Rukiko rw'Ubujurire, ivuga ko Urukiko Rukuru rw'Ubucuruzi rutasuzumye ingingo z'ubujurire zijyanye no kumenya niba Urukiko rw'Ubucuruzi rwa Nyarugenge rwaciye urubanza ku kitarasabwe ivuga ko yasabaga gukuraho icyemezo ahubwo rugafata icyemezo ku birebebana n'ishyirwa mu gihombo rya sosiyete splendid, no kuba kandi umucungamutungo w'agateganyo atarubahirije amategeko yanga gukura ingwate mu mutungo wa Spendid ngo igurishwe.

Sosiyete Splendid yiregura ivuga ko hashingiwe ku mpamvu ziteganywa n'itegeko ryerekeye izahura ry'ubucuruzi, gukurikirana ingwate birahagarara, ivuga kandi ko kuba iri mu gihombo, Urukiko Rukuru rw'Ubucuruzi ntirwari gufata icyemezo kigira ingaruka kuri splendid mu gihe yahombye.

116 _____

Incamake y'icyemezo: 1. Iyo hamaze kwemezwa ikurikirana ry'igihombo cya sosiyete, nta mutungo wayo wakurwa mu yindi mbere y'igabana ry'ababerewemo imyenda nubwo waba waratanzweho ingwate.

Ubujurire nta shingiro bufite. Amagarama y'urubanza ahwanye n'ibyakozwe muri uru rubanza.

Amategeko yashingiweho:

- 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 111.
- Itegeko N° 35/2013 ryo ku wa 29/05/2013 rihindura kandi ryuzuza Itegeko N°12/2009 ryo ku wa 26/05/2009 ryerekeye izahura ry'ubucuruzi n'irangiza ry'ibibazo biturutse ku gihombo, ingingo ya 4.

Nta manza zifashishijwe.

Urubanza

I.IMITERERE Y'URUBANZA

[1] Ku wa 09/09/2016 Urukiko rw'Ubucuruzi rwa Nyarugenge rwaciye urubanza RCOM 00985/16/TC/NYGE, rwemeza itangizwa ry'uburyo bw'ikurikirana bwerekeye igihombo muri Sosiyete Splendid Kalisimbi Ltd, runashyiraho umucungamutungo w'agateganyo wayo Me Mukwende Milimo Olivier, ahabwa inshingano nyamukuru yo gufasha Splendid Kalisimbi Ltd gukomeza gukora.

[2] Ku wa 14/09/2016 Me Mukwende Milimo Olivier yandikiye BRD Ltd ibaruwa ayimenyesha ko gukurikirana umwenda yari ifitiwe na Splendid Kalisimbi Ltd bibaye bisubitswe kubera ko Urukiko rwemeje itangizwa ry'uburyo bw'ikurikirana bwerekeye igihombo muri iyo sosiyete.

Ku wa 21/01/2017, BRD Ltd yatanze ikirego mu Rukiko [3] rw'Ubucuruzi rwa Nyarugenge isaba icyemezo gikuraho isubika ryo gukurikirana umwenda wayo ufite ingwate, kuko nta gahunda y'izahura (plan de redressement) yatanzwe n'umucungamutungo w'agateganyo wa Splendid Kalisimbi Ltd ngo yemezwe n'Urukiko, ko iramutse yaranatanzwe nta gaciro yagira, kuko itabanje kwemezwa n'inama y'ababerewemo imyenda (comité de kandi ko n'izahura ritashoboka créanciers). mu gihe komite umucungamutungo w'agateganyo adakoranye na y'ababerewemo imyenda, ndetse nta na gahunda ihamye y'izahura afite. Urukiko rw'Ubucuruzi rwa Nyarugenge rwemeje ko ikirego cya BRD Ltd nta shingiro gifite, ruyitegeka kwishyura Splendid Kalisimbi Ltd indishyi z'igihembo cya Avoka.

[4] BRD Ltd yajuririye Urukiko Rukuru rw'Ubucuruzi, ivuga ko umucamanza yaciye urubanza ku bitarasabwe, ko Urukiko rwemeje ko habayeho gahunda y'izahura yatanzwe na Splendid Kalisimbi Ltd en liquidation kandi nta bimenyetso, rukirengagiza ko hari amategeko atarubahirijwe n'umucungamutungo w'agateganyo, ndetse ko rwemeje ko izahura rya Splendid Kalisimbi Ltd rishoboka mu buryo bunyuranyije n'amategeko.

[5] Urwo Rukiko rwemeje ko imikirize y'urubanza RCOM 00351/2017/TC/NYGE rwaciwe n'Urukiko rw'Ubucuruzi rwa

118 _____

Nyarugenge idahindutse, rutegeka ko umutungo uri mu kibanza N° 1/01/09/03/867, mu Mujyi wa Kigali, Akarere ka Nyarugenge, Umurenge wa Nyarugenge, Akagari ka Kiyovu, utavanwa mu mitungo ya Splendid Kalisimbi Ltd en liquidation igomba kugurishwa.

[6] BRD Ltd yajuririye Urukiko rw'Ikirenga, urubanza rwimurirwa mu Rukiko rw'Ubujurire hashingiwe ku biteganywa n'ingingo ya 105, y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko, ruhabwa RCAA 00058/2018/CA.

[7] Urubanza rwaburanishijwe mu ruhame ku wa 26/03/2019, BRD Ltd iburanirwa na Me Mugeni Anita, Splendid Kalisimbi Ltd en liquidation ihagarariwe n'umucungamutungo w'agateganyo Me Mukwende Milimo Olivier, yunganiwe na Me Murutasibe Joseph hamwe na Me Nyiringabo Théoneste.

[8] Mu ntangiro y'iburanisha Me Murutusibe Joseph, yavuze ko inzitizi y'iburabubasha batanze y'uko BRD Ltd yatsinzwe ku mpamvu zimwe mu nzego zombi zabanje bayiretse, ariko bakomeje inzitizi y'iburabubasha irebana nuko nta gaciro kuri 50.000.000 k'ikiburanwa kageze Frw kemeiwe n'umucamanza igihe habaye impaka. Nyuma yo kumva impande zombi kuri iyo nzitizi, Urukiko rwafatiye icyemezo mu ntebe, maze rushingiye ku biteganywa n'ingingo ya 28, igika cya 2, agace ka 7°, v'Itegeko Ngenga N° 03/2012/OL ryo kuwa 13/06/2002 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga rusanga urubanza ruri mu bubasha bwarwo kuko ingwate BRD Ltd isaba kugurisha ifite agaciro gasumba kure 50.000.000Frw yateganyijwe n'itegeko kubera ko kangana na 2.300.000.000Frw, rukomerezaho iburanisha mizi mu v'urubanza.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

1. Kumenya niba hari amategeko atarubahirijwe mu rubanza rujuririrwa

a) Ku byerekeranye no kuba umucamanza yaraciye urubanza ku kitarajuririwe

[9] Me Mugeni Anita uhagarariye BRD Ltd avuga ko umucamanza yaciye urubanza ku kitarajuririwe, kuko BRD Ltd yajuririye gukuraho icyemezo cyafashwe ku kirego kirebana no gusaba ko icyemezo gisubika ikurikirana ry'umwenda ufite ingwate kivanwaho, ariko urukiko rukaba rutarigeze rugisuzuma ngo rugifateho icyemezo ahubwo rukaba rwarafashe icyemezo ku byerekeye ishyirwa mu gihombo rya Splendid Kalisimbi Ltd.

[10] Me Mugeni Anita avuga ko batunguwe no kubona umucungamutungo w'agateganyo agaragaza icyemezo cy'urukiko cyo kongerera Splendid Kalisimbi Ltd en liquidation igihe cy'izahura cyatanzwe amezi atandatu ateganywa n'itegeko yararangiye.

[11] Me Murutasibe Joseph na Me Nyiringabo Théoneste bavuga ko ingingo ya 4, y'Itegeko ryerekeye izahura ry'ubucuruzi n'irangiza ry'ibibazo biturutse ku gihombo ryo mu mwaka wa 2013, iteganya impamvu zituma gukurikirana ingwate bivanwaho, kandi ko sosiyete Splendid Kalisimbi Ltd en liquidation iri mu gihombo, akaba ari nta mpamvu y'ibyo BRD Ltd isaba. Bavuga ko Urukiko Rukuru rw'Ubucuruzi rwasuzumye ingingo z'ubujurire rwari rwashyikirijwe ruzifataho icyemezo kandi ko rutari gufata icyemezo kigira ingaruka kuri Splendid Kalisimbi Ltd en liquidation mu gihe yahombye, ikaba itakiriho nk'umucuruzi.

[12] Bakomeza bavuga ko inama y'ababerewemo imyenda yatinze kujyaho bitewe n'amananiza umucungamutungo w'agateganyo yashyizweho na BRD Ltd, ari nayo mpamvu igihe cy'izahura cyongerewe.

UKO URUKIKO RUBIBONA

[13] Ingingo ya 4 y'Itegeko N° 35/2013 ryo ku wa 29/05/2013 ihindura kandi ikuzuza ingingo ya 37 y'Itegeko N°12/2009 ryo ku wa 26/05/2009 ryerekeye izahura ry'ubucuruzi n'irangiza ry'ibibazo biturutse ku gihombo iteganya ko "*uhereye ku itariki y'itangizwa ry'uburyo bw'ikurikirana ry'igihombo:*

> 1° Gutangiza cyangwa gukomeza ibirego by'umuntu ubwe cyangwa uburyo bw'ikurikirana bureba ibintu by'ugomba kwishyura hamwe n'uburenganzira, inshingano cyangwa uburyozwe by'ugomba kwishyura biba bisubitswe;

> 2º Kurangiza imanza zirebana n'umutungo w'urimo umwenda biba bisubitswe;

3° Uburenganzira bwo guhagarika amasezerano n'ugomba kwishyura buba busubitswe;

4° Uburenganzira bwo guhererekanya, gutangaho ingwate cyangwa bwo gukoresha umutungo w'ugomba kwishyura buba busubitswe.

[14] Dosiye y'urubanza igaragaza ko BRD Ltd yareze isaba gukuraho icyemezo cyasubitse ikurikirana ry'umwenda ufite

ingwate, ishaka kwemererwa kugurisha ingwate yari yarahawe na Splendid Kalisimbi Ltd en liquidation igihe iyi yari yarashyiriweho itangiza ry'uburyo bw'ikurikirana bwerekeye igihombo, ndetse urukiko rwarashyizeho umucungamutungo w'agateganyo, ariko Urukiko rw'Ubucuruzi rwa Nyarugenge ruza kwemeza ko Splendid Kalisimbi Ltd en liquidation yahombye uru rubanza rugeze mu bujurire.

[15] Dosiye y'urubanza igaragaza ko mu bujurire Urukiko Rukuru rw'Ubucuruzi, rwari rwasabwe gusuzuma niba Urukiko rw'Ubucuruzi rwa Nyarugenge rwaraciye urubanza ku kitarasabwe, gusuzuma niba nta kimenyetso cyatanzwe kigaragaza ko habayeho gahunda y'izahura yatanzwe na Splendid Kalisimbi Ltd en liquidation, gusuzuma niba umucungamutungo w'agateganyo atarubahirije amategeko no gusuzuma niba urukiko rwaremeje ko izahura rya Splendid Kalisimbi Ltd en liquidation rishoboka mu buryo bunyuranyije n'amategeko, ariko urukiko rusanga hari ibitagomba gusuzumwa, kuko nyuma y'ipfundikira ry'urubanza hagaragaye icyemezo cyashize mu gihombo Splendid Kalisimbi Ltd en liquidation, bituma Urukiko rusuzuma gusa niba ingwate yahawe BRD Ltd yakurwa mu mutungo ugomba kugurishwa n'uwashinzwe iseswa rya Splendid Kalisimbi Ltd en liquidation n'isaranganyamutungo wayo, ariko rusanga icyifuzo cya BRD Ltd nta shingiro gifite kubera ko igomba gutegereza gahunda y'igabana kuko iri mu baberewemo imyenda bagomba kwishyurwa mbere kandi ingwate yahawe nyirayo nawe akiyifiteho uburenganzira.

[16] Urukiko rurasanga, ibyo BRD Ltd ivuga ko Urukiko Rukuru rw'Ubucuruzi rutasuzumye ingingo z'ubujurire zijyanye no kumenya niba Urukiko rw'Ubucuruzi rwa Nyarugenge

122 _____

rwaraciye urubanza ku kitarasabwe, gusuzuma niba nta kimenyetso cyatanzwe kigaragaza ko habayeho gahunda y'izahura yatanzwe na Splendid Kalisimbi Ltd en liquidation, gusuzuma niba umucungamutungo w'agateganyo atarubahirije amategeko no gusuzuma niba Urukiko rwaremeje ko izahura rya Splendid Kalisimbi Ltd en liquidation rishoboka mu buryo n'amategeko zavuzwe haruguru bunvuranviie bitahabwa ishingiro, kubera ko, nk'uko byasobanuwe mu gika cya 9, cy'urubanza rujuririrwa, yasabaga ibidashoboka hashingiwe ku ngingo ya 4 y'Itegeko Nº 35/2013 ryo ku wa 29/05/2013 ryavuzwe haruguru, iteganya ko "uhereye ku itariki y'itangizwa ry'uburyo bw'ikurikirana ry'igihombo gutangiza cyangwa gukomeza ibirego by'umuntu ubwe cyangwa uburyo bw'ikurikirana bureba ibintu by'ugomba kwishyura hamwe n'uburenganzira, inshingano cyangwa uburyozwe by'ugomba kwishyura biba bisubitswe, bityo rero Urukiko Rukuru rw'Ubucuruzi rukaba nta kosa rwakoze, kuko rutagombaga gufata icyemezo ku birebana n'izahura rya sosiyete cyangwa uburyo bw'ikurikirana bureba ibintu byayo kubera ko Splendid Kalisimbi Ltd yari yarangije gushyirwa mu gihomba.

b) Ku birebana no kumenya niba ingwate BRD Ltd yahawe yakurwa mu mitungo igomba kugurishwa n'uwashinzwe iseswa n'isaranganyamutungo.

[17] Me Mugeni Anita avuga ko, BRD Ltd yahawe ingwate na Splendid Kalisimbi Ltd en liquidation none ikaba yarashyizwe mu cyamunara, bikaba bitinze kandi ko kuva iyo ngwate yarishingiwe na BRD Ltd 100%, bivuze ko igihe habaye iseswa, ifite uburenganzira bwo gukuramo ingwate yayo ikayigurishiriza nk'uko biteganywa n'ingingo ya 37 ter, y'Itegeko ryerekeye izahura ry'ubucuruzi n'irangiza ry'ibibazo biturutse ku gihombo ryo mu mwaka wa 2009 yagiye ivugururwa mu mwaka wa 2013-2018.

[18] Me Mukwende Milimo Olivier, uhagarariye Splendid Kalisimbi Ltd en liquidation avuga ko ubushake bwo guteza cyamunara buhari, ko BRD Ltd imaze kwishyurwa 99.000.000 Frw kandi ko itagomba kwishyurwa yonyine, kuko hari n'abandi baberewemo umwenda barimo RSSB, RAA, BPR Ltd n'Akarere ka Nyarugenge.

[19] Me Nyiringabo Théoneste avuga ko ibyo BRD Ltd isaba bitakorwa mu gihe sosiyete yasheshwe, ahubwo ko ibyo bikorwa mu gihe cy'izahura.

UKO URUKIKO RUBIBONA

[20] Urukiko rurasanga ibisabwa na BRD Ltd ko ingwate yahawe yakurwa mu mutungo wa Splendid Kalisimbi Ltd en liquidation ugomba kugurishwa n'ushinzwe igihombo, nta shingiro byahabwa, kuko nk'uko biteganywa n'ingingo ya 4 y'Itegeko N°35/2013 ryo ku wa 29/05/2013 ihindura kandi ikuzuza ingingo ya 37, y'Itegeko N°12/2009 ryo ku wa 26/05/2009 ryavuzwe haruguru, nkuko Urukiko Rukuru rw'Ubucuruzi rwabisobanuye mu gika cya 15, cy'urubanza rujuririrwa, kuba Splendid Kalisimbi Ltd en *liquidation* yarasheshwe, ntaho Urukiko rwahera rutegeka ko ingwate BRD Ltd ikurikiranye ikurwa mu yindi mitungo igurishwa, kuko iseswa riba rigamije kugurisha ingwate kugira ngo ababerewemo umwenda bishyurwe.

[21] Hashingiwe ku bisobanuro byatanzwe, Urukiko rurasanga, kuba umwenda BRD Ltd yatanze ufitiwe ingwate kuri

124

uwo mutungo, igomba gutegereza igurisha ry'umutungo wa Splendid Kalisimbi Ltd en liquidation, ikishyurwa, nk'uko biteganywa n'amategeko.

2. Ku bijyanye n'indishyi zasabwe muri uru rubanza

[22] Ababuranira Splendid Kalisimbi Ltd en liquidation bavuga ko yakomeje kuburana uru rubanza ku rwego rw'ubujurire bwa kabiri, basaba Urukiko rw'Ubujurire gutegeka ko yakwishyurwa igihembo cya Avoka kingana na miliyoni eshatu (3.000.000Frw) kuri buri rwego, n'amafaranga y'ikurikiranarubanza angana na miliyoni ebyiri (2.000.000Frw) ku nzego zose urubanza rwaburanishijwemo.

[23] Uburanira BRD Ltd avuga ko indishyi zisabwa nta shingiro ryazo kuko ari uburenganzira ihabwa n'amategeko bwo kugaragaza ibyo itishimiye mu mikirize y'urubanza rujuririrwa harimo n'amategeko atarubahirijwe.

UKO URUKIKO RUBIBONA

[24] Ingingo ya 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 iteganya ko ikirego cy'amafaranga y'ikurikiranarubanza ni ikirego gishamikiye ku kirego cy'iremezo kigamije kwishyuza ibyakoreshejwe mu rubanza.

[25] Urukiko rurasanga Splendid Kalisimbi Ltd en liquidation yaraburaniwe n'aba Avoka yishyura, bityo BRD Ltd igomba kuyiha 500.000Frw y'igihembo cya Avoka na 300.000Frw y'ikurikiranarubanza agenwe mu bushishozi bw'Urukiko kuko ayo isaba ari ikirenga.

III. ICYEMEZO CY'URUKIKO

[26] Rwemeje ko ubujurire bwatanzwe na BRD Ltd nta shingiro bufite.

[27] Rwemeje ko urubanza RCOMA 00476/2017/CHC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 19/05/2017 rudahindutse, uretse amafaranga y'ikurikiranarubanza n'igihembo cya Avoka agenewe Splendid Kalisimbi Ltd (en liquidation) kuri uru rwego.

[28] Rutegetse BRD Ltd guha Splendid Kalisimbi Ltd en liquidation 800.000Frw akubiyemo ay'ikurikiranarubanza n'igihembo cya Avoka.

[29] Ruvuze ko amagarama yatanzwe ahwanye n'ibyakozwe muri uru rubanza.

URUBANZA RW'UBUTEGETSI

9

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IKIGO CY'UBWITEGANYIRIZE MU RWANDA (RSSB) v. TWAGIRAMUNGU

[Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RAD 00004/2018/SC – (Rugege, P.J., Cyanzayire, Kayitesi R, Hitiyaremye na Rukundakuvuga, J.) 30 Nyakanga 2019]

Amategeko agenga umurimo – Impanuka y'akazi – Ubumuga bwo mu mutwe – Ibarwa ry'indishyi zihabwa uwagize ubumuga bwo mu mutwe bukomoka ku mpanuka y'akazi, rikorwa kimwe n'izishingiye k'ubumuga bw'umubiri bwatewe n'impanuka y'akazi ziteganywa n'Iteka rya Perezida.

Incamake y'icyemezo: Twagiramungu yakoze impanuka y'akazi, umukoresha we abimenyesha RSSB, Umuganga wamusuzumye yerekanye ko afite ubumuga buhoraho bwa 45%, naho umuganga ngishwanama wa RSSB we yerekana ko afite ubumuga bwa 10%. Twagiramungu yasabye RSSB kumufasha muri ubwo bumuga yagize, imusubiza ko ntacyo yamumarira kuko nta nyandiko afite zemeza ko yamugaye.

Twagiramungu yareze RSSB mu Rukiko Rwisumbuye asaba ko yahabwa ibyo amategeko amwemerera biturutse ku mpanuka y'akazi yagize asaba no guhabwa indishyi zinyuranye. Urwo Rukiko rwategetse RSSB kumuha amafaranga yatanze yivuza, ayo yatanze ku ngendo yivuza, ay'insimburamushahara y'igihe atashoboye gukora, ay'ubumuga n'amafaranga y'ikurikiranarubanza. Mu kugena amafaranga ay'ubumuga buhoraho, rwashingiye ku kigero cy'ubumuga bwa 45% bwemejwe n'umuganga wo mu bitaro yivurizagamo. RSSB yajuririye Urukiko Rukuru ivuga ko Urukiko rubanza rwemeje urugero rw'ubumuga bwa 45% rwirengagije amategeko igenderaho, ruyitegeka kwishyura Twagiramungu amafaranga yo kwivuza kandi RSSB yarayishyuraga ibitaro byamuvuye, rugena amafaranga y'ingendo mu buryo bunyuranyije n'ibyo amategeko ateganya, rubara nabi amafaranga y'insimbura mushahara, ndetse ruyitegeka kwishyura indishyi kandi ari uwo baburana wishoye mu manza zitari ngombwa. Twagiramungu nawe yatanze ubujurire bwuririye ku bundi. Urukiko rwaciye urubanza rwemeza ko ubujurire bwa RSSB bufite ishingiro ku byerekeye amafaranga yo kwivuza, n'ay'ingendo, rwemeza ko ubujurire bwuririye ku bundi bufite ishingiro ku byerekeye amafaranga y'ikurikiranarubanza n'igihembo cya Avoka, kandi ko amafaranga ya buri kwezi y'ubumuga buhoraho agomba gutangwa guhera umunsi ukurikira uwo impanuka yabereyeho kugeza ku wa 22/03/2013 aho kuba ku wa 31/5/2013 .

RSSB yandikiye Urwego rw'Umuvunyi isaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane ivuga ko mu kugena ubumuga buhoraho Urukiko Rukuru rwirengagije ibyo amategeko ateganya mu gukemura impaka zerekeranye n'ikigero cy'ubumuga bwatewe n'impanuka y'akazi. Urwego rw'Umuvunyi, rwandikiye Perezida w'Urukiko rw'Ikirenga rumusaba ko urwo rubanza rwasubirwamo kumpamvu z'akarengane. Perezida w'Urukiko rw'Ikirenga yemeje ko urwo urubanza rugomba kongera kuburanishwa.

Mu iburanisha Twagiramungu yitabye Urukiko adafite imbaraga zo kuburana, asaba ko rwafata icyemezo gitegeka RSSB kumuha amafaranga yo kwivuza no kumusinyira akajya kwivuza, kuko itamuha amafaranga uko bikwiye, ikaba yaranze no kumusinyira kandi afite ``rendez-vous`` yo kujya kubonana n'Umuganga w'indwara zo mu mutwe. Mu rubanza rubanziriza urundi, Urukiko rwategetse RSSB gufasha Twagiramungu kuvuzwa mu bitaro bya CARAES Ndera ku bijyanye n'indwara yo mu mutwe, no kumuvuza indwara y'umubiri ikomoka ku mpanuka mu bitaro by'Umwami Faysal, kandi ikamufasha no kubona imiti yandikiwe n'abaganga b'ibyo bitaro, Urukiko rwanayitegetse kandi kubahiriza icyemezo cy'Urukiko ku bijyanye n'amafaranga yategetswe kumuha, kimwe n'ibirarane itamuhaye, mu gihe hagitegerejwe umwanzuro w'Abaganga.

RSSB yongeraho ko akarengane ka mbere muri uru rubanza kubara amafaranga y'ubumuga bw'umubiri aruko mu hashingiwe ku rugero ry'ubumuga bwa 45% byagenwe n'abatabifitiye ububasha, ariko ko ubu byakemuwe na Raporo y'Akanama k'Abaganga kashyizweho na **MINISANTE** kagaragaje ko afite ubumuga bw'umubiri bungana na 20%, bakaba basaba ko aricyo gipimo cy'ubumuga cyakoreshwa mu kubara amafaranga y'ubumuga bw'umubiri. Twagiramungu nawe avuga ko yemera ubumuga bwa 20% bw'umubiri bwagaragajwe n'Akanama k'Abaganga.

Iburanisha risubukuwe, RSSB ivuga kandi ko indi mpamvu y'akarengane ishingiye ku mafaranga y'insimburamushahara yabariwe kandi icyo gihe umukoresha we yarakomeje kumuhemba kuva yakora impanuka akaba yarahembwe amezi ane bityo isanga ayo agomba guhabwa ari ayo kuva igihe umukoresha we yahagarikiye umushahara we. Twagiramungu we asanga urukiko ntaho rwibeshye mu kubara ayo mafaranga, bityo ko ayo mafaranga atahinduka.

Ku kibazo cyo kumenya niba ubumuga bwo mu mutwe bwa 80% afite bukomoka ku mpanuka y'akazi yagize ku buryo yahabwa amafaranga ajyana nabwo, avuga ko bwatewe n'uko RSSB itamuvuje neza, agasobanura ko Raporo yakozwe n'Umuganga igaragaza ko ubumuga bwo mu mutwe afite bufitanye isano

n'impanuka yagiriye ku kazi akaba asaba ko RSSB yaryozwa ubwo burangare. RSSB ivuga ko ntakigaragaza ko ubwo bumuga yabutewe n'impanuka bityo ikaba isanga ubwo bumuga bwe bwo mu mutwe butayiryozwa.

Incamake y'icyemezo:1. Ibarwa ry'indishyi zihabwa uwagize ubumuga bwo mu mutwe bukomoka ku mpanuka y'akazi, rikorwa kimwe n'izishingiye k'ubumuga bw'umubiri bwatewe n'impanuka y'akazi ziteganywa n'Iteka rya Perezida.

Ikirego gisaba gusubirishamo urubanza ku mpamvu z'akarengane gifite ishingiro kuri bimwe; Ubujurire bwuririye ku bundi bufite ishingiro kuri bimwe.

Amategeko yashingiweho:

- Itegeko N° 22/2018 yo ku wa 29/4/2018 yerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 12 Iteka rya Minisitiri N° 1931 bis/06 ryo ku wa 08/12/1987 rishyiraho uburyo bwo kumenyesha impanuka n'indwara zikomoka ku kazi, ingingo ya 6 igika cya 4.
- Itegeko Teka ryo ku wa 22/8/1974 rigena ubwiteganyirize bw'abakozi, nk'uko ryahinduwe kandi ryujujwe kugeza ubu, ingingo ya 22 n'iya 23
- Iteka rya Perezida N° 069/01 ryo ku wa 13/04/2018 ryongera amafaranga ya pansiyo n'ay`ibyago bikomoka ku kazi atangwa n'Ikigo cy'Ubwiteganyirize mu Rwanda, ingingo ya 2
- Itegeko ryo ku wa 30 Nyakanga 1888 ryerekeye ibyerekeye imirimo nshinganwa cyangwa amasezerano, ingingo ya 259.

132

Urubanza

I. IMITERERE Y'URUBANZA:

[1] Ku wa 23/11/2012, Twagiramungu Eric yakoze impanuka y'akazi, avunika ukuguru kw'ibumoso maze Trustco Rwanda Company, umukoresha we kuva mu kwezi kwa mbere mu mwaka wa 2012, abimenyesha RSSB. Ku wa 31/05/2013, umuganga ukorera mu bitaro byitiriwe Umwami Faysal wamusuzumye yerekanye ko afite ubumuga buhoraho buri ku kigero cya 45%, naho ku wa 19/06/2013, umuganga ngishwanama wa RSSB we yerekana ko afite ubumuga buri ku kigero cya 10%. Yasabye RSSB kumufasha muri ubwo bumuga yagize biturutse ku mpanuka y'akazi, imusubiza ko ntacyo yamumarira kuko nta nyandiko zemeza ko yamugaye afite.

[2] Twagiramungu Eric yareze RSSB mu Rukiko Rwisumbuye rwa Nyarugenge, asaba kuyitegeka ko imuha ibyo amategeko amwemerera biturutse ku mpanuka y'akazi yakoze, nk'ibijyanye n'insimburamushahara na pansiyo y'izabukuru, asaba no guhabwa indishyi zinyuranye.

[3] Ku wa 30/12/2014, Urukiko Rwisumbuye rwa Nyarugenge, rwaciye urubanza RAD 0132/13/TGI/NYGE, rwemeza ko ikirego cyatanzwe na Twagiramungu Eric gifite ishingiro kuri bimwe, rutegeka RSSB kumuha:

2.336.140Frw yatanze yivuza; 438.000Frw yatanze ku ngendo yivuza; 125.640Frw y'insimburamushahara mu gihe cy'iminsi 180 atashoboye gukora; 20.947Frw y'ubumuga buri kwezi, ibyo bigakorwa kuva ku wa 31/5/2013, igihe muganga w'ibitaro by'Umwami Faysal yemereje urugero rw`ubumuga buhoraho bwa Twagiramungu Eric; gususubiza Twagiramungu Eric 200.000Frw y'ikurikiranarubanza.

[4] Mu kugena amafaranga y'ubumuga buhoraho, Urukiko rwavuze ko urugero rw'ubumuga bugomba gushingirwaho ari ubwemejwe n'umuganga wo mu Bitaro byitiriwe Umwami Faysal bwerekanywe muri raporo yo ku wa 31/5/2013, rwerekana ko Twagiramungu Eric afite ubumuga bwa 45% kubera ko ari naho yivurizaga, bakaba aribo bari baramukurikiranye mu burwayi bwe, aho gushingira kuri raporo yo ku wa 19/6/2013 yakozwe n'umuganga ngishwanama wa RSSB yerekana ko ubumuga afite ari 10% kubera ko urukiko rukemanga ukuri kuyikubiyemo kubera ko yakozwe n'umuganga w'uregwa.

[5] Mu kugena amafaranga y'insimburamushahara, Urukiko rwashingiye ku mafaranga yahembwaga angana na 27.943Frw, ruvuga ko umushahara ngereranyo w'umunsi ari 27.943 x 3:90 = 931Frw, aya mafaranga akubwa 75% by'umushahara ngereranyo wa buri munsi.

RSSB yajuririye Urukiko Rukuru ivuga ko Urukiko [6] Rwisumbuye rwemeje urugero rw'ubumuga bwa 45% rwirengagije amategeko igenderaho, ruyitegeka kwishyura Twagiramungu amafaranga yo kwivuza kandi yarayishyuraga ibitaro byamuvuye, rugena amafaranga y'ingendo mu buryo bunyuranyije n'ibyo amategeko ateganya, rubara nabi y'insimbura mushahara, amafaranga ndetse ruvitegeka kwishyura indishyi kandi ari uwo baburana wishoye mu manza zitari ngombwa. Twagiramungu nawe yatanze ubujurire bwuririye ku bundi.

[7] Urukiko Rukuru rwaciye urubanza RADA 0007/15/HC/KIG ku wa 30/04/2015, rwemeza ko ubujurire bwa RSSB bufite ishingiro ku byerekeye amafaranga yo kwivuza 2.336.140, n'av'ingendo 438.000 yari vategetswe guha Twagiramungu, akaba avanyweho, rwemeza ko ubujurire bwuririye ku bundi bwa Twagiramungu Eric bufite ishingiro ku byerekeye amafaranga y'ikurikiranarubanza n'igihembo cya Avoka, rutegeka RSSB kumuha 300.000Frw na 100.000Frw yiyongera ku mafaranga yari yategetswe kumuha mu rubanza rwajuririwe. Urukiko rwemeje kandi ko amafaranga 20.947Frw ya buri kwezi y'ubumuga buhoraho agomba gutangwa guhera umunsi ukurikira uwo impanuka yabereyeho kugeza ku wa 22/03/2013 aho kuba ku wa 31/5/2013, ni ukuvuga iminsi 119 aho kubara iminsi 180.

[8] RSSB yandikiye Urwego rw'Umuvunyi isaba ko urwo rubanza rwasubirishwamo ku mpamvu z'akarengane, ivuga ko mu kugena ubumuga buhoraho bwa Twagiramungu, Urukiko Rukuru rwirengagije amategeko kandi hari uburyo ateganya mu gukemura impaka zerekeranye n'ikigero cy'ubumuga bwatewe n'impanuka y'akazi, iyo nzira RSSB ikaba yari yarayitangije yandikira Minisitiri w'Ubuzima imusaba ko yashyiraho Akanama k'Abaganga bo gupima Twagiramungu nk'uko biteganywa n'ingingo ya 6 y'Iteka rya Minisitiri N°1931BIS/06 ryo ku wa 08/12/1987 rishyiraho uburyo bwo kumenyesha impanuka n'indwara zikomoka ku kazi.

[9] Urwego rw'Umuvunyi, rwandikiye Perezida w'Urukiko rw'Ikirenga, ruvuga ko imikirize y'urubanza N° RADA

0007/15/HC/KIG igaragaramo akarengane¹, rusaba ko rwasubirwamo.

[10] Perezida w'Urukiko rw'Ikirenga, ashingiye kuri Raporo y'Ubugenzuzi Bukuru bw'Inkiko, mu cyemezo N° 028/2018 yemeje ko urubanza RADA 0007/15/HC/KIG rugomba kongera kuburanishwa, iburanisha rishyirwa kuwa 24/07/2018, ariko uwo munsi ugeze, ntirwaburanishwa kubera ivugururwa ry'amategeko.

[11] Iburanisha ry`urubanza ryashyizwe ku wa 10/10/2018, urubanza ntirwaburanishwa kubera ko Twagiramungu Eric yitabye ariko adafite imbaraga zo kuburana, ahubwo asaba Urukiko ko rwafata icyemezo gitegeka RSSB kumuha amafaranga yo kwivuza no kumusinyira akajya kwivuza, kuko itamuha amafaranga uko bikwiye, ikaba yaranze no kumusinyira kandi afite ``rendez-vous`` yo kujya kubonana n'Umuganga w'indwara zo mu mutwe. Yasobanuye ko abaganga bo mu bitaro byitiriwe Umwami Faysal bamukurikirana, basanze afite ikibazo mu mutwe bamwohereza mu bitaro by`indwara zo mu mutwe i Ndera, iburanisha rishyirwa ku munsi utazwi (sine die).

136

¹ Urwego rw'Umuvunyi rusobanura ko Urukiko Rukuru rwashingiye ku kigero cy'ubumuga buhoraho RSSB itemera kandi ntirwakurikiza amategeko mu bijyanye no gukemura impaka zijyanye n'ikigero cy'ubumuga bwatewe n'impanuka yo ku kazi.

Ruvuga ko mu gihe Urukiko rwabonaga ko ubwumvikane hagati ya Twagiramungu Eric na RSSB bwananiranye, kandi rukaba rwari rwamenyeshejwe ko RSSB yandikiye Minisitiri w'Ubuzima imusaba ko yashyiraho Akanama k'abaganga nk'uko biteganywa n'ingingo ya 6 y'Iteka rya Minisitiri N° 1931/bis/06 ryo ku wa 08/12/1974 rishyiraho uburyo bwo kumenyesha impanuka n'indwara zikomoka ku kazi, rwari gukoresha ububasha bwarwo maze ishyirwaho ry'ako kanama rikihutishwa ariko ntiruce urubanza rushingiye kuri raporo z'abaganga zitumvikanweho, kandi itegeko riteganya uko bikemuka iyo habayeho impaka nk'izo.

[12] Uru Rukiko rukurikije icyemezo cyo ku wa 01/10/2018 cy'Akanama k'Abaganga kemeje ko Twagiramungu Eric agomba gupimwa ibyerekeye uburwayi bwe bwo mu mutwe nyuma yo guhabwa ubuvuzi bukwiye; rukurikije raporo yo ku wa 23/2/2017 yatanzwe na Muganga w'ibitaro bya CARAES Ndera igaragaza ko Twagiramungu Eric afite ubumuga buhoraho buri ku kigero cya 80%; rwategetse RSSB gufasha Twagiramungu kuvuzwa mu bitaro bya CARAES Ndera ku bijyanye n'indwara yo mu mutwe, no kumuvuza indwara y'umubiri ikomoka ku mpanuka mu bitaro by`Umwami Faysal, kandi ikamufasha no kubona imiti yandikiwe n'abaganga b'ibyo bitaro.

[13] Urukiko rwategetse kandi ko Twagiramungu nyuma y'amezi 3, azongera gusuzumwa n'Akanama k'Abaganga kavuzwe haruguru, kugira ngo hagaragazwe ubumuga bwe buhoraho (ubumuga bw'umubiri n'ubw'umutwe), ndetse hakagaragazwa n'itariki ibikomere byasubiranye (consolidation). Rwategetse RSSB kubahiriza icyemezo cy'Urukiko ku bijyanye n'amafaranga yategetswe guha Twagiramungu Eric, kimwe n'ibirarane itamuhaye, mu gihe hagitegerejwe umwanzuro w'Abaganga.

[14] Urubanza rwagombaga kuburanishwa ku wa 23/04/2019 ariko uwo munsi iburanisha ntiryaba kubera ko Twagiramungu nta Avoka yari afite umwunganira kuko Me Murekatete B. Marguerite wari usanzwe amwunganira, yari yarafatiwe ibihano atarabirangiza. Iburanisha ryimuriwe ku wa 28/05/2019, ababuranyi bose bamenyeshwa iyo tariki.

[15] Mbere y'uko iburanisha risubukurwa, Twagiramungu yashatse undi avoka witwa Me Karangwayire Epiphanie kugirango amwunganire, ariko ibyo Twagiramungu Eric yategetswe n'Urukiko byo kongera gusuzumwa n'Akanama

k'Abaganga, kugira ngo hagaragazwe ubumuga bwe buhoraho (ubumuga bw'umubiri n'ubw'umutwe), ndetse hakagaragazwa n'itariki ibikomere byasubiranye (consolidation) bikaba bitarakozwe.

[16] Me Karangwayire Epiphanie umwunganira yashyikirije Urukiko inyandiko zirimo ibaruwa yo ku wa 16/04/2019 RSSB yandikiye Twagiramungu imwibutsa ko agomba kujya mu bitaro byitiriwe Umwami Faysal kwipimisha kugirango muganga agaragaze ubumuga asigaranye.

[17] Urubanza rwongeye kuburanishwa ku wa 28/05/2019 hasuzumwa niba ibyategetswe n'Urukiko byo gupima ubumuga bwa Twagiramungu Eric byaba byarakozwe, rusanga bitarigeze bikorwa, muri iryo buranisha hanasuzumwe ibyasabwe na Twagiramungu by'uko yaba ahawe amafaranga yo kumutunga mu gihe urubanza rutaracibwa, kuko ubuzima bwe bugenda burushaho kwangirika kubera ko haziyemo n'izindi ndwara zikomoka ku kuba atavuzwa uko bikwiye, kutabona imiti yandikiwe na muganga no kuba abayeho ubuzima bubi kuko adafite ikimutunga n'uburyo bwo kuriha abamufasha.

[18] Urukiko rwafashe icyemezo cy'agateganyo (ADD) kuri ibyo byasabwe na Twagiramungu Eric, rutegeka MINISANTE gushyiraho Akanama k'abaganga ku buryo bwihuse kagomba kugaragaza ubumuga bwo mu mutwe n'ubw'umubiri Twagiramungu Eric afite n'aho agomba kuvurirwa, kandi raporo ikaba yageze mu Bwanditsi bw'Urukiko rw'Ikirenga bitarenze ku wa 20/06/2019, rutegeka RSSB guhita imuvuza indwara zikomoka ku bumuga yatewe n'impanuka mu bitaro byitiriwe Umwami Faysal no mu bitaro by' i Ndera bivura indwara zo mu mutwe n'ahandi hose hagenwa n'abaganga bo muri ibyo bitaro, rutegeka RSSB kumugurira imiti yose yandikiwe n'abaganga bidatinze kugirango hirindwe izindi ngaruka mbi ku buzima bwe, rutegeka RSSB guhita iha Twagiramungu Eric 2.000.000 Frw yo kumufasha kubaho n`ingendo zo kwivuza mu gihe urubanza rutararangira, rutegeka RSSB gukurikirana ko raporo y'akanama k'abaganga iboneka ikagezwa ku Rukiko, Twagiramungu Eric nawe ategekwa kwitaba Akanama k'abaganga igihe cyose kamukeneye.

[19] MINISANTE yagejeje ku Rukiko rw'Ikirenga Raporo y'Akanama k'Abaganga ku wa 08/7/2019 nk'uko yari yabitegetswe. Iyo raporo igaragaza ko Twagiramungu Eric afite ubumuga bw'umubiri bungana na 20%, n'ubumuga bwo mu mutwe bungana na 80%.

[20] Urubanza rwongeye kuburanishwa ku wa 10/07/2019, RSSB ihagarariwe na Me Nsabimana James afatanyije na Me Sekabuke Jean Paul, Twagiramungu Eric yunganiwe na Me Karangwayire Epiphanie, Me Murekatete Marguerite na Me Twagirumugabe Alexis. Iburanisha ryarapfundikiwe, ababuranyi bamenyeshwa ko urubanza ruzasomwa ku wa 30/07/2019.

II.IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

Kumenya amafaranga Twagiramungu Eric agomba guhabwa ahwanye n'ubumuga bw'umubiri.

