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ICYEGERANYO CY'IBYEMEZO BY'INKIKO

Icyegeranyo V. 1 - 2021
Mutarama, 2021

RWANDA LAW REPORTS

Law Report V. 1 - 2021
January, 2021

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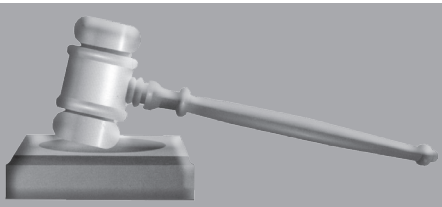

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KABIBI Specioza	:	Intumwa ya Leta
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IRIBURIRO

Basomyi bacu,

Tunejejwe no kubagezaho Icyegeranyo cy'Ibyemezo by'Inkiko, Volime 1 [2021]. Nk'uko mubizi, tubahitiramo imanza zikubiyemo bimwe mu bisubizo by'ibibazo muhura nabyo kenshi, haba mu mirimo yanyu ndetse no buzima bwa buri munsi.

Muri iyi nomero murasangamo imanza zirindwi (7) zikurikira: urubanza rumwe (1) rurebana n'ikirego gisaba kwemeza ko itegeko rinyuranye n'Itegeko Nshinga, urubanza rumwe (1) rurebana n'ikirego gisaba kubungabunga cyangwa gukuraho imbogamizi zibangamiye inyungu rusange, imanza ebyiri (2) z'imbonezamubano n'imanza eshatu (3) z'ubucuruzi.

Nk'uko mumaze kubimenyera imanza ziri muri iki cyegeranyo ziboneka no kurubuga rwa murandasi rw'Urukiko rw'Ikirenga: http://decisia.lexum.com/rlr/kn/nav.do.

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:

[2021] 1 RLR

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Amategeko agenga umusoro – Umusoro ku nyongeragaciro – Gutandukanya abasoreshwa bagura serivise zivuye mu mahanga zitaboneka mu Rwanda n'abagura serivise zivuye mu mahanga ariko ziboneka mu Rwanda ntibyafatwa nko kubavangura cg kutabarengera kimwe imbere y'amategeko kuko bigamije gufungura isoko rya serivise kandi bikaba byarakozwe hari impamvu zifite ireme zo gushyiraho ingamba zigamije kugabanya icyuho mu bucuruzi n'imyishyuranire n'amahanga.

Amategeko agenga umusoro – Umusoro ku nyongeragaciro – Ihame rishingiye kw'isoreshwa ry'umukiriya (Reverse charge) – Ni ihame rivana inshangano zo gukora ibijyanye n'itangwa ry'umusoro ku nyongeragaciro ku mugurisha zigahabwa umuguzi w'ibicuruzwa cyangwa servise ziturutse hanze y'igihugu.

Amategeko agenga umusoro – Umusoro ku nyongeragaciro – Ihame rishingiye ku hantu ibicuruzwa na serivisi byinjizwa mu mategeko agenga imisoro (Destination Principle in Tax Law) – Ibicuruzwa na serivisi byose byagurishijwe mu gihugu byinjijwemo cg byakoresherejwemo birasoreshwa ariko bigasonerwa umusoro ku nyongeragaciro mu bihugu byakorewemo cyangwa biturukamo.

Incamake y'ikibazo: Nzafashwanayo yatanze ikirego mu Rukiko rw'Ikirenga, avuga ko ingingo ya 12, igika cyayo cya 3

n'icya 4 y'Itegeko N° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro (VAT), inyuranyije n'ingingo ya 15 n'iya 95 z'Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 04/06/2003 ryavuguruwe mu mwaka wa 2015. Mu iburanisha hari Leta y'u Rwanda hamwe n'Ishuri ry'Amategeko rya Kaminuza y'u Rwanda (*School of Law*) ryajemo nk'inshuti y' Urukiko.

Mu gusobanura ikirego cye, Nzafashwanayo avuga ko ingingo ya 12 igika cya 3 n'icya 4 y'itegeko ryavuzwe haruguru itubahirije ihame rigaragara mu ngingo ya 15 y Itegeko Nshinga ryavuzwe haruguru, kuberako ko idafata abasora kimwe. Umusoreshwa utumije serivisi mu mahanga yemererwa gukura umusoro ku nyongeragaciro yishyuye (input VAT) kuri izo serivisi mu musoro ku nyongeragaciro yakiriye (output VAT) iyo gusa izo serivisi zitaboneka mu Rwanda, nyamara uguze serivisi imbere mu gihugu akemererwa gukura umusoro ku nyongeragaciro yishyuye kuri izo serivisi mu musoro ku nyongeragaciro yakiriye nta kindi abanje gusabwa.

