

REPUBLIC OF RWANDA

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ICYEGERANYO CY'IBYEMEZO BY'INKIKO

Icyegeranyo V. 3 - 2020 Nyakanga, 2020



RWANDA LAW REPORTS

Law Report V. 3 - 2020 July, 2020





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KAGABO U. Stephanie

KAVUTSE M. Claude

KUBWIMANA Jean Claude

MUJABI K. Naphtal

NINAHAZWA Roselyne

KOMITE YEMEZA IMANZA

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Umucamanza mu Rukiko

rw'Ubujurire

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Kaminuza y'u Rwanda

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rw'Ubujurire

RUKUNDAKUVUGA F. Regis : Umucamanza mu Rukiko

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RUTAZANA Angeline : Umugenzuzi Mukuru w'Inkiko

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Urukiko rw'Ubujurire

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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'Abayoka

IRIBURIRO

Basomyi bacu,

Urwego rw'Ubucamanza runejejwe no gutangaza Volime ya gatatu 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 icyenda (9) zirimo eshanu (5) zerekeranye n'imiburanishirize y'imanza, mu gihe izindi enye (4) zaburanishijwe mu mizi ari izi zikurikira : urubanza rumwe (1) rw'imbonezamubano, imanza ebyiri (2) z 'ubucuruzi, n'urundi rumwe (1) rw'ubutegetsi.

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

Dukomeje gushishikariza abantu bose bifashisha amategeko 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] 3 RLR

AMATEGEKO YASHINGIWEHO

Itegeko N° 22/2018 yo ku wa 29/04/2018 ryerekeye
imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi,
ingingo ya 10
ingingo ya 12 n'iya152155
Itegeko N° 76/2013 ryo ku wa 11/09/2013 rigena inshingano, ububasha, imiterere n'imikorere by'Urwego rw'Umuvunyi, ingingo ya 1515
Itegeko N° 12/2013 ryo ku wa 22/03/2013 rigenga umurimo w'abahesha b'inkiko ingingo ya 38103
Itegeko N° 45/2011 ryo ku wa 25/11/2011 ryerekeye amasezerano, ingingo ya 113137
Itegeko N°17/2011 ryo ku wa 12/05/2010 rishyiraho kandi rikagena imikorere imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa, ingingo ya 36104
Itegeko N°13/2010 ryo ku wa 07/05/2010 rihindura kandi ryuzuza Itegeko N°10/2009 ryo ku wa 14/05/2009 ryerekeye ubugwate ku mutungo utimukanwa, ingingo ya 3104
Itegeko $N^{\circ}15/2004$ ryo ku wa $12/06/2004$ ryerekeye ibimenyetso n'itangwa ryabyo mu manza,
ingingo ya 4,65 n'iya 11939
ingingo ya 108 n'iya 11955
ingingo ya 3103
ingingo ya 2155
Amabwiriza y'Umwanditsi Mukuru N° 03/2010/Org yo ku wa 16/11/2010 agenga ibyerekeye gukoresha, kugurisha muri cyamunara ndetse no kwegukana ingwate, ingingo ya 9104
cyamunara naeise no kwegukana ingwaie, ingingo ya 9104

Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/ imiterere, imikorere n'Ububasha by'Urukiko rw'Iki ingingo ya 28, igika cya 2, agace ka 7 n'igika ingingo ya 78 n'iya 79	irenga, 1 cya 44
Itegeko Ngenga N°01/2012/OL ryo kuwa 02/05/201 Igitabo cy'amategeko ahana, ingingo ya 573	326 n'iya
Itegeko $N^{\circ}21/2012$ ryo ku wa $14/06/2012$ imiburanishirize y'imanza z'imbonezamubano, iz'umurimo n'iz'ubutegetsi,	iz'ubucuruzi,
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ingingo ya 176	
ingingo ya 320	55
Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza mbere cy'urwunge rw'amategeko mbonezamu rishyiraho igice cya gatanu cyerekeye imicungire w'abashyingiranywe, impano n'izungura, ingingo ya 22	bano kandi y'umutungo a 17,21 n'iya
Itegeko Teka ryo kuwa 30/07/1888, rigenga d	amasezerano
cyangwa imirimo nshinganwa,	104
ingingo ya 258	
ingingo ya 552, n'iya 573	
ingingo ya 260, igika cya 1	

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Murorunkwere n n'Urukiko rw'Ikii			
Nzamubara na 1 n'Urukiko rw'Ikit		-	
Ubushinjacyaha n'Urukiko rw'Iki	•	-	

AMAGAMBO MPINE

1. Amasezerano – Amasezerano y'inguzanyo – Amasezerano y'ubwishingizi – Umwishingizi akomeza kuryozwa inshingano zo kwishyura umwenda kugeza habonetse impamvu mu ziteganywa n'amategeko zizimya ubwishingire

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Amasezerano – Amasezerano y'inguzanyo – Amasezerano y'ubwishingizi – Umwishingizi ntiyakwitwaza ivugururwa ry'amasezerano y'inguzanyo y'ibanze mu gihe iryo vugurura ritahinduye ishingiro ry'ubwo bwishingire.

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Amasezerano y'ubugure – Umutungo utimukanwa – Ugushyikiriza (délivrance) – Gutanga ibintu byimukanwa byagurishijwe bikajya mu bubasha no mu butunzi bw'umuguzi (délivrance) biba iyo habaye itangwa nyakuri ry'ikintu, cyangwa hatanzwe imfunguzo z'inyubako birimo, cyangwa se hakurikijwe ukwemera kw'abagiranye amasezerano, iyo ugutangwa kw'ikintu kudashobora kuba umunsi w'igurisha cyangwa se niba ugura yari asanzwe agifite ku bundi buryo ubwo ari bwo bwose.

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2. Amategeko imiburanishirize y'imanza z'imbonezamubano

 Ikirego gisaba gusubirishamo urubanza ku mpamvu z'akarengane – Ababuranyi – Ababuranyi bose barebwa n'urubanza rusabirwa gusubirishwamo ku impamvu z'akarengane bagomba guhamagazwa kabone n'ubwo bataba baranditse babisaba urwego rubishinzwe

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	Kwiregura – Uwireguza impamvu itunguranye kandi idashobora kwirindwa (cas de force majeure) – Uwireguza impamvu itunguranye kandi idashobora kwirindwa (cas de force majeure) agomba kugaragaza ko ingaruka zayo zidashoboraga kwirindwa UMUJYI WA KIGALI v. MACO MUSONI
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	Inyito y'icyaha — Guhindura inyito y'icyaha ni uburenganzira n'inshingano umucamanza afite mu gihe asanga ibikorwa uregwa akurikiranyweho bidahuye n'inyito byahawe, hakurikijwe ihame ry'uko umucamanza aregerwa ibikorwa bigize icyaha — Igihe cyose icyemezo cy'Urukiko kitaraba ndakuka, inyito y'icyaha ishobora guhinduka, ariko uregwa agahabwa igihe cyo kugira icyo abivugaho. UBUSHINJACYAHA v. MUKARUYANGE
4. A	Amategeko agenga ububasha bw'Inkiko – Ububasha bw'Urukiko mu bujurire bwa kabiri – Nubwo nta ndishyi

zingana n'iziteganywa n'Itegeko zagenwe mu manza zaciwe mu nkiko zibanza, hakaba nta n'impaka zabaye ku gaciro k'ikiburanwa muri izo nkiko, nta kibuza ko izo mpaka zabyutswa bwa mbere ku rwego rw'ubujurire kugira ngo hasuzumwe niba ubujurire bwa kabiri buri cyangwa butari mu bubasha bw'urwo rukiko hashingiwe ku gaciro k'ikiburanwa.

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5. Amategeko agenga umuryango — Umutungo w'umuryango — Imicungire y'umutungo w'umuryango — Ni ihame ku bashyingiranywe kugirana ubwumvikane mbere yo kugurisha umutungo utimukanwa bahuriyeho cyangwa kuwutangaho ubundi burenganzira.

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6. Ingaruka z'ugutesha cyamunara agaciro – Iyo cyamunara iteshejwe agaciro, ibintu bisubira uko byari bimeze mbere yuko cyamunara iba.

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7. Ingwate – Impaka zirebana n'igenagaciro ry'ingwate – Mu gihe habaye kutemeranya ku igenagaciro ry'ingwate hagati y'uwatanze ingwate n'ushinzwe gucunga no kugurisha ingwate, ku busabe bw'ukeka ko yarenganye hakorwa irindi genagaciro.

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Iyo ushinzwe gucunga no kugurisha ingwate yihaye inshingano z'Umwanditsi Mukuru atabiherewe ububasha n'uwo Amabwiriza ateganya aba arengereye inshingano ze.

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	bintu aryozwa ibyangijwe nibyo ashizwe kwitaho mu gihe
	biba byatewe n'uburangare bwe
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IMANZA ZEREKERANYE N'IMIBURANISHIRIZE Y'IMANZA Z'IMBONEZAMUBANO, IZ'UBUCURUZI, IZ'UMURIMO N'IZ'UBUTEGETSI

MT LAW OFFICE Ltd v. PELLA RWANDA RESOURCES Ltd

[Rwanda URUKIKO RW'IKIRENGA – RCAA 00003/2018/SC (Mutashya, P.J., Nyirinkwaya na Gakwaya, J.) 13 Mata 2018]

Amategeko agenga ububasha bw'Inkiko — Ububasha bw'Urukiko mu bujurire bwa kabiri — Nubwo nta ndishyi zingana n'iziteganywa n'Itegeko zagennwe mu manza zaciwe mu nkiko zibanza, hakaba nta n'impaka zabaye ku gaciro k'ikiburanwa muri izo nkiko, nta kibuza ko izo mpaka zabyutswa bwa mbere ku rwego rw'ubujurire kugira ngo hasuzumwe niba ubujurire bwa kabiri buri cyangwa butari mu bubasha bw'urwo rukiko hashingiwe ku gaciro k'ikiburanwa.

Incamake y'ikibazo: MT Law Office Ltd yagiranye na Pella Rwanda Resources Ltd amasezerano y'ubwunganizi. Pella Rwanda Resources Ltd yemera kuzishyura MT Law Office Ltd igihembo cy'ubwunganizi mu mategeko kingana na 1.200.00 USD, bumvikana ko mu gihe bagirana amakimbirane ibibazo byabo byakemurwa mu bwumvikane mu gihe cy'iminsi 10, byananirana bakiyambaza ubukemurampaka.

MT Law Office Ltd yareze Pella Rwanda Resources mu Rukiko rw'Ubucuruzi rwa Nyarugenge kuba itarubahirije inshingano zayo zo kwishyura, ikanga n'uko bakemura ikibazo mu bwumvikane, maze ishyiraho umukemurampaka wo ku ruhande rwayo, isaba Urukiko gushyiraho undi mukemurampaka wo ku rundi ruhande bityo bagafatanya gushyiraho uwa gatatu.

Nyuma yo kudaha ishingiro inzitizi y'iburabubasha bw'urwo Rukiko, rwemeje ko ikirego gifite ishingiro, maze rushyiraho umukemurampaka wa kabiri wo ku ruhande rwa Pella Rwanda Resources Ltd.

Pella Rwanda Resources Ltd ntiyishimiye icyo cyemezo, ikijuririra mu Urukiko Rukuru rw'Ubucuruzi, urwo rukiko rwasanga rutari rufite ububasha bwo kuburanisha urwo rubanza kuko ibikorwa bijyanye n'umwuga w'ubwunganizi mu nkiko atari ibikorwa by'ubucuruzi

MT Law Office Ltd yahise iregera Urukiko Rwisumbuye rwa Gasabo, Pella Rwanda Resources Ltd yongera kuzamura inziti yo kutakira ikirego ariko Urukiko rwemeza ko idafite ishingiro, maze ruca urubanza, rwemeza ko ikirego gifite ishingiro, rushyiraho umukemurampaka wa kabiri wo ku ruhande rwa Pella Rwanda Resources Ltd.

Pella Rwanda Resources Ltd yahise ijurira mu Rukiko Rukuru, MT Law Office Ltd nayo isaba ko ubujurire bwa Pella Rwanda butakirwa Resources Ltd kuko vajuririye icvemezo cy'ubukemurampaka kitajuririrwa, Urukiko Rukuru ruza kwemeza ko iyo nzitizi nta shingiro ifite kuko urubanza ari urw'imbonezamubano, ku bijyanye n'ubujurire bwa Pella Rwanda Resources Ltd ruvuga ko Urukiko Rwisumbuye rwa Gasabo rutagombaga gushyiraho umukemurampaka gukemura ikibazo cy'imbonezamubano, ko ahubwo rwagombaga kuburanisha urubanza, maze rutegeka ko ikirego gisubizwa mu Rukiko Rwisumbuye rwa Gasabo ngo rukiburanishe mu mizi.

MT Law Office Ltd yajuririye Urukiko rw'Ikirenga, Pella Rwanda Resources Ltd nayo itanga inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga mu bujurire bwa kabiri kuko ikiburanwa kidafite agaciro k'amafaranga ateganywa n'Itegeko kandi nta

n'indishyi zingana nibura na 50.000.000 Frw zagenwe mu manza zaciwe mu nkiko zibanza ndetse ko nta mpaka zishingiye ku gaciro k'ikiburanwa zabaye mu nkiko zibanza.

Mu kwiregura kuri iyo nzitizi, MT Law Office Ltd ivuga ko yareze isaba ko hashyirwaho umukemurampaka wa kabiri, ibyo bitashoboka, urukiko rugasuzuma mu mizi ikibazo cy'umwenda yishyuza ungana na 900.000 USD, ahwanye na 765.024.365 Frw, ushingiye ku masezerano bagiranye, maze Pella Rwanda Resources Ltd igategekwa kwishyura ayo mafaranga, inyungu z'ubukererwe n'indishyi zinyuranye, ko rero basanga urubanza ruri mu bubasha bw'uru Rukiko.

Incamake y'icyemezo: 1. Nubwo nta ndishyi zingana n'iziteganywa n'Itegeko zagennwe mu manza zaciwe mu nkiko zibanza, hakaba nta n'impaka zabaye ku gaciro k'ikiburanwa muri izo nkiko, nta kibuza ko izo mpaka zabyutswa bwa mbere ku rwego rw'ubujurire kugira ngo hasuzumwe niba ubujurire bwa kabiri buri cyangwa butari mu bubasha bw'urwo Urukiko bwarwo mu bujurire bwa kabiri hashingiwe ku gaciro k'ikiburanwa

Inzitizi y'iburabubasha nta shingiro ifite. Urubanza ruzakomeza mu mizi. Amagarama y'Urubanza abaye asubitswe.

Amategeko yashingiweho:

Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'Ububasha by'Urukiko rw'Ikirenga, ingingo ya 28, igika cya 2, agace ka 7 n'igika cya 4.

Imanza zifashishijwe:

Murorunkwere na Utamuriza, RCAA 0075/09/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 20/05/2011.
Nzamubara na Ntawukuriryayo, RCAA 0097/10/CS rwaciwe

zamubara na Ntawukuriryayo, RCAA 009//10/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 06/05/2011

Urubanza

I. IMITERERE Y'URUBANZA

- [1] MT Law Office Ltd yagiranye na Pella Rwanda Resources Ltd amasezerano yiswe "Agreement for Perfomance related to remuneration". Muri aya masezerano, Pella Rwanda Resources Ltd yemeye ko izishyura MT Law Office Ltd igihembo gishingiye ku bintu bitatu aribyo : "Finder's fees, Legal Fees and Consulting fees", kingana na 1.200.00 USD, bumvikana ko mu gihe bagiranye amakimbirane bazakemura ibibazo mu bwumvikane mu gihe cy'iminsi 10, byananirana bakiyambaza ubukemurampaka.
- [2] MT Law Office Ltd yabanje kurega Pella Rwanda Resources Ltd mu Rukiko rw'Ubucuruzi rwa Nyarugenge, ivuga ko yagiranye nayo amakimbirane ashingiye ku kutubahiriza inshingano zayo zo kwishyura nk'uko babisezeranye mu masezerano, yanga ko bakemura ikibazo mu bwumvikane, ishyiraho umukemurampaka wo ku ruhande rwayo, isaba ko urukiko rumushyiraho, agafatanya n'uwo yashyizeho bagashyiraho uwa gatatu.
- [3] Urukiko rw'Ubucuruzi rwa Nyarugenge rwaciye urubanza N° RCOM 00437/2016/TC/NYGE ku wa 24/05/2016.

Ku bijyanye n'inzitizi yo kutakira ikirego yazamuye na Pella Rwanda Resources Ltd ivuga ko MT Law Office Ltd yaregeye Urukiko rw'Ubucuruzi kandi ikirego cyayo ari icy'imbonezamubano gishingiye ku masezerano y'akazi k'ubwunganizi, urwo Rukiko rwemeje ko itakiriwe kuko abagiranye amasezerano ari ibigo by'ubucuruzi, n'ibikorwa biteganyijwe mu masezerano bagiranye akaba ari ibikorwa by'ubucuruzi. Ku bijyanye n'imizi y'urubanza, urwo Rukiko rwemeje ko ikirego cya MT Law Office Ltd gifite ishingiro, maze rushyiraho umukemurampaka wa kabiri wo ku ruhande rwa Pella Rwanda Resources Ltd.

- Pella Rwanda Resources Ltd yajuririye Urukiko Rukuru [4] rw'Ubucuruzi, mu rubanza N° RCOMA 00329/2016/CHC/HCC rwaciwe ku wa 16/09/2016, rwemeza ko ibikorwa bijyanye n'umwuga w'ubwunganizi nkiko mu atari ibikorwa by'ubucuruzi, ruvanaho urubanza rwaciwe n'Urukiko rw'Ubucuruzi rwa Nyarugenge, ko icyo kibazo cyo gushyiraho umukemurampaka cyaregerwa inkiko ziburanisha imanza z'imbonezamubano.
- [5] Nyuma y'aho urwo rubanza ruciriwe, MT Law Office Ltd yaregeye Urukiko Rwisumbuye rwa Gasabo, ikiregerwa ari ugushyiraho umukemurampaka wa kabiri mu rwego rwo kubahiriza amasezerano yagiranye na Pella Rwanda Resources Ltd, bitashoboka, hagasuzumwa ikibazo bafitanye, maze Pella Rwanda Resources Ltd igategekwa kuyishyura umwenda iyibereyemo n'indishyi zinyuranye.
- [6] Muri urwo Rukiko, Pella Rwanda Resources Ltd na none yazamuye inziti yo kutakira ikirego cya MT Law Office Ltd ivuga ko ikirego cyagakwiye gusuzumwa n'inkiko z'ubucuruzi.

- [7] Urukiko Rwisumbuye rwa Gasabo rwaciye urubanza N° RC 00026/2017/TGI/GSBO ku wa 31/05/2017, rwemeza ko ikirego cya MT Law Office Ltd cyakiriwe kandi ko gifite ishingiro, rushyiraho umukemurampaka wa kabiri wo ku ruhande rwa Pella Rwanda Resources Ltd.
- [8] Pella Rwanda Resources Ltd yajuririye Urukiko Rukuru. Muri urwo Rukiko, MT Law Office Ltd nayo yatanze inzitizi ivuga ko ikirego cy'ubujurire cya Pella Rwanda Resources Ltd kidakwiriye kwakirwa, hashingiye ku ngingo ya 13 y'Itegeko N° 05/2008 ryo ku wa 14/02/2008 ryerekeye Ubukemurampaka, kuko yajuririye icyemezo cy'ubukemurampaka kitajuririrwa.
- [9] Urukiko Rukuru rwaciye urubanza N°RCA 00189/2017/HC/KIG ku wa 06/12/2017, rwemeza ko inzitizi yatanzwe na MT Law Office Ltd isaba Urukiko Rukuru kutakira ubujurire bwa Pella Rwanda Resources Ltd nta shingiro ifite kuko iyishingira ku ngingo ya 13 y'Itegego N° 05/2008 ryo kuwa 14/02/2008 rigena ubukemurampaka mu manza z'ubucuruzi, mu gihe uru rubanza ari urw'imbonezamubano nk'uko byemejwe mu rubanza n° RCOMA 00329/2016/HCC rwamaze kuba itegeko.
- [10] Urwo Rukiko kandi rwemeje ko ubujurire bwa Pella Rwanda Resources Ltd bufite ishingiro, rutegeka ko urubanza N°RC 0026/2017/TGI/GSBO rwaciwe n'Urukiko Rwisumbuye rwa Gasabo rushyiraho umukemurampaka ruvanweho kuko rutagombaga gushyiraho umukemurampaka, ahubwo rwagombaga kuburanisha urubanza, rutegeka ko ikirego gisubizwa mu Rukiko Rwisumbuye rwa Gasabo ngo rukiburanishe mu mizi
- [11] Mu gufata iki cyemezo, Urukiko Rukuru rwasobanuye ko Itegeko N° 51/2010 ryo ku wa 10/01/2010 rishyiraho Ikigo

Mpuzamahanga cy'Ubukemurampaka cya Kigali rikanagena imitunganyirize, imikorere n'ububasha bwacyo, iteganya, mu ngingo yayo ya 5, ko ububasha bw'ikigo burebana n'impaka zo mu rwego rw'ubucuruzi mu Rwanda, ko rero umukemurampaka washyizweho n'Urukiko Rwisumbuye rwa Gasabo nta bubasha afite bwo kuba yakemura impaka zirebana n'ikibazo cy'imbonezamubano.

- [12] Urukiko rwasobanuye kandi ko nta tegeko rirajyaho ryihariye rigena ibijyanye n'ubukemurampaka mu manza zitari iz'ubucuruzi nyuma y'uko hashyizweho Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, aho ivuga, mu ngingo yayo ya 367, ko *hazashyirwaho* itegeko ryihariye rigena ibijyanye n'ubukemurampaka.
- [13] Mu kwemeza ko ikirego gisubizwa mu Rukiko Rwisumbuye rwa Gasabo ngo rukiburanishe mu mizi, Urukiko rwasobanuye ko rushingiye ku ngingo ya 26 y'Amabwiriza ya Perezida w'Urukiko rw'Ikirenga.
- [14] MT Law Office Ltd yajuririye Urukiko rw'Ikirenga ku wa 25/12/2017, Pella Rwanda Resources Ltd nayo yatanze inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga.
- [15] Urubanza rwaburanishijwe mu ruhame ku wa 06/03/2018, MT Law Office Ltd iburanirwa na Me Rwagatare Janvier, Me Rwenga Etienne na Me Mbaga Tuzinde Mbonyimbuga, naho Pella Rwanda Resources Ltd iburanirwa na Me Moïse Nkundabarashi na Me Kayigirwa Télèsphore, ababuranyi bajya impaka ku nzitizi y'iburabubasha bw'Urukiko rw'Ikirenga yabyukijwe na Pella Rwanda Resources Ltd.

II. IKIBAZO KIGOMBA GUSUZUMWA N'ISESENGURA RYACYO

Kumenya niba urubanza rutari mu bubasha bw'Urukiko rw'Ikirenga hashingiye ku gaciro k'ikiburanwa

- [16] Ababuranira Pella Rwanda Resources Ltd bavuga ko uru rubanza rutari mu bubasha bw'Urukiko rw'Ikirenga mu bujurire bwa kabiri kuko ububasha bwarwo butareberwa mu nyandiko itanga ikirego nk'uko MT Law Office Ltd ishaka kubyumvikanisha mu mwanzuro wayo w'ubujurire, ahubwo bureberwa ku ndishyi zagenwe zingana nibura na miliyoni mirongo itanu cyangwa ku gaciro kagenwe n'umucamanza, igihe habaye impaka, kangana nibura n'ayo mafaranga nk'uko bisobanurwa mu ngingo ya 28, igika cya kabiri, agace ka 7, y'Itegeko Ngenga N° 03/06/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha bw'Urukiko rw'Ikirenga, muri uru rubanza hakaba nta ndishyi zagenwemo, ndetse nta n'impaka zabaye ku gaciro k'ikiburanwa ngo kabe kagenwa n'umucamanza.
- [17] Ababuranira MT Law Office Ltd bavuga ko yareze isaba, ku bw'ibanze, ko hashyirwaho umukemurampaka wa kabiri wo ku ruhande rwa Pella Rwanda Resources Ltd kugira ngo hubahirizwe amasezerano bagiranye ateganya ko amakimbirane yavuka hagati yabo yakemurwa hiyambajwe ubukemurampaka, ibyo bitashoboka, urukiko rugasuzuma mu mizi ikibazo cy'umwenda yishyuza ungana na 900.000 USD, ahwanye na 765.024.365 Frw, ushingiye ku masezerano bagiranye, maze Pella Rwanda Resources Ltd igategekwa kwishyura ayo mafaranga, inyungu z'ubukererwe n'indishyi zinyuranye, ko rero basanga urubanza ruri mu bubasha bw'Urukiko rw'Ikirenga kuko agaciro k'ikiburanwa mu rubanza rwajuririwe karengeje miliyoni

mirongo itanu ziteganijwe mu ngingo ya 28, igika cya kabiri, agace ka 7, y'Itegeko Ngenga N° 03/06/2012/OL ryo ku wa 13/06/2012 ryavuzwe haruguru.

[18] Bavuga kandi ko iyo ngingo y'itegeko igomba gusomwa muri rusange, hakarebwa n'ibiteganywa mu gace ka 4, igira iti mu zindi manza, agaciro k'amafaranga, agaciro k'ikiburanwa kimwe n'agaciro k'icyo amasezerano ashingiyeho ni byo bigena ububasha bw'Urukiko rw'Ikirenga, hubahirijwe ibivugwa mu gace ka 7 k'igika cya 2 cy'iyi ngingo.

UKO URUKIKO RUBIBONA

- [19] Ku bijyanye n'ububasha bw'Urukiko rw'Ikirenga, ingingo ya 28 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, iteganya mu gika cyayo cya 2, agace ka 7, ko uru rukiko ruburanisha mu bujurire bwa kabiri imanza zagenwemo indishyi zingana nibura na 50.000.000 Frw cyangwa se zifite agaciro k'ikiburanwa kagenwe n'umucamanza igihe habaye impaka kangana nibura n'ayo mafaranga, naho mu gika cya 4, igateganya ko mu zindi manza, agaciro k'amafaranga, agaciro k'ikiburanwa kimwe n'agaciro k'icyo amasezerano ashingiyeho aribyo bigena ububasha bw'Urukiko rw'Ikirenga, hubahirijwe ibivugwa mu gace ka 2 k'iyi ngingo.
- [20] Ku birebana n'uru rubanza, Urukiko rurasanga, nubwo nta ndishyi zingana nibura na 50.000.000 Frw zagenwe mu manza zaciwe mu nkiko zibanza, hakaba nta n'impaka zabaye ku gaciro k'ikiburanwa muri izo nkiko kuko haburanywe gusa ku kibazo cyo gushyiraho umukemurampaka wa kabiri, nta kibuza ko izo mpaka zabyutswa bwa mbere kuri uru rwego kugira ngo

hasuzumwe niba ubujurire bwa kabiri buri cyangwa butari mu bubasha bwarwo hashingiwe ku gaciro k'ikiburanwa. Ibi byemejwe n'uru rukiko mu manza zitandukanye¹.

[21] Ku bijyanye rero n'agaciro k'ikiburanwa muri uru rubanza, Urukiko rurasanga, hagendeye ku mwenda wishyuzwa wa 900.000 USD, ahwanye na 775.987.164 Frw², ndetse no ku gaciro k'icyo amasezerano asabwa kubahirizwa ashingiyeho kirebana n'igihembo cya 1.200.000 USD, agaciro k'ikiburanwa muri uru rubanza karengeje 50.000.000 Frw zituma rujya mu bubasha bwarwo mu bujurire bwa kabiri hashingiye ku ngingo ya 28, igika cya 2, agace ka 7, ndetse n'igika cya 4 y'Itegeko Ngenga ryavuzwe rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, bityo inzitizi y'iburabubasha ishingiye ku gaciro k'ikiburanwa yatanzwe na Pella Rwanda Resources Ltd ikaba nta shingiro ifite.

III. ICYEMEZO CY'URUKIKO

- [22] Rwemeje ko ubujurire bwa MT Law Office Ltd buri mu bubasha bw'Urukiko rw'Ikirenga.
- [23] Rwemeje ko iburanisha rizakomeza ku wa 12/06/2018.
- [24] Ruvuze ko amagarama y'urubanza abaye asubitswe.

¹ Urubanza N° RCAA 0075/09/CS rwaciwe ku wa 20/05/2011, haburana Murorukwere na Utamuriza; Urubanza N° RCAA 0097/10/CS rwaciwe ku wa 06/05/2011, haburana Nzamubara na Ntawukuriryayo.

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² Ku gipimo cy'ivunja cya 862.20796 kigaragara ku rubuga rwa internet ya Banki Nkuru y'u Rwanda (BNR) yo ku wa 13/04/2018

MUKAGIFUNDU N'UNDI v. UWAMARIYA N'UNDI

[Rwanda URUKIKO RW'IKIRENGA – RS/REV/INJUST/CIV0011/16/CS – Kanyange, P.J., Ngagi na Mukandamage, J.) 21 Mata 2019]

Imiburanishirize y'imanza z'imbonezamubano — Ikirego gisaba gusubirishamo urubanza ku mpamvu z'akarengane — Ababuranyi — Ababuranyi bose barebwa n'urubanza rusabirwa gusubirishwamo ku impamvu z'akarengane bagomba guhamagazwa kabone n'ubwo bataba baranditse babisaba urwego rubishinzwe.

Incamake y'ikibazo: Mukagifundu na Mukamutana batanze ikirego mu cyahoze ari Urukiko rwa Mbere rw'Iremezo rwa Gitarama gisaba kwemeza ko Rugarama ari we se. Ivugururwa ry'amategeko n'inzego z'ubutabera ryo mu mwaka wa 2004 ryabaye izo manza zitaraburanishwa, zohererezwa Urukiko rw'Ibanze rwa Gacurabwenge rwari rufite ububasha bwo kuziburanisha.

Urubanza rwa Mukamutana rwaje gusibwa muri urwo rukiko, ariko ruza kongera kubyutswa, Uwamariya aza kugoboka ku bushake muri izo manza avuga ko ahagarariye abazungura ba Iyamuremye wapfuye yaragobotse mu manza zombi za mbere.

Urukiko rwemeje ko Mukagifundu na Mukamutana ari abana ba Rugarama, Uwamariya, Muhawenimana na Uwizeyimana bajuririra imikirize y'urwo rubanza mu urukiko Rwisumbuye rwa Muhanga rwaburanishirije hamwe imanza zombi maze rutesha agaciro izo manza zaciwe n'Urukiko rw'Ibanze rwa

Gacurabwenge, bituma Mukagifundu wari uhagarariye na murumuna we Mukamutana ajurira mu Urukiko Rukuru, ubujurire bwabo ntibwakirwa kubwo kudashingira ku mategeko.

Mukagifungo yajuririye kandi mu Urukiko rw'Ikirenga, mu cyemezo cy'ibanzirizasuzuma Umucamanza yemeza ko ubujurire butakiriwe kuko butari mu bubasha bw'Urukiko rw'Ikirenga, Mukagifundu Pauline ahita yandikira Urwego rw'Umuvunyi asaba ko urubanza rwaciwe n'Urukiko Rwisumbuye rwa Muhanga rusubirwamo ku mpamvu z'akarengane kuko Urukiko rwirengagije ko abajuriye muri urwo rukiko Muhawenimana na Uwizeyimana batabaye ababuranyi mu manza za mbere bikaba byari gutuma ubujurire butakirwa.

Nyuma yo gusanga ubusabe bwe bufite ishingiro, Urwego rw'Umuvunyi rwasabye ko urubanza rusubirwamo ku mpamvu z'akarengane; urubanza rusubirwamo mu Rukiko rw'Ikirenga ku mpamvu z'akarengane.

Mu iburanisha mu Rukiko rw'Ikirenga, abaregwa babyukije inzitizi yo kutakira ikirego cya Mukamutana kuko we atigeze atanga ikirego gisaba gusubirishamo urubanza ku mpamvu z'akarengane ku Rwego rw'Umuvunyi.

Mukamutana yiregura avuga ko we na Mukagifundu bombi bahuriye mu manza zahujwe n'Urukiko Rwisumbuye ari nazo zisubirishwamo ku mpamvu z'akarengane kandi ko rumwe rutasubirishwamo ngo urundi rusigare. Mukagifundu we avuga ko yasabye Urwego rw'Umuvunyi ko urubanza rwe rwasubirishwamo ku mpamvu z'akarengane, ariko ko yasabiraga na murumuna we kuko ari we wanamuhagarariye mu nkiko zose.

Incamake y'icyemezo: Ababuranyi bose barebwa n'urubanza rusabirwa gusubirishwamo ku impamvu z'akarengane bagomba

guhamagazwa kabone n'ubwo bataba baranditse babisaba urwego rubishinzwe kuko iyi nzira (procedure) igamije kuvanaho akarengane kagaragaye mu rubanza rwaciwe burundu, bityo Mukamutana ntagomba kuvanwa mu rubanza.

Inzitizi isaba kutakira ikirego nta shingiro ifite. Iburanisha rizakomeza mu mizi. Amagarama y'urubanza arasubitswe.

Amategeko yashingiweho:

- Itegeko Ngenga N° 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 78 n'iya 79.
- Itegeko N°76, N° 76/2013 ryo ku wa 11/09/2013 rigena inshingano, ububasha, imiterere n'imikorere by'Urwego rw'Umuvunyi, ingingo ya 15.
- 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 10.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Ku wa 06/06/1996, Mukagifundu Pauline na Mukamutana Hyacinthe batanze ibirego mu Rukiko rwa Mbere rw'Iremezo rwa gitarama, basaba ko urwo rukiko rwemeza ko Rugarama Landouard ari we se, urubanza rwa Mukagifundu

ruhabwa N° RC 152/1/96, naho urwa Mukamutana ruhabwa N° RC 0148/1/96.

- [2] Ivugururwa ry'amategeko ryo mu mwaka wa 2004 ryabaye izi manza zombi zitaraburanishwa. Mukagifundu Pauline yagiye gukurikirana urubanza rwe mu Rukiko Rwisumbuye rwa Muhanga, yoherezwa mu Rukiko rw'Ibanze rwa Gacurabwenge kuko ikirego cye cyari mu bubasha bwarwo, agezeyo, bamubwira ko urubanza rwe RC 152/1/96 rwasibwe hamwe n'urwa murumuna we (Mukamutana Hyacinthe).
- Mukagifundu [3] Pauline vatanze ikirego RC0175/09/TB/GBWE abyutsa urwo rubanza, hanyuma, mu iburanisha ryarwo, biza kugaragara ko urubanza RC 152/1/96 rutasibwe, ahubwo hasibwe urubanza RC 148/1/96 rwa murumuna we Mukamutana Hyacinthe, bityo, bisabwe na Mukagifundu Pauline, Urukiko rwemeza ko aretse urwo rubanza (RC 0175/09/TB/GBWE); maze akomeza urubanza rwe rwa mbere RC 152/1/96 mu Rukiko rw'Ibanze rwa Gacurabwenge, ruhabwa RC 0264/09/TB/GBWE - RC 152/1/96. Mukamutana Hyacinthe nawe yabyukije urubanza rwe RC 148/1/96, rwasibwe rumaze guhabwa RC 0060/05/TD/KMYI/RC167/09/ TB/GBWE, ikirego cye gihabwa RC 0176/09/TB/KBWE.
- [4] Uwamariya Agnès yatanze igarama agoboka mu rubanza RC 264/09/TB/GBWE RC 152/1/96, hamwe n'urubanza RC 0176/09/TB/GBWE avuga ko ahagarariye abazungura ba Iyamuremye Véneranda wari waragobotse mu manza zombi za mbere (urubanza RC 152/1/96 hamwe na RC 148/1/96) akaza kwitaba Imana.

- [5] Mu rubanza RC 264/09/TB/GBWE-RC152/1/96, Urukiko rwemeje ko Mukagifungo Pauline ari umwana wa Rugarama Landouard, ko ikirego cya Uwamariya Agnès nta shingiro gifite. Mu rubanza RC 0176/09/TB/KBWE, na none, urwo rukiko rwemeje ko Mukamutana Hyacinthe nawe ari umwana wa Rugarama Landouard.
- Uwamariya Agnès, Muhawenimana Bernadette na Marie Goretti bajuririye Uwizeyimana urubanza RC 0264/9/TB/GBWE-RC 0512/1/96 n'urubanza RC0176/09/TB/GBWE, mu Rukiko Rwisumbuye rwa Muhanga, izo manza zihabwa RCA 0163/010/TGI/MHG na RC RCA 0164/010/TGI/MHG. Urwo rukiko rwaciye izo manza ku wa 12/11/2010, rwemeza ko urubanza RC 0264/09/TB/GBWE -RC152/1/96 n'urubanza RC 0176/09/TB/GBWE zajuririwe zihindutse mu ngingo zazo zose kandi ko zikuweho, ko Mukagifundu Pauline na Mukamutana Hyacinthe batsinzwe.
- [7] Mukagifundu Pauline ntiyishimiye imikirize y'urubanza ajuririra Urukiko Rukuru, Urugereko rwa Nyanza, ubujurire bwe buhabwa RCAA 0347/10/HC/NYA, ku wa 14/10/2011, urwo rukiko rwemeza kutakira ngo rusuzume ubujurire rwashyikirijwe kuko butujuje ibiteganywa n'ingingo ya 106 y'itegeko ngenga n° 51/2008 ryo ku wa 09/09/2008 rigena imiterere, imikorere n'ububasha by'Inkiko.
- [8] Mukagifundu Pauline, na none, ntiyishimiye icyemezo cy'Urukiko Rukuru, Urugereko rwa Nyanza, ajuririra Urukiko rw'Ikirenga, ubujurire bwe buhabwa RCAA 0135/11/CS. Mu cyemezo RC 0050/12/PRE-EX/CS cy'ibanzirizasuzuma ry'urubanza, umucamanza yemeje ko ubujurire bwa Mukagifundu Pauline butakiriwe kuko butari mu bubasha bw'Urukiko rw'Ikirenga.

- [9] Nyuma y'urwo rubanza, Mukagifundu Pauline yandikiye Urwego rw'Umuvunyi asaba ko urubanza RC 0163-RCA 0164/010/TGI/MHG, rwaciwe n'Urukiko Rwisumbuye rwa Muhanga, rwasubirishwamo ku mpamvu z'akarengane zikurikira:
 - kuba urukiko rwarirengagije ko abajurive, Muhawenimana Bernadette na Uwizeyimana Marie Goretti, batabaye ababuranyi mu manza zajuririwe arizo RC0264/09/TB/GBWE-RC152/1/96 RC0176/09/TB/GBWE, kandi iyi ari inzitizi ndemyagihugu ituma ikirego kitakirwa ngo kiburanishwe mu mizi, bityo kuba cyarakiriwe kandi kitaragombaga kwakirwa bikaba ku byaragize ingaruka manza RC0264/09/TB/GBWE/RC152/1/96 na RC0176/09/TB/GBWE, mukagifundu na Mukamutana bari batsinze;
 - 2° kuba Uwamariya Agnès yaragobotse mu manza RC 0264/09/TB/GBWE/RC152/1/96 na RC 0176/09/TB/GBWE avuga ko ahagarariye abazungura ba Iyamuremye Vénéranda aribo Muhawenimana Bernadette na Uwizeyimana Marie Goretti, ariko kuri urwo rwego ndetse n'urw'ubujurire akaba yaratanze ikirego mu izina rye, cyane cyane ko ku rwego rw'ubujurire, Uwizeyimana Marie Goretti nawe yareze; bityo ko iyo nayo ari inzitizi ndemyagihugu ituma ikirego cyo kugoboka mu rubanza kitaragombaga kwakirwa.
- [10] Urwego rw'Umuvunyi, mu ibaruwa N° OMB 03/1689/0615 /KJP yo ku wa 02/06/2015, rwandikiye Perezida w'Urukiko rw'Ikirenga, rusaba ko urwo rubanza RCA 0163-RCA 0164/010/TGI/MHG rwasubirwamo kubera impamvu

z'akarengane; nyuma yo gusuzuma raporo y'Ubugenzuzi Bukuru bw'Inkiko, Perezida w'Urukiko rw'Ikirenga yemeza ko dosiye ishyikirizwa ubwanditsi bw'Urukiko kugira ngo urubanza ruburanishwe.

[11] Iburanisha ry'uru rubanza ryabereye mu ruhame ku wa 17/01/2017 no ku wa 14/03/2017, Mukagifundu Pauline na Mukamutana Hyacinthe baburanirwa na Me Mitsindo Tom, naho Uwamariya Agnès, Muhawenimana Bernadette na Uwizeyimana Marie Goretti bahagarariwe na Me Nkubayingoga Samuel, uyu akaba yaratanze inzitizi yo kutakira ikirego cya Mukamutana Hyacinthe kubera ko atigeze asaba ko urubanza rusubirishwamo ku mpamvu z'akarengane.

II. IKIBAZO KIRI MU RUBANZA N'ISESENGURWA RYACYO

Kumenya niba ikirego cya Mukamutana Hyacinthe kitagomba kwakirwa

- [12] Nkubayingoga Samuel, uburanira Uwamariya Agnès, Muhawenimana Bernadette na Uwizeyimana Marie Goretti, avuga ko ikirego cya Mukamutana Hyacinthe kitagomba kwakirwa kuko Mukagifundu Pauline ari we wenyine wasabye ko urubanza rwasubirishwamo ku mpamvu z'akarengane, ndetse ko n'ibaruwa y'Urwego rw'Umuvunyi igaragaraho Mukagifundu Pauline gusa.
- [13] Mukagifundu Pauline avuga ko yasabye Urwego rw'Umuvunyi ko urubanza rwe rwasubirishwamo ku mpamvu z'akarengane, ariko ko yasabiraga na murumuna we, Mukamutana Hyacinthe kuko ari we wanamuhagarariye mu

nkiko zose, bityo Urwego rw 'Umuvunyi narwo rusaba ko imanza zabo zari zarahujwe, zisubirishwamo ku mpamvu z'akarengane.

[14] Me Mitsindo Tom, wunganira Mukagifundu Pauline akanahagararira Mukamutana Hyacinthe, avuga ko uwatanze inzitizi nawe yemera ko ababuranyi bombi bahuriye mu manza RCA 0163-RCA 0164/010/TGI/MHG zahujwe, ari nazo zisubirishwamo ku mpamvu z'akarengane; bityo ko rumwe rutasubirishwamo ngo urundi rusigare mu gihe Mukagifundu Pauline avuga ko yari anahagarariye Mukamutana Hyacinthe. akomeza avuga ko n'icyemezo cya Perezida w'Urukiko rw'Ikirenga cyo gusubirishamo ku mpamvu z'akarengane urubanza rwaciwe ku rwego rwa nyuma, kigaragaza ko izo manza zombi zahujwe ari zo zigomba gusubirishwamo, bivuga ko na Mukamutana Hyacinthe ari umuburanyi.

UKO URUKIKO RUBIBONA

[15] Ingingo ya 78, y'itegeko ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, iteganya ko: "Urukiko rw'Ikirenga ni rwo ruburanisha ibirego byerekeranye no gusubirishamo ku mpamvu z'akarengane imanza zaciwe ku rwego rwa nyuma byemejwe na Perezida w'Urukiko rw'Ikirenga''. Ingingo ya 79, igika cya mbere n'icya kabiri, y'iryo tegeko ngenga, iteganya ko: "Urwego rw'Umuvunyi ni rwo rufite ububasha bwo kuregera urukiko rw'ikirenga ibirego byerekeranye no gusubirishamo ku mpamvu z'akarengane urubanza rwaciwe ku rwego rwa nyuma. iyo kuva aho urubanza ruciriwe burundu habonetse ibimenyetso bigaragaza akarengane kavugwa mu ngingo ya 81 y'iri tegeko

ngenga, abari ababuranyi muri urwo rubanza bashobora kubimenyesha Urwego rw'Umuvunyi [...]".

[16] Ingingo ya 15 y'itegeko n° 76/2013 ryo ku wa 11/09/2013 rigena inshingano, ububasha, imiterere n'imikorere by'Urwego rw'Umuvunyi, iteganya ko: "mu nyungu z'ubutabera, urwego rufite ububasha bwo gusaba Urukiko rw'Ikirenga gusuzuma no gusubiramo urubanza rwaciwe n'inkiko zisanzwe, inkiko z'ubucuruzi cyangwa iza gisirikare ku rwego rwa nyuma, mu gihe hakigaragaramo akarengane. Iryo suzuma n'isubiramo bikorwa hakurikijwe ibiteganywa mu itegeko ngenga rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga".

[17] Dosiye y'uru rubanza igaragaza ko mu rubanza RCA 0163-RCA 0164/010/TGI/MHG, ari narwo rwasubirishijwemo ku mpamvu z'akarengane, Mukagifundu Pauline ari we gusa ugaragara nk'uregwa, ariko, mu kwiregura kwe, akaba yari anahagarariye Mukamutana Hyacinthe, ndetse n'Urukiko, mu cyemezo cyarwo (dispositif), ruvanaho urubanza RC0264/09/TB/GBWE/RC 0152/1/96 n'urubanza RC176/09/TB/GBWE¹ zaciriwe hamwe ku wa 25/03/2010 n'Urukiko rw'Ibanze rwa Gacurabwenge. Na none, inyandiko ikibazo yakozwe n'Urwego rw'Umuvunyi isesengura ntigaragaza ko Mukagifundu Pauline yarushyikirije ikibazo afite anahagarariye Mukamutana Hyacinthe, ariko umwanzuro wafashwe n'urwo rwego werekana ko rwasanze, mu icibwa ry'urubanza RC 0163 - RCA 0164/010/TGI/MHG, Mukagifundu Pauline na Mukamutana Hyacinthe bahuriyeho nk'abaregwaga bujurire), harabayemo akarengane kuko Urukiko Rwisumbuye Muhanga rwirengagije rwa inzitizi z'indemyagihugu zari gutuma ubujurire bwa Uwamariya Agnès,

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¹ Urubanza rwa Mukamana Hyacinthe

Muhawenimana Bernadette na Uwizeyimana Marie Goretti butakirwa.

- [18] Urukiko rurasanga, hakurikijwe ibiteganywa n'ingingo z'amategeko zavuzwe haruguru, ikirego gitangwa n'urwego rw'umuvunyi mu rukiko rw'ikirenga kiba kigamije gusaba ko akarengane rubona ko kari mu rubanza rwaciwe burundu kavanwaho, ibi bikaba byerekana ko ababuranyi bose barebwa n'urwo rubanza bagomba kuruhamagazwamo. Kuba Me Nkubayingoga Samuel avuga ko ikirego cya Mukamutana Hyacinthe kitagomba kwakirwa, ariko ntagaragaze ingingo y'itegeko iteganya ko umuntu utaragejeje ikibazo ku Rwego rw'Umuvunyi, atemererwa kuba umuburanyi mu rubanza rurebana no gusubirishamo ku mpamvu z'akarengane, byerekana ko ibyo avuga nta shingiro byahabwa.
- [19] Urukiko rurasanga, by'umwihariko, Mukamutana Hyacinthe atagomba kuvanwa muri uru rubanza, kuko, hakurikijwe imiterere yarwo, ingingo zijyanye n'akarengane nk'uko kagaragajwe kagomba gusuzumwa, rw'Umuvunyi, nawe zimureba. ku buryo aramutse atarugaragayemo, hanyuma icyemezo gifashwe kikamugiraho ingaruka, byaba binyuranyije n'ibiteganywa n'ingingo ya 10 y'itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko nta muburanyi ushobora gucirwa urubanza atumviswe cyangwa atahamagawe.
- [20] Urukiko rurasanga, hakurikijwe ibimaze gusobanurwa haruguru, inzitizi yo kutakira ikirego cya Mukamutana Hyacinthe yatanzwe na Me Nkubayingoga Samuel, uburanira Uwamariya Agnès, Muhawenimana Bernadette na Uwizeyimana Marie Goretti, nta shingiro ifite.

III. ICYEMEZO CY'URUKIKO

- [21] Rwemeje ko inzitizi yatanzwe na Me Nkubayingoga uburanira Uwamariya Agnès, Muhawenimana Bernadette na Uwizeyimana Marie Goretti, nta shingiro ifite;
- Rwemeje ko iburanisha ry'uru rubanza rizakomeza mu mizi ku wa 27/06/2017;
- Rutegetse ko amagarama y'urubanza abaye asubitswe. [23]

NDEREYEHE v. NYIRAMAHINGURA N'ABANDI

[Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RC 00020/2017 (Mukanyundo J.P, Hitiyaremye na Munyangeri J.) 09 Werurwe 2018]

Amategeko y'imiburanishirize y'imanza mbonezamubano – Gutambamira urubanza – Inyungu – Inyungu z'utanga ikirego cyo gutambamira urubanza, zigomba kuba zitandukanye n'iz'ababuranye urubanza rutambamirwa.

Incamake y'ikibazo: Ndereyehe yareze umukobwa we Musengimana mu Rukiko rw'Ibanze rwa Kinihira, ko yihaye imirima ye ibiri, ishyamba n'inka eshatu. urwo Rukiko, rwemeza ko icyo kirego gifite ishingiro kuko imitungo yaregeye yayibonye nyina wa Musengimana yarapfuye, rutegeka kandi Ndereyehe guha Musengimana umunani.

Musengimana yajuririye mu Rukiko Rwisumbuye, avuga ko imitungo iburanwa yari iya nyina w'itabye Imana ko Se yari yarayambuye murumuna we Nyiramahingura nawe aburana muri urwo rubanza. Urwo Rukiko rwaciye urubanza rwemeza ko Musengimana ataburanira murumuna we kuko nta kimenyetso atanga kigaragaza ko yamutumye, rwemeje kandi ko imikirize y'urubanza rwajuririwe idahindutse.

Nyuma y'urwo rubanza, Nyiramahingura yararutambamiye arega Ndereyehe gusa, ariko Musengimana aza kuza mu rubanza nyuma yaho yemereye kuburana n'ubwo atarezwe. Nyiramahingura avuga ko yatambamiye urwo rubanza kuko Se Ndereyehe yatuje umugore we muto mu isambu yari ituwemo na

nyina, kandi yari yarayitekeshejwe na Sekuru. Urwo rukiko rwemeje ko Nyiramahingura na Musengimana bagumana inzu n'isambu basizwemo na nyina, kandi ko Se abaha igipande ku isambu iri i Remera kubera ko nta munani yigeze abaha, naho ku ibindi biburanwa rutegeka ko buri kimwe kigabanywamo kabiri, ½ kigahabwa Musengimana na Nyiramahingura, naho ikindi ½ kigahabwa Ndereyehe n'umugore we muto. Ndereyehe yajuriye mu Rukiko Rukuru, ariko ikirego cye nticyakirwa.

Ndereyehe yaganyee Urwego rw'Umuvunyi arusaba gusuzuma yagiriwe rwaciwe akarengane rubanza n'urukiko mu rw'isumbuye, Umuvunyi Mukuru nawe nyuma y'isuzuma ry'ubusabe bwe yandikiye Perezida w'Urukiko rw'Ikirenga rubanza rusubirwamo ku amusaba ko urwo mpamvu z'akarengane Nyiramahingura atemerewe kuko vari gutambamira urubanza RCA0195/12/TGI/GIC rwabaye hagati ya Se na mukuru we, maze nawe afata icyemezo ko urwo rubanza rusubirishwamo.

Ndereyehe mu Urukiko rw'Ikirenga, Ndereyehe nawe agaragaza. ko akarengane ke gashingiye ku kuba hari amategeko yirengagijwe mu rukiko rwisumbuye kuko rwakiriye ikirego cyo gutambama cy'umwana we Nyiramahingura kandi ikiburanwa ari umutungo w'umuryango.

Nyiramahingura, avuga ko mu kwakira ikirego cyo gutambama nta karengane kabaye mu Urukiko Rwisumbuye kuko yari afite inyungu muri urwo rubanza atari yabayemo umuburanyi mbere kandi ko tegeko riteganya ko umwana adashobora kuburana ibyo Se cyangwa nyina yaburanye n'umuntu utari uwo mu muryango ariko ko ritabuza umwe mu bagize umuryango guharanira uburenganzira afite ku mutungo w'umuryango aburana n'abandi bagize umuryango.

Incamake y'icyemezo: 1 Inyungu z'utanga ikirego cyo zigomba gutambamira urubanza. kuba zitandukanve n'iz'ababuranye urubanza rutambamirwa. Ntibihagije kwerekana ko ufite inyungu mu rubanza rutambamirwa, ko ahubwo ugomba kwerekana ko izo nyungu zigomba kuba zitandukanye urubanza rutambamirwa. Ikirego n'iz'ababuranye gutambama nticyakirwa ngo gisuzumwe iyo utambama adashobora kwerekana inyungu yihariye afite itandukanye n'iy'uwaburanye mbere yari akurikiranye mu rubanza atambamira. Bityo ikirego cyo gutambamira urubanza cyatanzwe na Nyiramahingura kitaragombaga kwakirwa kuko atashoboye kwerekana inyungu yihariye afite itandukanye n'iyo Musengimana yari akurikiranye mu rubanza yasabaga gutambamira

Ikirego cyo gusubirishamo urubanza ku mpamvu z'akarengane gifite ishingiro; Urubanza RCA0296/12/TGI/GIC rukuweho; Hagumyeho imikirize y'urubanza RCA0195/12/TGI/GIC.

Amategeko yashingiweho:

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 176

Nta manza zifashishijwe.

Inyandiko z'abahanga zifashishijwe.

Serges Guinchard, Droit et pratique de la procédure civile, 8ème Edition, Dalloz, 2014.

I. IMITERERE Y'URUBANZA

- [1] Uru rubanza rwatangiriye mu Rukiko rw'Ibanze rwa Kinihira, Ndereyehe François arega umukobwa we Musengimana Philomène imirima ibiri (2), ishyamba n'inka eshatu (3) yihaye. Ku itariki ya 31/05/2012, urwo Rukiko rwaciye urubanza RC0108/012/TB/KINIH, rwemeza ko ikirego cya Ndereyehe François gifite ishingiro kuko imitungo yaregeye yayibonye nyina wa Musengimana Philomène yarapfuye, kandi ko yakomeje inshingano zo kwita kuri uyu mwana we nyuma y'aho amushyingiriye akananirwa urugo, cyakora ko akwiriye kumuha umunani akurikije umutungo afite.
- [2] Musengimana Philomène yajuririye Urukiko Rwisumbuye rwa Gicumbi, avuga ko imitungo iburanwa yari iya nyina Icyitegetse Bernadette, ko ariko Se ashaka kuyiha umugore we wa kabiri, akaba yarayambuye murumuna we Nyiramahingura Gratia nawe aburanira muri urwo rubanza.
- [3] Ku itariki ya 14/09/2012, urwo Rukiko rwaciye urubanza RCA0195/12/TGI/GIC rwemeza ko nta kimenyetso Musengimana Philomène agaragaza cy'uko murumuna we yamutumye kumuburanira urubanza, kandi ko mu rwego rw'Ibanze atabivuze, urubanza rukaba ruri hagati ye na Se gusa. Ku byerekeye ibiburanwa, Urukiko rwemeje ko imikirize y'urubanza rwajuririwe idahindutse, kuko Musengimana Philomène atabashije gutanga gihamya cy'uko imitungo yaregeye yari iya nyina.
- [4] Nyuma y'icibwa ry'uru rubanza, Nyiramahingura Gratia yarutambamiye mu Rukiko Rwisumbuye rwa Gicumbi arega Ndereyehe François gusa, ariko Musengimana Philomène nawe

aza kuza mu rubanza amaze kwemera kuburana n'ubwo atarezwe. Impamvu zo gutambamira uru rubanza Nyiramahingura Gratia yatanze, ni uko Se Ndereyehe François yatuje umugore we muto mu isambu yari ituwemo na nyina Icyitegetse Bernadette, kandi yari yarayitekeshejwe na Sekuru Bagora.

- [5] Ku itariki ya 28/02/2013, urwo Rukiko rwaciye urubanza RCA0296/12/TGI/GIC, rwemeza ko Nyiramahingura Gratia na Musengimana Philomène bagumana inzu n'isambu biri i Gitwa basizwemo na nyina, kandi Ndereyehe François akabaha igipande ku isambu iri i Remera kubera ko nta munani yigeze abaha. Ku byerekeye ibindi biburanwa bigizwe n'ishyamba n'inka eshatu (3), Urukiko rwemeje ko buri cyose kigabanywa, igipande kimwe kikajya ku rugo rukuru rurimo Musengimana Philomène na Nyiramahingura Gratia, ikindi kigahabwa urugo ruto rurimo Ndereyehe François n'umugore we muto Siyonteze Verdianne, rutegeka ko imanza RC0108/012/TB/KINIH na RCA0195/12/TGI/GIC zivanyweho. Uru rubanza Ndereyehe François yarujuririye mu Rukiko Rukuru, ariko ikirego cye nticyakirwa kubera ko kitujuje ibiteganywa n'amategeko.
- [6] Ndereyehe François yaganye Urwego rw'Umuvunyi arusaba gusuzuma akarengane kabaye mu rubanza RCA0296/12/TGI/GIC, Umuvunyi Mukuru yandikira Perezida w'Urukiko rw'Ikirenga amusaba ko urwo rubanza rusubirwamo ku mpamvu z'akarengane, maze ku itariki ya 18/04/2017 afata icyemezo N°028/2017 ko urubanza RCA0296/12/TGI/GIC rwoherezwa mu Bwanditsi bw'Urukiko rw'Ikirenga rukandikwa mu bitabo byabugenewe kugira ngo rwongere ruburanishwe.
- [7] Urwego rw'Umuvunyi ruvuga ko impamvu z'akarengane zigaragara muri urwo rubanza zishingiye ku mpamvu y'uko hari

amategeko atarubahirijwe mu kwakira ikirego cyo gutambama cyatanzwe na Nyiramahingura Gratia. Uru rwego rusobanura ko Nyiramahingura Gratia atari yemerewe gutambamira urubanza RCA 0195/12/TGI/GIC hakurikijwe ibiteganywa n'ingingo ya 176, igika cya mbere n'icya kabiri, y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, kubera ko ikiburanwa cyari umutungo w'umuryango kandi akaba ari umwana w'uwarezwe, iyi mpamvu akaba ari nayo Ndereyehe François yagaragaje asobanurira Urukiko rw'Ikirenga akarengane ke.

[8] Urubanza rwaburanishirijwe mu ruhame ku itariki ya 30/01/2018 Ndereyehe François yunganiwe na Me Kayitana Dominique Savio, Me Kananga Protogène ahagarariye Musengimana Philomène nawe uhagarariye umuvandimwe we Nyiramahingura Gratia.

II. IKIBAZO KIRI MU RUBANZA N'ISESENGURA RYACYO

Kumenya niba ikirego cyo gutambamira urubanza RCA0195/12/TGI/GIC kitaragombaga kwakirwa mu Rukiko Rwisumbuye rwa Gicumbi.

[9] Ndereyehe François avuga ko yaburanye na Musengimana Philomène, ku buryo uyu atari yemerewe gusubira inyuma ngo atambamire urubanza yabayemo umuburanyi. Me Kayitana Dominique Savio umwunganira yongeraho ko ibi binyuranye n'ingingo ya 175 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi,

iteganya ko gutambamira urubanza bireba gusa umuntu utarabaye umuburanyi, bityo na Musengimana Philomène akaba atari yemerewe gutambamira urubanza RCA0195/12/GIC yabayemo umuburanyi.

- Me Kayitana Dominique Savio akomeza avuga ko RCA0296/12/TGI/GIC rwaciwe n'Urukiko Rwisumbuye rwa Gicumbi nyuma yo gutambamira urubanza RCA0195/12/TGI/GIC rwagaragayemo akarengane, kuko ikirego cyatanzwe na Nyiramahingura Gratia hamwe na Musengimana Philomène kitagombaga kwakirwa. Asobanura ko uru rubanza rwatangiriye mu Rukiko rw'Ibanze rwa Kinihira haburanwa umutungo w'umuryango ugizwe n'imirima ibiri (2), ishyamba n'inka eshatu (3) Ndereyehe François arega umukobwa we Musengimana Philomène asaba ko awuvamo. Akomeza avuga ko Musengimana Philomène amaze gutsindwa yajuriye nabwo agatsindwa, nyuma we na murumuna we Nyiramahingura Gratia batambamira urubanza birengagije ko umutungo uburanwa ari uw'umuryango, byongeye kandi Musengimana Philomène akaba yararubayemo umuburanyi, ibi bikaba binyuranye n'ibiteganywa n'ingingo ya 176 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize v'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.
- [11] Me Kananga Protogène uburanira Nyiramahingura Gratia na mukuru we Musengimana Philomène, avuga ko mu kwakira ikirego cyo gutambama cyatanzwe na Nyiramahingura Gratia wenyine mu Rukiko nta karengane kabaye kuko yari afite inyungu nk'uko bigaragara mu rubanza RCA0296/12/TGI/GIC, akaba atarigeze aba umuburanyi mu rubanza yatambamiye, ko Musengimana Philomène wabaye umuburanyi muri urwo

rubanza atigeze atanga ikirego cyo kurutambamira, ko yarujemo nk'uwabaye umuburanyi mu rubanza rutambamirwa nk'uko biteganywa n'itegeko riteganya ko iyo urubanza rutambamiwe, abarubayemo ababuranyi bose barugarukamo. Avuga ko kuba Musengimana Philomène yanditse mu batanze ikirego cyo gutambama byaturutse ku kwibeshya k'Urukiko. Arangiza avuga ko icyo Nyiramahingura Gratia na Musengimana Philomène baburana ari uburenganzira bwo kuguma mu mutungo basigiwe na nyina.