[21] Me Nsabimana James na Me Sekabuke Jean Paul bahagarariye RSSB bavuga ko akarengane ka mbere muri uru rubanza ari uko Urukiko Rukuru rwa Kigali mu kubara amafaranga y'ubumuga bw'umubiri agomba kugenerwa Twagiramungu, rwashingiye ku ngano y'ubumuga bwa 45% yagenwe n`abatabifitiye ububasha, ko ariko kuri ubu byakemuwe na Raporo y'Akanama k'Abaganga kashyizweho na MINISANTE kagaragaje ko afite ubumuga bw'umubiri bungana na 20%, bakaba basaba ko aricyo gipimo cy'ubumuga (taux d'incapacité physique/physical disability) cyakoreshwa mu kubara amafaranga y'ubumuga bw'umubiri Twagiramungu agomba kugenerwa.

Me Nsabimana James na Me Sekabuke Jean Paul bavuga [22] kandi ko uburyo bwakoreshejwe n'Urukiko Rukuru habarwa ayo mafaranga atari bwo kuko Umucamanza yayabaze nk'insimburamushahara, aho yafashe umushahara yabonaga ku munsi wa 931 (27.943Frw ku kwezi) x iminsi 30 x 75% x 45%= 20.847Frw, aho gufata umushahara we ku munsi wa 931 x30 x 85% x 20% =4.748Frw, akaba ariyo agomba kubona buri kwezi. Bavuga ariko ko hashingiwe ku ngingo ya 2 y'Iteka rya Perezida Nº 069/01 ryo ku wa 13/04/2018 ryongera amafaranga ya pansiyo n'ay`ibyago bikomoka ku kazi atangwa n'Ikigo cy'ubwiteganyirize mu Rwanda, Twagiramungu Eric yahabwa 13.000Frw buri kwezi.

[23] Me Karangwayire Epiphanie, Me Murekatete Marguerite na Twagirumugabe Alexis bunganira Twagiramungu, bavuga ko bemera ubumuga bwa 20% bw'umubiri bwa Twagiramungu bwagaragajwe n'Akanama k'Abaganga.

UKO URUKIKO RUBIBONA

[24] Urukiko rusanga koko mu kugenera Twagiramungu amafaranga y`ubumuga, Urukiko Rukuru rwaranyuranyije n`ibiteganywa n`Itegeko kuko rwashingiye ku gipimo cy`ubumuga cya 45% cyagenwe n`umuganga wamuvuye, aho

140

kugenwa n'Akanama k'Abaganga nkuko biteganywa n'ingingo ya 6, igika cyayo cya 4 y'Iteka rya Minisitiri N° 1931 bis/06 ryo ku wa 08/12/1987 rishyiraho uburyo bwo kumenyesha impanuka n'indwara zikomoka ku kazi iteganya ko: ``[......], iyo habaye impaka ku byerekeye itariki umurwayi yakiriyeho, ku gihe ibikomere byoroheyeho cyangwa se ku kigereranyo cy'ubumuga bwe budatezuka, nyir'ubwite ashyikiriza ikibazo Akanama Karenganura, nako kakifashisha Akanama k'Abaganga gashyirwaho na Minisitiri ushinzwe ubuzima mu gukemura izo mpaka``.

[25] Urukiko rw'Ikirenga rusanga rero uburyo ayo mafaranga yabazwemo bitarakurikije amategeko kuko nk'uko byagaragajwe na Raporo y'Akanama k'Abaganga kashyizweho na Minisitiri w'ubuzima, Twagiramungu afite ubumuga bw'umubiri bungana na 20% aho kuba 45%, bityo akaba agomba kugenerwa amafaranga y'ubumuga bw'umubiri hashingiwe ku rugero rw'ubumuga bwa 20%, no ku gipimo cya 75% cy'umushara we wa buri munsi nk'uko biteganywa n'ingingo ya 23 y'Itegeko -Teka ryo ku wa 22/8/1974 rigena ubwiteganyirize bw'abakozi, nk'uko ryahinduwe kandi ryujujwe kugeza ubu ivuga ko umukozi utarakira burundu, ni ukuvuga ufite ubumuga budahoraho, ahabwa amafanga angana na 75% by'umushara we wa buri munsi, akaba rero agomba kubona (931x30x75%x20%)= 4,189Frw buri kwezi. Rusanga ariko hashingiwe ku ngingo ya 2 y'Iteka rya Perezida Nº 069/01 ryo ku wa 13/04/2018 ryongera amafaranga ya pansiyo n'ay`ibyago bikomoka ku kazi atangwa n'Ikigo cy'Ubwiteganyirize mu Rwanda iteganyako amafaranga y'ubwiteganyirize bwa pansiyo n'ay'ibyago bikomoka ku kazi ahabwa uwiteganyirije adashobora kujya munsi y'ibihumbi cumi na bitatu (13.000Frw) ku kwezi``. Urukiko rusanga rero ayo Twagiramungu Eric agomba guhabwa ari 13.000Frw ku kwezi, aho kuba 20,947Frw nk'uko byari byemejwe mu rubanza rusabirwa gusubirishwamo ku mpamvu z'akarengane.

Kumenya ingano y'amafaranga y'insimburamushahara Twagiramungu Eric yagombaga guhabwa.

[26] Me Nsabimana James na Me Sekabuke Jean Paul baburanira RSSB bavuga ko indi mpamvu y'akarengane ishingiye ku mafaranga y'insimburamushahara yabariwe Twagiramungu, basobanura ko Urukiko rwamuhaye amafaranga kandi icyo gihe umukoresha we yarakomeje kumuhemba kuva yakora impanuka ku wa 23/11/2012. Bavuga ko yahembwe amezi ane (4): ukwezi kwa 11/2012, ukwa 12/2012, ukwa 01/2013 n'ukwa 2/2013, bakaba basanga ayo agomba guhabwa ari ayo kuva igihe umukoresha we yahagarikiye umushahara we, ko basanga agomba kubarirwa umushahara w`iminsi 21, aho kuba iminsi 119, ko kuba urukiko rwaramubariye iminsi ingana gutyo ari akarengane muri urwo rubanza gakwiye gukosorwa.

[27] Me Karangwayire Epiphanie, Me Murekatete Marguerite na Me Twagirumugabe Alexis bunganira Twagiramungu bo basanga ku mibare y'amafaranga yatanzwe n'Urukiko mu rubanza rusabirwa gusubirishwamo ku mpamvu z'akarengane ntaho rwibeshye, ko ayo mafaranga atahinduka.

UKO URUKIKO RUBIBONA

[28] Urukiko rw'Ikirenga rusanga amafaranga y'insimburamushahara angana na 83,062 Frw mu gihe cy'iminsi 119 yagenwe n'Urukiko Rukuru ariyo Twagiramungu yagombaga guhabwa, kuko nta kimenyetso RSSB yatanze kigaragaza ko kuva aho yakoreye impanuka, yakomeje guhembwa mu gihe cy'iminsi 119 aho kuba 21, hashingiwe ku

142

ngingo ya 12 y'Itegeko N°22/2018 yo ku wa 29/4/2018 yerekeye imiburanishirize y`imanza z`imbonezamubano, iz`ubucuruzi, iz'umurimo n,iz,ubutegetsi ivuga ko "urega agomba kugaragaza ibimenyetso by`ibyo aregera, iyo abibuze uwarezwe aratsinda [...]", bityo hakaba nta karengane RSSB yagiriwe mu buryo bwo kubara amafaranga nsimburamushahara.

Kumenya niba ubumuga bwo mu mutwe bwa 80% Twagiramungu Eric afite bukomoka ku mpanuka y'akazi yagize ku wa 23/12/2012, ku buryo yahabwa amafaranga ajyana nabwo.

[29] Me Karangwayire Epiphanie, Me Murekatete Marguerite na Me Twagirumugabe Alexis bunganira Twagiramungu Eric bavuga ko ubumuga bwo mu mutwe Twagiramungu Eric afite bungana na 80% bwatewe n'uko RSSB itamuvuje neza, bagasobanura ko Raporo yakozwe n'Umuganga w'ibitaro byitiriwe Umwami Faysal igaragaza ko ubumuga bwo mu mutwe Twagiramungu afite bufitanye isano n'impanuka yagiriye ku kazi kuko yahanutse aho yubakaga (mu rwego rw'akazi) akubita umutwe mu kirahuri, ko ariko yavujwe akaguru konyine n'ubwo bagaragaje ko afite ikibazo mu mutwe hamwe n'icy`amenyo yacitse. Bagasobanura ko uko kutamuvura izo ndwara zindi byatumye ubumuga bwo mu mutwe buzamuka bukagera ku rugero rwa 80% rwagaragajwe n'Akanama k'Abaganga, bakaba basanga RSSB igomba kuryozwa ubwo burangare, bashingiye ku ngingo za 258, 259 na 260 z'Itegeko ryo ku wa 30 Nyakanga 1888 ryerekeye ibyerekeye imirimo nshinganwa cyangwa amasezerano, igaha Twagiramungu indishyi zinyuranye zasabwe mu rubanza cyane cyane ko yakoze impanuka akiri muto, ubu akaba ntacyo ashobora kwimarira.

[30] Me Nsabimana James na Me Sekabuke Jean Paul baburanira RSSB, bavuga ko Akanama k'Abaganga kagaragaje ko Twagiramungu afite ubumuga bwo mu mutwe bungana koko na 80%, ariko ko abamwunganira batagaragaza ko ubwo bumuga yabutewe n'impanuka yabaye ku wa 23/11/2012, ahubwo bakavuga ko yabutewe na RSSB kubera kutamuvuza. Basobanura ahubwo ko hari Raporo yakozwe n'Umuganga w'ibitaro bya CARAES Ndera yo ku wa 19/03/2019 igaragaza ko Twagiramungu Eric yagize ``traumatisme cranien``, bo bakaba basanga ubwo bumuga bwe bwo mu mutwe butaryozwa RSSB, ko bo bemera ko yagize impanuka akagira ikibazo ku kuguru gusa, kuko Twagiramungu akora impanuka yayikoreye ahantu hatari ``étage``, kuburyo nta kuntu yaba yaraguye akabanza umutwe hasi. Basaba ko harebwa ``medical file`` ye mu Bitaro by'Umwami Faysal niba yarigeze yivuza mu mutwe.

UKO URUKIKO RUBIBONA.

[31] Dosiye y'urubanza igaragaza inyandiko yo ku wa 21/9//2015 RSSB yandikiye ibitaro byitiriwe Umwami Faysal, iha Twagiramungu uburenganzira bwo kwivuriza muri ibyo bitaro, ikavuga ko icyo yishingiye ari ukuvurwa ukuguru gusa.

[32] Dosiye y'urubanza igaragaza ko mu nyandiko y'isuzumwa rya Twagiramungu Eric ku itariki ya 01/10/2016, Umuganga wa KFH (Neurosurgery Departement), Dr Nkusi E. yagaragaje ko Twagiramungu yagize ibikomere mu bwonko hamwe n'imvune y'ukuguru kw'ibumoso, abivuga muri aya magambo y'icyongereza: *Eric Twagiramungu, 25 years old: traumatic brain injury in 2012 and left leg injury.*

144 ____

[33] Dosiye igaragaza kandi inyandiko y`imiti iri mu rurimi rw`Icyongereza Umuganga w`amenyo w`ibitaro byitiriwe Umwami Faysal yandikiye Twagiramungu igaragaza ko yatakaje amenyo abiri (2) yangirika n`urwasaya ku buryo adashobora kurya neza`` (this above patient lost 2 units of teeth which affects themasticatory function. We recommend to replace the missing 2 units of flexible partial denture.... for 190,000RWF). Abimenyesha kandi RSSB.

[34] Dosiye igaragaza nanone raporo ya Dr Sebera Fidel aho yerekanye mu rurimi rw`igifaransa ko Twagiramungu Eric yagize "traumatisme cranien" ikomoka ku mpanuka y`akazi yagize mu mwaka wa 2012 "(L'Hôpital Caraes a recu Twagiramungu le 14/10/2016 avec un transfert de CHK avec un tableau Clinique dominé par errance, l`agressivité, comportement hallucinatoire, langage incohérent, instabilité biscomotrice, insomnia associé àdes céphalées. Ce tableau clinique est survenu à la suite d`un accident de travail ayant occasioné un traumatisme cranien. Cet accident est survenu en 2012 (cote 85)".

[35] Urukiko rw'Ikirenga rurasanga igihe Twagiramungu yagiraga impanuka, RSSB yari yishingiye kumuvuza gusa ubumuga bw'ukuguru nk'uko bigaragazwa n'inyandiko yo ku wa 21/9/2015 yandikiye ibitaro byitiriwe Umwami Faysal. Urukiko rurasanga ariko nkuko bigaragazwa na Raporo zakozwe n'abaganga batandukanye bagiye basuzuma Twagiramungu, mu bisobanuro byabo, bose bagaragaje ko igihe cy'impanuka habaye kwangirika mu bwonko, RSSB ikaba itarigize imuvuza ubwo burwayi bundi nyamara yari yabugaragarijwe n'abaganga bamukurikiranye. Urukiko rusanga rero RSSB ntaho yahera ihakana ko ubwo burwayi bwo mu mutwe budakomoka kuri iyo

mpanuka yagize ku wa 23/11/2012, ko ari indwara zo mu mutwe yari asanganywe nk`uko ishaka kubyemeza, cyangwa se yaba ari indi mpanuka yaba yarakoze yabiteye nk'uko ibivuga.

[36] Hashingiwe ku bimaze kugaragazwa, Urukiko rusanga kuba RSSB itaravuje Twagiramungu n'ubwo bumuga bwo mu mutwe bwatewe n'impanuka yagize yo ku wa 23/11/2012 kandi yaragombaga kubikora nkuko yabikoze ku bumuga bw'akaguru, hashingiwe ku ngingo ya 22 y'Itegeko-Teka ryo ku wa 22/8/1974 rigenga ubwiteganyirize bw'abakozi nk'uko ryavuguruwe kandi ryujujwe kugeza ubu iteganya ubuvuzi bw'umukozi wagize impanuka y'akazi, kuko iyi ngingo y'Itegeko itavuga ko RSSB yishingira gusa ubumuga bw'umubiri, ikaba rero igomba kuryozwa n'ikiguzi cy'ubuvuzi bw'ubumuga bwo mu mutwe bungana na 80% nk'uko Akanama k'Abaganga kabigaragaje muri Raporo yako yo ku wa 08/7/2019.

[37] Ku birebana n'amafaranga y'ubwo buvuzi bw'ubumuga bwo mu mutwe, Urukiko rusanga nk'uko amafaranga y'ubumuga bw'umuburi yabazwe ari nako amafaranga y'ubumuga bwo mu mutwe agomba kubarwa, bityo RSSB ikaba igomba guha Twagiramungu buri kwezi amafaranga abazwe mu buryo bukurikira: 931 x 30x75% x 80% = 16,758Frw buri kwezi, bityo yose hamwe harimo n'ay'ubumuga bw'umubiri RSSB ikaba igomba kujya imuha buri kwezi 16,758Frw +13,000 Frw =29,758Frw.

Kumenya niba ubujurire bwuririye ku bundi bwatanzwe na Twagiramungu Eric bufite ishingiro.

[38] Twagiramungu n'Abavoka bamwunganira basaba mu bujurire bwuririye ku bwa RSSB ko Urukiko rwategeka ko Twagiramungu avurizwa mu mahanga kubera ko RSSB yatinze kumuvuza, igashyira ubuzima bwe mu kaga kurushaho, bituma ubumuga bwe buzamuka kugeza mu mutwe. Basaba kandi ko yavurwa urwasaya rwangiritse igihe cy`impanuka akanasimburirwa amenyo abiri yatakaje icyo gihe.

[39] Bavuga ko ibyo kumwohereza mu mahanga bidashobotse, basaba ko Urukiko rwafata icyemezo cyo kumutandukanya na RSSB kuko yarangije kumukorera iyicarubozo, Urukiko rukaba rwamugenera 60.000.000 Frw yo kwivuza hamwe na 50.000.000Frw yo kubaho.

[40] Banasaba kandi ko RSSB yabimuhera indishyi z'akababaro na 60,000,000Frw igihembo cya Avoka n`amafaranga yakoresheje asiragizwa mu manza.

[41] Me Nsabimana James na Me Sekabuke Jean Paul baburanira RSSB bavuga ko ibyo kumuvuza hanze batigeze babyanga kuko atariwe waba abaye uwa mbere bavuje hanze y'igihugu, ko ariko ibyo bikorwa ari uko bitegetswe n'abaganga, nyamara kuri Twagiramungu Eric, ibyo bikaba bitarigeze bitegekwa, akaba ahubwo ariwe urushya RSSB yanga gukora ibyo imusaba.

[42] Me Nsabimana James na Me Sekabuke Jean Paul bavuga ko ayo mafaranga atatangwa kuko atari ko amategeko abiteganya, ko ibyo asaba atabyemererwa n'Urukiko.

UKO URUKIKO RUBIBONA

[43] Ku byerekeye kuvurizwa hanze y'Igihugu Twagiramungu asaba, Urukiko rw'Ikirenga rusanga ntaho rwahera rubitegeka, kuko nta cyemezo cyafashwe n'umuganga kigaragaza ko agomba

kuvurizwa hanze bikemezwa n'Akanama k'Abaganga, hakurikijwe inzira zisanzwe zikoreshwa mu gihe ubuvuzi bwo mu gihugu butabifitiye ubushobozi.

[44] Ku birebana n'ibisabwa na Twagiramungu ko Urukiko rwamutandukanya na RSSB, rukamugenera amafaranga yo kwivuza no kubaho, Urukiko rurasanga ntaho rwahera rubyemeza kuko ubwo buryo bwo kugenera uwishingiwe amafaranga akimenya, ntaho biteganyijwe mu Itegeko rigena mu buryo bwihariye ibigenerwa abagize impanuka n'indwara zikomoka ku kazi. Urukiko rurasanga ahubwo RSSB igomba gukomeza kumuvuza indwara zose zikomoka ku mpanuka y'akazi yagize yo ku wa 23/11/2012 zirimo akaguru, urwasaya, gusimbura amenyo, indwara zo mu mutwe kuva aho agiriye impanuka no kugurirwa imiti yose yandikiwe na Muganga.

[45] Naho ku bijyanye n'indishyi zitandukanye Twagiramungu yasabye mu bujurire bwuririye ku bundi, zikaba zigomba gusuzumirwa hamwe n'indishyi zasabwe n'ababuranyi bombi muri uru rubanza.

Ku byerekeye indishyi RSSB isaba

[46] Me Nsabimana James na Me Sekabuke Jean Paul basaba indishyi zingana na 100.000 Frw zo gushorwa mu manza ku maherere.

[47] Abunganira Twagiramungu Eric basanga indishyi zisabwa na RSSB itazihabwa kuko ariyo yamushoye mu manza yanga kumuha ibyo amategeko amugenera nyuma yo gukora impanuka y`akazi kandi yari yarazigamiwe n`umukoresha we.

UKO URUKIKO RUBIBONA

[48] Urukiko rw'Ikirenga rusanga indishyi zisabwa na RSSB zo gushorwa mu manza, itazihabwa kuko ariyo yashoje urubanza kuri uru rwego kandi hakaba hari ibyo itsindiwe

Ku byerekeye indishyi Twagiramungu Eric asaba.

[49] Twagiramungu Eric n`abamwunganira basaba RSSB indishyi zikurikira:

Indishyi zingana na 60.000.000Frw kubera ko RSSB yamurangaranye bituma atavurwa neza, ubumuga bw'umuburi n'ubwo mu mutwe bugenda bwiyongera.

amafaranga 1.000.000 yakoresheje mu ngendo akurikirana urubanza hamwe n'ay`igihembo cya Avoka angana na 1.000.000 Frw.

[50] Me Nsabimana James na Me Sekabuke Jean Paul baburanira RSSB bavuga ko amafaranga y'indishyi zitandukanye asabwa na Twagiramungu Eric atayahabwa kuko atari RSSB yamushoye mu manza.

UKO URUKIKO RUBIBONA

[51] Urukiko rw'Ikirenga rusanga indishyi zisabwa na Twagiramungu Eric zishingiye ku burangare RSSB yamugiriye zifite ishingiro ku bijyanye no kwivuza kwe, imusiragiza mbere yo kumuha ibyemezo bimuhesha uburenganzira bwo kwivuza no kugura imiti, ndetse bikaba bigaragara ko kugeza ubu RSSB yagize uburangare n'umwete muke ntiyamuvuza uko bikwiye urwasaya, ngo inamugurire andi menyo, ibi bikaba byaratumye ubumuga bwe bukomeza kuzamuka hanaziramo n'izindi ndwara, ikaba igomba kubitangira indishyi hashingiwe ku ngingo ya 259 y'Itegeko ryo ku wa 30 Nyakanga 1888 ryerekeye ibyerekeye imirimo nshinganwa cyangwa amasezerano iteganya ko ''umuntu ataryozwa ibyangiritse biturutse ku bikorwa bye bwite gusa, ahubwo anaryozwa ibyangiritse kubera umwete we muke cyangwa ubwitonzi buke''. Urukiko rusanga ariko indishyi Twagiramungu asaba ari nyinshi, mu bushishozi bwarwo rukaba rumugeneye izingana na 12.000.000Frw, hakavanwamo 2.000.000Frw yo kubaho no kwivuza, n'ingendo byategetswe n'uru Rukiko mu rubanza rubanziriza urundi, mu gihe urubanza rwari rutaracibwa burundu, hagasigara10.000.000Frw agomba guhabwa.

[52] Urukiko rusanga kandi Twagiramugu yariyambaje Abavoka bamwunganira muri uru rubanza, hari n`amafaranga yagiye atanga akurikirana urubanza harimo ingendo n`ibindi, kubera iyo mpamvu RSSB ikaba igomba kumuha 1.500.000 Frw y`igihembo cyabo na 300.000Frw y`ikurikiranarubanza.

[53] Ku byerekeye amafaranga yo gusimbuza amenyo, Urukiko rw'Ikirenga rusanga amafaranga Twagiramungu asaba atayahabwa, ahubwo nk'uko byari byategetswe n.uru Rukiko mu rubanza rubanziriza urundi RS/INJUST/RAD 00004/2018/SC rwaciwe ku wa 25/6/2019, RSSB igomba gukomeza kumuvuza indwara zose zikomoka ku bumuga yatewe n'impanuka yo ku wa 23/11/2012, harimo kumuvuza urwasaya no kumugurira amenyo, mu bitaro byitiriwe Umwami Faysal no mu bitaro bya CARAES i Ndera, n'ahandi hose hagenwa n'abaganga b'ibyo bitaro.

III. ICYEMEZO CY'URUKIKO

[54] Rwemeje ko ikirego cyatanzwe na RSSB gisaba gusubirishamo ku mpamvu z'akarengane urubanza RADA 0007/15/HC/KIG rwaciwe n'Urukiko Rukuru rwa Kigali ku wa 30/04/2015 gifite ishingiro kuri bimwe;

[55] Rwemeje ko ubujurire bwuririye ku bundi bwatanzwe na Twagiramungu Eric bufite ishingiro kuri bimwe;

[56] Rwemeje ko imikirize y'urubanza RADA 0007/15/HC/KIG rwaciwe n'Urukiko Rukuru rwa Kigali ku wa 30/04/2015 ihindutse kuri bimwe;

[57] Rwemeje ko Twagiramungu Eric afite ubumuga bw`umubiri bungana na 20%, ubumuga bwo mu mutwe bungana na 80% nk`uko bwemejwe n`Akanama k`Abaganga muri Raporo yako yo ku wa 08/7/2019;

[58] Rwemeje ko ubumuga bwo mu mutwe bwa Twagiramungu Eric bukomoka ku mpanuka y`akazi yagize ku wa 23/11/2012;

[59] Rutegetse RSSB guha Twagiramungu Eric amafaranga y`ubumuga ya buri kwezi angana na 29.758Frw;

[60] Rutegetse ko RSSB igomba gukomeza kumuvuza indwara zose zikomoka ku mpanuka yagize y`akazi yo ku wa 23/11/2012 zirimo akaguru, urwasaya, gusimbura amenyo, indwara zo mu mutwe kuva aho agiriye impanuka y`akazi yo ku wa 23/11/2012, no kugurirwa imiti yose yandikiwe na Muganga kubera ubwo bumuga;

[61] Rutegetse RSSB guha Twagiramungu Eric indishyi zingana na 12.000.000Frw hakavanwamo 2.000.000Frw yahawe ategetswe n'uru Rukiko mu rubanza rubanziriza urundi rwaciwe ku wa 28/05/2019, ikanamuha 300.000Frw y'ikurikiranarubanza hamwe na 1.500.000Frw y'igihembo cya Avoka, yose hamwe akaba angana na 11.800.000Frw.

URUBANZA NSHINJACYAHA

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UBUSHINJACYAHA v. NSENGIYUMVA N'ABANDI

[Rwanda URUKIKO RW'UBUJURIRE – RPA 00074/2018/CA (Muhumuza, P.J., Kaliwabo na Tugireyezu, J.) 12 Nyakanga 2019]

Amategeko mpanabyaha – Gucuruza amahembe y'inzovu – Gucuruza amahembe y'inzovu no kuyashakira isoko ntibigize icyaha cyo gushimuta, kwica, gukomeretsa cyangwa gucuruza inzovu nta n'ubwo bigize kuba icvitso mu gushimuta, kwica, gukomeretsa cvangwa gucuruza inzovu ahubwo bigize icvaha cyo kwakira, gutunga, guhisha cyangwa gutanga ngo bahishe ibicuruzwa bazi neza ko bibujijwe cyangwa bisabirwa uruhushya bvatumijwe cyangwa byinjijwe burvo bunvuranije ти n'amategeko Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo, Ingingo ya 200 (d) (i) (ii).

Incamake y'ikibazo: Uru rubanza rwatangiriye mu Rukiko Rukuru urugereko rwa Rwamagana abaregwa bakurikiranywe n'Ubushinjacyaha ku cyaha cyo gukora ubucuruzi butemewe bw'amahembe y'inzovu mu mwaka wa 2012 kugeza muri Gicurasi 2015, Ubushinjacyaha bukavuga ko bagize uruhare mu kwica inzovu zo mu gihugu cya Tanzaniya, bagakurayo amahembe yazo bambutsaga mu Rwanda, bakayashakira isoko.

Urwo Rukiko rwemeje ko icyaha cyo kwica inzovu rwaregewe kitambuka imipaka kuko Ubushinjacyaha butagaragaje ibimenyetso by'aho inzovu zakuweho amahembe ziciwe, bityo rwemeza ko rudafite ububasha bwo kukiburanisha ku rwego rwa

mbere. Ku birebana n'Urukiko rufite ububasha bwo kuburanisha icyaha cyo gucuruza amahembe y'inzovu, urwo Rukiko rwasanze ibikorwa byo gucuruza amahembe y'inzovu no kuyashakira isoko nta tegeko ribihana mu Rwanda, bityo rwemeza ko urubanza nta Rukiko rugomba koherezwamo, rutegeka ko Nsengiyumva na Karambizi bari bakurikiranywe bafunze barekurwa.

Ubushinjacyaha ntibwishimiye imikirize y'urubanza, bujuririra Urukiko rw'Ikirenga, ubujurire buza koherezwa mu Rukiko rw'Ubujurire nyuma y'ivugururwa ry'inkiko. Mu bujurire bwabwo Ubushinjacyaha buvuga ko Urukiko rukwiye kwemeza ko abaregwa bagize uruhare mu kwica inzovu, kuko bitari gushoboka ko amahembe yazo aboneka zitabanje kwicwa cyangwa ngo zikomeretswe, Ubushinjacyaha bwongeraho ko banahamwa n'ibikorwa byo gucuruza amahembe y'inzovu kuko ngo abaregwa bari abahuza b'abica inzovu bakazikuraho amahembe yazo n'ababa bagomba kuyagura.

Ubushinjacyaha bukomeza busaba gukosora icyemezo cy'Urukiko Rukuru, Urugereko rwa Rwamagana rwavuze ko abaregwa badakwiye gukurikiranwaho icyaha cyo gucuruza amahembe y'inzovu ngo kuko nta tegeko ry'u Rwanda cyangwa amasezerano mpuzamahanga abihana, ko ahubwo Urukiko rwagombaga gushingira ku Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo.

Muri uru rubanza kandi Urukiko rwemeje ko hatumizwa Inshuti y'urukiko kugirango igire ibyo isobanurira Urukiko ku birebana n'icuruza ry'amahembe y'inzovu n'ibiyakomokaho, ni muri urwo rwego hatumiwe Ikigo cy'igihugu cy'iterambere(RDB) maze iyo nshuti y'urukiko isobanura ko hari uburyo bune umuntu ashobora kubonamo amahembe y'inzovu, ubwa mbere akaba ari uko wayica maze ukayikuraho amahembe yayo, ubwa kabiri

156 _____

akaba ari uko wayikomeretsa mu gihe cyo kuyikuraho amahembe, ubwa gatatu akaba ari uko wayagura ku isoko naho ubwa kane akaba ari uko wayatora ku nzovu yipfushije. Yongeyeho kandi ko nubwo amategeko ahana yo mu Rwanda adateganya igihano ku bakora ubucuruzi bw'amahembe y'inzovu n'ibice by'izindi nyamaswa zirinzwe hariho Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo rihana abakora ibyaha byo gucuruza ibice by'inyamaswa zirinzwe n'ibikomoka kuri izo nyamaswa biri ku rutonde rw'ibibanza gusabirwa uruhushya.

Abaregwa baburanye bahakana icyaha uretse Nsengiyumva waburanye yemera gucuruza amahembe y'inzovu ariko akavuga birebana n'Itegeko ry'Umuryango w'Afurika ku ko y'Iburasirazuba rigenga imicungire ya za Gasutamo, ko iryo tegeko ritashingirwaho kuko ngo Ubushinjacyaha butarigaragaje ngo baryisobanureho. Uwitwa Vunumwami we yaburanye avuga ko adakwiye gukurikiranwa ku bikorwa byo gucuruza amahembe y'inzovu kuko nta tegeko ribihana mu Rwanda, naho Semasaka viregura avuga ko Ubushinjacyaha butabashije kugaragaza uruhare rwe mu ikorwa ry'icyaha,bityo ngo akaba agomba kugirwa umwere naho Karambizi we aburana avuga ko Ubushinjacyaha bwahinduye imiburanire mu bujurire kuko ngo mu bujurire baregwa kwica inzovu aho kuba gucuruza amahembe y'inzovu no kuyashakira isoko, akavuga ko ibi byafatwa nk'imiburanire mishya.

Incamake y'icyemezo: 1. Gucuruza amahembe y'inzovu no kuyashakira isoko ntibigize icyaha cyo gushimuta, kwica, gukomeretsa cyangwa gucuruza inzovu nta n'ubwo bigize kuba icyitso mu gushimuta, kwica, gukomeretsa cyangwa gucuruza inzovu ahubwo bigize icyaha cyo kwakira, gutunga, guhisha

cyangwa gutanga ngo bahishe ibicuruzwa bazi neza ko bibujijwe cyangwa bisabirwa uruhushya, byatumijwe cyangwa byinjijwe mu buryo bunyuranije n'amategeko.

2. Urukiko Rukuru ntirwari kwemeza ko nta tegeko rihana gucuruza amahembe y'inzovu kubera ko rwagombaga gushingira ku ngingo ya 200 (d) (i) (ii) y'Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo.

Ubujurire bufite ishingiro kuri bimwe; Imikirize y'urubanza rwajuririwe irahindutse.

Amategeko yashingiweho:

- Itegeko -Ngenga Nº 01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana, ingingo ya 4 n'iya 78, 3°.
- Itegeko Nº 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 1 n'iya 154.
- Itegeko Nº 30/2013 ryo kuwa 24/5/2013 y'Itegeko ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 165 n'iya 190.
- Itegeko Nº 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 110
- Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo, ingingo ya 200 (d) (i) (ii).
- Itegeko Nº 72/2008 ryo ku wa 31/12/2008 rigena itangira gukurikizwa ry'Itegeko Nº1 ryo ku wa 01 Mutarama 2005 ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za gasutamo.

- Amasezerano yerekeye icuruzwa rikorerwa hagati y'ibihugu ku bwoko bw'inyamaswa n'ibimera mu gasozi byenda gucika yabereye i Washington ku wa 3/03/1973, ingingo ya 1,2 n'iya 3.
- Iteka rya Minisitiri Nº 007/2008 ryo ku wa 15/08/20084, rishyiraho urutonde rw'ubwoko bw'inyamaswa n'ibimera birinzwe.

Imanza zifashishijwe:

- Ubushinjacyaha vs Uwamurengeye, RPAA 0110/10/CS rwaciwe n'Urukiko rw'Ikirenga, Icyegeranyo cy'ibyemezo by'inkiko V.1, Nyakanga 2014, p. 133-140.
- Ubushinjacyaha vs CPL Ngabonziza na SGT Biziyaremye, RPAA 0117/07/CS rwaciwe n'Urukiko rw'Ikirenga, Icyegeranyo cy'ibyemezo by'inkiko, Igitabo cya kabiri 2011, Nº 9, P.57-62.
- Ubushinjacyaha vs Mukashema na Bihimana, RPA 0176/11/CS rwaciwe n'Urukiko rw'Ikirenga, Icyegeranyo cy'ibyemezo by'inkiko, V.1-2017, P147-160.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko Rukuru, Urugereko rwa Rwamagana, Ubushinjacyaha burega Nsengiyumva Vincent, Vunumwami Egide, Semasaka Silas na Karambizi Alphonse kuba barakoze ubucuruzi butemewe bw'amahembe y'inzovu mu mwaka wa 2012 kugeza muri Gicurasi 2015 ubwo batangiraga gukurikiranwa, Ubushinjacyaha bukavuga ko bagize uruhare mu kwica inzovu zo mu gihugu cya Tanzaniya, bagakurayo amahembe yazo bambutsaga mu Rwanda, bakayashakira isoko, amafaranga avuyemo bakayagabana.

[2] Ku wa 06/10/2016, Urukiko Rukuru, Urugereko rwa Rwamagana rwaciye urubanza RP 0013/15/HC/RWG, rwemeza ko icyaha cyo kwica inzovu rwaregewe kitambuka imipaka kuko Ubushinjacyaha buvuga ko budafite ibimenyetso by'aho inzovu zakuriweho amahembe ziciwe, bityo rukaba rutagifite ububasha bwo kukiburanisha ku rwego rwa mbere. Ku birebana n'Urukiko rufite ububasha bwo kuburanisha icyaha cyo gucuruza amahembe y'inzovu, Urukiko Rukuru, Urugereko rwa Rwamagana rwasanze ibikorwa byo gucuruza amahembe y'inzovu no kuyashakira isoko nta Tegeko ribihana mu Rwanda, bityo urubanza hakaba nta Rukiko rugomba koherezwamo, rutegeka ko Nsengiyumva Vincent na Karambizi Alphonse bari bakurikiranywe bafunze barekurwa.

[3] Ubushinjacyaha ntibwishimiye imikirize y'urubanza, bujuririra Urukiko rw'Ikirenga, buvuga ko Urukiko rwavuze ko butagaragaje ikimenyetso cy'uko abakurikiranywe bagize uruhare mu kwica inzovu, ariko ko ibi ari ukwirengagiza kuko ntawasobanura ukuntu yafatanywe amahembe y'inzovu atabanje kuyica cyangwa kuyikomeretsa, Urukiko Rukuru, Urugereko rwa Rwamagana rukaba rwarirengagije ko ibyo bikorwa bihanwa n'ingingo ya 417 y'Itegeko-Ngenga N° 01/2012 ryavuzwe haruguru.

[4] Mu bujurire, Ubushinjacyaha buvuga kandi ko mu kwemeza ko abaregwa badakwiye gukurikiranwa, Urukiko Rukuru, Urugereko rwa Rwamagana rwavuze ko nta Tegeko rihari, rihana ibikorwa byo gucuruza amahembe y'inzovu, rwirengagije ibiteganywa n'Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo mu ngingo yaryo ya 200 (d) (i).

[5] Ubushinjacyaha busaba Urukiko kwemeza ko abaregwa bakoze mu buryo bw'impurirane icyaha cyo kwica inzovu no kuzikuraho amahembe yazo bakayacuruza, buri wese agahanishwa igihano cy'igifungo cy'imyaka 10 n'ihazabu iri hagati ya 500.000Frw kugeza na 5.000.000Frw hashingiwe ku ngingo ya 417 y'Igitabo cy'amategeko ahana.

[6] Nyuma y'ivugururwa ry'inkiko, ubujurire bw'Ubushinjacyaha bwoherejwe mu Rukiko rw'Ubujurire hashingiwe ku ngingo ya 52 na 105 z'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko¹, buhabwa N° RPA 00074/2018/CA.

[7] Urubanza rwaburanishijwe ruhame mu ku wa 24/06/2019, Nsengiyumva Vincent yunganiwe na Me Mujawamaliya Immaculée, Vunumwami Egide yunganiwe na Me Kampire Claudine, Semasaka Silas yunganiwe na Me Nyirabasinga Hélène, Karambizi Alphonse yunganiwe na Me Mukesha David, Ubushinjacyaha buhagarariwe na Habineza Jean Damascène, Umushinjacyaha ku Rwego rw'Igihugu, maze Urukiko ruvuga ko urubanza ruzasomwa ku wa 26/07/2019. Kuri uwo munsi Urukiko rwaciye urubanza rubanziriza urundi rwemeza ko iburanisha ripfundurwa hagatumizwa inshuti

¹ Ingingo ya 52 iteganya ko Urukiko rw'Ubujurire rufite ububasha bwo kuburanisha ku rwego rw'ubujurire bwa mbere, imanza zaciwe mu rwego rwa mbere n'Urukiko Rukuru, Urukiko Rukuru rw'Ubucuruzi n'Urukiko Rukuru rwa Gisirikare naho ingingo ya 105, igika cya 1, ivuga ko guhera igihe iri tegeko ritangiriye gukurikizwa, uretse imanza zatangiye kuburanishwa, imanza zose zitakiri mu bubasha bw'urukiko zaregewe, zohererezwa Urukiko rubifitiye ububasha hakurikijwe ibiteganywa n'iri tegeko.

y'Urukiko kugirango igire ibyo isobanurira Urukiko ku birebana n'icuruza ry'amahembe y'inzovu n'ibiyakomokaho birebewe hamwe n'amategeko ahana y'u Rwanda, amategeko arengera ibidukikije, hamwe n'amasezerano mpuzamahanga n'ayo mu karere, u Rwanda rwashyizeho umukono. Hagati aho Perezida w'Urukiko yafashe icyemezo cyo kwagura inteko iburanisha.

[8] Urubanza rwongeye kuburanishwa mu ruhame ku wa 9/9/2019, ababuranyi bitabye Urukiko bunganiwe nka mbere, Ubushinjacyaha buhagarariwe na Rudatinya Gaspard, Umushinjacyaha ku Rwego rw'Igihugu, RDB nk'inshuti y'Urukiko, ihagarariwe na Richard Muvunyi, ukuriye ishami rishinzwe kubungabunga ibidukikije.

Nyuma yo kumva umwirondoro we, kumva inshingano ze [9] n'ubunararibonye bwe mu kubungabunga ibidukikije, Richard Muvunyi yamenyesheje Urukiko ko hari amasezerano yabereye i Washington muri Leta Zunze Ubumwe za Amerika yerekeye icuruzwa rikorerwa hagati y'Ibihugu ku bwoko bw'inyamaswa zo ku gasozi n'ibimera byenda gucika, u Rwanda rwashyizeho umukono, ko ariko nta bihano byateganyirijwe muri ayo inyamaswa bacuruza cyangwa Masezerano ku ibice by'inyamaswa zirinzwe, akaba ariyo mpamvu buri gihugu mu bvashvize umukono kuri ayo masezerano, kigomba kwishyiriraho amategeko ahana ubucuruzi butemewe.

[10] Yasobanuriye Urukiko kandi ko nyuma yo gusesengura, muri RDB baje gusanga Itegeko-Ngenga N^o 04/2005 ryo ku wa 08/04/2005 rigena uburyo bwo kurengera, kubungabunga no guteza imbere ibidukikije mu Rwanda ndetse n'andi mategeko ahana y'u Rwanda yakozwe muri urwo rwego atarigeze ateganya ibihano ku bantu bakora ibyaha byo gucuruza ibice by'inyamaswa zirinzwe n'ibikomoka kuri izo nyamaswa, akaba

162 ____

ari yo mpamvu RDB yateguye umushinga w'itegeko rigamije kuziba icyo cyuho, ubu ukaba warashyikirijwe Guverinoma.

[11] Inshuti y'Urukiko yakomeje imenyesha Urukiko ko ariko n'ubwo amategeko ahana yo mu Rwanda adateganya igihano ku bakora ibikorwa by'ubucuruzi bw'amahembe y'inzovu n'ibice by'izindi nyamaswa zirinzwe, hariho Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo rihana abakora ibyaha byo gucuruza ibice by'inyamaswa zirinzwe n'ibikomoka kuri izo nyamaswa biri ku rutonde rw'ibibanza gusabirwa uruhushya, kandi ko amahembe y'inzovu nayo ari kuri urwo rutonde.

[12] Inshuti y'Urukiko yanavuze kandi ko hari uburyo bune umuntu ashobora kubona amahembe y'inzovu, ubwa mbere akaba ari uko wayica maze ukayikuraho amahembe yayo, ubwa kabiri akaba ari uko wayikomeretsa mu gihe cyo kuyikuraho amahembe, ubwa gatatu akaba ari uko wayagura ku isoko naho ubwa kane akaba ari uko wayatora ku nzovu yipfushije; ko kandi uburyo bwose umuntu yaba abonyemo amahembe y'inzovu, aba agomba gusobanura aho yayakuye, kandi ko gucuruza amahembe y'inzovu bitemewe ku isi hose, haba ari ugucuruza amahembe ubwayo cyangwa se ibiyakomokaho keretse gusa ubifitiye uruhushya.