Ashingiye ku masezerano mpuzamahanga mu by'ubucuruzi u Rwanda rwasinye (GATS, EAC Common Market Protocol na Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services), avuga kandi ko ihame rya National treatment rikoreshwa muri ayo masezerano rivuguruzwa n'ingingo ya 12 igika cya 3 n'icya 4 y'itegeko ryavuzwe haruguru bityo, ikaba inyuranye n'ingingo ya 95 y'Itegeko Nshinga. Ukutareshya n'ukutarengerwa n'itegeko mu buryo bumwe bituma serivisi z'imbere mu gihugu zidashobora guhiganwa ku rwego rumwe na serivisi zo mu mahanga zishobora gukenerwa n'abakorera ibikorwa by'ubucuruzi mu Rwanda kubera ubwo busumbane.

Leta y'u Rwanda ivuga ko kuba umushingamategeko yarashyize abasoreshwa mu byiciro bibiri bitafatwa nko kuvangura cyangwa kutarengerwa kimwe imbere y'amategeko kuko yabikoze ashingiye ku mpamvu nziza kandi zumvikana.

Ibi byashimangiwe n'Inshuti y'Urukiko (Ishuli ry'amategeko rya Kaminiza y'u Rwanda) ivuga ko gufata kimwe mu misoro abantu batameze kimwe ahubwo aribyo byaba kudafata abantu kimwe hakazabamo ubusumbane. Akomeza avuga ko iyo ngingo y'Itegeko rishyiraho umusoro ku nyongeragaciro ntabwo inyuranyije n'ingingo ya 15 y'Itegeko Nshinga, kubera ko abasoreshwa bavugwamo ari abantu (2) batandukanye. Gusoresha uwaguze hanze ibicuruzwa cyangwa serivisi iboneka mu Rwanda ari uburyo bwo kurengera no guteza imbere abacuruzi n'abashoramari bakorera mu Rwanda kandi byemewe n'amasezerano.

Ku birebana niba inyuranyije n'ingingo ya 95 y'Itegeko Nshinga, Urega avuga ko ingingo ya 12 y'itegeko ryavuzwe haruguru inyuranyije n'ingingo ya 95 y'itegeko Nshinga kuko ivuguruza amasezerano mpuzamahanga yemejwe n'u Rwanda mu gihe ayo masezerano asumba iryo tegeko rishyiraho umusoro ku nyongeragaciro. Ayo masezerano mpuzamahanga ahuriza ku ihame rya *National Treatment* risobanura ko ibintu bitumijwe mu mahanga bifatwa mu buryo bumwe n'iby'imbere mu gihugu igihe byamaze kuva muri gasutamo. Akomeza avuga ko iyo iri hame ritubahirijwe bituma habaho guhinduka kw'ihiganwa mu buryo butonesha serivisi cyangwa abatanga serivisi bo mu Rwanda ugereranije na serivisi cyangwa abatanga serivisi bo mu bindi bihugu, akaba ari ingaruka ziterwa n'iyo ngingo ya 12.

Leta y'u Rwanda ivuga ko ingingo ya 12 itanyuranyije n'ingingo ya 95 y'itegeko Nshinga ndetse ikaba itavuguruza ihame rya *National* Treatment ahubwo ishimangira iryo hame, kubera ko

serivisi z'imbere mu gihugu n'izatumijwe mu mahanga zose zifatwa kimwe kuko zisoreshwa umusoro ku nyongeragaciro kuzigomba gusoreshwa n'ubusanzwe cyangwa zigasonerwa kuri serivisi zisanzwe zisonerwa.

Inshuti y'urukiko nayo ivuga ko ingingo ya 12 y'itegeko ryavuzwe haruguru itanyuranyije n'ingingo ya 95 y'itegeko Nshinga kubera ko uretse no kuba igihe cyose ingingo y'itegeko itubahirijwe cyangwa inyuranyije n'ingingo y'itegeko ririsumba bidashobora kwitwa ko habayeho kwica Itegeko Nshinga.

Incamake y'icyemezo: 1. Gutandukanya abasoreshwa bagura serivise zivuye mu mahanga zitaboneka mu Rwanda n'abagura serivise zivuye mu mahanga ariko ziboneka mu Rwanda ntibyafatwa nko kubavangura cg kutabarengera kimwe imbere y'amategeko kuko bigamije gufungura isoko rya serivise kandi bikaba byarakozwe hari mpamvu zifite ireme zo gushyiraho ingamba zigamije kugabanya icyuho mu bucuruzi n'imyishyuranire n'amahanga.

2. Ihame rishingiye kw'isoreshwa ry'umukiriya (*Reverse charge*) riha inshingano umuguzi w'ibicuruzwa cyangwa serivise byaturutse hanze y'u Rwanda yo kubitangira umusoro ku nyongeragaciro wagenwe .

3. Ihame rishingiye ku hantu ibicuruzwa na serivisi byinjizwa mu mategeko agenga imisoro (*Destination Principle in Tax Law*) riteganya ko ibicuruzwa na serivisi bisoreshwa umusoro ku nyongeragaciro mu gihugu byinjijwemo cg byakoresherejwemo bigasonerwa umusoro ku nyongeragaciro mu bihugu byakorewemo cyangwa biturukamo.