[12] Ku byerekeranye n'ibiteganywa n'ingingo ya 176, igika cya kabiri, y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, Me Kananga Protogène asobanura ko itegeko riteganya ko umwana adashobora kuburana ibyo Se cyangwa nyina baburanye n'umuntu utari uwo mu muryango, ko ritabuza umwe mu bagize umuryango guharanira uburenganzira afite ku mutungo w'umuryango aburana n'abandi bagize umuryango, ko bigenze bityo byaba ari akarengane. Me Kananga Protogène asanga bitabujijwe ko umwana cyangwa umubyeyi batambamira umutungo mu gihe umwe awambuye undi, ko icyo umushingamategeko yari agamije mu ngingo ya 176 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ari ukugira ngo uburenganzira bw'abanyamuryango hagati yabo budahungabanywa.

UKO URUKIKO RUBIBONA

[13] Ingingo ya 176 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko "Umuntu wese utareze cyangwa ngo aregwe mu rubanza ariko afite inyungu, iyo ari yo yose muri rwo, ashobora gutambamira urwo rubanza rumurenganya ngo rusubirwemo iyo,

ari we cyangwa ari n'abo ahagarariye nta warutumiwemo. Ibivugwa mu gika cya mbere cy'iyi ngingo ntibireba uwashakanye n'umuburanyi cyangwa abana babo mu gihe ikiburanwa ari umutungo w'umuryango".

Mu gutanga ibisobanuro ku nyungu (intérêt) y'utanga [14] ikirego cyo gutambamira urubanza, abahanga mu mategeko bavuga ko bidahagije kwerekana ko ufite inyungu mu rubanza rutambamirwa, ko ahubwo izo nyungu zigomba urubanza rutambamirwa. zitandukanve n'iz'ababuranye Akomeza avuga ko utanga ikirego cyo gutambamira urubanza agomba kwerekana ko rumurenganya ku giti cye mu buryo butandukanye n'ubw'abaruburanye, aho kureba gusa icyemezo cy'urukiko; ari nayo mpamvu ikiba kigamijwe atari ugusubiramo urubanza ngo ababuranyi babone ibirenze ibyo bari babonye mbere (.....Pour être utile, l'intérêt doit être distinct de l'une des parties ayant participé au procès. Le préjudice ne doit pas résulter, sans autre élément, de la seule solution, mais doit s'analyser au regard de la situation personnelle du tiers opposant, qui doit prétendre à un intérêt distinct, un préjudice personnel, et évidemment doit avoir une analyse juridique, au moins en partie différente de celle déjà présentée. Il ne s'agit point ici de refaire le procès à l'identique, pour tenter d'obtenir un meilleur résultat...)¹

[15] Ku birebana no kumenya niba Musengimana Philomène yaratambamiye urubanza yabayemo umuburanyi, inyandiko zigize dosiye y'urubanza zigaragaza ko ku itariki ya 12/11/2012, Nyiramahingura Gratia yatanze ikirego gitambamira urubanza RCA0195/12/TGI/GIC rwaciwe ku itariki ya 14/09/2012 arega

¹ Serges Guinchard, Droit et pratique de la procédure civile, 8ème Edition, Dalloz, 2014, P. 1595 (551-53).

Ndereyehe François (urubanza RCA0296/12/TGI/GIC, urupapuro rwa 2), aba baburanyi bakaba ari nabo bagaragara ku nyandiko zihamagara Ndereyehe François mu nama ntegurarubanza (urupapuro rwa 1112).

- [16] Dosiye igaragaza kandi ko mu iburanisha ry'urubanza RCA0296/12/TGI/GIC) ryo ku itariki ya 18/12/2012, Urukiko rwabajije Musengimana Philomène niba yemera kuburana kuko byagaragaraga ko Nyiramahingura Gratia yareze Ndereyehe François wenyine kandi bombi barabaye ababuranyi mu rubanza rutambamirwa, arabyemera.
- [17] Hashingiwe kuri izo nyandiko, n'ubwo muri kopi y'urubanza RCA0296/12/TGI/GIC rwasubirishijwemo ku mpamvu z'akarengane handitse ko abarega ari Nyiramahingura Gratia na Musengimana Philomène, Urukiko rw'Ikirenga rurasanga harabayeho kwibeshya kuko nk'uko byagaragajwe haruguru, uwatanze ikirego cyo gutambamira urubanza n°/12/TGI/GIC ni Nyiramahingura Gratia wenyine, ibi bigashimangirwa n'uko no mu cyemezo cy'Urukiko, ruvuga ko "rwemeye kwakira ikirego cya Nyiramahingura Gratia".
- [18] Ku birebana no kumenya niba Nyiramahingura Gratia we yari yemerewe gutambamira urubanza RCA0195/12/TGI/GIC, Urukiko rw'Ikirenga rurasanga ikiburanwa muri uru rubanza ari umutungo w'umuryango wa Ndereyehe François aburana n'abana be Musengimana Philomène na Nyiramahingura Gratia bakomoka ku mugore we mukuru nyakwigendera Icyitegetse Bernadette, buri ruhande ruvuga ko ruwufiteho uburenganzira. Nk'uko byagaragajwe haruguru, icyo Nyiramahingura Gratia na Musengimana Philomène bahuriyeho, ni ugushaka kwegukana isambu n'ishyamba bavuga ko ari ibya nyina nk'uko bigaragara mu rubanza RC0108/012/TB/KINIH (Urupapuro rwa 1, igika cya

mbere n'icya kabiri) no mu rubanza RCA0195/12/TGI/GIC (Urupapuro rwa 2, igika cya gatanu), Ndereyehe François nawe avuga ko uyu mutungo ari uwe.

- Kuba ibyo Musengimana Philomène na Nyiramahingura Gratia bagamije muri uru rubanza bidatandukanye kuko ntawe ugaragaza umwihariko wo gushaka kwegukana imitungo iburanwa ku giti cye, ahubwo bose bashaka ko igaruka mu mutungo wa nyina Icyitegetse Bernadette, ibi bikanashimangirwa ni uko mu rubanza RCA0195/12/TGI/GIC Musengimana Philomène yaburanaga avuga ko anaburanira murumuna we Nyiramahingura Gratia n'ubwo Urukiko rutabimwemereye, Urukiko rw'Ikirenga rurasanga ikirego cyo gutambamira urubanza RCA0195/12/TGI/GIC cyatanzwe na Nyiramahingura Gratia kitaragombaga kwakirwa ngo gisuzumwe atashoboye kwerekana inyungu yihariye afite itandukanye n'iyo Musengimana Philomène yari akurikiranye mu rubanza yasabaga gutambamira.
- [20] Hashingiwe ku biteganywa n'ingingo ya 176 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, ndetse no ku bisobanuro bitangwa n'abahanga mu mategeko, Urukiko rw'Ikirenga rurasanga ikirego cyo gutambamira urubanza RCA0195/12/TGI/GIC cyatanzwe na Nyiramahingura Gratia mu Rukiko Rwisumbuye rwa Gicumbi kitaragombaga kwakirwa ngo gisuzumwe, bityo urubanza RCA0296/12/TGI/GIC rukaba ruvanyweho hagahamaho imikirize y'urubanza RCA0195/12/TGI/GIC ari narwo rugomba kurangizwa.

III. ICYEMEZO CY'URUKIKO

- [21] Rwemeje ko ikirego cyo gusubirishamo ku mpamvu z'akarengane urubanza RCA0296/12/TGI/GIC cyatanzwe na Ndereyehe François gifite ishingiro;
- [22] Rwemeje ko urubanza RCA0296/12/TGI/GIC rwaciwe n'Urukiko Rwisumbuye rwa Gicumbi ku itariki ya 28/02/2013 rukuweho; hagahamaho imikirize y'urubanza RCA0195/12/TGI/GIC rwaciwe n'urwo Rukiko ku itariki ya 14/09/2012.

UBUSHINJACYAHA v. DUSENGIMANA

[Rwanda URUKIKO RW'IKIRENGA – RPAA 0001/14/CS (Mukanyundo, P.J., Munyangeri na Hitiyaremye, J.) 17 Ugushyingo 2017]

Amategeko agenga imiburanishirize y'imanza nshinjabyaha — Ibimenyetso mu manza nshinjabyaha — Nta muntu ugomba kwemezwa ko ahamwe n'icyaha nyuma y'urubanza atari uko Ubushinjacyaha bugaragaje ibimenyetso bidatera ugushidikanya uko ari kose.

Incamake y'ikibazo: Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Musanze, uregwa akurikiranyweho icyaha cyo gusambanya umwana muto cyane, Ubushinjacyaha buvuga ko ku wa 17/06/2012, mu ma saa tatu z'amanywa, uregwa yagiye mu rugo rw'uwitwa Nshizirungu adahari, ahengera umugore we witwa Uwamahoro agiye gutunganya mu nzu, afata umwana wabo w'umukobwa w'amezi 10 aramusambanya, nyina w'umwana yumvise arize, ajya kureba icyo abaye asanga ngo uregwa amaze kumusambanya, maze aratabaza, hanyuma uregwa ariruka, bamwirukaho arabasiga. Urwo rukiko rwahamije uregwa icyaha rumuhanisha igifungo cya burundu y'umwihariko, rushingiye ku buhamya bwatanzwe.

Uregwa yajuriye mu Rukiko Rukuru, Urugereko rwa Musanze, avuga ko Urukiko Rwisumbuye rwamuhamije icyaha atakoze avuga ko Urukiko rwamuhamije icyaha rushingiye ku mvugo z'abatangabuhamya kandi zivuguruzanya ku byerekeye igihe umwana yasambanyirijwe n'ahantu we yafatiwe, aho gushingira

ku buhamya bw'Umuforomo wemeje ko nta bimenyetso yabonye ku mwana bigaragaza ko yasambanyijwe. Urwo rukiko rwaciye urubanza rwemeza ko nta gihindutse ku rubanza rwajuririwe.

Uregwa yarongeye ajuririra Urukiko rw'Ikirenga, avuga ko Urukiko rutahaye agaciro imiburanire ye y'uko nta cyaha yakoze, avuga ko yakigeretsweho n'ababyeyi b'umwana kubera akagambane biturutse ku mafaranga y'ishuri yohererejwe n'umugiraneza ababyeyi b'umwana bakaba barashakaga ko ayabahaho, yongeraho ko Urukiko rwashingiye ku buhamya bw'abamushinja ibinyoma bemeza ko amaze gukora icyaha yirutse kandi afite ubumuga bwo kutabona ku buryo atakwiruka ngo asige abafite amaso mazima, ndetse ko Urukiko rwanze no guha agaciro ibyagaragajwe na muganga wakiriye umwana bwa mbere wemeje ko nta bimenyetso yabonye byerekana ko umwana yasambanyijwe.

Ubushinjacyaha bwo bwagaragazaga ko impamvu z'ubujurire z'uregwa nta shingiro zifite, kuko abazwa mu Bushinjacyaha yavuze ko yageze mu rugo rw'ababyeyi b'umwana, kandi ko ntacyo apfa n'ababyeyi b'uwo mwana, bwongeraho ko umutangabuhamya Mukarusanga yavuze ko yiboneye n'amaso ye amasohoro yari ku gitsina no ku matako y'umwana, ibi bimenyetso byose ngo bikaba bishimangirwa na raporo ya muganga igaragaza ko umwana yasambanyijwe kandi ko yatewe udusebe. Ku birebana n'imvugo y'Umuforomo wasuzumye umwana bwa mbere wemeje ko nta kimenyetso na kimwe yabonye ku mwana kigaragaza ko yasambanyijwe, Ubushinjacyaha buvuga ko imyitwarire y'uwo muforomo itahabwa agaciro kuko bigaragara ko yashatse kutiteranya n'uregwa. Naho ku bijyanye no kuba yari impumyi nyamara akabasha kwiruka Ubushinjacyaha buvuga ko bitafatwa

nk'ibidashoboka mu gihe uregwa ubwe yivugiye ko inzira yari nyabagendwa.

Incamake y'icyemezo: 1. Nta muntu ugomba kwemezwa ko ahamwe n'icyaha nyuma y'urubanza atari uko Ubushinjacyaha bugaragaje ibimenyetso bidatera ugushidikanya uko ari ko kose, bityo Urukiko rurasanga nta bimenyetso bikiranuye kandi bidashidikanywaho rwashyikirijwe ku buryo rwabishingiraho mu guhamya uregwa icyaha.

Imikirize y'urubanza rwajuririwe ihindutse kuri byose; Amagarama y'urubanza aherereye ku isanduku ya Leta.

Amategeko yashingiweho:

Itegeko N° 15/2004 ryo ku wa 12/06/2004, ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 4,65 n'iya 119.

Nta manza zifashishijwe.

Inyandiko z'abahanga:

Henry Bosly et Damien Vandermeersch, Droit de la procédure pénale, 4e édition, P. 1316, 5

Urubanza

I. IMITERERE Y'URUBANZA

[1] Ubushinjacyaha bwareze Dusengimana Ferdinand mu Rukiko Rwisumbuye rwa Musanze, bumukurikiranyeho icyaha cyo guhohotera umwana muto cyane, busobanura ko ku wa 17/06/2012, mu ma saa tatu z'amanywa, yagiye mu rugo kwa Nshizirungu Emmanuel, ahengera umugore we witwa Uwamahoro Solange agiye gutunganya mu nzu, naho umugabo we agiye guca ubwatsi bw'inka, afata umwana wabo w'umukobwa w'amezi 10 witwa I.B., amushyira ku bibero aramusambanya, nyina w'umwana yumvise arize, ajya kureba icyo abaye abona Dusengimana Ferdinand ari gusubiza igitsina cye mu ipantalo, amwaka uwo mwana, asanga yamutayeho amasohoro ku gitsina, ku matako no ku gakanzu yari yambaye, maze aratabaza, Dusengimana Ferdinand ariruka, bamwirukaho arabasiga.

- [2] Urukiko Rwisumbuye rwa Musanze rwaciye urubanza RP 0322/012/TGI/ MUS, ku wa 21/03/2013, rwemeza ko Dusengimana Ferdinand ahamwa n'icyaha cyo gusambanya umwana, kubera ko hari abatangabuhamya bamushinja, rumuhanisha igifungo cya burundu y'umwihariko.
- [3] Dusengimana Ferdinand yajuririye Urukiko Rukuru, Urugereko rwa Musanze, avuga ko Urukiko rwamuhamije icyaha rushingiye ku mvugo z'abatangabuhamya kandi zivuguruzanya ku byerekeye igihe umwana yasambanyirijwe n'ahantu we yafatiwe, aho gushingira ku buhamya bw'Umuforomo wemeje ko nta bimenyetso yabonye ku mwana bigaragaza ko yasambanyijwe. Urwo rukiko rwaciye urubanza RPA 0077/13/HC/MUS ku wa 21/10/2013, rwemeza ko ubujurire bwe nta shingiro bufite.
- [4] Dusengimana Ferdinand yajuririye Urukiko rw'Ikirenga, avuga ko Urukiko rutahaye agaciro imiburanire ye y'uko nta cyaha yakoze, ko yakigeretsweho n'ababyeyi b'umwana kubera akagambane, rushingira ku buhamya bw'abamushinja ibinyoma

bemeza ko amaze gukora icyaha yirutse kandi afite ubumuga bwo kutabona, rwanga no guha agaciro ubuhamya bwa muganga wakiriye umwana bwa mbere wemeje ko nta bimenyetso yabonye byerekana ko umwana yasambanyijwe.

[5] Urubanza rwaburanishijwe mu ruhame ku wa 16/10/2017, Dusengimana Ferdinand yunganiwe na Me Umupfasoni Blandine, naho Ubushinjacyaha buhagarariwe na Munyaneza Nkwaya Eric, Umushinjacyaha ku rwego rw'Igihugu.

II. ISESENGURA RY'IKIBAZO KIGIZE URUBANZA

Kumenya niba hari ibimenyetso bidashidikanywaho bihamya Dusengimana icyaha aregwa.

- [6] Dusengimana Ferdinand avuga ko impamvu yatumye ajurira ari uko Urukiko rutahaye agaciro ibisobanuro yatanze bigaragaza ko icyaha aregwa ntacyo yakoze, ko ahubwo ari akagambane yagiriwe na Nshizirungu Emmanuel n'umugore we Uwamahoro Solange biturutse ku makimbirane bari bafitanye n'umuryango we, kuko bamaze kumenya ko afite amafaranga yari yahawe n'umugiraneza w'Umudage witwa Thomas kugira ngo akomeze amashuli y'ababana n'ubumuga bwo kutabona i Rwamagana, bashakishije uburyo bayamukuraho dore ko ngo bari barigeze no gucisha ababyeyi be amafaranga ku buryo bw'amaherere, maze bamuhimbira icyaha bakimugerekaho kugira ngo bayatware.
- [7] Avuga kandi ko Urukiko Rukuru rwashingiye ku mvugo z'abatangabuhamya bemeje ko yafatiwe ku mugezi arimo

kwimeseraho imyenda akanakomeza kuyambara itose, nyamara umuforomo basanze kuri *Centre de Santé*, yemeje ko amubona atari yambaye imyenda itose. Akomeza asobanura ko ikindi kigaragaza ko ubuhamya bwashingiweho ari ibinyoma, ari uko abo batangabuhamya bavuze ko bamubonye yiruka ajya ku mugezi, nyamara bizwi ko afite ubumuga bwo kutabona, ko agenda yiyoboza agakoni; byongeye kandi, ngo ni uko amakuru batanga bayavuga nk'aho bari bahari icyaha gikorwa, mu gihe ari inkuru mbarirano babwiwe n'ababyeyi b'umwana. Atanga urugero nk'aho bavuga ko babonye amasohoro ku myenda y'umwana, ariko hakibazwa icyo bayapimishije nyamara umuforomo muganga wamwakiriye bwa mbere ntayo yabonye.

Me Umupfasoni Blandine wunganira Dusengimana [8] Ferdinand avuga ko uwo yunganira yageretsweho icyaha biturutse ku mafaranga y'ishuri yohererejwe n'umugiraneza, maze akajya ayagendana aribwo Nshizirungu Emmanuel wari wabimenye yamubonye anyuze iwe akamubaza niba atabahaho, undi aramuhakanira, maze aherako amucurira umugambi wo kuyamwaka. Avuga ko icyerekana ko bamuhoye amafaranga ye ari uko ubwo bari bageze kuri Centre de Santé bavuga ko bagiye gupimisha umwana mu rwego rwo gushaka ibimenyetso, Umuforomo wabakiriye yababwiye ko nta bimenyetso bigaragaza ko yasambanyijwe, abagira inama yo kujya kumvikana ku bibazo bindi baba bafitanye, maze bageze mu Mudugudu basaba Dusengimana Ferdinand kubaha amafaranga, ayabimye bahita bajya kumurega kuri Polisi, akaba atekereza ko nyina w'umwana yageze mu rugo akamukuba ku gitsina (ibyo yise frottement) kugira ngo noneho haze kuboneka ibimenyetso bigaragaza ko Dusengimana Ferdinand ariwe wakubye igitsina cye ku cy'umwana.

- Akomeza avuga ko ikindi kigaragaza ko n'imvugo z'abatangabuhamya zirimo ibinyoma, ari uko hari nk'aho bavuze ko nyina w'umwana yabatabaje ababwira ko Dusengimana Ferdinand yirutse amaze guhohotera umwana, byumvikanisha ko batamwiboneye. Avuga ko umutangabuhamya Harerimana Adrien we avuga ko yumvise umugore ataka bamusambanyirije umwana, ahageze asanga umwana afite amasohoro, ngo maze Dusengimana Ferdinand ahita yiruka, ibi bikaba bitumvikana kuko afite ubumuga bwo kutabona, bivuga ko adashobora kwiruka ngo asige abafite amaso mazima. Avuga ko ikindi cyerekana ko icyaha kiregwa uwo yunganira cyahimbwe, ari ivuguruzanya riri hagati y'imvugo z'ababyeyi b'umwana ubwabo, aho mu ibazwa ryabo umwe yavuze ko umwana batamwuhagiye naho undi akavuga ko bamwuhagiye.
- Avuga kandi ko ikindi kimenyetso cyerekana ko Dusengimana Ferdinand ari umwere, ari ukuba umuforomo wakiriye umwana bwa mbere ataramubonyeho ikimenyetso na kimwe kigaragaza ko yasambanyijwe, ndetse na Muganga wamusuzumye bwa kabiri akavuga ko nta masohoro yabonye, mu gihe nyina w'umwana atigeze avuga ko yamwuhagiye mbere yo kumuzana ku ivuriro, uwo muganga wamusuzumye nyuma akaba yarasabye ko hasuzumwa n'uwamuhohoteye (il faut tester le violeur) nyamara bikaba bitarigeze bikorwa. Akomeza avuga ko kuba Dr Nteziryayo Ezéchiel, umuganga wemewe wa Leta, yaravuze ko umwana yabyimbiwe ku myanya ndangagitsina ngo hariho n'udusebe twinshi, atari ikimenyetso cyashingirwaho mu guhamya uwo yunganira icyaha aregwa, kuko utwo dusebe dushobora guterwa n'impamvu nyinshi nk'uko yabisobanuye haruguru (frottement yakorewe mu rwego rwo gushakisha ibimenyetso).

- [11] Uhagarariye Ubushinjacyaha avuga ko impamvu z'ubujurire za Dusengimana Ferdinand nta shingiro zifite, kuko abazwa mu Bushinjacyaha yavuze ko yageze kwa Nshizirungu Emmanuel, kandi ko ntacyo apfa n'ababyeyi b'uwo mwana, ndetse n'umutangabuhamya Mukarusanga Marie Josée akaba yaravuze ko yiboneye n'amaso ye amasohoro yari ku gitsina no ku matako y'umwana, ibi bimenyetso byose ngo bikaba bishimangirwa na raporo ya Dr Nteziryayo Ezéchiel igaragaza ko umwana yasambanyijwe kandi ko yatewe udusebe.
- [12] Ku birebana n'imvugo y'Umuforomo wasuzumye umwana bwa mbere wemeje ko nta kimenyetso na kimwe yabonye ku mwana kigaragaza ko yasambanyijwe, uhagarariye Ubushinjacyaha avuga ko imyitwarire y'uwo muforomo itahabwa agaciro kuko bigaragara ko yashatse kutiteranya n'uregwa, ko yakoze nkaho yavuze ngo nagende azagwe ku bandi. Avuga kandi ko kuba nyina w'umwana yarabonye Dusengimana Ferdinand azamura imashini ya risani amaze gukora amarorerwa ari nk'aho yafatiwe mu cyuho, ku buryo bitagombye kugibwaho impaka. Naho ku bijyanye no kuba yari impumyi ariko akiruka kurinda ageze ku mugezi akamesa imyenda. Uhagarariye Ubushinjacyaha avuga ko bitafatwa nk'ibidashoboka mu gihe ubwe yivugiye ko inzira yari nyabagendwa.

UKO URUKIKO RUBIBONA

[13] Ikibazo kiri muri uru rubanza ni icyo kumenya niba imvugo z'ababyeyi n'iz'abatangabuhamya bumviswe zihura n'ibyabaye, ku buryo hakwemezwa ko koko Dusengimana Ferdinand yasambanyije uriya mwana I.B.

- [14] Ingingo ya 4 y'Itegeko n° 15/2004 ryo ku wa 12/06/2004, ryerekeye ibimenyetso mu manza n'itangwa ryabyo, iteganya ko "Urukiko ruca urubanza rwaregewe hakurikijwe ibimenyetso bihuje na kamere y'ikiburanwa". Ingingo ya 65 y'Itegeko N° 15/2004 ryo ku wa 12/06/2004, ryerekeye ibimenyetso mu manza n'itangwa ryabyo, iteganya ko "Urukiko ni rwo rwonyine rupima ko imikirize y'abatangabuhamya ihuye n'ikiburanwa, ifite ingingo zikiranuye kandi ikaba ikwiye kwemerwa cyangwa guhakanwa...». Naho ingingo ya 119 y'Itegeko N° 15/2004 ryo ku wa 12/06/2004 rimaze kuvugwa, iteganya ko "Urukiko ruhamya ku buryo butavuguruzwa ko ibimenyetso byose birega cyangwa biregura ari byo kandi bishobora kwemerwa".
- z'abatangabuhamya Ku bijyanye n'imvugo [15] nk'ikimenyetso nyamukuru cyashingiweho mu guhamva Dusengimana Ferdinand icyaha, inyandikomvugo z'ibazwa zabo zigaragaza ko nta n'umwe wigeze abona Dusengimana Ferdinand asambanya uwo mwana, usibye nyina Uwamahoro Solange wavuze ko yamubonye asubiza igitsina cye mu ipantalo, kandi ubuhamya bw'ababajijwe bukaba burimo imvugo zitera urujijo mu kwemeza ko Dusengimana Ferdinand yakoze koko icyaha akurikiranyweho, kuko:
 - Uwamahoro Solange, Harerimana Adrien na Mukarusanga Marie Josée, bavuga ko akabacika, Dusengimana Ferdinand yirutse bakamusanga ku mugezi wa Gaseke. Ubu buhamya burimo urujijo kuko bidashoboka ko ufite ubumuga bwo umuntu yakwirukango asige abafite amaso mazima, cyane cyane ko ababajijwe bose bemeje ko iyo atabonye umurandata, vivobora akoresheje agakoni.

- Abo babajijwe uko ari batatu bavuga kandi ko umwana yasambanyijwe saa tatu, Dusengimana Ferdinand bajya kumushaka saa yine n'igice, hakibazwa icyo bari bategereje aho kwihutira kumufata kandi nyina w'umwana avuga ko yamufatiye mu cyuho arimo gusubiza igitsina cye mu ipantalo.
- Abatangabuhamya babajijwe bavuzwe haruguru, bavuze na none ko Dusengimana Ferdinand yagiye kwimeseraho imyenda mu mugezi ayivanaho ibintu byayigiyeho mu rwego rwo gusibanganya ibimenyetso, ariko akaba nta n'umwe uvuga ibyo ari byo.
- Bavuga kandi ko aho bafatiye Dusengimana Ferdinand ari ku mu mugezi wa Gaseke aho basanze yambaye imyenda itose maze bakamujyanana kuri Centre de Santé, nyamara umuforomo wabakiriye yavuze ko imyenda ye itari itose, kandi ntaho abo batangabuhamya bavuga ko yaba yarayikuyemo akabambara indi.
- Uwo muforomo wakiriye umwana bwa mbere yavuze ko nta kimenyetso na kimwe yabonye kigaragaza ko uwo mwana yasambanyijwe, ababwira gusubira mu rugo bakajya gukemura ikibazo kindi baba bafitanye, ababyeyi baremera basubirayo. Niba koko ababyeyi b'uwo mwana barabonaga inama uwo muforomo abagiriye itabanyuze, hakwibazwa impamvu batahise bajya kuri Polisi aho kubanza kujya kumvikana na Dusengimana Ferdinand niba nta kibazo kindi bari bafitanye.

- Raporo yakozwe na muganga wa kabiri wasuzumye umwana igaragaza ko yasanze ku myanya ndangagitsina ye hariho udusebe duto (frottement au niveau des grandes lèvres compte tenu des oedèmes et des ulcérations de ces grandes lèvres), kandi ko nta gitsina cy'umugabo kinjiye mu cy'umwana, ahubwo asaba ko hasuzumwa ukekwa ko yaba yamusambanyije (il faut tester le violeur), ariko bikaba bitarakozwe, ko rero iyi raporo itafatwa nk'ikimenyetso simusiga cyerekana ko turiya dusebe twatewe no kuba umwana yarasambanyijwe.
- [16] Urukiko rurasanga hashingiwe ku ngingo ya 65 y'Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryavuzwe haruguru, ubuhamya bw'abantu babajijwe nk'uko bwagaragajwe haruguru, butafatwa nk'ibimenyetso bidashidikanywaho Urukiko rwashingiraho rwemeza ko umwana I.B. yasambanyijwe na Dusengimana Ferdinand, kuba nyina w'umwana avuga ko yahamagaye abantu akabereka ibintu we yita amasohoro, ariko ntibyerekwe Muganga ngo yemeze ko ariyo koko, ibyo bidahagije kugira ngo hemezwe ko ibyo bavuga ari amasohoro kandi ko ari aya Dusengimana Ferdinand kuko umuforomo wasuzumye umwana bwa mbere atigeze ayabona, muganga wamusuzumye ku nshuro ya kabiri nawe ntiyemeza ko yayabonye, ategetse ko uregwa apimwa, nabyo ntibyakorwa.
- [17] Urukiko rurasanga imvugo y'uhagarariye Ubushinjacyaha ko kuba Umuforomo wakiriye umwana bwa mbere avuga ko nta kimenyetso yabumubonyeho kigaragaza ko yasambanyijwe atari uko nta cyari gihari, ko ahubwo yashatse guhishira uregwa nta shingiro yahabwa kuko nta nta kimenyetso

cyashyikirijwe Urukiko kibishimangira. Ku byerekeranye na raporo ya muganga, Urukiko rurasanga nta cyemeza ko turiya dusebe n'ububyimbirwe muganga yabonye ku gitsina cy'umwana, byaba byaratewe byanze bikunze no kumusambanya.

[18] Abahanga mu mategeko yerekeye imiburanishirize y'imanza z'inshinjabyaha Henry Bosly et Damien Vandermeersch, nabo bavuga ko nta muntu ugomba kwemezwa ko ahamwe n'icyaha nyuma y'urubanza atari uko Ubushinjacyaha bugaragaje ibimenyetso bidatera ugushidikanya uko ari ko kose (Une personne ne peut être déclarée coupable au terme du procès que si l'accusation a apporté la preuve au-delà de tout doute raisonnable de la culpabilité de l'accusé). 1

[19] Hashingiwe ku ngingo ya 4, iya 65 n'iya 119, z'Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryavuzwe haruguru, Urukiko rurasanga nta bimenyetso bikiranuye kandi bidashidikanywaho rwashyikirijwe ku buryo rwabishingiraho mu guhamya Dusengimana Ferdinand icyaha akurikiranyweho, bityo akaba agomba kugihanagurwaho.

III. ICYEMEZO CY'URUKIKO

[20] Rwemeje ko ubujurire bwa Dusengimana Ferdinand bufite ishingiro;

[21] Rwemeje ko urubanza rwajuririwe ruhindutse muri byose;

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¹ Henry Bosly et Damien Vandermeersch, Droit de la procédure pénale, 4e édition, p. 1316, 5

- [22] Rwemeje ko Dusengimana Ferdinand agizwe umwere ku cyaha yari akurikiranyweho;
- Rutegetse ko ahita arekurwa uru rubanza rukimara [23] gusomwa;
- [24] Rutegetse ko amagarama y'urubanza aherera ku Isanduku ya Leta.

UBUSHINJACYAHA v. MUKARUYANGE

[Rwanda URUKIKO RW'IKIRENGA – RPAA 0001/14/CS (Mugenzi, P.J., Kanyange na Gakwaya, J.) 23 Gashyantare 2018]

Amategeko agenga imiburanishirize y'imanza nshinjabyaha — Inyito y'icyaha — Guhindura inyito y'icyaha ni uburenganzira n'inshingano umucamanza afite mu gihe asanga ibikorwa uregwa akurikiranyweho bidahuye n'inyito byahawe, hakurikijwe ihame ry'uko umucamanza aregerwa ibikorwa bigize icyaha — Igihe cyose icyemezo cy'Urukiko kitaraba ndakuka, inyito y'icyaha ishobora guhinduka, ariko uregwa agahabwa igihe cyo kugira icyo abivugaho, mu rwego rwo kubahiriza ihame ryo kwiregura.

Incamake y'ikibazo: Uru rubanza rwatangiriye mu Rukiko rw'Ibanze rwa Nyarugunga, Ubushinjacyaha bukurikiranye Habumugisha ku cyaha cy'ubujura buciye icyuho no kuri Mukaruyange ku cyaha cyo guhisha ibikomoka ku cyaha. Urwo rukiko rwaciye urubanza rwemeza ko Habumugisha ahamwa n'icyaha, rumuhanisha igihano cy'igifungo cy'umwaka umwe runamutegeka gusubiza 80.000.000Frw uwaregeye indishyi, naho Mukaruyange agirwa umwere.

Ubushinjacyaha n'uwaregeye indishyi ntibishimiye imikirize y'urwo rubanza maze bajuririra Urukiko Rwisumbuye rwa Nyarugenge bavuga ko hirengagijwe imvugo z'abatangabuhamya bashinja Mukaruyange ko yahishiriye Habumugisha akamuhishana n'amafaranga yari yibye, maze rumugira umwere. Basaba Urukiko ko rwasuzumana ubushishozi ibimenyetso byatanzwe. Urwo Rukiko rwaciye urubanza rwemeza ko igihano Habumugisha yahanishijwe kigumyeho runemeza ko Mukaruyange ahamwa n'icyaha cyo gufatanya na Habumugisha kwiba amafaranga aburanwa, n'icyo guhishira umujura n'ibintu bikomoka ku cyaha, rumuhanisha igifungo cy'imyaka ibiri (2) gisubitswe mu mwaka umwe (1) runategeka ko bafatanya kwishyura amafaranga yaburanwaga.

Mukaruyange ntiyishimiye imikirize y'urwo rubanza maze yandikira Urwego rw'Umuvunyi asaba gusuzuma akarengane kabaye muri urwo rubanza, avuga ko yahamijwe ubufatanyacyaha mu bujura kandi atari cyo yarezwe, ndetse ko hanashingiwe ku bimenyetso bidafatika kuko yamenyanye n'uwakoze icyaha nyuma y'uko gikozwe, bagura ikibanza.

Nyuma yo gusuzuma ikibazo cye,Umuvunyi Mukuru yandikiye Perezida w'Urukiko rw'Ikirenga asaba ko urwo rubanza RPA 0230/14/TGI/NYGE rusubirishwamo ku mpamvu z'akarengane, gatewe no kwirengagiza amategeko n'ibimenyetso, asobanura ko Mukaruyange yahamijwe ubufatanyacyaha mu cyaha cy'ubujura mu bujurire atarigeze agikurikiranwaho n'Ubushinjacyaha mu rwego rwa mbere ngo anacyiregureho, bikaba kandi ngo bitashoboka ko Mukaruyange yaba yaragize ubufatanyacyaha mu cyaha cy'ubujura, kuko yahuye na Habumugisha, uyu yarangije kwiba, naho ku cyaha cyo guhishira ibyibano, Urwego rw'Umuvunyi ruvuga ko Urukiko rutagaragaje ko hari amafaranga akomoka ku cyaha Mukaruyange yaba yarafatanywe, ingano yayo n'aho yaba yarayahishe.

Perezida w'Urukiko rw'Ikirenga, yafashe icyemezo cy'uko urwo rubanza rwongera kuburanishwa, maze Mukaruyange aburana avuga ko mu Rukiko Rwisumbuye yaburanye ku cyaha gishya mu bujurire, atari yarakirezwe ngo akiburaneho ku rwego rwa

mbere mu Rukiko rw'Ibanze, kuko yari yaraharezwe icyaha cyo guhisha ibintu bikomoka ku cyaha, nyamara mu bujurire aburanishwa ku bufatanyacyaha mu bujura buciye icyuho, yongeraho ko n'ubwo umucamanza ashobora guhindura inyito y'icyaha, agomba kuba agendeye ku byabaye, akaba asanga ikosa ryabaye ari uko umucamanza wo mu bujurire atabanje kwumva uregwa ngo abone guhindura inyito y'icyaha, ahubwo icyabaye akaba ari ukuzana mu bujurire icyaha gishya kitaburanwe mbere.

Uregera indishyi we avuga ko yemeranya n'abo baburana ku bijyanye n'ububasha bw'umucamanza bwo guhindura inyito y'icyaha cyaregewe, ngo akaba asanga ari cyo cyakozwe n'umucamanza w'Urukiko Rwisumbuye, amaze kumva imiburanire y'impande zombi ndetse n'abatangabuhamya, abona kwemeza inyito y'ubufatanyacyaha mu bujura buciye icyuho.

Ubushinjacyaha bwo buvuga ko nta cyaha gishya cyaciriweho urubanza mu Rukiko Rwisumbuye rwari rwajuririwe, ko ahubwo hahujwe ingingo ya 98 y'Itegeko Ngenga N° 01/2012/OL rishyiraho Igitabo cy'amategeko ahana, n'iya 327 y'iryo Tegeko Ngenga, iteganya ko uwahishe inkozi z'ibibi cyangwa uwazifashije guhisha nawe yitwa icyitso, Urukiko ngo rukaba rwarasanze ibikorwa Mukaruyange yakoze bigize icyaha cyo gufasha Habumugisha ubujura buciye icyuho.

Incamake y'icyemezo: 1. Guhindura inyito y'icyaha ni uburenganzira n'inshingano umucamanza afite mu gihe asanga ibikorwa uregwa akurikiranyweho bidahuye n'inyito byahawe, hakurikijwe ihame ry'uko umucamanza aregerwa ibikorwa bigize icyaha, ataregerwa inyito, bityo ingingo ijyanye no kuba Urukiko Rwisumbuye rwarahinduye icyaregewe rukaburanisha icyaha gishya, ikaba nta shingiro ifite.

- 2. Igihe cyose icyemezo cy'Urukiko kitaraba ndakuka, inyito y'icyaha ishobora guhinduka, ariko uregwa agahabwa igihe cyo kugira icyo abivugaho, mu rwego rwo kubahiriza ihame ryo kwiregura, bityo umucamanza yagombaga guha ababuranyi umwanya wo kugira icyo bavuga ku nyito y'icyaha.
- 3. Ku kibazo cyo kumenya niba Mukaruyange ahamwa n'ubufatanyacyaha mu bujura buciye icyuho, ibikorwa bye Urukiko Rwisumbuye rwabonyemo icyo cyaha, ntibigaragaramo ubwo bufatanyacyaha, kuko mu isesengura urwo Rukiko rwakoze, mu rwego rw'ibimenyetso bicukumbuwe gusesengura urubanza, bwenge n'ubushishozi mu bw'umucamanza ntihagaragajwe ko hari ibimenyetso bikomeye, bisobanuye kandi bihuje byagaragaza nta gushidikanya ko Mukaruyange yafashije Habumugisha igikorwa nyir'izina cy'ubujura buciye icyuho, bityo Mukaruyange agihanaguweho.
- 4. Ku byerekeye ibyaha byo guhisha uwakoze icyaha no guhisha ibikomoka ku cyaha, nta bimenyetso Mukaruyange agaragaza byirengagijwe mu rubanza byagaragaza ko atahishe ibikomoka ku cyaha n'uwagikoze, ahubwo hashingiwe ku mvugo y'uwakoze icyaha, n'imvugo zihuje z'abatangabuhamya, bigaragariza Urukiko nta gushidikanya, ko Mukaruyange ahamwa n'ibyaha byo guhisha uwakoze icyaha no guhisha ibikomoka ku cyaha nk'uko yabihamijwe mu rubanza RPA 0230/14/TGI/NYGE, hakaba rero nta karengane karugaragaramo, gashingiye ku kuba haba harirengagijwe ibimenyetso.

Ikirego cyo gusubirishamo urubanza ku mpamvu z'akarengane gifite ishingiro kuri bimwe; Amagarama y'urubanza aherereye ku isanduku ya Leta.

Amategeko yashingiweho:

- Itegeko Ngenga N°01/2012/OL rishyiraho Igitabo cy'amategeko ahana, ingingo ya 326 n'iya 573.
- 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 320.
- Itegeko N°15/2004 ryo ku wa 12/06/2004, ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 108 n'iya 119.

Imanza zifashishijwe:

Ubushinjacyaha vs Nyawera Céléstin, RPA 0033/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 14/9/2012.

Inyandiko z'abahanga:

Likulia Bolongo, Droit Pénal spécial zairois, Tome I, 2ème édition, Paris, 1985, P. 20, 21.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Ubushinjacyaha bwakurikiranye Habumugisha Butoyi ku cyaha cy'ubujura buciye icyuho no kuri Mukaruyange Athanasie

icyaha cyo guhisha ibikomoka ku cyaha, Rwasibo Mutesi Béatrice aregera indishyi.

- [2] Mu rubanza RP 0355/13/TB/NYRGA rwaciwe n'Urukiko rw'Ibanze rwa Nyarugunga ku wa 20/03/2014, urwo Rukiko rwemeje ko Habumugisha Butoyi ahamwa n'icyaha cy'ubujura buciye icyuho, rumuhanisha igifungo cy'umwaka umwe (1), runamutegeka gusubiza Rwasibo Mutesi Béatrice 80.000.000Frw n'indishyi zingana na 900.000Frw, runemeza ko Mukaruyange Athanasie adahamwa n'icyaha aregwa.
- [3] Ubushinjacyaha na Rwasibo Mutesi Béatrice bajuririye Urukiko Rwisumbuye rwa Nyarugenge bavuga ko hirengagijwe imvugo z'abatangabuhamya bashinja Mukaruyange Athanasie ko yahishiriye Habumugisha Butoyi akamuhishana n'amafaranga yari yibye, maze rumugira umwere. Busaba Urukiko ko rwasuzumana ubushishozi ibimenyetso byatanzwe, Mukaruyange Athanasie agahanirwa icyaha yakoze.
- RPA 0230/14/TGI/NYGE [4] Mu rubanza rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge ku wa 24/07/2014, urwo Rukiko rwemeje ko ubujurire bw'Ubushinjacyaha n'ubwa Rwasibo Mutesi Béatrice bufite ishingiro, rwemeza ko igihano Habumugisha Butoyi yahanishijwe kigumyeho, rwemeza ko Mukaruyange Athanasie ahamwa n'icyaha cyo gufatanya na Habumugisha Butoyi kwiba amafaranga aburanwa, n'icyo guhishira umujura n'ibintu bikomoka ku cyaha, rumuhanisha igifungo cy'imyaka ibiri (2) gisubitswe mu mwaka umwe(1), rumutegeka gufatanya na Habumugisha Butoyi kwishyura 84.740.000Frw rusobanura ko hari imvugo z'abatangabuhamya bashinja Mukaruyange Athanasie uruhare yagize mu kwiba amafaranga, barimo umukozi wamukoreraga witwa Uwamahoro Sara wemeje ko Mukaruyange Athanasie yacumbikiye

Habumugisha Butoyi igihe kitari gito mu rugo iwe, hakaba n'aho we yiyemereye ko yamucumbikiye kugira ngo atagirirwa nabi, kubera amafaranga menshi yari afite, bikaba bigaragaza ko bari baziranye ku mugambi wo kwiba amafaranga ya Rwasibo Mutesi Béatrice, hakoreshejwe ubujura buciye icyuho.

- [5] Ku wa 10/03/2015, Mukaruyange Athanasie yandikiye Umuvunyi Mukuru amusaba gusuzuma akarengane kabaye mu rubanza RPA 0230/14/TGI/NYGE, kuko yahamijwe ubufatanyacyaha mu bujura kandi atari cyo yarezwe, hanashingirwa ku bimenyetso bidafatika kuko yamenyanye n'uwakoze icyaha nyuma y'uko gikozwe, bagura ikibanza.
- [6] Umuvunyi Mukuru nawe yandikiye Perezida w'Urukiko rw'Ikirenga asaba ko urwo rubanza RPA 0230/14/TGI/NYGE ku mpamvu z'akarengane, rusubirishwamo gatewe kwirengagiza amategeko n'ibimenyetso, asobanura ko Mukaruyange Athanasie yahamijwe ubufatanyacyaha mu cyaha cy'ubujura bujurire atarigeze agikurikiranwaho mu n'Ubushinjacyaha mu rwego rwa mbere ngo anacyiregureho, bikaba kandi bitashoboka ko Mukaruyange Athanasie yaba yaragize ubufatanyacyaha mu cyaha cy'ubujura, kuko yahuye na Habumugisha Butoyi, uyu yarangije kwiba, naho ku cyaha cyo guhishira ibyibano, avuga ko Urukiko rutagaragaje ko hari amafaranga akomoka ku cyaha Mukaruyange Athanasie yaba yarafatanywe, ingano yayo n'aho yaba yarayahishe.
- [7] Mu cyemezo N° 026/2017 cyo ku wa 18/04/2017, Perezida w'Urukiko rw'Ikirenga, yategetse ko urubanza RPA 0230/14/TGI/NYGE rwavuzwe haruguru rwongera kuburanishwa, iburanisha ribera mu ruhame ku wa 15/01/2018, Mukaruyange Athanasie yunganiwe na Me Kayijuka Ngabo, Rwasibo Mutesi Béatrice yunganiwe na Me Munyeshema

Napoléon, naho Ubushinjacyaha buhagarariwe na Niyonkuru Françoise, Umushinjacyaha ku rwego rw'Igihugu.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

[8] Muri uru rubanza harasuzumwa niba harabaye akarengane, ku ruhande rumwe gatewe no kwirengagiza amategeko, ku rundi ruhande gatewe no kwirengagiza ibimenyetso, hanasuzumwe iby'indishyi zisabwa n'ababuranyi.

A. Kumenya niba harabaye akarengane gatewe no kwirengagiza amategeko.

- [9] Mukaruyange Athanasie na Me Kayijuka Ngabo umwunganira, bavuga ko Mukaruyange Athanasie yaburanye ku cyaha gishya mu bujurire mu Rukiko Rwisumbuye, atari yarakirezwe ngo akiburaneho ku rwego rwa mbere mu Rukiko rw'Ibanze, kuko yari yaraharezwe icyaha cyo guhisha ibintu bikomoka ku cyaha, giteganywa kandi kigahanishwa ingingo ya 326 y'Itegeko Ngenga N° 01/2012/OL ryo ku wa 02/05/2012 rishyiraho Igitabo cy'amategeko ahana, nyamara mu bujurire aburanishwa ku bufatanyacyaha mu bujura buciye icyuho.
- [10] Me Kayijuka Ngabo avuga ko n'ubwo umucamanza ashobora guhindura inyito y'icyaha, agomba kuba agendeye ku byabaye, akaba asanga ikosa ryabaye ari uko umucamanza wo mu bujurire atabanje kwumva Mukaruyange Athanasie ngo abone guhindura inyito y'icyaha, ahubwo icyabaye akaba ari ukuzana mu bujurire icyaha gishya kitaburanwe mbere.

- [11] Rwasibo Mutesi Béatrice na Me Munyeshema Napoléon umwunganira, bavuga ko bumvikana n'abo baburana ku bijyanye n'ububasha bw'umucamanza bwo guhindura inyito y'icyaha cyaregewe, bakaba basanga ari cyo cyakozwe n'umucamanza w'Urukiko Rwisumbuye, amaze kumva imiburanire y'impande zombi ndetse n'abatangabuhamya, abona kwemeza inyito y'ubufatanyacyaha mu bujura buciye icyuho.
- [12] Me Munyeshema Napoléon anavuga, mu myanzuro ye ko ingingo ya 98 y'Itegeko Ngenga N° 01/2012/OL ryavuzwe haruguru, igaragaza uburyo bunyuranye umuntu agira uruhare mu cyaha cyakozwe: kuba umuntu yakoze icyaha ubwe, kuba yabaye umufatanyacyaha (yafashije mu buryo butaziguye), cyangwa kuba yabaye icyitso, aha bigasobanurwa ko "yitwa kandi icyitso uwahishe inkozi z'ibibi cyangwa uwazifashije guhisha, mu buryo buteganywa n'ingingo ya 327 y'iri Tegeko Ngenga", akaba asanga ibimenyetso umucamanza hashingiyeho byerekana mu buryo budashidikanywa ko Mukaruyange Athanasie yabaye icyitso, ko rero yagombaga kubihanirwa, hakaba nta karengane kabayeho, ari nacyo basaba Urukiko rw'Ikirenga kwemeza.
- [13] Avuga ko, hashingiwe ku ngingo ya 81 y'Itegeko y'Itegeko N° 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, hakwiye kwemezwa ko isubirishamo ry'urubanza ku mpamvu z'akarengane ridafite ishingiro, kuko nta mategeko yishwe.
- [14] Uhagarariye Ubushinjacyaha avuga ko nta cyaha gishya cyaciriweho urubanza mu Rukiko Rwisumbuye rwari rwajuririwe, ko ahubwo hahujwe ingingo ya 98 y'Itegeko Ngenga N° 01/2012/OL ryavuzwe haruguru, n'iya 327 y'iryo Tegeko Ngenga, iteganya ko uwahishe inkozi z'ibibi cyangwa

uwazifashije guhisha nawe yitwa icyitso, Urukiko rukaba rwarasanze ibikorwa Mukaruyange Athanasie yakoze bigize icyaha cyo gufasha Habumugisha Butoyi ubujura buciye icyuho.

UKO URUKIKO RUBIBONA

- [15] Ku ngingo yo kuba Urukiko Rwisumbuye rwaba rwaraciriye urubanza ku cyaha kitaregewe, Urukiko rurasanga, nk'uko dosiye y'urubanza ibigaragaza, Mukaruyange Athanasie yararezwe mu Rukiko rw'Ibanze icyaha cyo guhisha ibyibano, giteganywa n'ingingo ya 326 y'Itegeko Ngenga N°01/2012/OL rishyiraho Igitabo cy'amategeko ahana, rukimuhanaguraho, Urukiko Rwisumbuye rwo rusanga kuba yaracumbikiye igihe kitari gito Habumugisha Butoyi wari wibye amafaranga aciye icyuho, hakiyongeraho ibikorwa byose byo kugura amazu n'ibibanza bakoranye muri icyo gihe yashakishwaga ataramutorokesha, bimugaragazaho ahubwo kuba barafatanyije umugambi n'igikorwa by'ubujura Habumugisha Butoyi yakoze, kuko hari n'aho uyu yiyemereye ko yamucumbikiye kubera amafaranga menshi yari afite ngo atagirirwa nabi, runamuhamya icyaha cyo guhisha ibikomoka ku cyaha, n'icyo guhisha uwakoze icyaha.
- [16] Urukiko rurasanga, kuba umucamanza yarahereye ku bikorwa yaregewe by'imyitwarire ya Mukaruyange Athanasie kuri Habumugisha Butoyi, mu kubisesengura agasanga byerekana kuri Mukaruyange Athanasie, ubufatanyacyaha mu bujura buciye icyuho, bitafatwaho kuba yaraciye urubanza ku cyaha ataregewe, mu gihe ibikorwa yasuzumye ari ibyo yaregewe n'Ubushinjacyaha, ahubwo umucamanza akaba yarabihaye inyito y'ubufatanyacyaha mu bujura buciye icyuho, nyuma yo kubisesengura, kuko guhindura inyito ari uburenganzira

n'inshingano umucamanza afite mu gihe asanga ibikorwa uregwa akurikiranyweho bidahuye n'inyito byahawe¹, hakurikijwe ihame ry'uko umucamanza aregerwa ibikorwa bigize icyaha, ataregerwa inyito, bityo ingingo ijyanye no kuba Urukiko Rwisumbuye rwarahinduye icyaregewe rukaburanisha icyaha gishya, ikaba nta shingiro ifite.

[17] Urukiko rurasanga ahubwo, ikibazo kiriho ari cyo kumenya niba iryo sesengura Urukiko Rwisumbuye rwakoze ryarakozwe neza, mu rwego rw'ibimenyetso byagaragaza ko Mukaruyange Athanasie yagiranye na Habumugisha Butoyi umugambi w'ubujura bakanafatanya kuwushyira mu bikorwa.

[18] Ku bijyanye no kuba umucamanza yarahinduye inyito y'icyaha atabanje guha Mukaruyange Athanasie umwanya wo kubijyaho impaka, Urukiko rurasanga, koko, yaragombaga kubikora yabajije Mukaruyange Athanasie icyo abivugaho, kuko, nk'uko abahanga mu mategeko babisobanura, igihe cyose icyemezo cy'Urukiko kitaraba ndakuka, inyito y'icyaha ishobora guhinduka, ariko uregwa yahawe igihe cyo kugira icyo abivugaho, mu rwego rwo kubahiriza ihame ryo kwiregura,² iryo kosa rikaba ariko ryarakosowe muri uru Rukiko, aho ababuranyi babonye umwanya wo kubijyaho impaka, nk'uko byagaragajwe mu ngingo zigize imiburanire yabo.

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¹ Reba urubanza RPA 0033/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 14/9/2012, haburana Ubushinjacyaha na Nyawera Céléstin.

² "Aussi longtemps que la décision judiciaire n'est pas encore devenue irrévocable, toute qualification est susceptible de modification.... Le respect des droits de la défense exige cependant qu'en cas de requalification s'opérant au niveau du jugement, les délais prévus par la loi soient accordés au prévenu pour répondre d'une qualification nouvelle": Likulia Bolongo, Droit Pénal spécial zairois, Tome I, 2ème édition, Paris, 1985, P 20, 21.

B. Kumenya niba harabaye akarengane gatewe no kwirengagiza ibimenyetso.

- [19] Mukaruyange Athanasie avuga ko Urukiko Rwisumbuye rwa Nyarugenge rwirengagije ibimenyetso bigaragaza ko atigeze akora icyaha, rwemeza ko yacumbikiye Habumugisha Butoyi amaze kumenya ko afite amafaranga menshi kandi atari byo. Asobanura ko haketswe ko yacumbikiye Habumugisha Butoyi bitewe n'uko, ubwo bamaraga kugura ikibanza, bahujwe n'umukomisiyoneri, Habumugisha Butoyi yajyanye na Mukaruyange Athanasie iwe bwije, gufata ibya ngombwa byacyo, nyuma arataha, usibye ko imodoka ye yaraye aho Mukaruyange Athanasie nawe ajya ahagarika iye, kuko umushoferi wari uyitwayemo Habumugisha Butoyi yasabaga ko yayiharaza.
- [20] Avuga ko ubuhamya bwa Uwamahoro Sara wahoze ari umukozi we mu rugo, akaba yaremeje ko yacumbikiye Habumugisha Butoyi nta gaciro bwahabwa, kuko uwo mukozi batandukanye nabi atagikora neza, akaba ari yo mpamvu amubeshyera.
- [21] Me Kayijuka Ngabo avuga ko ibyo Habumugisha Butoyi yavugiye mu Bugenzacyaha by'uko amafaranga yibye yayagabanye na Mukaruyange Athanasie atari ukuri, kuko atari anaziranyi na Mukaruyange Athanasie, ko ahubwo Habumugisha Butoyi yaje kuvuga ko yabivuze abitewe n'inkoni ya kubitwaga muri Police akimara gufatwa. Avuga ko iperereza ryatangiye riyobye kuva mu Bugenzacyaha, rinakomeza gutyo mu Bushinjacyaha, riyobejwe n'ibyatumye hakekwa ko Mukaruyange Athanasie yafatanyije icyaha na Habumugisha Butoyi, birimo kuba yaramufashije gushaka abapolisi kugira ngo abashe kubona ibya ngombwa, kuba baraguze inzu, kuba

yaramutwaye akamugeza iwe, kuba imodoka ya Habumugisha Butoyi yararaye iwe, ibyo byose bikaba ari byo byuririweho mu gukeka ko yaba yaramubikije amafaranga kandi ataribyo.

- [22] Avuga ko Habumugisha Butoyi yibye ari ku wa 3, agura inzu na Mukaruyange Athanasie ku wa 6, afatwa nyuma y'ukwezi, ayo mataliki akaba agaragaza ko batari baziranyi, bityo rero hakaba hari ugushidikanya ku byo Mukaruyange Athanasie aregwa.
- Rwasibo Mutesi Béatrice, uregera indishyi, avuga ko [23] Butoyi yafatirwaga Habumugisha ubwo mu Gatsata, agashyikirizwa Police, yabajijwe aho yashyize amafaranga avuga ko amwe yayaguze inzu, andi ayagura imodoka, andi ayabitsa Mukaruyange Athanasie, kandi ko uyu yamucumbikiye iwe mu rugo. Avuga ko atari bwo bwa mbere Mukaruyange Athanasie akurikiranyweho gucumbikira abajura, kuko hari hashize iminsi akurikiranyweho icyaha nk'icyo, ko ibyo kuba yaracumbikiye Habumugisha Butoyi akahamara iminsi byamenywe n'abantu benshi bo mu Gatsata barimo Uwamahoro Sara na Turatsinze Abdallah, ndetse binarakaza abana ba Mukaruyange Athanasie, bikaba bibabaje kubona atinyuka ibintu nk'ibyo kandi ari umuyobozi.
- [24] Me Munyeshema Napoléon avuga ko ibikorwa Mukaruyange yakoze bigaragaza ko yabaye umufatanyacyaha mu buryo bw'icyitso, buteganywa mu ngingo ya 98 y'Itegeko Ngenga N°01/2012/OL ryavuzwe haruguru. Avuga ko Habumugisha Butoyi yiyemereye, mu Bugenzacyaha, ko Mukaruyange Athanasie yamucumbikiye, nyuma aza guhindura imvugo, avuga ko ibyo yabivuze kubera inkoni, nyamara nta kimenyetso abitangira, kandi hari umutangabuhamya witwa Migezo wemeza ko Mukaruyange Athanasie yabonye

Habumugisha Butoyi afite amafaranga menshi amujyana kumucumbikira, hakaba na Turatsinze Abdala nawe memeza ko yamenye Habumugisha Butoyi amugejejweho na Mukaruyange Athanasie, kandi abo bose ntacyo bapfa.

[25] Uhagarariye Ubushinjacyaha avuga ko Habumugisha Butoyi amaze kwiba yaje kugisha inama Mukaruyange Athanasie yo kujya kugura ubutaka mu Bugesera, Mukaruyange Athanasie amucumbikira igihe kirekire, afite amafaranga menshi kandi bigaragara ko ntaho yari kuba yayavanye humvikana. Avuga ko ibyo byose Mukaruyange Athanasie yabyireguyeho, kandi ko Urukiko ruregerwa ibikorwa akaba ari rwo rutanga inyito y'icyaha, ibi akaba ari ko byemejwe n'uru Rukiko, mu rubanza RPAA 0117/07/CS, haburana Ubushinjacyaha na Ngabonziza na mugenzi we.

UKO URUKIKO RUBIBONA

[26] Ku kibazo cyo kumenya niba Mukaruyange Athanasie ahamwa n'ubufatanyacyaha mu bujura buciye icyuho, uru rusanga, ibikorwa bye Urukiko Rwisumbuye rwabonyemo icyo cyaha nk'uko byibukijwe haruguru, mu gika cya 15, bitagaragaramo ubwo bufatanyacyaha, kuko mu isesengura urwo Rukiko rwakoze, mu rwego rw'ibimenyetso bicukumbuwe gusesengura urubanza, no mu bw'umucamanza (présomptions humaines) n'ubushishozi nk'uko biteganywa n'ingingo ya 108 y'Itegeko Nº 15/2004 ryo kuwa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo³, hatagaragajwe ko hari ibimenyetso bikomeye,

³ Iyo ngingo ya 108 igira iti: "Ibimenyetso bicukumbuwe no gusesengura urubanza ni ibimenyetso bitacukumbuwe n'amategeko, bicukumburwa

bisobanuye kandi bihuje byagaragaza nta gushidikanya ko Mukaruyange Athanasie yafashije Habumugisha Butoyi igikorwa nyir'izina cy'ubujura buciye icyuho, bityo Mukaruyange Athanasie akaba agomba kugihanagurwaho.

Urukiko rurasanga kandi, ku byerekeye Mukaruyange Athanasie, ubufatanya cyaha mu bujura buciye icyuho, butanashingirwa ku ngingo ya 98, agace ka 3, igika cya 2, y'Itegeko Ngenga N° 01/2012/OL ryavuzwe haruguru, iteganya ko, uwahishe inkozi z'ibibi cyangwa uwazifashije guhisha mu buryo butegangwa n'ingingo ya 327 y'iryo Tegeko Ngenga yitwa icyitso, nk'uko Ubushinjacyaha n'uwunganira Rwasibo Mutesi Béatrice babiburanisha, kuko iyo ngingo ya 327, irebana n'ibyo "guhisha ibintu byakoreshejwe cyangwa byagenewe gukoreshwa icyaha" nk'uko byumvikana ku mutwe wayo, ndetse no ku mutwe w'agace (section) ka 10 iyo ngingo ibarizwamo, gatandukanya ibirebana n'iyo ngingo hamwe n'iya 326, iyi yo ikaba irebana no "guhisha ibikomoka ku cyaha", bikaba bigaragara rero ko ibijyanye no guhisha ibikomoka ku cyaha byongeye gushyirwa mu ngingo ya 327 habaye kwibeshya, kuko byari byamaze guteganywa ku buryo bwihariye kandi buhagije mu ngingo ya 326 nk'uko bisobanuwe haruguru.