[13] Nsengiyumva Vincent aburana yemera gucuruza amahembe y'inzovu, agasaba imbabazi, Vunumwami Egide akavuga ko yabikijwe na Nsengiyumva Vincent amahembe y'inzovu ariko we azi ko ari ay'inka, Semasaka na Karambizi Alphonse bakaburana bahakana icyaha naho Ubushinjacyaha bwo bukavuga ko hari ibimenyetso bihamya icyaha Nsengiyumva Vincent na Vunumwami Egide ko ariko budafite ibimenyetso bihagije ku birebana na Semasaka na Karambizi Alphonse.

[14] Ibibazo bigomba gusuzumwa muri uru rubanza akaba ari ukumenya niba ibikorwa abaregwa bakurikiranyweho bigize icyaha n'Itegeko rigomba gushingirwaho mu kubihana no kumenya niba hari ibimenyetso bihamya abakurikiranywe icyaha.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

II.1. Kumenya niba ibikorwa abaregwa bakurikiranyweho bigize icyaha n'Itegeko rigomba gushingirwaho mu kubihana.

[15] Uhagarariye Ubushinjacyaha avuga ko ibikorwa byabaye byo gucuruza amahembe y'inzovu bigize icyaha cyo kwica inzovu, gucuruza amahembe yazo no kuyashakira isoko, akanenga Urukiko Rukuru, Urugereko rwa Rwamagana kuba rwaremeje ko ibyo bikorwa bitagize icyaha, rwirengagije ingingo ya 417 y'Itegeko rishyiraho igitabo cy'amategeko ahana ryakoreshwaga ubwo icyaha cyakorwaga, ihana icyaha cyo gushimuta, gucuruza no kwica inyamaswa zirimo gucika.

[16] Akomeza asaba Urukiko kwemeza ko abaregwa ari ibyitso mu cyaha cyo kwica inzovu kuko amahembe yazo atari gushobora kuboneka, inzovu zitabanje kwicwa cyangwa ngo zikomeretswe, kandi ko banahamwa n'ibikorwa byo gucuruza amahembe yazo kuko bigaragara ko abaregwa ari abahuza (intermédiaires) b'abica inzovu bakazikuraho amahembe n'ababa bagomba kuyagura. Asaba kandi ko mu gufata icyemezo,

164

Urukiko rwazifashisha urubanza RPA ECON 00001/2018/CA rwaciwe n'Urukiko rw'Ubujurire ku wa 6/12/2018 kuko rusa neza n'uru rubanza ku birebana n'ibikorwa byakozwe.

[17] Uhagarariye Ubushinjacyaha asaba gukosora icyemezo cy'Urukiko Rukuru, Urugereko rwa Rwamagana rwavuze ko abaregwa badakwiye gukurikiranwaho icyaha cyo gucuruza amahembe y'inzovu ngo kuko n'ubwo bibujijwe nta tegeko ry'u Rwanda cyangwa amasezerano mpuzamahanga abihana, kubera ko asanga Urukiko Rukuru, Urugereko rwa Rwamagana rwaragombaga gushingira ku Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo mu ngingo yaryo ya 200 mu guhana icyo cyaha.

[18] Nsengiyumva Vincent na Me Mujawamaliya Immaculée umwunganira, bavuga ko Ubushinjacyaha mu Rukiko rw'Ubujurire bwahinduye ikirego kuko bwari bukurikiranye abaregwa ku cyaha cyo gucuruza amahembe y'inzovu gusa ariko ubu bukaba bwongeraho no kwica inzovu, asaba Urukiko ko rwasuzuma niba icyaburanishijweho mu Rukiko Rukuru ari nacyo kiburanishwaho mu Rukiko rw'Ubujurire, rukanareba niba kuba umuntu afite amahembe y'inzovu hagomba kwemezwa byanze bikunze ko aba yabanje kwica inzovu, kuko ushobora kuyabona uyaguze nk'uko byemejwe n'inshuti y'Urukiko. Avuga kandi ko nta rutonde rw'inyamaswa zirimo zicika Ubushinjacyaha bwagaragaje ngo bwerekane ko n'inzovu zirimo.

[19] Ku birebana n'Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo, Me Mujawamaliya Immaculée wunganira Nsengiyumva Vincent asaba ko mu guca urubanza, iryo Tegeko ritashingirwaho, kuko Ubushinjacyaha butarigaragaje ngo baryisobanureho mu Rukiko rw'Ubujurire. [20] Vunumwami Egide na Me Kampire Claudine umwunganira bavuga ko ingingo ya 417 y'igitabo cy'amategeko ahana Ubushinjacyaha bushingiraho itakoreshwa muri uru rubanza, kuko ntaho ihuriye no gucuruza amahembe y'inzovu, uwo yunganira akaba adakwiye gukurikiranwaho iki cyaha. Avuga ko nk'uko bigaragara ku rupapuro rwa 5, urwa 7 n'urwa 10 rw'urubanza rwajuririwe, mu Rukiko Rukuru Ubushinjacyaha bwavuze ko nta bimenyetso bufite ko inzovu ziciwe muri Tanzaniya, ko icyo bukurikiranyeho abaregwa ari ugucuruza no gushaka aho bacururiza amahembe y'inzovu kandi ko byakorewe mu Rwanda, ibyo bikorwa, Vunumwami Egide akaba atagomba kubikurikiranwaho, kuko nta tegeko ribihana.

[21] Semasaka Silas na Me Nyirabasinga Helène umwunganira bavuga ko Ubushinjacyaha butabashije kugaragaza uruhare rwa Semasaka Silas mu ikorwa ry'icyaha, ko ku bw'ibyo agomba kugirwa umwere.

Karambizi [22] Alphonse Me Mukesha David na Ubushinjacyaha umwunganira, bavuga ko bwahinduve imiburanire mu bujurire bukavuga ko icyaha buregera ari ukwica inzovu aho kuba gucuruza amahembe y'inzovu no kuyashakira isoko, ibi bikaba byafatwa nk'imiburanire mishya (moyen nouveau), idashobora gushingirwaho bwa mbere mu rwego rw'ubujurire.

[23] Ku birebana n'Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo, Me Mukesha David wunganira Karambizi Alphonse avuga ko iryo Tegeko ritashingirwaho kuko Ubushinjacyaha butigeze buriburanisha mu Rukiko rubanza kandi ko amahembe y'inzovu atari ibicuruzwa; ko ariko Urukiko rusanze rwarishingiraho rwareba niba u Rwanda rwararishyizeho umukono.

166 ____

UKO URUKIKO RUBIBONA

[24] Inyandiko ziri muri dosiye zigaragaza ko Ubushinjacyaha bukurikiranye abaregwa ku cyaha cyo kwica inzovu, kuba icyitso mu kwica inzovu kuko ngo bitari gushoboka kubona amahembe y'inzovu hatabayeho kubanza kuzica n'icyaha cyo gucuruza amahembe yazo no kuyashakira isoko, ariko Urukiko Rukuru, Urugereko rwa Rwamagana rukaba rwaremeje ko nta bimenyetso bigaragaza ko abakurikiranywe bagize uruhare mu kwica inzovu kandi ko gucuruza amahembe y'inzovu no kuyashakira isoko bitagize icyaha gihanwa n'ingingo ya 417 y'Itegeko rishyiraho igitabo cy'amategeko ahana cyangwa Itegeko-Ngenga N^o 04/2005 ryo ku wa 08/04/2005 rigena uburyo bwo kurengera, kubungabunga no guteza imbere ibidukikije mu Rwanda.

[25] Ku birebana n'icyaha cyo kwica inzovu, Ubushinjacyaha bushingira ku ngingo ya 417 y'Itegeko-Ngenga N^o 01/2012 ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana ryakoreshwaga ubwo Nsengiyumva Vincent na bagenzi be batangiraga gukurikiranwa iteganya ko umuntu wese ushimuta, ucuruza, ukomeretsa cyangwa wica ingagi cyangwa izindi nyamaswa zirengerwa ziriho zicika, ahanishwa igifungo kirenze imyaka itanu (5) kugeza ku myaka icumi (10) n'ihazabu y'amafaranga y'u Rwanda kuva ku bihumbi magana atanu (500.000) kugeza kuri miliyoni eshanu (5.000.000).

[26] Urukiko rurasanga n'ubwo koko inzovu iri ku rutonde rw'inyamaswa zirinzwe zivugwa mu Iteka rya Minisitiri Nº 007/2008 ryo ku wa 15/08/2008², rishyiraho urutonde

² Iteka rya Minisitiri № 007/2008 ryo ku wa 15/08/2008 ryasohotse mu Igazeti ya Leta № 22 yo ku wa 15/11/2008, iri teka rikaba ryarashyizweho hashingiwe ku ngingo ya 54 y'Itegeko- Ngenga № 04/2005 ryo ku wa 08/04/2005 rigena

rw'ubwoko bw'inyamaswa n'ibimera birinzwe (list of protected animal and plant species) ntabwo ingingo ya 417 y'Itegeko-Ngenga N^o 01/2012 rishyiraho igitabo cy'amategeko ahana yakoreshwa muri uru rubanza nk'uko biburanishwa n'Ubushinjacyaha, kubera ko nta bimenyetso bwagaragarije Urukiko rw'Ubujurire byemeza ko abakurikiranywe baba barakoze ibikorwa byo kwica inzovu cyane ko no mu miburanire yabwo mu Rukiko Rukuru bwari bwabanje kuvuga ko nta bimeyetso bifatika bufite byemeza ko abakurikiranywe bagize uruhare mu kwica inzovu, aho byabereye muri Tanzaniya.

[27] Hashingiwe ku bisobanuro bimaze kuvugwa haruguru, Urukiko rw'Ubujurure rurasanga, nk'uko byemejwe n'Urukiko Rukuru, Urugereko rwa Rwamagana ibikorwa Ubushinjacyaha bwaregeye byo kwica inzovu bidahura n'ibiteganyijwe mu ngingo ya 417 y'Itegeko-Ngenga Nº 01/2012 ryavuzwe haruguru ihana ibikorwa byo gushimuta, gucuruza, gukomeretsa cyangwa kwica ingagi cyangwa izindi nyamaswa zirengerwa ziriho zicika ryakoreshwaga ubwo Nsengiyumva Vincent na bagenzi be batangiraga gukurikiranwa.

[28] Ku birebana n'uko abakurikiranywe baba barabaye ibyitso by'abishe inzovu muri Tanzaniya ngo kuko bitari gushoboka kubona amahembe y'inzovu hatabayeho kubanza kuzica, Urukiko rw'Ubujurire rurasanga na none, hakurikijwe ingingo ya 98 y'Itegeko-Ngenga N°01/2012/OL ryo ku wa

168 ____

uburyo bwo kurengera, kubungabunga no guteza imbere ibidukikije mu Rwanda, rishyiraho urutonde rw'ubwoko bw'inyamaswa n'ibimera birinzwe (list of protected animal and plant species), ku mugereka wa mbere w'inyamabere rivuga inzovu hamwe n'izindi nyamaswa zitandukanye zirimo ingagi, impundu, inkura, inkoronko n'izindi, bikaba byumvikana ko inzovu nayo iri ku rutonde rw'inyamaswa zirinzwe zivugwa mu ngingo ya 417 yavuzwe haruguru.

02/05/2012 rishyiraho igitabo cy'amategeko ahana ryibukijwe haruguru³, nta gikorwa na kimwe Ubushinjacyaha bugaragaza cyerekana ko abaregwa babaye ibyitso mu kwica inzovu muri Tanzaniya mu buryo butandukanye buteganywa n'iyi ngingo. Ikindi kandi nta n'ubwo Ubushinjacyaha bwashoboye kugaragaza ko abafatanywe amahembe y'inzovu mu Rwanda baba barahishe babizi, ikintu cyangwa ibikoresho byakoreshejwe mu kwica inzovu, ibikoresho cyangwa inyandiko byabonetse bikomotse ku cyaha cyo kwica inzovu nk'uko byumvikana mu ngingo ya 327 y'Itegeko-Ngenga N°01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana.

[29] Urukiko rurasanga ibyo Ubushinjacyaha buvuga ko abaregwa babaye ibyitso by'abishe inzovu kubera ko amahembe atari kuboneka hatabanje kwicwa inzovu ari ukugenekereza kuko ayo mahembe ashobora kuboneka ku bundi buryo nko kuyakura ku nzovu yapfuye, gukomeretsa inzovu uyikuraho amahembe, kuyatoragura cyangwa kuyagura n'abayacuruza mu buryo butemewe n'amategeko nk'uko inshuti y'Urukiko Muvunyi Richard ushinzwe kubungabunga ibidukikije muri RDB yabisobanuriye Urukiko.

[30] Hashingiwe kuri ibyo bisobanuro, Urukiko rw'Ubujurure rurasanga rero ibikorwa Ubushinjacyaha bwaregeye bidahura n'ibiteganyijwe mu ngingo ya 98 n'iya 327 y'Itegeko-Ngenga N^o 01/2012 ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana ryakoreshwaga ubwo Nsengiyumva Vincent na bagenzi be

³ Icyitso ni uwafashije uwakoze icyaha mu byagiteguye, mu byoroheje imikorere yacyo cyangwa mu byakinonosoye kandi yarabikoze abizi cyangwa uwoheje uwakoze icyaha. Yitwa kandi icyitso uwoheje uwakoze icyaha cyangwa uwahishe inkozi y'ibibi cyangwa uwazifashije guhisha mu buryo buteganywa n'ingingo ya 327 y'Itegeko-Ngenga rivugwa muri iki gika.

batangiraga gukurikiranwa kubera ko Ubushinjacyaha butashoboye kugaragaza ibimenyetso byashingirwaho mu kwemeza ko abakurikiranywe babaye ibyitso by'abahigi baba barishe inzovu muri Tanzaniya nk'uko byasobanuwe haruguru.

[31] Ku birebana no gucuruza by'umwihariko, Urukiko rurasanga ibikorwa bihanwa n'ingingo ya 417 y'Igitabo cy'amategeko ahana byo gucuruza inyamaswa zirinzwe harimo n'inzovu nta byakozwe n'abakurikiranywe, kuko ahubwo ibyabaye ari ugucuruza amahembe y'inzovu aho kuba gucuruza inzovu. Gucuruza inzovu no gucuruza amahembe yazo bikaba bidashobora kwitiranywa mu rwego rw'amategeko kubera ko iyi ngingo ya 417 yumvikanisha ko gucuruza bireba inyamaswa ubwayo, atari ibice byayo cyangwa ibiyikomokaho.

[32] Urukiko rusanga kwitiranya ibyo bikorwa byombi byo gucuruza inzovu no gucuruza amahembe yazo byaba ari ugusobanura amategeko nshinjabyaha mu buryo butandukira (Interprétation extensive), kandi ibyo bibujijwe mu rwego rw'amategeko ahana ibyaha nk'uko bivugwa mu ngingo ya 4 y'Itegeko Ngenga N° 01/2012/OL ryo kuwa 02/05/2012 rishyiraho igitabo cy'amategeko ahana ivuga ko amategeko ahana adashobora gukoreshwa ku buryo butandukira, ko ahubwo agomba gufatwa uko ateye.⁴

[33] Hashingiwe kuri ibyo bisobanuro bimaze kuvugwa haruguru rero, Urukiko rw'Ubujurire rurasanga ahubwo icyabaye ari kubika no ugucuruza amahembe y'inzovu mu gihe yarimo

⁴ Ibi bihuye n'ibiteganywa n'ingingo ya 4, igika cya mbere y'Itegeko n°68/2018 ryo ku wa 30/08/2018 riteganya ibyaha n'ibihano muri rusange ivuga ko amategeko ahana agomba gufatwa uko ateye, ntashobora gukoreshwa ku buryo butandukira.

gushakirwa isoko kuko Nsengiyumva Vincent yemera ko yakiriye amahembe y'inzovu ayahawe n'abahigi bayambukije bayavanye muri Tanzaniya maze akayabitsa Vunumwami Egide mu gihe bari bategereje kuyashakira isoko, Vunumwami Egide nawe akemera kuyahisha mu gihe bagishakisha umuguzi ndetse bakaba barayafatanywe bagiye kuyashyikiriza uwashakaga kuyagura.

[34] Ingingo ya 1, 2 n'iya 3 z' Amasezerano yerekeye icuruzwa rikorerwa hagati y'ibihugu ku bwoko bw'inyamaswa n'ibimera mu gasozi byenda gucika yabereye i Washington ku wa 3/03/1973, yemejwe burundu n'Iteka rya Perezida N° 211 ryo ku wa 25/08/1980, zumvikanisha ko inzovu ari inyamaswa iri ku mugereka wa I (Annexe I) w'ayo Masezerano kandi ko icuruzwa ry'inyamaswa zenda gucika, rireba inyamaswa nzima, izapfuye, ibice by'izo nyamaswa cyangwa ibikomoka kuri izo nyamaswa (...) kandi ko icuruza rigomba kubahiriza ibiteganywa n'aya Masezerano harimo kuba icuruzwa ryatangiwe uruhushya n'umuyobozi ubifitiye ububasha.⁵

⁵ Convention sur le commerce international des espèces de faune et de flore sauvages menacées d'extinction Article I. Aux fins de la présente Convention et, sauf si le contexte exige qu'il en soit autrement, les expressions suivantes signifient:

a) "Espèces": toute espèce, sous-espèce, ou une de leurs populations géographiquement isolée;

b) "Spécimen":

i) tout animal ou toute plante, vivants ou morts;

ii) dans le cas d'un animal: pour les espèces inscrites aux Annexes I et II, toute partie ou tout produit obtenu à partir de l'animal, facilement identifiables, et, pour les espèces inscrites à l'Annexe III, toute partie ou tout produit obtenu à partir de l'animal, facilement identifiables, lorsqu'ils sont mentionnés à ladite Annexe; iii) (...).

Article II. L'Annexe I comprend toutes les espèces menacées d'extinction qui sont ou pourraient être affectées par le commerce. Le commerce des

[35] Ingingo ya 200 (d) (i) (ii) y'Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo nayo yumvikanisha ko umuntu wakira, utunga, uhisha cyangwa utanga ngo bahishe ibicuruzwa azi neza ko bibujijwe cyangwa bisabirwa uruhushya byatumijwe cyangwa byinjijwe mu buryo bunyuranije n'amategeko ahanishwa igihano cy'igifungo kitarenze imyaka itanu (5) cyangwa ihazabu ingana na 50% y'umusoro byari busore cyangwa byombi⁶ naho umugereka wa 2, B w'iryo Tegeko, mu gace ka 8 ukaba ushyira amahembe y'inzovu ku rutonde rw'ibintu bicuruzwa bibanje gusabirwa uruhushya⁷.

c) un organe de gestion de l'Etat d'importation a la preuve que le spécimen ne sera pas utilisé à des fins principalement commerciales.

⁶ Any person who acquires, has in his or her possession, keeps or conceals, or procures to be kept or concealed, any goods which he or she knows, or ought reasonably to have known, to be (....) commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both.

⁷ Ivory, elephant unworked or simply prepared but not cut to shape, worked ivory and articles of ivory

spécimens de ces espèces doit être soumis à une réglementation particulièrement stricte afin de ne pas mettre davantage leur survie en danger, et ne doit être autorisé que dans des conditions exceptionnelles.

Article III. 1. Tout commerce de spécimens d'une espèce inscrite à l'Annexe I doit être conforme aux dispositions du présent Article. 2. (...), 3. L'importation d'un spécimen d'une espèce inscrite à l'Annexe I nécessite la délivrance et la présentation préalables d'un permis d'importation et, soit d'un permis d'exportation, soit d'un certificat de réexportation. Un permis d'importation doit satisfaire aux conditions suivantes:

a) une autorité scientifique de l'Etat d'importation a émis l'avis que les objectifs de l'importation ne nuisent pas à la survie de ladite espèce;

b) une autorité scientifique de l'Etat d'importation a la preuve que, dans le cas d'un spécimen vivant, le destinataire a les installations adéquates pour le conserver et le traiter avec soin;

[36] Kubera ko rero abakurikiranywe batigeze bagaragariza Urukiko ko bahawe uruhushya rwo gucuruza amahembe y'inzovu bakuye muri Tanzaniya nk'uko bisabwa n'Itegeko ry'Umuryango w'Afurika w'iburasirazuba rigenga imicungire ya za Gasutamo ndetse n'amasezerano yabereye i Washington ku wa 3 Werurwe 1973 yerekeye icuruzwa rikorerwa hagati y'ibihugu ku bwoko bw'inyamaswa n'ibimera mu gasozi byenda gucika, bakaba kandi barinjije ayo mahembe mu buryo bunyuranije n'amategeko, Urukiko rurasanga ibikorwa abashinjwa bakurikiranyweho bigize icyaha cyo gucuruza amahembe y'inzovu giteganywa kandi gihanishwa ingingo ya ingingo ya 200 (d) (i) (ii) y'Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo ihana kwakira, gutunga, guhisha cyangwa gutanga ngo bahishe ibicuruzwa bazi neza ko bibujijwe cyangwa bisabirwa uruhushya byatumijwe cyangwa byinjijwe mu buryo bunyuranije n'amategeko, ku bw'ibyo, Urukiko rukaba rusanga icyemezo cyari cyafashwe n'Urukiko Rukuru, Urugereko rwa Rwamagana cy'uko gucuruza amahembe y'inzovu bitagize icyaha nta shingiro gifite.

[37] Kuba Me Mujawamaliya Immaculée wunganira Nsengiyumva Vincent asaba kudashingira ku Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo kuko Ubushinjacyaha butarigaragaje ngo baryisobanureho, Urukiko rurasanga bidafite ishingiro kubera ko iri Tegeko ari nk'ayandi yose, rikaba ryaratangajwe mu igazeti ya Leta N° idasanzwe yo ku wa 26/06/2009; bikaba bidasanzwe ko amategeko yose ashingiweho mu Rukiko agomba kubanza kugaragazwa n'ababuranyi imbonankubone kugirango yemerwe. Ahubwo buri wese ukeneye itegeko, akaba ashobora kurisanga mu igazeti bitabaye ngombwa ko Ubushinjacyaha burizana mu Rukiko ngo burigaragarize Abavoka mu nyandiko. Umuburanyi apfa gusa kuba yavuze itegeko ashingiraho iryo ariryo na numero yaryo, ari nabyo Ubushinjacyaha bwakoze.

Kuba Me Mukesha David wunganira Karambizi [38] Alphonse asaba Itegeko ry'Umuryango w'Afurika ko y'Iburasirazuba rigenga imicungire ya Gasutamo za ritashingirwaho ngo kuko Ubushinjacyaha butigeze buriburanisha Rukuru ngo mu Rukiko maze nabo baryisobanureho, Urukiko rw'ubujurire rusanga icy'ingenzi ari uko ibikorwa birebana no gucuruza amahembe y'inzovu byari bikubiye mu nyandiko itanga ikirego y'Ubushinjacyaha ndetse akaba ari n'uko ababuranyi babyireguyeho, Urukiko rukaba rugomba kubihuza n'amategeko yaba ari avagaragajwe n'umuburanyi cyangwa ayo rwiboneye ubwarwo, kuko ari inshingano y'umucamanza guhuza inyito y'icyaha n'igikorwa ubwacyo gikurikiranywe iyo asanga inyito y'igikorwa gikurikiranywe atari yo ihura n'ibyabaye nk'uko Urukiko rw'Ikirenga rwabyemeje mu manza zitandukanye rwaciye.⁸

[39] Ikindi kandi ingingo ya 1 n'iya 154 y'Itegeko N^o 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ari naryo rigenga imiburanishirize y'izindi manza mu gihe nta yandi mategeko yihariye agenga iyo miburanishirize yindi, iteganya ko bitabujijwe mu rwego rw'ubujurire gutanga ibisobanuro bishya cyangwa ibimenyetso bishya bigamije

⁸ Urubanza RPAA 0110/10/CS rw'Ubushinjacyaha na Uwamurengeye Vénant, Icyegeranyo cy'ibyemezo by'inkiko V.1, Nyakanga 2014, p. 133-140 ; Urubanza RPAA 0117/07/CS rw'Ubushinjacyaha na CPL Ngabonziza Faustin na SGT Biziyaremye Jean Baptiste, icyegeranyo cy'ibyemezo by'inkiko, Igitabo cya kabiri 2011, Nº 9, P.57-62.

kumvikanisha kurushaho ibyari byaraburanishijwe mu rwego rwa mbere, bityo rero Urukiko rukaba rubona nta kosa Ubushinjacyaha bwakoze mu gushingira ku rindi tegeko mu rwego rw'ubujurire, icyangombwa akaba ari uko ntacyo bwahinduye ku bikorwa bwaregeye byo gucuruza amahembe y'inzovu no kuyashakira isoko.

[40] Ku birebana n'ibivugwa na Me Mukesha David wunganira Karambizi Alphonse ko amahembe y'inzovu atari igicuruzwa, Urukiko rurasanga Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo riteganya ibyo bita ibicuruzwa muri iri Tegeko, ari ibintu by'ubwoko bwose harimo ibigenewe gucuruzwa, ibikoresho (...)⁹, bityo rero n'amahembe y'inzovu akaba arebwa nk'ibicuruzwa cyane ko anagaragara ku mugereka wa 2, B w'iryo Tegeko, mu gace ka 8.

[41] Ku kibazo Me Mukesha David wunganira Karambizi Alphonse asaba Urukiko gusuzuma kirebana no kumenya niba Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo ryarinjijwe mu mategeko y'u Rwanda, Urukiko rurasanga kwinjiza ayo masezerano mu mategeko y'u Rwanda byarakozwe n'Itegeko N° 72/2008 ryo ku wa 31/12/2008 rigena itangira gukurikizwa ry'Itegeko N° 1 ryo ku wa 01 Mutarama 2005 ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za gasutamo ryatangajwe mu igazeti ya Leta muri numero idasanzwe yo ku wa 26/06/2009.

⁹ Reba Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo ingingo zibanza, Preliminary provisions, 2. (1) *Goods includes all kinds of articles, wares, merchandise, livestock, ...*

[42] Urukiko rw'Ubujurire rurasanga rero Urukiko Rukuru rutaragombaga kwemeza ko nta tegeko rihana gucuruza amahembe y'inzovu kubera ko rusanga rwaragombaga gushingira ku ngingo ya 200 (d) (i) (ii) y'Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo nk'uko byasobanuwe haruguru.

[43] Ingingo ya 190 y'Itegeko N° 30/2013 ryo kuwa 24/5/2013 y'Itegeko ryerekeye imiburanishirize y'imanza z'inshinjabyaha iteganya ko: "Urukiko rwajuririwe, iyo rusanze rugomba guhindura icyemezo cyajuririwe, ruburanisha urwo rubanza mu mizi yarwo, keretse iyo rurutesheje agaciro ku mpamvu y'uko rwaregewe mu buryo budakurikije amategeko cyangwa ku mpamvu y'iburabubasha". Hashingiwe kuri iyi ngingo, Urukiko rukaba rusanga rugomba gukomeza kuburanisha uru rubanza.

II.2. Kumenya niba hari ibimenyetso bihamya abakurikiranywe icyaha.

A. Kuri Nsengiyumva Vincent na Vunumwami Egide.

[44] Uhagarariye Ubushinjacyaha avuga ko abaregwa bakurikiranyweho ibyaha byo kwica inzovu, kuba icyitso mu kwica inzovu n'icyo gucuruza amahembe yazo, ibimenyetso ashingiraho bikaba bigizwe n'inyandikomvugo ya Nsengiyumva Vincent, nk'uko yabyemeye mu ibazwa rye ryo ku wa 22/05/2015, aho yabajijwe aho yakuraga amahembe y'inzovu, akavuga ko yayahawe n'umurobyi wo muri Tanzaniya witwa Nyabyenda nawe yarayahawe n'abahigi yambukije bava muri Tanzaniya, ayamuhera i Kirehe, ndetse avuga ko byari inshuro ya kabiri ajya muri ubwo bucuruzi, akaba yari amaze kugurisha ibiro 13. Uhagarariye Ubushinjacyaha asaba kandi Urukiko ko Nsengiyumva Vincent atagabanyirizwa igihano kuko adasobanura neza uko icyaha cyakozwe ndetse hakaba hari ibyo ahisha.

[45] Nsengiyumva Vincent yemera icyaha kandi akagisabira imbabazi, agasobanura ko yari hamwe na Vunumwami Egide, maze amutuma iwe mu rugo kumuzanira amahembe y'inzovu, mu gihe bariho bayashyikiriza uwayashakaga, babona haje imodoka y'abasirikare, ihita ibatwara. Avuga ariko ko iby'uko amahembe yayahawe n'umuhigi ayavanye muri Tanzaniya ntabyo yavuze, ndetse ko atazi uko Semasaka na Karambizi bageze muri iyi dosiye kuko atigeze abashinja ndetse atari asanzwe abazi.

[46] Me Mujawamaliya Immaculée wunganira Nsengiyumva Vincent avuga ko uwo yunganira yatumwe na Vunumwami Egide, wari usanzwe ari umukoresha we, kuzana igikapu cyarimo amahembe y'inzovu, ariko ko kuba yaremeye gutumwa na shebuja bitagize icyaha giteganywa mu ngingo ya 417 y'Igitabo cy'amategeko ahana ibyaha. Avuga kandi ko nta cyemeza ko inzovu zavanyweho ayo mahembe zishwe kuko byanashoboka kuyaca nk'uko byasobanuwe n'inshuti y'Urukiko.

[47] Ku birebana na Vunumwami Egide, Uhagarariye Ubushinjacyaha avuga ko mu ibazwa rye ryo ku wa 28/05/2015 yemeye ko ari we wari ubitse aya mahembe y'inzovu yazaniwe na Nsengiyumva Vincent ko ariko na Nsengiyumva Vincent amushinja ko bari basanzwe bafatanya gucuruza amahembe y'inzovu.

[48] Vunumwami Egide we ahakana icyaha cyo kwica inzovu, akemera gusa ko yabitse amahembe Nsengiyumva Vincent yamubikije kandi ko yari azi ko ari amahembe y'inka. Avuga ko asanzwe azi Nsengiyumva Vincent kuko bakoranye mu bucuruzi

bw'amafi, ariko ko nta bucuruzi bw'amahembe y'inzovu bakoranye. Avuga ko iby'uko Ubushinjacyaha buvuga y'uko yabaye icyitso mu ikorwa ry'icyaha atari byo kuko atigeze yambuka umupaka, akaba afite n'ubumuga bw'ukuboko amaranye igihe kinini ku buryo ubwo bumuga butari kumwemerera kujya muri ibyo bikorwa, asoza asaba ko Urukiko rumurenganura.

[49] Me Kampire Claudine wunganira Vunumwami Egide avuga ko Ubushinjacyaha bukwiye gutanga ibimenyetso by'icyaha bukurikiranyeho Vunumwami Egide, kuko we yemeza ko amahembe yabitse ari ay'inka, aho kuba ay'inzovu.

UKO URUKIKO RUBIBONA

[50] Ingingo ya 86 y'Itegeko Nº 30/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, iteganya ko ibimenyetso bishobora gushingira ku mpamvu zose z'ibyabaye n'ibyemejwe n'amategeko, ababuranyi bapfa kuba babigiyeho impaka. Urukiko ruhamya ku buryo butavuguruzwa ko ibimenyetso byose bishinja cyangwa bishinjura ari byo kandi bishobora kwemerwa.

[51] Inyandiko ziri muri dosiye zigaragaza ko Urukiko Rukuru, Urugereko rwa Rwamagana rwemeje ko ibikorwa Nsengiyumva Vincent na bagenzi be bakurikiranyweho bitagize icyaha cyambuka imipaka kandi ko bidahanwa n'amategeko y'u Rwanda, mu gihe nyamara mu Bugenzacyaha, Nsengiyumva Vincent yabajijwe agasobanura ko amahembe y'inzovu yafatanywe yayahawe n'uwitwa Nyabyenda w'umurobyi ukomoka muri Tanzaniya, avuga ko yayamuhaye mu mwaka wa 2013, amubwira ko hari bene wabo b'abahigi baba muri

178

Tanzaniya bayamuhaye abambukije mu bwato babuze amafaranga bishyura, aba ari yo bamwishyura, Nyabyenda akaba yarayamuhaye amusaba ko azamushakira umukiliya.

[52] Izo nyandiko zigaragaza kandi ko Nsengiyumva Vincent yemeye ko yatangiye gucuruza amahembe y'inzovu mu mwaka wa 2012, akaba yarayahabwaga n'uwitwa Joachim uba Tanzaniya, ayamugurisha ku kiro 20.000Frw, nawe akayagurisha ku bihumbi mirongo itanu (50.000Frw), kandi ko mu bucuruzi bwe yafatanyaga na Vunumwami Egide na Semasaka Silas. Mu Bushinjacyaha, mu Rukiko Rukuru ndetse n'imbere y'uru Rukiko, Nsengiyumva Vincent akaba yarakomeje kwemera icyaha kandi agashinja Vunumwami Egide ko bafatanyaga muri ubwo bucuruzi ariko akavuga ko Semasaka Silas atamuzi, kandi ko batigeze bafatanya muri ubwo bucuruzi.

[53] Izi nyandiko zigaragaza ko Vunumwami Egide mu ibazwa rye mu Bugenzacyaha yemeye ko hari umurobyi wamuzaniye amahembe amubwira ko ari Nsengiyumva Vincent uyamuhaye kandi ko azaza kuyafata, ko yayabitse umwaka wose (Cote 8-11), mu Bushinjacyaha akaba yarakomeje kubyemera (cote 53-58) ndetse n'imbere y'uru Rukiko, ariko akavuga ko yabonaga ari amahembe y'inka.

[54] Urukiko rw'Ubujurire rurasanga imvugo za Nsengiyumva Vincent, aho yemera ko yakiriye kandi agatanga ngo bahishe amahembe y'inzovu mu gihe barimo kuyashakira isoko, ari ikimenyetso kimutsindisha kandi kimuhamya kuba yaracuruje amahembe y'inzovu nk'uko ingingo ya 110 y'Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo ibiteganya ivuga ko ukwiyemerera mu rubanza ari amagambo umuburanyi cyangwa umuhagarariye

avugira mu Rukiko agira ibyo yemera, ayo magambo akaba atsindisha uwayavuze.

[55] Kuba Nsengiyumva Vincent avuga ko ayo mahembe atayahawe n'umuhigi wo muri Tanzaniya, Urukiko rusanga bidafite ishingiro kuko mu Bugenzacyaha yasobanuye neza ko ayo mahembe yayahawe n'uwitwa Nyabyenda w'umurobyi ukomoka muri Tanzaniya nawe ayahawe n'abahigi yambukije mu bwato i Kirehe bakamusigira ayo mahembe mu mwanya wo kumwishyura, ko kandi yatangiye gukora ubwo bucuruzi kuva mu mwaka wa 2012, ubwo yahabwaga amahembe n'uwitwa Joachim uba Tanzaniya.

[56] Ku bireba Vunumwami Egide, Urukiko rurasanga n'ubwo ahakana kugira uruhare mu bucuruzi bw'amahembe y'inzovu, imvugo ya Nsengiyumva Vincent wemeje ko yamubikije aya mahembe mu gihe cy'umwaka wose, ko bari basanzwe bafatanya muri ubwo bucuruzi, kandi ko bafatiwe hamwe bariho bayashyikiriza uwayashakaga ari ikimenyetso kigaragaza ko yacuruje amahembe y'inzovu kandi bibujijwe no mu gihe bitasabiwe uruhushya. Iki gitekerezo cyo guhamya icyaha uregwa hashingiwe ku mvugo za mugenzi we bagifatanyije kigaragara mu rubanza RPA 0176/11/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 16/10/2015, Ubushinjacyaha buburana na Mukashema na Bihimana¹⁰.

[57] Urukiko rw'Ubujurire rurasanga ibyo Vunumwami Egide n'umwunganizi we bavuga ko yari azi ko ibyo abitse ari amahembe y'inka atari byo ahubwo ari uburyo bwo guhunga

¹⁰ Reba RPA 0176/11/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 16/10/2015, Ubushinjacyaha buburana na Mukashema na Bihimana, Icyegeranyo cy'ibyemezo by'inkiko, V.1-2017, P147-160.

icyaha kubera ko mugenzi we Nsengiyumva Vincent uburana yemera icyaha, amushinja ko bari basanzwe bakorana ubucuruzi bw'amahembe y'inzovu (cote 6) nk'uko byasobanuwe haruguru.

[58] Ku birebana n'ibihano, ingingo ya 200 (d) (i) (ii) y'Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo iteganya ko umuntu wakira, utunga, uhisha cyangwa utanga ngo bahishe ibicuruzwa azi neza ko bibujijwe cyangwa bisabirwa uruhushya byatumijwe cyangwa byinjijwe mu buryo bunyuranije n'amategeko ahanishwa igihano cy'igifungo kitarenze imyaka itanu (5) cyangwa ihazabu ingana na 50% y'umusoro byari busore cyangwa byombi.

[59] Kubera ko rero Nsengiyumva Vincent na Vunumwami Egide bahamwa n'icyaha cyo gucuruza amahembe y'inzovu bakoze ubwo bakiraga kandi bagahisha amahembe y'inzovu bagamije kuyacuruza bazi neza ko bibujijwe, Urukiko rurasanga buri wese akwiye guhanishwa igifungo cy'imyaka itatu (3) hakurikijwe ingingo ya 200 (d) (i) (ii) y'Itegeko ry'Umuryango w'Afurika y'Iburasirazuba rigenga imicungire ya za Gasutamo.

[60] Urukiko rurasanga ariko Nsengiyumva Vincent akwiye kugabanyirizwa igihano, hashingiwe ku mpamvu y'uko yaburanye yemera icyaha kuva yatangira gukurikiranwa kugera imbere y'uru Rukiko, hashingiwe ku ngingo ya 78, 3° y'Itegeko-Ngenga N° 01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy'amategeko ahana, iteganya ko iyo hari impamvu zoroshya uburemere bw'icyaha, igihano cy'igifungo kirenze imyaka itanu (5) ariko kitageze ku myaka 10, gishobora kugabanywa kugeza ku gifungo cy'umwaka umwe (1); bityo akaba agomba guhanishwa igifungo cy'imyaka 2.

B. Kuri Semasaka Silas na Karambizi Alphonse.

[61] Ubushinjacyaha buvuga ko ibimenyetso bwari bwashingiyeho mu gushinja Semasaka Silas na Karambizi Alphonse ari imvugo ya Nsengiyumva Vincent ubashinja ko bakoranaga ubucuruzi, ko ariko busanga ibyo bimenyetso birimo gushidikanya.

[62] Semasaka avuga ko atigeze akora ubucuruzi bw'amahembe y'inzovu kuko, nk'uko Nsengiyumva Vincent abivuga, bahuriye kuri Police, bityo akaba asaba Urukiko kwemeza ko ari umwere, naho Me Nyirabasinga Hélène umwunganira akavuga ko Ubushinjacyaha butabashije kugaragaza uruhare rwa Semasaka Silas mu ikorwa ry'icyaha, ko ku bw'ibyo agomba kugirwa umwere.

[63] Karambizi Alphonse avuga ko icyaha cyo kwica, kuba icyitso mu kwica inzovu no gucuruza amahembe yazo ntacyo vakoze, yakoraga k'Umunyamabanga kuko akazi nshingwabikorwa w'Umurenge katari kumwemerera kwishora muri ibyo bikorwa, maze asaba Urukiko kwemeza ko ari umwere ibimenvetso bitangwa n'Ubushiniacvaha birimo kuko ugushidikanya, naho Me Mukesha David wunganira Karambizi Alphonse avuga ko Ubushinjacyaha butigeze bugaragaza igihe icyaha cyakorewe, kandi ko kuri uru rwego butashoboye kunenga icyemezo cy'Urukiko Rukuru, Urugereko rwa Rwamagana.

UKO URUKIKO RUBIBONA

[64] Ingingo ya 165 y'itegeko N° 30/2013 ryo kuwa 24/5/2013 ryerekeye imiburanishirize y'imanza z'Inshinjabyaha iteganya ko iyo urubanza rwakurikiranywe mu buryo bwose, ntihagire

182

ibimenyetso nyakuri biboneka byemeza nta shiti abacamanza ko ushinjwa yakoze icyaha koko, bagomba kwemeza ko atsinze.

[65] Inyandiko zigize dosiye y'urubanza zigaragaza ko Ubushinjacyaha burega Semasaka Silas na Karambizi Alphonse bushingiye ku mvugo ya Nsengiyumva Vincent wabashinje ko bafatanyaga mu bucuruzi bw'amahembe y'inzovu, ko ariko bugeze mu Rukiko rw'Ubujurire bwavuze ko nta bimenyetso bidashidikanywaho bibahamya icyaha.

[66] Inyandiko zigize dosiye y'urubanza zigaragaza kandi ko ubwo Nsengiyumva Vincent yabazwaga mu Bugenzacyaha akemera ko yakoraga ubucuruzi bw'amahembe y'inzovu, Nsengiyumva Vincent yavuze ko yafatanyaga na Semasaka Silas na Karambizi Alphonse muri ubu bucuruzi ariko ntiyagira ibisobanuro atanga ku buryo bakoranaga (cote 5-7), nabo babajijwe barabihakana (12-16), Nsengiyumva Vincent ageze mu Bushinjacyaha avuga ko Semasaka atamuzi, ko yamumenye bafunganywe naho ku bireba Karambizi Alphonse avuga ko icyo yemeza ari uko bacuruzanyije amafi, ko ibindi nta byo yavuze naho imbere y'uru Rukiko, akaba atarabashinje.