4. Igihe hakiri imishyikirano igomba kubanza kuba cyangwa ibigomba kubanza gukorwa kugirango ibihugu byemeze

ibigomba gushingirwaho mu gushyira mu bikorwa amasezerano mpuzamahanga biba byasinye, ntibyafatwa nko kutubahiriza ibiyakubiyemo.

Ikirego nta shingiro gifite.

Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 15 na 95.

World Trade Organization General Agreement on Trade in services (GATS).

World Trade Organization. Communication from Rwanda, Schedule of Specific Commitments under the General Agreement on Trade in Services, 30 August 1995

Protocol on establishment of East African Community Common Market.

Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services.

Decision on the African Continental Free Trade Area (AfCFTA), 33rd Ordinary Session of the Assembly of the Union, 9-10 February 2020, Addis Abeba, Ethiopia,

Itegeko N° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro, ingingo ya 11 na 12.

Imanza zifashishijwe:

Conseil Constitutionnel, décision no 2009-599 DC du 29 décembre 2009, para 80

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis 165 U.S. 150 (1897)

Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS), Appeal No. CA/556/2018, p.23

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

Re Murangwa, RS/INCONST/SPEC 00001/2019/SC rwaciwe n'Urukiko rw'Ikirenga ku wa 29/11/2019

Inyandiko z'Abahanga:

MINICOM, Made in Rwanda Policy, 2017, pp. 1-2,

F Paris and N Ghei, "The Role of Reciprocity in International Law" (2003) Cornell International LJ 36 (93), p. 94

Joseph J. Cordes, Robert D. Ebel, and Jane Gravelle, The Encyclopedia of Taxation & Tax Policy (The Urban Insitute, 2005), page 82-83

Hans Gribnau, "Equality, Legal Certainty and Tax Legislation in the Netherlands: Fundamental Legal Principles as Checks on Legislative Power: A Case Study", (2013) Utrecht L. Rev. 52 (9), p.62.

P. Lampreave,'Fiscal Competitiveness Vesus Harmful Tax Competition in the European Uninion" (2011) bfit 65 (6), p.4;

P T Scanlam,'Globalization and Tax-Related Issues: What are the Concerns?' in R Biswas (ed), International Tax Competition: Globaliztion and Fiscal Sovereignty (commonwealth Secretariat 2002), p.45;

Victor Thuronyi (ed), Tax Law Design and Drafting, Volume 1 (International Monetary Fund, 1996), page 196

William B. Barker, 'The Three Faces of Equality: Constitutional Requirements in Taxation', (2006), Case W.Res.L.Rev. 57(1), p. 5

Italian Discrimination against Imported Agricultural Machinery, Report adopted on 23 October 1958 (L/833 - 7S/60

Consultants 'Report on the Harmonization of Income Taxes within the East African Community, 1 November 2014; East

African Community, Report of the Meeting to validate the studies on development of Policy frameworks for the harmonization of VAT, Excise duties and Income tax in EAC, Mombasa, 23rd – 25th October 2014; PWC, Policy for harmonization of VAT and Excise duties, 28 October 2014.

East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, pp. 30-31.

East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, Annex IV: EAC Domestic Tax Harmonization Policy, pp. 8-9.

Urubanza

I. IMITERERE Y'IKIBAZO

[1] Me Nzafashwanayo Dieudonné yatanze ikirego mu Rukiko rw'Ikirenga, avuga ko ingingo ya 12, igika cyayo cya 3 n'icya 4 y'Itegeko N° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro (*VAT*), inyuranyije n'ingingo ya 15 n'iya 95 z'Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 04/06/2003 ryavuguruwe mu mwaka wa 2015.

[2] Me Nzafashwanayo Dieudonné akomeza avuga ko ingingo ya 12, igika cya 3 n'icya 4 y'Itegeko n° 37/2012 ryavuzwe haruguru aregera ko inyuranyije n'Itegeko Nshinga, iteganya ko:

a. Iyo umusoreshwa yakiriye serivisi ahawe n'umuntu uri hanze y'u Rwanda, umusoreshwa afatwa nk'uwatanze serivisi zisoreshwa kandi akaba yarakiriye umusoro wakiriwe ahawe n'uwo mutuutaba mu Rwanda;

b. Gutanga serivisi bifatwa nk'ibyakozwe ku itariki izo serivisi zatangiweho n'umuntu uba hanze y'u Rwanda ku gaciro kagenwa mu ngingo ya 11 y'iri tegeko. Umusoro wakiriwe utangwa ku itariki yo gutanga imenyesha ry'umusoro ku nyongeragaciro mu gihe cy'isoreshwa izo serivisi zatanzwemo. Umusoro wakiriwe ugomba kugaragara ku mpamyabwishyu yakoreshejwe mu kwishyura uwatanze serivisi zivuye mu mahanga, kandi iyo nyandiko ifatwa nk'inyemezabuguzi y'umusoro ku nyongeragaciro;

c. Hatitawe ku bivugwa mu gika cya mbere n'icya 2 by'iyi ngingo, abaguzi ba serivisi zivuye mu mahanga zitaboneka mu Rwanda, bemerewe kuvana umwenda w'umusoro ku kiranguzo mu musoro wakiriwe;

d. Serivisi zifatwa nk'aho zitaboneka mu Rwanda iyo nta muntu n'umwe utanga serivisi nk'izo cyangwa izisa na zo ku masoko yo mu gihugu."