[28] Urukiko rurasanga rero, ibikorwa byo guhisha ibikomoka ku cyaha Mukaruyange Athanasie yarezwe bigomba gusuzumwa hashingiwe ku biteganywa n'ingingo ya 326 y'Itegeko Ngenga N°01/2012/OL ryavuzwe haruguru, harebwa niba koko hari ibimenyetso Urukiko Rwisumbuye rwaba rwarirengagije bigaragaza ko atakoze icyaha cyo guhisha ibikomoka ku cyaha,

n'ubwenge n'ubushishozi bw'abacamanza. Abacamanza bagomba kwemera gusa ibyo bimenyetso iyo bikomeye, bisobanuye kandi bihuje".

ndetse hanashingiwe ku ngingo ya 573 y'iryo Tegeko Ngenga⁴, iteganya icyaha cyo guhisha uwakoze icyaha, akaba ari byo bikorwa yakurikiranyweho kandi yireguyeho mu nkiko zombi yaburaniyemo, ari nabyo bisuzumwa mu cyiciro cya kabiri cy'ikibazo cya kabiri kigize uru rubanza.

[29] Mu kwemeza ko Urukiko Rwisumbuye rwirengagije ibimenyetso bigaragaza ko atigeze akora icyaha, Mukaruyange Athanasie n'umwunganira ntiberekana ibyo bimenyetso byirengagijwe, ahubwo bagaruka ku bisobanuro by'imyitwarire ye kuri Habumugisha Butoyi, bagamije kugaragaza ko iyo myitwarire itabonekamo guhisha ibyibano no guhisha uwakoze icyaha.

[30] Ingingo ya 119 y'Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, iteganya ko mu manza nshinjabyaha, ibimenyetso bishingira ku mpamvu zose z'ibyabaye n'ibyemejwe n'amategeko, ababuranyi bapfa kuba barahawe uburyo bwo kuhaba ngo banyomozanye. Urukiko ruhamya ku buryo butavuguruzwa ko ibimenyetso byose birega cyangwa biregura ari byo kandi ko bishobora kwemerwa".

[31] Mu bimenyetso byashingiweho n'Urukiko Rwisumbuye, mu kwemeza ko Mukaruyange Athanasie yahishe uwakoze icyaha n'ibigikomokaho, harimo icyo kuba Habumugisha Butoyi yariyemereye mu ibazwa rye mu Bugenzacyaha, akanabisubiramo mu ibazwa rye mu Bushinjacyaha, ko

ku bihumbi ijana(100.000) kugeza kuri miliyoni imwe(1.000.000)".

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⁴ Iyo ngingo iteganya ko:" Umuntu wese ucumbikira ukurikiranywe cyangwa uwakoze icyaha gikomeye cyangwa cy'ubugome, cyangwa icyitso cye, umushakira ubwihisho cyangwa se ubundi buryo ubwo ari bwo bwose bwatuma inzego z'ubutabera zimubura, ahanishwa igifungo kuva ku myaka ibiri(2) kugeza ku myaka itanu(5), n'ihazabu y'amafaranga y'u Rwanda kuva

yamenyesheje Mukaruyange Athanasie ko yibye amafaranga aho yakoraga, akamuha igice kimwe ngo akimubikire, akanasobanura ko yamuhaye imishandiko itatu y'amadolari n'amayero atazi umubare, amubwira ko nibamufata azayamuha bakayasubiza nyirayo, ibyo bikajyana n'imvugo y'umutangabuhamya Turatsinze Abdallah wemeje ko yamenye Habumugisha Butoyi amuzaniwe na Mukaruyange Athanasie, ngo amufashe gushaka ikibanza cyo kugura mu Bugesera.

- [32] Urukiko rurasanga, n'ubwo mu Rukiko Habumugisha Butoyi yahinduye imvugo akavuga ko yabeshyeye Mukaruyange Athanasie kubera inkoni yakubitwaga mu ibazwa rye, nta kimenyetso cyagaragajwe cy'uko yaba yarabeshye kubera inkoni, ndetse nta n'ubwo byumvikana ko yaba yarakubitiwe mu rwego rw'Ubugenzacyaha n'urw'Ubushinjacyaha, kandi bigaragara ko ibyo yiyemereye bihura n'ibyo umutangabuhamya Turatsinze Abdallah yemeje nk'uko byibukijwe haruguru.
- [33] Urukiko rurasanga, ibyo Habumugisha Butoyi yari yemeye mbere bihura n'ibyo umutangabuhamya Uwamahoro Sara, wahoze ari umukozi mu rugo kwa Mukaruyange Athanasie, yavuze asobanura ko Mukaruyange Athanasie yacumbikiye Habumugisha Butoyi mu rugo iwe, igihe kitari gito, ibi kandi bikaba bitabura gufatwaho ukuri n'ubwo Mukaruyange Athanasie avuga ko uwo mukozi yavuye iwe batumvikana, mu gihe hari n'undi mutangabuhamya, Manaturikumwe Eric wemeza ko ariwe watwaye Habumugisha Butoyi mu modoka uyu yari yaguze, akamugeza kwa Mukaruyange Athanasie akararayo, ndetse n'imodoka ikaba yararaye hafi aho ku muhanda, aho Mukaruyange Athanasie yari asanzwe araza iye, akaba kandi yemera ko iyo modoka yaharaye koko, n'ubwo avuga ko

Habumugisha Butoyi we yaje gutaha, yo iharara kubera ikibazo yari ifite, nyamara uwari uyitwaye akaba atariko abivuga.

[34] Urukiko rurasanga kandi hari n'ubundi buhamya bwatanzwe n'uwitwa Migezo Jean Bosco, buhuza n'ubwagaragajwe haruguru, aho nawe yasobanuye ko Mukaruyange Athanasie yacumbikiye Habumugisha Butoyi kubera ko yari afite amafaranga menshi, ngo hatagira umugirira nabi.

[35] Urukiko rusanga rero nta bimenyetso Mukaruyange Athanasie agaragaza byirengagijwe mu rubanza 0230/14/TGI/NYGE byagaragaza ko atahishe ibikomoka ku cyaha n'uwagikoze, ahubwo harashingiwe ku bimenyetso bihagije nk'uko byibukijwe haruguru, naho impamvu zashingiweho n'Urwego rw'Umuvunyi ruvuga ko habaye akarengane kuko hatagaragajwe umubare w'amafaranga yahishwe, ngo Mukaruyange Athanasie abe yarayafatanywe, nta shingiro zifite, kuko ibyo atari byo bimenyetso kamara bisabwa n'Itegeko, ahubwo ingingo ya 119 y'Itegeko Nº 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, yibukijwe haruguru, ikaba iteganya ko, mu manza nshinjabyaha, "ibimenyetso bishingira ku mpamvu zose z'ibyabaye n'ibyemejwe n'amategeko...", akaba ari muri ubwo buryo, ukwiyemerera kwa Habumugisha Butoyi, n'imvugo z'abatangabuhamya, bigaragariza Urukiko gushidikanya, ko Mukaruyange Athanasie ahamwa n'ibyaha byo guhisha uwakoze icyaha no guhisha ibikomoka ku cyaha⁵ nk'uko

⁵ Ingingo ya 326 iteganya ko « umuntu wese uhisha, abizi, ibintu cyangwa igice cyabyo, byambuwe, byarigishijwe cyangwa bikomoka ku cyaha kitari icy'ubugome, ahanishwa igifungo kuva ku mezi atandatu kugeza ku myaka ibiri, n'ihazabu y'amafaranga y'u Rwanda yikubye incuro kuva kuri ebyiri

yabihamijwe mu rubanza RPA 0230/14/TGI/NYGE, hakaba rero nta karengane karugaragaramo, gashingiye kuba haba harirengagijwe ibimenyetso.

[36] Urukiko rurasanga, n'ubwo Mukaruyange Athanasie ahanaguweho icyaha cy'ubufatanya cyaha mu bujura, nta kigomba guhinduka ku gihano yahawe n'Urukiko Rwisumbuye, kuko ahamwa n'ibyaha byo guhisha ibikomoka ku cyaha no guhisha uwakoze icyaha.

C. Ku bijyanye n'indishyi zasabwe.

- [37] Rwasibo Mutesi Béatrice na Me Munyeshema Napoléon basaba ko, mu gihe Urukiko rwasanga nta karengane kabaye mu rubanza rusabirwa gusubirwamo, Mukaruyange Athanasie yategekwa kwishyura 600.000Frw y'igihembo cya Avoka wamuburaniye ikirego cyihutirwa, na 1.000.000Frw y'igihembo cya Avoka kuri uru rubanza, hamwe na 500.000Frw y'ikurikiranarubanza, yose hamwe akaba 2.100.000Frw.
- [38] Me Ngabo Kayijuka avuga ko izo ndishyi nta shingiro zifite, kuko nta cyaha Mukaruyange Athanasie yakoze, ko ahubwo ari Rwasibo Mutesi Béatrice ukwiye kwishyura Mukaruyange Athanasie indishyi z'akababaro zihwanye na 2.000.000Fw, 1.000.000Frw y'igihembo cya Avoka, na 500.000Frw y'ikurikiranarubanza.
- [39] Me Munyeshema Napoléon avuga ko indishyi zisabwa na Mukaruyange Athanasie nta shingiro zifite, kuko Rwasibo Mutesi uzisabwa ariwe ahubwo wakorewe icyaha.

kugeza ku icumi z'agaciro k'ibyahishwe, cyangwa kimwe gusa muriibyo bihano ».

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UKO URUKIKO RUBIBONA

[40] Urukiko rurasanga indishyi zisabwa n'uburanira Mukaruyange Athanasie zitasuzumwa, kuko adatsinda urubanza, ahubwo hasuzumwa izisabwa na Rwasibo Mutesi Béatrice n'umwunganira.

[41] Urukiko rurasanga, hashingiwe ku ngingo ya 258 cya Gatatu cy'Urwunge rw'amategeko y'Igitabo mbonezamubano, iteganya ko igikorwa cy'umuntu cyangirije undi gitegeka nyiri ugukora ikosa rigikomokaho kuriha ibyangiritse, Rwasibo Mutesi Béatrice yagenerwa indishyi z'ikurikiranarubanza n'amafarannga y'igihembo cya Avoka, kuko byumvikana ko hari ibyo yatakaje akurikirana uru rubanza, anahemba avoka. ariko kuko nta bimenyetso bifatika yarugaragarije byakwerekana urugero rw'ibyo yatanze, akaba agomba kugenerwa indishyi mu bushishozi bw'Urukiko, agahabwa 300.000Frw y'ikurikiranarubanza, na 500.000Frw y'igihembo cya Avoka, hamwe n'amafaranga y'igihembo cya Avoka waburanye urubanza rw'Ikirego cyihutirwa, hashingiwe ku ngingo ya 258 yibukijwe haruguru, hamwe n'iya 320 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko indishyi n'ibindi byakozwe mu rubanza bijyanye n'amafaranga umuburanyi vakoresheje mu rubanza ku kirego cyihutirwa, biregerwa hamwe n'ikirego cy'iremezo.

III. ICYEMEZO CY'URUKIKO

- [42] Rwemeje ko ikirego cya Mukaruyange Athanasie cyo gusubirishamo urubanza ku mpamvu z'akarengane gifite ishingiro kuri bimwe;
- [43] Rwemeje ko adahamwa n'icyaha cy'ubufatanyacyaha mu bujura buciye icyuho;
- [44] Rwemeje ko, mu buryo bw'impurirane y'imbonezamugambi, ahamwa n'icyaha cyo guhisha ibikomoka ku cyaha, hamwe n'icyo guhisha uwakoze icyaha;
- [45] Rumuhanishije igifungo cy'imyaka ibiri (2), gisubitswe mu mwaka umwe(1);
- [46] Ruvuze ko indishyi n'amagarama yaciwe mu rubanza RPA 0230/14/TGI/NYGE bigumyeho;
- [47] Rumutegetse kwishyura Rwasibo Mutesi Béatrice amafaranga 500.000 y'igihembo cya Avoka, na 300.000Frw y'ikurikiranarubanza, hamwe na 500.000Frw y'igihembo cya Avoka waburanye mu rubanza rw'ikirego cyihutirwa rwabanjirije uru;
- [48] Rutegetse ko amagarama y'uru rubanza aherera ku Isanduku ya Leta.



IMANZA Z'IMBONEZAMUBANO

NDAHUNGA v. MUKAKALISA N'UNDI.

[Rwanda URUKIKO RW'IKIRENGA – RCAA 0022/15/CS (Nyirinkwaya, P.J; Hitiyaremye na Munyangeri) 15 Ukuboza 2017]

Amategeko agenga umuryango — Umutungo w'umuryango — Imicungire y'umutungo w'umuryango — Ni ihame ku bashyingiranywe kugirana ubwumvikane mbere yo kugurisha umutungo utimukanwa bahuriyeho cyangwa kuwutangaho ubundi burenganzira.

Amategeko agenga umuryango – Igihe ntarengwa cy'umwe mu bashakanye cy'ugutambamira amasezerano yubugure yakozwe ku mutugo basangiye – Igihe ntaregwa umwe mu bashakanye ashobora gutambamira amasezerano y'ubugure k'umutungo wimukanwa ni umwaka umwe(1) naho umutungo utimukanwa n'imyaka itanu (5) – Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingingo ya 22.

Incamake y'ikibazo: Mukakalisa yareze umugabo we Nduwayo na Ndahunga mu Rukiko Rwisumbuye rwa Nyarugenge asaba, asaba gusesa amasezerano y'ubugure bw'inzu bagiranye kuko atigeze ayamenya, urubanza ruburanishwa Nduwayo atitabye ariko yarahamagajwe mu buryo bukurikije amategeko. Urwo rukiko rwemeje ko ikirego cya Mukakalisa nta shingiro gifite.

Mukakalisa yajuririye iki cyemezo mu Rukiko Rukuru, maze urwo Rukiko rwemeza ko rutesheje agaciro ayo masezerano kuko

amasezerano Nduwayo yakoze ubwo yagurishaga inzu, umugore we atayasinyeho ndetse atanayamenye nyamara haragombaga ubwumvikane bwabo bombi nk'uko amategeko abiteganya.

Ndahunga yajuririye uru rubanza mu Rukiko rw'Ikirenga, avuga ko Urukiko Rukuru rutahaye agaciro inzitizi yatanze yo kutakira ikirego cya Mukakalisa kubera ko yarengeje igihe cyo gutambamira ayo masezerano kuko igihe cy'imyaka itanu umushingamategeko yahaye umwe mu bashyingiranywe cyo gutambamira ibintu bitimukanwa utabonetse ngo agaragaze igitekerezo cye; rero niba atarashoboye kuboneka ku mpamvu zikomeye, icyo gihe cyari gihagije ngo atambamire amasezerano yakozwe n'umugabo we, bityo kuba amasezerano yakozwe mu mwaka wa 2002, akarega mu mwaka wa 2012 hashize imyaka icumi (10) yose, ibi bigaragaza ko amasezeno yari yarabaye ndakuka, ko rwirengagije kandi ibimenyetso bicukumbuye yarushyikirije bigaragaza ko, n'ubwo uregwa atashyize umukono ku masezerano y'ubugure bw'inzu, yari ayazi.

Mukakalisa avuga ko ibyerekeye ibihe byo gutanga ikirego byaburanishijweho mu Rukiko Rukuru, ariko bitigeze bifatwa nk'inzitizi, ubu ikaba itazanwa bwa mbere mu Rukiko rw'Ikirenga, bityo ikaba itakwakirwa. Akomeza asobanura ko atigeze amenya ko umugabo we yakoze amasezerano y'ubugure ku mutungo basangiye kuko yamuhishaga ibintu byose ku buryo bukomeye.

Incamake y'icyemezo: 1. Ni ihame ku bashyingiranywe kugirana ubwumvikane mbere yo kugurisha umutungo utimukanwa bahuriyeho cyangwa kuwutangaho ubundi burenganzira.

2. Igihe ntaregwa umwe mu bashakanye ashobora gutambamira amasezerano y'ubugure ku mutungo wimukanwa ni umwaka

umwe (1) naho umutungo utimukanwa n'imyaka itanu (5), bityo kuba uregwa yamaze imyaka igera ku icumi (10) yose atarakurikirana umutungo we avuga ko wagurishijwe n'umugabo we atabizi bituma amasezerano yabaye hagati y'umugabo we n'uwajuriye atagomba guteshwa agaciro kuko yatinze kuyaregera.

Ubujurire bufite ishingiro Amasezerano agumanye agaciro kayo.

Amategeko yashingiweho

Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingingo ya 17,21 na 22.

Nta manza z'ifashishijwe

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Nyarugenge, Mukakalisa Dancille arega umugabo we Nduwayo Nathan na Ndahunga Jean Marie Vianney, asaba ko amasezerano y'ubugure bw'inzu iri mu kibanza n° 5798 bagiranye ku itariki ya 08/02/2002 aseswa kuko atigeze ayamenya, urubanza ruburanishwa Nduwayo Nathan adahari kuko atitabye Urukiko kandi yarahamagajwe ku buryo bukurikije amategeko.

- [2] Ku itariki ya 21/06/2013, Urukiko rwaciye urubanza rwemeza ko ikirego cya Mukakalisa Dancille nta shingiro gifite kuko atabashije kugaragaza icyo yakoze ubwo yabonaga Ndahunga Jean Marie Vianney yubaka mu kibanza yaguze n'umugabo we mu gihe uyu yari yaragiye hanze, mu gihe abashyingiranywe bafite ububasha bungana bwo gukurikirana umutungo wabo no kuwuhagararira, rugenera Ndahunga Jean Marie Vianney indishyi z'akababaro n'igihembo cya Avoka.
- [3] Mukakalisa Dancille yajuririye iki cyemezo mu Rukiko Rukuru, maze ku itariki ya 15/05/2015 urwo Rukiko rwemeza ko ubujurire bwe bufite ishingiro, rutesha agaciro amasezerano yakozwe n'umugabo we Nduwayo Nathan wenyine agurisha inzu iri mu kibanza n° 5798 na Ndahunga Jean Marie Vianney kuko umugore we atayasinyeho ndetse atanayamenye nyamara haragombaga ubwumvikane bwabo bombi nk'uko amategeko abiteganya.
- [4] Ndahunga Jean Marie Vianney yajuririye uru rubanza mu Rukiko rw'Ikirenga, avuga ko Urukiko Rukuru rutahaye agaciro inzitizi yatanze yo kutakira ikirego cya Mukakalisa Dancille kubera ko yarengeje igihe cyo kurega, rwirengagiza ibimenyetso bicukumbuye yatanze bigaragaza ko, n'ubwo Mukakalisa Dancille atashyize umukono ku masezerano y'ubugure bw'inzu, yari ayazi. Avuga kandi ko Urukiko rwemeje ko amasezerano y'ubugure bw'iyo nzu aseswa, ariko ntirwamugenera amafaranga ahwanye n'agaciro k'ibikorwa yashyize kuri iyo nzu no muri icyo kibanza nk'uko raporo y'umuhanga ibigaragaza.
- [5] Iburanisha ry'urubanza ryabaye mu ruhame ku itariki ya 18/07/2017, Ndahunga Jean Marie Vianney ahagarariwe na Me Ndagijimana Emmanuel, Mukakalisa Dancille ahagarariwe na Me Habimana Pie, Nduwayo Nathan atitabye ariko

yarahamagawe ahatazwi. Kuri uwo munsi, Me Habimana Pie yabyukije inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga, ku itariki ya 15/09/2017 Urukiko rufata icyemezo ko iyo nzitizi nta shingiro ifite, rutegeka ko iburanisha ry'urubanza mu mizi rizakomeza ku itariki ya 14/11/2017.

[6] Uwo munsi ababuranyi bitabye Urukiko, Ndahunga Jean Marie Vianney ahagarariwe na Me Ndagijimana Emmanuel afatanyije na Me Rukundo Emile, Mukakalisa Dancille ahagarariwe na Me Habimana Pie, Nduwayo Nathan adahari ariko yarahamagajwe ahatazwi mu buryo bukurikije amategeko.

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURA RYABYO

Kumenya niba Mukakalisa Dancille yararengeje igihe cyo kuregera amasezerano yakozwe n'umugabo we Nduwayo Nathan.

- [7] Me Rukundo Emile avuga ko impamvu ya mbere y'ubujurire ya Ndahunga Jean Marie Vianney aburanira, ari uko Urukiko Rukuru rutahaye agaciro inzitizi yari yatanze avuga ko ikirego cya Mukakalisa Dancille kitagombaga kwakirwa kubera ko yarengeje igihe cyo kurega, ikaba idatanzwe bwa mbere mu Rukiko rw'Ikirenga nk'uko uregwa abivuga kuko bigaragara ko umucamanza yayisuzumye (urupapuro rwa 5, igika cya 18, urubanza RCA 0415/13/HC/KIG).
- [8] Me Rukundo Emile akomeza asobanura ko nk'uko biteganywa n'ingingo ya 22 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya

gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, umushingamategeko yahaye igihe cy'imyaka itanu (5) umwe mu bashyingiranywe wagombaga kwemera amasezerano utabonetse ngo agaragaze igitekerezo cye; bityo rero niba Mukakalisa Dancille atarashoboye kuboneka ku mpamvu zikomeye, icyo gihe cyari gihagije ngo atambamire amasezerano yakozwe n'umugabo we. Akomeza avuga ko ibi bihura n'ibiteganyijwe mu ngingo ya 17 y'Itegeko n° 22/99 ryo ku wa 12/11/1999 ryavuzwe haruguru, riteganya ko abashakanye bafite ububasha bungana bwo gukurikirana umutungo wabo no kuwuhagararira.

- [9] Indi mpamvu y'ubujurire itangwa na Ndahunga Jean Marie Vianney nk'uko Me Rukundo Emile umuburanira abivuga, ni uko ibimenyetso bicukumbuye bigaragaza ko nta kuntu Mukakalisa Dancille ataba yaramenye ko ubugure bwabayeho nk'umuntu wasigaye mu gihugu mu gihe umugabo we atari ahari, ni uko niba yari azi ko inzu ikodeshwa nk'uko abivuga, akabona yarasenywe yubatswe bundi bushya kandi yari azi ko ari iye, aba yarabikurikiranye kuko yari afite uburenganzira bungana n'ubw'umugabo we mu guhagararira umutungo no kuwucunga; kuba rero ntacyo yakoze mu gihe cy'imyaka itanu (5) iteganywa n'amategeko, byerekana ko yari azi ubwo bugure.
- [10] Me Rukundo Emile avuga ko ikigaragaza ko Ndahunga Jean Marie Vianney afite uburenganzira ku kibanza yaguze, ni uko yemerewe kucyubakamo ubwo ubuyobozi bwandikiraga nyiri igaraji iri muri icyo kibanza bumwemerera kubaka urukuta no gukotera, nyuma agahabwa uburenganzira bwo gukora no mu igaraji.
- [11] Kuri izi ngingo z'ubujurire, Me Ndagijimana Emmanuel nawe wunganira Ndahunga Jean Marie Vianney yongeraho ko

amasezerano umukiriya (client) yagiranye na Nduwayo Nathan ari inyandikomvaho kuko yakorewe imbere ya Noteri, ibyangombwa uwagurishije yatanze bikaba bigaragaza ko umutungo ari uwe ku giti cye, ntiyerekana ko afite umugore cyangwa ko ari ingaragu. Akomeza avuga ko ubwo Ndahunga Jean Marie Vianney yaguraga iki kibanza cyarimo akazu aragasenya nyuma ahashyira igaraji (garage), kandi muri icyo gihe Mukakalisa Dancille yahanyuraga buri munsi ajya ku kazi kuko ari ku nzira ijya kuri Bralirwa aho yakoraga, nyamara ntiyigera avuga ko umutungo ari uwe.

- [12] Me Ndagijimana Emmanuel akomeza avuga ko Ndahunga Jean Marie Vianney yagiranye amasezerano na Nduwayo Nathan mu mwaka wa 2002, Mukakalisa Dancille arega mu mwaka wa 2012 hashize imyaka icumi (10) yose, ibi bikaba bigaragaza ko amasezeno yari yarabaye ndakuka; Urukiko Rukuru rero rukaba rwarumvise nabi ingingo ya 22, igika cya 3, y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryavuzwe haruguru kuko rwavuze ko Nduwayo Nathan atagaragaje impamvu umugore we atabonetse ngo amusinyire.
- [13] Ku byerekeye ibimenyetso bicukumbuye bigaragaza ko Mukakalisa Dancille yamenye amasezerano yakozwe n'umugabo we, Me Ndagijimana Emmanuel avuga ko nyuma yo kugurisha, Nduwayo Nathan yagiye i Burayi, uwaguze yubaka igaraji ndetse akajya atanga umusoro w'ubukode (impôt locatif) n'uw'ubutaka (impôt foncier), ibi byose bikaba byerekana ko Mukakalisa Dancille yamenye aya masezerano.
- [14] Me Ndagijimana Emmanuel arangiza asaba ko mu gihe Urukiko rwasanga ari ngombwa gusesa amasezerano y'ubugure yabaye hagati ya Nduwayo Nathan na Ndahunga Jean Marie Vianney, umutungo uburanwa ugasubira mu maboko ya

Mukakalisa Dancille, rwamutegeka gusubiza Ndahunga Jean Marie Vianney 177.533.575Frw zihawanye n'agaciro k'ibyo yakoze muri uwo mutungo nk'uko kagaragazwa na raporo y'umugenagaciro iri muri dosiye, ibi bikaba ari mu rwego rwo kwirinda ubukungahare budakwiye (enrichissement sans cause), cyane cyane ko Ndahunga Jean Marie Vianney yaguze uwo mutungo nta buryarya.

- [15] Me Habimana Pie uburanira Mukakalisa Dancille, avuga ko ibyerekeye ibihe byo gutanga ikirego byaburanishijweho mu Rukiko Rukuru, ariko bitigeze bifatwa nk'inzitizi, ubu ikaba itazanwa bwa mbere mu Rukiko rw'Ikirenga. Akomeza avuga ko ingingo ya 21 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryavuzwe haruguru ishyiraho ihame ry'uko igihe cyose hari umutungo ugiye kugurishwa, umwe mu bashyingiranywe abimenyeshwa, naho iya 22 y'iryo Tegeko igashyiraho irengayobora (exception) yerekeranye n'igihe umwe mu bashyingiranywe atabonetse.
- [16] Me Habimana avuga ko Ndahunga Jean Marie Vianney atari gusinya ku masezerano atabanje kubaza umugore w'uwo bayakoranye kandi abona ari umugabo washatse, nk'uko n'ubundi umuntu ugiye kugura akora iperereza ku mutungo agiye kugura, naho ibivugwa mu ngingo ya 17 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryakomeje kuvugwa bikaba bitakoreshwa muri uru rubanza kuko iyi ngingo igena uburyo umutungo w'abashakanye ucungwa n'uburyo bawikuraho.
- [17] Ku birebana n'ibimenyetso bicukumbuye abo baburana bavuga ko bigaragaza ko Mukakalisa Dancille yamenye amasezerano yakozwe n'umugabo we, Me Habimana Pie avuga ko ibyo bavuga nta shingiro bifite kuko byashobokaga cyane kutamenya ibyakozwe ku kibanza cyagurishijwe bitewe n'uko

aho kiri atari ho Mukakalisa Dancille atuye ; naho kuba Ndahunga Jean Marie Vianney ari we wishyura umusoro, asanga ibyo atabyitwaza kuko ibyo atari uburyo buteganyijwe bwo kwegukana umutungo (moyen d'acquisition de la propriété).

- [18] Me Habimana Pie arangiza avuga ko mu gihe amasezerano yaba asheshwe ntacyo Mukakalisa Dancille yasubiza Ndahunga Jean Marie Vianney, kuko ibintu byasubira uko byari bimeze mbere y'isinywa ry'ayo masezerano, agasanga ibyo basaba biri hanze y'ikiburanwa.
- [19] Mukakalisa Dancille wari witabiriye iburanisha yabajijwe n'Urukiko ku byerekeye uru rubanza, asobanura ko atigeze amenya ko umugabo we yagurishije inzu n'ikibanza yarimo biburanwa, kuko yamuhishaga ibintu byose ku buryo bukomeye, akaba ahubwo yari yaramubwiye ko aha hantu ahakodesha nawe arabyemera. Akomeza avuga ko koko muri icyo gihe yakoreraga hafi aho, ko ariko nta kuntu yari kumenya ko hagurishijwe, ko yabimenye mu gihe cyo kwandikisha ubutaka, ari nabwo yumvise bivugwa ko umugabo we yari yaratangiye gufata amafaranga na mbere y'umwaka wa 2002.
- [20] Ku byerekeranye no kuba hari amafaranga y'ubukode Mukakalisa Dancille yaba yarigeze asaba Ndahunga Jean Marie Vianney mu gihe umugabo we Nduwayo Nathan yari yaragiye hanze y'igihugu, avuga ko yagiye ku Murenge wa Kicukiro kubaza ukodesha ikibanza n'inzu biburanwa agasanga koko ari Ndahunga Jean Marie Vianney ndetse anahasorera, abajije umuzamu uko yamubona amubwira ko atazi iwe, ko rero nta n'uburyo yari kumwandikira atazi aho abarizwa.

UKO URUKIKO RUBIBONA.

- [21] Ingingo ya 17, igika cya kabiri, y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura ryakurikizwaga ubwo Nduwayo Nathan yagiranaga amasezerano y'ubugure na Ndahunga Jean Marie Vianney, iteganya ko « Mu buryo bw'ivangamutungo rusange cyangwa ubw'ivangamutungo w'umuhahano, abashyingiranywe bumvikana ku ucunga umutungo bahuriyeho, bafite kandi ububasha bungana bwo kuwukurikirana no kuwuhagararira ».
- [22] Ingingo ya 21 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 rimaze kuvugwa, iteganya ko "Uko imicungire y'umutungo n'uburyo bawucunga byaba bimeze kose, ubwumvikane bw'abashyingiranywe ari ngombwa mu gutanga ikitimukanwa bwite n'umutungo bahuriyeho no kubitangaho ubundi burenganzira".
- [23] Ingingo ya 22 y'iryo Tegeko, igira iti "Umwe mu bashyingiranywe wagize amasezerano ku mutungo agomba ubwumvikane bwabo bombi, agomba mu gihe cyo kuyakora cyangwa mu gihe cy'amezi atandatu akurikira, gusaba uwo bashyingiranywe ko ayemera. Iryo yemera rimenyeshwa mu nyandiko uwo bagiranye amasezerano; iyo nta gisubizo yatanze nyuma y'ukwezi gukurikira umunsi yabimenyesherejweho, ukwemera kwe gufatwa nk'aho kwatanzwe mu buryo budasubirwaho. Iyo uwagombaga kubyemera atabashije kuboneka cyangwa kugaragaza igitekerezo cye abitewe n'impamvu zikomeye, amasezerano aba ntakuka iyo hashize

umwaka umwe (1) ku bintu byimukanwa n'imyaka itanu (5) ku bintu bitimukanwa".

- [24] Isesengura ry'ingingo ya 21 n'iya 22 zimaze kuvugwa, ryumvikanisha ko ari ihame ku bashyingiranywe kugirana ubwumvikane mbere yo gutanga (donation) umutungo utimukanwa bahuriyeho cyangwa kuwutangaho ubundi burenganzira (kuwutangaho ingwate, kuwugurisha...), igihe amasezerano yakozwe n'umwe muri bo, akaba agomba kuyamenyesha mugenzi we kugira ngo agaragaze ko ayemera, uwo bagiranye amasezerano akabimenyeshwa. Igihe umwe mu bashyingiranywe adashoboye kuboneka ku mpamvu iyo ari yo yose ngo agaragaze ukwemera kwe, umushingamategeko yashyizeho igihe cy'umwaka umwe (1) ku bintu byimukanwa, n'imyaka itanu (5) ku bintu bitimukanwa kugira amasezerano yakozwe umwe mu bashyingiranywe adahari agaragaze ko ayemera cyangwa atayemera, haba nta gikozwe muri icyo gihe, ayo masezerana akaba ndakuka. Iki gihe nicyo umushingamategeko yasanze gikwiye kugira ngo umwe mu bashakanye utarabashije kugaragaza ko yemera amasezerano yakozwe na mugenzi we adahari abe yasaba ko ateshwa agaciro mu gihe asanze atayemera. Ibi bikaba ari ngombwa kandi ku ruhande rw'uwaguze kugira ngo yumve atekanye mu buryo bwo gukoresha umutungo we atikanga ko igihe icyo aricyo cyose hazagira uza kuwutambamira.
- [25] Ku byerekeranye n'uru rubanza, inyandiko ziri muri dosiye zigaragaza ko ku itariki ya 08/02/2002, Nduwayo Nathan, umugabo wa Mukakalisa Dancille, yagiranye amasezerano na Ndahunga Jean Marie Vianney amugurisha inzu iri mu kibanza N° 5798 kiri mu Mudugudu w'Amajyambere, Akagari ka Gasharu, Umurenge wa Kicukiro, Akarere ka Kicukiro, mu

Mujyi wa Kigali, ku mafaranga miliyoni zirindwi n'ibihumbi magana atanu (7.500.000Frw), hari abatangabuhamya Niyonzima Fidèle, Umugwaneza Miriam, Kobusingye Penina na Uwayezu Dorothy.

Izo nyandiko zigaragaza kandi ko ku itariki ya 07/12/2012 Mukakalisa Dancille yaregeye Urukiko Rwisumbuye rwa Nyarugenge asaba gutesha agaciro amasezerano y'ubugure bw'ikibanza n° 5798 kirimo igaraje (garage) kiri mu Mudugudu w'Amajyambere, Akagari ka Gasharu, Umurenge wa Kicukiro, Akarere ka Kicukiro, mu Mujyi wa Kigali, bwabaye hagati ya Nduwayo Nathan na Ndahunga Jean Marie Vianney kubera ko uwagurishije yari umugabo we wemewe n'amategeko, akaba yaragurishije atabizi, arangije yigira i Burayi. Mu mwanzuro we wakozwe na Me Mukamisha Claudine, Mukakalisa Dancille yasobanuye ko yakomeje kwibwira ko inzu ari iyabo kuko atari varamenyeshejwe ubwo bugure kugeza ubwo kwandikisha ubutaka agahurirayo n'umugore wa Nduwayo Jean Marie Vianney nawe wari uje kwandikisha aho hantu, ndetse asobanura ko impamvu atakurikiranye uwo mutungo ari uko yibwiraga ko umugabo we ari we yari yarahakodesheje akajya afata amafaranga yaho ngo yite ku bana babo bari barajyanye.

[27] Urukiko Rwisumbuye rwa Nyarugenge rwemeje ko ikirego cya Mukakalisa Dancille nta shingiro gifite kubera ko hari inyubako zazamuwe kuri ubu butaka hamaze gusenywa izarimo ahari arebera ntagire icyo akora ngo akurikirane abubakaga, nyamara yari afite uburenganzira bungana n'ubw'umugabo we bwo gucunga umutungo wabo, naho iby'uko umugabo we yamubwiye ko yahakodesheje by'igihe kirekire akaba atabitangira ikimenyetso¹. Urukiko Rukuru rwo rwasanze

¹ Reba urubanza RC 0014/13/TGI/NYGE igika cya 7, Urupapuro rwa 2

amasezerano yabaye hagati ya Ndahunga Jean Marie Vianney na Nduwayo Nathan akwiye guteshwa agaciro kubera ko Mukakalisa Dancille atagaragaje ukwemera kwe nk'uko biteganywa mu ngingo ya 22 y'Itegeko ryerekeye imicungire y'umutungo w'abashakanye yibukijwe haruguru ibigaragaza².

[28] Urukiko rw'Ikirenga rurasanga koko mu gihe cyo gukora amasezerano, Nduwayo Nathan ataramenyesheje umugore we Mukakalisa Dancille ngo agaragaze ukwemera kwe kuko atanagaragara mu bayashyizeho umukono, nta n'ikindi kimenyetso gihari cyerekana ko nyuma yo kuyakora yabimumenyesheje kugeza ajya i Burayi mu kwezi kwa 03/2003.

rw'Ikirenga [29] Urukiko rurasanga ariko. n'ubwo Mukakalisa Dancille atamenyeshejwe n'umugabo we Nduwayo Nathan amasezerano y'ubugure yagiranye na Ndahunga Jean Marie Vianney ku mutungo bari basangiye ku mpamvu iyo ariyo yose, yari afite igihe kingana n'imyaka itanu (5) kugira ngo akurikirane umutungo we nk'uko biteganyanywa n'ingingo ya 22 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 yavuzwe haruguru, cyane cyane ko yari amaze kubona ko umugabo we avuga ko batumvikanaga agiye i Burayi, akaba yari afite ububasha bwo kuwukurikirana no kuwuhagararira ahabwa n'ingingo ya 17 y'Itegako rimaze kuvugwa. Kuba rero Mukakalisa Dancille wagombaga kugira icyo avuga ku masezerano y'ubugure yabaye hagati y'umugabo we Nduwayo Nathan na Ndahunga Jean Marie Vianney hagashira imyaka irenga itanu (5) ntacyo akoze, bivuze ko ayo maserano yabaye ndakuka bityo akaba adashobora guseswa ku mpamvu y'uko gusa atayemeye ubwo yakorwaga.

 $^{^2}$ Reba urubanza RCA 0415/13/HC/KIG, igika cya 13, urupapuro rwa 4.

- [30] Urukiko rw'Ikirenga rurasanga imyumvire y'Urukiko Rukuru y'uko ingingo ya 17 y'Itegeko ryerekeye imicungire y'umutungo w'abashyingiranywe ryibukijwe haruguru ireba gusa uburenganzira bwo gucunga umutungo abashyingiranywe basangiye (gestion du patrimoine commun) atari yo, kuko iyo ngingo ivuga neza ko bafite uburenganzira bungana bwo kuwukurikirana no kuwuhagararira, akaba ari yo yahaga Mukakalisa Dancille uburenganzira bwo gukurikirana umutungo asangiye n'umugabo we Ndahunga Nathan ubwo atari ahari, cyane cyane ko yemereye Urukiko ko aho hantu yahanyuraga ajya ku kazi, bikaba bitumvikana ukuntu atabonaga ko hari izindi nyubako ziri kubakwamo kugira ngo agire icyo akora.
- [31] Urukiko rw'Ikirenga rurasanga kandi ibyo Urukiko Rukuru rwemeje mu gika cya 17 ko "nta gihe ntarengwa cyateganyijwe n'itegeko cyo kuba umwe mu bashakanye yakurikirana uburenganzira yavukijwe buteganywa mu ngingo ya 22 yavuzwe haruguru" atari byo, kuko nk'uko byagaragajwe haruguru, umushingamategeko yashyizeho igihe cy'umwaka (1) ku bintu byimukanwa n'igihe cy'imyaka itanu (5) ku mutungo utimukanwa ngo amasezerano abe ndakuka ku washyingiwe utarabashije kugaragaza ukwemera kwe ku masezerano yakozwe na mugenzi we mu gihe atabashije kuboneka cyangwa hari impamvu zikomeye zatumye atabasha kugaragaza igitekerezo cye, iki gihe kikaba giteganyijwe ngo uwumva afite uburenganzira abukurikirane.
- [32] Urukiko rw'Ikirenga rurasanga rero, niba itegeko rivuga ko uwagombaga kwemera amasezerano y'ubugure yakozwe n'uwo bashakanye atabashije kuboneka cyangwa kugaragaza igitekerezo cye abitewe n'impamvu zikomeye, amasezerano aba ntakuka iyo hashize umwaka umwe (1) ku bintu byimukanwa

n'imyaka itanu (5) ku bintu bitimukanwa, bitumvikana ahubwo ukuntu Mukakalisa Dancille we uvuga ko yari ahari, yamara imyaka igera ku icumi (10) yose atarakurikirana umutungo we avuga ko wagurishijwe n'umugabo we atabizi.

- [33] Hashingiwe ku bisobanuro no ku mategeko byagaragajwe haruguru, Urukiko rw'Ikirenga rurasanga amasezerano y'ubugure bw'inzu iri mu kibanza n° 5798 giherereye mu Mudugudu w'Amajyambere, Akagari ka Gasharu, Umurenge wa Kicukiro, Akarere ka Kicukiro, mu Mujyi wa Kigali, yabaye hagati ya Nduwayo Nathan na Ndahunga Jean Marie Vianney ku itariki ya 08/02/2002 atagomba guteshwa agaciro kuko Mukakalisa Dancille yatinze kuyaregera, bityo akaba agumanye agaciro kayo.
- [34] Urukiko rw'Ikirenga rurasanga atari ngombwa gusuzuma ingingo irebana no kuba Mukakalisa Dancille agomba gusubiza Ndahunga Jean Marie Vianney amafaranga ahwanye n'agaciro k'ibyo yongeye ku mutungo uburanwa kubera ko amasezerano yaregeraga ko aseswa agumanye agaciro kayo.

Kumenya niba ababuranyi bakwiye guhabwa indishyi basaba.

[35] Me Habimana Pie asaba ko kuri uru rwego Mukakalisa Dancille ahabwa miliyoni imwe (1.000.000Frw) y'amafaranga y'u Rwanda ahanye n'igihembo cya Avoka n'ibihumbi magana atatu (300.000Frw) y'ikurikiranarubanza. Asaba kandi ko ahabwa miliyoni makumyabiri (20.000.000Frw) y'indishyi z'akababaro kubera agahinda aterwa n'uko atari mu mutungo we kandi ari umukecuru, akaba abayeho nabi, ndetse agasubizwa ibihumbi icumi (10.000Frw) yatanzeho igarama mu Rukiko Rwisumbuye no mu Rukiko Rukuru.

- [36] Me Rukundo Emile avuga ko ntacyo avuga kuri izi ndishyi kuko Ndahunga Jean Marie Vianney asaba ko amasezerano ahabwa agaciro, ahubwo mu mwanzuro yakoze afatanyije na Me Ndagijimana Emmanuel, basaba ko Mukakalisa Dancille na Nduwayo Nathan bategekwa kwishyura Ndahunga Jean Marie Vianney amafaranga y'ikurikiranarubanza angana na miliyoni ebyiri (2.000.000Frw) n'igihembo cya Avoka kingana na miliyoni eshanu (5.000.000Frw) hamwe n'indishyi z'akababaro zingana na miliyoni icumi (10.000.000Frw).
- [37] Ku birebana n'indishyi zisabwa na Ndahunga Jean Marie Vianney, mu nama ntegurarubanza Me Habimana Pie yavuze ko zidakwiye kuko Ndahunga Jean Marie Vianney yakoze amakosa yo kugura na Nduwayo Nathan umugore we adahari, akaba atakuririra ku makosa ye ngo agire ibyo asaba (Nul ne peut invoquer sa propre turpitude).

UKO URUKIKO RUBIBONA

[38] Urukiko rw'Ikirenga rurasanga Mukakalisa Dancille nta ndishyi akwiye guhabwa kuko atsinzwe n'urubanza, ahubwo akaba agomba gufatanya na Nduwayo Nathan kwishyura Ndahunga Jean Marie Vianney amafaranga yakoresheje mu kwishyura Abavoka bamuburanira. Ariko kubera ko ayo yaka ari menshi, bakaba bagomba gufatanya kumuha miliyoni imwe (1.000.000Frw) akubiyemo igihembo Avoka cya n'ay'ikurikiranarubanza. Urukiko indishyi rurasanga z'akababaro Ndahunga Jean Marie Vianney yaka adakwiye kuzihabwa kuko atabashije kuzisobanura.

III. ICYEMEZO CY'URUKIKO

- [39] Rwemeje ko ubujurire bwa Ndahunga Jean Marie Vianney bufite ishingiro ;
- [40] Rwemeje ko amasezerano y'ubugure bw'inzu iri mu kibanza n° 5798 giherereye mu Mudugudu w'Amajyambere, Akagari ka Gasharu, Umurenge wa Kicukiro, Akarere ka Kicukiro, mu Mujyi wa Kigali, yabaye hagati ya Ndahunga Jean Marie Vianney na Nduwayo Nathan ku itariki ya 08/02/2002 agumanye agaciro kayo ;
- [41] Rwemeje ko urubanza n° RCA 0415/13/HC/KIG rwaciwe n'Urukiko Rukuru ku itariki ya 15/05/2015 ruhindutse mu ngingo zarwo zose ;
- [42] Rutegetse Mukakalisa Dancille na Nduwayo Nathan guha Ndahunga Jean Marie Vianney miliyoni imwe (1.000.000 Frw) akubiyemo igihembo cya Avoka n'ay'ikurikiranarubanza;
- [43] Rutegetse Mukakalisa Dancille na Nduwayo Nathan gusubiza Ndahunga Jean Marie Vianney amafaranga ibihumbi ijana (100.000 Frw) y'ingwate y'amagarama yatanze muri uru Rukiko.

IMANZA Z'UBUCURUZI

HABIMANA N'UNDI v. ASIIMWE N'ABANDI

[Rwanda URUKIKO RW'IKIRENGA – RCOMAA 00031/2016/SC - RCOMAA 00036/16/CS (Nyirinkwaya, P.J., Karimunda na Ngagi, J.) 29 Kamena 2018]

Ingwate – Impaka zirebana n'igenagaciro ry'ingwate – Mu gihe habaye kutemeranya ku igenagaciro ry'ingwate hagati y'uwatanze ingwate n'ushinzwe gucunga no kugurisha ingwate, ku busabe bw'ukeka ko yarenganye hakorwa irindi genagaciro.

Ingwate – Iyo ushinzwe gucunga no kugurisha ingwate y'ihaye inshingano z'Umwanditsi Mukuru atabiherewe ububasha n'uwo Amabwiriza ateganya aba arengereye inshingano ze.

Ingwate — Ingaruka z'ugutesha cyamunara agaciro — Iyo cyamunara iteshejwe agaciro, ibintu bisubira uko byari bimeze mbere yuko cyamunara iba.

Incamake y'ikibazo: Asiimwe Frank yahawe inguzanyo na Bank of Kigali Ltd (BK), nawe ayiha ingwate y'inzu ye ifite agaciro ka 121.000.000Frw, yandikishwa muri RDB. Iyi nguzanyo ntiyishyuwe nk'uko bikwiye, maze uwahawe ingwate asaba Umwanditsi Mukuru muri RDB gushyiraho ushinzwe gucunga no kugurisha ingwate, bityo ashyiraho Me Habimana, ari nawe wagurishije iyo ngwate muri cyamunara.

Ibibazo byatangiye kuvuka ubwo ushinzwe gucunga no kugurisha ingwate yashyizeho umugenagaciro mushyashya wakoze irindi genagaciro ritandukanye n'iryakozwe mu gihe yahabwaga inguzanyo yemeza ko inzu ifite agaciro kangana na

65.197.200Frw, mu gihe yari yarahawe agaciro ka 121.000.000Frw ubwo yandikishwaga muri RDB, ibyo byatumye uwatanze ingwate yandikira *Regulatory Council for Property Valuation* asaba ko hashyirwaho abandi bagenagaciro ku nzu ye kuko atemeraga igenagaciro ryakoreshejwe n'ushinzwe gucunga no kugurisha ingwate, abimenyesha Umwanditsi Mukuru n' ushinzwe gucunga no kugurisha ingwate, ariko icyo kigo nticyamusubiza kugera aho cyamunara ikozwe, iyo ngwate ikagurishwa ku giciro cya 55.000.000Frw.

Ibi byatumye uwatanze ingwate aregara Urukiko rw'Ubucuruzi rwa Nyarugenge asaba gutesha agaciro iyo cyamunara. Urwo Rukiko rwaciye urubanza rwemeza ko iyo cyamunara iteshejwe agaciro ku mpamvu yuko hatubahirijwe Amabwiriza y'Umwanditsi Mukuru agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate, rutegeka ushinzwe gucunga no kugurisha ingwate, Bank of Kigali Ltd, Regulatory Council for Property Valuation n'Umwanditsi Mukuru wa RDB, buri wese kumwishyura indishyi z'akababaro n'ay'ikurikiranarubanza.

Uwari ushinzwe gucunga no kugurisha ingwate yajuririye mu Rukiko Rukuru rw'Ubucuruzi avuga ko urukiko rwatesheje agaciro cyamunara ntaho rushingiye, avuga kandi ko rwageneye uwareze indishyi zidafite aho zishingiye. Bank of Kigali Ltd nayo yajuriye inenga kuba Urukiko rwaremeje ko cyamunara iseswa, no kuba rwarategetse ko igomba gutanga indishyi rutagaragaje ikosa yakoze ryatuma izitanga, ivuga ko nta ruhare na rumwe yagize mu migendekere ya cyamunara. Uru rukiko rwemeje ko ubujurire bw' uwari ushinzwe gucunga no kugurisha ingwate nta shingiro bufite naho ubwa Bank of Kigali Ltd bufite ishingiro ku bijyanye n'uko nta ndishyi igomba gucibwa.

Uwari ushinzwe gucunga no kugurisha ingwate na Bank of Kigali Ltd ntibishimiye imikirize y'urubanza, maze buri umwe ajurira mu Rukiko rw'Ikirenga, naho uwatanze ingwate, Uwaguze inzu na Regulatory Council for Property Valuation nabo buri umwe yatanze ubujurire bwuririye ku bundi.

Mu bujurire bwe, uwashinzwe gucunga no kugurisha ingwata avuga ko inkiko zibanza zitagombaga gutesha agaciro cyamunara ku mpamvu yuko ingwate yagurishijwe ku gaciro gato kuko iyo ny'irimutungo atishimiye igenagaciro ryakozwe asaba ko hakorwa irindi genagaciro cyamunara igahagarara, ko igihe atabikoze ibyo bitabazwa ushinzwe kugurisha ingwate kuko atari we uba wakoze iryo genagaciro ngo anaryemeze kandi ko iyo bigaragaye ko agaciro kagenwe ari gato ku giciro nyakuri, icyo gihe inyandiko yemeza Amabwiriza n'icyemezo cy'Umwanditsi Mukuru cyemeza cyamunara nibyo biteshwa agaciro.

Uwatanze ingwate avuga ko nta cyari gutuma cyamunara ikomeza mu gihe ushinzwe gucunga no kugurisha ingwate yabonaga ko nyir'umutungo yari yasabye Urwego rubishizwe ko habanza gukorwa irindi genagaciro kandi ko mu inkiko haburanwaga gutesha agaciro cyamunara yakozwe mu buryo bunyuranyije n'amategeko kuko yari yaramaze gukorwa, ko mu byo aregwa harimo "conflit d'intérets" kuko yakoze inshingano za 'receiver' n'iz'umuhesha w'inkiko icyarimwe, asoza avuga ko adahakana ko ingwate ari iya Bank of Kigali Ltd, ariko avuga ko iyo ngwate ikwiye guhabwa agaciro kayo.

Ku ingingo yo kumenya niba kuba ushinzwe gucunga no kugurisha ingwate ariwe wamenyesheje Amabwiriza y'igurisha muri cyamunara mu mwanya w'Umwanditsi Mukuru yaba impamvu yo gutesha agaciro cyamunara, uwari ushinzwe gucunga no kugurisha ingwate avuga ko Amabwiriza y'Umwanditsi Mukuru ateganya kugenerwa kopi kandi ko

Umwanditsi Mukuru amenyesha uko ashaka, ko kuba bikozwe na ushinzwe gucunga no kugurisha ingwate ntacyo byangirije kandi ko Urukiko rwaragombaga kugaragaza icyo uwatanze ingwate yahombejwe no kuba Umwanditsi Mukuru atariwe wamushyikirije mu ntoki ze inyandiko y'Amabwiriza.

Naho uwatanze ingwate avuga ko Amabwiriza y'Umwanditsi Mukuru muri RDB ateganya ko Umwanditsi Mukuru ariwe ugenera kopi y'inyandiko y'amabwiriza y'igurisha uwatanze ingwate ndetse n'uwahawe ingwate bitarenze amasaha 16 y'akazi amaze kuyemeza, bityo kuba yayihawe n'ushinzwe gucunga no kugurisha ingwate, nukuvuga ko yakoze inshingano z'Umuhesha w'Inkiko kandi nabwo ntiyubahiriza igihe giteganywa n'Amabwiriza kuko we yayamenyeshejwe nyuma y'iminsi itanu aho kuba amasaha 16 ateganywa n'amategeko. Akomeza asobanura ko gutesha agaciro cyamunara bidasaba ko umuntu agaragaza icyo yangirijwe, ahubwo iyo Amabwiriza y'Umwanditsi Mukuru atubahirijwe, cyamunara igomba guteshwa agaciro.

Kuri iyi ngingo, uwaguze inzu muri cyamunara na Bank of Kigali Ltd, bahuza n'uwari ushinzwe gucunga no kugurisha ingwate ko kuba ushinzwe gucunga no kugurisha ingwate ariwe wamenyesheje uwatanze ingwate amabwiriza y'igurisha muri cyamunara mu mwanya w'Umwanditsi Mukuru Atari impamvu yo gutesha agaciro cyamunara kuko icyari kigamijwe ari ukugira ngo amenyeshwe amabwiriza kandi akaba yarayamenye, icyari kigamijwe cyagezweho.

Mu bujurire bwa Bank of Kigali Ltd ivuga ko urukiko rubanza rwitiranyije inshingano z'inzego zarebwaga na cyamunara n'iz'uwahawe uburenganzira bwo kugurisha ingwate, bituma rugera ku mwanzuro utari wo, ko rutayigeneye indishyi z'ugushyorwa mu manza ku maherere kandi rwaremeje ko nta

makosa yakoze muri cyamunara kandi ko rwafashe icyemezo cyo gusesa cyamunara ariko ntirwasobanura uko bizagenda nyuma y'aho kuri yo yari yarahawe ingwate.

Uwatanze ingwate avuga ko ibyo iyo banki ivuga nta shingiro bikwiye guhabwa kubera ko itaburanira izo nzego, zinahagarariwe mu iburanisha kandi ko atari we watumye Bank of Kigali Ltd ishorwa mu manza ahubwo byatewe n'uwari ushinzwe gucunga no kugurisha ingwate kandi ko kuvuga uko ibintu bizagenda nyuma yo gusesa cyamunara atari byo byaregewe, ndetse ko nta n'uwasabye ko urukiko rubifataho icyemezo.

Mu bujurire bwuririye ku bundi bw' uwatanze ingwate, avuga ko ashingiye ku guteza cyamunara inzu ye muburyo bunyuranyije n'amategeko hari ingaruka byamugizeho, asaba ko uwari ushinzwe gucunga no kugurisha ingwate ko yamuha indishyi zitandukanye.

Uwari ushinzwe gucunga no kugurisha ingwate avuga ko izo indishyi atazigenerwa kuko yananiwe kwishyura umwenda bituma habaho kurangiza urubanza ku ngufu akaba ariwe ugomba kwirengera ingaruka zabyo.

Uwaguze inzu, mu bujurire bwe bwuririye ku bundi avuga ko Urukiko rusanze amakosa yarakozwe n'uwari ushinzwe gucunga no kugurisha ingwate yategekwa gutanga indishyi z'ikurikiranarubanza n'igihembo cy'Avoka. Akomeza avuga ko rusanze cyamunara itarakurikije amategeko rwategeka Bank of Kigali Ltd gusubiza amafaranga yishyuwe muri cyamunara kandi ko yamuha amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka kuko kuba ari mu bujuririre bishingiye ku kirego yashowemo nayo.

Mu bujurire bwuririye ku bundi bwa Regulatory Council for Property Valuation, ivuga ko Urukiko rwasuzuma niba, mu rwego rw'amategeko, yarashoboraga kuregwa no gucibwa indishyi mu rubanza mu gihe atari ishyirahamwe, umuryango cyangwa Ikigo cya Leta kuko itagira umutungo, ikaba itagira uyihagarariye mu mategeko kuko ikora nka Komite gusa y'abantu baturuka hirya no hino ariko ikaba atariyo rugaga rw'abagenagaciro kuko rwo rufite ubuzima gatozi. Ntacyo abandi baburanyi bavuze kui ubu bujurire bwuririye ku bundi.

Incamake y'icyemezo : 1. Mu gihe habaye kutemeranya ku igenagaciro ry'ingwate hagati y'uwatanze ingwate n'ushinzwe gucunga no kugurisha ingwate, ku busabe bw'ukeka ko yarenganye hakorwa irindi genagaciro, bitabaye ibyo abashinzwe kugurisha ingwate bakabirengaho cyamunara igakorwa, iteshwa agaciro kuko iba ikozwe mu buryo bunyuranije n'amategekoiro.

- 2. Iyo ushinzwe gucunga no kugurisha ingwate y'ihaye inshingano z'Umwanditsi Mukuru atabiherewe ububasha n'uwo Amabwiriza ateganya abaarengereye inshingano ze, bityo ibyo yakoze bikaba impfabusa.
- 3. Iyo cyamunara iteshejwe agaciro, ibintu bisubira uko byari bimeze mbere yuko cyamunara iba, Bank of Kigali Ltd igasubirana ingwate yayo, ikanasubiza uwaguze ingwate amafaranga yatanze agura iyo ngwate muri cyamunara.
- 4. Indishyi z'akababaro ntizihabwa uzisaba iyo bigaragara ko ari we nyirabayazana mu kutubahiriza inshingano ze ku bushake nubwo yaba yatsinze urubanza.
- 5. Kuba uwari ushinzwe gucunga no kugurisha ingwate yarayigurishije muri cyamuna ku buryo budakurikije amategeko bigatuma uwaguze ahamagazwa mu manza kubera amakosa ye

agomba kumuha amafaranga y'ikurikiranarubanza n'igihembo cya Avoka.

6. Kuba uwatanze ngwate yandikiye Urwego rwa Regulatory Council for Valuation Property arusaba gushyiraho abandi bahanga bakora irindi genagaciro, ariko nti rusubize, cyamunara ikarinda irangira, kandi rwari rufite iyo nshingano ruhabwa n'Itegeko, bihagije kugira ngo rube rwacibwa indishyi.

Ubujurire bw'uwari ushinzwe gucunga no kugurisha ingwate nta shingiro bufite;
Ubujurire bwa Bank of Kigali Ltd nta shingiro bufite;
Ubujurire bwuririye ku bundi bw'uwatanze ingwate bufite ishingiro kuri bimwe;
Ubujurire bwuririye ku bundi bw'uwaguze inzu bufite ishingiro;
Ubujurire bwuririye ku bundi bwa Regulatory Council for Property Valuation nta shingiro bufite;
Cyamunara iteshejwo agaciro;
Ingwate y'amagarama yatanzwe ihwanye n'ibyakozwe mu rubanza.

Amategeko yashingiweho:

Itegeko N° 22/2018 yo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 10 Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 3 Itegeko N° 12/2013 ryo ku wa 22/03/2013 rigenga umurimo w'abahesha b'inkiko ingingo ya 38 Itegeko N° 13/2010 ryo ku wa 07/05/2010 rihindura kandi ryuzuza Itegeko N° 10/2009 ryo ku wa 14/05/2009

- ryerekeye ubugwate ku mutungo utimukanwa, ingingo ya 3
- Itegeko N° 17/2011 ryo ku wa 12/05/2010 rishyiraho kandi rikagena imikorere imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa, ingingo ya 36
- Amabwiriza y'Umwanditsi Mukuru N° 03/2010/Org yo ku wa 16/11/2010 agenga ibyerekeye gukoresha, kugurisha muri cyamunara ndetse no kwegukana ingwate, ingingo ya 9,
- Itegeko Teka ryo kuwa 30/07/1888, rigenga amasezerano cyangwa imirimo nshinganwa, ingingo ya 258.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Asiimwe Frank yahawe inguzanyo na *Bank of Kigali Ltd*, nawe ayiha ingwate y'inzu ye ifite agaciro ka 121.000.000Frw nk'uko byanditswe mu cyemezo cy'ingwate cyatanzwe na *Rwanda Development Board* (RDB).
- [2] Asiimwe Frank yananiwe kwishyura umwenda yahawe, bituma *Bank of Kigali Ltd* isaba Umwanditsi Mukuru muri RDB gushyiraho ushinzwe gucunga no kugurisha ingwate yahawe na Asiimwe Frank, maze Umwanditsi Mukuru ashyiraho Me Habimana Vedaste, ari nawe wagurishije iyo ngwate mu cyamunara yabaye ku wa 29/04/2015.