[67] Urukiko rw'Ubujurire rurasanga nk'uko n'Ubushinjacyaha bubivuga, nta bimenyetso bidashidikanywaho bigaragaza ko Semasaka Silas na Karambizi Alphonse bagize uruhare mu bucuruzi bw'amahembe y'inzovu bigize icyaha cyo kwakira, gutunga, guhisha amahembe y'inzovu mu buryo bunyuranije n'amategeko, kuko na Nsengiyumva Vincent n'ubwo yari yabashinje mu Bugenzacyaha, atongeye kubashinja mu Bushinjacyaha no mu Rukiko, uretse ko no mu Bugenzacyaha nta bisobanuro yari yatanze bigaragaza uruhare rwabo muri ubwo bucuruzi, bityo bakaba bagomba guhanagurwaho icyaha bakurikiranyweho. [68] Kubera ibyo bisobanuro rero, Urukiko rw'Ubujurire rurasanga hashingiwe ku ngingo ya 165 y'itegeko N° 30/2013 ryo kuwa 24/5/2013 ryavuzwe haruguru, nta bimenyetso byemeza nta shiti ko Semasaka Silas na Karambizi Alphonse bakoze icyaha bakurikiranyweho, kubw'ibyo bakaba bagizwe abere.

III. ICYEMEZO CY'URUKIKO

[69] Rwemeje ko ubujurire bw'Ubushinjacyaha bufite ishingiro kuri bimwe;

[70] Rwemeje ko imikirize y'urubanza RP 0013/15/HC/RWG rwaciwe n'Urukiko Rukuru, Urugereko rwa Rwamagana ku wa 06/10/2016 ihindutse;

[71] Rwemeje ko Nsengiyumva Vincent na Vunumwami Egide bahamwa n'icyaha cyo gucuruza amahembe y'inzovu kigizwe no kwakira, gutunga, guhisha no gutanga ngo bahishe ibicuruzwa mu buryo bunyuranije n'amategeko;

[72] Rwemeje ko Semasaka Silas na Karambizi Alphonse badahamwa n'icyaha cyo gucuruza amahembe y'inzovu kigizwe no kwakira, gutunga, guhisha no gutanga ngo bahishe ibicuruzwa mu buryo bunyuranije n'amategeko, bakaba bagizwe abere;

[73] Ruhanishije Nsengiyumva Vincent igifungo cy'imyaka ibiri (2);

[74] Ruhanishije Vunumwami Egide igifungo cy'imyaka itatu(3);

[75] Rutegetse Nsengiyumva Vincent na Vunumwami Egide kwishyura amagarama y'ibyakozwe muri uru rubanza angana n'ibihumbi mirongo itanu (50.000Frw).

184

RWANDA LAW REPORTS

ENGLISH VERSION

TABLE OF CONTENTS

TEAM OF EDITORSii
MULTI-INSTITUTIONAL COMMITTEE iv
PREFACE
SCOPE OF THE REPORTS vii
CITATION
LIST OF STATUTES AND STATUTORY INSTRUMENTS CONSIDEREDix
LIST OF CASES CONSIDEREDxii
SUBJECT INDEX xx
Re. MURANGWA 1
MPORANYI v. USENGIMANA
PASSAG COMPANY Ltd v. GTBANK Ltd ET AL 73
TUYISENGE v. MUKARONI
DEVELOPMENT BANK OF RWANDA LTD (BRD Ltd) v SPLENDID KALISIMBI Ltd 107
RWANDA SOCIAL SECURITY BOARD (RSSB) v TWAGIRAMUNGU121
PROSECUTION v. NSENGIYUMVA ET.AL 147

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PREFACE

Dear Readers,

The Rwandan judiciary is pleased to publish the first volume of Rwanda Report for the year 2020. We reiterate our thanks to you for regularly providing us with your ideas and showing us the areas of improvement. This helps us to publish a more enhanced Law Report, useful to those who face legal challenges in their profession.

This volume of Rwanda Law Reports, contains seven (7) cases, containing five (5) case in merit: one (1) administrative case, one (1) civil case, one (1) commercial case, one (1) penal cases and one (1) petition seeking to declare a law unconstitutional, while the remaining two (2) are procedural cases.

We are also pleased to remind you that published cases can also be accessed on the website of the judiciary http://decisia.lexum.com/rlr/kn/nav.do.

We still encourage all legal practitioners and others who regularly deal with the law in their work to use these Law Reports.

Dr NTEZILYAYO Faustin President of the Supreme Court and President of the High Council of Judiciary.

SCOPE OF THE REPORTS

These reports cover cases decided by the Supreme Court and the Court of appeal cited under the heading below:

CITATION

The Reports in this volume are cited thus: [2020] 1 RLR

LIST OF STATUTES AND STATUTORY INSTRUMENTS CONSIDERED

<i>The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 164</i>
Universal Declaration of Human Rights of 1948, articles 7 and 17
International Covenant on Civil and Political Rights of 1966, article 26
African Charter on Human and Peoples' Rights, article 148
Convention on International Trade in Endangered Species of Wild Fauna and Flora Signed at Washington, D.C., on 3 March 1973, article 1,2 and 3150
East African Community Customs Management Act, article 200(d)(i)(ii)150
Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure,
<i>article</i> 275
article 1 and 154150
article 12
Law N° 35/2013 of 29/05/2013 modifying and complementing Law N° 12/2009 of 26/5/2009 relating to commercial recovery and settling of issues arising from insolvency, article 4
Law N°43/2013 of 16/06/2013 determining the use and management of land in Rwanda, article 1092

Law N°72/2008 of 31/12/2008 determining the entry into force of the East African Community Customs Management Act of 1st January 2005
Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 110150
Presidential order N° 069/01 of 13/04/2018 increasing pension and the accident from work that are allocated by RSSB, article 2
<i>Ministerial order N°007/2008 of 15/08/2008 instituting the list of protecetd animal and plant species</i> 150
Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 4 and 78,3°150
Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure, article 165 and 190150
Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 2
Law N°.07/2009 of 27/04/2009 relating to companies, article 223 and 224
Law N°22/99 of 12/11/1999 completing book one of civil code and instituting part three governing matrimonial regimes donations and successions, article 37, 38 and 4092
Decree law of 30 July 1888 relating to Contracts or conventional obligations, article 259124
Decree law of 22/08/1974 governing Social Security as it is amended and completed to date, article 22 and 23

Χ_____

Ministerial Order N°1931/bis/06 of 08/12/1974 establishing	g the
procedure of informing accident and illness caused by v	vork,
article 6 paragraph 4	125
French Civil Code, article 956	92
American Convention on Human Rights, article. 21	8
European Convention on Human Rights, Protocol No. 1, an 1	

LIST OF CASES CONSIDERED

Association Momentanée SOBETRA SARL & SOBTRA (U) Ltd v Office Rwandais des Recettes (RRA), RCOMA 0064/11/CS rendered by the Supreme Court on 28/11/2012......61 Communication No 172/1984 S.W.M. Broeks v The Netherlands

(views adopted on 9 April 1987) in UN Doc. GOAR, A/42/40 Free Zone, Co, Ltd v Association Momentanée (Joint Venture) «H3E»RCOMA 0064/12/CS rendered by the Supreme Court on Julia Shop v Ecobank Rwanda Ltd, RCOMAA 0042/14/CS, Re AKAGERA BUSINESS GROUP (ABG).RS/SPEC/0001/16/CS rendered by the Supreme Court on Supreme Court of United States, BELL'S GAP RAILROAD COMPANY v. PENNSYLVANIA, 134 U.S. 232 (1890)......9 Supreme Court of the United States, Nordlinger v. Hahn, June Supreme Court of the United States, Regan v. Taxation with Prosecution vs Mukashema and Bihimana, RPA 0176/11/CS bv the Supreme Court, Rwanda Law Report, V1,2017, P.147-

Prosecution vs CPL Ngabonziza and SGT Biziyaremye, RPAA 0117/07/CS rendered by the Supreme Court, Rwanda Law Report, V2,2011, P.57-62151
Prosecution vs Uwamurengeye, RPAA 0110/10/CS rendered by the Supreme Court, Rwanda Law Report, V1, July 2014, P.133- 140151

SUBJECT INDEX

Commercial procedure – Bussiness name – Standing to sue – A business name cannot be used to sue in the courts of law because it doesnot have a legal personality rather the claim is lodged by the owner of the business activities in his own name since he is the one with the legal personality which entitles him to sue in the interest of his business activities he carries out under that name.

MPORANYI v. USENGIMANA......59

Commercial law – Company – Insolvency – Upon the commencement of the insolvency proceedings, no company's asset can be removed from the pool of the company's property even if it was mortgaged before its liquidation – Law N° 35/2013 of 29/05/2013 modifying and complementing – Law N° 12/2009 of 26/5/2009 relating to commercial recovery and settling of issues arising from insolvency, article 4.

DEVELOPMENT BANK OF RWANDA LTD (BRD Ltd) v. SPLENDID KALISIMBI Ltd.....107

Company law – Shareholder – Standing to sue in the interest of the company – A shareholder who seeks to sue in the interests of the company must first obtain relief from court – A shareholder authorized by the Court to sue for the interests of a company, does not file a lawsuit in his name but in the name of the company.

PASSAG COMPANY Ltd v. GTBANK Ltd ET AL...73

Constitution – Separation of persons – Much as people are equal before the law, the differentiation or categorisation thereof sometimes does not necessarily imply discrimination

because differentiation or categorisation of persons may be necessary when there is a legitimate or rational purpose. Re. MURANGWA.....1

Petition requesting to declare a provision of the Law or a Law unconstitutional - The petitioner challenging the constitutionality of the Law or its provisions is obliged to prove that it's implicitly or explicitly unconstitutional.

- Re. MURANGWA.....1
- Contract Law Donation contract Termination of contract If the receiver of a donation accepts related obligations and fails to comply with them, it is a reasonable ground to terminate that contract because it has become a bilateral contract.

Termination of contract – Though the Law provides that the termination of the donation contract has to be decided by the Court, it is not necessary to file a claim for the termination of that contract if the contracting parties consent for its termination and bear its consequences.

Criminal Law – Selling ivory and looking for their clients do not constitute an offence of poaching, killing, injuring or selling elephants and do not also constitute complicity in poaching, killing, injuring or selling elephants, instead, it constitutes an offence of acquiring, having in possession, keeping or concealing, or procuring to be kept or concealed, any goods whith knowledge, or ought reasonably to have known, to be prohibited goods or that require to be permitted which have been imported or carried contrary to the conditions regulating such importation - The East African Community Customs Management Act, article 200(d)(i)(ii).

PROSECUTION v. NSENGIYUMVA ET.AL.....147

Labour law – Work related accident – Mental illness – Compensation for the disability caused by mental illness caused by work accident is calculated in the same way as the compensation for the physical disability caused by work accident that are provided by the Presidential order are calculated.

RWANDA SOCIAL SECURITY BOARD (RSSB) v. TWAGIRAMUNGU.....121

PETITION SEEKING TO DECLARE A LAW UNCONSTITUTIONAL

Re. MURANGWA

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00001/ 2019/SC – (Rugege, P.J., Nyirinkwaya, Cyanzayire, Hitiyaremye and Rukundakuvuga, J.) November 29, 2019]

Constitution – Separation of persons – Much as people are equal before the law, the differentiation or categorisation thereof sometimes does not necessarily imply discrimination because differentiation or categorisation of persons may be necessary when there is a legitimate or rational purpose.

Constitution – Petition requesting to declare a provision of the Law or a Law unconstitutional – The petitioner challenging the constitutionality of the Law or its provisions is obliged to prove that it's implicitly or explicitly unconstitutional.

Facts: After the publication in the Official Gazette of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities, Murangwa filed a petition to the Supreme Court arguing that articles 16, 17, 19 and 20 are contrary to articles 15, 16, 34 and 35 of the Constitution of the Republic of Rwanda of 2003 revised in 2015. Before proceeding with the hearing on merits, the Court requested those who wish to intervene as Amicus curiae to apply for leave to do so through the Court Registry, thereafter the Court accepted the School of Law/University of Rwanda, Transparency International Rwanda, Counsel Dieudonne Nzafashwanayo, Counsel Twiringiyemungu Joseph and Ntibaziyaremye Innocent to be the Amicus Curiae.

The challenged articles are in the following three categories:

The first category is made up of two articles, 16 and 17, whereby the petitioner states that the provisions of article 16 are inconsistent with the Constitution given that apart from the fact that it oppresses those in the category of residential buildings, it also provides for high tax rate for the same category which is of low-income earners compared to the category of commercial and industrial buildings, to the extent that it can hinder the gorvnment policy of affordable housing. He further states that if someone opts to construct a residential building, another one opts to construct a commercial building and another to construct an industrial building, they should all be equally treated as investors, thus differentiating them for the purpose of imposing tax is immaterial yet all people are equal before the law, rather each one should pay tax basing on his/her income. He adds that all paragraphs of article 17 complement article 16 which discriminates individuals on basis of economic categories and property, he thus finds those articles do not treat people before the law equally, neither do they uphold equal protection as stated by articles 15 and 16 of the Constitution.

The School of Law/ University of Rwanda argue that article 16 violates the principle of building a State committed to promoting social welfare and establishing appropriate mechanisms for equal opportunity to social justice, because that article provides for high tax on residential buildings instead of commercial buildings which generate high income, the fact that it provides for high tax for residential houses will discourage the estate developers while the are still those in need of residential houses and it does not back up the national housing policy.

Transparency International Rwanda assert that article 16 indicates that the legislator focused on the promotion of investment, however it was not necessary to differentiate

2

residential and commercial buildings, because he disregarded the need for residential houses by most of Rwandans and the State commitment for affordable housing for all Rwandans by enabling them to access housing.

Ntibaziyaremye Innocent as Amicus Curiae states that the tax on residential buildings should not be different from that of commercial buildings given that each person opts among the two a business of his/her choice. He adds that the tax should gradually decrease in proportion to the depreciation rate of the building, and such tax be calculated after the owner has completely paid the loan incurred to buy the plot of land or for constructing the house or to determine the value of the property by deducting the construction loan incurred by the owner up to its full payment.

The State argues that there is no separation based on the wealth because categorisation concerns the buildings, not the owners and especially that for one family, one building whose owner resides in and its annexes in that residential plot are exempted from the tax while commercial and industrial buildings are not exempted from tax, the reason why other residential buildings can be considered as luxury.

Advocate Twiringiyemungu Joseph as Amicus Curiae states that any promulgated tax is legal because it is determined by a law providing for who will be the taxpayers and tax collection modalities to the degree that it is difficult to challenge constitutionality of such tax as its enactment is based on the Constitution. He submits that it is not mandatory that all laws shall always have a general scope.

The second category contains article 19 relating to the tax rate on land exceeding the standard size of plot of land which he states that it is inconsistent with article 15 of the Constitution. On this issue in consideration of the different modalities of transfer of land rights in Rwanda which include gift, succession, inheritance, sale, there is no equal protection for those who acquire the land before after the publication of this Law.

The School of Law/University of Rwanda state that article 19 contravenes article 15 of the Constitution because imposing differentiated taxes on plots of land on basis of the period of acquisition by the taxpayer does not constitute a valid ground for the differentiation. Concerning the plot of land acquired before or after the application of the law, they argue that the principle of non-retroactivity of a law as a ground for differentiation of plot owners, such ground should not be envisioned in terms of the period the plot was bought or put to use, rather it should be approached in the light of the period when the right over land was effective (the time when the land was started to be used).

Transparency International Rwanda contends that this article is problematic to citizens as regards the procedure to follow in case of plot of land bought or inherited from its owner, whether the buyer or the inheritor must firstly proceed by subdivision and to reflect on the grounds upon which the legislator differentiates between the actual and potential owners of land, the owners of large and small land. That for it, this tax is considered as a penalty.

Counsel Twiringiyemungu Joseph states that the additional tax rate provided for under article 19 is a common practice; he cites an example of the income tax according to which a tax of 20% is imposed on a salary of 100.000 Frw and below, whereby a tax of 30% is imposed on a salary above 100.000 Frw. In that light whoever exceeds the standard size provided for by the law shall be liable accordingly. Regarding the fact that article 19 states that the additional tax rate does not apply to the plot of land acquired before the commencement of the Law, he submits that this is in line with the protection of the inviolable right acquired before the publication of the law, that a new law cannot encroach on the right acquired before its commencement.

The State avers that the differentiation of taxpayers must not be considered as violation of the principle of equality before the law when there is legitimate and rational purpose to do so. It further states that the principle of equality before the law has other principles connected to it and these include the equal treatment in equal circumstances, the preferential treatment, the specificity and special rules.

The third category is made up of article 20 which relates to the tax rate for undeveloped plot of land, the petitioner states that the provisions of that article contravene articles 34 and 35 of the Constitution because it imposes 100% on undeveloped plot without considering if the owner has capacity to pay such tax, thus that tax is excessive and cannot be afforded by many individuals. Therefore, they submit that given that the right to immovable property and land is inviolable and taking into account the principles of taxation, they observe that article 20 of the law mentioned above which provides for the tax increase of 100% on the undeveloped plot of land irrespective of the reason for which the plot is not developed is inconsistent with the rights enshrined under articles 34 and 35 of the Constitution.

University of Rwanda/School of Law states that articles 19 and 20 seem to be punitive because they respectively provide for an increase of 50% and 100%, this is contrary to the legal general principles, given that one is punished in case of failure to perform an obligation legally stated or the performance of an act legally prohibited, one wonders what the citizens in this case omitted or committed to be penalized. This violates the principles governing

the social welfare and the citizen will bear the tax burden given that one who paid tax for his/her plot when selling the plot he/she will add the tax and the tenant will add the same tax, thus making the cost of living high and moreover the State to fulfil its obligation of ensuring the social welfare, but it cannot achieve the social justice when the citizens do not have the right to property, the equal opportunities and when they are not equal before the law.

Nzafashwanayo as Amicus curiae, argues that the provisions of article 20 contravenes articles 15 and 16 of the Constitution because it discriminates the owner of a developed plot of land from the owner of undeveloped plot who is requested to pay an additional tax, he further adds that it also 20 infringes on the rights provided for under articles 34 and 35 because the owner can be dispossessed of the plot of land when he/she fails to pay tax, therefore it was enacted without taking into account the effects it will have on the owners of undeveloped plots of land. He also states that such article was not mandatory to overcome the issue related to speculation on plots of land given that such issue is addressed by article 58 of the Law governing land.

Transparency International Rwanda as Amicus curiae states that article 20 violates the right to private property of the land because the tax provided for by that article is a burden to low-income earner, because it is like a penalty for those who has land which is undeveloped because of lack of means and in case he/she is unable to pay that tax, the consequence will be to auction his/her proprety including that land to recover the tax, and therefore he/she would be deprived of the right to property enshrined in the Constitution.

Ntibaziyaremye Innocent as Amicus curiae asserts that it is inappropriate to levy a tax of 100% on undeveloped plot of land

6

because there are different reasons as to why it is undeveloped, especially lack of means. He further adds that when a land purpose is modified from agricultural to residential, the owner automatically pays tax while he/she no longer exploit it and he/she bears the burden of paying tax to the extent that he/she can give it as heritage to the children and they refuse to take it because they are not able to pay tax arrears.

The State argues that article 20 does not violate the right to the immovable property and the right to land enshrined in the Constitution because it differentiates the owners who exploit the land for the intended purpose and those who do not do so and the plots are kept undeveloped without being transferred to others who are able to develop them and moreover, the State is committed to boost its economy by exploiting the small land it has.

Held: 1. The petitioner challenging the constitutionality of the Law or its provisions is obliged to prove that it's implicitly or explicitly unconstitutional.

2. Much as people are equal before the law, the differentiation or categorisation thereof sometimes does not necessarily imply discrimination because differentiation or categorisation of persons may be necessary when there is a legitimate or rational purpose.

3. Much as article 20 of the Law N° 75/2018 is not inconsistent which the Constitution, it should be completed and the timelimit for which the land can spend without being exploited for it to be charged additional tax and also that tax is not imposed in case there is a legitimate ground as to why that land is not exploited.

7

Article 16 and 17 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities, is not inconsistent with 15 and 16 of the Constitution of the Republic of Rwanda. Article 19 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities, is inconsistent with 15 of the Constitution of the Republic of Rwanda. Article 20 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities is not inconsistent with articles 34 and 35 of the Constitution of the Republic of Rwanda.

Statutes and statutory instruments referred to:

- The Constitution of the Republic of Rwanda of 2003 revised in 2015, article 164
- The Universal Declaration of Human Rights of 1948, articles 7 and 17
- International Covenant on Civil and Political Rights of 1966, article 26
- African Charter on Human and Peoples' Rights, article 14.

Foreign legislation:

European Convention on Human Rights, Protocol No. 1, article 1

American Convention on Human Rights, article. 21

Cases referred to:

Re AKAGERA BUSINESS GROUP (ABG), RS/SPEC/0001/16/CS rendered by the Supreme Court on 23/09/2016

Cases from foreign courts:

Supreme Court of the United States, Regan v. Taxation with Representation of Wash., 461 U.S. 540.

Supreme Court of United States, BELL'S GAP RAILROAD COMPANY v. PENNSYLVANIA, 134 U.S. 232 (1890).

Madden v. Kentucky, 309 U.S. 83, 87-88 (1940)

- Supreme Court of the United States, Nordlinger v. Hahn, June 18, 1992, 112 S. Ct. (1992).
- Communication No 172/1984 S.W.M. Broeks v The Netherlands (views adopted on 9 April 1987) in UN Doc. GOAR, A/42/40 P.150.

Authors cited:

- Erwin Chemerinsky, In Defense of Equality: A Reply to Professor Westin, 81 MICH. L. REv. 575, 578 n.17 (1983)
- Levell, P., Roantree, B., & Shaw, J.). Mobility and the Lifetime Distributional Impact of Tax and Transfer Reforms, 2016, p32.,

Judgment

I. BACKGROUND OF THE CASE

[1] Murangwa Edward filed an application to the Supreme Court contending that after the publication in the Official Gazette of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities, he read it and noticed that the articles 16, 17, 19 and 20 are contrary to articles 15, 16, 34 and 35 of the Constitution of the Republic of Rwanda

of 2003 revised in 2015. He submits that he filed the petition in reference to article 43 of the Constitution of the Republic of Rwanda which states that "The Judiciary is the guardian of human rights and freedoms".

[2] According to Muramgwa Edward, the impugned articles sought to be repealed on the grounds that they are unconstitutional are four [4] divided in three categories: the first category comprises of two (2) articles: articles 16 and 17 of the Law N° 75/2018 mentioned hereinabove. Article 16 states that " The tax rate on buildings is determined as follows:

 1^{0} one per cent (1%) of the market value of a residential building, 2^{0} zero point five per cent (0.5%) of the market value of the building for commercial buildings,

 3^{0} zero point one per cent (0.1%) of the market value of industrial buildings, buildings belonging to small and medium enterprises and those intended for other activities not specified in this article".

The article 17 states that "Except for the tax rate of zero point one per cent (0.1%), the tax rates prescribed by Article 16 of this Law are applied progressively as follows :

1° for residential buildings a progressive rate is applied as follows :

- a. Zero point twenty-five percent (0.25%) from the first year after the commencement of this Law ;
- b. Zero point fifty percent (0.50%) from the second year after the commencement of this Law ;
- c. Zero point seventy-five percent (0.75%) from the third year after the commencement of this Law ;

d. One percent (1%) from the fourth year after the commencement of this Law ;

2° for commercial buildings a progressive rate is applied as follows :

- a. Zero point two percent (0.2%) of the market value of the building is applied in the first year of the commencement of this Law ;
- b. Zero point three percent (0.3%) during the second year of the commencement of this Law ;
- c. Zero point four per cent (0.4%) during the third year of the commencement of this Law ;
- d. Zero point five percent (0.5%) during the fourth year of the commencement of this Law.

Residential apartments having a minimum of four floors, including basement floors, benefit from reduction of tax rates, equivalent to fifty percent (50%) of the ordinary rate".

[3] Murangwa Edward avers that the provisions of the article 16 are unconstitutional given that aside from the fact that it oppresses those in the category of residential buildings, it also provides for high tax rate for the same category which is of lowincome earners compared to the category of commercial and industrial buildings upon which a low tax rate is imposed while industry owners are high-income earners. He asserts that all paragraphs of article 17 complement article 16 which discriminates individuals on basis of economic categories and property, he thus finds those articles to unequally treat individuals before the law, neither do they uphold equal protection as stated by articles 15 and 16 of the Constitution.

[4] The second category includes the article 19 of Law n° 75/2018 mentioned herein above which states that "The tax rate determined by the District Council per square meter of land in accordance with the provisions of Article 18 of this Law¹ is increased by fifty percent (50%) applicable to land in excess to standard size of plot of land meant for construction of buildings. The standard size of plot of land meant for construction of buildings are determined by an Order of the Minister in charge of housing. Additional tax rate as referred to under Paragraph One of this Article does not apply to the plot of land acquired before the commencement of this Law". Murangwa asserts that the provisions of article 19, paragraphs 1 and 3 contravene article 15 of the Constitution which states that "All persons are equal before the law. They are entitled to equal protection of the law", in consideration of the different modalities of transfer of land rights in Rwanda which include gift, succession, inheritance, sale, there is no equal protection for those who acquire the land before the publication of the law N° 75/2018 against which a petition has been filed.

[5] The third category concerns article 20 of Law N° 75/2018 mentioned herein above which provides for the tax rate for undeveloped plot of land, it states that "Any undeveloped plot of land is subject to additional tax of one hundred percent (100%) to the tax rate referred to in Article 18 of this Law". Murangwa avers that the provisions of article 20 contravene articles 34 and 35 of the Constitution which state that the right to immovable

¹ The article 18 provides for the tax rate on plots of land and states that "The tax rate on plot of land varies between zero (0) and three hundred Rwandan francs (FRW 300) per square meter. The District Council determines the tax rate on square meter of plot of land based on criteria and standard rates set by an Order of the Minister in charge of taxes".

property and the right to land are inviolable and the first category of national resource is the citizens, the second category is the land they occupy, exploit and which is the source of their livelihood, he finds that the fact that this article imposes additional tax of 100% on undeveloped plot without considering if the owner has capacity to pay such tax indicates that it is excessive and outstanding for many persons.

[6] Article 34 states that "Everyone has the right to private property, whether individually or collectively owned. Private property, whether owned individually or collectively, is inviolable. The right to property shall not be encroached upon except in public interest and in accordance with the provisions of the law". Article 35 states that "Private ownership of land and other rights related to land are granted by the State. A law determines modalities of concession, transfer and use of land".

[7] The State Attorney contends that the assertion according to which articles 16 and 17 of Law N° 75/2018 of 07/09/2018 mentioned herein above encroaches the principle of the equal protection provided for by the Constitution is misleading because this is a tax imposed on property and what has been categorized is the property (buildings), not the owners, and the categorization of buildings for taxation does not constitute discrimination based on financial means.

[8] The State Attorney adds that article 19 does not violate the principle of equality before the law enshrined in article 15 of the Constitution and the principle of protection from discrimination provided under article 16 of the Constitution since article 19 highlights other legal principles including the right to fair justice and non-retroactivity of the law. [9] The State Attorney avers that article 20 does not infringe upon the right to immovable property and the right to land provided under articles 34 and 35 of the Constitution as claimed by MURANGWA because article 20 serves to differentiate between the owners who use the land for the intended purpose and those who do not and the land is not transferred to the one with the willingness and capacity to exploit it cognizant of the State need to boost its economic development by rationally exploiting its small land.

[10] Before proceeding to the hearing on merits of the case, the Court notices that due to the importance of the legal issues to be examined in this case, it is imperative for individuals, public entities and non-governmental organisations who wish to intervene as Amicus curiae to apply for leave to do so through the Court Registry and file their submissions thereafter.

[11] Following the reception of submissions from different persons seeking leave to intervene in this case as Amicus curiae, The Court analysed them and decided that the following applicants meet the requirements and are allowed to intervene as Amicus curiae: School of the Law/University of Rwanda, Transparency International Rwanda, Counsel Dieudonne NZAFASHWANAYO, Counsel TWIRINGIYEMUNGU Joseph and NTIBAZIYAREMYE Innocent and filed their submissions on the petition of MURANGWA Edward as it will be demonstrated.

[12] The hearing was held on 1/11/2019, MURANGWA Edward represented by Counsel RUGEMINTWAZA Jean Marie Vianney and Counsel Bahati Vedaste, the State Attorney were Counsel Cyubahiro Fiat and Counsel Ntarugera Nicolas, the School of Law/University of Rwanda represented by Turatsinze Emmanuel, Bagabo Faustin and Habimana Pie, Transparency International Rwanda represented by its Chairperson, Ingabire Marie Immaculée assisted by Counsel Habumuremyi Anglebert. Present also were Counsel Dieudonne Nzafashwanayo, Counsel Twiringiyemungu Joseph and Ntibaziyaremye Innocent.

II. LEGAL ISSUES AND THEIR ANALYSIS

Whether articles 16 and 17 of Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities contravene articles 15 and 16 of the Constitution of the Republic of Rwanda

[13] MURANGWA Edward and his Counsel argue that article 10, paragraph 5 of the Constitution of the Republic of Rwanda provides that "The State of Rwanda commits itself to build a State committed to promoting social welfare and establishing appropriate mechanisms for equal opportunity to social justice" and the paragraph 6 provides that "The State of Rwanda commits itself to a constant quest for solutions through dialogue and consensus". They aver that these principles are upheld in article 15 of the Constitution which stipulates that "All persons are equal before the law. They are entitled to equal protection of the law" and article 16 states that all Rwandans are born and remain equal in rights and freedoms without any form of discrimination².

² All Rwandans are born and remain equal in rights and freedoms. Discrimination of any kind or its propaganda based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination is prohibited and punishable by law.

[14] They explain that articles 16 and 17 of Law N° 75/2018 of 07/09/2018 aforementioned violate the fundamental principles enshrined in articles 15 and 16 cited above because apart from oppressing those in the category of residential buildings, they also provide for the high tax rate for the same category which is of low-income earners compared to the category of commercial and industrial buildings upon which a low tax rate is imposed while they are high-income earners, to extent that it can affect the national housing policy.

[15] They aver that if someone opts to construct a residential building, another one opts to construct a commercial building and another to construct an industrial building, they should all be equally treated as investors, thus differentiating them to impose the tax is irrelevant yet all people are equal before the law, rather each one should pay tax basing on his/her income because someone who developed an estate earns more than the owner of small industry.

[16] Murangwa Edward and his counsel add that the legislator under article 17 highlighted the modalities under which the annual tax rate will progressively apply, but he did not motivate the grounds underlying the tax increase, instead, the appropriate course of action would be to establish a person's profit for the first and second years and such profit would constitute the base for the tax progressive rate, otherwise the legislator's action tantamounts to the impoverishment of the citizens.

[17] Turatsinze Emmanuel, Bagabo Faustin, and Habimana Pie, on behalf of the School of Law/ University of Rwanda, argue that all State policies which do not uphold its commitment to promoting social welfare contravene the Constitution.

[18] They contend that article 16 violates the principle of building a State committed to promoting social welfare and establishing appropriate mechanisms for equal opportunity to social justice because that article provides for high tax on residential buildings instead of commercial buildings that generate high income. They submit that the fact that a residential house is constructed for income generation and a commercial building for rental purposes does not constitute a valid reason for imposing a tax on those buildings differently, especially that they are constructed for income generation. They further submit that the fact that such an article provides for high tax for residential houses will discourage the estate developers while the are still those in need of residential houses and it does not support the national housing policy.

They aver that normally taxation policy should [19] correspond to the rights of taxpayers-the citizens, and the distribution of national resources so that the tax should not become a burden to the citizens, but according to their analysis the tax for residential building is double of the tax for commercial building and ten times that of an industrial building and this is contrary to the principle of equal opportunity for social justice with equal rights; the taxation policy should not be perceived as a way of only collecting financial resources, instead, it should be a system of safeguarding the citizens' welfare. They contend that the reason of promoting cities and industries mentioned in the preamble of the law is not relevant because even if such tax will be a burden to the developers of rental houses, it will not preclude a few to build such houses and it will be a burden to the tenants, also industrial and commercial buildings cannot contribute to the development of the cities when there is lack of residential houses. [20] They refute the reason mentioned in the preamble that the grounds for the taxation policy is based on the fact that Rwanda is the one with the lowest tax rate in the Region because in the Region Rwanda is ranked fourth as regards to GDP, the increase of the tax rate while it is evident that a citizen has meagre income will deprive him/her of purchasing power. They give the example of Kenya where GDP per capita is 1507 USD per annum while it is 780 USD in Rwanda, and this demonstrates that the preamble is misleading.

[21] They maintain that the tax rate should be identical for taxpayers of the same category or with the same indicator, it is unfair to charge identical tax to the taxpayers of different categories when the tax administration did not indicate the serious grounds for differentiation among taxpayers.

[22] They assert that article 17 serves to implement the provisions of article 16 to the degree that the unconstitutionality of article 16 occasions the repealing of article 17 given that what it serves to implement is misleading. They conclude by submitting that both articles are contrary to articles 15 and 16 of the Constitution on the ground of discrimination among taxpayers and violate the principle guaranteeing the State commitment for equal opportunity for social justice.

[23] Ingabire Marie Immaculée and her Counsel on behalf of Transparency International Rwanda assert that they concur with the petition against articles 16 and 17 of the Law n° 75/2018 mentioned herein above on grounds of discrimination among the owners of residential and commercial buildings because they contravene the principles guaranteed by the Constitution. According to them, the spirit of article 16 denotes that the legislator focused on the promotion of investment, however, it was not necessary to differentiate residential and commercial buildings, because he disregarded the need of most of Rwandans for residential houses and the State commitment for affordable housing for all Rwandans by enabling them to access housing. Therefore, the tax provided for by that article is excessive and detrimental to the citizens' welfare and the National Housing Policy of 2015³, hence it is contrary to article 10, paragraph 5 of the Constitution.

[24] Moreover, they aver that the provisions of articles 17 are similar to those of article 16 mentioned in the preceding paragraph, which elucidates that it is also discriminatory and infringes upon the citizens' welfare because it provides for the taxation procedure. It is in that regard they advance that in case article 16 is repealed, article 17 should also be repealed because as such it will have no purpose to serve, consequently both articles should be repealed. It is in their stance that the legislator determined that the tax shall be paid in different rates is a piece of evidence enough to prove his awareness that the tax rate is high in contrast to Rwandans ability to pay, such procedure did not benefit Rwandans, and the right course of action would be to refrain from imposing such tax.

[25] Ntibaziyaremye Innocent asserts that the tax on residential buildings should not be different from that of commercial buildings given that each person opts among the two a business of his/her choice. He adds that the tax should gradually decrease in proportion to the depreciation rate of the building, and such tax be calculated after the owner has completely paid the loan incurred to buy the plot of land or for constructing the house or to determine the value of the property by deducting the

³ Ministry of Infrastructure, National Housing Policy, 2015.

construction loan incurred by the owner up to its full payment. He says that the tax on a building should be proportional to its depreciation rate because, within 100 years, a person is likely to pay a tax higher than the value of the house he/she is paying the tax for, and thus he notices that such tax is excessive and detrimental to the citizens.

[26] He submits that several taxes (land tax, rental income tax, and property tax) should not be imposed on the same property given that many taxes harm the taxation system. He is of the view that a building itself is such a burden that it should not be taxed as provided for by Law $n^{\circ}75/2018$, rather the tax should be imposed on the income it generates, especially in a case where a person may construct additional house purposely to assist indigents, for example, a house constructed by a child for his/her parents after studies as a way of acknowledging their efforts in underwriting for his/her tuition fees, but the house is not registered in the parents' names for avoiding its inheritance by others.

[27] In his response, the State Attorney rebuts the allegations according to which articles 16 and 17 of Law N° 75/2018 of 07/09/2018 mentioned above violate the principle of protection from discrimination provided for by the Constitution on grounds that this tax is the tax property and the categorization concerns the buildings, not the owners, moreover the categorization of buildings for taxation purpose does not constitute discrimination based on the economic categories. The State Attorney adds that even if such is construed as taxpayers' categorization, it does not necessarily amount to discrimination, especially if such categories were determined for the achievement of reasonable,

manifestly evident, and legitimate purpose and the grounds for such categorization underlie the public interest.

[28] He furthermore submits that it is baseless to allege that a high tax was imposed on residential houses in comparison to the commercial and industrial buildings while the owners of residential houses are low-income earners, for the following reasons:

> a) Those who support such allegations did not carry out a survey to demonstrate that the owners of residential houses are low-income earners in comparison to the owners of commercial buildings.

> b) Even if the owners of residential houses are lowincome earners, this cannot justify the allegations according to which this taxation policy is discriminatory because there are different taxation procedures (proportional, progressive, and regressive) in accordance to the taxation policy, the national economy and development goals.

[29] The State Attorney reminds that one building whose owner intends for occupancy for dwelling purposes and its annex buildings located in a residential plot for one family are exempted from the tax (art 12) while commercial and industrial buildings are not exempted from tax, the reason why other residential buildings can be considered as luxury, a piece of evidence that he/she is wealthy so that he/she cannot be considered as a lowincome earner.

[30] Counsel Twiringiyemungu Joseph asserts that any promulgate tax is legal because it is determined by a law providing for who will be the taxpayers and tax collection modalities to the degree that it is difficult to challenge the constitutionality of such tax as its enactment is based on the Constitution. He submits that not all laws need to always have a general scope; he gave the example of the law establishing the general statutes for public service that exclusively governs public servants employed permanently.

[31] He contends that taxation laws provide for the taxpayers' categories in accordance with the intended policy, for example, article 21 of Law N° 016/2018 of 13/04/2018 establishing taxes on income states that the income earned from agricultural activities is exempt if the turnover does not exceed 12.000.000 Frw, while a lawyer who earns 12.000.000 Frw pays the tax, such procedure does not tantamount to discrimination, consequently, he finds that articles 16 and 17 do not contravene the Constitution.

DETERMINATION OF THE COURT

[32] In determining whether article 16 of Law n° 75/2018 of 07/09/2018 is contrary to articles 15 and 16 of the Constitution, it is necessary to analyze their spirit and difference. As held in the case No RS/SPEC/0001/16/CS pronounced by this Court on $23/04/2016^4$, articles 15 and 16 of the Constitution are complementary to the extent that it is barely impossible to separately interpret their spirit. As motivated in that case, article 15 states that all persons are equal before the law and they are entitled to equal protection of the law. Implying that any form of discrimination that can hinder the equality before the law and the

⁴ Case RS/SPEC/0001/16/CS AKAGERA BUSINESS GROUP (ABG), para. 15.

rights to which all persons are entitled is prohibited. Article 16 complements by providing how any kind of discrimination is prohibited by the Constitution. Both articles enshrine the same principle with two complementary points.

[33] The international conventions ratified by Rwanda uphold the complementarity of the principle of equality before the law and the principle of equal protection of the law. Article 7 of the Universal Declaration of Human Rights, 1948, states that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and any incitement to such discrimination". Article 26 of the International Covenant on Civil and Political Rights, 1966, states that "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinions, national or social origin, property, birth, or another status".

[34] In simple terms, equality before the law means that all persons are equally treated before the law without inequality, nor discrimination and the newly enacted law treats equally its subjects. Erwin Chemerinsky puts that "Things that are alike should be treated alike, and unalike things should be treated unalike in proportion to their unalikeness⁵".

⁵ Erwin Chemerinsky, In Defense of Equality: A Reply to Professor Westin, 81 MICH. L. REv. 575, 578 n.17 (1983).

[35] Much as people are equal before the law, the differentiation or categorization thereof does not necessarily tantamount to discrimination. Differentiation or categorization of persons may be necessary given the intent, legitimate or rational purpose. In that respect, the Human Rights Committee observed that "The right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26⁶".

[36] Even if the differentiation of persons is allowed as explained in the preceding paragraph, their differentiation on basis of the grounds laid down under article 16⁷the law of the Constitution is prohibited. The Human Rights Committee does not recognize the differentiation based on the grounds enumerated in article 26 of the International Covenant on Civil and Political Rights. The same was upheld in Muller and Engelhard v Namibia case "A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26. Different treatment based on one of the specific grounds enumerated in Article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation⁸".

⁶Communication No 172/1984 S.W.M. Broeks v The Netherlands (views adopted on 9 April 1987) in UN Doc. GOAR, A/42/40 P.150, para 13.

⁷ Based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by

⁸ HRC, Muller, and Engelhard v Namibia (Communication No. 919/00), para 6.7.

[37] Article 16 of Law N° 75/2018 of 07/09/2018 establishes the tax rate on residential buildings which is different from the tax rate on commercial, industrial buildings, and other buildings intended for other activities not specified in this Article. The Court finds that, according to the nature of article 16 indicated in this paragraph, there is a differentiation of tax rates levied on the buildings based on their purposes (residence, commerce, industry, and other). The State Attorney explained that such differentiation is based on the State policy of promoting commercial buildings more than residential houses.

[38] As held in the case RS/SPEC/0001/16/CS⁹ pronounced by this Court on 23/04/2016, equality before the law and protection from discrimination does not mean that the differentiation of persons is always discrimination. Differentiation or categorization of persons can be necessary because of the objective, legitimate or rational purpose. In this case, the differentiation of tax rates is based on the State's policy of promoting commercial buildings more than residential houses as asserted by the State Attorney in his rejoinder in the hearing.