[3] Ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda yo ivuga ko abantu bose bareshya imbere y'amategeko kandi ko itegeko ribarengera ku buryo bumwe; naho ingingo ya 95 yo ikavuga ko amategeko asumbana mu buryo bukurikira:

1° Itegeko Nshinga;

2° Itegeko Ngenga;

3° amasezerano mpuzamahanga yemejwe n'u Rwanda;

4° itegeko risanzwe;

5° amateka.

Kandi ko nta tegeko rivuguruza iririsumba.

[4] Urubanza rwaburanishijwe mu ruhame ku wa 23/06/2020, Me Nzafashwanayo Dieudonné yunganiwe na Me Bizimana Emmanuel hari na Leta y'u Rwanda ihagarariwe na Me Kabibi Spéciose. Muri iryo buranisha, Urukiko rwabanje kumva abari mu rubanza ku busabe bw'Ishuri ry'Amategeko rya Kaminuza y'u Rwanda (*School of Law*) rwo kurubamo Inshuti y'Urukiko (*Amicus Curiae*) mu rwego rwo gutanga ibitekerezo, maze rumaze kubona ko bemera ko ryakwemererwa kuko ryujuje ibisabwa, rwemera ko ubusabe bwaryo bwemewe, hanyuma rubona gusuzuma ingingo zigize urubanza mu mizi.

[5] Nk'uko babisobanura mu myanzuro no mu miburanire imbere y'Urukiko, Me Nzafashwanayo Dieudonné na Me Bizimana Emmanuel umwunganira bavuga ko bashingiye ku ihame rigaragara mu ngingo ya 15 y'Itegeko Nshinga yavuzwe haruguru, basanga ingingo ya 12 igika cya 3 n'icya 4 y'Itegeko N° 37/2012 ryavuzwe haruguru idafata abasora kimwe, aho umusoreshwa utumije serivisi mu mahanga mu rwego rw'ibikorwa bye by'ubucuruzi yemererwa gukura umusoro ku nyongeragaciro yishyuye (*input VAT*) kuri izo serivisi mu musoro ku nyongeragaciro yakiriye (*output VAT*) iyo gusa izo serivisi zitaboneka mu Rwanda, nyamara uguze serivisi imbere mu gihugu akemererwa gukura umusoro ku nyongeragaciro yishyuye kuri izo serivisi mu musoro ku nyongeragaciro yakiriye nta kindi abanje gusabwa.

[6] Bavuga kandi ko ibyo iyo ngingo ya 12 igika cya 3 n'icya 4 iteganya, binyuranyije n'ingingo ya 95 y'Itegeko Nshinga yavuzwe haruguru, kubera ko ivuguruza ihame rya *national treatment* rikoreshwa cyane mu bucuruzi mpuzamahanga mu bya serivisi riteganywa na *World Trade Organization General Agreement on Trade in services* (GATS); *Protocol on*

establishment of East African Community Common Market (*EAC Common Market Protocol*), na *Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services*, kandi ayo masezerano mpuzamahanga yose u Rwanda rukaba rwarayashyizeho umukono rukanayemeza.

[7] Leta y'u Rwanda n'Inshuti y'Urukiko ntibemeranya nabo. Bavuga ko mu mategeko y'imisoro, igihugu gishobora gushyira abantu mu byiciro ku mpamvu zumvikana. Ibyo bikaba bitanyuranyije n'ihame ryo kureshya imbere y'amategeko, ko ahubwo gusoresha abantu kimwe kandi batari mu cyiciro kimwe, aribyo byaba ari ukubasumbanya. Bavuga kandi ko kuba uburenganzira bwo kuvana umwenda w'umusoro ku kiranguzo mu musoro wakiriwe buhabwa uwatumije hanze serivisi zitaboneka mu gihugu ariko ntibuhabwe uwatumije hanze serivisi ziboneka mu gihugu ari uburyo bwo kurengera abashoramari bo mu gihugu, ubwo buryo bukaba bwemewe na WTO/GATS nk'irengayobora ku ihame rya *national treatment.*

[8] Urukiko rusanga ibibazo bigomba gusuzumwa muri uru rubanza ari:

A. Kumenya niba ingingo ya 12, igika cya 3 n'icya 4 y'Itegeko No. 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015.