- [3] Asiimwe Frank yatanze ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge asaba gutesha agaciro cyamunara yabaye ku wa 29/04/2015, ku mpamvu yuko Me Habimana Vedaste wari ushinzwe gucunga no kugurisha iyo ngwate yashyizeho umugenagaciro mushyashya wakoze irindi genagaciro ritandukanye n'iryakozwe mu gihe yahabwaga inguzanyo yemeza ko inzu ifite agaciro kangana na 65.197.200Frw kandi yarahawe agaciro ka 121.000.000Frw mu gihe yahabwaga inguzanyo, bituma inzu ye igurishwa ku mafaranga make cyane, kuko yagurishijwe 55.000.000Frw, kandi igurishwa mu bwiru, atabizi.
- [4] Ku wa 03/12/2015, Urukiko rw'Ubucuruzi rwa Nyarugenge rwaciye urubanza RCOM 1321/15TC/NYGE, rwemeza ko cyamunara iteshejwe agaciro ku mpamvu yuko hatubahirijwe ingingo ya 9 y'Amabwiriza y'Umwanditsi Mukuru N° 03/2010/Org yo ku wa 16/11/2010 agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate, iteganya ko Umwanditsi Mukuru ari we wemeza inyandiko y'amabwiriza y'igurisha, akagenera kopi y'iyi nyandiko uwatanze ingwate ndetse n'uwahawe ingwate bitarenze amasaha 16 y'akazi amaze kuyemeza; mu gihe nyamara ibiteganywa n'iyi ngingo byakozwe na Me Habimana Vedaste kandi bitari mu nshingano ze.
- [5] Urwo Rukiko kandi rwashingiye ku mpamvu yuko Asiimwe Frank yandikiye *Regulatory Council for Property Valuation* asaba ko hashyirwaho abandi bagenagaciro ku nzu ye kuko atemeraga igenagaciro ryakoreshejwe na Me Habimana Vedaste, abimenyesha Umwanditsi Mukuru na Me Habimana Vedaste ubwe, ariko cyamunara irakomeza ngo hashingiwe ku ngingo ya 19 y'Itegeko ryerekeye ubugwate ku mutungo

utimukanwa ivuga ko ucunga ingwate afite inshingano yo kugurisha ingwate ku giciro gikwiye kigenwa hakurikijwe uko ibiciro bigenda bihindagurika ku isoko, mu gihe nyamara ibivugwa muri iyo ngingo bitamuha uburenganzira bwo kugurisha ingwate ku giciro kiri hasi cyangwa bwo gutesha agaciro ingwate ngo abyite ko ari cyo gicirio kiri ku isoko, kuko mu gihe ukora irindi genagaciro ritandukanye n'iryatanzwe hatangwa inguzanyo, agomba kugaragaza ibikoresho bigize ingwate byataye agaciro, atari ukwemeza agaciro kari hasi gusa nta bimenyetso byerekana icyatumye ingwate ita agaciro.

- [6] Urwo Rukiko rwategetse Me Habimana Vedaste, Bank of Kigali Ltd, *Regulatory Council for Property Valuation* n'Umwanditsi Mukuru wa RDB, buri wese kwishyura Asiimwe Frank 1.000.000Frw y'indishyi z'akababaro n'ay'ikurikiranarubanza.
- [7] Me Habimana Vedaste yajuririye Urukiko Rukuru rw'Ubucuruzi anenga kuba Urukiko:
 - 1. rwaratesheje agaciro cyamunara ku mpamvu yuko yamenyesheje inyandiko itanga amabwiriza y'igurisha muri cyamunara mu mwanya w'Umwanditsi Mukuru kandi ari "*Receiver*", nyamara ari inshingano z' Umuhesha w'Inkiko;
 - **2.** rwaratesheje agaciro cyamunara ngo kuko ingwate ya Asiimwe Frank yateshejwe agaciro, nyamara atari byo kuko rwibeshye kubera ko ntaho rwashingiye rwemeza ko iyo ngwate yateshejwe agaciro.
 - **3.** rwaravuze ko uburenganzira bwa Asiimwe Frank bwo gusaba irindi genagaciro butubahirijwe, rushingiye ku ngingo ya 36 y'Itegeko No 17/2011 ryo ku wa 12/05/2010

rishyiraho kandi rikagena imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa, nyamara rwarakoresheje iyo ngingo nabi kuko ikirebwa muri uru rubanza ari igiciro cyatanzwe muri cyamunara, aho kuba igiciro cy'igenagaciro;

- **4.** rwarageneye Asiimwe Frank indishyi zitagira icyo zishingiyeho.
- [8] Bank of Kigali Ltd nayo yajuriye inenga kuba Urukiko rwaremeje ko:
 - 1. cyamunara yakozwe ku wa 29/04/2015, iseswa kuko uwamenyesheje iyemeza ry'amabwiriza atari abifitiye ububasha, ko ariko iyo ngingo yubahirijwe, kuko ntaho ivuga ko kugenera kopi Asiimwe Frank byari gukorwa n'Umwanditsi Mukuru muri RDB, ko ahubwo byari gukorwa n'uwo ari we wese;
 - 2. cyamunara iseswa kuko ingwate yagurishijwe ku giciro gito, ko ariko ibyo atari byo kuko igiciro ingwate izagurishirizwaho muri cyamunara kitagengwa n'igenagaciro nk'uko biteganywa n'ingingo ya 3 ihindura ingingo ya 19 y'Itegeko ryerekeye ubugwate ku mutungo utimukanwa:
 - **3.** Bank of Kigali Ltd igomba gutanga indishyi zingana na 1.000.000Frw rutagaragaje ikosa yakoze ryatuma izitanga, kuko nta ruhare na rumwe yagize mu migendekere ya cyamunara.
- [9] Ku wa 31/03/2016, Urukiko Rukuru rw'Ubucuruzi rwaciye izo manza (RCOMA 0011/16/HCC RCOMA 0035/16/HCC), rwemeza ko ubujurire bwa Me Habimana Vedaste nta shingiro bufite, naho ubujurire bwa *Bank of Kigali*

Ltd bufite ishingiro kuri bimwe, ko urubanza RCOM 1321/15/TC/NYGE ruhindutse ku bijyanye n'uko nta ndishyi Bank of Kigali Ltd igomba gucibwa. Rwategetse Me Habimana Vedaste kwishyura Asiimwe Frank 1.500.000Frw y'ikurikiranarubanza n'igihembo cya Avoka ku rwego rwa mbere na 1.000.000Frw y'ikurikiranarubanza n'igihembo cya Avoka mu bujurire.

- [10] Habimana Vedaste yajuririye Urukiko rw'Ikirenga, arusaba gusuzuma ibibazo bikurikira ari ibyo kumenya niba:
 - 1. cyamunara yakozwe hashyirwa mu bikorwa ibyemezo binyuranye by'ubutegetsi kandi ikemezwa n'icyemezo cy'Umwanditsi Mukuru muri RDB ishobora guteshwa agaciro hataregewe gutesha agaciro icyemezo cy'Umwanditsi Mukuru cyemeza cyamunara;
 - 2. impaka ku igenagaciro cyangwa kunenga imihango y'icyamunara ari impamvu yo gutesha agaciro cyamunara;
 - 3. iyo igenagaciro ryakozwe n'umuhanga kandi rikemezwa n'Umwanditsi Mukururitemewe na nyir'umutungo, bibazwa ushinzwe kugurisha ingwate;
 - 4. kuba nyir'umutungo ugurishwa yasabye urwego rubishinzwe gushyiraho abandi bahanga bagena agaciro bihagarika cyamunara;
 - **5.** isesengura Urukiko rwakoze ariryo ku ngingo ya 19 y'itegeko rigenga ingwate n'ingingo ya 36 y'itegeko N°17/2010 ryo ku wa 12/05 /2010 rishyiraho kandi rikagena imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa:

- 6. amabwiriza N°03/2010/ORG atarubahirijwe, ingaruka byagira n'uwo byaryozwa;
- 7. Urukiko rutarivuguruje;
- 8. atahabwa amafaranga y'ikurikiranarubanza hamwe n'igihembo cya Avoka hamwe n'ibisabwa urukiko.
- [11] Bank of Kigali Ltd nayo yajuriye ivuga ko Urukiko:
 - 1. rutayigeneye indishyi kandi rwaremeje ko nta makosa yakoze muri cyamunara, bityo ikaba yarashowe mu manza ku maherere;
 - 2. rwitiranyije inshingano z'inzego zarebwaga na cyamunara n'iz'uwahawe uburenganzira bwo kugurisha ingwate, bituma rugera ku mwanzuro utari wo;
 - 3. rwafashe icyemezo cyo gusesa cyamunara yo ku wa 29/04/2015, ariko nti rwasobanura uko bizagenda nyuma y'aho kuri Bank of Kigali Ltd yari yarahawe ingwate.
- [12] Urubanza rwaburanishijwe mu ruhame ku wa 27/02/2018, Me Habimana Vedaste ahagarariwe na Me Nkurunziza François-Xavier, Bank of Kigali Ltd ihagarariwe na Me Rutembesa Phocas, Asiimwe Frank yunganiwe na Me Rwigema Vincent, Me Kayihura Didas na Me Munyentwari Charles, *Regulatory Council for Property Valuation* ihagarariwe na Me Ntarugira Nicolas, Musinguzi Hannington ahagarariwe na Me Nsengiyumva Niyondora, naho Umwanditsi Mukuru muri RDB atitabye ariko yarasinyiye itariki y'iburanisha.
- [13] Nyuma yo kumva icyo ababuranyi bavuga ku kutitaba k'Umwanditsi Mukuru,Urukiko rumaze gusesengura ibitegenywa n'ingingo ya 59 y'Itegeko N° 21/2012 ryo ku wa

14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, rwemeje ko urubanza rubanishwa Umwanditsi Mukuru adahari hakazitabwa ku myanzuro ye, habanza gusuzumwa inzitizi y'iburabubasha ry'uru Rukiko yatanzwe na Asiimwe Frank, ariko rusanga iyo nzitizi nta shingiro ifite, urubanza ruburanishwa mu ruhame hasuzumwa imizi yarwo ku wa 29/05/2018, na none Umwanditsi Mukuru atitabye, ariko yaramenyeshejwe uru rubanza, Bank of Kigali Ltd iburanirwa na Me Buzayire Angèle, abandi baburanyi bahagarariwe nka mbere.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

A. Ubujurire bwa Me Habimana Vedaste

[14] Mu bujurire bwe Me Habimana Vedaste yatanze ingingo zigeze ku munani, ariko zishobora kubumbirwa muri ebyiri zijyanye no kumenya niba cyamunara yo ku wa 29/04/2015 yaragamboga guteshwa agaciro n'ingaruka zabyo hasuzumwa ingingo zose ziyikubiyemo nk'uko zagiye zitangwa na Me Nkurunziza François-Xavier, ikindi ni ukumenya niba hari indishyi zatangwa muri urubanza.

- 1. Kumenya niba cyamunara yo ku wa 29/04/2015 yaragamboga guteshwa agaciro n'ingaruka zabyo
- a. Kumenya niba Urukiko Rukuru rw'Ubucuruzi rutaragombaga gutesha agaciro cyamunara ku mpamvu zuko ingwate yagurishijwe ku gaciro gato
- [15] Me Nkurunziza François-Xavier, uburanira Me Habimana Vedaste, avuga ko icyo banenga imikirize y'urubanza RCOMA 0011/16/HCC &RCOMA 035/16/HCC rwaciwe n'Urukiko Rukuru ku wa 31/03/2016, ari uko rwatesheje agaciro cyamunara rushingiye kuko ingwate yagurishijwe ku gaciro gato ugendeye ku igenagaciro ryakozwe hatangwa inguzanyo.
- [16] Akomeza avuga ko Urukiko Rukuru rw'Ubucuruzi rutagombaga gutesha agaciro cyamunara yakozwe ku wa 19/04/2015 ku mpamvu yuko ingwate yagurishijwe ku gaciro gato kuko iyo ny'irimutungo atishimiye igenagaciro ryakozwe asaba ko hakorwa irindi genagaciro cyamunara igahagarara, ko igihe atabikoze ibyo bitabazwa ushinzwe kugurisha ingwate (Habimana Vedaste) kuko atari we uba wakoze iryo genagaciro ngo anaryemeze.
- [17] Asoza avuga ko impaka ku igenagaciro zikemurwa hakurikijwe ibiteganyijwe n'ingingo ya 36 y'Itegeko N° 17/2010 ryo ku wa 12/05/2010 rishyiraho kandi rikagena imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa, ko iyo icyemezo gifashwe n'urwo rwego cyangwa kigaragaje ko agaciro kagenwe ari gato ku giciro nyakuri, icyo gihe inyandiko yemeza Amabwiriza n'icyemezo cy'Umwanditsi Mukuru cyemeza cyamunara biteshwa agaciro.

- [18] Asiimwe Frank avuga ko, uretse inyungu Me Habimana Vedaste we bwite yari afite yo gukomeza cyamunara mu gihe yabonaga ko nyir'umutungo yari yasabye ko habanza gukorwa irindi genagaciro, nta cyari gutuma cyamunara ikomeza kandi ko ari byo byaregewe, ko haburanwaga gutesha agaciro cyamunara yakozwe mu buryo bunyuranyije n'amategeko yari yaramaze gukorwa, bityo akaba asanga Me Habimana Vedaste ashaka kongera kuburana ku bintu yamaze kuburanaho akanabitsindirwa ku rwego rwa mbere n'urwa kabiri. Avuga ko ibyo avuga ko atakoresheje irindi genagaciro (contre expertise) atari kuyikoresha kandi yari yandikiye Urwego rubishizwe. Akomeza avuga ko mu mwaka umwe n'igice umutungo wavanywe ku giciro cya 140.500.00Frw ushyirwa ku giciro cya 65.197.200Frw nacyo cyagezweho bitewe nuko inzu yahimbiwe ibikoresho bitayubatse hagamijwe kuyitesha agaciro n'umugenagaciro washyizweho na Me Habimana Vedaste nk'uko byasobanuwe mu icibwa ry'urubanza RCOM 1321/15/TC/NYGE, ko mu byo Me Habimana Vedaste aregwa harimo "conflit d'intérets", kuko yakoze inshingano za "receiver", n'iz'umuhesha w'inkiko icyarimwe. Asoza avuga ko adahakana ko ingwate ari iya Bank of Kigali Ltd, ariko avuga ko iyo ngwate ikwiye guhabwa agaciro kayo.
- [19] Me Kayihura Didace, wunganira Asiimwe Frank, asobanura ko impamvu y'ingingo ya 7 y'Amabwiriza y'Umwanditsi Mukuru ari ukugira ngo ukoresha igenagaciro (expertise) agereranye n'agaciro ingwate yandikiweho, ko iyo harimo ikinyuranyo gikabije, nawe ashyira mu gaciro akirinda kugurisha ingwate. Avuga ko iyo ingingo z'Amabwiriza zubahirizwa umutungo wa Asiimwe Frank utari guteshwa agaciro ngo ugurishwe ku gaciro gato cyane.

- [20] Me Munyentwari Charles, wunganira Asiimwe Frank, avuga ko icyo basaba uru Rukiko ari ukwemeza ko inkiko zabanje zari zifite ukuri zemeza ko cyamunara iteshejwe agaciro.
- [21] Me Rwigema Vincent, nawe wunganira Asiimwe Frank, avuga ko Itegeko riha ububasha ugurisha ingwate kugurisha ku giciro gikwiye hagendewe kw'ihindagurika ry'ibiciro.
- [22] Me Ntarugira Nicolas, uburanira *Regulatory Council for Property Valuation*, avuga ko ikirego cyashyikirijwe urukiko atari ikirego cy'igenagacagiro ko ahubwo ari icyo gutesha agaciro cyamunara.
- [23] Me Niyondora Nsengiyumva, uburanira Musinguzi Hannington, avuga ko uwo aburanira yazanywe mu rukiko kuko urubanza rumufiteho ingaruka nk'uwaguze muri cyamunara.
- [24] Me Buzayire Angèle, uburanira *Bank of Kigali Ltd*, avuga ko kuba cyamunara yakurwaho kubera ingwate yaba yaragurishijwe ku gaciro gato bidakuraho ko *Bank of Kigali Ltd* yagumana ingwate yayo.
- [25] Umwanditsi Mukuru muri RDB ntacyo yavuze kuri iyi ngingo kuko nta myanzuro ye igaragara kandi nta nubwo yitabiriye inama ntegurarubanza n'amaburanisha kandi yaramenyeshejwe mu buryo bukurikije amategeko.

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[26] Ingingo ya 3 y'Itegeko N° 13/2010 ryo ku wa 07/05/2010 rihindura kandi ryuzuza Itegeko N° 10/2009 ryo ku wa 14/05/2009 ryerekeye ubugwate ku mutungo utimukanwa, mu

gika cyayo cya mbere, iteganya ko "Ucunga ingwate afite inshingano yo kugurisha ingwate ku giciro gikwiye kiri ku isoko, amaze kubimenyesha impande zombi". Naho igika cya kabiri giteganya ko "Igiciro gikwiye kigenwa hakurijwe uko ibiciro bigenda bihindagurika ku isoko. Igurisha ryose rikurikiza inzira y'icyamunara",.

- [27] Ingingo ya 36 y'Itegeko N° 17/2011 ryo ku wa 12/05/2010 rishyiraho kandi rikagena imikorere imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa iteganya ko "Mu gihe habayeho kutemeranya ku igenagaciro ry'umutungo utimukanwa, ukeka ko yarenganye ashyikiriza ikirego Urwego, icyo gihe Urwego rushyiraho abandi bagenagaciro bemewe bagakoresha uburyo bushya bw'igenagaciro, iyo impaka zidakemutse, ikirego gishyikirizwa urukiko rubifitiye ububasha",.
- [28] Ingingo ya 11 y'Amabwiriza y'Umwanditsi Mukuru N° 03/2010/Org yo ku wa 16/11/2010 agenga ibyerekeye gukoresha, kugurisha muri cyamunara ndetse no kwegukana ingwate ivuga ko "Uwahawe ububasha bwo guteza cyamunara ingwate afite inshingano zo kugurisha ku giciro gikwiye hakurikijwe ihindagurika ry'ibiciro ku soko ndetse no ku igenagaciro ry'umutungo ryagaragajwe mu nyandiko y'Amabwiriza y'igurisha",.
- [29] Dosiye y'urubanza igaragaza ko ku wa 02/03/2015, Umwanditsi Mukuru muri RDB yashyize umukono ku nyandiko yitwa "Permit to sale the mortgaged property",, Me Habimana Vedaste, Bank of Kigali Ltd na Asiimwe Frank bahabwa kopi yayo. Muri iyo nyandiko hagaragaramo ko agaciro k'ingwate igihe yandikishwaga ari 121.000.000Frw, ko umwenda wishyurwa Bank of Kigali Ltd ungana na 70.850.000Frw, igihe cyamunara izatangirira n'igihe izasozwa.

- [30] Dosiye igaragaza ko igihe ingwate yajyaga kugurishwa, Me Habimana Vedaste yakoresheje igenagaciro ku wa 07/03/2015 ryerekana ko iyo ngwate ifite agaciro ka 65.197.200Frw. Dosiye igaragaza ko Asiimwe Frank abonye atishimiye iryo genagaciro, ku wa 16/03/2015, yandikiye Regulatory Council for Property Valuation asaba ko hashyirwaho bagenagaciro bo gukora irindi genagaciro abandi (contreexpertise) k'iyari yakoreshejwe na Me Habimana Vedaste, Asiimwe Frank abimenyesha Umwanditsi Mukuru muri RDB, Me Habimana Vedaste na Banki ya Kigali, ariko iryo genagaciro (contre-expertise) ntabwo ryakozwe kuko Asiimwe Frank atigeze abona igisubizo, ahubwo cyamunara yarakomeje kugeze ingwate igurishijwe 55.000.000Frw.
- [31] Urukiko rurasanga, kuva Asiimwe Frank agaragaje ko atemeranya n'igenagaciro ryasabwe na Me Habimana Vedaste wari ushinzwe gucunga no kugurisha ingwate, akandikira Regulatory Council for Property Valuation ayisaba ko hakorwa irindi genagaciro ry'ingwate yari yahaye Banki ya Kigali Ltd, ndetse akanagenera kopi Umwanditsi Mukuru muri RDB, Me Habimana Vedaste na Bank of Kigali Ltd, ariko Me Habimana Vedaste wari uzi neza ko ingingo ya 36 y'Itegeko Nº 17/2011 ryo ku wa 12/05/2010 rishyiraho kandi rikagena imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa iteganya uko bigenda iyo hatabaye kwemeranya ku igenagaciro akabirengaho inzu ikagurishwa ku giciro cya 55.000.000Frw, ibi bigaragaza ko cyamunara yakozwe mu buryo butubahirije amategeko.
- [32] Urukiko rurasanga na none kuba Asiimwe Frank yaranditse asaba ko haba irindi genagaciro ariko ntihagire ubyitaho yaba uwandikiwe cyangwa abagenewe kopi kugeza inzu igurishijwe kuri kimwe cya kabiri (1/2) cy'agaciro yari

yarahawe ubwo ingwate yandikwagwa muri RDB Ltd nyuma y'imyaka ibiri gusa, ibi bigaragaza ko ntaho Me Habimana Vedaste yashingira avuga ko atatesheje agaciro ingwate, kuko igihe yirengangije ko hakorwa irindi genagaciro nk'uko byari byasabwe na nyir'umutungo,kugira ngo rigaragaze uko ibiciro bihagaze ku isoko hanyuma ingwate ikagurishwa ku gaciro kari hasi cyane y'ako yari ifite, byumvikana ko Me Habimimana Vedaste atubahirije ibiteganywa n'ingingo ya 3 y'Itegeko No 13/2010 ryo ku wa 07/05/2010 rihindura kandi ryuzuza Itegeko Nº 10/2009 ryo ku wa 14/05/2009 ryerekeye ubugwate ku mutungo utimukanwa, mu gika cyayo cya mbere, ndetse n'ingingo ya 11 y'Amabwiriza y'Umwanditsi Mukuru Nº 03/2010/Org yo ku wa 16/11/2010 agenga ibyerekeye gukoresha, kugurisha muri cyamunara ndetse no kwegukana ingwate ziteganya ko "Ucunga ingwate afite inshingano yo kugurisha ingwate ku giciro gikwiye kiri ku isoko, amaze kubimenyesha impande zombi".

- [33] Urukiko rurasanga nk'uko inkiko zabanje zabibonye, kuba Asiimwe Frank yari yaranenze igenagaciro ryakozwe n'Umugenagaciro washyizweho na Me Habimana Vedaste, haragombaga gukoreshwa irindi genagaciro kuko ari uko amategeko abiteganya, bityo cyamunara yakozwe ku wa 29/04/2015 ikaba igomba guteshwa agaciro.
- b. Kumenya niba ku kuba Me Habimana Vedaste ariwe wamenyesheje Amabwiriza y'igurisha muri cyamunara mu mwanya w'Umwanditsi Mukuru yaba impamvu yo gutesha agaciro cyamunara
- [34] Me Nkurunziza François-Xavier, uhagarariye Me Habimana Vedaste, avuga ko kuba yarashyizweho nk'ushinzwe kugurisha ingwate n'icyemezo cy'Umwanditsi Mukuru muri

RDB, agafata icyemezo cyo kumuha amabwiriza ndetse n'icyemezo cyemeza ko ibyo yashyiriweho yabikoze uko amategeko abiteganya, bivuze ko nyir'umutungo wagurishijwe adashobora kurega asaba gutesha agaciro cyamunara atabanje gutesha agaciro ibyemezo binyuranye byafashwe n'urwego rw'ubutegetsi, yishyingikirije ko atemera igenagaciro ry'umutungo we, cyangwa ko n'imihango yo kugurisha ayinenga.

- [35] Me Nkurunziza François Xavier, uburanira Me Habimana Vedaste, avuga ko Amabwiriza y'Umwanditsi Mukuru ateganya kugenerwa kopi aho kubakumenyeshwa kandi ko Umwanditsi Mukuru amenyesha uko ashaka, ko kuba bikozwe na "Receiver" ntacyo byangirije, akaba asanga Urukiko rwaragombaga kugaragaza icyo Asiimwe Frank yahombejwe no kuba Umwanditsi Mukuru atariwe wamushyikirije mu ntoki ze inyandiko y'Amabwiriza; ko, uretse nibyo, Urukiko rwivuguruje aho ku rupapuro rwa 9, agace ka 26, rwavuze ko kugenera kopi ari inshingano z'Umwanditsi Mukuru, kandi ko ari we ubibazwa iyo kumenyesha bidakurikije amategeko, naho ku rupapuro rwa 14, agace ka 53, rukavuga ko Habimana Vedaste atagaragaje ubushishozi n'ubwitonzi no kwirinda kubogama, ko rero yakoze ikosa ryagize ingaruka kuri Asiimwe Frank.
- [36] Asiimwe Frank avuga ko ingingo ya 9 y'Amabwiriza y'Umwanditsi Mukuru muri RDB iteganya ko Umwanditsi Mukuru ariwe ugenera kopi y'inyandiko y'amabwiriza y'igurisha uwatanze ingwate ndetse n'uwahawe ingwate bitarenze amasaha 16 y'akazi amaze kuyemeza. Avuga ko Me Habimana Vedaste nka *Receiver* yakoze inshingano z'Umuhesha w'Inkiko kandi nabwo ntiyubahiriza igihe giteganywa n'Amabwiriza kuko Amabwiriza yo ku wa 25/03/2015

yayamenyeshejwe ku wa 30/03/2015, bivuze nyuma y'iminsi itanu aho kuba amasaha 16 ateganywa n'amategeko.

- [37] Me Kayihura Didace, Me Munyentwari Charles na Me Rwigema Vincent, bose bunganira Asiimwe Frank bavuga ko ingingo ya 9 y'Amabwiriza y'Umwanditsi Mukuru muri RDB iteganya ko iyo Umwanditsi Mukuru amaze kwemeza amabwiriza y'igurisha, agenera kopi uwatanze ingwate, bavuga ko uwo bunganira atamenyeshejwe n'Umwanditsi Mukuru, kandi ingingo z'Amabwiriza zarashyizweho hagamijwe guca akajagari kagaragara muri cyamunara, ko gutesha agaciro cyamunara bidasaba ko umuntu agaragaza icyo yangirijwe, ko ahubwo iyo Amabwiriza y'Umwanditsi Mukuru atubahirijwe, cyamunara igomba guteshwa agaciro, ko kuba imigenzo (procédures) itarubahirijwe ari impamvu yo gutesha agaciro kuko iyo migenzo ari ndemyagihugu.
- [38] Me Niyondora Nsengiyumva, avuga ko ku bijyanye n'ibiteganywa n'ingingo ya 9 y'Amabwiriza y'Umwanditsi Mukuru, iyi ngingo ivuga ko iyo Umwanditsi Mukuru amaze kwemeza amabwiriza agenderwaho abimenyesha uwatanze ingwate bitarenze amasaha 16, ko kuba inkiko zaravuze ko kutabyubahiriza yaba impamvu yo gutesha agaciro cyamunara, abona ntacyo amabwiriza yateganyije mu gihe bitubahirijwe, abona ko niba icyari kigamijwe ari ukugira ngo Asiimwe Frank amenyeshwe amabwiriza kandi akaba yarayamenye, iyo itaba impamvu yo gutesha agaciro cyamunara kuko icyari kigamijwe cyagezweho. Ku byerekeye kumenya niba imigenzo iteganywa n'Amabwiriza y'Umwandatsi Mukuru RDB indemyagihugu avuga ko atari ndemyagihugu (d'ordre public) kuko itajyanye n'imiburanishirize y'imanza (procedure judiciaire).

- [39] Me Buzayire Angèle, uburanira *Bank of Kigali Ltd*, avuga ko kuba Asiimwe Frank ataramenyeshwe inyandiko y'amabwiriza y'igurisha, iyo itaba impamvu yo gutesha agaciro cyamunara. Akomeza avuga ko imigenzo iteganywa n'Amabwiriza atari indemyagihugu, ko rero bitavuze ko kuba hari imigenzo itarubahirijwe muri cyamunara, ibyo byatuma cyamunara iteshwa agaciro.
- [40] Uhagarariye Regulatory Council for Property Valuation ndetse n'Umwanditsi Mukuru ntacyo bavuga kuri iyi ngingo.

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- [41] Ingingo ya 9 y'Amabwiriza y'Umwanditsi Mukuru yibukijwe haruguru iteganya ibikurikira: "Umwanditsi Mukuru niwe wemeza inyandiko y'amabwiriza y'igurisha. Umwanditsi Mukuru agenera kopi y'iyi nyandiko uwatanze ingwate ndetse n'uwahawe ingwate bitarenze amasaha 16 y'akazi amaze kuyemeza".
- [42] Dosiye igaragaza ko ku wa 10/03/2015, Me Habimana Vedaste yoherereje Umwanditsi Mukuru muri RDB Amabwiriza y'igurisha ry'ingwate ya Asiimwe Frank amusaba kuyemeza, agenera kopi Umuyobozi Mukuru wa Bank of Kigali Ltd na Asiimwe Frank, ariko uyu akaba yarayakiriye ku wa 15/03/2015. Dosiye igaragaza ko ku wa 25/03/2015, Umwanditsi Mukuru muri RDB yandikiye Me Habimana Vedaste amumenyesha ko yemeje amabwiriza y'igurisha ry'ingwate ya Asiimwe Frank agenera kopi Bank of Kigali Ltd na Asiimwe Frank. Ku wa 30/03/2015, Me Habimana Vedaste nibwo yashyikirije Asiimwe Frank inyandiko y'amabwiriza y'igurisha ayisigiye umukozi we Jesika.

- [43] Urukiko rurasanga ingingo ya 9 y'Amabwiriza y'Umwanditsi Mukuru iteganya gusa ko Umwanditsi Mukuru agenera kopi y'inyandiko y'amabwiriza uwatanze ingwate n'uwahawe ingwate bitarenze amasaha 16 y'akazi amaze kuyemeza. Ikigaragara nuko Umwanditsi Mukuru yageneye kopi Asiimwe Frank, ariko uyu ayishyikirizwa na Me Habimana Vedaste ku wa 30/03/2015. Isesengura ry'iyi ngingo ryerekana ko ivuga gusa ibyo kugena kopi ariko ntivuga uburyo iyo kopi ishyikirizwa uwo yagenewe, nta nubwo ivuga ko Umwanditsi Mukuru ariwe uyishyikiriza uwatanze ingwate. Nubwo iyi ngingo itavuga ko Umwanditsi Mukuru ariwe utanga iyi nyandiko, ariko ikigaragara nuko afite ishingano yo kumenya no guteganya uburyo iyi nyandiko yagera k'uwo yagenewe mu masaha yateganyijwe n'Amabwiriza.
- [44] Urukiko rurasanga nta hantu na hamwe muri dosiye hagaragaza ko Me Habimana Vedaste yaba yarahawe inshingano n'Umwanditsi Mukuru yo gushyikiriza Asiimwe Frank kopi y'inyandiko y'amabwiriza. Rurasanga nk'uko Urukiko Rukuru rw'Ubucuruzi rwabibonye kuba Me Habimana Vedaste yarihaye inshingano z'Umwanditsi Mukuru atabiherewe ububasha n'uwo Amabwiriza ateganya, ari ukurengera ku nshingano ze kuko nubwo yaba ari Umuhesha w'Inkiko w'umwuga, yagombye kubanza gukorana amasezerano yanditse n'uwamwiyambaje nk'uko biteganywa n'ingingo ya 38 y'Itegeko Nº 12/2013 ryo ku wa 22/03/2013 rigenga umurimo w'abahesha b'inkiko ivuga ko mbere yo kurangiza ibyemezo, Umuhesha w'Inkiko w'umwuga abanza kugirana amasezerano yanditse n'uwamwiyambaje. Urukiko rurasanga kuba nta kigaragaza ko Umwanditsi Mukuru muri RDB yaba yariyambaje Me Habimana Vedaste nk'Umuhesha w'inkiko, bivuze ko ibyo yakoze byose yabikoze atabyemerewe n'ubufitiye ububasha, bivuze ko atubahirije

ibiteganywa n'amategeko, bityo ibyo yakoze bikaba ari impfabusa.

- [45] Urukiko rurasanga imvugo y'ababuranira Habimana Vedaste, Bank of Kigali Ltd na Musinguzi Hannington ko kuba Asiimwe Frank yarashyikirijwe kopi y'inyandiko y'amabwiriza na Me Habimana Vedaste ntacyo byamwangirije, ikaba itaba impamvu yo gutesha agaciro cyamunara, cyane cyane ko imigenzo ya cyamunara atari indemyagihugu, itahabwa ishingiro, kuko muri rurasange amabwirizwa yashyiriweho kugira ngo uburenganzira bwa buri ruhande cyamunara ireba bwubahirizwe kandi ibintu bikorwe kuri gahunda, kuba bitarubahirijwe birahagije kugira ngo Asiimwe Frank asabe ko bikorwa mu buryo bwateganyijwe bitabaye ngombwa ko atanga ibimenyetso y'ibyangirijwe. Urukiko rurasanga na none ikigamijwe atari ukumenya niba imigendekere iteganywa n'amabwiriza ari amategeko ndemyagihugu cyangwa niba atari yo ngo cyamunara ibone guteshwa agaciro, kuko gutesha agaciro cyamunara itubahirije ibiteganywa n'amategeko bidasaba byanze bikunze ko ayo mategeko aba ari amategeko ndemyagihugu, igihe cyose uwo amategeko agamije kurengera akoresheje ubwo bubasha bwe asaba ko ibyakozwe mu buryo butubahirije amategeko kandi bimubangamiye byateshwa agaciro.
- [46] Urukiko rurasanga n'iyo Me Habimana Vedaste yari kuba yemerewe n'amategeko gushyikiriza kopi y'inyandiko y'amabwiriza Asiimwe Frank, na none amasaha 16 ateganywa n'Amabwiriza ntabwo yari kuba yubahirijwe, kuko nk'uko byibukijwe haruguru, inyandiko yakozwe ku wa 25/05/2015 igera kwa Asiimwe Frank ku wa 30/03/2015, iyi nayo ikaba yari kuba impamvu yihagije yo gutuma cyamunara iteshwa agaciro.

[47] Hashingiwe ku ngingo z'amategeko, Amabwiriza n'ibisobanuro byavuzwe haruguru, Urukiko rurasanga nk'uko inkiko zabanje zabibonye, cyamunara yabaye ku wa 29/04/2015 hagurishwa ingwate Asiimwe Frank yahaye *Bank of Kigali Ltd* igomba guteshwa agaciro kuko yakozwe mu buryo bunyuranyije n'amategeko, bityo ibintu bikaba bigomba gusubira uko byari bimeze mbere ya cyamunara.

B. Ubujurire bwa BANK OF KIGALI Ltd

Kumenya niba Urukiko Rukuru rw'Ubucuruzi rwaritiranyije inshingano z'inzego zarebwaga na cyamunara n'iz'uwahawe uburenganzira bwo kugurisha ingwate

- [48] Me Rutembesa Phocas, mu myanzuro ye, avuga ko Urukiko Rukururw'Ubucuruzi rwitiranyije inshingano z'inzego zarebwaga na cyamunara n'iz'uwahawe uburenganzira bwo kugurisha ingwate, bituma rugera ku mwanzuro utari wo.
- [49] Asiimwe Frank avuga ko kuba *Bank of Kigali Ltd* itagaragaza ikimenyetso ko ihagarariye izo nzego irimo kuvugira muri uru rubanza, ibyo ivuga nta shingiro bikwiye guhabwa kubera ko *Bank of Kigali Ltd* itaburanira izo nzego, dore ko zari zinahagarariwe mu iburanisha.
- [50] Me Niyondora Nsengiyumva, uburanira Musinguzi Hannington, avuga ko iyi ngingo y'ubujurire itareba Musinguzi Hannington kubera ko we yitabiriye cyamunara kandi kubahiriza imihango ibanziriza cyamunara bikaba biri mu nshingano z'Umwanditsi Mukuru na "Receiver".

UKO URUKIKO RUBIBONA

- [51] Ingingo ya 3 y'Itegeko Nº 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo iteganya ko : "Buri muburanyi agomba kugaragaza ukuri kw'ibyo aburana".
- [52] Kuri iyi ngingo y'ubujurire, usibye kuba *Bank of Kigali Ltd* yivugira gusa ko Urukiko Rukuru rw'Ubucuruzi rwitiranyije inshingano z'inzego zarebwaga na cyamunara n'iz'uwahawe uburenganzira bwo kugurisha ingwate, bituma rugera ku mwanzuro utari wo, Urukiko rurasanga itagaragaza uburyo Urukiko rwaba rwaritiranyije izo nshingano, kandi nta nubwo igaragaza umwanzuro utari wo Urukiko rwagezeho n'icyo byaba byarayangirije, kuko rwasobanuye neza inshingano za buri rwego, runagaragaza ko Me Habimana Vedaste yakoze inshingano atahawe n'Umwanditsi Mukuru, bityo iyi ngingo y'ubujurire ikaba nta shingiro yahabwa.

Kumenya niba Bank of Kigali Ltd yaragombaga kugenerwa indishyi zo kuba yarashowe mu manza nta mpamvu

- [53] Me Rutembesa Phocas, uhagarariye Bank of Kigali Ltd, mu myanzuro ye avuga ko Urukiko Rukuru rw'Ubucuruzi rutageneye uwo ahagarariye indishyi kandi rwaremeje ko nta makosa yakoze muri cyamunara, bityo ikaba yarashowe mu manza ku maherere.
- [54] Asiimwe Frank avuga ko iyi mpamvu nta shingiro yahabwa, kubera ko Urukiko Rukuru rw'Ubucuruzi rwagaragaje ko atari we watumye Bank of Kigali Ltd ishorwa mu manza, ko ahubwo byatewe na Me Habimana Vedaste, ibyo rukaba rwarabisobanuye neza mu gika cya 58, ku rupapuro rwa 15,

cy'urubanza rujuririrwa, bityo ko izo ndishyi Bank of Kigali Ltd izishakira k'utagomba kuzitanga, ikaba idakwiye kuzihabwa.

UKO URUKIKO RUBIBONA

Urukiko rurasanga kuba Urukiko Rukuru rw'Ubucuruzi rwaravuze ko Bank of Kigali Ltd itagombaga gucibwa indishyi kubera ko atariyo yakoze amakosa yatumye cyamunara iteshwa agaciro bidashatse kuvuga ko yagombaga kugenerwa indishyi na Asiimwe Frank. Rurasanga ahubwo mu gihe bigaragaye ko Asiimwe Frank ariwe wari utsinze urubanza kubera ko ingwate yatanze yagurishijwe mu cyamunara ku buryo budakurikije amategeko bigatuma iyo cyamunara iteshwa byumvikana ko atari we wari guha Bank of Kigali Ltd indishyi kuko atari we watumye Bank of Kigali Ltd ishorwa mu manza, ahubwo byatewe na Me Habimana Vedaste wagurishije ingwate yatanzwe na Asiimwe Frank mu buryo budakurikije amategeko, akaba ari nawe Bank of Kigali Ltd yagombaga gusaba izo ndishyi, kuba itarabikoze rero igomba kwirengera izo ngaruka, bityo nk'uko Urukiko Rukuru rw'Ubucuruzi rwabibonye nta ndishyi Bank of Kigali yagombaga kugenerwa.

Kumenya niba Urukiko Rukuru rw'Ubucuruzi rwari rufite inshingano yo gusobanura uko bizagenda nyuma yo gusesa cyamunara kuri Bank of Kigali Ltd yari yarahawe ingwate

- [56] Ababuranira *Bank of Kigali Ltd* bavuga ko Urukiko Rukuru rw'Ubucuruzi rwafashe icyemezo cyo gusesa cyamunara yo ku wa 29/04/2015, nyamara ntirwasobanura uko bizagenda nyuma y'aho kuri *Bank of Kigali Ltd* yari yarahawe ingwate.
- [57] Asiimwe Frank avuga ko iyi mpamvu nta shingiro yahabwa kubera ko kuvuga uko ibintu bizagenda nyuma yo

gusesa cyamunara atari byo byaregewe, ndetse ko nta n'uwasabye ko urukiko rubifataho icyemezo, bityo urukiko rukaba rutari guca urubanza kukitasabwe kuko byaba binyuranyije n'ibiteganywa n'ingingo ya 7 y'Itegeko N° 21/2012 yo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko: "Umucamanza aca urubanza ku cyasabwe cyose kandi kuri icyo cyonyine".

[58] Me Niyondora Nsengiyumva avuga ko kuri iyi ngingo Urukiko rwabivuga ku buryo bweruye cyangwa buteruye, ikizwi iyo cyamunara iteshejwe agaciro ibintu bisubira uko byari bimeze. Akomeza avuga ko inzu ikomeza kuba ingwate ya *Bank of Kigali Ltd* kugeza umwenda wishyuwe ku neza cyangwa hagakorwa cyamunara mu buryo bukurikije amategeko.

UKO URUKIKO RUBIBONA

- [59] Ingingo ya 10 y'Itegeko N° 22/2018 yo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko "Umucamanza aca urubanza ku cyasabwe cyose kandi kuri icyo cyonyine".
- [60] Dosiye igaragaza ko mu Rukiko Rukuru rw'Ubucuruzi, *Bank of Kigali Ltd* yajuriye inenga kuba Urukiko rwaremeje ko cyamunara yakozwe ku wa 29/04/2015 iseswa kuko uwamenyesheje iyemeza ry'Amabwiriza atari abifitiye ububasha, n'ingwate ikaba yaragurishijwe ku giciro gito no kuba rwarategetse *Bank of Kigali Ltd* gutanga indishyi zingana na 1.000.000Frw itagaragaje ikosa yakoze.

[61] Urukiko rurasanga, mu gihe Urukiko Rukuru rw'Ubucuruzi rwari rumaze kwemeza ko cyamunara yo ku wa 29/04/2015 iteshejwe agaciro bitari ngombwa kuvuga uko ibintu bizagenda kuri *Bank of Kigali*, kuko nk'uko uburanira Musinguzi Hannington abivuga, Urukiko rwabivuga ku buryo bweruye cyangwa buteruye, ikizwi iyo cyamunara iteshejwe agaciro, ibintu bisubira uko byari bimeze.

C. Ubujurire bwuririye ku bundi n'imyiregurire kuri bwo

C.1. Ubujurire bwuririye ku bundi bwa Asiimwe Frank

Kumenya niba hari indishyi Asiimwe Frank akwiye kugenerwa

[62] Asiimwe Frank avuga ko ashingiye ku kuba inzu ye yaratejwe cyamunara muburyo bunyuranyije n'amategeko ku wa 29/04/2015, akavutswa uburenganzira bwo kubona ibimutunga n'umuryango we, akavutswa uburenganzira bwo kuba mu gice cy'iyo nzu kitakodeshwaga, no kuvutswa uburenganzira bwo gukorera ahari hagenewe"bureau" yakoreragamo, kandi kuva icyo gihe iyo nzu ikaba yaragiye mu maboko y'uwayiguze kandi kugeza ubu cyamunara ikaba yarateshejwe agaciro ndetse bamwe mu bagize uruhare muri iryo gurisha bakaba baremeye imikirize y'urubanza, ariko iyo nzu ikaba ikomeje gukorerwamo ubucuruzi bayibyaza inyungu mu buryo butandukanye, arasaba ko Me Habimana Vedaste wagurishije inzu ye mu buryo bunyuranyije n'amategeko, akamuteza ibihombo, agatuma umuryango we indishyi z'akababaro yacibwa zingana wangara na

- 55.802.800Frw, zikomoka ku kinyuranyo cy'agaciro inzu yari yanditsweho muri RDB ka 121.000.000Frw n'agaciro kahawe inzu ka 65.197.200Frw,amafaranga y'ikurikiranarubanza angana na 2.000.000Frw n'igihembo cy'avoka kingana na 5.000.000Frw kubera gukomeza kumusiragiza mu manza nta mpamvu abizi neza ko ubujurire bwa kabiri yatanze bunyuranyije n'amategeko, ahubwo agamije gukingira ikibaba uwo yagurishije inzu mu buryo bunyuranyije n'amategeko, ariwe Musinguzi Hannington ngo akomeze kuyibyaza umusaruro, ibyo kandi akaba abisaba ashingiye ku ngingo ya 258 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano n'amabwiriza ashyiraho ibihembombonera by'abavoka.
- [63] Me Nkurunziza François Xavier avuga ko indishyi zisabwa na Asiimwe Frank nta shingiro zifite kuko yananiwe kwishyura umwenda wa *Bank of Kigali Ltd* bituma habaho kurangiza urubanza ku ngufu akaba ariwe ugomba kwirengera ingaruka zabyo. Naho ku bijyanye n'igihembo cya Avoka avuga ko abirekera ubushishozi bw'Urukiko uzatsinda akayagenerwa.
- [64] Me Buzayire Angèle, uburanira Bank of Kigali Ltd, avuga ko indishyi Asiimwe Frank asaba atazihabwa kuko ariwe wakoze amakosa, kuko *Bank of Kigali Ltd* nta nzu ikodesha Musinguzi Hannington, ahubwo yaramugurishije kugira ngo igabanye ingano y'umwenda Asiimwe Frank ayibereyemo. Avuga ko ahubwo Asiimwe Frank ariwe ukwiye gusubiza Bank of Kigali Ltd ayo yishyuye Avoka.
- [65] Kuri ubu bujurire, uhagarariye Musinguzi Hannington n'uhagarariye *Regulatory Council for Property Valuation* bashubije ko iyi ngingo itabareba.

UKO URUKIKO RUBIBONA

[66] Urukiko rurasanga indishyi z'akababaro Asiimwe Frank asaba guhabwa atazigenerwa kuko nubwo cyamunara yateshejwe agaciro kubera ko hari imigenzo itarubahirijwe, nawe atakwirengangiza ko ariwe nyirabayazana wa cyamunara kuko atashoboye kuzuza inshingano ze ku bushake, bigatuma biba ngombwa ko habaho cyamunara. Urukiko rurasanga ariko Me Habimana Vedaste akwiye guha Asiimwe Frank amafaranga y'igihembo cya Avoka n'ay'ikurikiranarubanza kuko kuba atarubahirije amategeko aricyo cyatumye Asiimwe aregera inkiko, akaba rero mu bushishozi bw'Urukiko agenewe 1.000.000Frw y'igihembo cya Avoka na 300.000Frw y'ikurikiranarubanza, kuko 2.000.000Frw asaba atayatangira ibimenyetso ko ari yo yagiye kuri uru rubanza.

C.2. Ubujurire bwuririye ku bundi bwa Musinguzi Hannington

Kumenya niba Musinguzi Hannington ashobora gusubizwa 55.000.000Frw yatanze agura inzu ya Asiimwe Frank akaba yagenerwa n'indishyi

- [67] Musinguzi Hannington avuga ko amaze kuzanwa mu manza ku nzego eshatu (3) kandi nta kosa yakoze; ko Urukiko rusanze amakosa yarakozwe na Me Habimana Vedaste maze bigatuma cyamunara iteshwa agaciro, Me Habimana Vedaste yategekwa gutanga indishyi z'ikurikiranarubanza n'igihembo cy'Avoka zingana na 2.000.000Frw.
- [68] Avuga ko yazanywe mu rubanza mu Rukiko Rukuru rw'Ubucuruzi ndetse no mu Rukiko rw'Ikirenga nyamara ntacyo

Bank of Kigali Ltd imurega kugeza ubu kuko nta kosa yakoze, ko Urukiko rusanze cyamunara itarakurikije amategeko, basaba ko rwategeka Bank of Kigali Ltd gusubiza amafaranga angana na 55.000.000Frw yishyuwe muri cyamunara kuko nta mpamvu yayagumana kandi cyamunara itagifite agaciro. Asaba kandi urukiko gutegeka *Bank of Kigali Ltd* kumugenera 2.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka kuko kuba ari mu bujuririre mu Rukiko rw'Ikirenga bishingiye ku kirego yashowemo na Bank of Kigali Ltd.

[69] Asiimwe Frank avuga iko ibyo Musinguzi Hannington avuga nta gaciro byahabwa kuko binyuranyije n'ibyo yivugiye mu myanzuro ye.

UKO URUKIKO RUBIBONA

- [70] Ingingo ya 258 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano iteganya ko: "Igikorwa cyose cyangirije undi gitegeka nyirigukora ikosa rigikomokaho kuriha ibyangiritse".
- [71] Urukiko rurasanga kuba Habimana Vedaste yagurishije ingwate muri cyamuna ku buryo budakurikije amategeko bigatuma Asiimwe Frank aregera inkiko asaba ko iyo cyamunara yateshwa agaciro, inkiko zikayitesha agaciro, kandi akaba n'uru Rukiko ariko rubibona, byaratumye koko Musinguzi Hannington waguze muri cyamunara ahamagazwa mu manza kubera amakosa ya Habimana Vedaste, kandi biba ngombwa ko yiyambaza Avoka wo kumuburanira, biba na ngombwa ko anakurikirana urubunza, akaba rero amafaranga asaba ayakwiye, ariko kubera ko ayo asaba atagaragaza ibimenyetso by'uko ariyo yagiye kuri uru rubanza, mu bushishozi bw'urukiko, rumugeneye

500.000Frw y'igihembo cya Avoka na 300.000Frw y'ikurikiranarubanza, yose hamwe akaba 800.000Frw.

[72] Urukiko rurasanga, nk'uko byibikijwe haruguru, kuba cyamunara iteshejweagaciro, ibintu bigomba gusubira uko byari bimeze mbere yuko cyamunara iba, Bank of Kigali Ltd igasubirana ingwate yayo, ikanasubiza Muzinguzi Hannington 55.000.000Frw yatanze agura inzu mu cyamunara. Urukiko rurasanga ariko 2.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka Musinguzi Hannington asaba Bank of Kigali Ltd ntayo akwiye guhabwa kuko nta kosa Bank of Kigali Ltd yamukoreye.

C.3. Ubujurire bwuririye ku bundi bwa regulatory council for property valuation

[73] Regulatory Council for Property Valuation ivuga ko Urukiko rwasuzuma niba, mu rwego rw'amategeko, yarashoboraga kuregwa no gucibwa indishyi mu rubanza mu gihe atari ishyirahamwe, umuryango cyangwa Ikigo cya Leta; ko rusanze bitari bikwiye, hakurwaho indishyi za 1.000.000Frw zategetswe kuko Regulatory Council itagira umutungo, ikaba itagira uyihagarariye mu mategeko ku buryo tubona nta n'uburyo icyo cyemezo cyashyirwa mu bikorwa kuri yo kuko ikora nka Komite gusa y'abantu baturuka hirya no hino ariko ikaba atariyo rugaga rw'abagenagaciro kuko rwo rufite ubuzima gatozi.

[74] Ntacyo abandi baburanyi bavuze kuri ubu bujurire bwa Regulatory Council for Property Valuation.

UKO URUKIKO RUBIBONA

- [75] Ingingo ya 3, igika cya 3, y'Itegeko N° 17/2010 ryo ku wa 12/05/2010 rishyiraho kandi rikagena imikorere y'umwuga w'igenagaciro ku mutungo utimukanwa mu Rwanda iteganya ko Urugaga rufite ubuzimagatozi kandi rwigenga. Naho ingingo ya 9 y'iryo Tegeko ikaba ari yo ishyiraho Urwego rutunganya imikorere y'abagenagaciro ku mutungo utimukanwa mu Rwanda, kandi igateganya ko urwo rwego rutangira gukora mu minsi itarenze 90 nyuma yuko itegeko ritangazwa mu Igazeti ya Leta ya Repubulika y'u Rwanda.
- [76] Dosiye igaragaza ko ku wa 16/03/2015, Asiimwe Frank yandikiye *Regulatory Council for Property Valuation* arusaba gushyiraho abandi bahanga bakora irindi genagaciro nk'uko biteganywa n'ingingo ya 36 y'Itegeko ryibukijwe mu gika kibanziriza iki, Urwego nti rwasubiza iyo baruwa bityo cyamunara irakomeza irarangira.
- [77] Urukiko rurasanga kuba Asiimwe Frank yandikiye Urwego rwa *Regulatory Council for Valuation Property* arusaba gushyiraho abandi bahanga bakora irindi genagaciro, ariko nti rusubize, cyamunara ikarinda irangira, kandi rwari rufite iyo nshingano ruhabwa n'Itegeko, bihagije kugira ngo rube rwaciwe indishyi. Urukiko rurasanga Urwego rwarahawe iminsi 90 nyuma y'aho Itegeko ritangazwa mu Igazeti ya Leta ya Repubulika y'u Rwanda ngo rube rwatangiye gukora, kuba rero rwarashyizweho mu mwaka wa 2010, Asiimwe Frank akarwandikira mu mwaka wa 2015, nyuma y'imyaka itanu, imvugo y'uburanira *Regulatory Council for Valuation Property* ko nta buryo yarigushyira mu bikorwa ubusabe wa Asiimwe Frank ngo itagira umutungo, ikaba itagira uyihagarariye mu mategeko nta shingiro yahabwa kuko

ingingo ya 3, igika cya 3, y'Itegeko rimaze kwibutswa iteganya ko Urugaga rufite ubuzimagatozi kandi rwigenga, kuba rero rwaba rudakora ibyo ntabwo byabazwa Asiimwe Frank, bityo indishyi za 1.000.000Frw rwaciwe n'Urukiko Rukuru rw'Ubucuruzi zikaba zitagomba kuvanwaho.

D. Kumenya niba indishyi me Habimana Vedaste asaba Asiimwe Frank zifite ishingiro

- [78] Me Nkurunziza François-Xavier, uhagarariye Me Habimana Vedaste asaba uru Rukiko gutegeka Asiimwe Frank kumuha indishyi yasabye mu rwego rwa mbere n'urwa kabiri hiyongereyeho 3.000.000Frw yo muri uru rwego rw'ubujurire no gusubizwa amagarama yose yatanze.
- [79] Asiimwe Frank avuga ko amafaranga asabwa, uretse no kudatangirwa ibimenyetso nta shingiro yahabwa, kubera ko uyasaba ari we wishoye mu manza ku bushake bwe.

UKO URUKIKO RUBIBONA

[80] Urukiko rurasanga kuba Me Habimana Vedaste ariwe wagurishije ingwate mu cyamunara, kandi nk'uko inkiko zibanza zabibonye zigatesha agaciro cyamunara kubera yakozwe mu buryo bunyuranyije n'amategeko, akaba ari ko n'uru Rukiko rubibona, rurasanga indishyi asaba atazihabwa kuko ariwe utsinzwe urubanza.

III. ICYEMEZO CY'URUKIKO

- [81] Rwemeje ko ubujurire bwa Habimana Vedaste nta shingiro bufite;
- [82] Rwemeje ko ubujurire bwa Bank of Kigali Ltd nta shingiro bufite;
- [83] Rwemeje ko ubujurire bwuririye ku bundi bwa Asiimwe Frank bufite ishingiro kuri bimwe;
- [84] Rwemeje ko ubujurire bwuririye ku bundi bwa Musinguzi Hannington bufite ishingiro;
- [85] Rwemeje ko ubujurire bwuririye ku bundi bwa Regulatory Council for Property Valuation nta shingiro bufite;
- [86] Rwemeje ko imikirize y'urubanza RCOMA 0011/16/2016 HCC & RCOMA 0035/16/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 31/03/2016 idahindutse, usibye ku ndishyi zagenwe kuri uru rwego no kuba Bank of Kigali Ltd igomba gusubiza Musinguzi Hannington 55.000.000Frw;
- [87] Rutegetse Me Habimana Vedaste guha Asiimwe Frank 1.000.000Frw y'igihembo cya Avoka na 300.000Frw y'ikurikiranarubanza yose hamwe akaba 1.300.000Frw kuri uru rwego;
- [88] Ruvuze ko cyamunara yakozwe ku wa 29/04/2015 iteshejwo agaciro;

- [89] Rutegetse Bank of Kigali Ltd gusubiza Musinguzi Hannington 55.000.000Frw yatanze agura inzu muri cyamunara, nayo ikagumana ingwate yatanzwe na Asiimwe Frank;
- [90] Ruvuze ko ingwate y'amagarama yatanzwe ihwanye n'ibyakozwe mu rubanza.

MUNYANEZA N'UNDI v. ACCESS BANK Ltd

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA 00090/2018/CA (Mukanyundo P.J., Ngagi na Kanyange, J.) 26 Juillet 2019]

Amasezerano – amasezerano y'inguzanyo – Amasezerano y'ubwishingizi – Umwishingizi akomeza kuryozwa inshingano zo kwishyura umwenda kugeza habonetse impamvu mu ziteganywa n'amategeko zizimya ubwishingire.

Amasezerano – Amasezerano y'inguzanyo – Amasezerano y'ubwishingizi – Umwishingizi ntiyakwitwaza ivugururwa ry'amasezerano y'inguzanyo y'ibanze mu gihe iryo vugurura ritahinduye ishingiro ry'ubwo bwishingire.

Incamake y'ikibazo: ACCESS BANK RWANDA Ltd yahaye EXERT ENGINEERING Group Ltd inguzanyo, iyo nguzanyo yishingirwa na Munyaneza Félicien na Mudenge Emmanuel, buri wese yishingira inshingano ziwukomokaho nk'uko bigaragara mu masezerano (personal guarantee).

Uwahawe inguzanyo yananiwe kwishyura bituma banki irega abishingizi mu Rukiko rw'ubucuruzi rwa nyarugenge isaba kwishyurwa umwenda remezo n'inyungu, inasaba indishyi zitandukanye. Uru rukiko rwemeza ko abishingizi bishyura umwenda wose.

Abishingizi ntibishimiye imikirize y'urubanza maze bajurira mu Rukiko Rukuru rw'Ubucuruzi, uru rukiko rwemeza ko ubujurire nta shingiro bufite maze ruhamishaho imikirize y'urubanza rwajuririwe.

Bongeye bajurira mu Rukiko rw'Ubujurire ko Urukiko Rukuru rw'Ubucuruzi rwirengagije nkana ingingo z'amategeko zivuga ko ubwishingire budakekwa, kandi ko bugomba kumenyeshwa umwishingire mu buryo bweruye bavuga ko bamenyeshwa amasezerano yahinduwe aho banki yavuguruye amasezerano y'inguzanyo ku bijyanye n'icyo umwenda ugiye gukora, ariko Urukiko rwemeza ko kuba amasezerano y'inguzanyo yarahinduwe bitabuza ko bagomba kuyishingira; mu gihe kuba umuntu ari umuyobozi wa sosiyete, bitavuze ko iyo amasezerano ahinduwe akomeza byanze bikunze kuba umwishingizi, bityo, bakaba bataryozwa inguzanyo iri mu masezerano avuguruye batigeze bamenyeshwa.

Banki yiregura ivuga ko icyo abishingizi bishingiye ari umwenda atari icyo uzakora, bakaba rero bafite inshingano yo kuwishyura kuko bawishingiye kandi ko kuvuga ko abishingizi baragombaga kumenyeshwa ivugurura ry'amasezerano (amendement), bitari ngombwa kuko batagombaga kongera kwishingira icyo inguzanyo izakoreshwa (affectation) kandi barishingiye umwenda, bityo rero ko kuba amasezerano ya mbere atarahindutse, ahubwo yavuguruwe, nta mpamvu bari kubimenyeshwa.

Incamake y'icyemezo: 1. Umwishingizi akomeza kuryozwa inshingano zo kwishyura umwenda kugeza habonetse impamvu mu ziteganywa n'amategeko zizimya ubwishingire.

2. Umwishingirzi ntiyakwitwaza ivugururwa ry'amasezerano y'inguzanyo y'ibanze ngo areke kuzuza inshingano zo kwishyura umwenda, mu gihe iryo vugurura ritahinduye ishingiro ry'ubwo bwishingire.

Ubujurire nta shingiro bufite.

Amategeko yashingiweho:

Igitabo cya gatatu cy'urwenge rw'amategeko mbonezamubano (CCL III), ingingo ya 552, n'iya 573.

Itegeko N° 45/2011 ryo ku wa 25/11/2011 ryerekeye amasezerano, ingingo ya 113.

Nta manza zifashishijwe.

Urubanza

LIMITERERE Y'URUBANZA

[1] Ku wa 25/09/2014, ACCESS BANK RWANDA Ltd, yagiranye na EXERT ENGINEERING Group Ltd amasezerano y'inguzanyo ingana na 2.070.000.000Frw hiyongereyeho inyungu za 16% ku mwaka; iyo nguzanyo ikaba yarimo ibice 3 ari byo:Term loan facility ingana na 410.000.000Frw ACCESS BANK RWANDA Ltd vagurive EXERT ENGINEERING GROUP Ltd muri COGEBANQUE Rwanda Ltd, Asset Finance ingana na 560.000.000Frw yo kugura amamashini yo gukoresha mu kazi EXERT ENGINEERING GROUP Ltd yari yatsindiye muri MINAGRI na Kaminuza y'U Rwanda, ishami rya finance facility Nyagatare, contract ingana na 1.100.000.000Frw yo gukoreshwa mu kurangiza amasezerano amaze kuvugwa, EXERT ENGINEERING GROUP Ltd yari ifitanye na MINAGRI hamwe na Kaminuza y'URwanda. Mbere y'uko uyu mwenda utangwa, Munyaneza Félicien na Mudenge Emmanuel, buri wese yari yishingiye inshingano ziwukomokaho

nk'uko bigaragara mu masezerano (personal guarantee) bagiranye na ACCESS BANK RWANDA Ltd ku wa 20/05/2014.