[39] As regards taxation, the legislator has the freedom to categorize taxpayers because he is in the right position more than the judge to know the needs of the citizens and the State onto to which he bases himself to determine if the categories and rates of tax and he reserve all the discretion to do so unless it is manifestly clear that he did as a result of discrimination with the intent of harming particular persons. The similar statement was upheld by the Supreme Court of the United States in Regan v. Taxation with Representation of Wash case wherein the Court declared that "[T]he passage of time has only served to underscore the wisdom

⁹ Case RS/SPEC/0001/16/CS AKAGERA BUSINESS GROUP (ABG)

of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it¹⁰". The Court finds that the promotion of commercial and industrial buildings is a valid and lawful reason as the applicant and supporting Amicus curiae did not demonstrate that the intent was the discrimination of taxpayers to the detriment of the owners of residential buildings.

[40] For the public interest, the State can classify taxpayers to promote a particular category and discourage what is not needed, but such should be done in avoidance of the discrimination and the categorization which oppress particular persons. The similar statement was upheld the Supreme Court of the United States Bell's Gap Railroad Company v. Pennsylvania, whereby the Court declared that "It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property differently; it may tax visible property only, and not tax

¹⁰ Supreme Court of the United States, Regan v. Taxation with Representation of Wash., 461 U.S. 540. See also Madden v. Kentucky, 309 U.S. 83, 87-88 (1940)

securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are unusual, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition¹¹". This indicates that differentiation or classification in taxation is a practice that is not contrary to the Constitution unless it is done based on kinds of discrimination provided under article 16 of the Constitution.

[41] Concerning the submission of Murangwa Edward and supporting Amicus curiae who advanced that the imposition of the high tax rate on residential buildings will differently prejudice particular persons, the Court notices that this issue cannot be handled by analyzing the unconstitutionality of laws, but it should be assessed in the framework of public policy, an attribution that falls under the responsibility of the State. The observations on that policy, the areas of improvement, the gaps therein, and other related issues should be submitted to the organ competent to decide on it. The Courts have the powers of adjudicating cases and other State branches have their powers provided for by the Constitution and other laws.

[42] In respect of the principle of the separation and independence of the three State branches¹², the Court cannot

¹¹ Supreme Court of United States, Bell's gap railroad company v. Pennsylvania, 134 U.S. 232 (1890).

¹² Article 61 of the Constitution of the Republic of Rwanda of 2003 revised in 2015

solely decide on the unconstitutionality of law based on different understandings, the criticisms, the unfair aspects of law, or its impugned articles that are sought to be repealed. The petitioner should prove that a law or its articles on categories are directly or indirectly unconstitutional. In this particular case, the Court finds that the tax rates on buildings have been determined in the framework of public policy implementation. The similar statement was upheld by the Supreme Court of the United States in Tax Commissioners v. Jackson case wherein the Court declared that "It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified¹³".

[43] Concerning the fact that article 16 of Law n°75/2018 of 07/09/2018 is discriminatory, article 16 of the Constitution enumerates the grounds underlying the discrimination. Generally, discrimination is the differentiation of persons to deprive some of their opportunities to the advantage of others. In this case, there are tax rates on residential, commercial, and industrial buildings. Among those categories, none of them is based on the grounds underlying the discrimination as enumerated in the Constitution.

[44] Even if article 16 enumerates the grounds underlying the discrimination, it adds the statement "or any other form of discrimination". Murangwa Edward does not indicate any other criterion of classification that would tantamount to discrimination. As explained, discrimination is the differentiation

¹³ U.S. Reports: Tax Commissioners v. Jackson, 283 U.S. 527 (1931).

of persons to deprive some of their opportunities to the advantage of others. In this case, article 16 was not enacted to deprive particular persons of their opportunities and advantage others. As explained above, there were established different tax rates on building categories in order to promote commercial and industrial buildings. Such policy does not tantamount to discrimination to warrant a conclusion that article 16 of Law n° 75/2018 of 07/09/2018 is contrary to article 16 of the Constitution.

[45] Basing on the motivations provided in the preceding paragraphs, the Court finds that article 16 of Law n° 75/2018 of 07/09/2018 determining the tax rate on building categories denotes the differentiation based on the purpose of that building. As explained above, such differentiation is based on a legitimate ground related to the promotion of commercial buildings. Article 16 does not contain any form of discrimination. Consequently, the Court concludes that it is not contrary to articles 15 and 16 of the Constitution of the Republic of Rwanda.

[46] Much as the Court does not have the responsibility nor power to examine the grounds based on in determining the tax rate on residential buildings as explained, it would be prudent for the State to meticulously reconsider the various obstacles that would emanate from the enforcement of article 16 as indicated by Murangwa Edward and Amicus curiae who supported his stance. Among the obstacles to be examined include the fact that the rate of 1% of the value of a building is too high; the fact that the taxable value of a building is comprised of the value of the building itself and the value of the plot whereon the building is constructed while there is separate tax exclusive on land; matters related to the building constructed on outstanding loans; the houses constructed for parents; the buildings constructed but not in use or which cannot be used for particular reasons so that it is difficult to get the tax for such buildings; the fact that the building tax is imposed on basis of the market value without taking into account of its depreciation.

[47] Murangwa Edward prays the Court to repeal article 17 which serves to enforce the provision of article 16 which is contrary to the Constitution. The Court finds that to repeal or to maintain article 17 because of the unconstitutionality of article 16 is an issue related to legal drafting, not to the unconstitutionality.

[48] Article 17 provides that tax rates on buildings will be progressively applied, which is not contrary to the Constitution, rather it is a procedure set by the legislator for facilitating taxpayers to pay the new tax, starting by the low tax and the tax rates are progressively applied as provided for by that article. The Court finds that the tax on the building should be determined in respect of the principle of the equality before the law provided for by article 15 of the Constitution, nothing precludes its payment according to the modalities provided for by article 17 of Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities.

Whether article 19 of Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities contravenes article 15 of the Constitution of the Republic of Rwanda.

[49] Murangwa Edward and his Counsel contend that article 19 providing for the tax rate on land exceeding the standard size of a plot of the land states that "The tax rate determined by the District Council per square meter of land in accordance with the provisions of Article 18 of this Law¹⁴ is increased by fifty percent (50%) applicable to land in excess to standard size of a plot of land meant for construction of buildings.

The standard size of the plot of land meant for construction of buildings is determined by an Order of the Minister in charge of housing.

Additional tax rate as referred to under Paragraph One of this Article does not apply to the plot of land acquired before the commencement of this Law".

[50] They aver that such article contravenes article 15 of the Constitution which reads that "All persons are equal before the law. They are entitled to equal protection of the law", in consideration of the different modalities of transfer of land rights in Rwanda including gift, succession, inheritance, sale, there is no equal protection for those who acquire the land before and after the publication of Law N° 75/2018 against which a claim has been filed.

[51] They further adduce examples corroborating the unconstitutionality of such article, for instance, a child who got the plot of land as a gift and registered in his/her names in 2018 before the entry into force of this article and his/her relative who got and registered it in his/her names in 2019 after this article is into force. Even if they got the plots of land from their parents and those plots have the equal surface, both children are not subjected to pay the same tax, the child who got the plot of land in 2019 will pay the tax increment 50% provided for under

¹⁴ Article 18 states that "The tax rate on a plot of land varies between zero (0) and three hundred Rwandan francs (FRW 300) per square meter. The District Council determines the tax rate on a square meter of a plot of land based on criteria and standard rates set by an Order of the Minister in charge of taxes".

paragraph 2 of article 19, meaning that they are not entitled to equal protection of the law pursuant to article 15 of the Constitution.

[52] They cite another example of the land managed by the guardian of minors where the land is registered on the guardian that in the due time when each child had had his/her plot of land registered on him/her (after 2019), and after the entry into force of this law, each child will be obliged to pay a tax of 50% for the land exceeding the standard size of a plot of land, while their relatives who were adult before the enforcement of this law are not concerned with an additional tax of 50%, thus ostensibly clear that this law does not guarantee them the equality and the equal protection as provided for by article 15 of the Constitution mentioned above.

[53] They conclude by pointing out that the provision of article 19 related to the fact that the law does not apply to persons who got the plot of land before its publication while a published law applies collectively to everyone, one would wonder whether being born before the enactment of the law confers more rights above other Rwandans.

[54] Turatsinze Emmanuel, Bagabo Faustin, and Habimana Pie, on behalf of the School of Law/University of Rwanda, sustain that article 19 which is sought to be repealed contravenes article 15 of the Constitution because imposing differentiated taxes on plots of land on basis of the period of acquisition by the taxpayer does not constitute a valid ground for the differentiation.

[55] Concerning the plot of land acquired before or after the application of the law, they argue that the principle of non-retroactivity of law relied upon by the State Attorney as a ground

for differentiation of plot owners, such ground should not be envisioned in terms of the period the plot was bought or put to use, rather it should be approached in the light of the period when the right over land was effective (the time when the land was started to be used).

[56] Ingabire Marie Immaculée and her Counsel, on behalf of Transparency International Rwanda, contend that article 19 is problematic to the Citizens as regards the procedure to follow in case of the plot of land bought or inherited from its owner, whether the buyer or the inheritor must firstly proceed by subdivision and to reflect on the grounds upon which the legislator differentiates between the actual and potential owners of land, the owners of large and small land.

[57] They uphold that article discriminates between the owners of large and small land. Irrespective of the acquisition modalities, large land ownership should not raise any problem, instead of imposing a tax on the owner. They consider this tax as punishment and it is illegal because punishment follows the failure to discharge an obligation or the performance of a prohibited act.

[58] The State Attorney sustains that article 19 does not violate the principle of equality before the law provided for under article 15 of the Constitution and the principle of equal protection of the law provided under article 16 on backdrop that article 19 serves to emphasize other legal principles, mostly the principles of fair justice and non-retroactivity of a law.

[59] The State Attorney explains that the differentiation of taxpayers must not be considered a violation of the principle of equality before the law when there is a legitimate and rational

purpose to do so. He submits that the principle of equality before the law has other principles connected to it and these include equal treatment in equal circumstances, the preferential treatment, the specificity, and special rules.

[60] Counsel Twiringiyemungu Joseph argues that the additional tax rate provided for under article 19 is a common practice; he cites an example of the income tax according to which a tax of 20% is imposed on a salary of Frw 100.000 and below, where a tax of 30% is imposed on a salary of and above Frw 100.000. In that light whoever exceeds the standard size provided for by the law shall be liable accordingly. Regarding the fact that article 19 states that the additional tax rate does not apply to the plot of land acquired before the commencement of the Law, he submits that this is in line with the protection of the inviolable right acquired before the publication of the law, that a new law cannot encroach on the right acquired before its commencement.

DETERMINATION OF THE COURT

[61] Article 19 includes the following ideas: (1) the standard size of a plot of land meant for construction of buildings¹⁵ will be set; (2) the owners of plots of land which do not exceed the standard size will pay a tax varying between zero (0) and three hundred Rwandan francs (FRW 300) per square meter; (3) the tax rate for the land in excess to standard size will be increased by 50%; (4) additional tax rate of 50% does not apply to the plot of land acquired before the publication of the Law n°75/2018 of 07/09/2018 in the Official Gazette on 29/10/2018.

¹⁵ It will be determined by an Order of the Minister.

[62] According to Murangwa Edward who filed the application, the questionable part of article 19 is the one that is related to the fact that the tax rate of land in excess to standard size will be increased by 50% and the fact that the additional tax rate of 50% does not apply to the plot of land acquired before the publication of the Law $n^{\circ}75/2018$ of 07/09/2018 in the Official Gazette on 29/10/2018. It is in this context that the applicant notices that this article is discriminator in as far as that it provides for differentiated tax on the plots of land with equal surface and that the owners of the land in excess to standard size acquired before the publication of the Law $n^{\circ}75/2018$ of 07/09/2018 will not pay the additional tax rate of 50% which will be applied to those who will acquire the land in excess to standard size after the publication of the law.

[63] The issue for determination is whether the differentiation contravenes the principle of equality before the law provided for under article 15 of the Constitution. In other words, to determine whether paying for the land in excess to standard size a tax of 50% as additional tax rate in comparison to the tax paid for the plots of land which do not exceed the standard size and the fact that those who acquired the plots of land before the publication of the law do not pay the additional tax contravene article 15 of the Constitution.

[64] As explained in the preceding paragraphs, the differentiation based on legitimate and rational purpose is not considered as inequality before the law. Whether it is article 19 of Law n° 75/2018 of 07/09/2018 in general, there is no valid ground to justify the imposition of the additional tax rate for the land in excess to standard size. The arguments of the State Attorney that the differentiation intended to encourage the

construction of buildings on the plots not exceeding the standard size to be determined and to uphold the principle of nonretroactivity of law are baseless because the non-retroactivity of a law insinuates non-payment of taxes effective from before the publication of the law. The payment of tax on the property owned before the publication of the law is not contrary to the principle of non-retroactivity of a law.

[65] Article 10 of the Law N° 43/2013 of 16/06/2013 governing land in Rwanda stipulates that "Private individual land shall comprise land acquired through custom or written law. That land has been granted definitely by competent authorities or acquired by purchase, donation, inheritance, succession, ascending sharing, and exchange or through sharing". This article indicates the modalities for land acquisition. The same modalities enumerated in article 10 apply for the acquisition of land meant for construction of buildings. In case of transfer of land exceeding the standard size based on one of the grounds enumerated in this article and performed after the publication of the Law n° 75/2018 of 07/09/2018, only then the additional tax rate of 50% is applied.

[66] Article 19 of the Law n° 75/2018 of 07/09/2018 provides that the standard size of the plot of land meant for construction of buildings is determined by an Order of the Minister in charge of housing. This Order mentioned in article 19 can determine the standard size inferior to those determined before it enters into force. This elucidates that the difference of the standard sizes of the plots meant for construction depends on the development in the amendment of the laws on that issue. Any transfer performed on the plot of land exceeding the standard size provided for by the Order, but in respect of the law into force by the acquisition period, may warrant the owner to pay an additional tax rate of 50% occasioned by the reasons beyond his/her control, -reasons dependent on the evolution in the amendment of the law.

[67] For those who will acquire plots of land in accordance with the sizes determined by an Order of the Minister stated under article 19 of the Law $n^{\circ}75/2018$ of 07/09/2018, it would be contrary to the principle of equality before the law if a differentiated tax is imposed on the plots with an equal surface, closely located in the same area, some being subjected to an additional tax rate of 50% solely on the grounds that they were acquired before or after the publication of the Law $n^{\circ}75/2018$ of 07/09/2018 in the Official Gazette.

[68] In the similar case Nordlinger v. Hahn rendered by the Supreme Court of the United States, the applicant filed a claim seeking the repealing of the law providing for the high tax for those who acquired houses after that law in comparison to those who already had them, the majority of judges decided that such procedure cannot be considered as inequality. According to the dissenting opinion of Judge John Paul Stevens, [...] "it is irrational to treat similarly situated persons differently based on the date they joined the class of property owners. [....] Similarly, situated neighbors have an equal right to share in the benefits of local government. It would be unconstitutional to provide one with more or better fire or police protection than the other; it is just as unconstitutional to require one to pay five times as much in property taxes as the other for the same government services. In my opinion, the severe inequalities created by Proposition 13 are arbitrary and unreasonable and do not rationally further a legitimate state interest¹⁶ [...]". This Court concurs with the

¹⁶ Supreme Court of the United States, Nordlinger v. Hahn, June 18, 1992, 112 S. Ct. (1992).

dissent of Judge Stevens, the tax rate for plots of land meant for construction of buildings should be identical for the plots with the equal surface, located in the same area, regardless of the acquisition period. It is this kind of procedure that respects the principle of equality before the law.

[69] The Court finds that the fact that the Law n° 75/2018 of 07/09/2018 provides for the tax on plots of land meant for construction of buildings is not problematic because, pursuant to articles 3 and 18 of that Law, the tax on plots of land meant for construction of buildings is one of the sources of the revenue and property of decentralized entities. The Court observes that the tax rate should be identical and those with extra land should pay excessive tax given that the taxable land is also large. This procedure complies with the principle of vertical equity according to which those with higher income, or higher ability to pay, should pay a greater amount of tax¹⁷.

[70] On basis of the explanations provided in the preceding paragraphs, the Court is persuaded that the imposition of additional tax provided for by the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities, does not equally treat the taxpayers without legitimate grounds, such procedure is contrary to the principle of equality before the law provided for under article 15 of the Constitution, consequently, that article has no effect pursuant to article 3 of the Constitution which states that any law contrary to the Constitution is without effect.

38

¹⁷ Levell, P., Roantree, B., & Shaw, J.). Mobility and the Lifetime Distributional Impact of Tax and Transfer Reforms, 2016, p 32.

Whether article 20 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities contravenes the articles 34 and 35 of the Constitution of the Republic of Rwanda.

[71] Murangwa Edward and his Counsel aver that article 20 providing for the tax rate for undeveloped plot of land which states that "Any undeveloped plot of land is subject to an additional tax of one hundred percent (100%) to the tax rate referred to in Article 18 of this Law" is contrary to articles 34 and 35 of the Constitution which stipulate that everyone has the right to immovable property and land and it is inviolable, consequently such article should be repealed.

They submit that Rwandans are the first category of a [72] national resource, the second category is the land they occupy, exploit and which is the source of their livelihood, therefore the fact that this article provides for an additional tax of 100% for the undeveloped plot without considering whether the owner can pay such tax, indicates that it is excessive and it will be outstanding for many persons. They argue that the fact that MURANGWA Edward filed a petition does not mean that he opposes the determination of such tax because he acknowledges that the tax is the source of national development as provided for under article 18 of the law mentioned above determining the sources of revenue and property of decentralized entities, nor does he question the increase from 0-80 Frw per square meter provided under the former law to 0-300 Frw per square meter provided under the new law, instead he challenges the additional tax of 100% for an undeveloped plot of land which was imposed without considering the reason for which the owner does not

develop it because the owner of a plot of land can lack means to develop it.

[73] They further submit that the fact that the tax was increased to 300%, it was not necessary to increase it again to 100% without considering the reason for which the owner does not develop the plot. Concerning the argument of the State Attorney who sustains that the purpose of such tax is to discourage those who accumulate plots, Murangwa Edward and Counsel rebut that such procedure was not the appropriate one to be applied on Rwandans, especially given that there are instructions which dictate that an owner of the plot of land not developed for its purpose will be dispossessed of it, such instructions discourage the accumulation of plots of land and considering that Rwandans have modest means.

[74] They moreover sustain that the persons cited in the categories above will finally be unable to pay such tax, as consequence article 44 of the Law governing land in Rwanda which states that "In case the lessee does not comply with the lease contract obligations other than those stipulated in article 38 of this Law¹⁸, the lessor may terminate the lease after a written warning notice of fifteen (15) working days, without any other formalities" will be applied, thus all those persons will be dispossessed of their land due to the tax arrears.

¹⁸ The article 38 provides for servitudes as follows "The landowner shall not act against other people's rights. In that regard he/she shall not:

^{1°} refuse passage to his/her neighbours leading to their parcels when there is not any other way. However, for other passage, this should be convenient for both parties;

^{2°} block water that is naturally flowing through his / her land;

^{3°} refuse other people to access water from a well found on his or her land unless he or she can prove that such a well has been dug by him or her."

[75] They demonstrate that their argument is based on the Constitution which provides for the inviolable right to the property and that right is protected by the Constitution in articles 34 and 35. Article 34 states that "Everyone has the right to private property, whether individually or collectively owned. Private property, whether owned individually or collectively, is inviolable. The right to property shall not be encroached upon except in public interest and in accordance with the provisions of the law". Article 35 states that "Private ownership of land and other rights related to land is granted by the State. A law determines modalities of concession, transfer, and use of land".

They aver that the fundamental principles of taxation [76] including the ability to pay and tax certainty are important to enable taxpayers to willingly pay tax. Therefore, they submit that given that the right to immovable property and land is inviolable and taking into account the principles of taxation, they observe that article 20 of the law mentioned above which provides for the tax increase of 100% on the undeveloped plot of land irrespective of the reason for which the plot is not developed is inconsistent with the rights enshrined under articles 34 and 35 of the Constitution and the rights protected by the international conventions ratified by Rwanda (Universal Declaration of Human Rights, art.17, paragraph 1 which states "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property"). Hence, he prays the Supreme Court to use its discretion and powers bestowed on by the law to repeal article 20 which is inconsistent with the Constitution.

[77] They conclude by praying the Supreme Court that, in examining the petition filed by MURANGWA Edward, in its

discretion, the impugned articles be analyzed in light with the Rwandan society livelihood, the essence of immovable property in Rwandan society, the value of the land in Rwandan society before the introduction of written laws and establishment of master plans, even the consequences of confiscation of the immovable property on Rwandans who are unable to pay the additional tax of 100%.

[78] Turatsinze Emmanuel, Bagabo Faustin, and Habimana Pie, on behalf of the University of Rwanda/School of Law, support that the principles enshrined in the Constitution mainly preserve the social welfare, especially article 10 which provides for building a State committed to promoting social welfare and equal opportunity to social justice, the State has the responsibility to ensure the social welfare as provided for under laws and international conventions. They aver that the report of National Housing Policy indicates that 83% depend on rent, they wonder on the consequences of the tax increase on Rwandans because each landlord will increase the rent without disregarding that when a tax becomes a burden to the citizens, it also affects the State because properties are concealed and it is obvious that tax fairness facilitates tax payment.

[79] They point out that articles 19 and 20 seem to be punitive because they respectively provide for an increase of 50% and 100%, this is contrary to the legal general principles, given that one is punished in case of failure to perform any obligation legally stated or the performance of an act legally prohibited. One wonders what the citizens in this case omitted or committed to be penalized. This violates the principles governing the social welfare and the citizen will bear the tax burden given that one who paid tax for his/her plot when selling the plot, he/she will add the tax and the tenant will add the same tax, thus making the cost of living high.

[80] They maintain that the taxes are among factors that enable the State to fulfill its obligation of ensuring social welfare, but it cannot achieve social justice when the citizens do not have the right to property, equal opportunities, and when they are not equal before the law.

[81] Dieudonne Nzafashwanayo as Amicus curiae, argues that article 20 of the Law n° 75/2018 mentioned above contravenes articles 15 and 16 of the Constitution and it discriminates the owner of a developed plot of land from the owner of the undeveloped plot of land who is requested to pay an additional tax of 100%. He adds that article 20 infringes on the rights provided for under articles 34 and 35 because the owner can be dispossessed of the plot of land when he/she fails to pay tax, therefore it was enacted without taking into account the effects it will have on the owners of undeveloped plots of land.

[82] He submits that through the enactment laws the State is empowered to obstruct the rights provided for under articles 15, 16, 34 and 35 of the Constitution through taxation purposely for its functioning, but he notices that article 20 does not serve that purpose, because if it was the intended purpose, the State would have provided for such tax in accordance with the ability of taxpayers. He further states that such an article was not mandatory to overcome the issue related to speculation on plots of land given that such issue is addressed by article 58 of the Law governing land which states that the land is confiscated when there are no tangible reasons of its not being exploited. [83] He furthermore asserts that the issue of tax determination was settled by the African Court on Human and Peoples'Rights and its decisions corroborate the statements of Adam Smith in his book, *Inquiry into the Nature and Causes of the Wealth of Nations*¹⁹, they concurred that tax is determined purposely to enable the State to address the citizens' needs and the tax should be determined in accordance with the ability of taxpayers; for that reason, he notices that the tax provided for under article 20 was determined without putting into consideration those opinions.

[84] He also argues that a plot of land can be undeveloped because of the regulation of master plan, without any relation with the owner's ability and article 20 should not have provided for the land to be confiscated for being unexploited while article 58, paragraphs 3 and 4 provides for the land which cannot be confiscated for not being exploited and its location. He states that the legislator can discourage a given behaviour through taxation, however, the tax should not be confiscatory nor a burden on the taxpayer.

[85] He asserts that the State can impose a tax for a legitimate purpose and use the adequate procedure for achieving the intended purpose. He concludes that if the Court puts into consideration those principles it will find that article 20 which is sought to be repealed can cause the deprivation of the right to the property for those who fail to pay tax.

[86] Ingabire Marie Immaculée, on behalf of Transparency International Rwanda as Amicus curiae, asserts that she generally supports the taxation as the tax benefits the citizens, but it should

¹⁹ Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, Lausane, 2007, p. 639.

not be detrimental to their social welfare. Article 20 of the Law n° 75/2018 mentioned above violates the right to private property of the land because the tax provided for by that article is a burden to low-income earner as it seems to be a penalty for the owner of an undeveloped plot of land resulting from lack of means and in case he/she is unable to pay that tax, the consequence will be to auction his/her property including that land to recover the tax, and therefore he/she would be deprived of the right to property enshrined in article 34 of the Constitution.

[87] She advances that the legislator set the tax provided for by article 20 as a harsh sanction of 100% without taking into account the reason for which the plot of land is undeveloped to the extent that the provisions of that article encroach upon the social welfare of the citizens, mostly the youth, because when a citizen earns some money he/she buys a plot of land and he/she has to wait to get other money for him/her to build a house, thus this tax will not allow him/her to build because the money saved will be used to pay tax. They argue that such tax will impoverish the citizens because if a citizen fails to pay such tax and if his/her plot of land is auctioned, he/she will be destitute, the citizens will lose their property, this will lead to most of them being in the first category of *ubudehe*.

[88] She furthermore avers that some citizens do not have residential houses due to the lack of financial means, thus the legislator did not consider them when enacting this article, nor does he consider a person who bought a plot of land, but later after the introduction of a master plan, the area in which that plot is located was meant for construction of storeyed buildings, the citizen is unable to construct a required building, that means that the plot will continue to be charged tax of 100% and such situation can finally be a loophole for corruption in decentralized entities. She also argues that the legislator did not take into account the reasons why a plot of land can remain undeveloped, which are many and varies. She concludes by praying the Court to repeal the impugned article 20.

[89] Ntibaziyaremye Innocent as Amicus curiae asserts that it is inappropriate to levy a tax of 100% on an undeveloped plot of land because there are different reasons as to why it is undeveloped, especially lack of means. He moreover adds that when a land purpose is modified from agricultural to residential, the owner automatically pays tax while he/she no longer exploit it and he/she bears the burden of paying tax to the extent that he/she can give it as a heritage to the children and they refuse to take it because they are not able to pay tax arrears.

[90] The State Attorney contends that article 20 does not violate the right to the immovable property and the right to land provided for under articles 34 and 35 of the Constitution because it differentiates the owners who exploit the land for the intended purpose and those who do not do so and the plots are kept undeveloped without being transferred to others who can develop them. Moreover, the State is committed to boosting its development by exploiting the small land it has. He further argues that when a plot of land is developed, a low tax is charged due to depreciation, contrary to the undeveloped plot of land which does not depreciate, instead, its value can increase, this is the reason why these two categories cannot pay the same taxes.

[91] He avers that article 20 does not violate the right to the immovable property and the right to land provided for by the Constitution because the tax does not imply deprivation of the right to private property, nor encroaching upon that property. He

submits that, even if it would be considered like that, that principle states that "The right to private property can be encroached upon in public interest and accordance with the provisions of the law", and it is obvious that tax serves the public interest given that it contributes to the development, consequently, imposing tax determined by the law on private property for national development, for developing infrastructures and other activities beneficial to all citizens should not be considered as a violation of the right to private property or the right to private land. He concludes that, based on the explanations he provided, article 20 which is sought to be repealed is not contrary to the Constitution.

DETERMINATION OF THE COURT

[92] The legal issue to be analyzed in this part is to determine whether the additional tax rate of 100% imposed on an undeveloped plot of land violates the principle of the right to property in general and the right to land in particular.

[93] Article 34 of the Constitution states that "Everyone has the right to private property, whether individually or collectively owned.

Private property, whether owned individually or collectively, is inviolable. The right to property shall not be encroached upon except in public interest and in accordance with the provisions of the law". Article 35 states that "Private ownership of land and other rights related to land is granted by the State. A law determines modalities of concession, transfer, and use of land". These two articles enshrine two complementary principles: the first one is the right to private property, the second one is related to the right to land. [94] These principles are embedded in various international conventions, such as the Universal Declaration of Human Rights, article 17 which provides that "Everyone has the right to own property, alone as well as in association with others and no one shall be arbitrarily deprived of his or her property"²⁰, European Convention on Human Rights, Protocol No. 1, article 1²¹, American Convention on Human Rights, article 21, African Charter on Human and Peoples' Rights, article 14²².

[95] Article 20 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities provides that "Any undeveloped plot of land is subject to an additional tax of one hundred percent (100%) to the tax rate referred to in Article 18 of this Law". That article provides that "The tax rate on a plot of land varies between zero (0) and three hundred Rwandan francs (FRW 300) per square meter".

[96] Article 39, paragraph 1 of the Law N° 43/2013 of 16/06/2013 governing land in Rwanda states that "Any person owning land shall exploit it in a productive way and in accordance with its nature and intended use". This article clearly indicates that the landowner has the obligation to properly exploit

²⁰ Article 17, Universal Declaration of Human Rights

²¹ "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

²² "Everyone has the right to property. No one shall be deprived of his property except in the public interest and in accordance with the law (and upon payment of just compensation".

it. The owner of the undeveloped plot of land violates article 39 because the land should be exploited unless there is a reasonable and legitimate reason for its not being exploited.

[97] The Court finds that the tax of 100% added to the standard tax rate emanates from the fact that the landowners do not fulfill that obligation. Exploiting the land is in the public interest of promoting economic sustainable development and social welfare of Rwandans. This concurs with the provisions of article 3 of the Law N° 43/2013 of 16/06/2013 governing land in Rwanda which provides that "The land is part of the common heritage of all the Rwandan people: the ancestors, present and future generations. Notwithstanding the recognized rights of people, only the State has the supreme power of management of all land situated on the national territory, which it exercises in the general interest of all intending to ensure rational economic and social development as defined by law. [...] ".

[98] The ground for imposing the additional tax on an undeveloped plot of land raised by the State is to discourage those who acquire plots which they do not exploit for speculation, the Court finds that such ground is reasonable and not contrary to the Constitution, it is also in line with the national policy of small land use and exploitation for the public interest.

[99] Regarding the issue of those who will fail to pay the additional tax of 100% leading to the auction of their land for tax recovery as stated by Murangwa and some of the amicus curiae, that issue can be analyzed in the general context when a taxpayer defaults on tax. As provided for under articles 63 and 64 of the Law N° 026/2019 of 18/09/2019 on tax procedures, if the taxpayer does not pay within the period referred to in the Law, the Tax administration may seize any movable or immovable

property of the taxpayer, held by the taxpayer or a third person and such property shall be auctioned. If a taxpayer fails to pay the tax land within the period referred to in the Law, the tax payment can proceed with the auction of such property that may be the taxable land. The Court finds that such a procedure does not violate the taxpayer's right to private property, instead, it is a common procedure for tax payment.

[100] According to the provisions of article 20 which is sought to be repealed, it should be noted that the auction is not a must. Also, there is no survey conducted which demonstrates that most of the owners who do not exploit their plots of land lack the means or they keep them for speculation.

[101] Article 31 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities states that "The concerned District Council can only waive the due immovable property tax in the following cases: 1° the taxpayer has provided a written statement of an inventory of his property justifying that he/she is totally indebted so as a public auction of his/her remaining property would yield no result; 2° the taxpayer proves that he/she is not able to pay immovable property tax. The taxpayer applying for a waiver of the immovable property tax liability must write to the tax administration. When the request is found valid, the tax administration makes a report to the executive committee of the competent decentralized entity which also submits it to the District Council for decision. The waiver of immovable property tax liability cannot be granted to a taxpayer who understated or evaded taxes". The provisions of this article indicate that the State took into account those who lack the means to pay the tax on the immovable property. Even the owner of the land referred to in article 20 who lacks the means to pay the tax due to grounds provided by article 31 of the Law n° 75/2018 mentioned above can also apply for a waiver of immovable property tax liability. This clears the doubts raised by the petitioner and some of the amicus curiae who indicated that some will fail to pay that tax due to lack of means and their property be auctioned.

[102] Concerning the statement made by Murangwa that the additional tax of 100% provided under article 20 is excessively high, the Court reminds its motivation in the judgment N^0 RS/SPEC/0001/16/CS rendered by this Court on 23/09/2016, where it held that "The Court cannot order that a law is contrary to the Constitution only on the basis that in its understanding the purpose of that law could be realized through other means. A party who challenges a law must demonstrate that the process set by the legislator is equivocal, unclear or it logically differs from the purpose of the law. This underpins the principle that the branches of government are separate, independent and they respect each other²³". The Court finds that this legal position should be maintained even in this case, thus it cannot examine whether that tax rate is excessive or lower as asserted by the applicant and some of the amicus curiae and decide on its unconstitutionality because the matter related to the value of tax rate is under the responsibility and discretion of the Parliament²⁴.

[103] Generally, the owner of a plot of land meant for construction of a building has the full right to exploit it. If he/she is required to pay additional tax because he/she did not develop

²³ Case No RS/SPEC/0001/16/CS, AKAGERA Business, p.29

²⁴ The article 164 of the Constitution states that "Tax is imposed, modified or removed by law. No exemption or reduction of a tax can be granted unless authorized by law".

it, and defaulted on it, and he/she has to forcibly pay it, therefore this cannot be considered as a violation of the right to exploit the land in accordance with the law. Article 1 of Protocol No. 1 to the European Convention on Human Rights clearly illustrates that paying tax should not be confused with violation of the right to property. It states that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

[104] As motivated above, imposing the additional tax of 100% on the undeveloped plot of land emanates from the failure of the landowner to fulfill the obligation of exploiting it for the intended purpose. Those unable to pay such tax to apply for tax waiver in case they fulfill the requirements stated under article 31 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities. The fact that such a tax rate is excessive is not a ground to justify that the law determining such tax is inconsistent with the Constitution. Basing on these grounds, the Court finds article 20 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities. 34 and 35 of the Constitution.

[105] Even if article 20 of the Law N° 75/2018 is not inconsistent with the Constitution as motivated above, the Court finds that its drafting should be completed to include the time

limit during which the land can spend without being exploited, to be charged the additional tax and also that the additional tax is waived in case there is reasonable ground for its un exploitation as provided by article 58 of the Law N° 43/2013 of 16/06/2013 governing land in Rwanda relating to the land subject to confiscation.

DECISION OF THE COURT

[106] Decides that the petition filed by Murangwa Edward has merits in part.

[107] Decides that article 16 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities is not contrary to article 15 of the Constitution of the Republic of Rwanda.

[108] Decides that article 16 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities is not contrary to article 16 of the Constitution of the Republic of Rwanda.

[109] Decides that article 17 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities is not contrary to articles 15 and 16 of the Constitution of the Republic of Rwanda.

[110] Decides that article 19 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities is inconsistent with article 15 of the Constitution of the Republic of Rwanda, therefore, article 19 is

without effect as provided for by article 3 of the Constitution of the Republic of Rwanda.

[111] Decides that article 20 of the Law N° 75/2018 of 07/09/2018 determining the sources of revenue and property of decentralized entities is not contrary to articles 34 and 35 of the Constitution.

[112] Orders that this judgment is published in the Official Gazette.

PROCEDURAL CASES

CASE RELATING TO CIVIL, COMMERCIAL, LABOUR AND ADMINISTRATIVE PROCEDURE

MPORANYI v. USENGIMANA

[Rwanda SUPREME COURT – RCOMAA 0014/15/CS (Kayitesi, P.J., Karimunda and Ngagi, J.) June 23, 2017]

Commercial procedure – Business name – Standing to sue – A business name cannot be used to sue in the courts of law because it does not have a legal personality rather the claim is lodged by the owner of the business activities in his name since he is the one with the legal personality which entitles him to sue in the interest of the business activities he carries out under that name.

Facts: Entreprise Usengimana Richard brought shares in SORAS Group Ltd and later sued the latter's director Mporanyi Charles in the Commercial High Court of Nyarugenge arguing that he sold them at a higher price and requested the Court to compel him to reimburse the balance of the price at which he sold him the shares. The Court first examined the issue whether Entreprise Usengimana Richard has the standing to sue, and it found that it is not a company nor an entity with legal personality for it to sue or be sued, instead, the court found that it is a business name whereby the owner of the business activity is the one to sue, thus it found the claim inadmissible.

Entreprise Usengimana was not contented with the rulings of the judgment and appealed to the Commercial High Court claiming that the previous court disregarded the evidence and the provisions of laws he submitted to it proving that Entreprise is registered in Rwanda Development Board and thus rejected its claim. Mporanyi raised an objection of inadmissibility of the appeal of Entreprise Usengimana on the ground that it does not have the standing to be a party in the case. The Commercial High Court found that nothing is demonstrating that Entreprise Usengimana Richard is separate from its owner, The Court held that the claim should have been admitted because Usengimana is a name he uses in business activities and himself he has the legal capacity, thus he should not be refused to file a claim using the name of his business activities, therefore that the claim should be transferred back to the Commercial Court of Nyarugenge to be heard.

Mporanyi Charles appealed in the Supreme Court arguing that the Commercial High Court erred in holding that Entreprise Usengimana cannot be separated from its owner, because the business name does not have the standing to sue because it has no legal personality instead the owner is the one with the capacity to sue because he has legal personality. In its defense, Entreprise Usengimana Richard argues that as an institution nothing bars it from having a legal personality because it's a business name issued by a competent state organ.

Mporanyi Charles claims for damages for being dragged into unnecessary lawsuits, while Entreprise Usengimana rebuts that those damages are groundless because that is the work of the counsel to follow up on the case.

Held: 1. A business name cannot be used to sue in the courts of law because it does not have a legal personality rather the claim is lodged by the owner of the business activities in his name since he is the one with the legal personality which entitles him to sue in the interest of the business activities he carries out under that name.

The appeal has merit;

The claim filed by Entreprise Usengimana Richard should not have been admitted; The appealed judgment is quashed; Court fees on Entreprise Usengimana.

Statutes or statutory instruments referred to:

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 2 Law N°07/2009 of 27/04/2009 relating to companies, article 375

Cases referred to:

Julia Shop v Ecobank Rwanda Ltd, RCOMAA 0042/14/CS, rendered by the Supreme Court on 18/03/2016 Association Momentanée SOBETRA SARL & SOBTRA (U) Ltd v Office Rwandais des Recettes (RRA), RCOMA 0064/11/CS rendered by the Supreme Court on 28/11/2012

Free Zone, Co, Ltd v Association Momentanée (Joint Venture) "H3E" RCOMA 0064/12/CS rendered by the Supreme Court on 03/06/2016

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started in Commercial Court of Nyarugenge, whereby Entreprise Usengimana Richard requested the court to compel Mporanyi Charles to pay back 318,433,000Frw which is exceeded the price of its shares it bought in SORAS Group Ltd because the Entreprise Usengimana Richard states that it was overcharged when it bought 4,260 shares.

[2] That Court first examined whether the Entreprise Usengimana Richard had the legal standing to sue, and found that it is not a commercial company or an institute with legal personality for it to be allowed to sue or to be sued, rather it is a commercial name that gives its owner the right to sue in his own name. It dismissed the claim filed by Entreprise Usengimana Richard.

[3] Entreprise Usengimana Richard appealed to the Commercial High Court, stating that the previous court dismissed its claim, disregarding the law and the elements of evidence it produced before it, because even if that entreprise is owned by Usengimana Richard, but it is registered in Rwanda Development Board and it has legal personality.

[4] Mporanyi Charles raised an objection of inadmissibility of the appeal lodged by Entreprise Usengimana Richard arguing that it does not fullfil all requirements to be a part in a lawsuit, he based his argument on the provisions of article 18 of the Law N° 07/2009 of 27/04/2009 relating to companies and article 2,142 and that of 355, *litera* 10 of the law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.

[5] The Commercial High Court held that nothing distinguishes Entreprise Usengimana Richard from its owner because it is not an association, organization or an institution which have interest, capacity and legal standing to sue as provided by article 2 of Law N° 21/2012 of 14/06/2012 relating

to the civil, commercial, labour and administrative procedure, thus, it should not be requested what are provided in article 18 of the law $N^{\circ}07/2009$ of 27/04/2009 relating to companies so that it can have legal standing, capacity and interest for filing a claim. It concludes that nothing is preventing Entreprise Usengimana Richard or Usengimana Richard himself to have the capacity to sue or to be sued because it is a personal commercial name, therefore, his appeal should be admitted and heard on merit.

[6] The Commercial High Court continued the hearing on the issue of legal standing in the court decision RCOMA 500/15/HCC rendered on 31/10/214 and found that Entreprise Usengimana Richard is the name which Usengimana Richard uses in his commercial activities, thus if Usengimana Richard himself has legal personality, he should not be prevented to fill a claim by using his Commercial name. The court held that the claim should have been admitted and ordered the transfer of the case to the commercial court so that it should be heard¹

[7] Mporanyi Charles was not satisfied with that decision and appealed to the supreme court stating that:

a) the commercial High Court erred in declaring that Entreprise Usengimana Richard is a commercial name that can be used as a proper name while Entreprise Usengimana Richard stated that it has a legal personality which is different from its own because it is registered in *Rwanda Development Board*.

b) the commercial high court declared that Usengimana Richard should not be separated from the commercial

¹, the Court based on article 171 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.

activities that he carried under the name of Entreprise Usengimana Richard while that « *entreprise* » is not a commercial name with a legal personality as it was declared by that Court so that it can have the standing to file a claim on behalf of its owner because the plaintiff must have a full identification (*personne morale ou physique dotée de personnalité juridique*), which is not possessed by Entreprise Usengimana Richard.