B. Kumenya niba ingingo ya 12, igika cya 3 n'icya 4 y'Itegeko No. 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'ingingo ya 95 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

A. Gusuzuma niba ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko N° 37/2012 ryo kuwa 09/11/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015.

[9] Me Nzafashwanayo Dieudonné na Me Bizimana Emmanuel umwunganira bavuga ko ingingo ya 12 igika cya 3 n'icya 4 y'Itegeko N° 37/2012 ryo ku wa 09/11/2012 ryavuzwe haruguru inyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu mwaka wa 2015 ivuga ko abantu bari mu cyiciro kimwe bareshya imbere y'amategeko, kuko idafata kimwe abasora aho umusoreshwa utumije serivisi mu mahanga mu rwego rw'ibikorwa bye by'ubucuruzi yemererwa gukura umusoro ku nyongeragaciro yishyuye (*input VAT*) kuri izo serivisi mu musoro ku nyongeragaciro yakiriye (*output VAT*) iyo gusa izo serivisi zitaboneka mu Rwanda, ariko uguze serivisi imbere mu gihugu akemererwa gukura umusoro ku nyongeragaciro yishyuye kuri serivisi mu musoro ku nyongeragaciro yakiriye nta kindi asabwe. Basobanura ko n'ubwo Leta yemerewe kuba yafata abantu ku buryo butandukanye cyangwa ikabashyira mu byiciro, hari uburyo bigomba gukorwa hashingiwe ku mpamvu yumvikana, kandi bigakorwa hubahirizwa amahame ateganywa n'Itegeko Nshinga nk'uko byemejwe n'Urukiko rurinda iremezo ry'Itegeko Nshinga rwo mu Bufaransa, aho urwo rukiko rwabivuze muri aya magambo y'Igifaransa: "*il appartient au Législateur de déterminer, dans le respect des principes constitutionnels et*

compte tenu des caractéristiques de chaque impôt, les règles selon lesquelles doivent être assujettis les contribuables…"[1]

[10] Me Bizimana Emmanuel avuga ko n'Urukiko rw'Ikirenga rwo muri Leta Zunze Ubumwe z'Amerika[2] rwabivuze muri aya magambo y'icyongereza: *"The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground - something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection*".

[11] Ahereye kuri ibyo byemejwe n'inkiko nkuru (zifite ububasha bwo kureba ko amategeko atanyuranyije n'Itegeko Nshinga—*judicial review*) zo mu bindi bihugu, Me Bizimana Emmanuel asanga nta mpamvu n'imwe yumvikana kandi ifatika yatuma umucuruzi utumije mu mahanga serivisi zikenewe mu bikorwa bye by'ubucuruzi atemererwa gukura umusoro ku nyongeragaciro yishyuye (*input* VAT) kuri izo serivisi mu musoro ku nyongeragaciro yakiriye (*ouput VAT*) hagendewe ku kuba izo serivisi zitaboneka mu Rwanda, mu gihe uguze serivisi imbere mu gihugu we abyemererwa nta kindi asabwe.

[12] Me Nzafashwanayo Dieudonné na Me Bizimana Emmanuel umwunganira basanga n'iyo Leta y'u Rwanda yavuga ko icyari kigamijwe hashyirwaho ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko n° 37/2012 ari ugukangurira abantu kugura serivisi z'imbere mu gihugu kurusha izitumijwe mu mahanga mu

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[1] Reba *Conseil Constitutionnel, décision* no 2009-599 DC du *29 décembre* 2009, para 80

[2] Reba Gulf, Colorado & Santa Fe Ry. Co. v. Ellis 165 U.S. 150 (1897)

rwego rwo kurengera urwego rwa serivisi, Urukiko rutabifata nk'impamvu yemewe kuko binyuranyije n'ihame rya *national treatment* riteganywa mu masezerano mpuzamahanga yerekeye ubucuruzi mpuzamahanga mu bya serivisi u Rwanda rwasinye rukanayemeza. Bakavuga ko muri urwo rwego, ingingo ya 17 ya *East African Community Common Market Protocol*, ingingo ya 17 ya *General Agreement on Trade in Services (GATS)* ndetse n'iya 20 ya *African Continental Free Trade Area Protocol on Trade in Services* zose ziteganya ko igihugu cyasinye aya masezerano kigomba gufata abatanga serivisi zo mu bindi bihugu mu buryo bumwe (*no less favourable treatment*) na serivisi zo muri icyo gihugu zisa nazo cyangwa abantu bo muri icyo gihugu batanga serivisi zisa nazo.

[13] Bashingiye kuri izo mpamvu zose zavuzwe haruguru, banzura bavuga ko ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko n° 37/2012 ituma habaho ukutareshya kw'abantu imbere y'amategeko n'ukutarengerwa n'itegeko mu buryo bumwe nk'uko biteganijwe mu ngingo ya 15 y'Itegeko Nshinga kuko binatuma serivisi z'imbere mu gihugu zidashobora guhiganwa ku rwego rumwe na serivisi zo mu mahanga zishobora gukenerwa n'abakorera ibikorwa by'ubucuruzi mu Rwanda kubera ubwo busumbane.