- [2] EXERT ENGINEERING GROUP Ltd yananiwe kwishyura umwenda, bituma ACCESS BANK RWANDA Ltd irega Munyaneza Félicien na Mudenge Emmanuel bayishingiye, isaba ko bayishyura umwenda ungana na 2.556.352.640Frw wabazwe kugeza ku wa 01/11/2016 kandi uzakomeza kubarwa kugeza igihe wose uzishyurirwa, bakanayiha indishyi zitandukanye.
- [3] Urubanza rwatangiriye mu Rukiko rw'Ubucuruzi rwa Nyarugenge, Munyaneza Félicien na Mudenge Emmanuel bemera ko koko amasezerano yo ku wa 20/05/2014 yabayeho, ariko ko umwenda bishingiye wamaze kwishyurwa kuko 1.100.000.000Frw ya *Guarantee Line* EXERT ENGINEERING GROUP Ltd itigeze iyahabwa. Babwiye Urukiko ko 970.000.000Frw bemera ko bishingiye ACCESSS BANK RWANDA Ltd yayiyishyuwe igurisha inzu n'imashini bya EXERT ENGINEERING GROUP Ltd zikoreshwa mu bwubatsi byari byatanzweho ingwate.
- [4] Ku wa 13/10/2017, Urukiko rw'Ubucuruzi rwa Nyarugenge rwaciye urubanza, rwemeza ko Munyaneza Félicien na Mudenge Emmanuel batubahirije amasezerano y'ubwishingizi bw'inguzanyo ACCESS BANK RWANDA Ltd yahaye EXERT ENGINEERING GROUP Ltd, ko ibyo bireguza ko hari ingwate zagurishijwe zikishyura umwenda nta shingiro bifite, kandi ko n'ibyo basaba ko itambamira ry'umutungo wabo ryakorewe ku mubitsi w'impapuro mpamo z'ubutaka ryakurwaho, nabyo bidakwiye guhabwa ishingiro.Uru Rukiko rwemeje ko umwenda Munyaneza Félicien na Mudenge Emmanuel bagomba kwishyura ACCESSS BANK RWANDA Ltd ubarwa kugeza ku wa

22/12/2016 ,ubwo Urukiko rwemeje ko hatangijwe ikurikirana ry'igihombo cya EXERT ENGINEERING GROUP Ltd nk'uko bigaragara mu rubanza RCOM 0729/2016/TC/NYGE na R COM 0756/2016/TC/NYGE,rutegeka Munyaneza Félicien na Mudenge Emmanuel kwishyura ACCESS BANK RWANDA Ltd amafaranga angana na 2.594.697.930 Frw y'umwenda wagaragaraga kuri compte ya EXERT ENGINEERING GROUP Ltd kugeza ku wa 26/05/2017 hamwe n'amafaranga 500.000 Frw y'igihembo cya avoka.

- [5] Mudenge Emmanuel na Munyaneza Félicien bajuririye Urukiko Rukuru rw'Ubucuruzi, maze ku wa 21/06/2018, Urukiko Rukuru rw'Ubucuruzi ruca urubanza RCOMA 00723/2017/CHC/HCC, rwemeza ko ubujurire bwa Mudenge Emmanuel na Munyaneza Félicien nta shingiro bufite, ruhamishaho imikirize y'urubanza rwajuririwe, rubategeka guha ACCESS BANK RWANDA Ltd 1.000.000Frw y'ikurikiranarubanza n'igihembo cya Avoka.
- Emmanuel Munyaneza Mudenge na Félicien imikirize v'urubanza, baiuririra ntibishimive Urukiko rw'Ubujurire, bavuga ko Urukiko Rukuru rw'Ubucuruzi rwirengagije nkana ingingo z'amategeko zivuga ko ubwishingire budakekwa, kandi ko bugomba kumenyeshwa umwishingire mu buryo bweruye nk'uko abahanga babiyuga, ntirwaha agaciro ubusabe bwabo bwo gukuraho itambama ryashyizwe ku mitungo yabo kuko umwenda bishingiye warangije kwishyurwa, bakaba bataryozwa inguzanyo iri mu masezerano avuguruye batigeze bamenyeshwa,basaba ko Urukiko rukuraho iri tambama.
- [7] Indi mpamvu y'ubujurire batanga, ni uko badakwiye kuryozwa umwenda wa 1,100,000,000Frw kuko nta masezerano y'ubwishingire avugurura aya mbere bagiranye na ACCESS

BANK RWANDA Ltd ngo bemeranye ku bijyanye n'icyo umwenda ugiye gukora. Bavuga ko rero nta kuntu baryozwa inguzanyo kuko amasezerano agira ingaruka ku bayagiranye.

- ruhame rwaburanishijwe mu [8] Urubanza wa 07/05/2019, Mudenge Emmanuel na Munyaneza Félicien bahagarariwe na Me Mugengangabo Jean Népomuscène, naho ACCESS BANK RWANDA Ltd ihagarariwe Bizumuremyi Isaac, wahise azamura inzitizi y'uko Umwanditsi Mukuru w'Urukiko rw'Ubujurire yari afite inshingano yo gusuzuma inzitizi yo kutakira ubujurire bwa kabiri bwatanzwe na Mudenge Emmanuel na Munyaneza Félicien kuko batsinzwe mu nkiko zombi ku mpamvu zimwe, ashingiye ku ngingo ya 52 y'Itegeko Nº 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko, asaba ko Urukiko rumutegeka kubisuzuma kuko atabikoze, aho kugira ngo bisuzumwe bwa mbere n'inteko iburanisha urubanza. Bitewe n'uko Me Bizumuremyi Isaac yari yashyize imyanzuro y'iyi nzitizi muri IECMS bucya iburanisha riba, Urukiko rwafashe icyemezo cyo kwimura iburanisha kugira ngo Me Mugengangabo Jean Népomuscène abashe gutegura imyanzuro yo kwiregura, iburanisha rishyirwa ku wa 14/05/2019.
- [9] Kuri iyo tariki, urubanza rwaburanishijwe mu ruhame, ababuranyi bahagarariwe nka mbere, icyo kibazo aba ari cyo cyonyine kigibwaho impaka. Ku wa 24/05/2019, Urukiko rwafashe icyemezo ko ibyo ACCESS BANK RWANDA Ltd isaba ko Umwanditsi Mukuru yakongera gusuzuma iyakirwa ry'ikirego cy'ubujurire bwa kabiri bwatanzwe na Mudenge Emmanuel na Munyaneza Félicien nta shingiro bifite, rwemeza ko iburanisha rizakomeza ku wa 24/06/2019.
- [10] Kuri iyo tariki, urubanza rwaburanishijwe mu ruhame, impande zombi zihagarariwe nka mbere, Me Bizumuremyi Isaac

avuga ko inzitizi y'iburabubasha ry'Urukiko rw'Ubujurire ishingiye y'uko abajuriye batsinzwe ku mpamvu zimwe ku rwego rwa mbere n'urwa kabiri yari yatanze ayiretse; isomwa ry'urubanza rishyirwa ku wa 26/07/2019.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

Kumenya niba Munyaneza Félicien na Mudenge Emmanuel bataryozwa inguzanyo iri mu masezerano avuguruye kuko batayamenyeshejwe

- [11] Me Mugengangabo Jean Népomuscène, uburanira Munyaneza Félicien na Mudenge Emmanuel, avuga ko Urukiko Rukuru rw'Ubucuruzi rwirengagije nkana ingingo z'amategeko zivuga ko ubwishingire budakekwa, kandi ko bugomba kumenyeshwa umwishingire mu buryo bweruye nk'uko abahanga babivuga, ntirwaha agaciro ubusabe bwabo bwo gukuraho itambama ryashyizwe ku mitungo yabo kuko umwenda bishingiye warangije kwishyurwa, bakaba bataryozwa inguzanyo iri mu masezerano avuguruye batigeze bamenyeshwa.
- [12] Akomeza avuga ko icyo banenga urubanza rwaciwe n'Urukiko Rukuru rw'Ubucuruzi, ari uko rwemeje ko kuba amasezerano y'inguzanyo yarahinduwe bitabuza ko Mudenge Emmanuel na Munyaneza Félicien bagomba kuyishingira; mu gihe kuba umuntu ari umuyobozi wa sosiyete, bitavuze ko iyo amasezerano ahinduwe akomeza byaze bikunze kuba umwishingizi; ko rero umwenda bishingira ari 2.070.000.000Frw hakuwemo 1.100.000.000Frw kuko yo yahinduriwe icyo yari agenewe mu masezerano ya mbere nk'uko bigaragara mu ivugurura ry'amasezerano ryo ku wa 03/06/2014. Asaba Urukiko

ko rwazasuzuma niba igihe habayeho guhindura icyo amafaranga y'umwenda yari agenewe (affectation) hagati ya banki n'uyirimo umwenda, bishyiraho inshingano yo kwishyura uwari wayishingiye mbere y'uko habaho guhindura "affectation" yawo.

- [13] Me Bizumuremyi Isaac avuga ko mu kuvugurura amasezerano, 1.100.000.000Frw yagabanyijwemo ibice bitatu, 700.000.000Frw aba aya "garantie", 300.000.000Frw aba discount naho 100.000.000Frw aba aya overdraft, bivuze ko iyo baba baburana ibyo kuba 1.100.000.000Frw, yarahinduriwe icyo yari yagenewe (affectation), baba baburana 400.000.000Frw kuko 700.000.000Frw yo icyo yari agenewe kitahindutse, kuko yakomeje kuba aya garantie. Avuga ko icyo Mudenge Emmanuel na Munyaneza Félicien bishingiye ari umwenda atari icyo uzakora, bakaba rero bafite inshingano yo kuwishyura kuko bawishingiye, bakaba batazabazwa ibyavuye mu masezerano, ko ibi biteganyijwe mu ngingo ya mbere, agace ka "a", k'amasezerano ya "personal guarantee".
- [14] Akomeza avuga ko ku bijyanye no kuba abishingizi baragombaga kumenyeshwa ivugurura ry'amasezerano (amendement), ibi bitari ngombwa kuko batagombaga kongera kwishingira icyo inguzanyo izakoreshwa (affectation) kandi barishingiye umwenda, bityo rero ko kuba amasezerano ya mbere atarahindutse, ahubwo yavuguruwe, nta mpamvu bari kumenyeshwa.

UKO URUKIKO RUBIBONA

[15] Ingingo ya 552 y'Igitabo cya gatatu cy'urwenge rw'amategeko mbonezamubano iteganya ko: "Uwishingiye undi aba yiyemeje imbere y'ugomba kwishyurwa kuzamwishyura mu

igihe ugomba kwishyura azaba atabikoze". Ingingo ya 573 y'itegeko rimaze kwibutswa iteganya ko: "Inshingano ikomoka ku bwishingire izima kubera impamvu zimwe n'izizimya izindi nshingano.

- [16] Dosiye y'urubanza igaragaza ko ku wa 29/05/2014, ACCESS BANK RWANDA Ltd yakoranye na EXERT ENGINEERING GROUP Ltd amasezerano y'inguzanyo afite No 5855/HCC/LH/TN14 arimo ibyiciro bitatu bigizwe na "Term loan facility" ingana na 410.000.000Frw, ACCESS BANK RWANDA Ltd yaguriye EXERT ENGINEERING GROUP Ltd muri COGEBANQUE RWANDA Ltd, "Asset Finance" ingana na 560.000.000Frw yo kugura amamashini yo gukoresha mu kazi EXERT ENGINEERING GROUP Ltd yari yatsindiye muri MINAGRI na Kaminuza y'u Rwanda, ishami rya Nyagatare, na "contract finance facility" ingana na 1.100.000.000Frw vo gukoresha mu kurangiza amasezerano amaze kuvugwa, Munyaneza Félicien na Mudenge Emmanuel bakaba bari bishingiye iyo nguzanyo ya 2.070.000.000Frw yo ku wa 20/05/2014, nk'uko bigaragazwa n'amasezerano y'ubwishingire vasinyiwe imbere va noteri ku wa 02/06/2014.
- [17] Muri dosiye harimo na none inyandiko yitwa "Amendment N° 1 to the Principle Loan Agreement N° 5855/HCC/LH/TN/14 of May 30, 2014" yo ku wa 03/06/2014 yashyizweho umukono na Munyaneza Félicien nka Managing Director wa EXERT ENGINEERING GROUP Ltd. Mu iriburiro (preambule) ry'ayo masezerano havugwamo ko banki na

nyir'ukugurizwa bemeranyije ko ayo masezerano ari igice cy'amasezerano y'ibanze kandi ko ari amwe mu biyagize¹.

[18] Urukiko rurasanga mu gihe EXERT ENGINEERING GROUP Ltd yahawe inguzanyo inaniwe kwishyura nk'uko bigaragara mu rubanza RCOM 0729/2016/TC/ NYGE na RCOM 0756/2016/TC/NYGE rwemeje itangira ry'ikurikiranwa ry'igihombo cya EXERT ENGINEERING GROUP Ltd, nta cyabuza ACCESS BANK RWANDA Ltd gusaba ko Munyaneza Félicien na Mudenge Emmanuel baryozwa umwenda bishingiye, nk'uko ingingo ya 552 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano yibukijwe haruguru ibiteganya.

[19] Urukiko rurasanga amasezerano yo ku wa 03/06/2014 adasimbura ay'ibanze yo ku wa 29/04/2014, ari nayo arimo umwenda wa 2.070.000.000Frw, Munyaneza Félicien na Mudenge Emmanuel bishingiye, buri wese akishingira inguzanyo yose, ahubwo agize kimwe mu gice cy'ay'ibanze, kandi muri ayo masezerano ibyahinduwe mu bwumvikane bw'impande zombi bikaba bitareba ingingo y'ubwishingire, bivuze ko mu gihe umwenda Munyaneza Félicien na Mudenge Emmanuel bishingiye utarishyurwa, kandi no mu masezerano avugurura aya mbere akaba ntaho bigaragara ko bahinduye ingingo ijyanye n'ubwishingizi bwabo, bakomeze kuryozwa umwenda bishingiye kugeza habonetse impamvu mu zitengwanywa n'amategeko zizimya ubwishingire² nk'uko ingingo ya 573

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¹ The Bank and the Borrower hereby agree that the present addendum agreement constitute part of the principle agreement and forms an integral part of it.

² Ingingo za 98-108 y'Itegeko Nº 45/2011 ryo ku wa 25/11/2011 ryerekeye amasezerano iteganya impamvu zatuma inshingano zivanwaho nko: gusaba ingurane cyangwa isimbura; gusiba inyandiko, kuyica cyangwa kuyisubiza ufite inshingano, kwemera kuvanaho inshingano z'urundi ruhande; guhara

y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano cyavuzwe haruguru ibiteganya.

[20] Urukiko rurasanga ibyo Munyaneza Félicien na Mudenge Emmanuel bavuga ko bataryozwa inguzanyo iri mu masezerano avuguruye batigeze bamenyeshwa, nta shingiro byahabwa kuko nk'uko byibukijwe haruguru, ingingo ijyanye n'ubwishingire itigeze ivugururwa, bivuze ko yagumanye agaciro kayo, cyane cyane ko ariya masezerano yiswe "Amendment No 1 to the Principle Loan Agreement N°5855/HCC/LH/TN/14 of May 30, ataie asimbura amasezerano y'ibanze, varashvizweho umukono na Munyaneza Félicien nka Managing Director wa EXERT ENGINEERING GROUP Ltd.

[21] Urukiko rurasanga na none ibyo bavuga ko kuba affectation ya 1.100.000.000Frw harahinduwe bataryozwa aya mafaranga, nabyo nta shingiro byahabwa kuko icyo bishingiye ari umwenda wose, n'aya 1.100.000.000Frw arimo. Naho kuba baragombaga kumenyeshwa ivugururwa ry'amasezerano, Urukiko rurasanga mu gihe byari bigaragaye ko izindi ngingo z'amasezerano y'ibanze zigumanye agaciro kazo, harimo n'ubwishingire, bitari ngombwa ko bamenyeshwa, ariko kandi rukaba runasanga Munyaneza Félicien wari Managing Director wa EXERT ENGINEERING GROUP Ltd washyize umukono kuri ayo masezerano avugurura aya mbere atasubira inyuma ngo avuge ko batigeze bamenyeshwa ko ishingano zabo zo kwishingira umwenda wa sosiyete zikomezanya n'umwenda iyo sosiyete ifitiye banki.

umwenda; ibisimbura ibisabwa gukorwa, amasezerano asimbura andi, ubwishyu bwumvikanyweho, ubwumvikane bwo gusesa amasezerano; uguharira umwenda n'ihwanya ry'imyenda.

- [22] Hashingiwe ku ngingo z'amategeko zibukijwe no ku bisobanuro bimaze gutangwa, Urukiko rurasanga Munyaneza Félicien na Mudenge Emmanuel ari abishingizi ba EXERT ENGINEERING GROUP Ltd, bakaba bagomba kuryozwa umwenda iyo sosiyete ibereyemo ACCESS BANK RWANDA Ltd.
- 2. Kumenya niba amasezerano y'ubugure bw'ingwate yagumana agaciro kayo ku buryo yaherwaho mu kugabanya umwenda Munyaneza Félicien na Mudenge Emmanuel bishyuzwa.
- [23] Me Mugengangabo Jean Népomuscène, uburanira Munyaneza Félicien na Mudenge Emmanuel, avuga ko amasezerano y'ubugure bw'ingwate y'inzu ku bushake ya EXERT ENGINEERING GROUP Ltd bitabaye ngombwa ko binyura mu cyamunara atagombaga guteshwa agaciro, ko kandi banki yakoze amakosa ubwo yashingiraga ku ibaruwa ya liquidateur yavugaga ko ayo masezerano nta gaciro afite bigatuma isubiza ULTRA INVESTMENT 1.500.000.000Frw yari yatanze igura iyo inzu, ikaba yaraje kongera kugurishwa amafaranga make bigatuma umwenda wa EXERT ENGINEERING GROUP Ltd utagabanyuka cyane.
- [24] Me Bizumuremyi Isaac avuga ko iyi ngwate yagurishijwe na Munyaneza Félicien, kandi nta ruhare ACCESS BANK RWANDA Ltd yabigizemo, usibye gusa kuba yari umuhamya muri ayo masezerano. Akomeza avuga ko liquidateur washyizweho n'Urukiko yandikiye ACCESS BANK RWANDA Ltd ayimenyesha ko ingwate yagurishijwe n'umuntu utabifitiye ububasha, bituma banki isubiza ULTRA INVESTMENT 1.500.000.000Frw yari yaguze iyo inzu, yaje kugurishwa 300.000.000Frw mu buryo bwemewe n'amategeko.

UKO URUKIKO RUBIBONA

- [25] Ingingo ya 113, igika cya mbere, y'Itegeko N° 45/2011 ryo ku wa 25/11/2011 ryerekeye amasezerano iteganya ko: "Amasezerano agira inkurikizi ku bayagiranye (...)".
- [26] Urukiko rurasanga amasezerano yo kugurisha ingwate yatanzwe na EXERT ENGINEERING GROUP Ltd yarabaye hagati ya ULTRA INVESTMENT na Munyaneza Félicien, akaba ntaho areba ACCESS BANK RWANDA Ltd, usibye gusa kuba yaravuyemo ubwishyu bwayo nk'uko bwari kuva n'ahandi. Kuba rero uwari ushinzwe gucunga igihombo cya EXERT ENGINEERING GROUP Ltd yarandikiye banki ayisaba gusubiza amafaranga yavuye mu igurisha ry'ingwate, koko banki ikayasubiza, nta kosa banki yakoze kuko itari kugumana ubwishyu buturutse ku igurisha ryateshejwe agaciro.
- [27] Urukiko rurasanga na none n'ubwo ingwate yaje kugurishwa ku mafaranga make cyane, ugereranyije n'aya mbere, nta ruhare banki yabigizemo kuko nta nyungu yari ifite yo gusubiza ubwishyu yari yamaze kwakira cyangwa se yo kwakira ubwishyu buri hasi y'ubwo yari yakiriye mbere.
- [28] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rurasanga ubujurire bwa Munyaneza Félicien na Mudenge Emmanuel kuri iyi ngingo budafite ishingiro kuko ntaho rwahera ruvuga ko amasezerano y'ubugure yateshejwe agaciro kubera ko atujuje ibisabwa n'amategeko yagumaho, n'ubwishyu buyakomokaho ngo nabwo bugumane agaciro.

3. Kumenya ishingiro ry'indishyi zisabwa muri uru rubanza

- [29] Munyaneza Félicien na Mudenge Emmanuel basaba Urukiko gutegeka ko indishyi baciwe (550.000Frw mu Rukiko rw'Ubucuruzi rwa Nyarugenge na 2.000.000Frw mu Rukiko Rukuru rw'Ubucuruzi) zikurwaho kuko ACCESS BANK RWANDA Ltd ari yo yabakuruye mu manza ibaryoza umwenda batishingiye, basaba ko ahubwo ariyo ibaha indishyi zingana na 8.000.000Frw kuri buri wese, y'igihembo cya Avoka wababuraniye kuva mu Rukiko rw'Ubucuruzi rwa Nyarugenge kugera mu Rukiko rw'Ubujurire. Basaba kandi ko Urukiko ruyitegeka kubishyura 100.000 Frw y'amagarama y'urubanza batanze bajuririra urubanza RCOM 00120/2017/TC/NYGE na 150.000Frw batanze bajuririra RCOMA 00723/2017/CHC/HCC, bakanabasubiza 2,000, 000Frw y'ikurikiranarubanza.
- [30] Ku birebana n'izi ndishyi, Me Bizumuremyi Isaac avuga ko Munyaneza Félicien na Mudenge Emmanuel badakwiye gukurirwaho amafaranga baciwe cyangwa guhabwa igihembo cya avoka n'amafaranga y'ikurikiranarubanza basaba, cyeretse mu gihe baba batsinze urubanza.
- [31] ACCESS BANK RWANDA Ltd yo isaba gusubizwa igihembo cya Avoka kingana na 1.000.000Frw kuri buri urega kugira ngo isubizwe ibyo yatanze kuri uru rwego, na 10.000.000Frw y'ikurikiranarubanza kubera ko imaze igihe cy'imyaka irenga ibiri (kuva ku wa 10/01/2017) iburana uru rubanza.

UKO URUKIKO RUBIBONA

- Ingingo ya 111 y'Itegeko $N^022/2018$ ryo ku wa [32] imiburanishirize 29/04/2018 ryerekeye v'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko: "Ikirego cy'amafaranga y'ikurikiranarubanza ari ikirego gishamikira ku kirego cy'iremezo kigamije kwishyuza ibyakoreshejwe rubanza. Ikirego cv'amafaranga mu y'ikurikiranarubanza kiburanishirizwa rimwe n'ikirego cy'iremezo. Gishobora kandi kwakirwa kikanaburanishwa n'iyo ikirego cy'iremezo cyaba kitakiriwe".
- [33] Urukiko rw'Ubujurire rurasanga Munyaneza Félicien na Mudenge Emmanuel badakwiye guhabwa indishyi basaba kubera ko ari bo batubahirije amasezerano bagiranye na ACCESS BANK RWANDA Ltd, bityo rero bakaba batagomba gusaba gusubizwa ibyo baba baratakaje kubera uru rubanza.
- [34] Urukiko rurasanga ACCESS BANK RWANDA Ltd yarashatse umunyamategeko uyiburanira uru rubanza kuri uru rwego, bikaba byumvikana ko yamuhaye ikiguzi kugira ngo akore uwo murimo, bityo rero rukaba rusanga Munyaneza Félicien na Mudenge Emmanuel bagomba kuyiha amafaranga 700.000Frw y'igihembo cya Avoka agenwe mu bushishozi bwarwo kuko rusanga ari mu rugero rukwiye.
- [35] Rurasanga kandi bakwiye kuyiha amafaranga y'ikurikiranarubanza kuri uru rwego kuko ayasabwe ari ikirenga kandi ACCESS BANK RWANDA Ltd ikaba itagaragaza ibimenyetso yahereyeho iyabara, akaba atanagenwa haherewe igihe urubanza rwatangiriye mu mwaka wa 2017 kuko hari ayo bagenewe mu Rukiko Rukuru rw'Ubucuruzi, bityo bakaba bagomba kuyiha amafaranga ibihumbi magana atatu (300.000Frw) kuri uru rwego, hakurikijwe igihe urubanza rumaze muri uru Rukiko n'imirimo yarukozweho. Urukiko

rurasanga ibirebana n'uko ACCESS BANK RWANDA Ltd imaze igihe cy'imyaka ibiri iburana uru rubanza bitashingirwaho mu kuyiha indishyi, kuko Mudenge Emmanuel na Munyaneza Félicien bari bafite uburenganzira bwo kujurira mu gihe batishimiye ibyemezo byafashwe n'inkiko zabanje.

III. ICYEMEZO CY'URUKIKO

- [36] Rwemeje ko ubujurire bwa Mudenge Emmanuel na Munyaneza Félicien nta shingiro bufite;
- [37] Rwemeje ko imikirize y'urubanza RCOMA 00723/2017/CHC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 21/06/2018, idahindutse;
- [38] Rutegetse Mudenge Emmanuel na Munyaneza Félicien guha ACCESS BANK RWANDA Ltd amafaranga ibihumbi magana arindwi (700.000Frw) y'igihembo cya Avoka n'ibihumbi magana atatu (300.000Frw) y'ikurikiranarubanza kuri uru rwego;
- [39] Ruvuze ko amagarama yatanzwe ahwanye n'imirimo yakozwe muri uru rubanza.

URUBANZA RW'UBUTEGETSI

UMUJYI WA KIGALI v. MACO MUSONI

[Rwanda URUKIKO RW'UBUJURIRE – RADA 00005/2018/CA (Mukanyundo, P.J., Mukandamage na Kanyange J.) 05 Ukwakira 2018]

Amasezerano — Amasezerano y'ubugure —Umutungo utimukanwa — Ugushikiriza (délivrance) — Gutanga ibintu byimukanwa byagurishijwe bikajya mu bubasha no mu butunzi bw'umuguzi (délivrance) biba iyo habaye itangwa nyakuri ry'ikintu, cyangwa hatanzwe imfunguzo z'inyubako birimo, cyangwa se hakurikijwe ukwemera kw'abagiranye amasezerano, iyo ugutangwa kw'ikintu kudashobora kuba umunsi w'igurisha cyangwa se niba ugura yari asanzwe agifite ku bundi buryo ubwo ari bwo bwose

Amategeko agenga inshingano – Uburyozwe – Uburangare – Ushinzwe kurinda n'ukwita ku bintu aryozwa ibyangijwe nibyo ashizwe kwitaho mugihe biba byatewe n'uburangare bwe.

Amategeko agenga imiburanishirize y'imanza mbonezamubano – Kwiregura – Uwireguza impamvu itunguranye kandi idashobora kwirindwa (cas de force majeure) – Uwireguza impamvu itunguranye kandi idashobora kwirindwa (cas de force majeure) agomba kugaragaza ko ingaruka zayo zidashoboraga kwirindwa.

Incamake y'ikibazo: Nyuma yaho igiti kiri ku muhanda Remera – Gishushu cyigwiriye imodoka minibus Hiace RAA 089 K ikangirika, nyirayo yareze Umujyi wa Kigali mu Rukiko Rukuru asaba indishyi zikubiyemo yo gukoresha imodoka amafaranga

iyo modoka yingizaga buri munsi mu gihe cyose yamaze ihagaze n'amafaranga y'ikurikiranarubanza. Urwo Rukiko rwaciye urubanza rwemeza ko igiti cyawo cyagwiriye iyo modoka ikangirika, bityo, ukaba ugomba kuryozwa ibyangiritse kuri iyo modoka, rumugenera n'amafaranga iyo modoka yagombaga kuba yarinjije iyo iza kuba ikora.

Umujyi wa Kigali wajuririye urwo rubanza mu Rukiko rw 'Ikirenga, nyuma yivugurura ry'inkiko rwimurirwa mu Rukiko rw'Ubujurire. Aho uvuga ko ubujurire bwayo bushingiye ku mpanvu ko Urukiko rubanza rutasuzumye niba imodoka asabira indishyi ari iy'uwareze cyangwa ari iy'undi muntu, ko rutasesenguye impamvu y'iyo mpanuka ngo rubone ko udakwiye kuryozwa impanuka yatewe n 'impamvu itunguranye kandi itawuturutseho (cas de force majeure) kandi ko rwagennye indishyi nyinshi zidakwiye.

Mu kwiregura nyiri modoka avuga ko yatanze ibimenyetso bigaragaza ko ariwe nyiri imodoka ko kandi nta wundi muntu uyikurikiranye, igiti cyagwiriye iyo modoka ari icy'Umujyi wa Kigali, cyaguye ku uburangare bwa nyiracyo kuko cyari gishaje kandi kititabwagaho, ko kandi indishyi zagenwe n'Urukiko rubanza zikwiye kongerwa kubera ko n'ubu imodoka itarakorwa.

Incamake y'icyemezo:1.Gutanga ibintu byimukanwa byagurishijwe bikajya mu bubasha no mu butunzi bw'umuguzi (délivrance) biba iyo habaye itangwa nyakuri ry'ikintu, cyangwa hatanzwe imfunguzo z'inyubako birimo, cyangwa se hakurikijwe ukwemera kw'abagiranye amasezerano, iyo ugutangwa kw'ikintu kudashobora kuba umunsi w'igurisha cyangwa se niba ugura yari asanzwe agifite ku bundi buryo ubwo ari bwo bwose, bityo n'ubwo mu guhererekanya imodoka yagize impanuka hagati y'abayiguze mu bihe bitandukanye, "carte jaune" yayo

itaragiye ihindurirwa amazina ngo yandikweho uguze, bigaragara ko iyo modoka ari iyo uregwa, kuko yayiguze, ikaba yaragize impanuka ariwe uyitunze n'ibyangombwa byayo..

- 2. Ushinzwe kurinda n'ukwita ku bintu aryozwa ibyangijwe n'ibyo ashizwe kwitaho mugihe biba byatewe n'uburangare bwe, bityo Umujyi wa Kigali ugomba kwishyura amafaranga yo gukoresha imodoka yangiritse kubera impanuka yatewe n'igiti cyayo cyo ku muhanda n'indishyi z'akababaro.
- 3. Uwireguza impamvu itunguranye kandi idashobora kwirindwa agomba kugaragaza ko ingaruka zayo zitashoboraga kwirindwa.

Ubujurire bufite ishingiro kuri bimwe. Ubujurire bwuririye ku bundi bufite ishingiro kuri bimwe. Amagarama y'urubanza aherereye k'Umujyi wa Kigali.

Amategeko yashingiweho:

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 12,152

Itegeko Nº 15/2004 ryo ku wa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 2.

Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano (CCLIII), ingingo ya 260, igika cya 1

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

- [1] Maco Musoni Oscar Léonce yareze Umujyi wa Kigali mu Rukiko Rukuru asaba indishyi zingana na 24.450.000 Frw, zikubiyemo 3.304.000 Frw yo gukoresha imodoka ye minibus Hiace RAA 089 K yagize impanuka ku wa 09/09/2010 itewe n'igiti cyo ku muhanda Remera Gishushu cyayigwiriye ikangirika, 30.000 Frw ku munsi iyo modoka yakoreraga mu gihe cyose yamaze ihagaze kuva ku itariki ya 10/09/2010 kugeza urubanza ruciwe, n'amafaranga y'ikurikiranarubanza.
- [2] Ku wa 19/04/2013, Urukiko Rukuru rwaciye urubanza n° RAD 0108/11/HC/KIG Umujyi wa Kigali udahari, rwemeza ko igiti cyawo cyagwiriye imodoka ya Maco Musoni Oscar Léonce ikangirika cyane nk'uko bigaragazwa n'inyandikomvugo y'impanuka (procès verbal d'accident) yo ku wa 17/09/2010 na "devis de réparation", bityo ukaba ugomba kuryozwa ibyangiritse kuri iyo modoka hashingiwe ku biteganywa n'ingingo ya 260 y'Itegeko ryo ku wa 30/07/1888 ryerekeye imirimo nshinganwa cyangwa amasezerano (CCLIII), maze ukamuha 14.025.000 Frw imodoka yagombaga kuba yarinjije iyo iza kuba ikora, agenwe mu bushishozi, abariwe kuri 15.000Frw ku munsi mu gihe cy'iminsi 935, amafaranga angana na 3.304.000 Frw yo kuyikoresha n'indishyi z'akababaro zingana na 200.000 Frw zo kubura imodoka muri icyo gihe cyose, nazo zigenwe mu bushishozi.
- [3] Umujyi wa Kigali wajuririye urwo rubanza mu Rukiko rw'Ikirenga ruhabwa n^o RADA 0001/14/SC, nyuma 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, maze ruhabwa n° RADA 00005/2018/CA.

- [4] Mu bujurire bwawo, Umujyi wa Kigali uvuga ko Urukiko Rukuru rwageneye indishyi Maco Musoni Oscar Léonce rudasuzumye niba imodoka asabira indishyi ari iye cyangwa ari iy'undi muntu, ko rutasesenguye impamvu y'iyo mpanuka ngo rubone ko udakwiye kuryozwa impanuka yatewe n'impamvu itunguranye kandi itawuturutseho (cas de force majeure), ko ndetse rwagennye indishyi nyinshi zidakwiye, naho MACO MUSONI Oscar Léonce akavuga ko yatanze ibimenyetso bigaragaza ko ariwe nyiri imodoka ko kandi nta wundi muntu uyikurikiranye, ko igiti cyayigwiriye ari icy'Umujyi wa Kigali kubera uburangare wagize kuko cyari gishaje, ko kandi indishyi zagenwe n'Urukiko Rukuru zikwiye kongerwa kubera ko n'ubu imodoka itarakorwa.
- [5] Urubanza rwaburanishijwe mu ruhame ku wa 12/09/2018, Umujyi wa Kigali uhagarariwe na Me Kayiranga Rukumbi Bernard, naho Maco Musoni Oscar Léonce ahagarariwe na Me Bizimana Shoshi Jean Claude.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

A. Ubujurire bw'Umujyi wa Kigali

- a. Kumenya niba Maco Musoni Oscar Léonce yararegeye indishyi zikomoka ku mpanuka y 'imodoka mu Rukiko Rukuru kandi adafite ububasha bwo kuziregera.
- [6] Me Kayiranga Rukumbi Bernard, uburanira Umujyi wa Kigali, avuga ko ikirego gisaba indishyi cyatanzwe na Maco Musoni Oscar Léonce mu Rukiko Rukuru kitagombaga kwakirwa, ko hagombaga kubanza gusuzumwa niba koko imodoka azisabira ari iye. Akomeza avuga ko mu nyandikomvugo y'impanuka (procès-verbaL d'accident) ku rupapuro rwa 4 hagaragaramo ko nyiri imodoka yitwa Ntare Mathias, ko icyari kugaragaza nyirayo ari "carte jaune", ko ariko Maco Musoni Oscar Léonce ntayo yatanze muri urwo Urukiko, hakaba rero nta kigaragaza ukuntu iyo modoka yanditse kuri Ntare Mathias yabaye iya Twagirimana Emmanuel mu buryo bwemewe n'amategeko, ku buryo nawe yashoboraga kuyigurisha maco Musoni Oscar Léonce nk'uko biri mu masezerano y'ubugure.
- [7] Asanga rero mu gihe icyo kimenyetso kiranga imodoka kitagaragajwe, hashobora kuba uburiganya, Maco Musoni Oscar Léonce akiyitirira imodoka y'undi muntu, kuko hari n'igihe umutungo ushobora kubaho udafite nyirawo (bien abandonné), hakaba rero hadakwiye gushingirwa ku ihame ry'uko ufite umutungo wimukanwa ari we nyirawo.

- [8] Me Bizimana Shoshi Jean Claude, uhagarariye Maco Musoni Oscar Léonce, avuga ko muri dosiye harimo amasezerano agaragaza ko yaguze imodoka na Twagirimana Emmanuel ku wa 24/07/2010, ko ndetse Ntare Mathias ugaragara kuri "carte jaune" ko ari nyirayo yiyemereye mu nyandiko ye yo ku wa 09/01/2018 ko iyo modoka itakibarizwa mu mutungo we, kuko yayigurishije na Niyonzima Théogène, waje nawe kuyigurisha na Twagirimana Emmanuel, ko kandi bisanzwe ko umuntu yagura imodoka yanditse ku wundi akayitunga nta nkomyi. Asanga rero imodoka yakoze impanuka ari iya Maco Musoni Oscar Léonce, ko kandi ari Ntare Mathias cyangwa Twagirimana Emmanuel ntawigeze aza kuyiburana ngo habe hariho impaka.
- [9] Akomeza avuga ko "carte jaune" atari cyo kimenyetso kiranga nyiri imodoka n'ubwo ishobora kwifashishwa, ko ariko mu gihe habayeho ubugure, ugura n'ugurisha bakumvikana ku giciro no ku kigurwa, amasezerano y'ubugure aba yuzuye, ko rero guhinduza imodoka muri Rwanda Revenue Authority ari umuhango gusa utuma hamenyekana uzatanga umusoro w'imodoka.

UKO URUKIKO RUBIBONA

[10] Ingingo ya 2 y'Itegeko N° 15/2004 ryo ku wa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo iteganya ko "ikimenyetso cyo mu rubanza ni uburyo bukoreshwa kugira ngo ukuri kw'ibyabaye kugaragare ". Naho ingingo ya 12, igika cya 1, 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 "Urega agomba agomba

kugaragaza ibimenyetso by'ibyo aregera. Iyo abibuze, uwarezwe aratsinda".

- [11] Ku byerekeye inshingano z'umugurisha, ingingo ya 283 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano (CCLIII) iteganya ko gutanga ibintu byimukanwa byagurishijwe bikajya mu bubasha no mu butunzi bw'umuguzi (délivrance) biba iyo habaye itangwa nyakuri ry'ikintu, cyangwa hatanzwe imfunguzo z'inyubako birimo, cyangwa se hakurikijwe ukwemera kw'abagiranye amasezerano, iyo ugutangwa kw'ikintu kudashobora kuba umunsi w'igurisha cyangwa se niba ugura yari asanzwe agifite ku bundi buryo ubwo ari bwo bwose.
- [12] Nk'uko bigaragara mu nyandiko ziri muri dosiye, imodoka minibus Toyota Hiace RAA 089 K yakoze impanuka ku wa 09/09/2010 yanditse kuri Ntare Mathias, uyu akaba yaranditse hamwe n'umugore we Dusabimana Hawa bavuga ko iyo modoka itakiri mu mutungo wabo kuko bayigurishije Niyonzima Théogène, nawe aza kuyigurisha Twagirimana Emmanuel nk'uko amasezerano bagiranye ku wa 30/09/2005 abisobanura, nyuma igurwa na Maco Musoni Oscar Léonce nk'uko amasezerano yo ku wa 24/07/2010 abigaragaza, ikaba rero yarakoze impanuka ayimaranye hafi amezi abiri.
- [13] Urukiko rurasanga n'ubwo mu guhererekanya imodoka minibus Toyota Hiace RAA 089 K hagati y'abayiguze mu bihe bitandukanye, "carte jaune" yayo itaragiye ihindurirwa amazina ngo yandikweho uguze, ibimenyetso Maco Musoni Oscar Léonce yatanze bigaragaza ko ari iye, kuko yayiguze, ikaba yaragize impanuka ariwe uyitunze n'ibyangombwa byayo.

- [14] Urukiko rurasanga kandi, Umujyi wa Kigali nta kimenyetso watanze kigaragaza ko, ubwo iyo modoka yagiraga impanuka, yari idafite nyirayo ku buryo Maco Musoni Oscar Léonce yayiyitiriye.
- [15] Hashingiwe rero ku ngingo z'amategeko zavuzwe haruguru no ku bisobanuro bimaze gutangwa, Urukiko rurasanga ntacyari kubuza Maco Musoni Oscar Léonce kuregera indishyi zikomoka ku mpanuka y'imodoka minibus Toyota Hiace RAA 089 K nk'uko yabikoze, ngo anazihabwe mu gihe zaba zifite ishingiro.

b. Kumenya niba Umujyi wa Kigali utagomba kuryozwa indishyi z'impanuka yatewe n'igiti cyangije imodoka ya Maco Musoni Oscar Léonce

- [16] Me Kayiranga Rukumbi Bernard, uburanira Umujyi wa Kigali, avuga ko Urukiko Rukuru rwageneye indishyi Maco Musoni Oscar Léonce rudasesenguye neza impamvu yateje impanuka, ngo rwumve niba koko Umujyi wa Kigali waryozwa impanuka yatewe n'imvura yaguye irimo umuyaga mwinshi igatuma igiti cyo ku muhanda kigwa.
- [17] Akomeza avuga ko adahakana ko igiti cyagwiriye imodoka ari icy'Umujyi wa Kigali, ko ariko uburyozwe bwawo bwabaho ari uko hagaragaye ko utacunze neza ibiti byawo, ko rero icyabaye atari ukutabyitaho, ahubwo impanuka yatewe n'impamvu Umujyi wa Kigali utashoboraga guteganya cyangwa kwirinda (cas de force majeure), ko rero hashingiwe ku biteganywa n'ingingo ya 46 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano (CCLIII) yakurikizwaga icyo gihe, Umujyi wa Kigali udakwiye kuryozwa indishyi izo arizo zose.

[18] Me Bizimana Shoshi Jean Claude, uhagarariye Maco Musoni Oscar Léonce, avuga ko uburyozwe bw'Umujyi wa Kigali bushingiye ku biteganywa n'ingingo ya 260 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano (CCLIII), kubera ko igiti cyagwiriye imodoka ye ari icyawo, kikaba cyaraguye kubera uburangare bwawo ndetse no kutacyitaho (manque d'entretien). Asobanura ko umunsi impanuka iba hari haguye imvura irimo n'umuyaga, ko ariko nta kiza cyabayeho, kuko ibiti byose mu mujyi bitaguye, cyangwa se ngo hagire ikintu cyangirika kidasanzwe, ko haguye gusa ibiti bikuze bitasazuwe, ko ndetse nyuma y'iyo mpanuka ibiti byari bisigaye byatemwe bvose hasigara gusa ibikiri bito. Asanga rero uwo muyaga usanzwe wabayeho icyo gihe utabarirwa mu mpamvu zitunguranye kandi zitashoboraga kwirindwa (cas de force majeure) nk'uko bisobanurwa n'umuhanga mu mategeko O. De Grandcourt¹.

UKO URUKIKO RUBIBONA

[19] Ingingo ya 260, igika cya 1, y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano (CCLIII) iteganya ko Umuntu ntaryozwa gusa ibyangiritse kubera ibikorwa bye bwite, ahubwo anaryozwa ibyangijwe n'ibikorwa by'abantu yishingiye cyangwa n'ibintu ashinzwe kurinda.

[20] 20. Nk'uko bigaragara mu miburanire yabo, ababuranyi bemeranya ko igiti cyagwiriye imodoka minibus Toyota Hiace RAA 089 K ya Maco Musoni Oscar Léonce nk'uko byasobanuwe haruguru, ari icy'Umujyi wa Kigali, ko kandi umunsi impanuka

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¹ O. De Grandcourt, La responsabilité du propriétaire d'arbres, in Revue Forestière Française.

iba hari haguye imvura irimo umuyaga. Icyo batumvikanaho ni ukumenya niba umuyaga wagushije icyo giti wafatwa nk'impamvu itunguranye kandi itarashoboraga kwirindwa (cas de force majeure) yatuma Umujyi wa Kigali utaryozwa indishyi izo ari zo zose zikomoka kuri iyo mpanuka.

[21] Abahanga mategeko, basobanura ko mu (catastrophe naturelle) gitandukanye n'impamvu itunguranye kandi idashobora kwirindwa (cas de force majeure), ko kuba hari n'icyemezo cy'ubuyobozi kigaragaza ko habayeho imvura idasanzwe, bidasobanuye byanze bikunze ko habayeho impamvu itunguranye kandi idashobora kwirindwa, ko ariko byombi bigira ingaruka zimwe². Bakomeza basobanura ko umuyaga ushobora kuba impamvu itunguranye kandi idashobora kwirindwa iyo hatashobove kwirindwa ingaruka zawo kandi bitarashobokaga guteganya ko uri bubeho. Ugomba kuba ari umuyaga ukomeye cyane mu gace wabayemo cyangwa se ingaruka zawo zitashoboraga kwirindwa³.

² Philippe Le Tourneau, Cyril Bloch, Jérôme Julien, Christophe Guettier, Didier Krajeski, André Giudicelli et Matthieu Poumarède, Droit de la responsabilité et des contrats, Régimes d'indemnisation, Dalloz, Février 2014, p.749..... "Néanmoins, il n'y a pas d'identité entre l'état de catastrophe naturelle et la force majeure ; ainsi, la décision administrative de classement de pluies dans la première catégorie ne vaut pas ipso facto reconnaissance d'un cas de force majeure ; mais les effets d'une catastrophe naturelle sont les mêmes que ceux qui résultent d'une circonstance de force majeure".

³ Op, cit. p. 750... "Le vent sera un cas de force majeure, à la condition qu'il n'ait pas été possible d'en éviter les conséquences, et qu'il n'ait pas été prévisible. Le vent ne sera donc un cas de force majeure que s'il est établi que sa violence a présenté une intensité insolite dans la région considérée ou si les inconvénients en résultant ne pouvaient pas être conjurés. Un vent de 112 km/h est un cas de force majeure exonérant le constructeur d'un camion de l'accident survenu à celui-ci".

- [22] Ku bijyanye n'uru rubanza, Urukiko rurasanga, uretse kuvuga gusa ko ku wa 09/09/2010 haguye imvura irimo umuyaga watumye igiti cyo ku muhanda kigwira imodoka, Umujyi wa Kigali nta kimenyetso utanga kigaragaza ko habaye umuyaga udasanzwe, ko sevisi z'iteganyagihe zitashoboraga kuwuteganya kugira ngo hirindwe ingaruka zawo, cyangwa se ko usibye icyo giti hari n'ibindi bintu byaba byarangiritse mu gace impanuka yabereyemo.
- [23] 23. Hashingiwe rero ku ngingo ya 260, igika cya 1, y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano (CCLIII) yavuzwe haruguru, no ku bisobanuro bimaze gutangwa, Urukiko rurasanga, nk'uko n'Urukiko Rukuru rwabyemeje, Umujyi wa Kigali ugomba kuryozwa indishyi zikomoka ku mpanuka y'imodoka minibus Toyota Hiace RAA 089 K yatejwe n'igiti cyo ku muhanda yari ishinzwe kurinda, bityo impamvu yayo y'ubujurire kuri iyi ngingo ikaba nta shingiro ifite.

c. Kumenya niba Urukiko Rukuru rwarageneye MACO MUSONI Oscar Léonce indishyi zidakwiye

- [24] Me Kayiranga Rukumbi Bernard, uburanira Umujyi wa Kigali, avuga ko Urukiko Rukuru rwageneye Maco Musoni Oscar Léonce indishyi nyinshi zidakwiye, kubera ko imodoka yari yarayiguze 1.400.000 Frw, ikaba rero itakwangirika ngo ikoreshwe ku mafaranga 3.304.000 Frw, ni ukuvuga inshuro zirenze ebyiri agaciro kayo. Asanga ahubwo hari kubaho kuyivana mu muhanda (déclassement), maze akishyurwa gusa agaciro kayo havuyemo ubusaze bwayo (amortissement).
- [25] Ku byerekeye indishyi zo gusana imodoka Maco Musoni Oscar Léonce yagenewe n'Urukiko, Me Kayiranga rukumbi

Bernard avuga ko niba imodoka yarashoboraga gusanwa, nyirayo nk'umucuruzi aba yarayikoresheje, ko rero Umujyi wa Kigali utari kuryozwa izo ndishyi zo kuyisana. Naho ku ndishyi z'igihombo yagenewe n'Urukiko, asanga kuba zarabariwe kuri 15.000 Frw ku munsi nayo ari menshi ukurikije ko hari ubwo taxis nyinshi zirirwa zihagaze zabuze abagenzi, izindi zapfuye zikajyanwa mu ma garaji, ko ndetse no ku mafaranga y'inyungu zikorera havamo umusoro, kuzikoresha (entretien) n'ibindi.

- [26] Me Bizimana Shoshi Jean Claude, uburanira Maco Musoni Oscar Léonce, avuga ko ibyo uhagarariye Umujyi wa Kigali avuga ko taxis nyinshi zirirwa zihagaze, ari amagambo gusa, kuko nta nyigo wabikoreye, ko rero asanga indishyi zagenwe n'Urukiko Rukuru zifite ishingiro, kandi uru rukiko rukwiye kongera izo ndishyi zikabarwa kugeza igihe uru rubanza ruciwe, kuko kugeza ubu imodoka ikiri mu igaraji kubera ko habuze amafaranga yo kuyikoresha, maze Maco Musoni Oscar Léonce akagenerwa izingana na 15.000 Frw x iminsi 2.666 = 39.990.000 Frw.
- [27] Ku byerekeye amafaranga yo gukoresha imodoka, Me Bizimana Shoshi Jean Claude avuga ko nta buriganya bwabayeho mu kugena agaciro ko kuyisana, kuko hari igaraji ryatanze "devis de reparation" yemewe n'amategeko, kandi ko nta gitangaza kirimo ko imodoka yakoreshwa ku mafaranga arenze ayo yaguzwe.

UKO URUKIKO RUBIBONA

[28] Nk'uko byasobanuwe haruguru kandi hashingiwe ku biteganywa n'ingingo ya 260, igika cya 1, y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano (CCLIII),

Umujyi wa Kigali ugomba kuryozwa indishyi zikomoka ku mpanuka yavuzwe haruguru.

[29] Urukiko rurasanga 3.304.000 Frw y'indishyi zo gukoresha imodoka Urukiko Rukuru rwageneye Maco Musoni Oscar Léonce mu rubanza rwajuririwe ariyo akwiye kugumaho, kubera ko Umujyi wa Kigali, umaze kubona ibaruwa ye yo ku wa 28/12/2010 yanditse asaba kwishyurwa ibyangiritse ku modoka ye n'iyo ku wa 14/03/2011 yibutsa iyo ya mbere, ntacyo wamusubije cyangwa se ngo ukoreshe "contre-expertise" igaragaza ko iyo modoka igomba kuvanwa ku muhanda, maze akishyurwa agaciro kayo havuyemo "amortissement" nk'uko ubiburanisha, ndetse no mu rukiko rwabanje ndetse n'ubu, ntugaragaza uko ibyo uburanisha bigomba gukorwa, uretse kuvuga gusa ko ayo mafaranga ari menshi.

[30] Ku byerekeye amafaranga y'igihombo Maco Musoni Oscar Léonce avuga ko imodoka ye iba yarakoreye kugeza ubu, Urukiko rurasanga 14.025.000 Frw yagenwe n'Urukiko Rukuru ko ariyo imodoka yagombaga kuba yinjiza iyo iza kuba ikora, yaragenwe mu bushishozi gusa, akaba rero mu by'ukuri ntaho ashingiye, kuko uyasaba atagaragaje urwunguko yari asanzwe agira mu buryo bw'ibaruramari ngo hamenyekane icyo yatakaje, bityo rero, ayo mafaranga ntiyagombaga gutangwa, n'ubu kandi ntiyatangwa cyangwa se ngo yongerwe nk'uko abisaba, ahubwo agomba kuvanwaho kuko Maco Musoni Oscar Léonce atayagaragarije ibimenyetso nk'uko abisabwa n'ingingo ya 12 y'Itegeko n° 22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru.

B. Ubujurire bwuririye ku bundi bwa Maco Musoni

- [31] Me Bizimana Shoshi Jean Claude uburanira Maco Musoni Oscar Léonce avuga ko indishyi z'akababaro zingana na 200.000 Frw yagenewe n'Urukiko Rukuru ari nkeya, ko uru rukiko rwamuha izingana na 15.000.000 Frw kubera ko Umujyi wa Kigali wamushoye mu manza nta mpamvu, akabaho nabi n'umuryango we kandi yari yariteganyirije, hakiyongereyeho 2.500.000 Frw yo gukurikirana urubanza n'igihembo cy'Avoka.
- [32] Me Kayiranga Rukumbi Bernard, uhagarariye Umujyi wa Kigali, avuga ko indishyi z'akababaro zisabwa na Maco Musoni Oscar Léonce nta shingiro zifite, kuko ari uburenganzira bw'umuburanyi kujurira, kandi Umujyi wa Kigali ntukwiye kuryozwa indishyi nk'uko byasobanuwe haruguru. Ku byerekeye amafaranga y'igihembo cy'Avoka, avuga ko asabwa ari menshi, ko bibaye ngombwa ko atangwa yahabwa 500.000 Frw nk'uko biteganywa n'amabwiriza y'Urugaga rw'Abavoka.

UKO URUKIKO RUBIBONA

- [33] Ingingo ya 152 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 uregwa mu rukiko rujuririrwa ashobora na we kugira ibyo asaba yiregura (...).
- [34] Urukiko rurasanga indishyi z'akababaro Maco Musoni Oscar Léonce asaba Umujyi wa Kigali zifite ishingiro, kuko kuva imodoka ye yakora impanuka, atahwemye gusiragira agira ngo Umujyi wa Kigali umwishyure ibyangiritse ku modoka ye, ariko

ntiyahabwa igisubizo biba ngombwa kwiyambaza inkiko, nabwo ntiwitaba mu rukiko rwabanje, ubu hakaba hashize imyaka 8 atarishyurwa, bikaba byaramuteye akababaro, ariko indishyi zingana na 15.000.000 Frw asaba avuga ko 200.000 Frw yagenwe n'Urukiko Rukuru ari make, ni menshi, mu bushisozi bwarwo akaba agenewe1.000.000 Frw.

[35] Ku byerekeye 2.500.000 Frw yo gukurikirana urubanza n'igihembo cy'Avoka, Maco Musoni Oscar Léonce asaba Umujyi wa Kigali, Urukiko rurasanga atayagenerwa, kuko buri ruhande rufite icyo rutsindiye muri uru rubanza ku byo rwasabaga.

III. ICYEMEZO CY'URUKIKO

- [36] Rwemeje ko ubujurire bw'Umujyi wa Kigali bufite ishingiro kuri bimwe.
- [37] Rwemeje ko ubujurire bwuririye ku bundi bwa Maco Musoni Oscar Léonce bufite ishingiro kuri bimwe.
- [38] Rutegetse Umujyi wa Kigali kwishyura Maco Musoni Oscar Léonce 3.304.000 Frw y'indishyi zo gukoresha imodoka ye minibus Toyota Hiace RAA 089 K yangiritse kubera impanuka yatewe n'igiti cyo ku muhanda na 1.000.000 Frw y'indishyi z'akababaro yose hamwe akaba 4.304.000 Frw.
- [39] Rutegetse Umujyi wa Kigali kwishyura 100.000Frw y'amagarama y'urubanza.

RWANDA LAW REPORTS

ENGLISH VERSION



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PREFACE

Dear Readers,

The Rwandan judiciary is pleased to publish the third 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 nine (9) cases, containing four (4) cases in merit: one (1) administrative case, one (1) civil case, two (2) commercial cases, while the remaining five (5) 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] 3 RLR

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Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure,
Article 10
Law N° 76/2013 of 11/09/2013 determining the mission, powers, organization and functioning of the Office of the Ombudsman, article 15
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Law $N^{\circ}13/2010$ of $07/05/2010$ modifying and complementing Law $N^{\circ}10/2009$ of $14/05/2009$ on mortgages, article 3117
Law N° 15/2004 of 12/06/2004 relating to evidence and its production,
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Instructions of the Registrar General N° 03/2010/org of 16/11/2010 on modalities of lease, sale, public auction and mortgage, article 9117

Organic Law N° 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court, articles 28, (2), 7° and (4)
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Decree-Law of 30/07/1888 relating to contracts or obligations,
(abrogated by the law N° 020/2019 of 22/08/2019 abrogating all
laws established before the independence),
Article 258117
Article 552, n'iya 573149.
Article 260, paragraph 177

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Nzamubara v. Ntawukuriryayo, RCAA 0097/10/CS re the Supreme Court on 06/05/2011	•
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Personal guarantee – The guarantor continues to be under the obligations to repay the credit unless those obligations are extinguished on the grounds provided by the law. MUNYANEZA ET. AL. v. ACCESS BANK Ltd147 Loan contract – Personal guarantee – A personal guarantor cannot renege on his promise of repaying the loan in case the principal debtor fails to repay it on the pretext that the principal loan contract was restructured in case the restructuring did not change the basis of the personal guarantee. MUNYANEZA N'UNDI v. ACCESS BANK Ltd147
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CASE RELATING TO CIVIL, COMMERCIAL, LABOUR AND ADMINISTRATIVE PROCEDURE

MT LAW OFFICE Ltd v. PELLA RWANDA RESOURCES Ltd

[Rwanda SUPREME COURT – RCAA 00003/2018/SC (Mutashya, P.J., Nyirinkwaya and Gakwaya, J.) April 13, 2018]

Jurisdiction of Courts – Jurisdiction of the court on the second appeal – Despite the fact that in the previous courts neither the damages equivalent or more than those provided by the Law were awarded and the value of the subject matter was not debated upon, the issue of the value of the subject matter can be raised for the first time at the appealante level in order to determine the pecuniary jurisdiction of that court.

Facts: MT Law Office Ltd concluded with Pella Rwanda Resources Ltd a contract of providing legal services whereby Pella Rwanda Resources Ltd greed to pay MT Law Office Ltd a legal assistance fee of USD 1,200.00. In their contract, they included a dispute resolution clause according to which any dispute between them will be settled amicably within 10 days but in case it fails, the matter will be submitted to an arbitrator.

MT Law Office Ltd sued Pella Rwanda Resources before the Commercial Court of Nyarugenge for not honouring its obligation of paying the legal fees and for refusing to settle their dispute amicably; consequently, it appointed its arbitrator and it requested the court to appoint another arbitrator for the other party so that together they can appoint a third one.

After overruling the objection of lack of jurisdiction of that Court, it found the claim with merit. It appointed the second arbitrator on the side of Pella Rwanda Resources Ltd. The latter was not

contended with that decision and appealed before the Commercial High Court, which quashed the appealed judgment on all grounds because it found that the profession of legal advocacy is not commercial activity.

MT Law Office Ltd consequently seized Gasabo Intermediate Court, Pella Rwanda Resources Ltd raised again the objection of lack of jurisdiction, but it was overruled and the Court appointed the arbitrator on the side of Pella Rwanda Resources Ltd.

Pella Rwanda Resources Ltd appealed to the High Court and MT Law Office Ltd raised the objection of inadmissibility of Pella Rwanda Resources Ltd's appeal on the ground that the award is not subject to appeal, the Court overruled it on the ground that the case was civil in nature. With regard to the appeal of Pella Rwanda Resources Ltd, it held that Gasabo Intermediate Court should not have appointed an arbitrator to facilitate a civil case, instead that it had to hear the case in merit. Therefore, it referred the case to the Gasabo Intermediate Court for it to hear the case in merit.

MT Law Office Ltd was not contended by that decision and appealed before the Supreme Court. Pella Rwanda Resources Ltd again raised an objection of lack of jurisdiction of the Supreme Court because the subject matter does not have a value provided by the Law and there were no damages equal to at least 50,000,000Frw awarded by the previous Courts, also that the value of the subject matter was not debated upon in the previous courts.

In its defence, MT Law Office Ltd argued that it filed a claim requesting the Court to appoint a second arbitrator, and alternatively, it requested the Court to examine in merits the issue of the fees which it is claiming to be paid which amounts to 900.000 USD equivalent to 765,024,365 Frw, as per the contract concluded, whereby Pella Rwanda Resources Ltd was ordered to pay the whole amount, fine for delay and various damages, they thus find the case in the jurisdiction of this Court.

Held: 1. Despite the fact that in the previous courts neither the damages equivalent or more than those provided by the Law were awarded and the value of the subject matter was not debated upon, the issue of the value of the subject matter can be raised for the first time at the appealante level in order to determine the pecuniary jurisdiction of that court.

The objection of lack of jurisdiction is overruled.

The hearing will resume in merit.

Court fees are suspended.

Statutes and statutory instruments referred to:

Organic Law N° 03/2012/OL of 13/06/2012 determining organization, functioning and jurisdiction of the Supreme Court, articles 28, (2), 7° and (4).

Cases referred to:

Murorunkwere v. Utamuriza, RCAA 0075/09/CS rendered by the Supreme Court on 20/05/2011.

Nzamubara v. Ntawukuriryayo, RCAA 0097/10/CS rendered by the Supreme Court on 06/05/2011

Judgement

I. BRIEF BACKGROUND OF THE CASE

- [1] MT Law Office Ltd signed an agreement titled "Agreement for Performance related to remuneration". in this contract Pella Rwanda Resources Ltd agreed to pay MT Law Office Ltd the counsel fee in respect of three aspects: "Finder's fees, Legal Fees and Consulting fees" equivalent to USD 1,200.00. They agreed to resolve amicably any dispute that may occur within 10 days and submit it to the arbitration in case they fail to reach an agreement.
- [2] MT Law Office Ltd first filed a claim against Pella Rwanda Resources Ltd before Nyarugenge Commercial Court for non-execution of its obligation of payment as provided in the contract, also that it refused to settle their dispute amicably, consequently, it appointed its arbitrator, it requests the Court to appoint the second one, so that together they appoint the third one.
- [3] On 24/05/2016, the Commercial Court of Nyarugenge rendered the judgment RCOM00437/2016/TC/NYGE. Concerning the objection raised by Pella Rwanda Resources that MT Law Office Ltd filed the case before the commercial Court whereas it is a civil claim because it originates from labour contract of legal counsel, that Court overruled it, because the contract concerns commercial companies and the activities provided for in the contracts are commercial, with regarding to the merits of the case, the Court found the claim of MT Law

Office Ltd with merit and it appointed a second arbitrator on the side of Pella Rwanda Resources Ltd.