[8] The hearing was conducted in public on 04/10/2016, Mporanyi Charles was represented by Counsel Ruzindana Ignace whereas Entreprise Usengimana Richard represented by Counsel Idahemuka Tharcisse.

[9] The Court first examined the objection of lack of jurisdiction that was raised by Counsel Idahemuka Tharcisse arguing that the value of the subject matter of at least 50,000,000Frw was not determined by the previous Court or debated upon, but even if the appeal falls into the jurisdiction of this Court, again it cannot be admitted because he appealed against the interlocutory judgment the appeal against an interlocutory judgment is made only jointly with the final judgment.

In interlocutory judgment rendered on 11/11/2016, the [10] Court overruled the raised objections and held that the hearing on 21/01/2017. dav. Counsel merit resume on On that Mugabonabandi Jean Maurice informed the court that he replaced Counsel Idahemuka Tharcisse who withdrew himself in all cases of Entreprise Usengimana Richard and also that besides having accessed the case file for the first time but also the Rwanda bar association has not yet authorised him to plead this case, he requested that the hearing be postponed in order for him to prepare and get the permission to plead.

[11] The hearing was postponed to 21/03/2017. On that day the bench was not complete and postponed to 23/05/2017. On that day, the hearing was conducted in public, Mporanyi Charles was represented by Counsel Ruzindana Ignace whereas Entreprise Usengimana Richard represented by Counsel Mugabonabandi Jean Maurice who informed the Court that he has widrawn his letter he submitted to the Court on 17/03/2017 whereby he stated that he withdrew from the case because he was unable to fulfill what he was requested by Rwanda bar association so that he can plead this case.

II. ANALYSIS OF THE LEGAL ISSUE

II.1. Whether the Entreprise Usengimana Richard has the standing to sue.

[12] Ruzindana Ignace, the counsel for Mporanyi Charles states that the Commercial High Court erred in declaring that Entreprise Usengimana Richard should not be separated from its owner instead of accepting or rejecting the statement of Usengimana Richard that Entreprise Usengimana Richard is a company or an institution. He explains that a commercial name does not have the standing to file a claim because it does not have legal personality rather the owner is the one who files the claim, and this is the position of this Court which was held in the judgment of *Rwanda Free Zone, Co, Ltd v. Association momentanée (joint-venture)*, thus, he requests the Court to rely on that caselaw and article 2 of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and

administrative procedure and hold that Entreprise Usengimana Richard does not have the standing to sue and reverse the appealed judgment and sustain the rulings of the judgment rendered by the Commercial Court of Nyarugenge.

[13] Mugabonabandi Jean Maurice, the counsel for Entreprise Usengimana Richard states that the Commercial High Court did not err because it ruled on the issue of standing to sue which was filed before it, it was not obliged to rely on the statement of parties only. He further states that he, sought for guidance from the Rwanda Development Board and it informed him that the entreprises are only issued with certificates, that even if it confused him because they told him that it is given to the small traders, he finds that nothing stops Entreprise Usengimana Richard as an institution to have legal personality because it is a commercial name that was issued by a competent public organ, but if this court finds it contrary, it should hold that the certificate issued to Entreprise Usengimana Richard, as the commercial name, which grants it the status of performing the contract, to buy and sale shares, therefore it also grants it the standing to sue as it was held in paragraph 5 of the appealed judgment.

DETERMINATION OF THE COURT

[14] Article 2 of the Law N^o 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that a claim cannot be accepted in court unless the plaintiff has the status, interest and capacity to bring the suit.

[15] Article 375 of the Law $N^{\circ}07/2009$ of 27/04/2009 relating to companies which was in place at the time of filing the claim provides that registration, nature and organization of those who

can not score a daily income of at least ten thousand Rwandan francs (10.000 Rwf) shall be determined by an Order of the Minister in charge of commerce.

[16] Article 2 of the Ministerial Order N°02/09/MINICOM of 08/05/2009 relating to business of low income, provides that, a business activity shall mean any business activity carried out by any individual regardless of sex and registered as provided for by this Order. It shall include purchase and sale, service delivery or any other professional activity done regularly to gain profit.

[17] The documents contained in the case file demonstrate that on 17/03/2014, in the name of its director, Entreprise Usengimana Richard registered on « *Entreprise code* » 100058249, sued Mporanyi Charles at the Commercial High Court of Nyarugenge requesting that he be compelled to pay 318,433,000Frw originating from the balance of 276,900,000Frw for the 4260 shares he brought from him and he paid 595.335.000Frw and various damages (cote 6).

[18] Again the documents in the case file indicate that on 10/07/2011, Rwanda Development Board (RDB), in accordance to article 10 of the Ministerial Order N°02/09/MINICOM of 08/05/2009 relating to business of low income,² issued to Entreprise Usengimana Richard a Certificate of Entreprise Registration, in the names of (Entreprise Name) Usengimana

² That article provides registration certificate shall mention the following: Registration number of the business activity; b) - Names of the registered person; c) - Business name, name of the business d) activity and name of the trader; e) - Brief and precise description of the registered business activity; f) - The company head office and the place of business; g) - The date on which the registration certificate was issued; h) - Signature and stamp of the Registrar General or his/her representatives; - Category of the commercial activity.

Richard, which had to operate under the business name of Usengimana Richard (cote 62).

[19] The Court finds that the Ministerial Order N° 02/09/MINICOM of 08/05/2009 mentioned which was based on to issue to Entreprise Usengimana Richard a Certificate of Entreprise Registration, states clearly that it determines modalities of registration, the nature and organization of business whose income is less than ten thousand Rwandan francs (10,000 Rwf) per day, while article 10 provides that in registering such traders it mentions the following names of the registered person, registration number of the business activity and the activity, this implies that a trader registered in that way is not considered as someone who has registered a company but does it to formalize the commercial activities he has.

[20] Therefore, the Court finds that since Entreprise Usengimana Richard is a business name implies that it has no legal personality, thus it cannot file a claim in the court, that is the reason the claim has to be lodged by the owner of that name or *«entreprise »* who is Usengimana Richard because he is the one with legal personality, with the legal standing to sue for the interests of the business activities he carries out in that name. This is the legal position that the court has emphasized in various judgments such as in the case of Julia Shop and Ecobank Rwanda Ltd³, the case of Association Momentanée SOBETRA SARL & SOBTRA (U) Ltd versus Office Rwandais des Recettes (RRA)⁴ and that of Rwanda Free Zone, Co, Ltd versus Association

³ See Judgment RCOMAA 0042/14/CS between Julia Shop and Ecobank Rwanda Ltd rendered by the Supreme Court on 18/03/2016 par 19 and 22.

⁴ Judgment RCOMA 0064/11/CS rendered by the Supreme Court on 28/11/2012, par 16.

Momentanée (Joint Venture) «H3E»⁵, whereby it held that a business name or a temporary cooperative which have no legal personality do not have obligations or rights before the law, implying that they cannot sue in courts rather the owners of the business activity is the one who has the standing to sue and if it is done otherwise the Court should rule that it was moved by a person with no capacity to sue and thus dismiss the case.

[21] The Court finds that this legal position is also emphasized by the legal scholars in commercial matters, whereby they argue that a sole proprietorship does not have a legal personality distinct from that of the natural person who operates it and that a personal *«entreprise»* regestered as a bussiness name do not have the standing to sue rather legal actions are brought by the owner in his own name, these also emphasize that Entreprise Usengimana Richard did not have the standing to sue,⁶ therefore its claim should have been admitted.

 $^{^5}$ Judgment RCOMA 0064/12/CS rendered by the Supreme Court on 03/06/2016, par 39.

⁶ « L'entreprise individuelle est donc celle exploitée par un commerçant physique seul, c'est-à-dire sans associé. [...] une telle entreprise individuelle n'a pas de personnalité juridique distincte de celle de la personne physique qui l'exploite. L'entreprise individuelle, à la différence de la société n'a donc pas la personnalité morale. » Jean-Pierre BERTREL et Marina BERTREL, Droit des sociétés, in Droit de l'Entreprise, Paris, Wolters Kluwer France SAS, 2010, p.382. « [....] l'entreprise individuelle ne possède pas de la personnalité juridique et n'est pas sujet de droit. En conséquence, elle ne peut pas être titulaire de droits réels et fait partie du patrimoine personnel de l'entrepreneur. Elle ne peut également pas ester en justice. Les actions en justice sont intentées par l'entrepreneur. » See Le commerçant, entrepreneur individuel « traditionnel » available on http://www.distripedie.com/distripedie/spip.php [accessed on 20/06/2017].

[22] The Court finds that, in paragraph five of the appealed judgment, the Commercial High Court erred in holding that Usengimana Richard "should not be barred from filing a claim in the name of *[Entreprise Usengimana Richard]*, which he is allowed to be known as it his business activity [...] because its a name for a person with a legal personality [...]," because as motivated above and held by the Commercial Court of Nyarugenge, the name itself has no legal personality to the extent that it can file a claim to the court, instead Usengimana Richard, the owner of the business activities is the one who has the standing to sue, therefore as provided by 2, par 1of the Law N^O 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, the plaintiff has no standing, thus the claim is inadmissible.

[23] Pursuant to the provisions of laws and motivations given above, the Court holds that the judgment RCOMA 500/14/HCC rendered by the Commercial High Court on 31/10/2014 is overturned, if Usengimana Richard wishes to sue he must do it in his name instead of suing in the name of the director of Entreprise Usengimana Richard.

II.2. Whether Mporanyi Charles should be awarded damages.

[24] Counsel Ruzindana Ignace argues that Mporanyi Charles was dragged into unnecessary lawsuits, thus he should be awarded 1,000,000Frw for procedural fees and counsel fees of 2,000,000Frw on both Commercial High Court and at the Supreme Court.

[25] Counsel Mugabonabandi Jean Maurice argues that the procedural fees requested by Mporanyi Charles is groundless

because the counsel is paid to follow on the case, he rather states that the Court should declare that Entreprise Usengimana Richard had the standing to sue as held by the Commercial High Court and award Entreprise Usengimana Richard the counsel fees of 1.000.000Frw.

DETERMINATION OF THE COURT

[26] The Court finds that the procedural fees and the counsel fees requested by Mporanyi Charles, should be awarded to him because he had to follow up on the case and also hire the counsel, but since he cannot prove that the amount he requests for, in the court's discretion he should be 300,000Frw for procedural fees and 500,000Frw for the counsel fees, all amounting to 800,000Frw.

III. DECISION OF THE COURT

[27] Decides that the appeal lodged by Mporanyi Charles has merit;

[28] Decides that the claim filed by Entreprise Usengimana Richard should not have been admitted.

[29] Decides that Judgment RCOMA 500/14/HCC rendered by the Commercial High Court on 31/10/2014 is quashed;

[30] Orders Entreprise Usengimana Richard to pay Mporanyi Charles 300,000Frw for procedural fees and 500,000Frw for counsel fees, all amounting to 800,000Frw;

[31] Orders Entreprise Usengimana Richard to remburse to Mporanyi Charles the court fees deposit of 100,000Frw.

PASSAG COMPANY Ltd v. GTBANK Ltd ET AL

[Rwanda COURT OF APPEAL – RCOMAA 00050/2018/CA (Karimunda, P.J., Ngagi and Munyangeri J.) April 26, 2019]

Company law – Shareholder – Standing to sue in the interest of the company – A shareholder who seeks to sue in the interests of the company must first obtain relief from court – A shareholder authorized by the Court to sue for the interests of a company, does not file a lawsuit in his name but in the name of the company.

Facts: PASSAG COMPANY Ltd and ECOMIL have entered into a joint venture agreement and formed a new company called ECOMIL-PASSAG Ltd, which means that the two merged companies became shareholders of the new company. After the merger, they won a tender from Minagri, they worked together and opened a bank account at FINA BANK SA now known as GTBANK RWANDA Ltd, they also chose the signatories on that account whereby they included Gatarayiha.

The dispute arose when Minagri paid for the work done, the money was deposited in the account of ECOMIL-PASSAG Ltd in GTBANK RWANDA LTD, whereby it was withdrawn by one of the signatories called Gatarayiha. PASSAG COMPANY Ltd as a shareholder sued GTBANK in the Commercial Court stating that the money had to be withdrawn from the account only if there are three signatures out of the four signatories, requesting GTBANK to return that money to the account of ECOMIL PASSAG Ltd. In this case, Gatarayiha was forcefully intervened. GTBANK RWANDA Ltd raised an objection of inadmissibility of the claim on the ground that it has no contractual relationship with that company of being its client, while Gatarayiha claims that the company has no interest or standing to sue. The court dismissed the case on the ground that the company had no interest and standing to sue.

PASSAG COMPANY Ltd was not contented with the ruling and appeal to the Commercial High Court arguing that the previous court made its rulings based on the grounds that it had not been debated upon. The court found the appeal with no merit.

Again, PASSAG COMPANY Ltd was not satisfied with the decision and appealed to the Supreme Court. The case was transferred and heard by the Court of Appeal after the judiciary reform.

PASSAG COMPANY Ltd argues that the lower courts held that it had no standing to sue, yet it had it pursuant to the Law relating to the civil, commercial, labour and administrative procedure and that it should not be deprived of its rights because it still has an interest. in the "joint venture".

For GT Bank Ltd, it argues that PASSAG COMPANY Ltd had no standing to sue because it is distinct from PASSAG ECOMIL Ltd and that PASSAG COMPANY Ltd is a being a shareholder of PASSAG-ECOMIL does not give it the standing to sue on behalf of PASSAG ECOMIL.

In his defence, Gatarayiha argues that no shareholder can personally sue for the interests of a company. He also concurs that it has no standing.

Held: 1. A shareholder who seeks to sue in the interests of the company must first obtain relief from the court.

74

2. A shareholder authorized by the Court to sue for the interests of a company does not file a lawsuit in his name but the name of the company.

The appeal has merit; Appealed judgment sustained.

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 2 and 111.
Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 2.
Law N° 07/2009 of 27/04/2009 governing companies, articles 223 and 224.

No case referred to.

Authors cited:

J.Héron, Droit judiciaire privé, Paris, Montchrestien, 1991, p. 51.

Judgment

I. BACKGROUND OF THE CASES

[1] PASSAG COMPANY Ltd and Misigaro Louis, who operates his commercial activities in the business name of ECOMIL, entered into a joint venture agreement, thus they begun a new company called ECOMIL-PASSAG Ltd, they agreed to execute jointly the tender awarded to them by MINAGRI in Nyamugali, Kirehe District, they later opened a bank account in FINA BANK SA, currently GT BANK RWANDA Ltd, and appointed the signatories including Gatarayiha Augustin.

[2] Disputes arose when on 16/02/2013, MINAGRI made a payment of 72,534,548 Frw to paid ECOMIL-PASSAG Ltd, which GT BANK RWANDA Ltd gave to Gatarayiha Augustin, PASSAG COMPANY Ltd claimed that the money had to be withdrawn from the account only if there were three signatures out of the four signatories, thus resorting to the courts of law.

[3] The case began in Commercial Court of Nyarugenge, PASSAG COMPANY Ltd suing GT BANK RWANDA Ltd, formerly known as FINA BANK Ltd, demanding that the Court order it to return the money mentioned above on the account of ECOMIL-PASSAG Ltd, Gatarayiha Augustin was forcibly intervened. During the hearing, GT BANK RWANDA Ltd raised an objection requesting that the case filed by PASSAG COMPANY Ltd be dismissed on the ground that it has no contract with it to have and use the bank account as its client, Gatarayiha Augustin also objected that the company which sued had no interest and standing to file a claim and that there is no proof that it is a company that exists legally in accordance with the Rwandan law.

[4] On 19/07/2016, the Commercial Court of Nyarugenge rendered a judgment RCOM 00445/2016 / TC / NYGE, whereby it dismissed the cases of PASSAG COMPANY Ltd on the ground that it had no interest and standing to file a case, stating that what it is suing for is not its inherent right, rather its the property of ECOMIL-PASSAG Ltd, and that as required by Rwandan law, a shareholder who wants to file a claim must first request for it from

the Court. The Commercial Court of Nyarugenge also ruled that the decision to seize the litigated money had been revoked.

[5] PASSAG COMPANY Ltd was not contented with the ruling and appealed to the Commercial High Court claiming that the previous court in its ruling based on the grounds that had not been debated on during the hearing, on 02/02/2018, the Court rendered judgment RCOMA00461/2017 / CHC / HCC, found the appeal of PASSAG COMPANY Ltd unfounded, ordered it to pay 500,000 Frw to GT BANK RWANDA Ltd and Gatarayiha Augustin each for procedural and counsel fees, confirming the merits of the judgment under appeal.

[6] PASSAG COMPANY Ltd was not again contented with the rulings of the Commercial High Court, thus appealed to the Supreme Court arguing that it should not be deprived of its rights as it still has interest in the joint venture and that it does not acknowledge the document appointing Gatarayiha Augustin as a signatory to the bank account of ECOMIL-PASSAG Ltd and also that it was not allowed to submit on it.

[7] After the judiciary reform, its appeal was transferred to the Court of Appeal in accordance with the provisions of article 105 of Law $N^{\circ}30/2018$ of 02/06/2018 determining the jurisdiction of the courts.

[8] The case was heard in public on 05/02/2019, PASSAG COMPANY Ltd represented by Me Gabiro David, Gatarayiha Augustin represented by Counsel Pierre Claver Zitoni and Counsel Mbarushimana Jean Marie Vianney and GT BANK RWANDA Ltd represented by Counsel Bimenyimana Eric, The Court first examined the objection of lack of jurisdiction raised by GT BANK RWANDA Ltd arguing that PASSAG

COMPANY Ltd lost on the same grounds at the first and second instance, but the court overruled it and the hearing on merits was scheduled on 27/03/2019. On the day of the hearing, PASSAG COMPANY Ltd was represented by Counsel Muhirwa Ngabo Audace, others were represented as before.

II. ANALYSIS OF THE LEGSL ISSUES

1. Whether PASSAG COMPANY Ltd had the standing to sue.

[9] Counsel Muhirwa Ngabo Audace, representing PASSAG COMPANY Ltd, argues that the Commercial High Court held that PASSAG COMPANY Ltd had no standing to sue, yet it had it in accordance with article 2 of Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure¹ which was in force when PASSAG COMPANY Ltd initiated a lawsuit at the Commercial Court of Nyarugenge. He argues that the Commercial High Court should not only have relied on the Law governing companies but also it should have based on the law relating to the civil, commercial, labour and administrative procedure.

[10] Counsel Bimenyimana Eric, representing GT Bank Ltd, argues that PASSAG COMPANY Ltd had no standing to sue because it is not PASSAG-ECOMIL Ltd. He argues that the fact that PASSAG COMPANY Ltd is a shareholder of PASSAG-ECOMIL does not give it the standing to sue on behalf of PASSAG-ECOMIL as the previous courts found it based on

78

¹ This article became article 3 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure.

article 223 of the law governing companies, therefore he is of the view that the Commercial High Court was not in error to hold that PASSAG COMPANY Ltd had no standing to sue to the Commercial Court of Nyarugenge.

[11] Counsel Zitoni Pierre Claver, representing Gatarayiha Augustin, concurs with Counsel Bimenyimana Eric, he adds that based on article 23 of the law governing companies, no shareholder can personally sue for the rights of the company for which he is a shareholder. Counsel Mbarushimana Jean Marie Vianney, also representing Gatarayiha Augustin, also concurs with his learned colleagues because he finds that PASSAG COMPANY Ltd had no standing to sue for rights that are not it's own.

DETERMINATION OF THE COURT

[12] Article 2, paragraph one of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which was in force at the time PASSAG COMPANY Ltd filed the claim provides that: "a claim is admissible in court only if the claimant has standing, interest and capacity to sue.

[13] While article 2, subsection 7°, of the Law N° 22/2018 of 29/04/2018 r relating to the civil, commercial, labour and administrative procedure defines standing as a legal ability to defend a specific interest or raise or defy a claim before the court.

[14] Legal scholars also define standing as the right to sue to courts by anyone who considers that his or her personal interests may be disturbed by the implementation of a particular provision

of the law². This means that for a claim to be admitted in a court of law, the plaintiff must have a personal, direct and legal interest.

[15] Regarding this case, the documents in the case file demonstrate that MINAGRI entered into a contract with ECOMIL PASSAG Ltd, as part of the execution of the contract, on 16/02/2013 it paid 72,534,548Frw, the next day that money was taken by Gatarayiha Augustin given to him by ECOMIL-PASSAG Ltd. This forced PASSAG COMPANY Ltd to file a claim to the Commercial Court of Nyarugenge requesting it to compel FINA BANK (GT BANK RWANDA Ltd) to return that money to the bank account of ECOMIL-PASSAG Ltd.

[16] The court finds that the money in dispute was in the property of ECOMIL PASSAG Ltd, and it is the one which decided to give it to Gatarayiha Augustin, implying that it was the one with the standing to sue for its legal interest on its property when it has been invaded by anyone. As held by previous courts, this Court also finds that PASSAG COMPANY Ltd had no standing to individually sue for the property which belonged to ECOMIL-PASSAG Ltd, therefore it had no personal legal interest invaded.

[17] The Court again finds that, as held by the previous courts, article 223 of the Law $N^{\circ}07/2009$ of 27/04/2009 governing companies which were in force when PASSAG COMPANY Ltd filed the claim provides that: "In a company, one of the members of the Board of Directors or one of the shareholders may request

² (.... que soit habilitée à former une demande toute personne dont la situation est susceptible d'être affectée par l'application d'une règle de droit), J. Héron, Droit judiciaire privé, Paris, Montchrestien, 1991, p. 51.

the court to file a lawsuit on behalf of and in the interest of the company or its affiliated company ", this article makes it clear that the shareholder (PASSAG COMPANY Ltd) can file a lawsuit on behalf of the company (ECOMIL- PASSAG Ltd) but has to first motion the court and get relief, therefore it is obvious that PASSAG COMPANY Ltd did not comply with the provisions of the article mentioned above because it filed sued on its behalf, instead of filing the lawsuit on behalf of ECOMIL PASSAG Ltd.

[18] The Court also finds that article 224 allows a shareholder of a company or a former shareholder to sue a company, a member of the Board of Directors or one of its members or a senior employee for non-compliance with the obligations to protect the interests of the shareholders, which also PASSAG COMPANY Ltd did not comply with, because instead of suing the parties mentioned in this article for non-compliance with the obligations to protect the interests of the shareholders, it sued GT BANK RWANDA Ltd requesting to have a share in the property of ECOMIL PASSAG Ltd.

[19] The Court finds that the defense of PASSAG COMPANY Ltd that the Commercial High Court of Commerce should not only have relied on the law governing companies but should also have relied on the law relating to the civil, commercial, labour and administrative procedure has no basis, because apart from the fact that nothing prevented the court from basing on that law if it provided a solution, even if it had based on the law relating to the civil, commercial, labour and administrative procedure there would be no difference because still, PASSAG COMPANY Ltd has no standing endowed by that law to sue ECOMIL-PASSAG Ltd. [20] The Court also finds that again the submission of PASSAG COMPANY Ltd that it was not necessary for the company, registered in Kenya, to apply to the court requesting for a relief to sue another shareholder, is also unfounded because article 223 of Law N°. 07/2009 of 27/04/2009 mentioned above does not provide for exceptions on foreign companies.

[21] Based on the legal provisions and the motivations given above, the Court finds that PASSAG COMPANY Ltd did not comply with the legal requirements to be allowed to file a claim on behalf of ECOMIL PASSAG Ltd, therefore the Commercial High Court did not err to sustain the rulings of the Commercial Court of Nyarugenge of dismissing the claim of PASSAG COMPANY Ltd.

2. Determining the basis of the damages claimed in this case.

[22] Counsel Muhirwa Ngabo Audace, assisting PASSAG COMPANY Ltd, requested that PASSAG COMPANY Ltd be paid 10,000,000Frw for continuing to deprive it of its legal rights on the money under litigation, 3,000,000Frw for counsel fees in addition to the one it had previously claimed all to amount to 6,000,000Frw and 2,000,000Frw for procedural fees. He argues that the damages claimed by the defendants are unfounded because they are the ones who dragged PASSAG COMPANY Ltd in lawsuits.

[23] Counsel Bimenyimana Eric, Counsel Zitoni Pierre Claver and Counsel Mbarushimana Jean Marie Vianney argue that the damages claimed by PASSAG COMPANY Ltd are unfounded because of its claims on which they are based on are without merit.

82

[24] Counsel Bimenyimana Eric argues that in case this Court upheld the judgment of the Commercial High Court, it should award counsel fees of 1,000,000Frw to GT BANK Ltd.

[25] Also, Counsel Zitoni Pierre Claver, assisting Gatarayiha Augustin argues that in case the Court upheld the decision of the Commercial High Court, his client should be awarded 5.000.000Frw for counsel fees, this replaces the previous requests.

DETERMINATION OF THE COURT

[26] Article 111 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that : "The claim for representation fees is an incidental claim to the principal claim aiming to repay expenses incurred during judicial proceedings. The claim for legal costs is adjudicated at the same time as the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted".

[27] The court finds that the various damages requested by PASSAG COMPANY Ltd should not be awarded because it has lost this case.

[28] The Court finds that GT BANK RWANDA Ltd and Gatarayiha Augustin incurred some expenses in the hearing of the case in which they were sued caused by the appeal of PASSAG COMPANY Ltd, so as this appeal is without merit, PASSAG COMPANY Ltd must pay GT BANK RWANDA Ltd 1,000,000Frw for the counsel and procedural fees which it requested on this instance as it is in range, and also pay

Gatarayiha Augustin damages for counsel and procedural fees of 1,000,000Frw at this instance awarded in the discretion of the court, as he cannot prove that the 5,000,000Frw he claimed for is what he incurred as an expense on this case.

III. DECISION OF THE COURT

[29] The appeal of PASSAG COMPANY Ltd lacks merit;

[30] Holds that the rulings of the judgment RCOMA 00461/2017/CHC/HCC rendered by the Commercial High Court on 02/02/2018 are upheld;

[31] Orders PASSAG COMPANY Ltd to give GT BANK RWANDA Ltd and Gatarayiha Augustin, each 1.000.000Frw for the counsel and procedural fees on this instance;

[32] The court fees of this case cover the expenses of this case.

CASES IN MERITS

CIVIL CASE

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D

TUYISENGE v. MUKARONI

[Rwanda SUPREME COURT – RS/INJUST/RC00008/2018/SC (Rugege, P.J., Kayitesi R, Kayitesi Z, Hitiyaremye and Cyanzayire J.) June 28, 2019]

Contract law - Donation contract - Termination of contract - If the receiver of a donation accepts related obligations and fails to comply with them, it is a reasonable ground to terminate that contract because it has become a bilateral contract.

Contract Law – Termination of contract – Though the Law provides that the termination of the donation contract has to be decided by the Court, it is not necessary to file a claim for the termination of that contract if the contracting parties consent for its termination and bear its consequences.

Facts: Kabaziga gave his grandchild Bizimana all her properties and entrusted him with obligations of their management and exploiting them to produce what he will use to feed her because she has become older, then she also donated him one piece of land, they concluded a written contract which was signed by their family members.

Afterwards, when Kabaziga noticed that her grandchild does not execute his obligations as they agreed, she terminated the contract and made another contract with one of Bizimana's wives called Mukaroni with whom they were not legally married, then the land that Mukaroni received as a donation, she registered it in her names and she was granted emphyteutic lease title on that land. Bizimana got married legally to his second wife called Tuyisenge, then he divided his properties to his two wives except for two pieces of land which were possessed by Mukaroni.

Tuyisenge filed a claim before abunzi committee of kabeza cell against Mukaroni and Bizimana, requesting to share two pieces of land which were in possession of Mukaroni, Abunzi committee of the cell decided that the disputed land belongs to Mukaroni. Tuyisenge appealed for that decision before the Abunzi committee of the Cyuve sector which sustained that two pieces of land in litigation, belongs to Mukaroni.

Tuyisenge filed a claim to the Primary Court of Muhoza against the decision of Abunzi committee, that Court dismissed that decision of Abunzi, it decided that all two pieces of land which are under litigation have to be divided by two, $\frac{1}{2}$ of each piece of land will be allocated to the common property of Tuyisenge and Bizimana, and that $\frac{1}{2}$ belongs to Mukaroni, it decided that the document of 01/02/2000 terminating the donation of the piece of land which Bizimana was given by his grandmother is void because it disregarded the provisions of the Law.

Mukaroni applied for the case review before the Primary Court of Muhoza, stating that some of her elements of evidence produced before the Court, were not examined, these include a land title which proves that the land under litigation belongs to her. She also states that Bizimana and Tuyisenge did not put a caveat on that title or get registered on that land. The Court decided that the claim for the case review of Mukaroni has merit in part, and decided that the judgment rendered by the Primary Court of Muhoza is reversed with regard to the piece of land N° 1 and decided that the piece of land N° 2 registered on Mukaroni belongs to her, and ordered Tuyisenge to pay Mukaroni for counsel fee, it also ordered Tuyisenge and Bizimana to refund Court fee to Mukaroni jointly.

Tuyisenge wrote to the office of Ombudsman requesting to render her justice because she found that the ruling of the judgment in the case review rendered by the Primary Court of Muhoza was unjust. After analysis of that issue, the office of Ombudsman wrote to the President of the Supreme Court requesting him that the case be reviewed due to injustice. After analyzing the report of the Inspectorate General of Courts, the President of the Supreme Court ordered to review the concerned case.

Before the Supreme Court, Tuyisenge states that she prays to render her justice because she finds that the contract of donation concluded between Bizimana and Kabaziga was terminated illegally because the termination should have been decided by the Court, but was not the case.

Mukaroni defends herself stating that the statement of Tuyisenge that the contract of donation contract was terminated illegally, has no merit because there was no need for the donor to seize the Court seeking for that termination while the contracting party consented for it.

Held: 1. If the receiver of a donation accepts related obligations and fails to comply with them, it is a reasonable ground to terminate that contract because it has become a bilateral contract.

2. Though the Law provides that the termination of the contract of donation has to be decided by the Court, it is not necessary to file a claim for the termination of that contract if the contracting parties consent for its termination and bear its consequences. Thus, the termination of the contract of donation is not contrary to the law.

The claim for the review of the case due to injustice has no merit.

Statutes and statutory instruments referred to

Law N°43/2013 of 16/06/2013 determining the use and management of land in Rwanda, article 10.
Law N°22/99 of 12/11/1999 completing book one of civil code and instituting part three governing matrimonial regimes donations and successions, artiles 37,38 and 40.
French Civil Code, article 956.

No cases referred to

Judgment

I. BACKGROUND OF THE CASE

[1] When Bizimana Daniel was living with Mukaroni Xaverine without being legally married, his grandmother Kabaziga who was no longer capable to cultivate, gave him, her properties for their management and to make it more productive so that, he can feed her, particularly she gave him a piece land located chez Ndagozera as a donation. This was put in writing on 04/4/1999 in presence of family members who signed it. When Kabaziga did not find assistance she was expecting from him and after noticing that he was mismanaging her properties due to his misbehaviors, she terminated the contract, she canceled

responsibilities of management of her properties and returned a piece of land she gave him as a donation. She entrusted her properties to Mukaroni for their management and was also given an obligation of looking after her, she also donated to the latter, the land returned fromBizimana. The contract for that was also made on 01/2/2000 in presence of family members. Mukaroni registered that land and was given a land title with UPI number 4/03/02/04/2883.

[2] When Bizimana Daniel got married to Tuyisenge Francoise before administrative organs on 15/9/2006, (but they were living together as he was living with Mukaroni as well), that day, he shared his properties between his two wives, Tuyisenge and Mukaroni, except two pieces of land owned by Mukaroni. Bizimana stated that one piece of land was given by his parents when he was living together with Mukaroni. For the second piece of land, Bizimana and Mukaroni, each pretends to be his as a donation from Mukabaziga. Tuyisenge, the legitimate wife sued to courts praying to have a share on those pieces of land.

[3] Tuyisenge sued Mukaroni and Bizimana before the Abunzi Committee of Kabeza cell, requesting to share two pieces of land possessed by Mukaroni, stating that the latter remains with half of each piece of land, and thatTuyisenge and Bizimana be given¹/₂ of each piece of land. She adds that those pieces of land are composed of land located at Kalinzi and land located next to Ntaganzwa place, this was given to Bizimana by his grandmother Kabaziga for him to manage it and feed her. Mukaroni pleaded that the land in litigation was really given to Bizimana by his grandmother Kabaziga by the contract of 04/4/1999, but that land was returned in terminating that contract

and was later given to Mukaroni in the contract of 01/02/2000, thus it is her property which cannot be shared with them.

[4] On 01/03/2006, the Abunzi committee decided, that the piece of land in litigation belongs to Mukaroni, that it was given to her by Bizimana's grandmother, that committee also decided that the first piece of land in litigation shall be shared between all Bizimana's children.

[5] Tuyisenge appealed against that decision before the Abunzi committee of the Sector of Cyuve, on 21/10/2011, that committee decided that Mukaroni Xaverine be given all pieces of land which were in litigation.

[6] Tuyisenge filed a claim against the decision of Abunzi committee before the Primary Court of Muhoza, that Court rendered the judgment RC1017/011/TB/MUH on 20/11/2013, and quashed it, it decided that two pieces of land under litigation should be divided into 2, that the half of each piece of land becomes the common property of Bizimana and Tuyisenge, and that other half of each piece of land belongs to Mukaroni, the court decided to annul the document of 01/02/2000 from which is alleged to have terminated the final donation of the land to Bizimana by his grandmother, because it does not fulfill the requirements of the Law.

[7] Mukaroni applied for the case review of the judgment RC 1017/011/TB/MUH rendered on 20/11/2011before the Primary Court of Muhoza, stating that some of the elements of evidence produced before that Court, including her land title were not examined. She also states that Bizimana and Tuyisenge did not put a caveat on that land title or registering that land in their names.

[8] On 25/04/2014, The Court rendered the judgment RC0741/13/TB/MUH, and decided that the claim for the review of the case RC1017/011/TB/MUH has merit in part, it reversed the judgment RC 1017/011/TB/MUH rendered by the Primary Court of Muhoza on 20/11/2013 with regard to the piece of landN° 1, it also decided that Mukaroni is the real owner of the piece of land N° two 883/MUS/CYU registered in her names, it ordered Tuyisenge to pay to Mukaroni 150.000Frw of Counsel fee, and ordered Tuyisenge and Bizimana to pay Court fee equal to 3.500Frw jointly, and that Mukaroni is reimbursed 2000Frw which she paid as Court fee.

[9] Tuyisenge wrote to the Ombudsman requesting to render her justice because she finds that the judgment RC0741/13/TB/MUH rendered by the Primary Court of Muhoza on 25/04/2014 is vitiated by injustice.

[10] After examination of that application, the office of Ombudsman found that the case RC 0741/13/TB/MUH has to be reviewed due to injustice, and wrote to the President of the Supreme Court on 21/03/2016, requesting him to review that case due to injustice. After examination of the Inspectorate of Court's report, the President of the Supreme Court decided to review that case.

[11] The case was heard on 03/06/2019, Tuyisenge and Bizimana represented by Counsel Kanyarugano Cassien, Mukaroni represented by Counsel Nyirabera Josephine. The main issue to be analyzed in this case is to know whether the termination of the contract of donation between Kabaziga and her grandchild Bizimana Daniel was lawfully effected.

II.ANALYSIS OF LEGAL ISSUES

Whether the termination of the contract of donation of 04/04/1999 was lawfully effected.

[12] Counsel Kanyarugano Cassien representing Tuyisenge Françoise and Bizimana Daniel states that the injustice, in this case, is based on the mistakes of the Primary Court of Muhoza, whereby it decided in the case being reviewed due to injustice, to terminate the contract of donation dated 04/4/1999 for Bizimana, he finds, that procedure contradicts the provisions of the Law because it should have been first requested before the Court (Termination of the contract)

[13] Counsel Kanyarugano Cassien states that the Law N°22/99 of 12/11/1999 completing book one of civil code and instituting part three governing matrimonial regimes donations and successions which was in force during the hearing of this case, provided that "the donor of a gift, if he has the grounds of its revocation, he has to file a claim before a competent Court which decides on its revocation He states that the Judge based on article 37 of the Law N°22/99 of 12/11/1999 aforementioned, and revoked the donation, he finds that the procedure was contrary to the Law especially that Bizimana does not appear on the document of 01/02/2000 which is alleged to have revoked the donation he was given by his grandmother on 04/04/1999.

[14] Counsel Kanyarugano Cassien on behalf of the claimants adds that the land under litigation, in this case, was divided by two, Tuyisenge and Bizimana were given a half and the other half was given to Mukaroni, but after its division, Mukaroni kept to exploit it alone. [15] As regards to the termination of the contract of donation of 04/04/1999, Counsel Nyirabera Josephine representing Mukaroni states that the statement of the representative of Tuyisenge has no merit, that the termination of the contract should have been requested before the Court because there was no need for the donor to seize the Court while her contracting party agreed for the termination of the contract, this is emphasized by the fact that, the original contract of 04/04/1999 was given by Bizimana to Kabaziga who tore it up, the reason why the original copy is not available in the case file. Besides, after the termination of the contract, Bizimana kept quiet and did not react, this proves that he consented.

[16] As regards to the issue that the land under litigation was divided between parties to the case, Counsel Nyirabera Josephine states that the statement of the representative of the defendants is false because when Bizimana shared his properties to his wives, the land under litigation has never been divided, this is also indicated by the fact that during the period of the systematic land registration, Mukaroni registered it in her names on hundred percent (100%). She further argues that if she co-owned that land with Bizimana, the latter could have put a caveat on that registration indicating that there are disputes, she finds that if he did not do that, this means that the land belongs to Mukaroni.

DETERMINATION OF THE COURT

[17] Tuyisenge Françoise and Bizimana Daniel state that, the injustice they suffer in the case under review is based on the mistakes of the Primary Court of Muhoza, whereby it decided that, the contract of donation t of the land which Bizimana concluded with his grandmother Kabaziga on 04/4/1999 was

terminated by their mutual consent, without being decided by the Court.

Regarding the elements of evidence, the case file [18] indicates a document of 04/4/1999, from which Kabaziga gave her properties to Bizimana who had to care for her, she also gave him a piece of land as a donation, Bizimana consented to everything. The case file also indicates that the document of 01/2/2000, which Kabaziga made for revoking Bizimana's responsibilities of managing her properties and taking care of her. She got back her piece of land and were given to Mukaroni, the latter accepted the donation and she fulfilled her obligations. In the document of 01/2/2000, Kabaziga explains that she terminates the contract he had with Bizimana of management of her properties and the donation he made to him on 04/4/2000, Kabaziga explains that she revoked the donation agreement of 04/4/1999 she made to Bizimana because he did not take care of her and that he may mismanage her properties due to his misbehavior, (adultery), she made the same contract with Mukaroni, and put a clause stipulating that if she also fails to take care of her, she will look for another one to manage her properties. Within that contract, she grants to Mukaroni the land returned from Bizimana, and her family agreed upon the agreement. This contract as well as the previous one were made in front of her family and was signed. The case file contains the land title N° 4/03/02/04/2883 of 19/12/2011 which indicates that Mukaroni immediately registered that land.

[19] One of the grounds set forth by the Law governing liberties and succession, from which the contract of donation is terminated, is no execution of obligations attached with it by the

receiver, and this is done within one year from the day the fault is committed or the day it is known to the donor.

With regards to the grounds of termination of the contract [20] of donation of 4/4/1999 between Kabaziga and her grandchild Bizimana regarding the management of her properties, looking after her using those properties and a donation of the land under litigation as indicated above, the Court finds that Kabaziga indicated in new contract reasons of terminating the first contract. These reasons include that Bizimana did not manage her properties and failed to look after her properly, instead, he might have mismanaged it because of his misconduct. The Court finds that this is enough reason to terminate the contract of donation made by Kabaziga to Bizimana due to his failure of executing his obligations, basing on article 38, litera 3 of the Law Nº 22/99 of $12/11/1999^{1}$ which was in force when the claim was filed. That termination was done on 01/02/2000, when it was clear that Bizimana failed to execute obligations he was given, the revocation was done within one year, this is in accordance with the provisions of article 40 of the Law above cited. This is also the case in comparative Law, like in France, whereby some donation can be handed over, and the receiver may be requested to comply with some obligations: for example, an old woman who gives her neighbour a house but requesting him to feed her and looking after her during her lifetime.in that case everyone has to execute his/her obligations. The contract of donation becomes bilateral, if any of the parties, does not execute his/her obligation, the other party, can apply for termination of the cont² (Certaines

¹ Law N°22/99 of 12/11/1999 completing book one of civil code and instituting part three governing matrimonial regimes donations and successions

²Act https://www.notaire.be/donations-successions/les-donations/une-donation-est-irrevocable

donations peuvent être consenties en demandant au gratifié d'exécuter certaines charges: par exemple, une dame âgée donne son immeuble \bar{a} un voisin en lui demandant, en-contrepartie, de la nourrir et de l'entretenir sa vie durant. Dans ce cas, chacun doit executer une obligation [.....]. La donation devient un contrat réciproque, et si l'une des parties ne respecte pas ses obligations, l'autre aura la possibilité de demander l'annulation de la convention).

[21] The Court finds however that though the law provides that the termination of the contract is decided by the Court, it is not necessary to go before the Judge if the parties to the contract consent to terminate it and bear its consequences.