[14] Me Kabibi Spéciose, uhagarariye Leta y'u Rwanda, avuga ko kuba urwego rwashyira abantu mu byiciro bidasobanura ko buri gihe ari ukubavangura, ko uwo murongo ari nawo wemejwe n'Urukiko rw'Ikirenga mu rubanza RS/SPEC/0001/16/CS rwaciwe ku wa 23/09/2016 no mu rubanza RS/INCONST/SPEC 00001/2019/SC rwaciwe ku wa 29/11/2019.

[15] Me Kabibi Spéciose yakomeje avuga ko mu rubanza RS/INCONST/SPEC 00001/2019/SC rwaciwe ku wa 29/11/2019, Urukiko rw'Ikirenga rwemeje kandi ko: mu birebana n'imisoro, umushingamategeko afite ubwisanzure bwo gushyira abasoreshwa mu byiciro cyane cyane ko ari mu mwanya mwiza kurusha inkiko, wo kumenya ibyo abaturage na Leta bakeneye akabiheraho ashyiraho ibyiciro n'igipimo cy'isoresha, ibyo akaba abyemerewe, keretse bigaragaye ko byakozwe hashingiwe ku ivangura rigamije gukandamiza bamwe.

[16] Me Kabibi Speciose asobanura ko kuba Umushingamategeko yarashyize abasoreshwa mu byiciro bibiri aribyo icyiciro cy'abasoreshwa bagura serivisi zivuye mu mahanga zitaboneka mu Rwanda n'icyiciro cy'abasoreshwa bagura serivisi zivuye mu mahanga ariko ziboneka no mu Rwanda, bitafatwa nko kuvangura cyangwa kutarengerwa kimwe imbere y'amategeko kuko yabikoze kubera impamvu nziza, kandi zumvikana. Zimwe muri izo mpamvu akaba ari ukurengera no guteza imbere abacuruzi n'abashoramari bato bakorera mu Rwanda, gukomeza urwego rw'umusoro ku nyongeragaciro kuko iyo uwo muntu arangura iyo serivisi mu Rwanda, abamugurishije iyo servisi batanga umusoro ku nyongeragaciro mu gihe iyo uranguye servisi hanze y'u Rwanda abo bagurishije izo serivisi badasorera mu Rwanda, ibyo bikaba byumvikana ko uwiyemeje kurangura izo serivisi hanze akwiye kuba ariwe usora uwo musoro ku nyongera gaciro kuko ataguriye uwari busore mu Rwanda kandi ahari.

[17] Me Kabibi Spéciose avuga ko ku baguze serivisi zitaboneka mu Rwanda hanze y'igihugu, bo ntabwo bishyura uwo musoro (bemerewe kuvana umwenda w'umusoro ku kiranguzo mu musoro wakiriwe), kubera ko nta bundi buryo

babonamo izo serivisi uretse kuzikura hanze, hakaba nta n'umucuruzi uri mu Rwanda wari busorere izo serivisi wanze guhabwa ayo mahirwe yuko ariwe baranguraho. Asoza avuga ko ibivugwa na Me Nzafashwanayo Dieudonné na Me Bizimana Emmanuel umwunganira ko ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko N° 37/2012 inyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015 nta shingiro bifite.

[18] Mu izina ry'Inshuti y'Urukiko (*amicus curiae*), Me Habimana Pie avuga ko igihugu icyo aricyo cyose gifite ubwigenge busesuye mu gushyiraho amategeko y'imisoro mu miterere yayo yose. Yanavuze ko ubwigenge mu misoro n'imisoreshereze bwemezwa n'abahanga mu mategeko nk'ikintu cya ngombwa kugira ngo igihugu kibeho nk'igihugu kandi ko ari ntayegayezwa.[3]Anavuga ko ubwigenge mu misoro kandi buhoraho ku bihugu kabone n'ubwo ibyo bihugu byaba byibumbiye mu miryango mpuzamahanga, atanga ingero ku muryango mpuzamahanga mu bukungu n'iterambere (*Organisation for Economic Cooperation and Development – OECD*) ndetse n'Umuryango w'ubumwe bw'Uburayi (*European Union -EU*) aho usanga urwego rw'imisoro ari urwego rukigendera ahanini ku mategeko ya buri gihugu mu bwigenge n'ubwisanzure.[4]

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[3] *P. Lampreave,'Fiscal Competitiveness Vesus Harmful Tax Competition in the European Uninion" (2011) bfit 65 (6), p.4;*
P T Scanlam,'Globalization and Tax-Related Issues: What are the Concerns?' in R Biswas (ed), International Tax Competition: Globaliztion and Fiscal Sovereignty (ommonwealth Secretariat 2002), p.45;