- [4] Pella Rwanda Resources Ltd, appealed to the Commercial High Court, and on 16/09/2016, that Court rendered the judgment RCOMA00329/2016/CHC/HCC, and held that the services of legal counsel are not commercial, quashed the appealed judgment and that the claim of appointing an arbitrator be filed before the civil courts.
- [5] After the decision of the Commercial Court, MT Law Office Ltd filed a claim before the Intermediate Court of Gasabo, the subject matter being the appointment of a second arbitrator as provided in the contract it concluded with Pella Rwanda Resources Ltd, if not possible to examine the dispute between the two parties so that Pella Rwanda Resources Ltd be ordered to pay its debts and various damages.
- [6] Pella Rwanda Resources Ltd raised again an objection of lack of jurisdiction, stating that the case of MT Law Office Ltd should be heard by commercial courts.
- [7] In Judgment RC 00026/2017/TGI/GSBO rendered on 31/05/2017, the Intermediate Court of Gasabo held that it has jurisdiction to hear the case, admitted the claim of MT Law Office Ltd and later found it with merit and appointed an arbitrator on the side of Pella Rwanda Resources Ltd.
- [8] Pella Rwanda Resources Ltd appealed to the High Court, and MT Law Office Ltd raised before that Court an objection of inadmissibility basing on article 13 of the Law No 05/2008 of 14/02/2008 on arbitration and conciliation in commercial matters explaining that the award is not subject to appeal.

- [9] In the Judgment RCA00189/2017/HC/KIG rendered on 06/12/2017, the High Court, ruled by that the objection raised by MT Law Office Ltd requesting the High Court to declare inadmissible the appeal of Pella Rwanda Resources because it is based on article 13 of the Law No. 05/2008 of 14/02/2008 on arbitration and conciliation in commercial matters whereas this is a civil case as held in the judgment RCOMA00329/2016/HCC rendered by the Commercial High Court and which is now res judicata.
- [10] That Court also found with merit the appeal of Pella Rwanda Resources Ltd, it quashed the Judgment RC0026/2017/TGI/GSBO rendered by the Intermediate Court of Gasabo which appointed the arbitrator because it should not have appointed an arbitrator instead it would have heard the case in merit the case, it then referred the case before Gasabo intermediate Court for hearing in merits.
- [11] By deciding so, the Commercial High Court motivated that the Law No 051/2010 of 10/01/2010 establishing the Kigali international arbitration center and determining its organization, functioning, and competence, in its article 5, provides that the competence of the center is limited to arbitration in commercial matters, thus, the arbitrator appointed by Gasabo Intermediate Court has no jurisdiction to hear disputes in civil matters.
- [12] The Court further explained that there is no specific law relating to arbitration in other matters which are not commercial in force, since the promulgation of the Law No 21/2012 of 14/06/2012 on the civil, commercial, social and administrative procedure which provides, in its article 367, that a specific law will be put in place for arbitration.

- [13] In deciding that the case should be referred to the Intermediate Court of Gasabo, the Court relied on the provisions of article 26 of the Chief Justice's Practice Directions N° 002/2015 of 18/05/2015 governing civil, commercial, labour, and administrative procedure.
- [14] MT Law Office Ltd was not contended with the decision and on 25/12/2017, it appealed before the Supreme Court, again Pella Rwanda Resources Ltd raised the objection of lack of jurisdiction of the Supreme Court.
- [15] The public hearing was held on 06/03/2018, MT Law Office Ltd represented by Counsel Rwagatare Janvier, Counsel Rwenga Etienne, Counsel Mbaga Tuzinde Mbonyimbuga, while Pella Rwanda Resources Ltd represented by Counsel Moise Nkundabarashi and Counsel Kayigirwa Telesphore, the Court first heard the submissions of both parties on the objection of lack of jurisdiction raised by Pella Rwanda Resources Ltd.

II. LEGAL ISSUE TO BE EXAMINED BY THE COURT

Whether the case is not within the peculiar jurisdiction of the Supreme Court

[16] The Counsels for Pella Rwanda Resources Ltd explain that this case is not under the jurisdiction of the Supreme Court on the second appeal, because its jurisdiction cannot be determined by the documents filing a lawsuits as alleged by MT Law Office Ltd in its appeal submissions, but is rather determined either by the value of damages awarded which must be equivalent at least to 50,000,000Frw or the value of the subject matter

determined by the judge in case it was litigated upon which is equivalent at least to that provided by article 28, paragraph 2 of the Organic Law No 03/06/2012/OL of 13/06/2012 on the functioning, organization, and jurisdiction of the Supreme Court, with regard to this case, there are no damages awarded nor the value of the subject matter was not debated upon for the judge to determine the value.

[17] The Counsels for MT Law Office Ltd states that, in principle, they requested the Court for the appointment of a second arbitrator on the side of Pella Rwanda Resources Ltd as provided by contract which stipulate that any dispute between them will be solved by an arbitrator in case amicable settlement fails and in case the court views it otherwise they prayed that the Court examine the claim resulting from the debt of 900. 000 USD equivalent to 765,024,365 Frw originating from the contract signed, so that Pella Rwanda Resources Ltd be ordered to pay that amount, late fees and various damages. Based on these arguments, they find that the Supreme Court has jurisdiction to hear the case because the value of the subject matter exceeds 50,000,000Frw provided for by article 28, paragraph 2, 7° of the Organic Law No 03/06/2012/OL of 13/06/2012 mentioned above.

[18] They further state that this article must be interpreted broadly together with the provision of paragraph 4 which stipulates that "in other cases, the jurisdiction of the Supreme Court is determined based on the amount, the value of the object of the dispute and the value of the object of the contract, in accordance with the paragraph 2, 7° of this article".

DETERMINATION OF THE COURT

- [19] Regarding the jurisdiction of the Supreme Court, article 28 paragraph 2, 7° of the Organic Law No 03/06/2012/OL of 13/06/2012 on the functioning, organisation and jurisdiction of the Supreme Court, provides that the Supreme Court shall also have appellate jurisdiction over cases heard and decided in the second instance by the High Court, the Commercial High Court or by the Military which involve a judgment in respect of which there was an award of damages of at least 50,000,000Frw, or when the value of the case as determined by the judge in case of a dispute, is at least that 50,000,000Frw as for paragraph 4, this it provides that " in other cases, the amount of money, the value of subject-matter of the dispute and the value of the contract shall be based upon while determining whether such cases fall within the jurisdiction of the Supreme Court in accordance with the provisions of item 7 of Paragraph 2 of this article. ".
- [20] With regarding to this case, the Court finds that, though the lower courts, did not award damages equivalent to at least 50,000,000Frw, and there was no debate on the value of the subject-matter because the issue in those courts was only the appointment of the second arbitrator but nothing prevents that issue to be raised for the first time at this instance, so that the Court can determine whether or not the second appeal is within its jurisdiction basing on the value of the subject-matter. This is the position of this Court in various case laws
- [21] Concerning the value of the subject-matter in this case, the Court finds that based on the debt of USD 900,000 equivalent to 775,987,164 Frw and the value of the object of the contract which is the legal counsel fees of 1,200,000 USD, the value of

the subject matter in this case, exceeds 50,000,000Frw which makes this case to be in the jurisdiction of the Supreme Court for the second appeal in accordance with the provisions of article 28, paragraph 2, 7°, as well as paragraph 4 of the above mentioned Organic Law, thus the objection of inadmissibility based on the value of the subject matter raised by Pella Rwanda Resources Ltd is overruled.

III. DECISION OF THE COURT

- [22] Holds that the appeal of MT Law Office Ltd is in the jurisdiction of the Supreme Court.
- [23] Declares that the hearing will resume on 12/06/2018.
- [24] Declares that the court fees are suspended.

MUKAGIFUNDU ET.AL v. UWAMARIYA ET.AL

[Rwanda SUPREME COURT – RS/REV/INJUST/CIV0011/16/CS –Kanyange, P.J., Ngagi, Mukandamage, J.) April 21, 2019]

Civil procedure – Application for review of judgment on grounds of injustice – Parties – All parties to the case whose judgment is to be reviewed due to injustice must be summoned regardless of whether they applied for that review to the competent organ or not.

Facts: Mukagifundu and Mukamutana filed a paternity case to the former Court of First Instance of Gitarama requesting the Court to declare Rugarama the legal father. There was a judicial reform in 2004 when those cases were still pending and thus they were transferred to the Primary Court of Gacurabwenge, which had the jurisdiction to hear such cases.

Mukamutana's claim was struck off the case registrar, but few days later she reintroduced the case and Uwamariya voluntarily intervened in the case claiming to represent the heirs of Iyamuremye Vénéranda, who died after he had intervened in all previous cases.

The Court held that of Rugarama was the legal father of Mukagifundu and Mukamutana, this led Uwamariya, Muhawenimana, and Uwizeyimana to appeal to the Intermediate Court of Muhanga, which heard the case after the two cases were combined. That Court reversed the rulings of the Primary Court of Gacurabwenge, and thus, Mukagifundu who also represented

her younger sister Mukamutana appealed to the High Court, but the appeal was dismissed.

Mukagifungo also appealed to the Supreme Court, and the Pre-Trial Judge, in his decision, declared the appeal inadmissible on the grounds that the case was not within the jurisdiction of the Supreme Court, Mukagifundu wrote to the Office of the Ombudsman requesting that the judgment rendered by the Intermediate Court of Muhanga be reviewed on the grounds of injustice, explaining that this Court disregarded that the appellants Muhawenimana and Uwizeyimana were not parties in previous cases.

After the analysis of her request, the Office of the Ombudsman requested for the review of that judgment, and the case was reviewed before the Supreme Court on grounds of injustice.

During the hearing before the Supreme Court, the defendants raised an objection of inadmissibility of Mukamutana's claim alleging that she did not write to the Office of the Ombudsman requesting for the review of the judgment on grounds of injustice.

In her defence, Mukamutana explained that together with Mukagifundu, they were parties in court cases which were combined by the Intermediate court, the cases which are also subject to the review due to injustice and that it is not possible to review one of those judgments and leave the other. Mukagifundu argues that she requested the Office of the Ombudsman for the review of the judgment on her behalf but also for her sister, because she has been representing her in previous cases.

Held: All parties to the case whose judgment is to be reviewed due to injustice must be summoned regardless of whether they

applied for that review to the competent organ or not, therefore, Mukamana must not be excluded from the proceedings.

The objection overruled The hearing will resume; Court fees are suspended.

Statutes and statutory instruments referred to:

- Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, articles 78 and 79.
- Law N° 76/2013 of 11/09/2013 determining the mission, powers, organization and functioning of the Office of the Ombudsman, article 15.
- Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labor and administrative procedure, article 10.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 06/06/1996, Mukagifundu Pauline and Mukamutana Hyacinthe brought paternity proceedings before the Court of First Instance of Gitarama praying the Court to declare that Rugarama is their father, Mukagifungo's claim was recorded under N° RC 152/1/96, and that of Mukamutana under RC 0148/1/96.

- [2] The Judicial Reform of 2004 occurred while all those cases were pending. Mukagifundu Pauline followed up her case in the Intermediate Court of Muhanga but she was advised to follow up her case before the Primary Court of Gacurabwenge because her case was in the jurisdiction of that court, thereafter, she was told that her claim N° RC 152/1/96 and that of her sister were removed from the court registers.
- Mukagifundu Pauline filed an application for re-[3] introduction of her case, and her claim was recorded under RC 0175/09/TB/GBWE, and the court noted during the hearing that case RC 152/1/96 had not been removed from the court registers, but, the case RC 148/1/96 of her young sister Mukamutana Hyacinthe was removed, and on her request, the Court accepted Mukagifundu Pauline to withdraw her action RC 0175/09/TB/GBWE and proceeded with her first action RC 152/1/96 before the Primary Court of Gacurabwenge and was recorded on RC 0264/09/TB/GBWE - RC 152/1/96, On the other hand, Mukamutana Hyacinthe reintroduced the case N° RC 148/1/96, which was removed from the list of the court cases after it recorded RCwas on 0060/05/TD/KMYI/RC167/09/TB/GBWE, and her new claim was recorded on RC 0176/09/TB/KBWE.
- [4] Uwamariya Agnès paid court fees to intervene in the case RC 264/09/TB/GBWE RC 152/1/96 and RC 0176/09/TB/GBWE stating that she represents the heirs of Iyamuremye Véneranda who had intervened in two previous cases RC 152/1/96 and RC 148/1/96 and she died afterward.
- [5] In judgment RC 0176/09/TB/GBWE-RC152/1/96, the Court held that Mukagifungo Pauline is Rugarama Landouard's daughter, that Uwamariya Agnes' claim is without merit. And

also in the judgment RC 0176/09/TB/KBWE, the same Court held that Mukamutana Hyacinthe is also the daughter of Rugarama Landouard.

- [6] Uwamariya Agnès, Muhawenimana Bernadette, and Uwizeyimana Marie Goretti appealed against judgments RC 0264/9/TB/GBWE-RC 0512/1/96 and RC 0176/09/TB/GBWE, to the Intermediate Court of Muhanga, the appeals were recorded under N° RCA 0163/010/TGI/MHG and N° RCA 0164/010/TGI/MHG. That Court rendered those judgments on 12/11/2010, holding that the appealed judgment RC 0264/09/TB/GBWE RC152/1/96 and RC 0176/09/TB/GBWE are reversed in whole and quashed, that Mukagifundu Pauline and Mukamutana Hyacinthe lose the case.
- [7] Not satisfied with this decision, Mukagifundu Pauline appealed to the High Court, chamber of Nyanza, his appeal was registered under RCAA 0347/10/HC/NYA, and on 14/10/2011, the High Court declared the appeal inadmissible for noncompliance with the requirements of article 106 of the Organic Law No 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts.
- [8] Mukagifundu Pauline was again not satisfied with the decision, she appealed to the Supreme Court, and her appeal was registered on RCAA 0135/11/CS. In pre-examination decision RC 0050/12/PRE-EX/CS, the judge declared the case inadmissible on the grounds that the Supreme Court is not competent to hear the case
- [9] Following this decision, Mukagifundu sent a written request to the Office of the Ombudsman requesting that the judgment of the Intermediate Court of Muhanga RC 0163-RCA

0164/010/TGI/MHG be reviewed due to injustice on the following grounds:

1° the fact that the court disregarded that the appellants Muhawenimana Bernadette and Uwizeyimana Marie Goretti were not parties in the appealed judgments RC 0264/09/TB/GBWE-RC152/1/96 and RC 0176/09/TB/GBWE, while this objection is of a public order which prevents the claim to be admitted, therefore the fact that the claim was admitted while it should not have been admitted, this had an effect on judgments RC 0264/09/TB/GBWE/RC152/1/96 and RC0176/09/TB/GBWE in which Mukagifundu and Mukamutana were successful;

2° the fact that Uwamariya Agnes intervened in the cases 0264/09/TB/GBWE/RC152/1/96 RCand RC0176/09/TB/GBWE stating that she represents Iyamuremye Vénéranda's heirs who are Muhawenimana Bernadette and Uwizeyimana Marie Goretti, but that at this instance and at the level of appeal, she had acted in her own name, that especially at the level of appeal, Uwizeyimana Marie Goretti had also acted on her own behalf, therefore, this is also an objection of a public order which should have prevented the intervention in a case to be admitted.

[10] The Office of the Ombudsman, in its letter N° OMB 03/1689/0615 /KJP of 02/06/2015, addressed a request to the President of the Supreme Court, requesting that the Judgment RCA 0163-RCA 0164/010/TGI/MHG be reviewed on grounds of injustice, after analysing the General Inspectorate of Courts's

report, the President of the Supreme Court ordered that the case be sent to the Court Registry for hearing.

[11] The hearing was held in public on 17/01/2017 and on 14/03/2017, Mukagifundu Pauline and Mukamutana Hyacinthe represented by Counsel Mitsindo Tom, and Uwamariya Agnes, Muhawenimana Bernadette and Uwizeyimana Marie Goretti represented by Counsel Nkubayingoga Samuel. The latter raised an objection that Mukamutana Hyacinthe's claim should not be admitted on the ground that she did not apply for the review of the judgment due to injustice.

II. ANALYSIS OF THE LEGAL ISSUE

Whether Mukamutana Hyacinthe's claim should not have been admitted.

- [12] Me Nkubayingoga Samuel, representing Uwamariya Agnes, Counsel Nkubayingoga Samuel, representing Uwamariya Agnes, Muhawenimana Bernadette, and Uwizeyimana Marie Goretti states that Mukamutana Hyacinth's claim should not be admitted because Mukagifundu Pauline is the only one to have applied for the review of the judgment due to injustice, and the Office of the Ombudsman's letter indicates Mukagifundu Pauline only.
- [13] Mukagifundu Pauline submits that she had addressed a request to the Office of the Ombudsman asking that her case be reviewed because of injustice, that she did so on her own behalf, but that she also represented her younger sister, Mukamutana Hyacinthe, especially that she represented her in all court proceedings, in that sense, the Office of the Ombudsman sought

that their cases which had been joined, be reviewed because of injustice.

[14] Mitsindo Tom, Counsel for Mukagifundu Pauline and Mukamutana Hyacinthe, argues that the one who raised this objection agrees that both parties are those who were in the combined cases RCA 0163-RCA 0164/010/TGI/MHG, which are being reviewed due to injustice, that it would not be possible for only one of them to be reviewed and let the other, especially thatMukagifundu Pauline states that she also represented her younger sister Mukamutana Hyacinthe. He adds that of the order of the President of the Supreme Court on the admissibility of the application for review on the grounds of injustice demonstrates that those combined cases are the ones to be reviewed, which implies that Mukamutana Hyacinthe is also a party to the case

THE OPINION OF THE COURT

[15] Article 78 of the Organic Law N° 03/2012/OL of 3/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, states that the Supreme Court shall have exclusive jurisdiction over applications for review of final decisions due to injustice upon approval of the President of the Supreme Court". Article 79, paragraph 1 and 2 of that Law, states that the Office of the Ombudsman shall be the competent organ to petition the Supreme Court over the application for review of a final decision due to injustice. When the final decision is made and there is evidence of injustice referred to under Article 81 of this Organic Law, parties to the case shall inform the Office of the Ombudsman of the matter [...]".

Article 15 of the Law N° 76/2013 of 11/09/2013 determining the mission, powers, organization and functioning of the Office of the Ombudsman states that in the interest of the justice, the Office shall have powers to request the Supreme Court to reconsider and review judgments rendered at the last instance by ordinary courts, commercial and Military courts if there is any persistence of injustice. The reconsideration and review shall be made in accordance with the Organic Law establishing the organization, functioning and competence of the Supreme Court".

[17] The case file demonstrates that the judgment RCA 0163-RCA 0164/010/TGI/MHG, under review due to injustice, Mukagifundu Pauline appears alone as a defendant, but in her defence, she also represents her younger sister Mukamutana Hyacinthe, Moreover, even in its decision, the Court quashed the judgments RC 0264/09/TB/GBWE/RC 0152/1/96 and RC 176/09/TB/GBWE¹ which had all been rendered on 25/03/2010 by the Primary Court of Gacurabwenge. In addition, the report issued by the Office of the Ombudsman on an application for review does not show whether Mukagifundu Pauline addressed her request to the Office of the Ombudsman, having also represented Mukamutana Hyacinthe, however, the report of the Office of the Ombudsman indicates that It had found that the judgment RC 0163-RCA 0164/010/TGI/MHG for which Mukagifundu Pauline and Mukamutana Hyacinthe were both defendants (in appeal), that judgment was vitiated with injustice because the Intermediate Court of Muhanga disregarded an objection of a public order which would have resulted in the inadmissibility of the appeal of Uwamariya Muhawenimana Bernadette and Uwizevimana Marie Goretti.

¹ Mukamutana Hyacinthe's case

- [18] Pursuant to the provisions cited above, the Court finds that an application for the review of a judgment vitiated with injustice which is submitted by the Office of the Ombudsman to the Supreme Court, intends to request removing injustice found in a judgment rendered in final instance consequently, all parties to that judgment must be summoned. The fact that Counsel Nkubayingoga Samuel is invoking that Mukamutana's application should not be admitted, but that he fails to indicate the provisions which provide that a party to the proceedings who has not applied for review on the grounds of the injustice of a final judgment to the Office of the Ombudsman cannot be admitted as a party to the proceedings examining the alleged injustice, this proves that his statement has no merit.
- [19] In particular, the Court finds that Mukamutana Hyacinthe should not be excluded from the parties to the trial, because based on the nature of the case as well as on grounds of injustice submitted for review by the Office of the Ombudsman, she is concerned, so that once she is excluded from the parties to the trial, and when the ruling of the judgment affects her, this would be in contradiction with the provisions of article 10 of Law No. 21/2012 of 14/06/2012 on the Code of Civil, Commercial, Social and Administrative Procedure, which provides that no party may be judged without having been heard or summoned.
- [20] In light of the above motivations, the Court finds that an objection of rejecting Mukamutana Hyacinthe's claim raised by Counsel Nkubayingoga Samuel representing Uwamariya Agnes, Muhawenimana Bernadette, and Uwizeyimana Marie Goretti is without merit.

III. DECISION OF THE COURT

- [21] Finds that the objection raised by Counsel Nkubayingoga Samuel, representing Uwamariya Agnès, Muhawenimana Bernadette and Uwizeyimana Marie Goretti, lacks merit;
- [22] Orders that the hearing of this case will be resumed on 27/06/2017;
- [23] Orders to suspend the Court fees;

NDEREYEHE V. NYIRAMAHINGURA ET AL.

[Rwanda SUPREME COURT- RS/INJUST/RC 00020/2017 (Mukanyundo P.J., Hitiyaremye and Munyangeri J.) March 09, 2018]

Civil procedure Law – Third party opposition – Interests – Interests of a party who files a third party opposition claim, must be different from those of the parties to the case whose judgment is subject to the opposition.

Facts: Ndereyehe filed a claim against her daughter Musengimana before the Primary Court of Kinihira, that she illegally appropriated his two pieces of land, eucalyptus plantation, and three cows. That Court decided that the claim has merit because he got the properties he claimed for, after the death of Musengimana's mother, It also ordered Ndereyehe to give to Musengimana her ascending partition.

Musengimana appealed before the Intermediate Court, stating that the properties under litigation belonged to her late mother, that his father dispossessed them from her young sister Nyiramahingura who she also represents in this case. That Court decided that Musengimana cannot represent her sister because she has no power of attorney, It also sustained the decision of the appealed judgment.

After that judgment, Nyiramahingura filed a third party opposition claim against it, suing Ndereyehe alone, but Musengimana intervened in the case after accepting to be a party to it though she was not sued. Nyiramahingura states that she

opposed that judgment because her father Ndereyehe located his second wife's residence in the land where her mother used to reside, whilst she got it as a donation from her grandfather. That Court decided that Nyiramahingura and Musengimana should keep the house and the land left by their mother and that their father should donate to them half of the piece of land located at Remera because he did not donate them any ascending partition while regarding the other issues in this case, the Court decided that each should be divided into two, whereby the ½ must be given to Musengimana and Nyiramahingura, and the other ½ must be given to Ndereyehe and his second wife. Ndereyehe appealed before the High Court, but his claim was inadmissible.

Ndereyehe applied to the office of Ombudsman, the review due to injustice, the judgment rendered by the Intermediate Court, the Ombudsman after examining his request, he wrote to the President of the Supreme Court, requesting to review the judgment due to injustice because Nyiramahingura was not allowed to file for third party opposition claim against the judgment RCA0195/12/TGI/GIC between her father and her old sister, then the President of the Supreme Court ordered for the review of that judgment.

Before the Supreme Court, Ndereye states that the injustice he faced, based on disregarding laws before the Intermediate Court by admitting his daughter Nyiramahingura's claim whereas the object in litigation was the family property.

Nyiramahingura, submits that, there was no injustice in admitting the third party opposition claim by the Intermediate Court, because she had interests in that case in which she was not a party before, and that the law provides that a child cannot claim for what his/her father or mother claimed to another person rather than a family member, it does not prevent any family member to

claim for his/her rights on the family properties against other family members

Held: 1. Interests of a party who files a third party opposition claim must be different from those of the parties to the case whose judgment subject to the opposition it is not enough to indicate that someone has interests in the judgment subject to the opposition, the third party opposition claim is not admitted if the claimant in that claim, cannot indicate a particular interest he/she has different from that one pursued by the previous party. Therefore, Nyiramahingura's claim for the third party opposition should not have been admitted because she failed to prove her particular interests different from the one pursued by Musengimana in the judgment for which she applied for the opposition.

The claim for the review of the judgment due to injustice has merit;

Judgment RCA 0296/12/TGI/GIC is quashed;
Sustains the judgment RCA 0195/12/TGI/GIC.

Statutes and statutory instrument referred to:

Law N°21/2012 of 14/06/2012 relating to the civil, commercial labour and administrative procedure, article 176

No case referred to.

Authors cited:

Serges Guinchard, Droit et pratique de la procédure civile, 8ème Edition, Dalloz, 2014, P. 1595 (551-53)

Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] This case started before the Primary Court of Kinihira t, Ndereyehe François suing his daughter Musengimana Philomène for two pieces of land, forest and three cows which she appropriated herself. On 31/05/2012, that Court rendered the judgment RC0108/012/TB/KINIH, and decided that the claim of Ndereyehe François has merit because he acquired the properties he sued for, after the death of Musengimana Philomène's mother, and he kept the obligation of looking after this child after she separated from her husband, that however, he has to make an ascending partition for her according to his patrimony.
- [2] Musengimana Philomène appealed for that decision before the Intermediate Court of Gicumbi, stating that the properties under litigation belonged to her mother Icyitegetse Bernadette, but his father wants to donate them to his second wife, that he took off them from her little sister Nyiramahingura Gratia who she also represents in that case.
- [3] On 14/09/2012, that Court rendered the judgment RCA0195/12/TGI/GIC and decided that Musengimana Philomène did not submit any proof that her sister gave her the power of representing her, that she did not also mention it at first instance, thus the case is between her and her father only. Regarding the properties in litigation, the Court sustained the rulings of the appealed judgment because Musengimana Philomène did not prove that the properties under litigation belonged to her mother.

- [4] After rendering this judgment, Nyiramahingura Gratia filed a third party opposition before the intermediate Court of Gicumbi suing Ndereyehe François only, but later, Musengimana Philomène intervened in the case though she was not sued. The grounds of Nyiramahingura Gratia's claim, are that her father Ndereyehe François gave his second wife the land as a residence where her mother Icyitegetse Bernadette used to reside, whereas it was donated to her by her grandfather Bagora.
- [5] On 28/02/2013, that Court rendered the judgment RCA0296/12/TGI/GIC, and decided that Nyiramahingura Gratia and Musengimana Philomène own the house and the land located at Gitwa in which they were left in by their mother, and ordered Ndereyehe François to give them on the land located at Remera because he did not make an ascending partition. Regarding other objects in litigation, comprising of the forest and three (3) cows, the Court decided that each of them is divided, and the half be given to Musengimana Philomène and Nyiramahingura Gratia, whereas the other half be given to Ndereyehe François and his second wife Siyonteze Verdianne, It holds that the judgments RC0108/012/TB/KINIH and RCA0195/12/TGI/GIC are nullified Ndereyehe François appealed against this judgment before the High Court, but his claim was not admitted because it does not fulfill the requirements of the Law.
- [6] Ndereyehe François applied to the Office of Ombudsman for the review of the judgment RCA0296/12/TGI/GIC due to injustice to the Ombudsman, wrote to the President of the Supreme Court requesting him the review of that judgment due to injustice, then on 18/04/2017 the President of the Supreme Court in order N°028/2017, decided that the judgment

RCA0296/12/TGI/GIC be transferred to the registry of the Supreme Court to be rescheduled for review.

- The office of Ombudsman states that the grounds of [7] injustice in that judgment are based on disregarding the Laws in admitting the third party opposition's claim filed by This Nyiramahingura that Gratia. office explains Nyiramahingura Gratia had no standing to file a third party opposition against the judgment RCA 0195/12/TGI/GIC basing on the provisions of the article 176, paragraph one and two, of the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure because the subject matter was a family's property and she is a child of the respondent, this ground was also the one indicated by Ndereyehe François while explaining his injustice before the Supreme Court.
- [8] The hearing was conducted in public on 30/01/2018, Ndereyehe François being assisted by Counsel Kayitana Dominique Savio, whereas Counsel Kananga Protogène represents Musengimana Philomène who in also represents her sister Nyiramahingura Gratia.

II. ANALYSIS OF THE LEGAL ISSUE

Whether the claim of third party opposition against the case RCA0195/12/TGI/GIC should not have been admitted by the Intermediate Court of Gicumbi.

[9] Ndereyehe François states that he had a court case with Musengimana Philomène, thus she had no standing to apply for the opposition of the judgment in which she was a party. Counsel Kayitana Dominique Savio who assists her, adds that this is

contrary to article 175 of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, which provides that, the person entitled to apply for opposition is that one who was not a party to the case, thus Musengimana Philomène had no standing to apply for opposition of the case RCA0195/12/GIC in which she was a party.

[10] Counsel Kayitana Dominique Savio continues stating that the judgment RCA0296/12/TGI/GIC rendered by Intermediate Court of Gicumbi, after the opposition of the judgment RCA0195/12/TGI/GIC, was vitiated by injustice because the claim filed by Nyiramahingura Gratia and Musengimana Philomène, should not have been admitted. He explains that this case started before the Primary Court of Kinihira whereby family property composed of two (2) pieces of land, forest, and six (6) cows were in litigation, Ndereyehe François suing his daughter Musengimana Philomène claiming that she leaves those properties. He keeps stating that Musengimana Philomène after she lost the case, she appealed but she lost again afterward, she and her young sister Nyiramahingura Gratia applied for the opposition of that judgment disregarding the fact that the property under litigation is a family property, besides, Musengimana Philomène was party to it, this violates the provisions of the article 176 of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.

[11] Counsel Kananga Protogène representing Nyiramahingura Gratia and her old sister Musengimana Philomène, states that by admitting the claim for third party opposition filed before the Court by Nyiramahingura Gratia alone, there is no injustice because she had interests as indicated

in the judgment RCA0296/12/TGI/GIC, she has never been a party to the case for which she applied for opposition, though Musengimana Philomène who was party to the case did not oppose it, rather the latter was summoned to the case as a person who was party to the case for which the opposition was applied, as provided by the Law that if a judgment is subject of opposition, all parties to the concerned case are summoned. He states, the fact that Musengimana Philomène appears among the claimants, was due to the Court's mistake. He concludes by stating that the issue of Nyiramahingura Gratia and Musengimana Philomène concerns their rights to stay in the properties left by their late mother.

[12] With regard the provisions of article 176, paragraph two of the Law N°21/2012 of 14/06/2012 aforementioned, Counsel Kananga Protogène explains that the Law provides that a child cannot claim for what his/her father or mother claimed to another person rather than a family member, it does not prevent any family member to claim for his/her rights on the family properties against other family members, if it is so instituted, it would be an injustice. Counsel Kananga Protogène finds that it is not prohibited for a child or a parent to oppose a property in case anyone dispossesses the other, the will of the legislator in article 176 of the Law N°21/2012 of 14/06/2012 is to protect the rights of family members among themselves.

DETERMINATION OF THE COURT

[13] Article 176 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that "any person who was not a party to a case but who has an interest in it may make a third party application to set aside

a judgment which is prejudicial to his/her rights and if neither he/she nor the person he/she represents were called at the trial. The provisions of paragraph one of this article shall not apply to the spouse of either party or their children when the subject matter is the family property".

In explaining the interests of the claimant of the third [14] party opposition claim, the Legal scholars state that it is not enough to indicate the interest in judgment subject to opposition, rather those interests should be different from that one of the parties to the case subject to opposition. They continue stating that, the claimant is a third party opposition claim must indicate that he/she is personally prejudiced, in a way different from that of the parties to the opposed judgment, rather than considering the decision of the Court only, this is why the claim does not intend reviewing the judgment for a better result. (.....Pour être utile, l'intérêt doit être distinct de l'une des parties ayant participé au procès. Le préjudice ne doit pas résulter, sans autre élément, de la seule solution, mais doit s'analyser au regard de la situation personnelle du tiers opposant, qui doit prétendre à un intérêt distinct, un préjudice personnel, et évidemment doit avoir une analyse juridique, au moins en partie différente de celle déjà présentée. Il ne s'agit point ici de refaire le procès à l'identique, pour tenter d'obtenir un meilleur résultat...)¹

[15] With regard to whether Musengimana Philomène opposed a judgment for which she has been a party, the documents in the case file indicate that on 12/11/2012, Nyiramahingura Gratia filed a third party opposition claim against the judgment RCA 0195/12/TGI/GIC rendered on

¹ Serges Guinchard, Droit et pratique de la procédure civile, 8ème Edition, Dalloz, 2014, P. 1595 (551-53).

14/09/2012 suing Ndereyehe François (judgment RCA0296/12/TGI/GIC, page 2), these parties are also mentioned on the document summoning Ndereyehe François in the pre-trial meeting (page 11,12).

[16] The case file indicates also, the hearing of the case RCA0296/12/TGI/GIC of 18/12/2012, the Court asked Musengimana Philomène whether she agrees to proceed with the hearing because it was clear that Nyiramahingura Gratia sued Ndereyehe François alone while they were all parties in the case subject to opposition, and she agreed.

[17] Basing on those documents, though the judgment RCA0296/12/TGI/GIC reviewed due to injustice indicates that the claimants are Nyiramahingura Gratia and Musengimana Philomène, the Supreme Court finds that there was a mistake because as aforementioned, Nyiramahingura Gratia is the only one claimant for a third party opposition claim against the judgment RCA0195/12/TGI/GIC, this is emphasized by the decision of the Court whereby It states that "It admits Nyiramahingura Gratia's claim".

Concerning the issue whether Nyiramahingura Gratia, had standing to apply for opposition for the case RCA 0195/12/TGI/GIC, the Supreme Court finds that in this case, the object in litigation is a family property of Ndereyehe François pleads Musengimana Philomène against who and Nyiramahingura Gratia, he has from his first wife, late Icyitegetse Bernadette, each party argues to be entitled with the rights over that property. As afore indicated, Nyiramahingura Gratia and Musengimana Philomène both want to appropriate the land and forest which they state that they belong to their mother as indicated in the judgment RC0108/012/TB/KINIH (page 1, paragraph one and two) and in case RCA 0195/12/TGI/GIC (page 2, paragraph 5), on the other hand, Ndereyehe François states that property is his.

[19] of the fact that Musengimana Philomène and Nyiramahingura Gratia's claims are the same in this case because none is requesting, in particular, the ownership on her own of the property under litigation, rather they all claim that property to be returned to the property of their mother Icyitegetse Bernadette, this is also emphasized by the fact that in the judgment RCA 0195/12/TGI/GIC Musengimana Philomène was pleading stating that she also pleads on behalf of her young sister Nyiramahingura Gratia though the Court did not admit it, therefore, the Supreme Court finds that Nyiramahingura Gratia's claim for opposing the judgment RCA 0195/12/TGI/GIC should not have been admitted because she failed to prove a particular interest different from the one pursued by Musengimana Philomène in the judgment for which she applied for a third party opposition.

[20] Basing on the provision of article 176 of the Law N° 21/2012 of 14/06/2012 aforementioned and doctrines of the Legal scholars, the Supreme Court finds that the claim of a third party opposition of the judgment RCA 0195/12/TGI/GIC filed by Nyiramahingura Gratia before the Intermediate Court of should not have been admitted, thus, the judgment RCA 0296/12/TGI/GIC is quashed, the Court sustains the rulings of the judgment RCA 0195/12/TGI/GIC, the one which has to be executed.

III. DECISION OF THE COURT

- [21] Decides that the claim for the review of the judgment RCA 0296/12/TGI/GIC due to injustice filed by Ndereyehe François has merit;
- [22] Decides that the judgment RCA 0296/12/TGI/GIC rendered by the Intermediate Court of Gicumbi on 28/02/2013 is quashed, sustains the rulings of the judgment RCA 0195/12/TGI/GIC rendered by the same Court on 14/09/2012.

PROSECUTION v. DUSENGIMANA

[Rwanda SUPREME COURT– RPAA 0001/14/CS (Mukanyundo, P.J., Munyangeri and Hitiyaremye, J.) November 17, 2017]

Criminal Procedure – Evidence in criminal matters – Proof beyond a reasonable doubt – A person can only be convicted if the Prosecution has proved beyond any reasonable doubt that the accused is guilty.

Facts: This case started before the Intermediate Court of Musanze, whereby the accused were charged with child defilement, The Prosecution states that on 17/06/2012 at around 9 AM, the accused went to Nshizirungu's home, and when his wife Uwamahoro was cleaning the house, the accused defiled their child of ten months old called I.B., when the mother heard her baby crying, she went out to see what happened to her and found the accused had just defiled the baby, she made an alarm and the accused ran, people came running after him but he escaped. That Court found the accused guilty basing on testimonies and sentenced him to life imprisonment with special provisions.

The accused appealed before the High Court, chamber of Musanze, arguing that the Intermediate Court wrongly convicted him for the offence he did not commit, and based on the statements of the witnesses which contradict themselves with regard the alleged time of defiling the baby as well as the place where he was arrested instead of considering the testimony of the nurse who affirmed not found signs of defilement on the baby,

that Court rendered the judgment sustaining the appealed judgment.

The accused appealed again before the Supreme Court, arguing that the court disregarded his defence which proved his innocence, that he faced false accusations from the baby's parents because of money for tuition he got from the donor, and the baby's parents wanted to appropriate themselves some of them, he adds that the court based on the testimonies of those accusing him falsely, who testified that he ran after having committed the offence whereas he is visually impaired and cannot run faster than those with perfect eye vision, he concludes stating that the Court disregarded the testimony of the nurse who first treated the baby affirming not found signs of defilement on the baby.

The Prosecution contends that the accused's grounds of appeal lack merit because in his interrogation before the Prosecution, had stated that he went to the home of baby's parents and he had no conflict with the parents, It adds that the witness called Mukarusanga had testified that she saw the sperms on baby's genitals and thighs, The Prosecution also states that all these elements of evidence are supported by the report issued by the Physician which indicates that the baby was defiled, which caused some injuries. Concerning the statement of the nurse who treated the baby first and asserted that there was no sign of defilement, the Prosecution contests that the statements of that nurse should not be considered because she did not want to accuse the culprit. Concerning the issue that the accused was blind, and how he managed to run, the Prosecution states that it should not be considered as if it would not be possible since the accused stated himself that the way was easily accessible.

Held: 1. A person can only be convicted if the Prosecution has proved beyond any reasonable doubt that the accused is guilty, therefore, the Court finds no reliable and conclusive elements of evidence to be based on to convict the accused.

Appeal has merit; The appealed judgment is squashed; Court fees to the public treasury.

Statute and statutory instruments referred to:

Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article 3,65 and 119.

No case laws referred to.

Author cited:

Henry Bosly & Damien Vandermeersch, *Droit de la procédure pénale, 4e édition*, P. 1316, 5.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The Prosecution sued Dusengimana Ferdinand before Musanze Intermediate Court of, charging him with child defilement, It states that on 17/06/2012 around 9 AM, the accused went to Nshizirungu Emmanuel's home, and when his wife called Uwamahoro Solange was busy cleaning the house, whereas the husband had gone to look for cow's grasses, the accused took

their baby girl aged ten months called I.B. and defiled her when the mother heard her baby crying, she went out to see what happened and found Dusengimana Ferdinand putting back his penis in his pant, she immediately took the baby and found sperms on her sex, on thighs and on the dress she was wearing, then she screamed, Dusengimana Ferdinand ran and people came running after him but he escaped.

- [2] The Intermediate Court of Musanze rendered the judgment RP0322/012/TGI/MUS on 21/03/2013 finding Dusengimana Ferdinand guilty of child defilement basing on testimonies of prosecution witnesses, the Court sentenced him to life imprisonment with special provisions.
- [3] Dusengimana Ferdinand appealed before the High Court, chamber of Musanze stating that the court found him guilty basing on the testimonies of the witnesses which contradict themselves on the time on which they allege that the offence was committed as well as the place where he was arrested instead of considering the testimony of the nurse who affirmed the lack of signs of child defilement on the baby, that Court rendered the judgment RPA0077/13/HC/MUS on 21/10/2013, holding that his appeal lacks merit.
- [4] Dusengimana Ferdinand appealed before the Supreme Court, stating that the court disregarded his pleadings, that he is innocent, that he was falsely accused by the baby's parents because of conspiracy, he adds that the Court based on the testimonies of those accusing him lies, who testified that he ran after having committed the offence whereas he is blind, he also states that the court disregarded the testimony of the nurse who first treated the baby which affirms not found signs of child defilement.

[5] The hearing of the case was conducted in public on 16/10/2017, Dusengimana Ferdinand assisted by Counsel Umupfasoni Blandine, whilst the Prosecution was represented by Munyaneza Nkwaya Eric, the National Prosecutor.

II. ANALYSIS OF LEGAL ISSUE

Whether there are reliable elements of evidence proving Dusengimana guilty.

- [6] Dusengimana Ferdinand argues that his grounds of appeal are based on the fact that the Court disregarded his defense which proves that he is not guilty of the offence he is accused, rather, Nshizirungu Emmanuel and his wife Uwamahoro Solange conspired for false accusations against him due to the conflicts they had with his family when they knew about the money he got from the german donor called Thomas, purposely for pursuing his studies at Rwamagana in the school of people living with blindness disability, that they tried to appropriate his money, they even once deliberately charged his parents unjustified damages, then they made false accusation with the intention to take that money.
- [7] He further states that the High Court relied on the testimonies witnesses who affirmed that he was arrested on the river while washing the clothes which he wore and kept wearing them when they are wet, whereas, the nurse whom they found at the health center, affirmed that he was not wearing wet clothes when she saw him. He keeps stating that what also proves that the Court relied on false testimonies, is that those witnesses testified to have seen him running towards the river whereas he is known to be living with blindness disability, that he uses a

white cane, in addition, they testify as eye-witnesses whereas it is hearsay told by the baby's parents. He gives an example such as the statement that they saw sperms on baby's clothes, but one can ask which material they used to test those sperms whereas the nurse who first treated the baby, did not notice them.

- Counsel Umupfasoni Blandine assisting Dusengimana [8] Ferdinand, states that her client was falsely accused because of tuition he got from the donor, which he used to walk with it, hence, Nshizirungu Emmanuel who knew it, asked him to give him some of that money when he was passing by his home but he refused, consequently, Nshizirungu plotted to take it off from him. She explained that what proves that the money was the motive of false accusations, is that when they reached at the Health Center, for the child to be examined in order to collect elements of evidence, the nurse who treated the baby, revealed to lack signs of defilement, she advised them to negotiate for the other possible issues they might have, then when they went home in the village, they asked Dusengimana Ferdinand for money, he refused, then they filed a claim to the Police, she adds, that the mother of the baby, would have rubbed the baby's sexual organs (frottement) with intention of getting proofs that Dusengimana Ferdinand is the one who rubbed his sex organs to that one of the baby.
- [9] She further argues that what also proves that the testimonies of the witnesses contain false accusations, is where they stated that the baby's mother called them for rescue stating that Dusengimana Ferdinand ran after having defiled the baby, this implies that the witnesses did not see him. She adds that witness Harerimana Adrien had stated that he heard a woman making a scream for help that her child was defiled, that when he

reached the place he found sperms on the baby, that Dusengimana Ferdinand ran instantly, this is not reasonable, because a person visually impaired cannot run faster than those with perfect eye vision. Counsel Umupfasoni Blandine also adds that another argument to prove that his client is falsely accused is that the statements of baby's parents contain a contradiction, whereby in their interrogation, one of them stated that they did not wash the baby whereas the other stated that they did.

- She also argues, the fact that the nurse who first treated the child, did not notice any sign of defilement, is another element of evidence proving that Dusengimana Ferdinand is not guilty, and the physician who conducted the second consultation stated that he did not also notice sperms, whereas the baby's mother did not reveal that she washed the baby before she took her to the Health Center, the physician who conducted the second consultation, had recommended to also examine the alleged author, unfortunately, it was not done. She adds the fact that Dr. Nteziryayo Ezéchiel, authorized government medical Doctor, stated that the baby had inflammation and various little wounds in her genital organs, this should not be considered as a piece of incriminating evidence against her client, because those wounds might have been caused by many reasons as she motivated above (rubbing the baby's organs(frottement) with intention of getting proofs)
- [11] The Prosecution contends that Dusengimana Ferdinand's grounds of appeal lack merit because in his interrogation before the Prosecution, had stated that he went to Nshizirungu Emmanuel and that he had no conflict with the baby's parents, in addition, the witness called Mukarusanga Marie Josée had said that she saw the sperms on baby's sex and thighs, It adds that all

these elements of evidence are supported by the report issued by Dr. Nteziryayo Ezéchiel which indicates that the baby was defiled and caused her some wounds.

[12] With regard to the statement of the nurse who first treated the baby, who affirmed that there was no any sign of defilement, the Prosecution contends that the statements of that nurse should not be considered because she refused to be against the accused, that she only let him go and be accused by others. Concerning the issue whereby the baby's mother found Dusengimana Ferdinand lifting up the zipper of his pant after having defiled, this should be considered as he was caught red-handed and this should not be subject of doubt about it. with regard to the issue of the blindness of the accused and be able to run to the extent of reaching the river to wash his clothes, the Prosecution states that it should not be considered as if it would not be possible since the accused had himself stated that the way was easily accessible.

DETERMINATION OF THE COURT

- [13] for defiling the child I.B.
- [14] Article 4 of the Law N° 15/2004 of 12/06/2004 relating to evidence and its production provides that a court decides a case before it in accordance with the rules of evidence applicable to the nature of the case. Article 65 of the Law N° 15/2004 of 12/06/2004 relating to evidence and its production provides that only the Court assesses the relevance, pertinence, and admissibility or rejection of testimonial evidence. It shall not be influenced by the number of witnesses. It shall mainly consider their knowledge of facts and the objectivity and sincerity of their testimonies, whereas article 119 of the Law N° 15/2004 of

12/06/2004 previously mentioned states that the Court rules on the validity of the prosecution or defence evidence.

- [15] With regarding the statements of witnesses as queen evidence to convict Dusengimana Ferdinand, the statements of their interrogation demonstrate that no one of them was present when Dusengimana Ferdinand defiled that child except her mother Uwamahoro Solange who stated that she saw him putting back his sex in pant, in addition, the testimonies of those interrogated, are confusing in relation to the conviction of Dusengimana Ferdinand as follows:
 - a) Uwamahoro Solange, Harerimana Adrien, and Mukarusanga Marie Josée state that Dusengimana Ferdinand ran and escaped, that they found him on Gaseke river. This testimony is confusing because there is no possibility for a person visually impaired to run faster than those with perfect eye vision, especially, all witnesses testified that in absence of someone to help him, he walks with a white cane.
 - b) All those three witnesses state that the child was defiled at 9 AM, and they went to search for Dusengimana Ferdinand at 10:30 AM, it is questionable, to wait such time instead of arresting him immediately as the baby's mother states that she caught him red-handed putting back his sex in pants.
 - c) The witnesses listed above, also testified that Dusengimana Ferdinand went to the river for washing clothes he was wearing and cleaned the all stain to destroy elements of evidence, however, none of them can identify cleary which kind of stain.

- d) They further state that the place where they arrested Dusengimana Ferdinand is Gaseke river, where they found him wearing wet clothes, that they took him to the Health Center, but the nurse who treated the case, stated that his clothes were dry, and those witnesses do not state that he might have changed clothes.
- e) That nurse who first treated the child revealed that she did not notice any sign of child defilement, she advised them to return home and negotiate for other possible issues that they might have, which the parents agreed upon. If the parents were not contented with the nurse's advice, one would ask why they didn't immediately refer the matter to the police instead of trying first to negotiate with Dusengimana Ferdinand.
- f) The report issued by the second physician who treated the baby, indicates that there were little wounds on baby's sex (frottement au niveau des grandes lèvres compte tenu des oedèmes et des ulcérations de ces grandes lèvres) and that there is no male genital which penetrated the child, on the other hand, the physician recommended to examine the alleged author, but it was not done so, therefore, this report cannot be considered as conclusive evidence that those little wounds were caused by child defilement.
- [16] The Court finds, pursuant to article 65 of the Law N° 15/2004 of 12/06/2004 mentioned above, the testimony of the witnesses mentioned above, should not be considered as reliable evidence to referred to by the Court to convict Dusengimana Ferdinand for having defiled I.B, the fact that the mother of the child states that he called people for help and showed them substance she pretends to be sperms, but they were not brought

before the physician to confirm that those substances were sperms, and to verify that they belong to Dusengimana Ferdinand because neither the nurse who treated the baby did not notice them northe physician who treated her for the second time, he recommended rather examine the accused but it was not done so.

[17] The Court finds that the Prosecution's statement contending that the fact that the nurse who first treated the baby, affirmed that there was no any sign of defilement, does not mean that the signs were absent, that instead, she did not want to be against the accused, this statement has no merit because there is no related element of evidence submitted to the Court. With regarding to the medical report, the Court does not find that those little wounds and inflammation would have been caused by defilement only.

[18] The legal scholars in criminal procedure, Henry Bosly and Damien Vandermeersch state that a person can only be convicted if the Prosecution has proved beyond any reasonable doubt that the accused is guilty. (Une personne ne peut être déclarée coupable au terme du procès que si l'accusation a apporté la preuve au-delà de tout doute raisonnable de la culpabilité de l'accusé).¹

[19] Pursuant to article 4, article 65, and article 119 of the Law N° 15/2004 of 12/06/2004 mentioned above, the Court finds no reliable elements of evidence to be based on to convict Dusengimana Ferdinand for the offence he is accused, therefore he has to be declared not guilty.

¹ Henry Bosly & Damien Vandermeersch, *Droit de la procédure pénale*, 4e *édition*, p. 1316, 5

III. THE DECISION OF THE COURT

- [20] Holds that Dusengimana Ferdinand's appeal has merit;
- [21] Overrules the appealed judgment;
- [22] Decides that Dusengimana Ferdinand is not guilty of the offence he is accused;
- [23] Orders the release of Dusengimana Ferdinand after the pronouncement of this case;
- [24] Orders that the court fees be charged to the public treasury.

PROSECUTION v. MUKARUYANGE

[Rwanda SUPREME COURT- RS/INJUST/PEN 00004/2017/SC, (Mugenzi, P.J., Kanyange and Gakwaya, J.) February 23, 2018]

Criminal Procedure – Classification of the offence – Reclassification of the offence is in the judge's duties in case, the judge finds that the acts for which the accused is charged, are not given the right classification – As long as the decision of the Court has not acquired the status of res judicata the offence can be re-classified and the accused's right to defense be respected.

Facts: This case started before the Primary Court of Nyarugunga whereby Habumugisha was prosecuted for the burglary and Mukaruyange for concealing objects obtained from an offence. That Court rendered the judgment and convicted Habumugisha for the offence and sentenced him to one year of imprisonment and ordered him to pay 80,000,000Frw to the claimant for damages, whereas Mukaruyange was acquitted.

The Prosecution and the civil party were not contented with the rulings of the judgment and appealed to the Intermediate Court of Nyarugenge stating that the Court ignored the statements of the witnesses accusing Mukaruyange of harbouring Habumugisha together with the money he robbed and the Court acquitted her. They pray to the Court for proper examination of the elements of evidence. That Court rendered the judgment sustaining the sentence infringed to Habumugisha, It also found Mukaruyange guilty of being the accomplice of Habumugisha in the theft of money in litigation and of harbouring the offender and objects obtained from an offence, It sentenced her to two (2) years

of imprisonment suspended in one year, the Court also ordered them to jointly pay money which was in litigation.

Mukaruyange was not satisfied with the ruling of that judgment, consequently, she wrote to the Office of Ombudsman requesting for the assessment of the injustice she suffered in that judgment stating that she was convicted for the complicity of theft whereas she was not sued for that offence also that, the Court considered the elements of evidence which are not reliable because she knew the offender after the latter has committed the offence when they dealt with the sale of plot.

After examining her request, the Ombudsman wrote to the President of the Supreme Court praying that the judgment RPA 0230/14/TGI/NYGE be reviewed due to injustice occurred for ignoring Laws and evidence, the Office of Ombudsman explains that Mukaruyange was found guilty of the complicity in theft at an appellate level whereas she was not charged for it before and did not respond against it on the first instance, that Office states that Mukaruyange would not have participated in the theft while she met Habumugisha when he had already committed the offence, with regarding the concealment of objects obtained from theft, the Office of Ombudsman states that the Court failed to demonstrate whether Mukaruyange Athanasie was found with money obtained from an offence, the amount and the place where she would have concealed it.

The President of the Supreme Court ordered for that judgment to be reviewed, Mukaruyange was pleading stating that she responded on new offence at the appellate level before the Intermediate Court while she was not prosecuted for it, hence she did not defend herself against it at first instance before the Primary Court because she was accused of concealment of objects obtained from an offence, but in appeal, she responded to the complicity in burglary, she adds that though the judge may reverse classification of an offence, he/she has to rely on facts, she argues that a judge of appeal erred because he did not hear the defence of the accused before he re-classified of the offence, rather what happened was to lodge a new claim on the appeal which was not pleaded before.

The civil party states that she agrees with her opponents with regarding the competence of the judge of giving a new classification of an offence, in this regards, she finds, that this was what did the judge of the Intermediate Court after hearing the parties and witnesses, he/she decided to qualify the facts as complicity in burglary.

The Prosecution contends that there was no new offence for which the judgment was rendered before the Intermediate Court which was seized in appeal, rather, if article 98 of the Organic Law N° 01/2012/OL instituting the penal code and article 327 of that Law are considered together, provides that a person is also considered as an accomplice if he/she harbours an offender or aids him/her in the concealing, the Court found then, that those acts committed by Mukaruyange, constitute an offence of aiding Habumugisha of burglary.

- **Held**: 1. Reclassification of an offence is in judge's duties when he/she finds that the acts for which the accused is charged, are not given the right classification, basing on the principle that the judge is seized with the facts and not with the classification, therefore, the issue whether the Intermediate Court would have reversed the claim and hears new charge, has no merit.
- 2. As long as the decision of the Court has not acquired the status of res judicata the offence can be re-classified and the accused's right to defense be respected, thus, the judge should have granted

the parties an opportunity to express their views about a new classification.

- 3. With regarding the issue whether Mukaruyange is guilty of complicity in burglary, her acts which the Intermediate Court found as an offence, do not contain the complicity because, in the analysis of that Court concerning the presumptions and analysis of the case made in accordance with the wisdom of the judge, there was no submission of elements of important evidence, precise and consistent to prove with no doubt that Mukaruyange helped Habumugisha in acts of burglary, therefore, Mukaruyange Anastasie has to be acquitted on that offence.
- 4. Concerning the offences of harbouring an offender and concealing objects obtained from an offence, Mukaruyange does not demonstrate elements of evidence which were ignored in judgment which would prove that she did not commit such offences, rather, basing on the offender's statement and corroborating statements of the witnesses, there is no doubt that the Court has enough proof to declare Mukaruyange guilty of harbouring an offender and concealing objects obtained from an convicted in offence she was the judgment as RPA0230/14/TGI/NYGE, therefore, there is no injustice related to ignoring elements of evidence.

The claim to review the judgment due to injustice has merit in part;

Court fees are charged to the public treasury.

Statute and statutory instruments referred to:

Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, article 326 and 573.

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 320.

Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article 108 and 119.

Case laws referred to:

Prosecution v. Nyawera Céléstin, RPA 0033/11/CS rendered on 14/9/2012 by the Supreme Court.

Author cited:

Likulia Bolongo, Droit Pénal spécial zairois, Tome I, 2ème édition, Paris, 1985, P. 20, 21.

Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] The Prosecution sued Habumugisha Butoyi and Mukaruyange Athanasie for the theft committed through burglary for the first and for concealment of objects obtained from an offence for the latter, in this case, Rwasibo Mutesi Béatrice intervened as civil party.
- [2] In the judgment RP0355/13/TB/NYRGA rendered by the Primary Court of Nyarugunga on 20/03/2014, that Court found Habumugisha Butoyi guilty for the theft committed through burglary and sentenced him to one year of imprisonment and ordered him to pay back Rwasibo Mutesi Béatrice 80.000.000Frw and damages equivalent to 900.000Frw, that

Court found Mukaruyange Athanasie not guilty for the offence she was charged.

- [3] The Prosecution and Rwasibo Mutesi Béatrice appealed to the Intermediate Court of Nyarugenge stating that the Court disregarded the testimonies of witnesses accusing Mukaruyange Athanasie of having concealed Habumugisha Butoyi together with the money he stole and found her not guilty. The Prosecution sought to the Court to diligently examine the elements of evidence submitted and held Mukaruyange Athanasie liable for the offence she committed.
- In the judgment RPA 0230/14/TGI/NYGE rendered by the Intermediate Court of Nyarugenge on 24/07/2014, that Court found the Prosecution's appeal and that of Rwasibo Mutesi Béatrice with merit, It sustained the penalty infringed to Habumugisha Butoyi, It also held that Mukaruyange Athanasie is guilty of being in complicity with Habumugisha Butoyi in the theft of money in litigation and that one of concealing the offender and objects obtained from an offence, It sentenced her to two(2) years of imprisonment with one year of suspension, the Court ordered her to pay 84.740.000Frw jointly with Habumugisha Butoyi, the Court motivated that, there are testimonies of the witnesses accusing her for the role in the theft of money, these witnesses include her housemaid named Uwamahoro Sara who testified that Mukaruyange Athanasie lodged Habumugisha Butoyi for a long time at her home, and that she had ever confessed that she lodged him for protection because of a lot of money he possessed, this proves that they had convened for robbing the money belonging to Rwasibo Mutesi Béatrice through burglary.

- [5] On 10/03/2015, Mukaruyange Athanasie wrote to the Office of Ombudsman requesting for the assessment of the injustice she suffered in the judgment RPA 0230/14/TGI/NYGE because she was convicted for the complicity of theft whereas she was not sued for that offence and that, the Court considered the elements of evidence which are not reliable because she knew the offender after having committed the offence when they dealt with the sale of plot.
- [6] The Ombudsman wrote to the President of the Supreme Court requesting that the caseRPA0230/14/TGI/NYGE be reviewed due to injustice on the grounds of disregarding Laws and elements of evidence, the Office of Ombudsman states that Mukaruyange Athanasie was convicted for complicity in theft whereas she was not prosecuted for that offence on the first instance, for her to defend accordingly, in addition, that Office states that Mukaruyange Athanasie would not have participated in the theft while she met Habumugisha Butoyi when he had already committed the offence, with regard to the concealment of objects obtained from theft, the Office of Ombudsman states that the Court failed to demonstrate whether Mukaruyange Athanasie was found with money obtained from an offence, the amount and the place where she would have concealed it.
- [7] In the order N° 026/2017 of 18/04/2017, the President of the Supreme Court ordered that the case RPA0230/14/TGI/NYGE mentioned above, be reviewed, the hearing was held in public on 15/01/2018, Mukaruyange Athanasie being assisted by Counsel Kayijuka Ngabo, Rwasibo Mutesi Béatrice being assisted by Counsel Munyeshema Napoléon, whilst the Prosecution was represented by Niyonkuru Françoise, the National Prosecutor.

II. ANALYSIS OF LEGAL ISSUES

[8] In this case, the Court examines whether the judgment was vitiated by the injustice for not complying with the Laws on one hand and disregarding elements of evidence, on the other hand, the Court also examines the issue of damages claimed by the parties.

A. Whether there was an injustice for not complying with the laws

- [9] Mukaruyange Athanasie and Counsel Kayijuka Ngabo assisting her, state that Mukaruyange Athanasie pleaded on new offence at the appellate level before the Intermediate Court while she was not prosecuted for it, hence she did not defend herself against it at first instance before the Primary Court of Nyarugunga because she was accused of concealment of objects obtained from an offence provided and punished by article 326 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code, whereas in appeal she had to respond to the complicity in the burglary.
- [10] Counsel Kayijuka Ngabo argues that though the judge may qualify acts of an offence to the new classification, he/she has to rely on facts, Counsel Kayijuka finds that a judge of appeal was mistaken because he did not hear Mukaruyange Athanasie before he makes reclassification of the offence, rather what happened was to lodge a new claim on appeal which was not heard before.
- [11] Rwasibo Mutesi Béatrice and Counsel Munyeshema Napoléon assisting her, state that they agree with their opponents with regard to the competence of the judge of giving a new

classification of an offence, in this regards, they find that this is what did exactly the judge of the Intermediate Court after hearing the parties and witnesses, he/she decided to qualify the facts as complicity in burglary.