[22] With regard to this case, though the termination of the donation was not claimed to be decided by courts under article 40 of the Law N°22/99 of 12/11/1999 mentioned above, this is also what provided by foreign laws such as article 956 of French Civil Code, and it is not contrary to law because it was decided by the contracting parties by their mutual consent as proven by their respective conduct. Kabaziga who terminated the contract gave its reasons in a document and revealed it to her family and Bizimana as well, as motivated above, the latter did not react to it. Furthermore, the fact that the properties and obligations she gave to Bizimana and the donation of the land, in particular, were withdrawn and entrusted them to his wife Mukaroni, Bizimana accepted without any claim, he did not even deny his misconduct, it is a proof that he agreed.

[23] The Court finds that another fact which proves that Bizimana agreed to return the donation is that Mukaroni who received it, registered it with Bizimana's awareness, but the latter did nothing to put a caveat on it, till Mukaroni was given a title of that land with number 2883/MUS/CYU as it is indicated in the case file. That silence of Bizimana proves his acceptance that he had no longer rights over that land, that belongs to Mukaroni. The Court also finds that was the same reason at the time of sharing the land between both wives Mukaroni and Tuyisenge, that piece of land was not put on the list of the land that Bizimana gave to be shared between them as demonstrated by the document of 15/06/2006 for which Bizimana donated to two of his wives the land inherited from his father Rwanuburi composed of 4 plots, and they signed.

In light of the provisions of the law, elements of evidence [24] and motivations provided above, the Court finds that the termination of the contract of donation f 4/4/1999 occurred on 1/02/2000, is not contrary to law, thus there are no reasons to annul the contract of 01/2/2000. The land under litigation belongs to Mukaroni because she owns it as a donation from Kabaziga basing on article 10 of the Law Nº43/2013 of 16/06/2013 determining the use and management of land in Rwanda which provides that private individual land shall comprise land acquired through custom or written law. That land has been granted definitely by competent authorities or acquired by purchase, [.....] the of ruling donation. the case RC 0741/13/TB/MUH/TB/MUH rendered by the primary Court on 25/04/2014 for which it was applied to be reviewed due to injustice, it is sustained because it is not vitiated by injustice.

[25] Concerning the issue of whether the land under litigation was divided between Bizimana's wives, the Court finds it not necessary to examine this issue.

2. Whether the damages requested can be awarded.

a. Regarding damages requested by Tuyisenge Françoise and Bizimana Daniel.

[26] Counsel Kanyarugano Cassien representing the claimants, in this case, states that Mukaroni cultivates the land of Tuyisenge since 2006, she has been benefiting it for twelve years now (12years), that the land rent fee is 90,000Frw per year, for ten years she has been exploiting it, she earnt 1,000,000Frw this is the amount she has, to return, and 200, 000Frw paid to the Court bailiff Irakiza Elie who executed the judgment.

[27] Counsel Nyirabera Josephine on behalf of Mukaroni states that Tuyisenge should not be awarded what she requests because the land under disputes is not hers, that her client cannot pay damages for the property proven that it is hers.

DETERMINATION OF THE COURT

[28] The Supreme Court finds that the Damages claimed on behalf of Tuyisenge and Bizimana have no merit because they have no rights on the land under litigation, and related rights cannot be granted to them.

b. concerning the cross-appeal lodged by Mukaroni Xaverine

[29] In the cross-appeal, Counsel Nyirabera Josephine representing Mukaroni requests for her damages worth 2,500,000Frw for being dragged in lawsuits, which include 1,000,000Frw for counsel fee, 500,000Frw for a procedural fee and 1,000,000Frw for moral damages.

[30] Counsel Kanyarugano Cassien states that damages claimed by Mukaroni have no merit because he finds that this case is not vitiated by injustice.

[31] The Supreme Court finds that the procedural and counsel fee requested by Mukaroni should be granted because she had to hire advocate and bore some expenses related to following up the case, but because what she requests are excessive, the Court grants in its discretion, 500,000Frw for counsel fee, 300,000Frw for a procedural fee, all amounting to 800,000Frw. With regard to moral damages, they cannot be granted because she did not prove it, also she cannot be granted damages for being dragged into lawsuits because it is the right of the claimants when they feel to have suffered injustice in the judgment for which it was applied to be reviewed.

III. THE DECISION OF THE COURT

[32] Finds with no merit the application of Tuyisenge Francoise for the review due to injustice the case RC 0741/13/TB/MUH rendered by the Primary Court of Muhoza on 25/04/2014, in which Bizimana was forced to intervene.

[33] Sustains the ruling of the judgment RC0741/13/TB/MUH rendered on 25/04/2004 by the Primary Court of Muhoza except for procedural and counsel fees.

[34] Orders Tuyisenge Françoise to pay Mukaroni Xaverine 800,000Frw for procedural and counsel fees.

ADMINISTRATIVE CASE

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Ω

DEVELOPMENT BANK OF RWANDA LTD (BRD Ltd) v. SPLENDID KALISIMBI Ltd

[Rwanda COURT OF APPEAL – RCOMAA 00058/2018/CA (Mukanyundo, P.J., Munyangeri and Mukandamage, J.) May10, 2019]

Commercial law – Company – Insolvency – Upon the commencement of the insolvency proceedings, no company's asset can be removed from the pool of the company's property even if it was mortgaged before its liquidation – Law N° 35/2013 of 29/05/2013 modifying and complementing – Law N° 12/2009 of 26/5/2009 relating to commercial recovery and settling of issues arising from insolvency, article 4.

Facts: BRD Ltd gave Splendid company a secured loan, which the latter defaulted on that loan and later became insolvent and the court appointed a provisional administrator.

Meanwhile, as BRD Ltd had begun the process of selling the mortgage, the provisional administrator of Splendid Kalisimbi (under liquidation) notified BRD of the stay of the secured claims because of the reorganizational plan, consequently, BRD Ltd sued to the Commercial High Court Nyarugenge requesting for the relief from the stay of the claims of the secured debts. The Court found the application without merit because Splendid Ltd had already become insolvent and that mortgage cannot be deducted from the property of that company before they share the as provided by the law.

BRD Ltd appealed in the Commercial High Court arguing that the court ruled *ultra petita* because it applied for the relief from the stay of the secured claim instead the Court examined the insolvency and the provisional administrator acted illegally when hr refused to deduct the mortgage from the property of Splendid Kalisimbi. The Court sustained the rulings of the Commercial Court of Nyarugenge and ordered that the mortgage should not be removed from the property of the company to be sold.

BRD Ltd appealed to the Supreme Court and after the reform, the case was transferred to the Court of Appeal, it argued that the Commercial High Court did not examine the grounds of its appeal relating to determining whether the Commercial Court of Nyarugenge ruled ultra petita because it applied for relief from the stay of the secured claim instead it ruled on the issue concerning the insolvency of splendid, the provisional administrator acted illegally when hr refused to deduct the mortgage from the property of Splendid Kalisimbi.

In its defense, Splendid argues that due to the legitimate ground of a reorganizational plan of commercial activity the claims on the mortgage are suspended and also that since its insolvent the court could not take a decision which is detrimental to its situation.

Facts: 1. Upon the commencement of the insolvency proceedings, no company's asset can be removed from the pool of the company's property even if it was mortgaged before its liquidation.

The appeal lacks merit. Court fees deposit covers the expenses incurred by the court in this case.

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 111.

Law N° 35/2013 of 29/05/2013 modifying and complementing Law N° 12/2009 of 26/5/2009 relating to commercial recovery and settling of issues arising from insolvency, article 4.

No cases referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] On 09/09/2016, the Commercial Court of Nyarugenge rendered a judgment RCOM 00985/16/TC/NYGE and ordered for the commencement of the insolvency proceeding of Splendid Kalisimbi Ltd and appointed Advocate Mukwende Milimo Olivier as the provisional administrator with the main duty of keeping Splendid Kalisimbi Ltd functioning.

[2] On 14/09/2016 Advocate Mukwende Milimo Olivier wrote to BRD Ltd notifying it the stay of the claim of the secured debt against Splendid Kalisimbi Ltd because the Court ordered for the commencement of insolvency proceedings.

[3] On 21/01/2017, BRD Ltd, applied for relief from stay by of the claim of the secured debt to the Commercial Court of Nyarugenge on the ground that the provisional administrator did not submit a reorganization plan, to first be confirmed by the Court and even if it was submitted it is invalid because it was not

first confirmed bt the committee of the creditors and also that the reorganization plan is not possible in a case where the provisional administrator do not cooperate with the committee of the creditors and also that he does not have a sustainable reorganizational plan. The Court found the application of BRD without merit and ordered BRD to pay counsel fees to Splendid Kalisimbi Ltd.

[4] BRD Ltd appealed to the Commercial High Court arguing that the court erred in ruling ultra petita, the Court confirmed that there is a reorganizational plan submitted by Splendid Kalisimbi Ltd under liquidation without proof in disregard of the irregularities done by the provisional administrator and also that it erred in confirming that the reorganizational plan of Splendid Kalisimbi Ltd can be implemented.

[5] That Court found the appeal with no merit and thus sustained the judgment RCOM 00351/2017/TC/NYGE rendered by the Commercial Court of Nyarugenge, ordered that the property on plot N° 1/01/09/03/867, located in the Kigali City, Nyarugenge District, Nyarugenge Sector, Kiyovu Cell, remains in the property of Splendid Kalisimbi Ltd under liquidation which has to be auctioned.

[6] BRD Ltd appealed to the Supreme Court and the case was transferred in the Court of Appeal as provided by article 105, of Law N° 30/2018 of 02/06/2018 regulating the Jurisdiction of Courts and registered on RCAA 00058/2018/CA.

[7] The case was heard in public on 26/03/2019, BRD Ltd assisted by Counsel Mugeni Anita, Splendid Kalisimbi Ltd under liquidation represented by its provisional administrator Advocate

110 _

Mukwende Milimo Olivier, assisted by Counsel Murutasibe Joseph together with Counsel Nyiringabo Théoneste.

At the beginning of the hearing, Counsel Murutusibe [8] Joseph, withdrawn the objection of inadmissibility on the ground that BRD Ltd lost the case on both levels on the same ground, however, they still insist on the one which relates to the value of the subject matter not being equal to 50.000.000 Frw confirmed by the judge in case of disputes. After the submission of both the Court made a bench ruling that the case is in its jurisdiction because the mortgage under BRD Ltd trusteeship which it requests to auction has a value which is far more than 50.000.000Frw provided by the law because it is worth 2.300.000.000Frw, this was based on the provisions of article 28, paragraph 2:7° of the Organic Law N° 03/2012/OL of 13/06/2002 determining the organization, functioning and jurisdiction of the Supreme Court, thus it proceeded with the hearing of the case on merit.

II. ANALYSIS OF THE LEGAL ISSUE

1. Whether there were irregularities in the appealed judgment

a) Concerning the issue that the judge ruled ultra petita

[9] Counsel Mugeni Anita representing BRD Ltd argues that the judge ruled *ultra petita* because BRD Ltd applied for relief from a stay of the claim of the secured debt, but the Court did not examine it instead it ruled on the insolvency of Splendid Kalisimbi Ltd. [10] Counsel Mugeni Anita state that they were surprised to see the provisional administrator producing an order extending the reorganizational plan of Splendid Kalisimbi Ltd under liquidation after the expiration of the period of six months which is provided by the law.

[11] Counsel Murutasibe Joseph and Counsel Nyiringabo Théoneste argue that article 4, relating to commercial recovery and settling of issues arising from the insolvency of 2013, provides for the grounds for the stay of the claims on secured debts and that Splendid Kalisimbi Ltd under liquidation is under insolvency, thus the demands of BRD are groundless. They state that the Commercial High Court examined the grounds of appeal submitted to it and ruled on them and it couldn't make a decision which Splendid Kalisimbi Ltd en liquidation while it's in insolvency, which no longer exists in business.

[12] They further argue that the committee of the creditors was delayed to be instituted because BRD Ltd was not cooperative and that is the reason the period for the reorganizational plan was extended.

DETERMINATION OF THE COURT

[13] Article 4 of the Law N° 35/2013 of 29/05/2013 modifying and complementing Law N° 12/2009 of 26/5/2009 relating to commercial recovery and settling of issues arising from insolvency provides that "Upon the commencement of the insolvency proceedings:

1° the commencement or continuation of individual actions or proceedings concerning the assets of the debtor

and the rights, obligations or liabilities of the debtor shall be stayed;

2° the execution of judgments related to the assets of the debtor's property shall be stayed;

3° the right of a counterparty to terminate any contract with the debtor shall be suspended;

4° the right to transfer, mortgage or otherwise dispose of any assets of the debtor shall be suspended.

[14] The documents in the case file demonstrate that BRD Ltd applied for the relief of the claims on secured debt, requesting to be allowed to sell the mortgage furnished to it by Splendid Kalisimbi Ltd under liquidation before the commencement of insolvency proceedings and also the Court appointed a provisional administrator however the Commercial Court of Nyarugenge held that Splendid Kalisimbi Ltd under liquidation becomes insolvent when this case was on appeal level.

[15] The case file demonstrates that on appeal the Commercial High Court was requested to examine whether the Commercial Court of Nyarugenge ruled ultra petita, to determine whether there was no evidence produced to prove that there was a reorganizational plan for Splendid Kalisimbi Ltd under liquidation, to assess whether the provisional administrator acted unlawfully and whether the court confirmed the reorganizational plan of Splendid Kalisimbi Ltd under liquidation illegally, but the Court found that there are some issues not to be examined , because after the closure of the hearing, an order putting Splendid Kalisimbi Ltd under liquidation was submitted, which lead the Court to only analyze whether the mortgage granted to BRD Ltd can be deducted from the property to be sold by the liquidator of

Splendid Kalisimbi Ltd under liquidation, but the court found BRD Ltd's claim unfounded because it had to wait for the division of the proceeds since it is among the creditors who have to be paid first because the mortgage was given to the owner who also has the right over it..

The Court finds that the arguments of BRD Ltd that the [16] Commercial High Court did not examine the grounds of appeal concerning the issue of whether the Commercial Court of Nyarugenge ruled *ultra petita*, whether there was no evidence produced to prove the reorganizational plan submitted by Splendid Kalisimbi Ltd under liquidation, whether the provisional administrator acted unlawfully and whether the court unlawfully confirmed the reorganizational plan of Splendid Kalisimbi Ltd en liquidation are without merit because as motivated in paragraph 9 of the appealed judgment, those requests were not possible pursuant to article 4 of the Law Nº 35/2013 of 29/05/2013 mentioned above, provides that "Upon the insolvency proceedings commencement of the the or continuation of individual actions or commencement proceedings concerning the assets of the debtor and the rights, obligations or liabilities of the debtor shall be stayed;, therefore the Commercial High Court did not err because it could not rule on the reorganizational plan or the the claims regarding its property because Splendid Kalisimbi Ltd had already being declared insolvent.

b) The issue concerning whether the mortgage furnished to BRD Ltd should be deducted from the property which is to be sold by the liquidator.

[17] Counsel Mugeni Anita argues that BRD Ltd was given a mortgage by Splendid Kalisimbi Ltd under liquidation but not is

114

under auction and it has taken the time and since it was mortgage was given to BRD Ltd 100%, implies that it has the right to remove its mortgage from the auction and sell it by itself as provided by article 37 ter, relating to commercial recovery and settling of issues arising from insolvency of 2009 which was amended in 2013-2018.

[18] Counsel Mukwende Milimo Olivier, representing Splendid Kalisimbi Ltd en liquidation argues that there is a will to conduct the auction, that BRD Ltd has already been paid 99.000.000 Frw and its not the only one to be paid because there are other creditors such as RSSB, RAA, BPR Ltd and Nyarugenge District.

[19] Counsel Nyiringabo Théoneste states that the demands of BRD Ltd cannot be done when the company is under liquidation, instead it is done during a reorganizational plan.

DERTEMINATION OF THE COURT

[20] The Court finds the demands of BRD Ltd that the mortgage should be deducted from the property of Splendid Kalisimbi Ltd under liquidation which has to be sold by the liquidator lacks merit because as provided by article 4 of the Law N°35/2013 of 29/05/2013 modifying and completing article 37, of the Law N°12/2009 of 26/05/2009 mentioned above, as motivated by the Commercial High Court in paragraph 15 of the appealed judgment the fact that Splendid Kalisimbi Ltd en liquidation was liquidated, the Court cannot order that the mortgage claimed by BRD Ltd be deducted from those to be sold because the purpose of liquidation is to sell the property to pay the creditors.

[21] Pursuant to the motivations given above, the Court finds that since the credit issued by BRD Ltd is guaranteed by the mortgage has to wait for the liquidation of Splendid Kalisimbi Ltd in order to be paid as provided by the laws.

2. Concerning the damages requested for in this case.

[22] The counsel for Splendid Kalisimbi Ltd en liquidation argue that it has been litigating this case on the second level of appeal, therefore the Court of Appeal to award it counsel fees equivalent to three million (3,000,000Frw) on each level and the procedural fees of two million (2,000,000Frw) on all levels.

[23] The counsel for BRD Ltd argues that there is no basis for the claimed damages because it is its legal right to appeal for those it is not contented with including the laws which were not adhered to.

DERTEMINATION OF THE COURT

[24] Article 111 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that The claim for representation fees is an incidental claim to the principal claim aiming to repay expenses incurred during judicial proceedings.

[25] The Court finds that Splendid Kalisimbi Ltd en liquidation was represented by counsel it hired, therefore BRD Ltd must give 500,000Frw of the counsel fees and 300.000Frw of the procedural fees awarded in the discretion of the court because what it claims for is excessive.

III. DECISION OF THE COURT

[26] Decides that the appeal of BRD Ltd lacks merit.

[27] Decides that the judgment RCOMA 00476/2017/CHC/HCC rendered by Commercial High Court on 19/05/2017 is sustained except the counsel and procedural fees awarded to Splendid Kalisimbi Ltd (en liquidation) on this level.

[28] Orders BRD Ltd to give Splendid Kalisimbi Ltd (en liquidation) 800.000Frw for both procedural and counsel fees.

[29] The deposits of the court fees are equivalent to the deeds of the court in this case.

ADMINISTRATIVE CASE

Ω

RWANDA SOCIAL SECURITY BOARD (RSSB) v. TWAGIRAMUNGU

[Rwanda SUPREME COURT – RS/INJUST/RAD00004/2018/SC – (Rugege, P.J., Cyanzayire, Kayitesi, Rukundakuvuga and Hitiyaremye, J.) July 30, 2019]

Labour law – Work related accident – Mental illness – Compensation for the disability caused by mental illness caused by work accidents is calculated in the same way as the compensation for the physical disability caused by work accidents that are provided by the Presidential order are calculated.

Facts: Twagiramungu had a work accident, his employer informed Rwanda Social Security Board (RSSB), the doctor who consulted him demonstrated that he has a permanent disability of 45%, whereas RSSB's doctor demonstrated that he has 10% of disability. He requested help to RSSB due to that disability he incurred and replied to him that nothing it can do because there are no documents to prove his disability.

Twagiramungu sued RSSB to the Intermediate Court of Nyarugenge; requesting to be given what provided by the law due to that work accident he incurred and requesting to be given the various damages. That Court ordered RSSB to reimburse him the medical fees he expensed, transport fees; salary compensation for the time he cannot be able to work, the money for disability per month and procedure fees. In determining the money for permanent disability, it relied on the degree of disability of 45%

that was confirmed by the doctor of the hospital where he was treated for.

RSSB appealed to the High Court stating that the previous Court confirmed the degree of disability of 45% with disregarding internal rules and ordered it to pay the medical fees to Twagiramungu while he paid it to the hospital which treated him; allocated the transport fees illegally; computed wrongly salary compensation and it ordered him to pay damages while his opponent was the one who dragged it into unnecessary lawsuit. Twagiramungu filed also cross-appeal. The court held that the appeal of RSSB has merit on what concerns with medical fees; transport fees, it ruled that the cross-appeal has merit on what concerns with procedure and counsel fees, and also the money of permanent disability for each month should be given from the day following the accident to 22/03/2013 instead of 31/5/2013.

RSSB wrote to the office of ombudsman requesting for a review of that judgment due to injustice, stating that in determining the permanent disability, the High Court disregarded laws while they provide for means of resolving the disputes relate to the degree of disability of work accident. The office of ombudsman wrote to the President of the Supreme Court, requesting to review that judgment due to injustice. The president of the Supreme Court decided to review that judgment.

During the hearing, Twagiramungu appeared but weak to plead, rather he asked the court to order RSSB to give him medical fees and sign so that he can go to the hospital for treatment since it cannot give him money properly and it refused to sign for him while he has Rendez-Vous with the doctor of mental illness. The Court ordered RSSB to help Twagiramungu to be treated at CARAES Ndera Hospital for mental illness, and take him for treatment of physical disability caused by the accident at King Faysal Hospital, and help him to get the medicine prescribed by the doctors of that hospital, and It ordered RSSB to comply with the court decision concerns with the amount it was ordered to give him together with arrears, during the time of waiting for the doctor decision

RSSB state that the first injustice this judgment contains is that in computing the money for physical disability the degree of disability based on was 45% which was determined by incompetent organ, but now, it is resolved by the report of the medical committee established by MINISANTE which indicates that he has a physical disability of 20%, thus, they request that to use this degree of disability in computing the money for physical disability.

Twagiramungu also states that he agrees with 20 % of physical disability demonstrated by the committee of doctors.

RSSB state that the other ground of injustice bases on salary compensation he was calculated for, while his employer continued to renumerating him from the day of the accident, he got four (4) months of salary; therefore, it realizes that what he should be given is that from the day his employer stopped to remunerate him. Twagiramungu states that the court did not err in their calculation, thus the money should sustain.

On the issue of determining whether the mental disability of 80% he has been caused by the work accident so that he could be given the money related to it, he states that it was caused by the fact that RSSB did not take him for treatment properly, he explains that the medical report indicates that his mental disability relates to the work accident, therefore, he requests, RSSB to be held liable for that negligence.

RSSB states that nothing proves that that disability was caused by the accident, thus, it finds that it should not be held liable for his mental disability.

Held: Pension and the money of the accident resulted from work that is given to affiliate shall not be less to 13,000,000Frw per month. Thus, he should be given 13,000,000 Frw every month, instead of 20,947Frw as it was decided in the judgment subjected to the application of the review due to injustice.

As it is indicated by the report drafted by the various doctors, in their explanation, all demonstrate that the accident injured the brain, RSSB did not take him for treatment of that another illness while it was demonstrated by the doctors who treated him.

Calculation of the damages that are awarded to the one who has a mental disability caused by a work accident, is similar to those of physical disability caused by a work accident that is provided by the law.

Application for the review due to injustice has merit in part, The cross appeal has merit in part; The defendant has a physical disability of 20% and 80% of mental disability; The plaintiff should continue to take the defendant for treatment of all illnesses caused by the work accident.

Statutes and Statutory instruments referred to:

Decree-law of 30 July 1888 relating to Contracts or conventional obligations, article 259, Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure, article 12

- Ministerial Order N°1931/bis/06 of 08/12/1974 establishing the procedure of informing accident and illness caused by work, article 6 paragraph 4.
- Decree-law of 22/08/1974 governing Social Security as it is amended and completed to date, article 22 and 23.
- Presidential order N° 069/01 of 13/04/2018 increasing pension and the accident from work that are allocated by RSSB, article 2.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 23/11/2012, Twagiramungu Eric had a work accident and he fractured his left leg, his employer Trustco Rwanda Company notified RSSB in January 2012. On 31/05/2013, a doctor at King Faysal hospital who treated him indicated that he has a permanent disability of 45%, whereas, on 19/06/2013, the RSSB doctor indicated that he has a permanent disability of 10%. He requested the intervention of RSSB due to the disability he sustained due to work accidents, and it replied that since there are no documents to prove his disability, it cannot compensate him.

[2] Twagiramungu Eric sued RSSB to the Intermediate Court of Nyarugenge; requesting to compel it to give him what he is entitled to because of the work accident, such as salary compensation and retirement benefit, then he requests to be awarded various damages. [3] On 30/12/2014, the Intermediate Court of Nyarugenge rendered judgment N° RAD 0132/13/TGI/NYGE and found with merit in part the claim submitted by Twagiramungu Eric, thus, it ordered RSSB to give him:

2,336,140Frw for the medical fees; 438,000Frw for transport fees; 125,640Frw as salary compensation for 180 days he was not able to work, 20,947Frw per month for the disability; these had to be paid to him beginning from 31/5/2013, the time when the doctor of King Faysal confirmed the degree of permanent disability of Twaramungu Eric; the Court also ordered RSSB to reimburse Twagiramungu Eric 200,000Frw of the procedure fees.

[4] In determining the compensation for the permanent disability, the Court declared that the degree of disability which should be based is the one confirmed by the doctor of King Faysal hospital contained in the report of 31/05/2013, the Court indicated that Twagiramungu Eric has a disability of 45% as indicated by King Faysal because that is where he was treated, instead of basing on the report of 19/06/2013 done by the doctor of RSSB, whereby he demonstrated that he has the disability of 10%, the reason why it was not based on it is that the court doubts its sincerity because it was done by the defendant doctor.

[5] In determining the salary compensation, the Court based on the salary he was renumerated of 27,943 Frw, and declared that the daily average salary is $27,943 \times 3:90 = 931$ Frw, that sum was multiplied by 75% of the daily average salary.

[6] RSSB appealed to the High Court stating that the Intermediate Court confirmed the 45% of disability in disregard

126

of the internal regulations and ordered it to pay the medical fees to Twagiramungu while it paid it to the hospital which treated him, allocated the transport fees unlawfully, erroneously computed salary compensation and it ordered him to pay damages while his opponent was the one who dragged it into unnecessary lawsuit. Twagiramungu filed also cross appeal.

[7] On 30/04/2015, the High Court rendered judgment n° RADA 0007/15/HC/KIG and held that the appeal of RSSB has merit on the issue concerning the medical fees of 2,336,140, transport fees of 438,000Frw which it was ordered to give to Twagiramungu, which was overruled, it further ruled that the cross-appeal of Twagiramungu Eric has merit on the issues concerning the procedure and counsel fees, it also ordered RSSB to give him 300,000Frw and 100,000Frw in addition to the one he was awarded previously. Furthermore, the Court the amount of 20,947Frw every month for the compensation due to a permanent disability should be paid starting from the day following the accident up to 22/03/13 instead of 31/5/2013, which means 119 days instead of 180.

[8] RSSB wrote to the office of Ombudsman requesting for a review of that judgment due to injustice, it states that in determining the permanent disability of TWAGIRAMUNGU, the High Court errored on laws to be applied on the issue of the disability resulting from a work-related accident, and also that, RSSB had started the procedure by writing to Minister of Health, requesting to form a committee of doctors to examine TWAGIRAMUNGU as it is provided by article 6 of Ministerial Order N° 1931/bis/06 of 08/12/1974 establishing the procedure of notifying about the accident and illness caused by work.

[9] The Office of Ombudsman wrote to the President of the Supreme Court, stating that the judgment N° RADA 0007/15/HC/KIG was vitiated with injustice¹, and thus requested to be for being reviewed.

[10] Basing on the report of the Inspectorate-General of Courts, the President of the Supreme Court, in the order N° 028/2018 decided to review the judgment N° RADA 0007/15/HC/KIG, the hearing was scheduled on 24/07/2018, but on that day it was not heard because of amending laws.

[11] The hearing was scheduled on 10/10/2018, it was postponed because Twagiramungu couldn't plead because he was feeling weak, but he requested the Court to compel RSSB to give him medical fees and sign for him so that he goes for treatment since it doesn't give him sufficient money for treatment and it refused to sign for him while he has an appointment with the doctor of mental illness. He explained that the doctors of King Faysal hospital who treated him, found that he has a mental problem and transferred him to CARAES Ndera, the hearing was adjourned sine die.

¹ The office of Ombudsman explains that the High Court relied on the degree of disability which RSSB does not agree and it did not apply the laws of resolving the disputes relate to the degree of disability caused by a work-related accident. It further states that in case the court found that TWAGIRAMUNGU Eric and RSSB failed to consent and that it was informed that RSSB wrote to the minister of health requesting to establish the committee of doctors as it is provided by article 6 of Ministerial Order N° 1931/bis/06 of 08/12/1974 establishing the procedure of informing accident and illness caused by work, it would use its power and speed up the establishment of that committee, but not rendering judgment based on a medical report which was not agreed on, while the law provides the means of resolving such disputes.

[12] This Court based on the decision of 01/10/2018 of the doctor's committee that Twagiramungu Eric should be tested to determine whether he suffered mental health disorders after getting treatment; based on the report of 23/02/2017 issued by the doctor of CARAES Ndera Hospital indicating that Twagiramungu Eric has a permanent disability of 80%; it ordered RSSB to facilitate Twagiramungu Eric to get mental health disorders treatment at CARAES Ndera Hospital, and the treatment for the body injuries caused by the accident at King Faysal Hospital, and also to get the medicine prescribed by the doctors from those hospitals.

[13] The court further ordered that after three months, Twagiramungu will be again examined by the doctors' committee cited above to determine his permanent disability (physical and mental disability), and also to indicate the time when the wounds consolidated. It ordered RSSB to comply with the court's decision regarding the money it was ordered to give Twagiramungu Eric, plus the arrears, while they wait for the doctors' recommendation.

[14] The hearing of the judgment was supposed to be on 23/04/2019 but on that date, the hearing was adjourned because Twagiramungu did not have a counsel because his former counsel, Murekatete B. Marguerite had a penalty she had not yet paid. The hearing was postponed to 28/05/2019, all parties were notified.

[15] Before the date of the hearing, Twagiramungu hired another advocate Me Karangwayire Epiphanie, however the decision of the court that Twagiramungu Eric should be reexamined by the committee of doctors to determine the percentage of his permanent disability (physical and mental disability) and to indicate the period in which the wounds were consolidated was not complied with.

[16] His Counsel Karangwayire Epiphanie produced to the court the documents that include the letter dated 16/04/2019 which RSSB wrote to Twagiramungu reminding him that he should go to King Faysal Hospital for examination for the doctor to determine the percentage the disability he has.

[17] The hearing resumed again on 28/05/2019, the court examined whether the order of the court of re-examining the disability of Twagiramungu Eric was executed, unfortunately, it wasn't, in that hearing, the court examined the request of Twagiramungu Eric that he can be given some financial assistance till the time of pronouncement of the judgment because his life is deteriorating, he developed other illness associated with not getting adequate treatment, not getting the prescribed medicine and also because of not getting enough diet and not affording a caretaker.

interlocutory judgment on the request [18] In of Twagiramungu Eric, the Court ordered MINISANTE to immediately establish a doctors committee, purposely to determine the percentage of the physical and mental disability of Twagiramungu Eric and also indicate the hospital in which he should be treated, and that the report must be submitted to the Supreme Court registry not later than 20/06/2019, it also ordered RSSB to immediately take him for treatment to the King Faysal Hospital for the illness he was affected due to the accident he got and to CARAES Ndera hospital and anywhere doctors will recommend for treatment of the illness resulting from the accident, it ordered RSSB to pay for all the prescribed medicines in order to prevent all negative effects to his life, it ordered RSSB

to immediately give him 2,000,000Frw for upkeep and transport to the hospital as they wait for the pronouncement of the judgment, it also ordered RSSB to follow up on the report of doctors' committee and submit it to the Court, Twagiramungu Eric also was ordered to avail himself to the doctors' committee whenever he is required to do so.

[19] On 08/7/2019, MINISANTE submitted to the Supreme Court the report of doctors' committee as it was ordered. That report indicates that Twagiramungu Eric has a physical disability of 20% and a mental disability of 80%.

[20] The judgment was resumed on 10/07/2019, RSSB represented by Counsel Nsabimana James together with Counsel Sekabuke Jean-Paul, Twagiramungu Eric assisted by Counsel Karangwayire Epiphanie, Counsel Murekatete Marguerite and Counsel Twagirumugabe Alexis. The hearing was closed; the parties were informed that the judgment will be pronounced on 30/07/2019.

II. ANALYSIS OF THE LEGAL ISSUES

1. To determine the compensation to be given to Twagiramungu Eric for the physical disability.

[21] Nsabimana James and Sekabuke Jean Paul, the counsel for RSSB argue that the first instance of injustice in this judgment is that the High Court of Kigali in computing the money for physical disability of Twagiramungu, is based on the disability of 45% which was determined by an incompetent organ, but fortunately, it has been settled by the report of doctors' committee instated by MINISANTE, which indicates that he has a physical disability of 20%, thus, they request that this percentage should

be the one based on in computing the compensation to be awarded to Twagiramungu.

[22] Counsel Nsabimana James and Sekabuke Jean Paul state that the High Court erroneously computed that compensation because the judge calculated it as salary compensation; whereby he took the daily salary of 931 (27,943 per month) x 30 days x 75% x 45% = 20,847 Frw, instead of calculating his daily salary of 931 x 30 x85% x 20% = 4,748Frw, which he must be given every month. They state that based on article 2 of Presidential Order N° 069/01 of 13/04/2018 Presidential Order increasing pension and occupational hazards benefits granted by Rwanda Social Security Board, Twagiramungu Eric would be given 13,000 Frw each month.

[23] Karangwayire Epiphanie, Murekatete Marguerite and Twagirumugabe Alexis, the counsel for Twagiramungu state that they consent to the physical disability of 20 % of Twagiramungu indicated by the medical committee.

DETERMINATION OF THE COURT

[24] The Court finds that the High Court contradicted with the provision of law in awarding disability compensation to Twagiramungu because it based on the disability of 45% which was determined by the doctor who treated him instead of basing on that determined by the committee of doctors as provided by article 6, paragraph 4 of Ministerial Order N° 1931/bis/06 of 08/12/1974 establishing the procedure of informing accident and illness caused by work that in case of the dispute about the date which patient is recovery; wounds are consolidated or the degree of his/her permanent disability, the concerned person submits the

issue to the committee fighting the injustice, the latter works in hands with the committee of doctors that is established by the minister of health in resolving those disputes.

Therefore, the Supreme Court finds that the compensation [25] for disability was erroneously calculated because as indicated by the report of the committee of doctors which was established by the minister of health, Twagiramungu has a physical disability of 20% instead of 45%, thus his compensation for the physical disability should be computed based on the disability of 20%, and on the rate of 75% of his daily income as it is provided by article 23 of Organic Law of 22/08/1974 determining the pension of employees, as it was amended and completed to date which relates to an employee who has not yet completely recovered, which means that with a temporary disability, receives 75% of his daily income, he should receive (931x30x75%x20%) = 4,189Frw every month. However, it finds that basing on article 2 of presidential order Nº 069/01 of 13/04/2018 increasing pension and the accident from work that are allocated by RSSB provides that pension and the money of the accident resulted from work that is given to affiliate shall not be less to 13,000Frw per month. Thus, the Court finds that Twagiramungu should be given 13,000Frw per month, instead of 20,947Frw as it was decided in the judgment subjected to the review due to injustice.

2. Determining the salary compensation to be awarded to Twagiramungu Eric.

[26] Nsabimana James and Sekabuke Jean Paul, the counsel for RSSB state that the other ground of injustice is the salary compensation awarded to Twagiramungu, they explain that the Court awarded him the salary compensation while also his employer continued to pay him since the day the accident occurred 23/11/2012. They state that he was paid the salary of four (4) months that is of; 11/2012, 12/2012, 01/2013 and that of 2/2013; therefore, they find that he should have been awarded beginning from the day his employer stopped paying him, that he should get a salary of 21 days instead of 119 days, the fact that the Court awarded him a salary for such days, demonstrates the injustice in that judgment which should be reviewed.

[27] Karangwayire Epiphanie, Murekatete Marguerite and Twagirumugabe Alexis, the counsel for Twagiramungu adduce that the Court did not err in their calculation in the judgment applied for review due to injustice.

DETERMINATION OF THE COURT

[28] The Supreme Court finds that Twagiramungu should have been given a salary compensation of 83,062 Frw for 119 days as it was determined by High Court because RSSB did not produce evidence demonstrating that from the day the accident happened, he continued to be paid during the 119 days instead of 21 days, basing on article 12 of the Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure which provided that the claimant must prove a claim, failing which the respondent wins the case [...], therefore, RSSB did not suffer injustice in modalities of calculating salary compensation..

3. Determining whether the mental disability of 80% which Twagiramungu Eric is due to work accident which occurred on 23/12/2012, to be awarded compensation for mental illness.

[29] Karangwayire Epiphanie, Murekatete Marguerite and Twagirumugabe Alexis, the counsel for Twagiramungu Eric state that the mental disability of 80% he has is a result of not getting enough means of treatment from RSSB, they explain that the report of the doctor of King Faysal indicates that the mental disability he has is related to the work accident because he fell from the house he was building and hit the head on the glass (at work), but he was treated only the leg although the report demonstrated that he got a mental illness and a broken tooth. They explained that due to delay in getting the required treatment deteriorated the disability to 80% which was indicated by the committee of doctors, therefore, they find that RSSB should be held liable for that negligence, pursuant to article 258, 259 and 260 of the decree-law of 30 July 1888 relating to Contracts or conventional obligations, it must give him various damages claimed in this case especially that he got the accident when he is still young, but now he can not do anything for him.

Adv. Nsabimana James and Adv. Sekabuke Jean Paul, the [30] counsel for RSSB argue that the committee of doctors demonstrate that Twagiramungu has a disability of mental illness of 80%, but his counsel does not prove that the disability was caused by the accident which occurred on 23/11/2012, rather they argue that it was caused by RSSB which did not give him good treatment. They rather explain that there is a report of 19/03/2019drafted by the doctor of CARAES Ndera which indicates that Twagiramungu Erich was suffering from ``traumatisme cranien'', thus, they find that his mental illness should not be associated with RSSB, that they acknowledge that he had an accident which only injured his leg, because the accident which Twagiramungu had, did not occur on a storage house, thus, it is impossible how he falls and hit the head on the ground. They request to assess his medical file at King Faysal hospital to verify if he got treatment for the mental illness.

DETERMINATION OF THE COURT

[31] The case file demonstrates that the letter of 21/09/2015 which RSSB wrote to King Faysal Hospital, authorized Twagiramungu to be treated in that Hospital, it indicates that it covers the treatment of the leg injuries only.

[32] The case file demonstrates that in the consultation document of Twagiramungu Eric on 01/10/2016, the doctor in the KFH (Neurosurgery Departement), Dr. Nkusi E. demonstrated that Twagiramungu Eric, 25 years old: sustained a traumatic brain injury in 2012 and left leg injury.

[33] The case file further indicates that the document of the medical prescription of dentists from KFH gave to Twagiramungu demonstrates that he lost two units of teeth which affect the masticatory function. We recommend to replace the missing 2 units of flexible partial denture.... for 190,000 RWF). He informed this to RSSB.

[34] It further indicates that the report of Dr Sebera Fidel in French demonstrates Twagiramungu Eric Caraes Hospital received Twagiramungu on 10/14/2016 with a transfer from CHK with a clinical picture dominated by wandering, aggressiveness, hallucinatory behavior, incoherent language, instability, insomnia associated with headache. This clinical picture occurred following a work accident that resulted in a head trauma. This accident occurred in 2012 (cote 85). L'Hôpital Caraes a recu Twagiramungu le 14/10/2016 avec un transfert de CHK avec un tableau Clinique dominé par errance, l'agressivité, comportement hallucinatoire, langage incohérent, instabilité biscomotrice, insomnia associé \bar{a} des céphalées. Ce tableau clinique est survenu à la suite d'un accident de travail ayant occasioné un traumatisme cranien. Cet accident est survenu en 2012

[35] The Supreme Court finds that when Twagiramungu committed the accident, RSSB only covered the injuries on the leg only as it is indicated by the document of 21/09/2015 which it gave King Faysal Hospital. However, the Court finds that as it is indicated by the reports from various doctors who consulted Twagiramungu, in their explanation, all demonstrate that the accident also injured the brain, however, RSSB did not treat him the mental illness he suffered although it was demonstrated by the doctors who treated him. Therefore, the Court finds that RSSB cannot deny that the mental illness was caused by the accident which occurred on 23/11/2012, but rather he had it before as it wants to convince this court or it is another accident he committed as it alleges.

[36] Basing on motivation above, the court finds the fact that RSSB did not take Twagiramungufor treatment of that mental disability which was caused by the accident of 23/11/2012 while it is its obligation as it did on leg disability, basing on article 22 of the decree-law of 22/08/1974 governing Social Security as it is amended and completed to date provides for medical treatment of an employee who committed a work accident, because this provision of law does not state that RSSB insures only physical disability, therefore, it should be held liable for the price of treatment for 80% of mental disability as it is indicated by the committee of doctors in its report of 08/7/2019.

[37] Regarding the amount of money for mental disability treatment, the court finds that as the money for physical disability was calculated, it is the same procedure for the money of mental

disability, therefore, RSSB should give to Twagiramungu every month the money which is calculated as follows: 931 x 30x75% x 80%= 16,758 Frw per month, thus, all including that of physical disability are totaling to16,758 Frw +13,000 Frw =29,758 Frw per month, which RSSB should give him.

4. Whether the cross appeal filed by Twagiramungu Eric has merit.

[38] Twagiramungu and his counsel request in cross-appeal to RSSB that the court could order that Twagiramungu to be treated abroad because RSSB delayed to take him for treatment, and out his life in danger and led his disability to increase up to the head, they also request to be treated the masticatory function which was damaged in the accident and replace his two units of teeth he lost that time.