[4] *Hans Gribnau, "Equality, Legal Certainty and Tax Legislation in the Netherlands: Fundamental Legal Principles as Checks on Legislative Power: A Case Study", (2013) Utrecht L. Rev. 52 (9), p.62.*

[19] Me Habimana Pie yakomeje avuga ko no mu gihugu kimwe bibaho ko uturere cyangwa uduce tumwe na tumwe tugira amategeko y'imisoro atandukanye, ko no mu Rwanda ariko bimeze ku misoro imwe n'imwe nk'imisoro ku butaka aho usanga ingano y'umusoro wishyurwa (*rate*) atari imwe ndetse n'umusoro w'ipatanti abantu bakaba bawusora ku ngano zitandukanye bitewe n'aho bakorera ibikorwa byabo by'ubucuruzi ndetse na kamere yabyo.

[20] Me Habimana Pie yavuze kandi ko uburinganire cyangwa ugufata kimwe mu mategeko y'imisoro kumvikana nk'ihame ryo gufata kimwe abameze kimwe no kudafata kimwe abatameze kimwe. Ibyo yabihuje n'ibyo umuhanga mu mategeko witwa William B. Barker yanditse ko "*things that are alike should be treated alike and things that are unlike should be treated unlike in proportion of their un-likeness.*[5] Muri urwo rwego, Me Habimana Pie yakomeje avuga ko gufata kimwe mu misoro abantu batameze kimwe ahubwo aribyo byaba kudafata abantu kimwe nk'uko umuhanga mu mategeko, William B. Barker yabyanditse avuga ko uwagerageza kureshyeshya abantu mu misoro ahubwo byarangira ashyizemo ubusumbane.[6]

[21] Na none Me Habimana Pie yavuze ko ingingo ya 12, igika cya 3 n'icya 4, y'itegeko rishyiraho umusoro ku nyongeragaciro,

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[5] *William B. Barker, 'The Three Faces of Equality: Constitutional Requirements in Taxation', (2006), Case W.Res.L.Rev. 57(1), p. 5 – Reba igika cya 8 cy'Umwanzuro w'Inshuti y'Urukiko (Amicus Curiae)*

[6] *The truth is that a formally equal tax can be in some cases the most unequal of all taxes. [….] In the same token, it has been even argued that adhering to a strict standard of equality would result in disaster.", - William B. Barker, op. cit., pp. 7,8,16. – Reba igika cya 9 cy'Umwanzuro w'Inshuti y'Urukiko (Amicus Curiae).*

itafatwa ukwayo yonyine ahubwo ikwiye gusobanurwa hanarebwe ingingo ya 15 y'iryo tegeko igaragaza igihe umusoreshwa yemererwa umusoro ku kiranguzo (*allowance of input tax*), bityo izi ngingo zombi ziramutse zisomewe hamwe zikaba zagaragaza ko hari ihame n'irengayobora (*principle and exceptions*) mu kwemerera umusoreshwa gukuramo cyangwa kudakuramo umusoro ku kiranguzo (*input* VAT).

[22] Asoza avuga ko ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko N° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro nk'uko ryahinduwe kandi ryujujwe kugeza ubu itanyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, kubera ko umusoreshwa uvugwa muri iyo ngingo ya 12, waguze hanze serivisi iboneka mu Rwanda n'umusoreshwa waguze serivisi mu Rwanda, ari abantu 2 batandukanye ku buryo ntaho umuntu yahera avuga ko ingingo ya 15 y'Itegeko Nshinga itubahirijwe kuko abantu batameze kimwe batanafatwa kimwe cyane cyane ko gusoresha uwo waguze hanze ibicuruzwa cyangwa serivisi iboneka mu Rwanda ari uburyo bwo kurengera no guteza imbere abacuruzi n'abashoramari bakorera mu Rwanda kandi bwemewe n'amasezerano mpuzamahanga urega avuga.

UKO URUKIKO RUBIBONA

[23] Mu gusesengura ikibazo cyo kumenya niba ingingo ya 12 (igika cya 3 n'icya 4 y'Itegeko n° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, Urukiko rurasanga ari ngombwa kubanza gusobanura amahame abiri y'ingenzi arebana n'iby'umusoro ku nyongeragaciro ku bucuruzi bw'ibintu na serivisi byambukiranya

umupaka, ariyo *Reverse Charge Principle* na *Destination Principle*, nyuma rukareba n'ihame ryo kureshya imbere y'amategeko (*Equality before the Law)*.