- [12] Counsel Munyeshema Napoléon also states in his written submissions that article 98 of the Organic Law N° 01/2012/OL mentioned above, provides different ways of a person's role in an offence: when a person commits an offence, co-offender(a person who directly cooperates in the commission of an offence) or an accomplice, here is explained that a person is also considered as an accomplice if he/she harbours an offender or aids him/her in the concealing under conditions provided under article 327 of this Organic Law, Counsel Munyeshema is on the view that elements of evidence which were considered, prove that Mukaruyange Athanasie was accomplice, thus she had to be liable, hence there was no injustice, this is also their request to the Supreme Court to sustain the same position.
- [13] He states that based on article 81 of the Organic Law N° 03/2012/OL of 13/06/2012 determining organization, functioning, and jurisdiction of the Supreme Court, it should be held that the review of the judgment due to injustice lacks merit since there were no Laws disregarded.
- [14] The Prosecution contends that there was no new offence for which the judgment was rendered before the Intermediate Court which was the appellate Court, rather, if article 98 of the Organic Law N° 01/2012/OL mentioned above and article 327 of same Laware considered together, it is clear that a person is also considered as an accomplice if he/she harbours an offender or aids him/her in the concealing, that the Court found that those

acts committed by Mukaruyange Athanasie, constitute an offence of aiding Habumugisha Butoyi in the commission of burglary.

DETERMINATION OF THE COURT

[15] With regarding to the issue whether the Intermediate Court would have rendered the judgment for the offence which was not charged, the Court finds that, as the case file demonstrates, Mukaruyange Athanasie was accused before the Primary Court for the concealment of objects obtained from theft which is provided by article 326 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code and the Court discharged her on that offence, whereas the Intermediate Court found, the fact that for long time Mukaruyange lodged Habumugisha Butoyi who had stolen money through burglary, also that, bought together houses and plots in that period he was wanted before she helped him to flee, this indicates rather that she participated and conspired to the acts of theft committed by Habumugisha Butoyi because she also confessed to have lodged him because of a lot of money he possessed for his protection, the Court also convicted her for concealment either of objects from an offence or of an offender.

[16] The Court finds, the fact that the judge based on the acts for which he/she was seized from the conduct of Mukaruyange Athanasie and Habumugisha Butoyi, in its analysis s/he found that those facts demonstrate Mukaruyange Athanasie'complicity in burglary, this cannot be considered as rendering the judgment out of charges in case the judge had analysed the facts submitted by the Prosecution, instead, after analysis, the judge gave them a new classification as complicity in burglary knowing that reversing the classification of an offence is in judge's rights and

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obligations when s/he finds that the facts for which the accused is charged, is not linked to the classification¹ basing on the principle that the judge is seized with the facts and not with the classification, therefore, the issue of whether the Intermediate Court would have reversed the claim and heard a new charge, has no merit.

[17] The Cout finds rather that, the issue at hand is to know whether the Intermediate Court's analysis was well-made with regarding to the elements of evidence to prove conspiracy of theft and joint participation in committing it.

[18] With regarding to the fact that the judge has reversed a classification of the offence without first having granted Mukaruyange Athanasie the opportunity to respond to a new classification, the Court finds that the judge should have done so after having accorded Mukaruyange Athanasie an opportunity to express her view because as the legal scholars explain, as long as the decision of the Court has not acquired res judicata power, classification of an offence may be reversed, but the accused must be allowed to respond to it, in the sense of the respect of rights to defense,² that mistake was rectified before this Court whereby the parties had the opportunity of contradicting themselves as indicated in the grounds of their pleadings.

¹ See the judgment RPA 0033/11/CS rendered on 14/9/2012 by the Supreme Court, the Prosecution v. Nyawera Céléstin.

² "Aussi longtemps que la décision judiciaire n'est pas encore devenue irrévocable, toute qualification est susceptible de modification.... Le respect des droits de la défense exige cependant qu'en cas de requalification s'opérant au niveau du jugement, les délais prévus par la loi soient accordés au prévenu pour répondre d'une qualification nouvelle": LIKULIA BOLONGO, Droit Pénal spécial zairois, Tome I, 2ème édition, Paris, 1985, P 20, 21.

B. Whether there was injustice due to disregarding elements of evidence

- [19] Mukaruyange Athanasie states that Nyarugenge Intermediate Court of disregarded elements of evidence proving that he did not commit an offence and that Court held that she lodged Habumugisha Butoyi after knowing that he possessed a lot of money whereas it is not true. She explains that it was suspicious that she lodged Habumugisha Butoyi as they went together at her home late at night to take the land title after having bought a plot, and they met through a broker, she adds that Habumugisha returned to his home except that he left parked his car where Mukaruyange Athanasieparks as well because Habumugisha Butoyi's driver requested so.
- [20] She argues that her former housemaid Uwamahoro Sara testified that she lodged Habumugisha Butoyi, but this testimony should not be considered because she had quarrels with the latter regarding her job as she was no longer working properly, that's why she falsely accused her.
- [21] Counsel Kayijuka Ngabo states that Habumugisha Butoyi's statement before the investigators is false, that he shared money he robbed with Mukaruyange Athanasie because they didn't know each other, instead, Habumugisha Butoyi had later revealed that he made such statement under duress he faced in police just after his arrest. He argues that the investigation was wrongly conducted since before the investigators and it continued as such before the Prosecution, the investigation was misled by suspecting that Mukaruyange Athanasie collaborated with Habumugisha Butoyi in the commission of the offense which includes helping him searching for policemen to assist him getting the land title, the fact that she drove him to her home,

being involved in the contract of a sale of a house, the fact that Habumugisha Butoyi's car was kept overnight at her home, all these listed reasons prompted to suspect that she would have kept the money for him whereas it did not happen.

- [22] He also states that Habumugisha Butoyi robbed when it was on Wednesday and he bought a house from Mukaruyange Athanasie on Saturday, that he was arrested after a month, those dates demonstrate that they didn't know each other, thus the charges against Mukaruyange Athanasie contains doubt.
- [23] Rwasibo Mutesi Béatrice, the claimant for damages, states that when Habumugisha Butoyi was arrested in Gatsata, he was handed over to the Police, he was asked where he had put money and responded that he had used part of that money to buy a house, another part to buy a car, and that he entrusted the rest to Mukaruyange Athanasie, and the latter lodged him at her home. She adds that it is not the first time for Mukaruyange Athanasie to be prosecuted for concealing the thieves because she was previously prosecuted for the offence of such kind, she states that many people in Gatsata, knew that she lodged Habumugisha Butoyi who spent some days, those people include Uwamahoro Sara and Turatsinze Abdallah, and also, for that reason, Mukaruyange Athanasie's children were angry, that it is painful that she dared do such acts whilst she is a leader.
- [24] Counsel Munyeshema Napoléon states that the acts committed by Mukaruyange demonstrate that she had been a co-author in complicity provided by article 98 of the Organic Law N°01/2012/OL mentioned above. He adds that Habumugisha Butoyi confessed in an investigation that Mukaruyange Athanasie lodged him but he changed his statement later stating that he confessed under duress but he failed to prove it while a

witness named Migezo affirms that Mukaruyange Athanasie saw Habumugisha Butoyi in possession of a lot of money and she took him to stay at her home, another witness called Turatsinze Abdala also testified that he had known Habumugisha Butoyi by the help of Mukaruyange Athanasie and that he has no dispute with each of them.

[25] The Prosecution contends that after Habumugisha Butoyi committed theft, he sought advice from Mukaruyange Athanasie for buying land in Bugesera, the latter confessed before investigators that she lodged him for a long time, while he was in possession of much money and obviously, that money was without reasonable origin. The Prosecution states that Mukaruyange Athanasie responded to all these charges and that the Court which is seized with the facts and it is up to it to classify those facts in an offence, this was the position of this Court in the judgment RPAA 0117/07/CS between the Prosecution versus Ngabonziza et.al.

THE DETERMINATION OF THE COURT

[26] Regarding the issue whether Mukaruyange Anastasie is guilty of complicity in burglary, this Court finds that her acts from which the Intermediate Court found the offence as mentioned above in paragraph 15, do not contain the complicity because in the analysis of that Court with regard to the presumptions and analysis of the case which are left to the wisdom of the judge as provided by article 108 of the Law N°

15/2004 of 12/06/2004 relating to evidence and its production³, there was no submission of important evidence, precise and consistent to prove with no doubt that Mukaruyange Anastasie had helped Habumugisha Butoyi in acts of burglary, therefore, Mukaruyange Anastasie has to be acquitted on that offence.

The Court also finds, with regarding to Mukaruyange Anastasie, complicity in burglary should not rely on article 98 litera 3 paragraph 2 of the Organic Law Nº 01/2012/OL mentioned above which provides that a person is also considered as an accomplice if he/she harbours an offender or aids him/her in the concealing under conditions provided under article 327 of this Organic Law as stated by the Prosecution and Counsel for Rwasibo Mutesi Beatrice because that article 327 refers to the concealing of objects which were used or meant to commit an offence as indicated in its title as well as in section 10 where that article is located, which make the difference provisions of that article and and those of article 326 which refers to the concealment of objects obtained from an offence, it is obvious that by errors, the provisions concerning the concealment of objects obtained from an offence were again put in article 327 because they were already provided in article 326 in particular and sufficient manner as motivated above.

[28] Therefore, the Court finds, the acts of concealing objects obtained from an offence for which Mukaruyange Athanasie was charged, should be analysed in consideration of the provisions of article 326 of the Organic Law N° 01/2012/OL mentioned above by examining whether there were elements of evidence which

³ That article of 108 provides that presumptions that have not been established by the law are left to the discretion and wisdom of the Court. The Court shall admit only those presumptions if they are important, precise, and consistent.

were disregarded by the Intermediate Court to prove that she is innocent from the offence of concealing objects obtained from an offence, and also, basing on article 573⁴ of that Organic Law which provides for an offence of concealing an offender, these are acts for which she was prosecuted and she pleaded on it before all previous Courts, this is what shall be examined in part two of the second issue of this case.

[29] In demonstrating that the Intermediate Court ignored elements of evidence which prove that she did not commit an offence, Mukaruyange Athanasie and her Counsel do not demonstrate those elements of evidence which were disregarded, rather, they insist on her behavior towards Habumugisha Butoyi with intention of proving that her conduct does not imply concealing stolen objects and harbouring an offender.

[30] Article 119 of Law No 15/2004 of 12/06/2004 relating to evidence and its production provides that in criminal cases, the evidence is based on all grounds, factual or legal provided that parties have been given a chance to be present for cross-examination. The court rules on the validity of the Prosecution or defence evidence.

[31] Among elements of evidence taken into consideration by the Intermediate Court to held Mukaruyange Athanasie guilty for concealing an offender and objects obtained from an offence, include Habumugisha Butoyi's confession during his

hundred thousand (100,000) to one million (1,000,000) Rwandan francs.

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⁴ That article states that any person who provides accommodation, a hiding place or any other means to a suspect or an offender or an accomplice of a felony or misdemeanor that hinders an arrest by judicial organs, shall be liable to a term of imprisonment of two (2) years to five (5) years and a fine of one

interrogation before the investigators and he made the same confession before the Prosecution that he revealed to Mukaruyange Athanasie that he robbed money from his workplace, that he gave her the half of it for concealment, he states that he gave her three bunches of dollars and euros which he ignores the exact amount, he told her that in case he will be arrested she will bring it back to refund it., this corroborates with the statement of the witness Turatsinze Abdallah who affirmed that he knew Habumugisha Butoyi through Mukaruyange Athanasie and was looking for a plot to buy in Bugesera.

- [32] The Court finds, though before the Court Habumugisha Butoyi reversed his statement and said that he falsely accused Mukaruyange Athanasie because he was under duress in his interrogation, there is no proof that he made such statement under duress and it is also not reasonable that he might have faced assault before the Investigators and before the Prosecution whereas it is obvious that his confession corroborates with the statement of the witness Turatsinze Abdallah as indicated above.
- [33] The Court finds, Habumugisha Butoyi's initial confession corroborates with Uwamahoro Sara'statement, the one who was Mukaruyange Athanasie's housemaid, she testified that Mukaruyange Athanasie lodged Habumugisha Butoyi for a long time at her home, this cannot be excluded as it is not true though Mukaruyange Athanasie states that she had quarrels with her housemaid before the latter left her house, while the other witness, Manaturikumwe Eric affirms that he is the one who drove Habumugisha Butoyi to Mukaruyange Athanasie's place in the car that habumugisha had bought, that he slept overnight there, and the car was parked around on the road where Mukaruyange Athanasie parks hers, and she admits that the car

was parked in that place though she states that Habumugisha Butoyi returned to his place whereas the vehicle was left because it had mechanical problems, but the driver stated otherwise.

[34] The Court finds that there is another testimony from the witness called Migezo Jean Bosco which corroborates with those given above, whereby he explained that Mukaruyange Athanasie had lodged Habumugisha Butoyi for protection because he had much money.

The Court finds that Mukaruyange Athanasie does not demonstrate elements of evidence which were ignored in judgment RPA0230/14/TGI/NYGE which would prove that he did not conceal objects obtained from an offence and harbouring an offender, rather, enough evidence was based on as reminded above, whereas the grounds considered by the Office of Ombousdman stating that there was injustice because the amount of money robbed, were not established, so that Mukaruyange Athanasie be caught with it, are without merit because those are not reliable evidence required by the Law, instead, article 119 of the Law No 15/2004 of 12/06/2004 relating to evidence and its production provides that in criminal cases, evidence is based on all grounds, factual or legal'it is in this sense that Habumugisha Butoyi's confession and corroborating statements of the witnesses, prove with no doubt that Mukaruyange Athanasie is guilty of harbouring an offender and concealing objects obtained from an offence⁵ as she was convicted in

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⁵ Article 326 provides that any person who knowingly conceals in all or in part extorted or embezzled objects, or objects obtained from an offence other than a felony, shall be liable to a term of imprisonment of six (6) months to two (2) years and a fine of two (2) to ten (10) times the value of the concealed goods or one of these penalties.

judgment RPA0230/14/TGI/NYGE, therefore, there is no injustice related to ignoring elements of evidence.

[36] The Court finds, though Mukaruyange Athanasie is acquitted on the complicity of burglary, the sentence for which she was infringed by the Intermediate Court is sustained because she is guilty of concealing objects obtained from an offence and harbouring an offender.

C. The issue of damages

- [37] Rwasibo Mutesi Béatrice and Counsel Munyeshema Napoléon claim that in case the Court finds no injustice in the judgment which is subject to the review, Mukaruyange Athanasie should be ordered to 600.000Frw for the fees of her Counsel in the urgent application as well as 1.000.000Frw for the counsel fees in the present case and 500.000Frw for procedural fees, all amounting to 2.100.000Frw.
- [38] Rwasibo Mutesi Béatrice and Counsel Munyeshema Napoléon claim that in case the Court finds no injustice in the judgment which is subject to the review, Mukaruyange Athanasie should be ordered to 600.000Frw for the fees of her Counsel in the urgent application as well as 1.000.000Frw for the counsel fees in the present case and 500.000Frw for procedural fees, all amounting to 2.100.000Frw.
- [39] Counsel Munyeshema Napoléon states that damages being requested by Mukaruyange Athanasie lack merit because they are requested against Rwasibo Mutesi while she is the one who is the victim.

DETERMINATION OF THE COURT

- [40] The Court finds, the damages requested by Mukaruyange Athanasie's Counsel should not be examined because she does not win the case, rather those claimed by Rwasibo Mutesi Béatrice and her Counsel have to be examined.
- The Court finds, basing on article 258 of the Civil Code Book III which provides that "any act of a man, which causes damage to another obliges the person by whose fault it happened to repair it, Rwasibo Mutesi Béatrice would be awarded procedural fees and counsel fees because it is reasonable that she underwent loss in case proceedings and payment of counsel fees, but, since she did not submit concrete evidence to prove her expenses, damages have to be awarded in the discretion of the Court and be given 300.000Frw for procedural fees, 500.000Frw for counsel fees and those of Counsel who pleaded in the urgent application pursuant to article 258 mentioned above and based on article 320 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which provides that damages and related expenses incurred by the party during the hearing of summary procedure shall be claimed together with the principal application.

III. THE DECISION OF THE COURT

- [42] Holds that Mukaruyange Athanasie's claim for the review the judgment due to injustice has merit in part;
- [43] Decides that she is not guilty of the offence of the complicity of burglary;

- [44] Decides that by ideal concurrence, she is guilty of concealing the offender and objects obtained from an offence;
- [45] Sentences her to two (2) years of imprisonment suspended in one (1) year;
- [46] Sustains damages and court fees ordered in the judgment RPA 0230/14/TGI/NYGE;
- [47] Orders her to pay Rwasibo Mutesi Béatrice 500.000Frw for counsel fees and 300.000Frw for procedural fees and 500.000Frw for the counsel fees who pleaded in the urgent application which preceded this judgment;
- [48] Orders that the court fees of this judgment be charged to the public treasury.

ADMINISTRATIVE CASE

KIGALI CITY v. MACO MUSONI

[Rwanda COURT OF APPEAL – RADA 00005/2018/CA (Mukanyundo, P.J., Mukandamage and Kanyange J.) October 05, 2018]

Contract – Contract of sale –Movable property – Delivery. – Delivery of movable property (merx) is effected when there is a real handover of the goods or the keys of the building in which they are stored or based on the consent of the parties in case the merx (sold property) cannot be delivered at the time of sale or if the buyer already had it in possession in any other way.

Obligations – Liability – Negligence – A person is liable for the damages caused by those under his care caused as a result of his/her negligence.

Civil procedure – Ground of defence – Force majeure – The party which invokes the force majeure as a defence has the burden to prove it.

Facts: After a tree along Remera - Gishushu road fell on a vehicle Hiace RAA 089 K minibus, the owner sued the City of Kigali in the High Court seeking the cost for repair and damages for loss of profit. The court ruled that the tree belonging to Kigali City damaged the vehicle, therefore, Kigali City is liable for the repair of the damages caused and the damages for loss of profit.

The City of Kigali appealed the case to the Supreme Court, following the reform of the judiciary, the case was transferred to the Court of Appeal. Its grounds of appeal are: the previous court did not examine whether the vehicle, in this case, belongs to the plaintiff or another person, did not analyse the cause of the

accident so that it could determine that it was not liable for an accident caused by unforeseen events and beyond its control (cas de force majeure) and lastly that the damages it awarded are unjust.

In his defense, the owner of the vehicle argues that he produced sufficient evidence proving his ownership of the vehicle and no one challenges that ownership, the tree that damaged it belonged to the City of Kigali, it fell because of its owner's negligence because it was old and not properly maintained and that the damages awarded by the previous court should be increased because the vehicle has not been repaired.

- Held: 1. Delivery of movable property (merx) is effected when there is a real handover of the goods or the keys of the building in which they are stored or based on the consent of the parties in case the merx cannot be delivered at the time of sale or if the buyer already had it in possession in any other way, therefore even though in the transferring of the vehicle which had the accident between the buyers in different intervals, the names on the registration card "carte jaune" were not changed to the name of the current buyer, it is obvious that the vehicle belongs to the respondent, because he bought it, and it belonged to him at the time of the accident.
- 2. A person is liable for the damages caused by those under his care in case it was due to his negligence, thus Kigali City is liable for the damages resulting from the accident caused by its tree alongside the road.
- 3. The party which invokes the force majeure as a defence has the burden to prove it.

The appeal has merit. The cross appeal has merit. Court fees on Kigali City

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 12, 152

Law n° 15/2004 of 12/6/2004 relating to evidence and its production, articles 2.

Decree-Law of 30/07/1888 relating to contracts or obligations, (abrogated by the law No 020/2019 of 22/08/2019 abrogating all laws established before the independence) articles 260

No cases referred to.

Authors cited:

O. De GRANDCOURT, La responsabilité du propriétaire d'arbres, in Revue Forestière Française.

Philippe Le Tourneau, Cyril Bloch, Jérôme Julien, Christophe Guettier, Didier Krajeski, André Giudicelli et Matthieu Poumarède, Droit de la responsabilité et des contrats, Régimes d'indemnisation, Dalloz, Février 2014.

Judgment

I. BRIEF BACKGROUND OF THE CASE

- [1] Maco Musoni Oscar Léonce sued the City of Kigali in the High Court seeking damages amounting to 24,450,000 Frw, which included 3,304,000Frw for the repair of his vehicle a minibus Hiace RAA 089 K which had an accident on 09/09/2010 caused by a tree which fell along Remera Gishushu road and damaged it and 30,000 Frw per day for the lost income, computed beginning 10/09/2010 until the pronouncement of the judgment and also requests for procedural fees.
- [2] On 19/04/2013, the High Court rendered the judgment RAD 0108/11 / HC / KIG in the absentia of Kigali City and ruled that a tree belonging to Kigali City fell on Maco Musoni Oscar Léonce's vehicle and severely damaged it as indicated by both the police accident report (procès-verbal d'accident) dated 17/09/2010 and the quotation for repair, thus found it liable for the damage caused to the vehicle in accordance with the provisions of article 260 of the Law of 30/07/1888 relating to contracts or obligations (CCLIII), and in its discretion, it awarded him 14,025,000 Frw for the lost income computed on 15,000Frw per day for 935 days, 3,304,000Frw for its repair and moral damages of 200,000Frw.
- [3] Kigali City appealed the rulings in the Supreme Court and the appeal registered on NoRADA 0001/14/SC, later it was transferred in the Court of Appeal as provided by article 105 of

the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of the courts and registered on No RADA 00005/2018/CA.

- [4] In its appeal, the City of Kigali argues that the High Court awarded damages to Maco Musoni Oscar Léonce without first verifying whether the vehicle belongs to him or another person, that it did not analyze the cause of the accident because it would have found that it was caused by force majeure and therefore it was not liable for the damages and that it awarded unjust and excessive damages, on another hand Maco Musoni Oscar Léonce argued that in previous Court, he produced enough evidence to prove that he was the owner of the vehicle and that no one contested that ownership, that the tree which damaged it is owned by Kigali City and that accident was caused by its negligence because that tree was old, and that the damages awarded by the High Court should be increased because the has not yet been repaired.
- [5] The case was heard in public on 12/09/2018, Kigali City represented by Counsel Kayiranga Rukumbi Bernard while Maco Musoni Oscar Léonce represented by Counsel Bizimana Shoshi Jean Claude.

II. ANALYSIS OF THE LEGAL ISSUES

A. APPEAL OF KIGALI CITY

- a. Whether Maco Musoni Oscar Léonce did not have the standing to sue for the damages resulting from the vehicle accident in the High Court.
- [6] Counsel Kayiranga Rukumbi Bernard, representing Kigali Counsel Kayiranga Rukumbi Bernard, representing Kigali City argues that the claim for damages filed by Maco Musoni Oscar Léonce in the High Court should have been dismissed because the court should have first examined whether the vehicle belonged to him. He further argues that on page 4 of the police accident report (procès-verbal d'accident) indicate that the vehicle belongs to Ntare Mathias, that what would have proved its owner was its registration card but Maco Musoni Oscar Léonce did not produce it in court, so there is proof of how the vehicle registered on Ntare Mathias, later belonged to Twagirimana Emmanuel could also sell it to Maco Musoni Oscar Léonce as indicated in the contract of sale.
- [7] He, therefore, finds that fraundent manueover may be involved since such a crucial element of evidence was not submitted to the court, whereby Maco Musoni Oscar Léonce claims ownership of a vehicle belonging to someone else, because some times property can be abandoned (bien abandonné), therefore the principle that the ownership of the movable property belongs to the one who possesses it.

- [8] Counsel Bizimana Shoshi Jean Claude, representing Maco Musoni Oscar Léonce, states that the case file contains a contract of sale which demonstrates that he bought the vehicle from Twagirimana Emmanuel on 24/07/2010, that even Ntare Mathias who is indicated on the registration certificate as its owner, in his letter dated 09/01/2018 acknowledged that the vehicle is no longer in his possession since he sold it to Niyonzima Théogène, who also sold it to Twagirimana Emmanuel, that it is normal for a person to buy a vehicle registered in another person's name and own it without hindrance. He, therefore, observes that the vehicle which was involved in the accident belonged to Maco Musoni Oscar Léonce and that neither Ntare Mathias nor Twagirimana Emmanuel came to litigate it.
- [9] He further argues that the registration certificate is not a piece of evidence to prove the owner of the vehicle even though it may be used, but that a contract of sale is valid when the buyer and a seller agree on the price and the merx, therefore the transfer of ownership of the vehicle in the Rwanda Revenue Authority is only a procedural process purposely to determine who will pay the tax...

DETERMINATION OF THE COURT

[10] Article 2 of the law No 15/2004 of 12/6/2004 relating to evidence and its production, which provides that evidence is the demonstration of the truth of a fact. Article 12, paragraph one of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure providing that the claimant must prove a claim, failing which the respondent wins the case. With regard to the obligations of the seller, article

- 283 of Code Civil Procedure (CCLIII) provides that the delivery of movable property (merx) is effected when there is real handover of the goods or the keys of the building in which they are stored or basing on the consent of the parties in case the merx cannot be delivered at the time of sale or if the buyer already had it in possession in any other way.
- [11] According to the documents contained in the case file, demonstrate that the vehicle, Toyota Hiace RAA 089 K minibus which was involved in an accident on 09/09/2010 is registered in the names of Ntare Mathias, who together with his wife Dusabimana Hawa wrote a letter acknowledging that the vehicle was no longer in their possession because they sold it to Niyonzima Théogène, who also sold it to Twagirimana Emmanuel as indicated by the contract of sale dated 30/09/2005 and it was later bought by Maco Musoni Oscar Léonce as indicated by the contract dated 24/07/2010, thus it was involved in the accident after he had it for almost two months.
- [12] The Court finds that although in the transfer of the vehicle Toyota Hiace RAA 089 K between the buyers at different occasions, the names on its registration certificate were not changed, the evidence produced by MACO MUSONI Oscar Léonce proves that it is his, because he bought it, it had an accident while it was in his possession with all its documents.
- [13] The Court also finds that Kigali City produced no evidence to prove that at the time of the accident, the vehicle had no owner, to adduce that Maco Musoni Oscar Léonce fraundently claimed its ownership.
- [14] Based on the provisions and the motivations given above, the Court finds that Maco Musoni Oscar Léonce has the standing

to sue for damages resulting from the accident which the vehicle Toyota Hiace RAA 089 K minibus had, as he did and be awarded them in case they have merit.

- b. Whether Kigali City is not liable for damages resulting from the accident caused by the tree which damaged the vehicle of Maco Musoni Oscar Léonce
- [15] Counsel Kayiranga Rukumbi Bernard, representing Kigali City argues that the High Court awarded damages to Maco Musoni Oscar Léonce without first examining the cause of the accident, to determine whether Kigali City was indeed liable for the accident caused by heavy rain and heavy storms which caused the tree along the road to fall.
- [16] . He further submits that he does not refute that the tree that hit the vehicle belonged to Kigali City, but it should only be liable when it has been proved that it was negligent with its trees, thus what happened was not negligence, but an accident caused by a force majeure which Kigali City could not foresee or control, therefore based on the provisions of article 46 of the Code Civil Book III (CCLIII) which was applicable at that time, Kigali City is not liable for any damages.
- [17] Counsel Bizimana Shoshi Jean Claude, representing MACO MUSONI Oscar Léonce argues that the liability of Kigali City is based on the provisions of article 260 of Code Civil Book III (CCLIII) because it was the owner of the tree that damaged his vehicle, it fell due to the negligence of the owner, since it was not well maintained (manque d'entretien). He explains that on the day the accident happened, there was stormy rain, but that there was no natural disaster because all the trees in the city did not fall

or any extraordinary damage, but only the old trees are the ones which fell, even after the accident all old trees were cut and only the young ones were left. He, therefore, finds that the normal wind which blew cannot be considered as a force majeure as emphasized by the legal scholar O. De Grandcourt¹.

DETERMINATION OF THE COURT

[18] Article 260, paragraph 1, Decree-Law of 30/07/1888 relating to contracts or obligations, (CCLIII) provides that "A person is liable for the damages caused by those under his care in case it was due to his negligence."

[19] Both parties agree that a tree that hit Maco Musoni Oscar Léonce's vehicle Toyota Hiace RAA 089 K minibus belongs to Kigali City as explained above and on that day there was a stormy rain. What they do not agree on is whether the tree falling under the storm wind is considered unforeseen and unavoidable factor (force majeure) which would exonerate the Kigali City from damages resulting from that accident.

[20] Legal Scholars, explain that natural disasters are different from unforeseen and unavoidable causes (cas de force majeure), that the existence of an administrative record proving that there has been an extraordinary rainfall, does not necessarily mean that there was an unforeseen and unavoidable cause, although both

¹ O. De GRANDCOURT, La responsabilité du propriétaire d'arbres, in Revue Forestière Française.

have the same effect². They further explain that storm can be unforeseen and unavoidable factor when its effects could not be controlled and it was not possible to predict that it will occur. It must have been a very strong wind or its effects could not be controlled.³

[21] Regarding this case, the Court finds that, apart from only alleging that on 09/09/2010 there was stormy rain which caused the tree along the road to fall, Kigali City did not provide any evidence to prove that it was an unprecedented storm to the extent that the Meteorology service could not forecast it, for its effects to be controlled or if there are other things which were destroyed in that area apart from that tree which fell.

[22] Pursuant to article 260, paragraph 1, of the Decree-Law of 30/07/1888 relating to contracts or obligations, (CCLIII) cited above and on the foregoing motivations, the Court finds, as held by the High Court, Kigali City is liable for damages arising from the accident caused by its tree on the roadside which fell on

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² Philippe Le Tourneau, Cyril Bloch, Jérôme Julien, Christophe Guettier, Didier Krajeski, André Giudicelli et Matthieu Poumarède, Droit de la responsabilité et des contrats, Régimes d'indemnisation, Dalloz, Février 2014, p.749..... "Néanmoins, il n'y a pas d'identité entre l'état de catastrophe naturelle et la force majeure; ainsi, la décision administrative de classement de pluies dans la première catégorie ne vaut pas ipso facto reconnaissance d'un cas de force majeure; mais les effets d'une catastrophe naturelle sont les mêmes que ceux qui résultent d'une circonstance de force majeure".

³ Op,cit. p. 750... "Le vent sera un cas de force majeure, à la condition qu'il n'ait pas été possible d'en éviter les conséquences, et qu'il n'ait pas été prévisible. Le vent ne sera donc un cas de force majeure que s'il est établi que sa violence a présenté une intensité insolite dans la région considérée ou si les inconvénients en résultant ne pouvaient pas être conjurés. Un vent de 112 km/h est un cas de force majeure exonérant le constructeur d'un camion de l'accident survenu à celui-ci".

vehicle Toyota Hiace RAA 089 K minibus, therefore this ground of appeal lacks merit.

c. Whether the High Court awarded Maco Musoni Oscar Léonce unjust damages

- [23] Counsel Kayiranga Rukumbi Bernard, representing Kigali Counsel Kayiranga Rukumbi Bernard, representing Kigali City, states that the High Court awarded Maco Musoni Oscar Léonce excessive unjust damages because he purchased the vehicle at the price of 1,400,000Frw, therefore if that vehicle was damaged it cannot be repaired at a cost of 3,304,000Frw, because it is more than twice its value. He finds that instead it should have been declassified and compensated after deducting its depreciation.
- [24] With regard to the costs for repairing the vehicle awarded to Maco Musoni Oscar Léonce, Counsel Kayiranga Rukumbi Bernard states that if the vehicle could have been repaired, the owner as a business person would have repaired it, therefore, Kigali City is not liable for the costs of repairs. Regarding the damages for the loss of income awarded by the Court, he finds that they were calculated at 15,000 Frw per day which is also excessive, given that there are times when many taxis spend a whole day parked because there are no passengers, some in garages and even they have to be serviced, which is paid from the profit they make.
- [25] Me Bizimana Shoshi Jean Claude, the counsel for Maco Musoni Oscar Léonce, argues that the allegations of the representative of Kigali City that most taxis spend most of the time parked is an assumption because he never researched it, thus he finds the damages awarded by the High Court reasonable, and

that this court should increase those damages and be computed until the judgment is pronounced because until now the vehicle is still in the garage because there is no money to repair it, he prays that Maco Musoni Oscar Léonce should be awarded 15,000 Frw x 2,666 days = 39,990,000 Frw.

[26] Regarding the cost of repairing the vehicle Counsel, Bizimana Shoshi Jean Claude argues that it was not computed fraudulently because there was a garage that submitted the quotation for the repair, and its normal for the cost of repairing a vehicle to be higher than the price the vehicle was purchased on.

DETERMINATION OF THE COURT

[27] 28. As motivated above and subject to the provisions of article as motivated above and subject to the provisions of article 260, paragraph 1, of the Decree-Law of 30/07/1888 relating to contracts or obligations (CCLIII), Kigali City should be liable for damages resulting from the above-mentioned accident.

[28] The Court finds that the 3,304,000Frw awarded for the cost the repair of the vehicle awarded to Maco Musoni Oscar Léonce by the High Court in the appealed case should be upheld, because Kigali City did not reply his letters it received, including that of 28/12/2010 requesting for the compensation for his damaged vehicle and also that of 14/03/2011 reminding of the first one, was not responded to either did it carry out counterexpertise to demonstrate that the vehicle should be declassified, and the owner is paid its standing value as he alleges, as, in the previous court, he does not also explain how it should be computed a part from alleging that it is excessive.

[29] Regarding the lost income which Maco Musoni Oscar Léonce claims that he should have got from his vehicle if it was operational, the Court finds that 14,025,000 Frw determined by the High Court as the revenue which would have been got from it, if it was operational was awarded in the discretion of the court, therefore it has no basis because the plaintiff did not produce his financial turnover to determine what he lost, therefore, it should not have been awarded and it should not be awarded by this Court or increased as requested because Maco Musoni Oscar Léonce did not produce the evidence as required by article 12 of the Law N° 22/2018 of 29/04/2018 mentioned above.

B. CROSS APPEAL FILED BY MACO MUSONI

- [30] Me Bizimana Shoshi Jean Claude, the counsel for Maco Musoni Oscar Léonce, argues that the 200,000Frw for the moral damages awarded by the High Court is little, he requests the Court to award him 15,000,000Frw because Kigali City led him to sue which was not necessary, the condition of living for his family became hard when he had planned and saved for it, he also requests for the procedural and counsel fees of 2,500,000Frw.
- [31] Counsel Kayiranga Rukumbi Bernard, representing Kigali City argues that the moral damages claimed by Maco Musoni Oscar Léonce are unfounded, as it is the right of the party to appeal, and Kigali City should not be liable for damages as explained above. As for the counsel fees, he argues that the amount is excessive, that if the court finds it necessary he should be paid 500,000Frw which is provided by the instructions of the Bar Association.

DETERMINATION OF THE COURT

- [32] Article 152 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that "The respondent in appeal court may also have some claims to be made in his or her defense (...)".
- [33] The Court finds that the moral damages which Maco Musoni Oscar Léonce claims from Kigali City are justified because since his vehicle was involved in an accident, he has been continuously requesting Kigali City to compensate for his damaged vehicle but did not respond, until he resorted to courts of law and it did not appear in the court on the first instance and it is now eight years without being paid, which caused him distress, however, the 15,000,000Frw, he requests arguing that the 200,000 Frw awarded by the High Court was too little, is excessive, therefore in its discretion, he is awarded 1,000,000Frw.
- [34] Regarding the 2,500,000Frw for the procedural and counsel fees, which Maco Musoni Oscar Léonce claims from Kigali City, the Court finds that it should not be awarded since some of the grounds of both parties have been found with merit.

III. DECISION OF THE COURT

- [35] The appeal of Kigali City has merit in parts.
- [36] The cross appeal filed by Maco Musoni Oscar Léonce has merit in parts.

[37] Orders Kigali City to pay to Maco Musoni Oscar Léonce 3.304.000Frw for repairing his vehicle Toyota Hiace Minibus RAA 089 K which was damaged by the accident caused by a tree on the roadside and 1.000.000 Frw for moral damages, altogether amounting to 4.304.000 Frw.

[38] Orders Kigali City to pay 100.000Frw for the court fees.

CIVIL CASE

NDAHUNGA v. MUKAKALISA ET AL

[Rwanda SUPREME COURT - RCAA 0022/15/CS (Nyirinkwaya, P.J; Hitiyaremye and Munyangeri) December 15, 2017]

Family Law – Family property – Management of family property – The consent of both spouses is mandatory before the sale or conveying any right on the immovable property which they jointly own.

Facts: Mukakalisa filed a claim before the Intermediate Court against her husband Nduwayo and Ndahunga, requesting the Court to annul the sale agreement of a house concluded between them because she was not aware of it, the hearing of the case conducted in absentia of Nduwayo but he was summoned according to the Law. That Court decided that the claim of Mukakalisa has no merit.

Mukakalisa appealed for that decision before the High Court, which decided to nullify the contract concluded by Nduwayo alone because his wife did not sign, she was not even aware of it whereas their mutual consent is required as provided by the Law.

Ndahunga appealed for that judgment before the Supreme Court, stating that the High Court dismissed the objection he raised for not admitting the claim of Mukakalisa because the time to oppose for that contract had expired. After all, the legislator provided five (5) years for immovable property for one of the spouses who should have expressed his/her consent despite his/her absence, if he/she was absent due to serious circumstances, that period was enough for her to oppose for the agreement concluded by her

husband, therefore, the fact that the contract was concluded in 2002, and she filed a claim in 2012 after ten (10) years, this indicates that the agreement was final and irreversible, he adds that the Court also disregarded the indirect evidence he submitted which indicate that, though the defendant did not sign on the sale agreement, she was aware of it.

Mukakalisa argues that the issue of the period for filing a claim was heard before the High Court but it was not considered as an objection, thus this objection should not be raised for the first time before the Supreme Court, hence, it should not be admitted. She further states that she had never been informed that her husband concluded a sale agreement on their common property because he used to conceal everything from her.

Held: 1. The consent of the spouse is necessary before the sale of their joint immovable property or conveying any right on it.

The appeal has merit; The contract is still valid.

Statutes and statutory instrument referred to:

Law N° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions article 17,21 and 22.

No cases referred to.

Judgment

I BACKGROUND OF THE CASE

- [1] This case started before the Intermediate Court of Nyarugenge, Mukakalisa Dancille suing her husband Nduwayo Nathan and Ndahunga Jean Marie Vianney, praying the Court to annul the sale agreement of a house located on parcel N° 5798 concluded between them on 08/02/2002 because she was not aware of it, the case was heard in absentia of Nduwayo Nathan though he was lawfully summoned.
- [2] On 21/06/2013, the Court rendered the judgment deciding thatMukakalisa Dancille's claim is without merit because she failed to demonstrate what she did when she knew that Ndahunga Jean Marie Vianney was building in the plot he bought from her husband while the latter has traveled abroad, whereas the spouses have equal rights to follow up their patrimony and stand for it, the Court ordered to give Ndahunga Jean Marie Vianney, moral damages and counsel fees.
- [3] Mukakalisa Dancille appealed for this decision before the High Court, then on 15/05/2015 that Court decided that her appeal has merit, It annulled the agreement concluded by her husband Nduwayo Nathan alone who sold the house which was in plot N° 5798 to Ndahunga Jean Marie Vianney because his wife did not sign it and she was not even informed whereas there should be a consent of both as provided by the Law.
- [4] Ndahunga Jean Marie Vianney appealed for this case before the Supreme Court, stating that the High Court did not consider the objection he raised for not admitting the claim of Mukakalisa Dancille because of the expiry of the prescribed period for filing a claim, that the Court also disregarded the

elements of evidence he submitted indicating that, though Mukakalisa Dancille did not sign the sale agreement of the house, she was aware of it. He further states that the Court declared void the sale agreement of that house but It failed to give him the money equivalent to the value he added on that house and in that plot as indicated by the expert's report.

- [5] The hearing of the case conducted in public on 18/07/2017, Ndahunga Jean Marie Vianney represented by Counsel Ndagijimana Emmanuel whereas Mukakalisa Dancille was represented by Counsel Habimana Pie, Nduwayo Nathan did not appear but he was summoned to an unknown address. On that day, Counsel Habimana Pie raised an objection of lack of jurisdiction of the Supreme Court, then on 15/09/2017 the Court overruled it. It ordered to resume the hearing of the case in merit on 14/11/2017.
- [6] On that day, parties to the case appeared before the Court, Ndahunga Jean Marie Vianney was represented by Counsel Ndagijimana Emmanuel and Counsel Rukundo Emile, whereas Mukakalisa Dancille was represented by Counsel Habimana Pie, Nduwayo Nathan was absent but he has been summoned to unknown address as provided by the Law.

II. ANALYSIS OF THE LEGAL ISSUE

Whether Mukakalisa Dancille exceeded the time limit prescribed to file a claim contesting the contract concluded by her husband Nduwayo Nathan.

[7] Counsel Rukundo Emile argues that the first ground of Ndahunga Jean Marie Vianney's appeal of his client is that the

High Court disregarded the objection he raised aiming at rejecting the claim of Mukakalisa Dancille because the time for its filing has expired, that it is not raised for the first time before the Supreme Court as the respondent pretends because it is clear that the judge examined it (page 5, paragraph 18, judgment RCA 0415/13/HC/KIG).

- [8] Counsel Rukundo Emile continues stating that as provided by article 22 of the Law N° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, the legislator gave a time limit of five (5) years to one of the spouses who were not around at the time of the transaction to express her/his opinion, thus, if Mukakalisa Dancille was absent due to serious reasons, that period was enough for her to oppose against the agreement concluded by her husband. He continues arguing that, this corroborates with the provisions of article 17 of the law N° 22/99 of 12/11/1999 aforementioned, which provides that the spouses have equal right to follow up their patrimony and stand for it.
- [9] Another ground for appeal submitted by Ndahunga Jean Marie Vianney as arguing by his Counsel Rukundo Emile is that the indirect evidence indicating that Mukakalisa Dancille should not deny having known the sale agreement as to the one who remained in the country when her husband was not around, if she believed that the house was under rent as she pretends, and having noticed it being demolished for rehabilitation whereas she knew that the house was hers, she would have followed it up because she had the same rights with her husband concerning the management of their patrimony, therefore, the fact that she failed

to take any action within five years (5) provided by the Law, it implies that she knew that sale agreement.

- [10] Counsel Rukundo Emile states that the proof which indicates that Ndahunga Jean Marie Vianney has rights over the plot he bought, is that, he was given a construction permit by authorities, whereby the latter wtote to the owner of the garage which is in that plot allowing him to build a wall and he was given afterward the permission to work in that garage.
- [11] From these grounds of appeal, Counsel Ndagijimana Emmanuel who also assistNdahunga Jean Marie Vianney adds that the agreement which his client concluded with Nduwayo Nathan is authentic because it was done before the notary, the property's title submitted by the seller indicates that he is the sole owner, he does not indicate that he is either married or single. He further states that at time Ndahunga Jean Marie Vianney bought that plot it contained a small house and he demolished it and built in a garage, and during that period, Mukakalisa Dancille used to pass nearby every day heading to her job because that place is on the way to Bralirwa where she was working, however, she never stated that the property is hers
- [12] Counsel Ndagijimana Emmanuel continues stating that Ndahunga Jean Marie Vianney had an agreement with Nduwayo Nathan in the year 2002, then Mukakalisa Dancille filed a claim in 2012 after ten (10) years, this demonstrates that the agreement has become final and irreversible, that the High Court misunderstood article 22, paragraph 3, of the Law N° 22/99 of 12/11/1999 aforementioned because it stated that Nduwayo Nathan did not demonstrate the reason why his wife did not sign.

- [13] Concerning indirect evidence which proves that Mukakalisa Dancille acknowledges the agreement concluded by her husband, Counsel Ndagijimana Emmanuel states that after selling, Nduwayo Nathan traveled to Europe, the buyer built a garage and he also paid rental taxes, land tax, all these show that Mukakalisa Dancille was informed of this agreement.
- [14] Counsel Ndagijimana Emmanuel concludes by praying the Court that alternatively if it finds necessarly to annul the sale agreement between Nduwayo Nathan and Ndahunga Jean Marie Vianney, which will result in returning the property in litigation to Mukakalisa Dancille, the latter should be ordered to refund to Ndahunga Jean Marie Vianney 177,533,575Frw equivalent to the value he added to that property as indicated by the expert's report available in the case file, this is to prevent unjust enrichment (enrichissement sans cause), mostly because Ndahunga Jean Marie Vianney bought that property in good faith.
- [15] Counsel Habimana Pie representing Mukakalisa Dancille states that the issue of the time limit for filing a case was heard before the High Court, but it was not considered as an objection, thus, it cannot be raised for the first time before the Supreme Court. He continues stating that, article 21 of the Law N° 22/99 of 12/11/1999 aforementioned institutes the principle that any time there is a property to be sold, one of the spouses should be notified, whereas article 22 of the same law provides an exception relating to the situation when one of the spouses is not available.
- [16] Counsel Habimana states that Ndahunga Jean Marie Vianney should not have signed on the agreement without asking the wife of his counterpart whereas it was clear that he is a married man, as it is a practice for a buyer to investigate the property he/she is about to acquire, with regard to the provisions

of article 17 of the Law N° 22/99 of 12/11/1999 which has often been stated, cannot apply e in this case because this article provides for the management and diposal of spouse's patrimony.

- [17] Concerning indirect evidence raised by her opponents arguing that those elements of evidence prove that Mukakalisa Dancille was informed of the agreement concluded by her husband, Counsel Habimana Pie submits that their statement has no merit. After all, it was possible to lose information on works which were done in the plot sold because its location is different from Mukakalisa Dancille'residence; whist the fact that Ndahunga Jean Marie Vianney is the one who pays taxes, he finds that this is baseless because this is not among how someone acquires a property (moyen d'acquisition de la propriété).
- [18] Counsel Habimana Pie concludes stating that, in case the agreement is annulled, nothing would be refunded to Ndahunga Jean Marie Vianney by Mukakalisa Dancille because the matter can be restored as before signing the agreement, he finds that, their request is out of the subject matter.
- [19] Mukakalisa Dancille who attended the hearing was asked by the Court about this case and explained that she did not know that her husband sold the house and the parcel which is in litigation, because he used to hide everything from her, that he told her that he rent that place and she accepted. She further stated that it is true that during that time she was working nearby but she couldn't know whether that property was sold, rather she knew about it during the period of land registration, at that same time she heard that her husband has started receiving money even before 2002.

[20] Concerning the fact that Mukakalisa Dancille had once asked rent from Ndahunga Jean Marie Vianney when her husband was abroad, she argues that she went to Kicukiro sector office to ask about the tenant of the plot and the house under litigation and found that Ndahunga Jean Marie Vianney was the one, who even pays taxes that when she asked his guard how she can find him, he replied that he does not know where he lives, thus she could not write to him without knowing his address.

DETERMINATION OF THE COURT.

- [21] Article 17, paragraph two, of the Law N° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions which was in force when Nduwayo Nathan concluded the sale agreement with Ndahunga Jean Marie Vianney, provides that "In case of marriage under the regime of community of property or that of limited community of acquests, the spouses shall choose who, among themselves, shall be responsible of the management of the common patrimony, they are also equally entitled to monitor, to represent".
- [22] Article 21 of the Law N° 22/99 of 12/11/1999 previously mentioned, provides that whatever be the matrimonial regime has chosen and the management modalities of the patrimony of the spouses, the agreement of both spouses shall be required for the donation of immovable property and any other property in the community, as well as for the acknowledgment of any right attached to these properties".
- [23] Article 22 of the same law provides that when one of the spouses is involved in a transaction that requires the consent of

the other spouse, he or she shall obtain this consent at the time of ratification of this transaction or within six months thereafter. This consent shall be notified to the third contracting party by written notice. Where no reply from the latter is made within a month following the date of notification, his or her consent shall be deemed given. Where, for some reasons the spouse whose consent is required is not available or due to serious reasons beyond his/her control could not give it, the transaction shall be deemed final one year (1) alter its ratification for movable property and five years (5) for immovable property".

The interpretation of article 21 and 22 previously [24] mentioned, implies that it's a principle for spouses to have a mitual consent before making any liberality or any disposal rights (mortgage, sale....) on a common immovable property when the agreement is concluded by one of the spouses, he/she has to notify his/her partner for the consent and then notify the contracting party. If one of the spouses is not available for any reason to express his /her consent, the legislator provided one year (1) for movable property and five years (5) for immovable property, so that spouse who was absent the time of concluding the transaction, expresses his/her consent or refusal if nothing is done during that period, the agreement becomes final. The legislator deemed this period to be enough for one of the spouse who was not able to provide his approval regarding the agreement concluded by his/her partner in his/her absence, so that he/she can apply for its annulment in case he/she disagrees. This is helpful for the buyer for his safety to manage his property without fear that someone may establish a caveat on it.

[25] Regarding this case, the documents of the case file indicate that on 08/02/2002, Nduwayo Nathan, the husband of

Mukakalisa Dancille, concluded an agreement with Ndahunga Jean Marie Vianney to whom he sold a house built in the plot N° 5798 located in Amajyambere village, Gasharu cell, Kicukiro sector, Kicukiro district, in Kigali city, for seven million and five hundred Rwandan francs (7.500.000Frw), in presence of Niyonzima Fidèle, Umugwaneza Miriam, Kobusingye Penina, and Uwayezu Dorothy as witnesses.

Those documents also indicate that on 07/12/2012 Mukakalisa Dancille filed a claim before the Intermediate Court of Nyarugenge requesting the court to annul the agreement concluded between Nduwayo Nathan and Ndahunga Jean Marie Vianney for the sale of the plot N° 5798 containing a garage which is located in Amajyambere village, Gasharu cell, Kicukiro sector, Kicukiro district, in Kigali city because the seller is her lawful husband, who sold it without her knowing and went afterward to Europe. In her submissions prepared by Counsel Mukamisha Claudine, Mukakalisa Dancille explained that she believed that the house is still theirs because she has not been notified about that sale till the time she went for land registration and meet with Nduwayo Jean Marie Vianney's wife who was also registering the same property, she also explains that she did not follow up that property because she believed that her husband rented it to look after their children who tavelled with him.

[27] The intermediate Court of Nyarugenge found Mukakalisa Dancille'sclaim without merit because there are constructions built on that land after demolishing the older ones, while she was around and she did not react whereas she had the same rights as her husband concerning the management of their property, the issue of long term rent that she was told by her husband, she does not prove it. The High Court found that the agreement between

Ndahunga Jean Marie Vianney and Nduwayo Nathan should be annulled because Mukakalisa Dancille did not express her consent as required by article 22 of the Law relating to matrimonial regime aforementioned.

- [28] The Supreme Court finds, that the time for which the contract was concluded, Nduwayo Nathan did not notify his wife Mukakalisa Dancille so that the latter may express her consent because she does not even appear among those who signed, there is not even other evidence which indicates that after concluding it, he notified her about it till he went to Europe in March 2003.
- The Supreme Court finds, though for any reason [29] Mukakalisa Dancille was not notified by her husband about the agreement he concluded with Ndahunga Jean Marie Vianney on common property, she had a period of five years (5) to follow up her property as provided by article 22 of the Law N° 22/99 of 12/11/1999 aforementioned, especially that her whom she states that she was in disputes with him, he went to Europe, she had legal standing for following up and represent it pursuant to article 17 of aforementioned Law. The fact that Mukakalisa Dancille had to take a decision on the sales contract which was concluded between her husband Nduwayo Nathan and Ndahunga Jean Marie Vianney and five years lapsed without doing anything, implies that the contract became binding and cannot be nullified on the ground that she did not consent to it when it was concluded.
- [30] The Supreme Court finds that the interpretation of the High Court that article 17 of the Law on matrimonial regime concerns only the right for managing common property, (gestion du patrimoine commun) is false, because that article states clearly that they have equal right for monitoring and representing it, thus,

this article is also the one which gives Mukakalisa Dancille the right to follow up the common property with her husband Ndahunga Nathan while he was absent, especially that she admitted before the Court that she used to pass by that place on her way to the work, thus, it is not reasonable how she would not have seen new buildings which were constructed so that she reacts accordingly.

- [31] The Supreme Court also finds that, the findings of the High Court in paragraph 17 that "there is no prescription period for one of the spouses to claim for her/his rights provided by article 22 aforementioned", this position is wrong because as aforementioned, the legislator's will was one year (1) for movable property and a period of five years (5) for immovable property for a contract to be final and irreversible for a spouse who did not express her/his consent regarding the contract concluded by his/her partner when he/she could not be around or for serious reasons he/she has precluded him/her from expressing his/her opinion, this period is set purposely for pursuing rights to anyone in case of need.
- [32] The Supreme Court finds, if the law provides that the one who should accept the agreement concluded by his/her partner was not able to appear or to express his/her opinion due to serious reasons, the contract becomes final and irreversible in one year(1) for movable property and five years(5) for immovable property, therefore, it is not reasonable, how Mukakalisa Dancille who states that she was around, would stay such long time of ten years(10) without follow up her property which she states that, was sold by her husband.
- [33] Basing on the motivation and the laws aforementioned, the Supreme Court finds that the sales contract for the house

located on plot N° 5798, in Amajyambere village, Gasharu cell, Kicukiro sector, Kicukiro district, Kigali city, concluded between Nduwayo Nathan and Ndahunga Jean Marie Vianney on 08/02/2002 should not be annulled because Mukakalisa Dancille delayed filing a claim against it.

[34] The Supreme Court finds it not necessary to examine the issue related to whether Mukakalisa Dancille should refund Ndahunga Jean Marie Vianney the money equivalent to the value he added on the property in litigation because of the contract she claimed to be annulled, remains valid.

Whether the parties should be awarded the damages they request.

- [35] Counsel Habimana Pie requests that at this level Mukakalisa Dancille be awarded 1,000,000Frwfor counsel fees and 300,000Frw for procedural fees. He also claims that she is awarded 20,000,000Frw for moral damages for not enjoying her property whereas she is an old woman and that she lives in poverty, she also claims to be refunded 10,000Frw she paid for court fee before the Intermediate Court and in High Court.
- [36] Counsel Rukundo Emile states that he cannot respond to these damages because Ndahunga Jean Marie Vianney request to consider that contract, rather in his submissions he jointly prepared together with Counsel Ndagijimana Emmanuel, they request that Mukakalisa Dancille and Nduwayo Nathan be ordered to pay Ndahunga Jean Marie Vianney procedural fees equal to 2,000,000Frw and counsel fees equal to five 5,000,000Frw and moral damages worth10,000,000Frw.

[37] Concerning the damages requested by Ndahunga Jean Marie Vianney, Counsel Habimana Pie stated during the pretrial conference, that is without merit because he faulted for buying from Nduwayo Nathan whereas in absence of his wife, thus he can not base on his faults and claim some rights (Nul ne peut invoquer sa propre turpitude).

DETERMINATION OF THE COURT

[38] The Supreme Court finds that Mukakalisa Dancille cannot be awarded damages because she loses the case, rather, she should pay jointly with Nduwayo Nathan to Ndahunga Jean Marie Vianney money he used to hire advocates who represented him. However, because the requests excessive amount, they should both pay him one million (1.000.000Frw) for counsel fees and procedural fees. The Court finds without merit the moral damages requested by Ndahunga Jean Marie Vianney because he cannot justify them.

III. DECISION OF THE COURT

- [39] Decides that the appeal of Ndahunga Jean Marie Vianney has merit;
- [40] Decides that the sale's contract of the house located in plot N° 5798 in Amajyambere village, Gasharu cell, Kicukiro sector, Kicukiro district, in Kigali city, concluded between Ndahunga Jean Marie Vianney and Nduwayo Nathan on 08/02/2002 is sustained;
- [41] Decides that the Judgment RCA0415/13/HC/KIG rendered by the High Court on 15/05/2015 is reversed in whole;

- [42] Orders Mukakalisa Dancille and Nduwayo Nathan to pay to Ndahunga Jean Marie Vianney one million (1,000,000 Frw) for counsel fees and procedural fees;
- [43] Orders Mukakalisa Dancille and Nduwayo Nathan to refund Ndahunga Jean Marie Vianney one hundred thousand (100,000Frw) for court fees he paid in this Court.

COMMERCIAL CASE

HABIMANA ET AL v. ASIIMWE ET AL

[Rwanda SUPREME COURT – RCOMAA 00031/2016/SC - RCOMAA 00036/16/CS (Nyirinkwaya, P.J., Karimunda and Ngagi, J.) June 29, 2018]

Mortgage — Disputes arising from real property evaluation — In case of disagreement on the property evaluation at the request of the one who feels prejudiced another property evaluation is conducted.

Mortgage – It's usurpation of duties When the receiver takes the obligations of the Registrar General without his authorisation.

Mortgage – The effect of nullifying the auction – When the auction is nullified, everything has to be in the status they were in before the auction.

Facts: Asiimwe Frank was given a secured loan by Bank of Kigali Ltd (BK), he mortgaged his house with a value of 121,000,000Frw, which was registered in RDB. The loan was not repaid as agreed, hence the mortgagor requested the Registrar General in RDB to appoint a receiver, thus appointed Advocate Habimana, who sold the mortgage in the auction.

Issues arose when the receiver hired a real property valuer to carry out a separate valuation from the one carried out when the laon was issued, that valuation valued the house at 65,197,200Frw, while the first valuation had valued it at 121,000,000Frw at the time when it was registered in RDB, this prompted the mortgagee to writes to the Regulatory Council for Property Valuation requesting that another real property valuer be appointed to conduct another valuation because he disagrees with the value given to the house by the real property valuer

appointed by the receiver, he gave a copy of that letter to both the Registrar General and the receiver, however that institute did not respond to his request until the auction.was held and the mortgage sold at 55,000,000Frw.

This prompted the mortgagee to sue to the Commercial Court of Nyarugenge requesting to declare the auction null and void. That court declared the auction null and void on the ground that it did not comply with the Instructions of the Registrar General relating to modalities of the lease, sale, public auction, and mortgage acquisition, it ordered the Receiver, Bank of Kigali Ltd, the Regulatory Council for Property Valuation and the Registrar General in RDB, each to pay him procedural and counsel fees.

The receiver appealed to the Commercial High Court alleging that the court nullified the auction and awarded damages without any basis. The Bank of Kigali Ltd also appealed against the Court's decision to nullify the auction and that it also ordered it to pay damages without first establishing its fault, it states that it had no role in the auction process. The court found the appeal of the receiver without merit and that of the Bank of Kigali Ltd was founded on the ground that it is not leiable for damages.

The receiver and Bank of Kigali Ltd were not contented with the outcome of the case and each appealed to the Supreme Court, while the mortgagee, the buyer of the house, and the Regulatory Council for Property Valuation each filed a cross-appeal.

In his appeal, the Receiver argued that the previous courts should not have invalidated the auction on the ground that the mortgage was sold at a lower price value, arguing that in case the mortgagee does not agree with the outcome of the valuation he requests for another valuation and the auction is suspended, if it is not done then its not the fault of the receiver because he is not the one who conducted the valuation and approve it and that when it is found that the value determined is less than the actual value, then the selling terms and conditions and the permit to sell the mortgage are the ones that are revoked.

The mortgagee argues that the auction cannot proceed after the receiver has seen that the owner of the property has requested the concerned organ for to first make another valuation and that in the courts the subject matter was the invalidation of the illegal auction because it had already been held, that he is also accused of conflict of interest because he acted as both a receiver and a court bailiff at the same time, he concludes that he did not deny that the mortgage is for Bank of Kigali Ltd, but it should be given its real value.

On the issue of whether the receiver notifying the selling terms and conditions instead of the Registrar General is ground to nullify the auction, the Receiver states that the Instructions of the Registrar General provide for the Registrar General to serve a copy instead of notifying them and that the Registrar General informs as he wishes, that the receiver doing it, is normal, he finds that the Court should have demonstrated the prejudice caused to him when the Registrar General did not personally hand to him the documents of instructions.

Whereas the mortgagee argues that the Instructions of the Registrar General in RDB stipulates that the Registrar General is the one who notifies the mortgagee and the mortgagor of the selling terms and conditions within 16 working hours from the time the document has been approved, therefore being notified by the receiver means that he has performed the duties of the Court Bailiff and also did not comply with the time limit set out in the Regulations as he was notified within five days instead of the 16 hours provided by the Instructions. He goes on to explain that the

cancellation of the auction does not require to first establish the harm caused rather when the Instructions of the Registrar General are not complied with, the auction is nullified.

On that ground of appeal, the buyer of the auctioned house and the Bank of Kigali Ltd concurs with the receiver that the Receiver notifying the sell terms and conditions instead of the Registrar General is not a ground for the nullification of the auction because the purpose was to inform him of those terms and conditions and he was informed, thus the purpose was achieved.

The Bank of Kigali Ltd in its appeal, argues that the previous Court confused the responsibilities of the organs concerned with the auction with those of the mortgagee allowed to sell the mortgage, which led to the unjust ruling, it did not award it damages for vexatious suits while it had ruled that it committed no fault during the auction process and that declared the auction null and void but did not rule on its situation as a mortgagor.

The mortgagee argues that the bank claims are unfounded because it does not represent those organs, they had they, representatives, during the hearing and that he is not the one who led the Bank of Kigali Ltd into lawsuits rather it was due to the Receiver and that the court ruling on the situation after nullifying the auction was the claim to the court.