[39] They also state that if to send him abroad fails, they request the court to make a decision of separating him from RSSB because it had already tortured him and awards him 60,000,000 Frw for medical treatment and 50,000,000 of living.

[40] They further request that RSSB give him moral damages and 60,000,000Frw of the counsel fees and procedure fees.

[41] Nsabimana James and Sekabuke Jean Paul, the counsel for RSSB state that they did not refuse to take him abroad for treatment because he is not the first one it takes abroad for treatment, but this must be ordered by the doctors, however for Twagiramungu Eric, it was not ordered, rather he is the one who annoys RSSB by refusing to do what it requests him.

138 _

[42] Counsel Nsabimana James and Sekabuke Jean Paul state that the money cannot be awarded because it is not provided by the law, thus his request cannot be put into consideration by the court.

DETERMINATION OF THE COURT

[43] Regarding be taken abroad for treatment which Twagiramugu requests, the Supreme Court finds that it does not have a basis to order it, because there is no decision of doctor which indicates that he must be treated abroad and be confirmed by the committee of doctors, according to the procedure used when the internal medical treatment does not have the capacity.

[44] Concerning the request of Twagiramungu that the court should separate him from RSSB, and awarding him the money for medical treatment and living, the court finds that it cannot order it because that procedure of awarding money to insuree and take care of himself, it is not provided in the law establishing the special procedure of determining what will be given to the victim of an accident and the illness from work. Rather, the Court finds that RSSB should continue to take him for the treatment of all illnesses caused by the accident of 23/11/2012 which include leg, themasticatory, replacement of teeth, mental disability and to be paid for all medication he was prescribed for by the doctor.

[45] Whereas, on what concerns with the various damages requested by Twagiramungu in cross-appeal, they must be examined together with damages requested by both parties in this case.

5. Damages requested by RSSB

[46] Adv. Nsabimana James and Adv. Sekabuke Jean Paul request damages worth 100,000 Frw for being dragged into unnecessary lawsuits

[47] The counsel for Twagiramungu Eric state that RSSB cannot be awarded damages it requests because it is the one who dragged him into lawsuits due to the refusal of giving him what law provides after having a work-related accident while his employer saved for him.

DETERMINATION OF THE COURT

[48] Supreme court finds that the damages requested by RSSB of being dragged into lawsuits, should not be awarded them on this instance since it lost in part.

6. Damages requested by Twagiramungu Eric

[49] Twagiramungu Eric and his counsel request RSSB the following damages:

Damages worth 60,000,000 Frw because RSSB neglected him and led him to not be treated well, the physical and mental disability continue to increase;

1,000,000 of transport fees for following up his case 1,000,000Frw of counsel fees.

[50] Nsabimana James and Me Sekabuke Jean Paul, the counsel for RSSB state that the various damages which Twagiramungu requests, should not be awarded to him because it is not RSSB who dragged him into lawsuits.

DETERMINATION OF THE COURT

Supreme court finds that the damages requested by [51] Twagiramungu Eric which are based to the negligence RSSB have merit on what concerns with his medical treatment, delaying before giving the right of being treated and to buy medications and it is obvious that RSSB neglected him and it did not give him the proper treatment of themasticatory, bought for him another tooth, this led to the increase of his disability and suffered the other illness, it should give the damages for it according to the article 259 of decree-law of 30 July 1888 relating to Contracts or conventional obligations which provides that "any act of a man which causes damage to another obliges the person by whose fault it happened to repair it". The court finds that Twagiramungu Eric requests excessive damages, in its discretion, it awards to him 12,000,000Frw which will be reduced in 2,000,000Frw of living and medical treatment expenses, transport fees which were ordered by this court in interlocutory judgment, and the rest is 10,000,000Frw he must be awarded.

[52] The court furth finds that Twagiramungu hired counsel in this case, he paid money for following up this case including transport, etc., for this reason, RSSB should give him 1,500,000 Frw of the counsel fees and 300,000Frw of the procedure fees.

[53] Concerning the money of replacing the tooth, the Supreme Court finds that Twagiramungu should not be awarded that money he requests, but as it was ordered by this court in interlocutory judgment N° RS/INJUST/RAD 00004/2018/SC rendered on 25/06/2019, RSSB should continue to take him for treatment of all illness caused by the accident of 23/11/2012, including to treat him for themasticatory and buy for him teeth,

at the King Faysal hospital, CARAES Indera and everywhere can be ordered by the doctors of those hospitals.

DECISION OF THE COURT

[54] Finds with merit in part the application filed by RSSB requesting to review due to injustice the judgment N° RADA 0007/15/HC/KIG rendered by the High Court of Kigali on 30/04/2015.

[55] Finds with merit in part the cross appeal filed by Twagiramungu Eric

[56] Overturns in part the rulings of the judgment N° RADA 0007/15/HC/KIG rendered by the High Court of Kigali on 30/04/2015.

[57] Rules that Twagiramungu Eric has a physical disability of 20%, mental disability of 80% as it was decided by the committee of doctors in the report of 08/07/2019

[58] Rules that the mental disability which Twagiramungu Eric has, is caused by the work accident which took place on 23/11/2012;

[59] Orders RSSB to give 29,758 Frw to Twagiramungu Eric the money of disability each month

[60] Orders RSSB to continues taking him for treatment all illness resulted from the work accident of 23/11/2012 which includes leg, themasticatory, replacement of teeth, mental disability and to be bought for all medication he was prescribed for by the doctor because of that disability.

[61] Orders RSSB to give to Twagiramungu Eric the damages worth 12,000,000 Frw which will be reduced in 2,000,000Frw which were ordered by this court in the interlocutory judgment rendered on 28/05/2019, and give him 300,000Frw of the procedure fees and 1,500,000Frw of the counsel fees; all together are totaling to 11,800,000Frw.

CRIMINAL CASES

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PROSECUTION v. NSENGIYUMVA ET.AL

[Rwanda COURT OF APPEAL– RPA 00074/2018/CA (Muhumuza, P.J., Kaliwabo and Tugireyezu, J.) 12 July 2019]

Criminal Law – Selling ivory and looking for their clients do not constitute an offence of poaching, killing, injuring or selling elephants and do not also constitute complicity in poaching, killing, injuring or selling elephants, instead, it constitutes an offence of acquiring, having in possession, keeping or concealing, or procuring to be kept or concealed, any goods with knowledge, or ought reasonably to have known, to be prohibited goods or that require to be permitted which have been imported or carried contrary to the conditions regulating such importation – The East African Community Customs Management Act, article 200(d)(i)(i).

Facts: This case started before the High Court, chamber of Rwamagana where the accused were prosecuted for having been involved in the illegal trade of elephant's ivories from 2012 to 2015 in May, in the beginning, the Prosecution stated that they took part in the killing of elephants in Tanzania, that they used to bring ivories to Rwanda and sought for the clients, the Prosecution added that they shared money from that trade.

That Court held that the offence of killing elephants for which the court was seized, is not a transnational crime since the Prosecution failed to produce evidence of the place where the elephants were killed, therefore, the Court concluded that It lacks the jurisdiction to hear the case for the first instance. Concerning the competent court to hear the case of trading ivories, that Court found that in Rwanda, there is no law to punish acts of selling ivories and seeking for their clients, thus, the case should not be transferred to any court, the court ordered for the release of Nsengiyumva and Karambizi who were prosecuted being detained.

The Prosecution was not contented with the rulings of the judgment and appealed to the Supreme Court but the appeal was transferred to the Court of Appeal after judicial reform. The Prosecution argues that the Court should hold the accused guilty of killing elephants because ivories are found after elephants are killed or wounded, the Prosecution further states that the accused are also guilty of selling ivories since the accused were brokers of those who kill elephants for taking off ivories and their clients.

The Prosecution also prays to the Court to rectify the ruling of the High Court, chamber of Rwamagana for holding that the accused should not be prosecuted for selling ivories stating that there is no Rwandan law or international conventions to punish those acts because the Court should have relied on East African Community Customs Management Act.

Moreover, in this case, the Court ordered to summon Amicus Curiae, to get from him, clarification on the trading of ivories and their derivatives, for this reason, Rwanda Development Board was summoned as Amicus Curiae, the latter explained that ivories can be found in four distinct ways, first is removing them after an elephant is killed, second is wounding an elephant and taking off its ivories, thirdly, purchasing them from commercial dealings and fourth is to getting them from dead elephant by natural death.

Amicus curiae further state that though, Rwandan criminal laws do not provide sanctions to those in acts of trading elephants

148

ivories and parts of other protected animals, there is an East African Community Customs Management Act which penalizing offences of trading body parts of protected animals and their derivatives for which prior authorization is required.

The accused pleaded not guilty except Nsengiyumva who pleaded admitting the selling of ivories, but he also argues that the East African Community Customs Management Act should not be based on because the Prosecution did not produce it so that they defend themselves. For Vunumwami, he states that he should not be prosecuted for the acts of selling ivories since there is no related criminal law in Rwanda, whereas Semasaka submits that the Prosecution failed to prove his role in the commission of the offence, thus, he should be acquitted, whilst Karambizi pleads stating that the Prosecution brought new claims at the appellate level by accusing the offence of killing elephants instead of selling ivories and looking for the clients, that it should be considered as new claims at the appellate level.

Held: 1. There is no evidence to prove the complicity of the accused in the killings of elephants in Tanzania, the fact that the Prosecution failed to prove that the accused knowingly concealed an object or tools which were used in killing elephants, thus the facts pursued are not those provided by article 98 and 327 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which was in force at the moment the prosecution was started.

2. Selling ivories and looking for their clients do not constitute an offence of poaching, killing, injuring or selling elephants and do not also constitute complicity in poaching, killing, injuring or selling elephants, rather, it constitutes an offence of acquiring, having in possession, keeping or concealing, or procuring to be

kept or concealed, any goods with knowledge, or ought reasonably to have known, to be prohibited goods or that require to be permitted which have been imported or carried contrary to the conditions regulating such importation.

3. The High Court should not have affirmed that selling ivories is not punishable by any law because the court should have relied on article 200(d)(i)(ii) of the East African Community Customs Management Act

The appeal has merit in part; The ruling of the appealed judgment is overruled.

Statute and statutory instruments referred to:

- Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 4 and 78,3°.
- Law Nº 22/2018 of 29/04/2018 Law relating to the civil, commercial, labour and administrative procedure, article land 154.
- Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure, articles 165 and 190.
- Law N°72/2008 of 31/12/2008 determining the entry into force of the East African Community Customs Management Act of 1st January 2005.
- Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article 110.
- East African Community Customs Management Act, article 200(d)(i)(ii).
- Convention on International Trade in Endangered Species of Wild Fauna and Flora Signed at Washington, D.C., on 3 March 1973, article 1,2 and 3.

Ministerial order N°007/2008 of 15/08/2008 instituting the list of protected animal and plant species.

Case laws referred to:

Prosecution vs Uwamurengeye, RPAA 0110/10/CS rendered by the Supreme Court, Rwanda Law Report, V1, July 2014, P.133-140.

Prosecution vs CPL Ngabonziza and SGT Biziyaremye, RPAA 0117/07/CS rendered by the Supreme Court, Rwanda Law Report, V2,2011, P.57-62

Prosecution vs Mukashema and Bihimana, RPA 0176/11/CS by the Supreme Court, Rwanda Law Report, V1,2017, P.147-160.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started before the High Court, chamber of Rwamagana where the Prosecution accused Nsengiyumva Vincent, Vunumwami Egide, Semasaka Silas and Karambizi Alphonse for having been involved in the illegal trade of elephant's ivories from 2012 to 2015 in May, in the beginning, the Prosecution stated that they took part in the killing of elephants in Tanzania, that they used to bring elephant's ivories to Rwanda and sought for customers, the Prosecution added that they shared money from that trade.

[2] On 06/10/2016, the High Court, chamber of Rwamagana rendered the judgment RP 0013/15/HC/RWG holding that the

offence of killing elephants for which the court was seized, is not a transnational crime since the Prosecution admitted that It does not possess evidence of where the elephants were killed, therefore, the Court concluded that It lacks the jurisdiction to hear the case for the first instance. Concerning the competent court for trying the case of trading elephant's ivories, the High Court, chamber of Rwamagana found that in Rwanda, there is no law to punish acts of selling elephant's ivories and seeking for their clients, thus, the case should not be transferred to any court, the court ordered for the release of Nsengiyumva Vincent and Karambizi Alphonse who were prosecuted being detained.

[3] The Prosecution was not contented with the rulings of the judgment and appealed to the Supreme Court stating that the previous court stated that the Prosecution failed to prove the role of the accused in killing elephants, that it disregarded that ivories are found after elephants are killed or wounded, therefore, the High Court, chamber of Rwamagana disregarded that those acts are punishable by article 417 of the organic law N° 01/2012 mentioned above.

[4] In the appeal, the Prosecution states that in deciding that the accused are not entitled to prosecution, the High Court, chamber of Rwamagana decided that there is no criminal law sanctioning acts of trading ivories, the court disregarded the provisions of the East African Community Customs Management Act in its article 200(d)(i).

[5] The Prosecution prays to the court to hold that the accused are guilty of the ideal concurrence of offences of killing elephants and taking their ivories for trade, it also argues that each of them is sentenced to 10 years of imprisonment and a fine between 500,000Frw and 5,000,000Frw pursuant to article 417 of penal code.

[6] After judicial reform, the Prosecution's appeal was transferred to the Court of Appeal basing on article 52 and 105 of Law $N^{\circ}30/2018$ of 02/06/2018 determining the jurisdiction of courts¹, the appeal was recorded on N° RPA 00074/2018/CA.

[7] The hearing was held in public on 24/06/2018, Nsengiyumva Vincent was assisted by Counsel Mujawamaliya Immaculée, Vunumwami Egide being assisted by Counsel Kampire Claudine, Semasaka Silas being assisted by Counsel Sebasinga Hélène, Karambizi Alphonse being assisted by Counsel Mukesha David while the Prosecution was represented by Habineza Jean Damascene, the National Prosecutor, the Court stated that the case will be pronounced on 26/07/2019. On that day, the Court rendered interlocutory judgment deciding to reopen the case and summons amicus curiae for clarification of trading elephant's ivories in relation to Rwandan criminal laws, laws for protecting the environment as well as international and regional conventions ratified by Rwanda. In the meanwhile, the President of the Court decided to expand the bench.

[8] The case hearing was again conducted on 09/09/2019, the parties appeared before the Court, being assisted as before, the Prosecution was assisted by Rudatinya Gaspard, the National

¹ Article 52 provides that The Court of Appeal has jurisdiction to hear at the first level of appeal cases tried at first instance by the High Court, the Commercial High Court and the Military High Court, whereas article 105 paragraph one provides that from the day this Law comes into force, except cases already under trial, all cases that are no longer in the jurisdiction of the court seized are transferred to the court with jurisdiction in accordance with the provisions of this Law.

Prosecutor, Amicus Curiae RDB was represented by Richard Muvunyi, the head of the environmental protection unit.

[9] After he was presenting himself, his responsibilities and his expertise in the conservation of the environment, Richard Muvunyi stated that there is a convention of Washington in the United States of America relating to the trade between countries, that agreement refers to the endangered wild animals and plants, that it was ratified by Rwanda, however, it does not provide sanctions to those trading animals or parts of protected animals, that's why any of the party states, has to put in place laws incriminating illegal trade.

[10] He explains to the court that RDB assessed Organic Law N° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of environment in Rwanda and other related criminal laws and found that laws did not provide sanctions to those involved in trading of body parts of protected animals, consequently, to cover the gap, RDB initiated a draft law and submitted it to the government.

[11] Amicus curiae further state that though, Rwandan criminal laws do not provide sanctions to those in acts of trading elephants ivories and parts of other protected animals, there is an East African Community Customs Management Act which penalizing offences of trading body parts of protected animals and their derivatives for which prior authorization is required, and that these include elephant's ivories.

[12] Amicus curiae also stated that elephant's ivories can be found in four distinct ways, first is removing them after an elephant is killed, second is wounding an elephant and taking off its ivories, thirdly, purchasing them from commercial dealings and fourth is to getting them from dead elephant by natural death, he adds that any kind of acquisition of ivories has to be explained and that the trade of ivories is banned all around the world, whether it's ivories or their derivatives, except in case of authorisation.

[13] In his pleading, Nsengiyumva Vincent confessing to having been trading of ivories, he seeks for forgiveness, whereas Vunumwami Egide states that he kept elephant's ivories for Nsengiyumva Vincent knowing that they were cow horns, Semasaka and Karambazi plead not guilty while the Prosecution states that there are incriminating elements of evidence against Nsengiyumva Vincent and Vunumwami Egide and that It has no sufficient elements of evidence against Semasaka and Karambizi Alphonse.

[14] Legal issues to be analysed in the present case are to know whether acts for which the accused are charged with can be an offence and to know applicable law and if there are incriminating elements of evidence.

II. ANALYSIS OF LEGAL ISSUE

II.1. Whether acts for which the accused are charged with can be an offence and to know applicable law.

[15] The Prosecution states that acts of trading elephant's ivories constitute an offence of killing elephants, selling ivories and looking for their clients, It criticizes the High Court, chamber of Rwamagana for having decided that those acts do not constitute an offense, that the Court disregarded article 417 of the law instituting penal code which was in force at the moment of

the commission of the offence which penalizes poaching, selling and killing endangered animal species.

[16] It further prays to the Court to hold that the accused are accomplices in the killing of elephants because they would not have got ivories without killing or wounding them, it adds that they are also guilty of selling ivories since it is obvious that the accused were brokers of those who kill elephants for taking off ivories and their clients. The Prosecution also prays to the Court to refer to the similar case RPA ECON 0001/2018/CA rendered on 06/12/2018 by the Court of Appeal.

[17] The Prosecution seeks to rectify the decision of the High Court, chamber of Rwamagana for holding that the accused should not be prosecuted for selling ivories stating that though it is banned, it is not penalized by any Rwandan law or international conventions because the Prosecution is of the view that in sanctioning that offence, the High Court, chamber of Rwamagana should have based on East African Community Customs Management Act in article 200.

[18] Nsengiyumva Vincent and Counsel Mujawamaliya Immaculée assisting him, state that before the Court of Appeal, the Prosecution filed a new claim because, before the previous court, the accused were only prosecuted for selling ivories, but this time, the Prosecution also accuses them of killing elephants, he requests to the Court to examine whether the claim which was heard before the High Court is the same with the one brought before the Court of Appeal, he further seeks to examine whether being in possession of ivories means to have killed elephants because one can get them from the sale as stated by Amicus Curiae. He also states that the Prosecution did not produce a list of endangered animal species to prove that it includes elephants. [19] With regard to the East African Community Customs Management Act, Counsel Mujawamaliya Immaculée assisting Nsengiyumva Vincent states, that act should not be relied on in rendering the judgment because the Prosecution failed to produce that act so that they defend themselves against it before the Court of Appeal.

[20] Vunumwami Egide and Counsel Kampire Claudine assisting him, state that article 417 of the penal code for which the Prosecution relies on, should not be based on in this case because it has no link with selling ivories, that her client should not be prosecuted. She further stated as indicated on page 5, page 7 and page 10 of the appealed judgment, the Prosecution stated before the High Court that it does not possess evidence proving that elephants were killed in Tanzania, that it charged them for selling and looking where ivories are to be sold and that these acts took place in Rwanda, therefore, Vunumwami Egide should not be prosecuted for those acts because there is no law incriminating it.

[21] Semasaka Silas and Counsel Nyirabasinga Helène assisting him, state that the Prosecution failed to prove Semasaka Silas's role in the commission of the offence, that consequently, he should be found not guilty.

[22] Karambizi Alphonse and Counsel Mukesha David assisting him, argue that the Prosecution brought new claims at the appellate level by accusing the offence of killing elephants instead of selling ivories and looking for the clients, that it should be considered as new claims which cannot be based on for the first time at the appellate level. [23] Concerning the East African Community Customs Management Act, Counsel Mukesha David assisting Karambizi Alphonse states, that act should not be relied on since the Prosecution did not bring that act for discussion before the previous court and that ivories are not commercial goods, he adds that in case the court finds necessary to use that act, the court would ascertain whether it was ratified by Rwanda.

DETERMINATION OF THE COURT

[24] The documents of the case file demonstrate that the accused are prosecuted for killing elephants, complicity in the killing of elephants because they would not have got ivories without killing elephants, the case file also demonstrates the accused were also prosecuted for selling ivories and looking for their clients, but the High Court, chamber of Rwamagana hold that there are not elements of evidence proving the role of the accused in killing elephants and that selling ivories and looking for their clients should not be considered as an offence punished under article 417 of the law instituting the penal code or Organic Law N° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of environment in Rwanda.

[25] Concerning the offence of killing elephants, the Prosecution relies on article 417 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which was in force at the beginning of prosecuting Nsengiyumva Vincent and his co-accused which provides that any person who poaches, sells, injures or kills a gorilla or any other protected endangered animal species shall be liable to a term of imprisonment of more than five (5) years to ten (10) years and a

fine of five hundred thousand (500,000) to five million (5,000,000) Rwandan francs.

[26] The Court finds that even though elephants are among protected animal and plant species provided in Ministerial order N°007/2008 of $15/08/2008^2$ instituting the list of protected animal and plant species, article 417 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code cannot apply in the present case contrary to the Prosecution's view because It fails to produce enough evidence before the Court of Appeal proving that the accused would have committed acts of killing elephants, especially that before the High Court, the Prosecution stated that it had no tangible evidence to prove the role of the accused in the killing of elephants in Tanzania.

[27] Basing on above motivations, the High Court finds that as found by the High Court, chamber of Rwamagana, the Prosecution's claim for the acts of killing elephants cannot be linked to those provided by article 417 of the Organic Law $N^{\circ}01/2012/OL$ of 02/05/2012 mentioned above, the article which penalizes poaching, selling, injuring or killing a gorilla or any other protected endangered animal species that was in force at the moment the prosecution of Nsengiyumva Vincent and his co-accused was started.

_ 159

² Ministerial order N°007/2008 of 15/08/2008 published in official gazette N° 22 of 15/11/2008 instituting the list of protected animal and plant species was promulgated pursuant to article 45 of the Organic Law N° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of the environment in Rwanda, in appendix 1 of that Ministerial order, it provides Gorilla, Chimpanzee, Black rhinoceros, Elephant, Roan antelope, etc,...it is obvious that elephant is listed among protected animal species stated in article 417 mentioned above.

[28] Concerning the complicity in the killings of elephants in Tanzania, since accessing ivories requires first to killing elephants, the Court of Appeal further finds that considering article 98 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code mentioned above³, the Prosecution does not produce any proof that the accused were accomplices in killing elephants in Tanzania in accordance with provisions of this article. And also, the Prosecution failed to prove that those found with ivories in Rwanda, would have knowingly concealed an object or tools which were used in killing elephants, tools or documents obtained from the offence of killing elephants as understood in article 327 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code.

[29] The Court finds, the Prosecution's statements to be speculation that the accused were accomplices of those who killed elephants because ivories would not have found without first killing elephants since those ivories may be found from a dead elephant, by wounding an elephant and taking off its ivories, finding or purchasing them from illegal commercial dealings as stated by Amicus Curiae Richard Muvunyi, the head of the environmental protection unit in RDB.

[30] Basing on the motivation above, the Court of Appeal finds that the facts presented by the Prosecution are not among those provided by article 98 and article 327 of the Organic Law $N^{\circ}01/2012/OL$ of 02/05/2012 instituting the penal code that was

³ Accomplice: a person knowingly aids or abets the offender in preparing, facilitating or committing the offence, or a person who incites the offender. He/She is also an accomplice, a person who incites or conceals offenders or aiding them to conceal pursuant to article 327 of the Organic Law mentioned in this paragraph

in force at the moment the prosecution of Nsengiyumva Vincent and his co-accused was started, because the Prosecution failed to produce elements of evidence to be based on in finding the accused guilty of being accomplices of hunters who might have killed elephants in Tanzania.

[31] Concerning the issue of selling specifically, the Court is of the view that the acts penalized by article 417 of the penal code of selling protected animal species including elephants, those acts did not occur, instead, selling ivories is what happened and not elephants. Selling elephants and selling ivories should not be confused in terms of laws because article 417 implies that the act of selling relates to selling the real animal and not to its body parts or derivatives.

[32] The Court finds that confusing acts of selling elephants and selling ivories would be interpreting criminal laws extensively, whereas it is prohibited in criminal matters as provided by article 4 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which provides that criminal laws shall not be interpreted to extensively, they must be construed strictly.⁴

[33] In light of the above motivations, the Court of Appeal finds that what happened is to keep and sell ivories awaiting the clients because Nsengiyumva Vincent admitted having been given ivories by hunters from Tanzania and he entrusted them to Vunumwami Egide as they looked for the clients, and

⁴ This is also what provided by article 4 of the law N°68/2018 of 30/08/2018 determining offences and penalties in general which provides that criminal laws cannot be interpreted broadly, they must be construed strictly

Vunumwami Egide accepted to conceal them, besides, they were arrested on their way to the client.

[34] Article 1,2 and 3 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora Signed at Washington, D.C., on 3 March 1973 which ratified by Presidential decree N°211 of 25/08/1980, the provisions of those articles imply that elephants are listed under Annex I of that convention and that selling endangered animal species concerns living animals, dead ones, animal body parts or their derivatives, and that their trade should comply with the provisions of this convention, this includes trade permit issued by the competent authority.⁵

⁵ For the purpose of the present Convention, unless the context otherwise requires:

⁽a) "Species" means any species, subspecies, or geographically separate population thereof;

⁽b) "Specimen" means:

⁽i) any animal or plant, whether alive or dead;

⁽ii) in the case of an animal: for species included in Appendices I and II, any readily recognizable part or a derivative thereof; and for species included in Appendix III, any readily recognizable part or derivative thereof specified in Appendix III in relation to the species(...)

Article II. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

Article III. 1. All trade in specimens of species included in Appendix I shall be in accordance with the provisions of this Article.2(...),3. The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:

[35] Article 200(d)(i)(ii) of the East African Community Customs Management Act also states that a person who acquires, has in his or her possession, keeps or conceals, or procures to be kept or concealed, any goods which he or she knows, or ought reasonably to have known, to be prohibited goods or restricted goods which have been imported or carried coastwise contrary to any condition regulating such importation or carriage coastwise shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both⁶.whereas appendix 2,B of that act, litera 8 places ivories in goods which require to be authorized before they are sold.⁷

[36] Since the accused failed to prove that they were permitted for selling ivories brought from Tanzania as required so by East African Community Customs Management Act as well as Convention on International Trade in Endangered Species of Wild Fauna and Flora Signed at Washington, D.C., on 3 March 1973, and they also carried those ivories contrary to conditions regulating such importation, the Court finds, acts for which the defendants are accused, constitute an offence of selling ivories provided by article 200 (d)(i)(ii) of East African Community Customs Management Act which penalizes acquiring, having in

⁽a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;

⁽b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and (c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes

⁷ Ivory, elephant unworked or simply prepared but not cut to shape, worked ivory and articles of ivory

possession, keeping or concealing, or procuring to be kept or concealed, any goods with knowledge, or ought reasonably to have known, to be prohibited goods or restricted goods which have been imported or carried contrary to the conditions regulating such importation, therefore, the Court finds without merit the rulings of the High Court, chamber of Rwamagana that selling ivories does not constitute an offence.

[37] The fact that Counsel Mujawamaliya Immaculée assisting Nsengiyumva Vincent requests for not considering East African Community Customs Management Act because the Prosecution did not produce it so that they defend themselves, the Court finds it without merit because this act should be treated as other laws, it was published in the official gazette, special number of 26/06/2009, it is not necessary that all laws be presented by parties to be based on by the court. But whoever in need of Law may get it from official gazette without the necessity for the Prosecution to produce it to lawyers. It is sufficient that a party to the case states the Law and its number and this what the Prosecution did.

[38] The fact that Counsel Mukesha David assisting Karambizi Alphonse asks that for not relying on East African Community Customs Management Act stating that the Prosecution did not use that act before the High Court, the Court of Appeal finds that what is important is that the acts of selling ivories were pointed out in the indictment and the parties to the case responded on those acts, the Court has to link them to the laws whether those produced by parties or those found necessary by the Court since it is in judge's duties to give right qualification to the facts pursued when he/she finds that qualification given is contrary to the facts, this was also decided so by the Supreme Court in different cases. 8

[39] Moreover, article 1 and 154 of the Law N° 22/2018 of 29/04/2018 Law relating to the civil, commercial, labour and administrative procedure, the law which governs the procedure applicable to other cases in the event such procedure is not governed by any other specific law, that article 154 provides that it is not prohibited to submit in appeal new arguments or elements of evidence that was not heard at the first level, therefore the Court finds no irregularities for the Prosecution to use other law at the appellate level, what matters is that the Prosecution did not submit new facts rather than those of selling ivories and looking for the clients.

[40] Concerning the statement of Mukesha David assisting Karambizi Alphonse that ivories are not goods, the Court finds that the East African Community Customs Management Act provides that goods include all kinds of articles, wares, merchandise, livestock, $(...)^9$, thus, ivories are also considered as goods especially that ivories are listed on appendix 2, B of that act in part 8.

[41] Concerning the issue raised by Counsel Mukesha David assisting Karambizi Alphonse that the Court examines whether East African Community Customs Management Act was ratified by Rwanda, the Court finds that the ratification was done in Law

⁸ Judgment RPAA 0110/10/CS, the Prosecution vs Uwamurengeye Venant, Rwanda Law Report, V1, July 2014,p 133-140, judgment RPAA 0117/07/CS, the Prosecution vs CPL Ngabonziza Faustin and SGT Biziyaremye Jean Baptiste, Rwanda Law Report, V2,2011, P.57-62

⁹ See East African Community Customs Management Act, Preliminary provisions, 2.(1)

N°72/2008 of 31/12/2008 determining the entry into force of the East African Community Customs Management Act of 1st January 2005 published in the official gazette, special number of 26/06/2009.

[42] The Court of Appeal finds the High Court should not have affirmed that selling ivories is not punishable by any law because the court should have relied on article 200(d)(i)(ii) of East African Community Customs Management Act as motivated above.

[43] Article 190 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure provides that When the court seized of the appeal considers it appropriate to alter a decision subjected to appeal, it shall try the case on its merits unless it nullifies the decision on the ground of non-observance of the required case filing procedure or lack of jurisdiction. Hence, the Court finds it appropriate to hear the case.

II.2. Whether they are incriminating evidence against the accused.

A. Nsengiyumva Vincent and Vunumwami Egide.

[44] The Prosecution states that the accused are prosecuted for killing elephants, complicity in killing elephants and selling ivories, elements of evidence for which the Prosecution relies on include Nsengiyumva Vincent's statement of his admission of 22/05/2015 when he was interrogated where he get ivories from, he replied that he got them from a fisherman from Tanzania called Nyabyenda, the latter also got those ivories from hunters he transported in crossing the lake from Tanzania, It further states that it was the second time for Nsengiyumva to be involved in such trade, that he has sold 13 kilos so far. The Prosecution prays

166 ____

to the Court not to reduce his penalty because he does not completely explain the commission of the offence and that he conceals some of the facts.

[45] Nsengiyumva Vincent admits the offence and seeks for forgiveness, he explains that he was together with Vunumwami Egide and the latter sent him at his home to get for him ivories, he adds that when they were about to hand them over to the client, the soldiers came and arrested them. He further states that he did not state that he was given ivories by a hunter from Tanzania and that he doesn't even know how Semasaka and Karambizi came to be involved in the case because he did not know them before, and did not accuse them.

[46] Counsel Mujawamaliya Immaculée assisting Nsengiyumva Vincent states that her client was sent by Vunumwami Egide who was his boss to get for him a bag containing ivories, she further states, that service rendered to his boss does not constitute an offence provided by article 417 of the penal code. She also states that nothing proves that there was killing of elephants from which ivories were taken off since one may cut them as affirmed by Amicus Curiae.

[47] Concerning Vunumwami Egide, the Prosecution states that in his interrogation of 28/05/2015, he confessed for having kept those ivories brought by Nsengiyumva Vincent and that the latter accuses him of collaborating in trading of ivories.

[48] Vunumwami Egide pleads not guilty of killing elephants, he only admits for having kept ivories for Nsengiyumva Vincent knowing that they were cow horns. He adds that he got to know Nsengiyumva Vincent because they worked together in the trade of fish. He states that they have never been together in the trade of fish. He contends that the statements of the Prosecution are wrong, for accusing him in being an accomplice in the commission of the offence because he had never crossed the border, and that he has disabilities on the arm which cannot allow him being involved in such activities, he concludes by praying to the Court to give him justice.

[49] Counsel Kampire Claudine assisting Vunumwami Egide argues that the Prosecution should produce elements of evidence for the offence pursued against Vunumwami Egide because he affirms that he kept horns of cows and not elephants.

DETERMINATION OF THE COURT

[50] Article 86 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure provides that Evidence shall be based on all the facts and legal considerations provided that parties are allowed to present adversary arguments. The court shall decide at its sole discretion on the veracity and admissibility of incriminating or exculpatory evidence.

[51] The documents in the case file demonstrate that the High Court, chamber of Rwamagana held that acts for which Nsengiyumva Vincent and his co-accused are charged, that those acts do not constitute a transnational crime and are not punishable under Rwandan law, whereas in his interrogation before investigators, he explained that ivories for which he was found with, he got them in 2013 from a fisherman from Tanzania called Nyabyenda, the latter also got those ivories from hunters living in Tanzania when he transported them in crossing the lake because they had no money, Nyabyenda entrusted those ivories to him seeking to look for the client.

[52] Those documents also demonstrate that Nsengiyumva Vincent confessed to having started selling ivories in 2012, that he used to get them from someone called Joachim who lives in Tanzania, the latter sold them to him for 20,000Frw per kilogram and in return, Nsengiyumva sold them to 50,000Frw per kilogram, the case file also demonstrates that he jointly conducted his activities with Vunumwami Egide and Semasaka Silas. Before the Prosecution, the High Court as well as before this Court, Nsengiyumva Vincent keeps admitting and accuses Vunumwami Egide of collaborating with him, however, he denies knowing Semasaka Silas and that they have never been together in such business.

[53] These documents indicate that in his interrogation before the investigators, Vunumwami Egide confessed that a hunter brought to him ivories stating that they belong to Nsengiyumva Vincent and that he will come to collect them. The documents show that Vunumwami kept those ivories for a whole year (identification mark 8-11), he also confessed it before the Prosecution (identification mark 53-58), moreover, he admitted it before the Court though he stated that he knew that they were cow horns.

[54] The Court of Appeal finds Nsengiyumva Vincent's statement to be incriminating evidence whereby he admitted for having got ivories and handed them to be concealed, this is an element of evidence to prove that he sold ivories as it is provided by article 110 of the Law N° 15/2004 of 12/06/2004 relating to evidence and its production which provides that a judicial admission refers to the statements the accused or his or her representative makes before the court by confessing on some matters, such statements shall lead him/her to lose the case.

[55] The fact that Nsengiyumva Vincent denies for having been given those ivories by a hunter from Tanzania, the Court finds it without merit because, in the investigation bureau, he has completely explained that he was given them by a fisherman called Nyabyenda from Tanzania the latter also got those ivories from hunters he transported in crossing the lake from Tanzania because they had no money, also, he admitted to having started selling ivories in 2012 when he was given them by someone called Joachim who lives in Tanzania.

[56] With regard to Vunumwami Egide, the Court finds, though he pleads not guilty for selling ivories, Nsengiyumva Vincent's statement denouncing to have entrusted him those ivories for a whole year, and that they have been together in such business, they were also arrested when offering ivories to the client, therefore, these are elements of evidence to prove his role in selling ivories whereas it is prohibited when it was not authorized. Finding someone guilty based on his/her co-accused's statement was also the opinion of the Court in the case RPA 0176/11/CS rendered on 16/10/2015 by the Supreme Court, the case of the Prosecution vs Mukashema and Bihimana.¹⁰

[57] The Court of Appeal finds without merit the statements of Vunumwami Egide and his counsel that he knew that what he kept were cow horns, rather, he wants to evade his role in the commission of the offence because his co-accused Nsengiyumva Vincent who pleads guilty, accuses him to have worked jointly in the selling of ivories as mentioned above.

¹⁰ See the judgment RPA 0176/11/CS rendered on 16/10/2015 by the Supreme Court, the case of the Prosecution vs Mukashema and Bihimana, Rwanda Law Report, V1,2017, P.147-160.

[58] Concerning sentences, article 200(d)(i)(ii) of the East African Community Customs Management Act provides that a person who acquires, has in his or her possession, keeps or conceals, or procures to be kept or concealed, any goods which he or she knows, or ought reasonably to have known, to be prohibited goods or restricted goods which have been imported or carried coastwise contrary to any condition regulating such importation or carriage coastwise shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the dutiable value of the goods involved, or both.

[59] The fact that Nsengiyumva Vincent and Vunumwami Egide are guilty of selling ivories, an offence which was committed when the accused acquired and concealed ivories with the intent of selling them knowing that it is prohibited, the Court finds, each one has to be sentenced to 3 years of imprisonment pursuant to article 200(d)(i)(ii) of the East African Community Customs Management Act.

[60] However, the Court finds that Nsengiyumva Vincent deserves the reduction of the penalty basing on mitigating circumstances of pleading guilty since the beginning of the prosecution and before the Court pursuant to article 78 3° of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code which provides that if there are mitigating circumstances, a penalty of imprisonment of more than five (5) years, but less than ten (10) years may be reduced up to a term of imprisonment of one (1) year, therefore, he must be sentenced to 2 years of imprisonment.

B. Concerning Semasaka Silas and Karambizi Alphonse

[61] The Prosecution states that the elements of evidence it based on to accuse Semasaka Silas and Karambizi Alphonse, was the statement of Nsengiyumva Vincent who accuses to collaborating with him in sellings of ivories, but the Prosecution adds that those elements of evidence are doubtful.

[62] Semasaka states that he has never been in ivories business because as Nsengiyumva Vincent states, they met at the police, thus he asks the Court to hold that he is innocent, whereas Counsel Nyirabasinga Hélène assisting him, argues that the Prosecution failed to prove his role in the commission of the offence, thus he should be found not guilty.

[63] Karambizi Alphonse states that he is not guilty of the offence of murder, complicity in killing elephants and selling their ivories because his occupation as Executive Secretary of the Sector would not have let him be involved in such business, hence he requests the Court to decide that he is not guilty because elements of evidence produced by the Prosecution are doubtful, whereas Counsel Mukesha David assisting Karambizi Alphonse states that the Prosecution did not prove the moment when the offence was committed and that on this instance the Prosecution fails to demonstrate imperfections in the ruling of the High Court, chamber of Rwamagana.

DETERMINATION OF THE COURT

[64] Article 165 of the Law N° 30/2013 of 24/5/2013 relating to the code of criminal procedure provides that if the proceedings conducted as completely as possible do not enable judges to find

reliable evidence proving beyond a reasonable doubt that the accused committed the offence, the judges shall order his/her acquittal.

[65] The documents of the case file indicate that the Prosecution accuses Semasaka Silas and Karambizi Alphonse using the statement of Nsengiyumva Vincent who accuses them to collaborate with him in sellings of ivories, but before the Court of Appeal, the Prosecution recognizes that there is no reliable evidence proving beyond a reasonable doubt.

[66] The documents of the case file also indicate that when Nsengiyumva Vincent was interrogated in investigation bureau, he confessed for having been in the trade of ivories, he reported that he worked together with Semasaka Silas and Karambizi Alphonse in such business, however, he did not give further information on their collaboration(identification mark 5-7)and in their turn, Semasaka and Karambizi also negated it(identification mark 12-16), before the Prosecution Nsengiyumva Vincent denied to have known Semasaka stating that he met him when they were detained together, whilst regarding Karambizi Alphonse, Nsengiyumva admits only that they worked together in sellings of the fish, that he declared nothing else, and before this Court, he did not accuse them.

[67] The Court of Appeal finds, as the Prosecution stated, that there is no reliable evidence proving beyond reasonable doubt the role of Semasaka Silas and Karambizi Alphonse in selling ivories which constitutes an offence of acquiring, having in possession, keeping or concealing ivories illegally because though Nsengiyumva Vincent accused them at the stage of investigation, he no longer accuses them before the Prosecution and the Court, in addition, even in Investigation Bureau, he did not provide complete information to prove their role in such business, hence, they should be declared not guilty.

[68] In light of the foregoing, the Court of Appeal finds that pursuant to article 165 of the Law N° 30/2013 of 24/5/2013 mentioned above, there is no reliable evidence proving beyond reasonable doubt that Semasaka Silas and Karambizi Alphonse committed an offence, therefore, they are acquitted.

III. DECISION OF THE COURT

[69] Holds that the appeal of the Prosecution has merit in part;

[70] Overrules the ruling of the judgment RP 0013/15/HC/RWG rendered on 06/10/2016 by the High Court, chamber of Rwamagana;

[71] Finds Nsengiyumva Vincent and Vunumwami Egide guilty of the offence of selling ivories which is composed of acquiring, having in possession, keeping or concealing, or procuring to be kept or concealed goods illegally.

[72] Holds that Semasaka Silas and Karambizi Alphonse are not guilty of the offence of selling ivories which is composed of acquiring, having in possession, keeping or concealing, or procuring to be kept or concealed goods illegally, therefore they are acquitted;

[73] Sentences Nsengiyumva Vincent to two (2) years of imprisonment;

[74] Sentences Vunumwami Egide to three (3) years of imprisonment;

[75] Orders Nsengiyumva Vincent and Vunumwami Egide to pay court fees worth 50,000Frw.

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