In his cross appeal, the mortgagee argues that based on the negative effects the illegal auction had on him, he requests that the receiver pays him various damages.

The Receiver argues that the damages claimed are unfounded because he defaulted on the loan, which resulted in the execution of the judgment by force, therefore he should bear the consequences. In his cross appeal, the buyer of the house states that if the Court finds that the fault which led to the nullification of the auction was made by the receiver, then he should be ordered to pay counsel and procedural fees. He also states that if it finds that the auction was illegal, it should compel the Bank of Kigali Ltd to reimburse the money paid in the auction and also pay his procedural and counsel fees because his appeal is a result of the claim it filed.

In a cross-appeal from the Regulatory Council for Property Valuation, it states that the Court could consider whether, legally, it could have been sued for damages in a lawsuit if it was not an association, organization, or public agency because it had no assets, and had no legal representative. because it acts only as a Committee of People from all over the world but it is not a union of values because it has legal status. The other parties have not commented on this appeal.

- **Held:** 1. In case of disagreement on the property evaluation at the request of the one who feels prejudiced another property evaluation is conducted, otherwise, the auction based on that challenged auction is nullified.
- 2. Its usurpation of duties, when the receiver performs the duties of the Registrar General without his/her authorisation.
- 3. When the auction is nullified, everything has to be in the status they were in before the auction, therefore, Bank of Kigali Ltd remains in possession of the mortgage furnished by the mortgagor and also reimburse the money paid for that morgatge.
- 4. Moral damages are not awarded in case the claimant is the one who defaulted on his duties even if the case is ruled in his favour.

- 5. The receiver unlawfully auctioning the mortgage which led the buyer to be enjoined in the case is liable for counsel and procedural fees.
- 6. Since the mortgagor wrote to the Regulatory Council requesting it to appoint other Property Valuers to carry out another property valuation but did not respond, until the auction took place, while it is mandated by the Law to do so, that is a ground for it to be liable for damages

The appeal of the Receiver is without merit;
The appeal of Bank of Kigali Ltd is without merit;
The cross appeal of the mortgagor has merit in parts;
The cross appeal of the buyer of the house has merit;
The cross appeal of the Regulatory Council for Property
Valuation is without merit;
The auction is nulliefied;
The court fees deposit covers the expense incurred in this case.

Statutes and statutory instrument referred to:

- Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 10
- Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 7
- Law N°15/2004 of 12/06/2004 relating to evidence and its production, article, article 3
- Law N° 12/2013 of 22/03/2013 governing the bailiff function, article 38
- Law N°13/2010 of 07/05/2010 modifying and complementing Law N°10/2009 of 14/05/2009 on mortgages, article 3

- Article 36 of the law N° 17/2011 of 12/05/2010 establishing and organizing the real property valuation profession article 36
- Instructions of the Registrar General N $^{\circ}$ 03/2010/org of 16/11/2010 on modalities of lease, sale, public auction and mortgage, article 9
- Decree Law of 30/07/1888 relating to contracts or obligations, article 258.

No case referred to.

Judgment

I. BACKGROUND OF THE CASE

- [1] Asiimwe Frank was granted a loan by Bank of Kigali Ltd, who also mortgaged his house worth 121,000,000Frw as indicated on the mortgage certificate issued by the Rwanda Development Board (RDB). Asiimwe Frank was granted a loan by Bank of Kigali Ltd, who also mortgaged his house worth 121,000,000Frw as indicated on the mortgage certificate issued by the Rwanda Development Board (RDB).
- [2] Asiimwe Frank failed to repay his debt, prompting the Bank of Kigali Ltd to request the Registrar General of the RDB to appoint a receiver to manage and sell the mortgage furnished to it by Asiimwe Frank, and the Registrar General appointed Me Habimana Vedaste, who sold the mortgage in the auction which took place on the 29/04/2015.

- [3] Asiimwe Frank filed a lawsuit in the Commercial Court of Nyarugenge requesting the court to declare the auction held on 29/04/2015 null and void, because Me. Habimana Vedaste, the receiver, engaged a new evaluator who carried out another evaluation which gave a different value from the one given at the time he was given the loan, he valued the house at 65,197,200Frw while the first one had valued it at 121,000,000Frw at the time of issuing the loan, this resulted in his house being sold at a very low price, because it was sold at 55,000,000Frw, and it was sold secretly, without being informed.
- [4] On 03/12/2015, the Commercial Court of Nyarugenge rendered a judgment RCOM 1321/15TC/NYGE and invalidated the auction on the ground that there was non compliance with article 9 of the instructions of the Registrar General N° 03/2010/org of 16/11/2010 on modalities of the lease, sale, public auction, and mortgage acquisition which provides that the Registrar general may approve of the selling terms and conditions and shall send notification of approval to both the mortgagee and the mortgagor within 24 working hours from the time the document has been approved but in this case, the provisions of this article were executed by Me Habimana Vedaste while it was not within his jurisdiction.
- [5] The Court also relied on the fact that Asiimwe Frank wrote to the Regulatory Council for Property Valuation requesting that other valuators be appointed to evaluate his house because he did not accept the valuation used by Me Habimana Vedaste, he copied the Registrar General and also Me Habimana Vedaste himself, however, the auction proceeded based on article 19 of the law on mortgage which provides that the receiver shall be responsible for the selling of the mortgage at an appropriate

market price after informing the two parties thereon, on the contrary, the provisions of that article do not give him the right to sell the mortgage at a lower price or devalue the mortgage claiming that it is the market value, because when you make another evaluation different from the first one, you have to indicate the materials on the mortgage which lost the value, not only just confirm a lower value of the mortgage without demonstrating how it lost value.

- [6] That Court ordered Me Habimana Vedaste, Bank of Kigali Ltd, the Regulatory Council for Property Valuation, and the Registrar General in RDB, each to pay Asiimwe Frank 1,000,000Frw for the moral damage and procedural fee.
- [7] Me Habimana Vedaste appealed to the Commercial High Court contesting that the Court:
 - 1. nullified the auction because he as a Receiver notified the approval of the selling terms and conditions instead of the Registrar General and was", yet it was the duty of the Court Bailiff;
 - 2. nullified the auction because the mortgage furnished by Asiimwe Frank was devalued but it was not the case because the court erred since it did not give the basis for its ruling that the mortgage was devalued;
 - 3. held that Asiimwe Frank's right to call for another valuation was not respected, it based on article 36 of Law No. 17/2011 of 12/05/2010 establishing and organizing the real property valuation profession, nevertheless, it misapplied that provision because the issue, in this case, is the price offered at the auction, rather than the value got from the valuation.

- 4. awarded damages to Asiimwe Frank without basis.
- [8] Bank of Kigali Ltd also appealed contesting the ruling of the Court that:
 - 1. the auction which was held on 29/04/2015, be canceled because the person who communicated the approval of the selling terms and conditions could not do so, but the provisions of that article were complied with, as it does not provide that serving a copy to Asiimwe Frank have to be done by the Registrar General in RDB, it would be done by anyone.
 - 2. the auction is canceled when the mortgage was sold at a low price, but that is not the case because the price of the mortgage on which it will be sold on the auction is not regulated by the valuation as provided for in article 3 amending article 19 of the Law on mortgage.
 - 3. Bank of Kigali Ltd must pay 1,000,000 Frw in damages without giving the fault for which is being charged those damages, as it was not involved in the auction process.
- [9] On 31/03/2016, the Commercial High Court rendered judgments (RCOMA 0011/16 / HCC RCOMA 0035/16 / HCC) whereby it found the appeal of Me Habimana Vedaste without merit, the appeal of Bank of Kigali Ltd with merit in parts, that the judgment RCOM 1321/15 / TC / NYGE has only changed in the sense that Bank of Kigali should not be charged damages. It ordered Me Habimana Vedaste to pay Asiimwe Frank 1,500,000Frw for the procedural and counsel fees on the first instance and 1,000,000Frw for the procedural and counsel fees on appeal level.

- [10] Habimana Vedaste appealed to the Supreme Court, requesting to examine the following issues which are whether:
 - 1. the auction which was conducted in the execution of various administrative decisions and approved by the certificate of the Registrar General in the RDB can be declared null and void without first suing requesting to declare null and void the certificate of the Registrar General which approved the auction;
 - 2. the disputes on the property valuation or challenging the procedures of the auction is a ground for invalidating the auction
 - 3. whether the receiver is held liable when the valuation made by an expert and approved by the Registrar General and rejected by the mortgagor;
 - 4. the mortgagor requesting the competent authority to appoint other evaluators to make another evaluation suspends the auction;
 - 5 analysis of the Court interpretation of article 19 of the law on mortgage and article 36 of the Law N $^{\circ}$ 17/2010 of 12/05/2010 establishing and organising the real property valuation profession;
 - 6. the effects of non compliance with the regulations N°03/2010/ORG, and the one who is liable for it;
 - 7. The court did not contradict itself;
 - 8. is not entitled to procedural and counsel fees and attorney's fees and other court costs.
- [11] Bank of Kigali Ltd also appealed arguing that the Court:

- 1. did not award it damages whilst it ruled that it committed no error during the auction, therefore it was dragged into a frivolous lawsuit;
- 2. confused the responsibilities of the auctioneer and the receiver, leading to an erroneous decision;
- 3. ruled null and void the auction held on 29/04/2015, but did not clarify the fate of Bank of Kigali which was furnished with the mortgage.
- [12] The case was heard in public on 27/02/2018, Me Habimana Vedaste represented by Me Nkurunziza François-Xavier, Bank of Kigali Ltd represented by Me Rutembesa Phocas, Asiimwe Frank assisted by Me Rwigema Vincent, Me Kayihura Didas and Me Munyentwari Charles, Regulatory Council for Property Valuation represented by Me Ntarugira Nicolas, Musinguzi Hannington represented by Me Nsengiyumva Niyondora, while the Registrar General in RDB did not appear although signed on the hearing date.
- [13] After hearing both parties on the issue of the absence of the Registrar General, the Court, after reviewing the provisions of article 59 of Law N° 21/2012 of 14/06/2012 on relating to the civil, commercial, labour and administrative procedure, it ruled that the case should proceed in absentia of the Registrar General and that it will consider the Registrar General's court submissions in deliberation, it first examined the objection of lack of jurisdiction of this Court raised by Asiimwe Frank, but it was overruled, the case in merit was heard on 29/05/2018, again the Registrar General did not appear, although was legally summoned, the Bank of Kigali Ltd represented by Me Buzayire Angèle, the other parties represented as before.

II. ANALYSIS OF LEGAL ISSUES

A. The appeal of Me Habimana Vedaste

- [14] In his appeal, Me Habimana Vedaste submitted eight grounds of appeal, but which may be categorised in two which are; whether the auction held on 29/04/2015 had to be null and void and its effects, all the grounds of appeal contained therein as they were submitted by Me Nkurunziza François-Xavier to be examined, the other is to determine whether damages should be awarded in this case.
 - 1. Whether the auction held on 29/04/2015 had to be nullified and its effects
 - a. Whether the Commercial High Court should not have relied on the ground that the mortgage was sold at a low price to nullify the auction
- [15] Me Nkurunziza François-Xavier, the counsel for Me Habimana Vedaste, argues that what they challenge in the judgment of RCOMA 0011/16 / HCC & RCOMA 035/16 / HCC rendered on 31/03/2016 by the High Court, is that it nullified the auction on the ground that the mortgage was sold at a lower price based on the real property valuation carried out at the time of granting the loan.
- [16] He further contends that the Commercial High Court not have nullified the auction held on 19/04/2015 on the ground that the mortgage was sold at a lower value because if the mortgagor is not contented with the real property valuation he requests for another property valuation and the auction is suspended, that when he does not do that then it's not the fault of the receiver

(Habimana Vedaste) because he is not the one who carried out that real property valuation and approved it.

[17] He concludes that the disputes over property valuations are settled in accordance with the provisions of article 36 of Law No. 17/2010 of 12/05/2010 establishing and organising the real property valuation profession, that when the decision is taken by that organ or if it demonstrates that the prescribed value is less than the actual value, then the document approving the terms and conditions of sell and the Registrar's certificate approving the auction are nullified.

Asiimwe Frank argues that, apart from Me Habimana Vedaste's interest in proceeding with the auction when he knew that the mortgagor had requested for another valuation to first be carried out, there would be no other reason for the auction to proceed while that was the gist of the action, that the issue which was being litigated was to declare null and void the auction which was illegally held, thus he finds that Me Habimana Vedaste wanted to litigate on the matters he already litigated and lost on the first and second level. He further argues that Me Habimana Vedaste's allegations that he did not carry out a counter valuation are misleading because there is no way he would have carried out when he had already written to the concerned organs. He further states that in one and a half years the property had devalued from 140,500.00Frw to 65,197,200Frw, this happened because the Valuer hired by Me Habimana Vedaste who valuated it using fake materials which were not used in its construction alleging that are the ones used purposely to devalue it as held in the judgment RCOM 1321/15/TC/NYGE, he further argues that among the claims against Me. Habimana Vedaste is a conflict of interest because he acted both as a receiver and a Court bailiff at the same time. He concludes by saying that he does not dispute that the mortgage was furnished to Bank of Kigali Ltd, but he wants the mortgage to be given its real value.

- [19] Me Kayihura Didace, the counsel for Asiimwe Frank, explains that the motive for article 7 of the Regulations of the Registrar General is that the one who uses the valuation (expertise) should compare it with its value at the time of its registration, that if there is a significant difference, he also puts it under consideration and do not sale the mortgage. He says that if the provisions of the Regulations were followed, Asiimwe Frank's property would not have been devalued and sold at a very low price.
- [20] Me Munyentwari Charles, the counsel for Asiimwe Frank, argues that what they are requesting from the Court is to confirm that the previous courts were correct to hold that the auction was null and void.
- [21] Me Rwigema Vincent, also assisting Asiimwe Frank, argues that the Law authorizes the receiver to sell the mortgage at a reasonable price considering the price fluctuations.
- [22] Me Ntarugira Nicolas, the counsel for the Regulatory Council for Property Valuation, argues that the claim filed with the court is not about property valuation rather its about nullification of the auction.
- [23] Me Niyondora Nsengiyumva, the counsel for Musinguzi Hannington, argues that his client also became a party to this case because as someone who brought the house in the auction, this case has effects on him.

- [24] Me Buzayire Angèle, the counsel for Bank of Kigali Ltd, argues that nullifying the auction because the mortgage was sold at a low price does not change the fact that the mortgage belongs to Bank of Kigali Ltd.
- [25] The Registrar General in RDB did not submit on this issue as his court submissions are not available nor did he attend the pre-trial conference although he was duly notified.

DETERMINATION OF THE COURT

- [26] Article 3 of the Law N°13/2010 of 07/05/2010 modifying and complementing Law N°10/2009 of 14/05/2009 on mortgages provides that "the receiver shall be responsible for selling the mortgage at the market price after informing the two parties thereon". Paragraph two of that article provides that "the market price shall be determined based on prevailing market conditions. Any proposed sale shall be conducted in accordance with auction procedures".
- [27] Article 36 of the law N° 17/2011 of 12/05/2010 establishing and organizing the real property valuation profession provides that "Where a party does not agree with a real property valuation, he/she shall refer the matter to the Council. In such a case, the Council shall select other certified valuers who shall decide other valuation methods to be used. In case the dispute is not settled, it shall be submitted to a competent court of Law".
- [28] Article 11 of the Instructions of the Registrar General N° 03/2010/org of 16/11/2010 on modalities of lease, sale, public auction and mortgage provides that "the receiver of the mortgage has the responsibility to sell the mortgage with a reasonable price

according to the changes on the market and its value state in the selling terms and conditions document".

- [29] The case file indicates that on 02/03/2015, the Registrar General in RDB signed a document entitled "Permit to sale the mortgaged property", Me Habimana Vedaste, Bank of Kigali Ltd and Asiimwe Frank were given a copy. That document indicates that the value of the mortgage at the time of its registration was 121,000,000Frw, the debt owed to the Bank of Kigali Ltd was 70,850,000Frw, it also indicated the time when the auction will begin and end.
- [30] The case file demonstrates that when the mortgage was about to be sold, Me. Habimana Vedaste employed real property valuer to carry out property valuation, which was conducted on 07/03/2015, its outcome indicated that the mortgage had a value at 65,197,200Frw. The case file also indicates that Asiimwe Frank challenged that valuation, on 16/03/2015, he wrote to the Regulatory Council for Property Valuation requesting that other property valuers be appointed to carry out another property valuation (counter- expertise) like the one which was done on behalf of Me Habimana Vedaste, Asiimwe Frank also copied that letter to the Registrar General in the RDB, Me Habimana Vedaste and the Bank of Kigali, nonetheless the requested valuation (counter-expertise) was not conducted because Asiimwe Frank did not get a response, instead, the auction proceeded and the mortgage was sold at for 55,000,000Frw.
- [31] The Court finds that, since Asiimwe Frank had challenged the outcome of the property valuation requested by Me Habimana Vedaste, who was the receiver and consequently wrote to the Regulatory Council for Property Valuation requesting that another real property valuation on the mortgage he had furnished

to the Bank of Kigali Ltd, healso gave a copy of that letter to the Registrar General in RDB, Me Habimana Vedaste and Bank of Kigali Ltd, unfortunately, Me Habimana Vedaste, who was knowledgeable that article 36 of Law N° 17/2011 of 12/05/2010 establishes and regulates the professional functioning of the valuation of the immovable property provides for the redress in case there is no agreement on the results of the real property valuation, this regarded it sold the house at 55,000,000Frw, implies that the auction was illegally conducted.

[32] The Court also finds that the fact that Asiimwe Frank wrote a letter requesting for another property valuation to be carried on his house but none reacted to it be the recipient of the letter nor those who were given a copy of that letter until the house was sold for a half (1/2) of the value it was valued, at the time the mortgatge was registered in RDB Ltd., that was two years before, this means that Me Habimana Vedaste cannot refute that he did not devalue the mortgage, because when he disregarded the request of conducting another valuation as requested by the mortgagor, so that the market price can be determined and unfortunately the mortgage was sold at a very lower price, it implies that Me Habimimana Vedaste did not comply with the provisions of article 3 of Law N°13/2010 of 07/05/2010 modifying and complementing Law N°10/2009 of 14/05/2009 on mortgages, in its first paragraph, and Article 11 of the Instructions of the Registrar General N° 03/2010/org of 16/11/2010 on modalities of lease, sale, public auction and mortgage stipulates that "the receiver has the responsibility to sell the mortgage at a reasonable price according to the changes on the market, having notified both parties".

- [33] As also held by the previous courts, this Court finds that since Asiimwe Frank had challenged the property valuation determined by the Property Valuer chosen by Me Habimana Vedaste, another valuation had to be carried out because that is what the law provides for in that situation, therefore the auction held on 29/04/2015 is null and void.
 - b. Whether Me Habimana Vedaste sending the notification of the selling terms and conditions instead of being sent by the Registrar General is a ground to declare the auction null and void.
- [34] Counsel Nkurunziza François-Xavier, representing Advocate Habimana Vedaste states that he was appointed as a receiver by the Registrar General in RDB, gave him instructions and a certificate confirming that he conducted his duties in conformity with the law, this implies that the mortgagor cannot sue requesting for nullification of the auction alleging that he challenges the property valuation conducted on his house or the sale procedures, without first requesting for the nullification of various decisions made by the authorities.
- [35] Counsel Nkurunziza François Xavier, assisting Advocate Habimana Vedaste argues that the Instructions of the Registrar General provide for the Registrar General to serve a copy instead of notifying them and that the Registrar General informs as he wishes, that being done by the Receiver is normal, he finds that the Court should have demonstrated the prejudice of Asiimwe Frank when the Registrar General did not personally hand to him the documents of instructions, besides that on page 9, section 26, the Court contradicted itself whereby it stated that serving a copy of instructions is in the responsibility of the Registrar General and he is liable when the notification is not conducted lawfully, while

on page 14, section 53, it stated that Habimana Vedaste did not use discernment, caution and refraining from bias, therefore his faults prejudiced Asiimwe Frank.

[36] Asiimwe Frank argues that article 9 of the Instructions of the Registrar General in RDB stipulates that the Registrar General is the one who notifies the mortgagee and the mortgagor of the selling terms and conditions within 16 working hours from the time the document has been approved. He adds that Advocate Habimana Vedaste as a Receiver performed the duties of Court Bailiff and again did not comply with the time limit prescribed by the Instructions of the Registrar General in RDB because the selling terms and conditions made on 25/03/2015 were notified on 30/03/2015, that is five days later instead of 16 hours prescribed by law.

[37] Counsel Kayihura Didace, Counsel Munyentwari Charles and Counsel Rwigema Vincent, all assisting Asiimwe Frank argue that article 9 of the Instructions of the Registrar General in RDB stipulates that once the Registrar General approves of the selling terms and conditions, shall send notification of approval to both the mortgagee and the mortgagor, they argue that their client was not notified of the selling terms and conditions by the Registrar General and those provisions of the Instructions were meant to eliminate the disorder in the auction, that the cancellation of the auction does not require a person to prove the damage suffered but if the Instructions of the Registrar General are not complied with, the auction must be canceled, the fact that the procedures (procedures) are not complied with is a ground to invalidate the auction because those procedures are public order.

[38] Counsel Niyondora Nsengiyumva, states that concerning the provisions of article 9 of the Instructions of the Registrar General, this article states that once the Registrar General has approved the selling terms and conditions, shall send notification of approval to both the mortgagee and the mortgagor within 16 working hours, that thus the courts holding that non compliance of it is a ground for the cancellation of the auction, he finds that the Instructions is silent on it and if the intention was for Asiimwe Frank to be notified the intention was achieved. As to whether the procedures set out in the Instructions of the Registrar General in RDB are of public order, he states that they are not of ordre public because they are not related to judicial process.

- [39] Counsel Buzayire Angèle, representing Bank of Kigali Ltd, argues that Asiimwe Frank not being notified of the selling terms and conditions is not a ground for the nullification of the auction. He further argues that the procedures provided for in the Instructions are not of d'ordre public so some of the procedures were not followed does not mean that there the auction should be nullified.
- [40] The representative of the Regulatory Council for Property Valuation and the Registrar General did not debate on this issue.

DETERMINATION OF THE COURT

- [41] Article 9 of the Instructions of the Registrar General provides that "the Registrar general may approve of the selling terms and conditions and shall send notification of approval to both the mortgagee and the mortgagor within 16 working hours from the time the document has been approved".
- [42] The case file demonstrates that on 10/03/2015, Advocate Habimana Vedaste sent the selling terms and conditions of the

mortgage furnished by Asiimwe Frank to the Registrar General in RDB requesting him to approve it, he gave a copy to the CEO of Bank of Kigali Ltd and Asiimwe Frank, but the latter received it on 15/03/2015. The case file also indicates that on 25/03/2015, the Registrar General in RDB wrote to Advocate Habimana Vedaste informing him that he had approved the selling terms and conditions of the mortgage furnished by Asiimwe Frank, made a copy for both Bank of Kigali Ltd and Asiimwe Frank. On 30/03/2015, Advocate Habimana Vedaste delivered a copy of the selling terms and conditions to Asiimwe Frank, he left it with his employee called Jesika.

- The Court finds that article 9 of the Instructions of the [43] Registrar General provides only the Registrar General to issue a copy of the selling terms and conditions to both the mortgagee and the mortgagor within 16 working hours from the time the document has been approved. It is apparent that the Registrar General designated a copy to Asiimwe Frank, but it was served to him by Advocate Habimana Vedaste on 30/03/2015. The interpretation of this article is that it only provides the designation of the copy but does not state how the copy is delivered to the intended recipient, nor does it state that the Registrar General is the one who delivers it to the mortgagor. Eventhough this article does not indicate that the Registrar General is the one who serves the document, it is clear that he is responsible for determining and planning how the document will be delivered to the intended recipient within the hours provided for in the Instructions of the Registrar General.
- [44] The Court finds that the case file does not indicate that Advocate Habimana Vedaste was given the duty of the Registrar General to serve a copy of the selling terms and conditions to

Asiimwe Frank. It finds that, as also held by the Commercial High Court that for Advocate Habimana Vedaste to delegate to himself the responsibility of the Registrar General without being delegated by the one provided for by the Instructions, is a usurpation of duties because even though he was a professional court bailiff, he would have first concluded a written contract with the client as provided by article 38 of Law No 12/2013 of 22/03/2013 governing the bailiff function, which states that before executing any judgment, decisions or other enforcement orders, the professional bailiff shall conclude a written contract with the client. The court finds that since there is no proof that the Registrar General in RDB hired Advocate Habimana Vedaste to carry out the duties of the Court Baillif, this implies that whatever he did was done without the authorization from the competent authority, which means that he did not comply with the provisions of the law, therefore they are invalid.

[45] The Court finds that the statements of the counsels for Habimana Vedaste, Bank of Kigali Ltd and Musinguzi Hannington that Asiimwe Frank being notified of the selling terms and conditions by Advocate Habimana Vedaste did not cause any harm to him and thus it should not be a ground to nullify auction, especially that the procedures for the auction are not of ordre public, is unfounded because generally those instructions were put in place to ensure that the rights of each party to the auction are respected and that its conducted in an orderly manner, thus non compliance with those instructions is a ground for Asiimwe Frank to request that the auction be conducted in compliance with those Instructions without proving the harm caused. The court also finds that the purpose is not to determine whether the proceedings provided for in those Instructions are of ordre public or not for the auction to be

nullified, because nullifying the auction which did not comply with the law does not necessarily require that those laws be of ordre public be civil, as long as the one whom the laws are intended to protect exercises his rights and requests that the auction which was illegally conducted and prejudicial to him be nullified.

- [46] The Court finds that even if Advocate Habimana Vedaste was legally permitted to serve a copy of the selling terms and conditions to Asiimwe Frank, the 16 hours provided for in the Instructions would not have been complied with, because as mentioned above, the document was made on 25/05/2015 and delivered to Asiimwe Frank on 30/03/2015, which is also a ground to nullify the auction.
- [47] Based on the legal provisions, Instructions of the Registrar General and the motivations given above, the Court finds that as held by previous courts, the auction held on 29/04/2015 selling the mortgage furnished by Asiimwe Frank to Bank of Kigali Ltd is nullified because it was conducted illegally, therefore things have to be in the state as they were before the auction.

B. APPEAL OF BANK OF KIGALI Ltd

- a. Whether the Commercial High Court confused the responsibilities of the organs in charge of the auction with those of the mortgagee allowed to sell the mortgage
- [48] In his court submissions, Counsel Rutembesa Phocas argues that the Commercial High Court confused the responsibilities of the organs concerned with the auction with

those of the mortgagee allowed to sell the mortgage, which led to the unjust ruling.

- [49] Asiimwe Frank argues that the fact that the Bank of Kigali Ltd does not prove that it represents those organs for which it's defending in this case, lenders his claims groundless because it does not represent them especially that they were also represented in the hearing.
- [50] Counsel Niyondora Nsengiyumva assisting Musinguzi Hannington, argues that this ground of appeal does not apply to Musinguzi Hannington because for him, he only participated in the auction and the observance of the procedures preceding the auction are in the responsibilities of the Registrar General and the Receiver.

DETERMINATION OF THE COURT

- [51] Article 3 of Law N° 15/2004 of 12/06/2004 on Evidence in Trial and its Evidence provides that: "Each party must prove the facts of the case.
- [52] On this ground of appeal, apart from Bank of Kigali Ltd merely alleging that the Commercial High Court confused the responsibilities of the organs that are concerned with the auction with those of the mortgagee allowed to sell the mortgage, which leads to the unjust ruling, the Court finds that it does not demonstrate how the Court may have confused these responsibilities, and does not even demonstrate the unjust ruling made by the Court and how it caused it harm, because it clearly explained the responsibilities of each organ and demonstrated that Advocate Habimana Vedaste performed the duties without

the delegation of the Registrar General, therefore this ground of appeal is unfounded.

b. Whether the Bank of Kigali Ltd should have been awarded damages for vexatious suit

- [53] In his court submissions, Counsel Rutembesa Phocas representing the Bank of Kigali Ltd argues that the Commercial High Court did not award damages to his client while it ruled that it had no faults in the auction conducted, thus it was dragged into vexatious lawsuits.
- [54] Asiimwe Frank argues that this ground of appeal is unfounded, because the Commercial High Court demonstrated that he is not the one who led the Bank of Kigali Ltd in lawsuits, but rather it was caused by Advocate Habimana Vedaste, as explained in paragraph 58, on page 15, of the appealed judgment, hence the Bank of Kigali Ltd is seeking damages from a wrong party, therefore it should not be awarded.

DETERMINATION OF THE COURT

[55] The Court finds that for the Commercial High Court holding that Bank of Kigali Ltd should not have been charged damages because it is not the one which made faults which caused the auction to be invalidated does not imply that Asiimwe Frank should pay it damages. It finds, however, that as it turned out that Asiimwe Frank won the case because the mortgage he furnished was illegally auctioned, which led to the auction being invalidated, it indicates that he was not the one to pay damages to the Bank of Kigali Ltd because he was not the one who led the Bank of Kigali Ltd into lawsuits, rather it was caused by Advocate Habimana Vedaste, who illegally sold the mortgage

furnished by Asiimwe Frank, the Bank of Kigali Ltd should have claimed those damages from him, therefore since it did not do so it has to bear the consequences, therefore as held by the Commercial High Court the Bank of Kigali did not deserve those damages.

- c. Whether the commercial High Court had the responsibility to give direction on how the issue will be handled on the part of the Bank of Kigali Ltd, the mortgagee after it nullified the auction.
- [56] The counsels for Bank of Kigali Ltd argue that the Commercial High Court declared the auction held on 29/04/2015 null and void, but did not specify on the situation of the Bank of Kigali Ltd, which was the mortgagee.
- [57] Asiimwe Frank argues that this ground of appeal is unfounded because ruling on how the matter should be handled after nullifying the auction was not the plaint and no one requested the court to rule upon it, therefore the court would not have ruled beyond the request because it would have been contrary to the provisions of article 7 of Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, which provides: "the judge shall rule only and on all that which is referred to the court".
- [58] Counsel Niyondora Nsengiyumva argues that on this ground, whether the Court states it directly or indirectly, it is obvious that when the auction is invalidated, things remain as they were before that auction. He further states that the house remains a mortgage for Bank of Kigali Ltd until the loan is paid off voluntarily or an auction is held in accordance with the law.

DETERMINATION OF THE COURT

- [59] Article 10 of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, which provides "a judge may not decide more than he/she has been asked to".
- [60] The case file demonstrates that in the Commercial High Court, the Bank of Kigali Ltd appealed against the Court's decision that the auction held on 29/04/2015 be annulled because the person who notified the selling terms and conditions had no capacity to do so, the mortgage was sold at a low price and ordered Bank of Kigali Ltd to pay 1,000,000Frw in damages but it did not demostrate the fault it committed.
- [61] The Court finds that, after the Commercial High Court had ruled that the auction of 29/04/2015 had been invalidated, it was not necessary to rule on what should happen next to the Bank of Kigali, because, as stated by the counsel for Musinguzi Hannington, the Court either states it directly or indirectly, it is obvious that when the auction is invalidated, things remain as they were before that auction.

C. CROSS APPEAL

C.1. CROSS APPEAL OF ASIIMWE Frank

a. Whether Asiimwe Frank should be awarded damages

[62] Asiimwe Frank argues that based on the fact that his house was illegally auctioned on 29/04/2015, as a consequence he couldn't feed family, couldnot live in the part of the house that was not rented, and he couldnolonger work from the room designated as office where used to work from, and since then the house is in the hands of the buyer and the auction has been invalidated and some of the participants in the sale have accepted the outcome of the case, but the house is still being used for commercial activities and its making profits in various ways, he requests that Advocate Habimana Vedaste who sold his house illegally, causing him losses, causing his family misery, to be charged moral damages of 55,802,800Frw, which is the difference between the value of the house registered in RDB of 121,000,000Frw and the value given to the house of 65,197,200Frw, procedural fees of 2,000,000Frw and counsel fees of 5,000,000Frw for continuing to drag him into lawsuits aware that his second appeal was unlawful with the purpose of protecting the one who brought the house illegally, Musinguzi Hannington so that he continues to get revenue from it, he requests that in accordance with article 258 of Code Civil Book III and the regulations on scale of fees for Advocates.

[63] Counsel Nkurunziza François Xavier argues that the damages claimed by Asiimwe Frank are unfounded because he

failed to pay the debt owed to the Bank of Kigali Ltd resulting in the execution of the judgment by force, therefore he should bear the consequences. As for the counsel fees, he states that he leaves it to the discretion of the court, let it be awarded to the one who wins the case.

[64] Counsel Buzayire Angèle, representing the Bank of Kigali Ltd, argues that the damages claimed by Asiimwe Frank should not be awarded because he is the one at fault, because the Bank of Kigali Ltd does not rent the house to Musinguzi Hannington rather it sold it to him to reduce the amount of debt Asiimwe Frank owes it. He argues that instead, Asiimwe Frank is the one who should reimburse the money which the Bank of Kigali Ltd spent on the advocates.

[65] On this ground of cross appeal, the counsel for Musinguzi Hannington and the representative of the Regulatory Council for Property Valuation responded that it does not concern them.

DETERMINATION OF THE COURT

[66] The Court finds that the moral damages requested by Asiimwe Frank should not be awarded because even though the auction was nullified due to non compliance with some of the procedures, he cannot also disregard that he is the cause of the auction because he failed to voluntarily fulfill his obligations, paving way for the auction to take place. However, the Court finds that Advocate Habimana Vedaste should pay counsel and procedural fees to Asiimwe Frank because his failure to comply with the law led Asiimwe to sue in the courts of law, therefore, in the discretion of the court, he is awarded 1,000,000Frw for counsel fees and 300,000Frw for procedural fees, because he

does not prove that the 2,000,000Frw he claims is what he spent on this case.

C.2. CROSS APPEAL OF MUSINGUZI Hannington

- a. Whether Musinguzi Hannington can be reimbursed the 55,000,000Frw he offered to buy Asiimwe Frank's house and if he can be awarded damages
- [67] Musinguzi Hannington states that he has been enjoined in the case on three instances and moreover he has no fault; that in case the Court finds that the fault was committed by Advocate Habimana Vedaste, which led the auction to be invalidated, then Advocate Habimana Vedaste should be ordered to pay procedural and counsel fees of 2,000,000Frw.
- [68] He argues that he was enjoined in the case before the Commercial High Court and the Supreme Court, while the Bank of Kigali Ltd has no claim against him because it did not make any fault, that if the Court finds that the auction was not in accordance with the law, they request that it orders the Bank of Kigali Ltd to reimburse the 55,000,000Frw he paid in the auction because there is no reason to retain it, while the auction has been invalidated. He also requests the Court to order Bank of Kigali Ltd to pay him 2,000,000Frw for the procedural and counsel fees because his appeal to the Supreme Court is based on the claim filed by Bank of Kigali Ltd.
- [69] Asiimwe Frank argues that the claims of Muzinguzi Hannington have no merit because they contradict the statements he made in his court submissions.

DETERMINATION OF THE COURT

- [70] Article 258 of Civil Code Book III provides that any action which causes harm to another entitles the one who did it to pay damages"
- [71] The Court finds that since Advocate Habimana Vedaste auctioned the mortgage illegally which led Asiimwe Frank to initiate lawsuits seeking do declare the auction null and void and the courts invalidated it, and it's also the view of this he Court, this led to Musinguzi Hannington, who brought the house in the auction to be summoned in the courts because of the faults done by Advocate Habimana Vedaste, which led him to hire the services of the legal counsel and had also to follow up the case, and therefore he deserves the damages he claims for, but because he does not prove that the amount he requests for is the one he spent on the case, in the discretion of the court, he is awarded 500,000Frw for counsel fees and 300,000Frw for the procedural fees, altogether amounting to 800,000Frw.
- [72] The Court finds that, as reminded above, that since the auction is invalidated, things had to remain as they were before the auction took place, the Bank of Kigali Ltd repossess the mortgage and reimburse 55,000,000Frw to Hannington which he bought the house at the auction. The court however finds that the 2,000,000Frw for the procedural and counsel fees claimed by Musinguzi Hannington from Bank of Kigali Ltd should not be awarded because the Bank of Kigali Ltd did not commit any mistake against him.

C.3. CROSS APPEAL OF REGULATORY COUNCIL FOR PROPERTY VALUATION

[73] The Regulatory Council for Property Valuation states that the Court should examine whether legally it is liable for damages in a lawsuit when it is not an association, organization or public institution; that it finds it inappropriate then the damages of 1,000,000Frw which it was imposed should be set aside, because the Regulatory Council has no assets, no legal representative and that decision cannot be implemented because it only functions as a committee of people from various places but it is not the Institute of the Real Property Valuers because for it it has legal personality.

[74] Other parties did not debate on this cross appeal filed by Regulatory Council for Property Valuation.

DETERMINATION OF THE COURT

[75] Article 3, paragraph 3, of Law N° 17/2010 of 12/05/2010 establishing and organising the real property valuation profession in Rwanda provides that The Institute has legal personality and autonomy. Article 9 of that Law provides for the establishment of the A council of regulation of the real property valuation profession in Rwanda and it also stipulates that The Council shall commence its activities within ninety (90) days from the publication of this Law in the Official Gazette of the Republic of Rwanda.

[76] The case file demonstrates that on 16/03/2015, Asiimwe Frank wrote to the Regulatory Council for Property Valuation requesting it to appoint other property valuers to carry out another

property valuation as provided for in article 36 of the Law in the preceding paragraph, the organ did not respond to that letter, thus the house was auctioned.

The Court finds that since Asiimwe Frank wrote to the Regulatory Council requesting it to appoint other Property Valuers to carry out another property valuation, but did not respond, until the auction took place, while it is mandated by the Law to do so, that is a ground for it to be liable for damages. The Court finds that the Institute was given 90 days after the publication of the Law in the Official Gazette of the Republic of Rwanda to be operational, for it to have been instituted in 2010 and Asiimwe Frank wrote to it in 2015, five years later, the allegation of the counsel for Regulatory Council for Valuation Property that it couldn't execute the request of Asiimwe Frank because it has no property and legal representative is unfounded because article 3, paragraph 3, of the aforementioned Law, provides that the Institute has legal personality and autonomy., so if it is not operational its not Asiimwe Frank's fault, therefore the damages of 1,000,000Frw, it was charged by Commercial High Court is sustained.

D. WHETHER THE DAMAGES CLAIMED BY ADVOCATE HABIMANA VEDASTE FROM ASHMWE FRANK HAVE MERIT

[78] Counsel Nkurunziza François-Xavier representing Advocate Habimana Vedaste requests the Court to order Asiimwe Frank to pay him damages he claimed at the first and

second instance, in addition to 3,000,000Frw on this appeal level and to reimburse all the court fees he paid.

[79] Asiimwe Frank argues that the damages requested cannot be awarded because apart from not proving them, the claimant is the one who voluntarily got involved in the lawsuits.

DETERMINATION OF THE COURT

[80] The Court finds that Advocate Habimana Vedaste was the one who sold the mortgage in the auction, and as held by the previous courts it was illegally conducted and thus invalidated it and that is also the view of this court, therefore the damages he claims should not be awarded because he losses the case.

III. DECISION OF THE COURT

- [81] Holds that the appeal of Habimana Vedaste lacks merit;
- [82] Holds that the appeal of Bank of Kigali Ltd lacks merit;
- [83] Holds that the cross appeal of Asiimwe Frank has merit in parts;
- [84] Holds that the cross appeal of Musinguzi Hannington has merit;
- [85] Holds that the cross appeal of Regulatory Council for Property Valuation has no merit;
- [86] Holds that the rulings of the judgment RCOMA 0011/16/2016 HCC & RCOMA 0035/16/HCC rendered by the

Commercial High Court on 31/03/2016 is upheld, apart from the damages awarded on this instance and that the Bank of Kigali Ltd must reimburse 55.000.000Frw to Musinguzi Hannington;

- [87] Orders Advocate Habimana Vedaste to pay to Asiimwe Frank, 1.000.000Frw for the counsel fees and 300.000Frw for procedural fees, all amounting to 1.300.000Frw on this instance;
- [88] Declares the auction conducted on 29/04/2015 null and void;
- [89] Orders Bank of Kigali Ltd to reimburse to Musinguzi Hannington the 55,000,000Frw which he bought the house in the auction and it also retains the mortgage which was furnished by Asiimwe Frank;
- [90] Declares that the cost of this case is equivalent to the court fees deposit.t.

MUNYANEZA ET.AL v. ACCESS BANK Ltd

[Rwanda COURT OF APPEAL – RCOMAA 00090/2018/CA (Mukanyundo P.J., Ngagi and Kanyange, J.) June 26, 2019]

Contract—Personal guarantee — The guarantor continues to be under the obligations to repay the credit unless those obligations are extinguished on the grounds provided by the law.

Contract – Loan contract – Personal guarantee – A personal guarantor cannot renege on his promise of repaying the loan in case the principal debtor fails to repay it on the pretext that the principal loan contract was restructured in case the restructuring did not change the basis of the personal guarantee.

Facts: ACCESS BANK RWANDA Ltd gave a loan to EXERT ENGINEERING Group Ltd, Munyaneza Félicien and Mudenge Emmanuel, both provided personal guarantee for that loan.

The principal debtor defaulted on the payment of the loan, thus the Bank sued the personal guarantors in the Commercial Court of Nyarugenge requesting that they pay the principal loan, interest, and various damages. The Court ordered the personal guarantor to repay the loan.

The personal guarantors were not contented with the rulings and appealed in the Commercial High Court, that court found the peal without merit and thus sustained the appealed judgment.

They again appealed in the Court of Appeal claiming that the Commercial High Court intentionally disregarded the principle of law which provides that guarantee is not implied, the personal guarantor has to be directly notified of the guarantee, they claim that they were never informed of the restructured contract in which the bank amended the intended purpose of the loan but instead the previous court held that restructuring the contract does not exonerate them from personal guarantee, disregarding the fact that being a director of a company does not mean that you must remain a personal guarantor even when the contract is restructured, therefore they argue that they cannot be liable for the loan which is provided in the restructured which they were never notified of

The bank argues that the appellants provided a personal guarantee for the loan but not for the intended purpose of that loan, thus they are obliged to repay it and that it was not necessary to notify the personal guarantor of the restructured contract because they were not going to provide a personal guarantee for the intended purpose of the loan because they had already provided a personal guarantee on the loan, therefore there was no need to be notified because the principal contract was not changed, it was only restructured.

- **Held:** 1. The guarantor continues to be under the obligations to repay the credit unless those obligations are extinguished on the grounds provided by the law.
- 2. A personal guarantor cannot renege on his promise of repaying the loan in case the principal debtor fails to repay it on the pretext that the principal loan contract was restructured in case the restructuring did not change the basis of the personal guarantee.

Appeal lacks merit.

Statutes and statutory instruments referred to:

Decree Law of 30/07/1888 relating to contracts or obligations, article 258, article 552 and 573.

Law Nº 45/2011 of 25/11/2011 regulating contract, article 113.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

On 25/09/2014, ACCESS BANK RWANDA Ltd, and EXERT ENGINEERING Group Ltd entered into a loan of 2,070,000,000Frw with an interest rate of 16% per annum; The loan consisted of 3 phases namely: Term loan facility amounting to 410,000,000Frw which ACCESS BANK RWANDA Ltd paid ENGINEERING for EXERT GROUP Ltd from COGEBANQUE Rwanda Ltd, Asset Finance amounting to 560,000,000Frw for the purchase of work machines to use in the tender which MINAGRI and the University of Rwanda awarded to EXERT ENGINEERING GROUP Ltd and, the Nyagatare branch, and a contract finance facility amounting to 1,100,000,000Frw to be used to complete the aforementioned contract, EXERT ENGINEERING GROUP Ltd had partnership with MINAGRI and the University of Rwanda. Before the issuance of the loan, Munyaneza Félicien and Mudenge Emmanuel each stood personal guarantee as set out in the contract they had with ACCESS BANK RWANDA Ltd on 20/05/2014.

- [2] EXERT ENGINEERING GROUP Ltd defaulted on the payment, prompting ACCESS BANK RWANDA Ltd to sue Munyaneza Félicien and Mudenge Emmanuel, its personal guarantee, claiming that they repay the debt amounting to 2,556,352,640Frw calculated as of 01/11/2016 and which will continue to accumulate until the full amount is paid, it also requests for various damages.
- [3] The hearing began in Commercial Court of Nyarugenge, Munyaneza Félicien and Mudenge Emmanuel admitting that the contract dated 20/05/2014 was indeed concluded, but that the loan on which it was concluded have already been paid because EXERT ENGINEERING GROUP Ltd did not get the Guarantee Line. They told the Court that the 970,000,000Frw which they acknowledge to have stood surety for, ACCESS BANK RWANDA Ltd have already reimbursed it when it sold the house and the machines of EXERT ENGINEERING GROUP Ltd which is used for the construction.
- [4] On 13/10/2017, the Commercial Court of Nyarugenge ruled that Munyaneza Félicien and Mudenge Emmanuel had not respected the personal guarantee of the loan which ACCESS BANK RWANDA Ltd gave to EXERT ENGINEERING GROUP Ltd, held that their argument that the there are some mortgages sold and repaid the loan is unfounded, and that even the claim that the caveat on their property which was done at the land registrar's office should be lifted dis also unfounded, it should also not be justified. The Court ruled that the debt

Munyaneza Félicien and Mudenge Emmanuel should pay ACCESS BANK RWANDA Ltd is computed up to 22/12/2016, when the Court declared the commencement of insolvency proceedings of EXERT ENGINEERING GROUP Ltd as held in the judgment RCOM 0729/2016 / TC / NYGE and R COM 0756/2016 / TC / NYGE, ordered Munyaneza Félicien and Mudenge Emmanuel to repay ACCESS BANK RWANDA Ltd the outstanding debt which is on the account of EXERT ENGINEERING GROUP Ltd of 2,594,697,930 Frw of the debt outstanding on the account of EXERT ENGINEERING GROUP Ltd as of 26/05/2017 and also 500,000 Frw for counsel fees.

- [5] Mudenge Emmanuel and Munyaneza Félicien appealed to the Commercial High Court, and on 21/06/2018, in the judgment RCOMA 00723/2017 / CHC / HCC, that Court held that the appeal of Mudenge Emmanuel and Munyaneza Félicien is without merit, it sustained the appealed judgment and ordered them to pay to the ACCESS BANK RWANDA Ltd the procedural and counsel fees of 1,000,000Frw.
- [6] Mudenge Emmanuel and Munyaneza Félicien were not contented with the rulings of the case and appealed to the Court of Appeal, arguing that the Commercial High Court deliberately disregarded the provisions of the law stating that personal guarantee is not implied, and that the guarantor should be notified of the obligations as stated by the scholars and that it refused to lift the caveat on their property while the debt they guaranteed had alread been paid and that they cannot be held liable for the loan which is provided in the restructured agreement which they were not notified of, thus they request the Court to lift that caveat.
- [7] Another ground of appeal is that they should not be liable for a debt of 1,100,000,000Frw because they have no restructured

personal guarantee agreement with ACCESS BANK RWANDA Ltd to agree on the purpose of the laon. Therefore, they are not liable for that loan because the contract is only binding to the parties.

- The case was heard in public on 07/05/2019, with Mudenge Emmanuel and Munyaneza Félicien represented by Counsel Mugengangabo Jean Népomuscène while ACCESS BANK RWANDA Ltd was represented by Counsel Bizumuremyi Isaac, who immediately raised the objection that the Chief Registrar of the Court of Appeal should have first examined the objection of inadmissibility of the second appeal of Mudenge Emmanuel and Munyaneza Félicien because they lost on the first and second instance on the same grounds, therefore pursuant to article 52 of Law No 30/2018 of 02/06/2018 determining the jurisdiction of courts, he requests the Court to compel the Chief Registrar to examine it instead of being examined for the first time by the trial court. Due to the fact that Counsel. Bizumuremyi Isaac had submitted the court submissions regarding that objection through the IECMS on the eve of the hearing, the Court decided to adjourn the hearing so that Counsel Jean Jean Népomuscène could prepare his defense, the hearing was scheduled on 14/05/2019.
- [9] On that date, the case was heard in public, with the parties represented as before, the court heard the submissions on that objection. On 24/05/2019, the Court ruled that ACCESS BANK RWANDA Ltd claim that the Chief Registrar should re-examine the admissibility of the second appeal filed by Mudenge Emmanuel and Munyaneza Félicien is unfounded, holding that the hearing should proceed on the 24/06/2019

[10] On that date, the case was heard in public, both parties represented as before, Me Bizumuremyi Isaac arguing that he has withdrawn the objection of lack of jurisdiction of the Court of Appeal is based on the ground that the appellants lost on the same grounds on the first and second instance, the pronouncement of the judgment was scheduled on 26/07/2019.

II. ANALYSIS OF THE LEGAL ISSUES

Whether Munyaneza Félicien and Mudenge Emmanuel are not liable for the loan which is provided in the restructured agreement because they were not notified of it.

- [11] Counsel Mugengangabo Jean Népomuscène, assisting Munyaneza Félicien and Mudenge Emmanuel, argues that the Commercial High Court deliberately disregarded the provisions of the law stating that personal guarantee is not implied, and that the guarantor should be notified of the obligations as stated by the scholars and that it refused to lift the caveat on their property while the debt they guaranteed had alread been paid and that they cannot be held liable for the loan which is provided in the restructured agreement which they were not notified of.
- [12] He further argues that what they are challenging about the decision of the Commercial High Court, is that it held that eventhough the loan contract was restructured, it doesnot not preclude Mudenge Emmanuel and Munyaneza Félicien from being the personal guarantees; while the fact that a person is the CEO of a company, does not mean that when a contract is restructured he/she continues to be a personal guarantee, that the loan for which they are personal guarantee is 2,070,000,000Frw

minus the 1,100,000,000Frw because its intended purpose as stipulated in the original contract was changed as reflected in the restructured contract dated 03/06/2014. He requests the Court to determine whether in case the intended purpose of the loan is restructured between the bank and the debtor, still makes the personal guarantee of the original loan contract liable for the restructured loan.

[13] Counsel Bizumuremyi Isaac argues that in the restructuring of the contract, the 1,100,000,000Frw was divided into three parts, 700,000,000Frw was for the guarantee, 300,000,000Frw was the discount and 100,000,000Frw was overdraft, which means that if they arguing that the purpose of the 1,100 .000.000Frw was restructured, they would have argued on the amount of the 400,000,000Frw because the intended purpose of the 700,000,000Frw was not restructured because its purpose remained that of the guarantee. He argues that Mudenge Emmanuel and Munyaneza Félicien are personal guarantees of the loan but not its intended purpose, therefore, they have the responsibility to repay it because they were personal guarantors for it, and that they will not be liable for the things that were removed from the contract, that this is stipulated in the first clause subsection "a", of the personal guarantee contract.

[14] He further argues that concerning the fact that the personal guarantee had to be notified of the restructuring of the contract, he states that it was not necessary because they did not have to be a personal guarantee for the intended purpose of the loan while they were personal guarantee for the loan, therefore since the original contract was not altered but was restructured, there was no need to notify them.

DETERMINATION OF THE COURT

- [15] Article 552 of Civil Code Book III provides that: "The personal guarantor assures the creditor to pay him/her in cases the debtor defaults on the payment". Article 573 of that Law provides that the obligations originating from personal guarantee is terminated by the same grounds as of any obligations.
- The case file demonstrates that on 29/05/2014, ACCESS BANK RWANDA Ltd and EXERT ENGINEERING GROUP Ltd made a loan contract No. 5855 / HCC / LH / TN14 comprising of three categories which are term loan facility amounting to 410,000,000Frw, which ACCESS BANK RWANDA Ltd paid on behalf of EXERT ENGINEERING GROUP Ltd in COGEBANQUE RWANDA Ltd, Asset Finance amounting to 560,000,000Frw for the purchase the machines to be used by EXERT ENGINEERING GROUP Ltd in the tender it had been awarded by MINAGRI and the University of Rwanda, Nyagatare campus and a contract finance facility amounting to 1,100,000,000Frw for facilitating the execution of the aforementioned contract, Munyaneza Félicien and Mudenge Emmanuel were the personal guarantees for that loan of 2,070,000,000Frw issued on 20/05/2014 as evidenced by the contract they signed on 02/06/2014 before the notary.
- [17] Also, the file contains a document entitled "Amendment No. 1 to the Principle Loan Agreement No. 5855 / HCC / LH / TN / 14 of May 30, 2014" dated 03/06/2014 signed by Munyaneza Félicien as the Managing Director of EXERT ENGINEERING GROUP Ltd. The preamble of that contract

states that the bank and the debtor acknowledge that the contract is part of the principle and forms an integral part of it¹.

[18] The Court finds that since EXERT ENGINEERING GROUP Ltd was given a loan on which it defaulted on as indicated in the judgment RCOM 0729/2016 / TC / NYGE and RCOM 0756/2016 / TC / NYGE, which approved the commencement of insolvency proceeding of EXERT ENGINEERING GROUP Ltd, nothing prevents ACCESS BANK RWANDA Ltd to request Munyaneza Félicien and Mudenge Emmanuel to be liable for the loan that they guaranteed as provided by article 552 of the Civil Code Book III cited mentioned above.

[19] The Court finds that the contract dated 03/06/2014 does not replace the principle contract of 29/04/2014, which provides for the laon of 2,070,000,000Frw that Munyaneza Félicien and Mudenge Emmanuel were personal guarantees, whereby each was a personal guarantee for the entire loan, rather it forms an integral part of it and the amendments in the contract between the two parties do not affect the clauses relating to its guarantee, which means that while the loan which Munyaneza Félicien and Mudenge Emmanuel are personal guarantee is not yet repaid, and even in the restructuring contract it is not mentioned that the clause relating to their status as personal guarantee was also restructured, they continue to be liable for that loan until there

¹ The Bank and the Borrower hereby agree that the present addendum agreement constitute part of the principle agreement and forms an integral part of it.

are grounds for the extinction of thier guaranteeship² as provided by article 573 of the Civil Code Book III cited above.

[20] The Court finds that Munyaneza Félicien and Mudenge Emmanuel's claim that they are not liable for the loan in the restructured contract because they were not notified of it is unfounded because, as mentioned above, the guarantee clause was not amended, implying that it retained its value, especially that the contract titled « Amendment N° 1 to the Principle Loan Agreement N°5855/HCC/LH/TN/14 of May 30, 2014" did not replace the principle contract, which was signed by Munyaneza Félicien as Managing Director of EXERT ENGINEERING GROUP Ltd.

[21] The Court also finds that their claim that they are not liable for the 1.100.000.000Frw because its intended purpose was changed also lacks merit because they gave guarantee for the entire loan, including the 1,100,000,000Frw. Regarding the fact that they had to be notified of the restructuring of the contract, the Court finds that since it was clear that other clauses of the principle contract remained valid, including the one concerning their guarantee, there was no need to notify them, again it also finds that since Munyaneza Félicien was the Managing Director of EXERT ENGINEERING GROUP Ltd, who signed the restructuring contract cannot turn and allege that they were not notified that their obligations of being personal guarantee of the

² Articles 98-108 of the Law N° 45/2011 of 25/11/2011 governing contracts provides that a debtor"s manifestation of assent to the extinguishment of obligations is not effective, unless: 1° it is made for after consideration; 2° it is a promise that would be enforceable without consideration; 3° it has induced an action or abstention

company's loan remains on the loan that the company owes to the bank.

- [22] Based on the legal provisions in the preceding articles, the Court finds that Munyaneza Félicien and Mudenge Emmanuel are the personal guarantee of EXERT ENGINEERING GROUP Ltd and are liable for the loan that company owes ACCESS BANK RWANDA Ltd
 - 2. Whether the sales contract of the mortgage should remain valid so that it can be considered in reducing the debt of Munyaneza Félicien and Mudenge Emmanuel
- [23] Counsel Mugengangabo Jean Népomuscène, assisting Munyaneza Félicien and Mudenge Emmanuel, argues that the sales contract of the mortgaged house on the will of EXERT ENGINEERING GROUP Ltd should not have been invalidated and that the bank faulted when it based on a letter from the receiver which stated that sales contract was null and void and reimbursed ULTRA INVESTMENT the 1,500,000,000Frw which it had paid for the house, which was later sold again at a small price, which led the loan of EXERT ENGINEERING GROUP Ltd not to reduce significantly.
- [24] Counsel Bizumuremyi Isaac argues that the mortgage was sold by Munyaneza Félicien, without any involvement of ACCESS BANK RWANDA Ltd, except that it was a witness to the contract. He further added that the liquidator appointed by the court had written to ACCESS BANK RWANDA Ltd informing him that the mortgage was sold by an incompetent person, prompting the bank to reimburse to ULTRA INVESTMENT the

1,500,000,000Frw which it had paid for the house and it was later lawfully sold for 300,000,000Frw.

VIEW OF THE COURT

- [25] Article 113, paragraph one of Law N° 45/2011 of 25/11/2011 relating to contracts provides that "a contract has effects on parties (...).
- [26] The Court finds that the sales contract of the mortgage furnished by EXERT ENGINEERING GROUP Ltd was between ULTRA INVESTMENT and Munyaneza Félicien, and does not affect ACCESS BANK RWANDA Ltd, except that it got its payments as money for the payment somewhere else. So the fact that the liquidator of EXERT ENGINEERING GROUP Ltd wrote to the bank requesting it to reimburse the proceeds from the sale of the mortgage and indeed the bank reimbursed it, it made no fault since it would not retain the proceeds got from an invalidated sale.
- [27] The Court finds that even though the mortgage was sold at a very low price compared to the previous one, the bank did not play any role because it had no interest in reimbursing the money it got from the sale of the mortgage nor receiving little proceeds than the one it had received before.
- [28] Pursuant to the motivations above, the Court finds the appeal of Munyaneza Félicien and Mudenge Emmanuel on this issue lacks merit because it cannot rule that the sales contract which was nullified because of its illegality that it remains in place and the proceeds from it be valid.

3. Determining the basis of damages requested in this case.

- [29] Munyaneza Félicien and Mudenge Emmanuel request the Court to reverse the damages they were charged (550,000Frw in the Commercial Court of Nyarugenge and 2,000,000Frw in the Commercial High Court) because ACCESS BANK RWANDA Ltd was the one who dragged them into unneccessary lawsuits demanding to pay the loan which they did not guarantee, they demand that instead, it gives them 8,000,000Frw each, for the counsel fees at the Commercial Court of Nyarugenge to the Court of Appeal each, of the lawyer's fee. They also request that the Court orders it to reimburse them 100,000 Frw for the court fees they paid when appealing the judgment RCOM 00120/2017 / TC / NYGE and 150,000Frw they paid when appealing the judgment RCOMA 00723/2017 / CHC / HCC, and 2,000,000 Frw for procedural fees.
- [30] Concerning the damages requested, Counsel Bizumuremyi Isaac argues that Munyaneza Félicien and Mudenge Emmanuel should pay the damages they were imposed and they should not be awarded counsel and procedural fees they claim for unless they have won the case.
- [31] ACCESS BANK RWANDA Ltd requests to be given the counsel fees of 1,000,000Frw to each and 10,000,000Frw for procedural fees because it has spent more than two years (since 10/01/2017) litigating this case.

DETERMINATION OF THE COURT

- [32] Article 1110f 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 with the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted."
- [33] The Court of Appeals finds that Munyaneza Félicien and Mudenge Emmanuel should not be awarded the damages they claim for, because they are the ones who did not honour the contract they concluded with ACCESS BANK RWANDA Ltd, therefore they should not claim to be refunded the expenses they incurred on this case.
- [34] The Court finds that ACCESS BANK RWANDA Ltd hired an advocate on this instance, its obvious that it paid for those services, therefore it finds that Munyaneza Félicien and Mudenge Emmanuel have to give the bank 700,000Frw for the counsel fees awarded in the discretion of the court.
- [35] It also finds that they should give the bank procedural fees on this level, but since the amount requested for is excessive and ACCESS BANK RWANDA Ltd does not prove how it computed it, and it cannot be computed beginning from 2017 since there are those it was awarded at the Commercial High Court, therefore they have given the bank three hundred thousand francs (300,000Frw) on this level. The court finds that the fact that the ACCESS BANK RWANDA Ltd has been litigating this case for

two years, it cannot be based on to award it damages, as Mudenge Emmanuel and Munyaneza Félicien had the right to appeal when they felt unsatisfied with the decisions of the previous courts.

III. DECISION OF THE COURT

- [36] Holds that the appeal of Mudenge Emmanuel and Munyaneza Félicien lacks merit;
- [37] Sustains the rulings of the judgment RCOMA 00723/2017/CHC/HCC rendered bt the Commercial High Court on 21/06/2018.
- [38] Orderes Mudenge Emmanuel and Munyaneza Félicien to give ACCESS BANK RWANDA Ltd seven hundred thousand (700.000Frw) for counsel fees and three thousand francs (300.000Frw) for the procedural fees on this level;
- [39] Declares that the court fees deposits are equivalent to the expenses incurred by the court in this case.