[24] Ku birebana n'ihame rishingiye ku isoreshwa ry'umukiliya (*Reverse Charge in Ta*x), abahanga mu mategeko basobanura ko iryo hame rishingiye ku isoresha ry'umukiliya rifata umukiliya wahawe serivisi iturutse hanze y'igihugu nk'aho ariwe wayihaye. Uwo mukiliya akaba agomba kwegera inzego zishinzwe isoresha kugira ngo atange umusoro ku nyongeragaciro wagenwe nk'umusoro ushingiye kuri serivisi yahawe.[7]

[25] Ibi ni nabyo byasobanuwe n'Urukiko rw'Ubujurire rwa Nigeria muri *Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS)* aho rwavuze ko ihame rishingiye ku isoreshwa ry'umukiliya rikoreshwa mu bihugu bigize Umuryango w'u Burayi aho umuguzi w'ibicuruzwa cyangwa serivisi byaturutse ku mugurisha ukorera mu kindi gihugu cy'Umuryango w'u Burayi ariwe ufite inshingano yo gutanga umusoro ku nyongeragaciro wagenwe aho kuba umugurisha. Hashingiwe kuri iri hame, ni umuguzi w'ibicuruzwa cyangwa serivisi utanga umusoro ku nyongeragaciro, mu yandi magambo umusoro utangwa n'umuntu wahawe ibicuruzwa cyangwa serivisi.[8]

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[7] *Victor Thuronyi (ed), Tax Law Design and Drafting, Volume 1 (International Monetary Fund, 1996), page 196 "A reverse-charging rule treats the customer being supplied with a service originating abroad as making the supply to itself. It must then account to its tax authorities for the VAT due as output tax on that supply*

[8] "***The reverse charge applicable to European Union Countries whereby the buyer of goods or services from supplier(s) in other EU countries assumes the responsibility of paying the applicable VAT rates instead of the Supplier.***

[26] Hashingiwe ku bimaze gusobanurwa haruguru, Urukiko rukaba rusanga ihame rishingiye ku isoreshwa ry'umukiliya ku musoro ku nyongeragaciro mu Muryango w'u Burayi risobanura ko iyo umuntu aguze ibicuruzwa cyangwa serivisi ku bagurisha bakorera mu bindi bihugu by'Umuryango w'u Burayi, ihame rishingiye ku isoreshwa ry'umukiliya rivana inshingano zo gukora ibijyanye n'itangwa ry'umusoro ku nyongeragaciro ku mugurisha zigahabwa umuguzi w'ibyo bicuruzwa cyangwa izo serivisi. Iryo hame rikaba rikuraho cyangwa rikagabanya inshingano z'abagurisha zo kwiyandikisha ku musoro ku nyongeragaciro mu gihugu ibicuruzwa cyangwa serivisi byinjijwemo. Iyo abagurisha basabwa gutanga umusoro nyongeragaciro ku kiguzi cy'ibicuruzwa cyangwa serivisi byagemuwe hashingiwe ku ihame rishingiye ku isoreshwa ry'umukiliya, bashobora gusubizwa uwo musoro hashingiwe ku buryo bwo gusaba gusubizwa umusoro ku nyongeragaciro bwashyizweho mu Muryango w'u Burayi.[9]

[27] Urukiko rusanga ihame rya *Reverse Charge* rimaze gusobanurwa hejuru nk'uko rikoreshwa mu Muryango w'u Burayi riteganyijwe mu ngingo ya 12, igika cya 1, y'Itegeko N°. 37 ryo ku wa 09/04/2012 rishyiraho umusoro ku nyongeragaciro aho ivuga ko iyo umusoreshwa yakiriye serivisi ahawe n'umuntu uri hanze y'u Rwanda, umusoreshwa afatwa nk'uwakiriye

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***By this principle it is the buyer of goods or services that pays the VAT, put differently the VAT is paid by the person to whom the goods or services are supplied**." - Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS), Appeal No. CA/556/2018, p.23, https://lawpavilionplus.com/summary/judgments/?suitno=CA.*

[9] *KPMG International, VAT/GST Treatment of Cross-Border Services, 2017 Survey, p.20,https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/11/ess-survey-13-nov-17.pdf*

serivisi zisoreshwa kandi akaba yarakiriye umusoro wakiriwe ahawe n'uwo muntu utaba mu Rwanda.

[28] Ku bijyanye n'ihame rishingiye ku hantu ibicuruzwa na serivisi byinjizwa mu mategeko agenga imisoro (*Destination Principle in Tax Law*), Urukiko rusanga ryarasobanuwe mu rubanza rwavuzwe haruguru rwa *Vodacom Business Nigeria na Federal Inland Revenue Service (FIRS)* aho Urukiko rw'Ubujurire rwemeje ko ihame rishingiye ku hantu ibicuruzwa na serivisi byinjizwa mu mategeko agenga isoreshwa rivuga ko ibicuruzwa byatumijwe mu gihugu bisonerwa umusoro ku nyongeragaciro ahubwo bigasoreshwa umusoro ku nyongeragaciro mu gihugu byinjijwemo. Iri hame rishyirwa imbere n'Umuryango w'Ubufatanye mu Bukungu n'Iterambere (OECD).[10]

[29] Abahanga mu mategeko nabo bavuga ko hashingiwe ku ihame ry'isoresha rishingiye ku hantu igicuruzwa cyinjijwe, ibicuruzwa na serivisi bisoreshwa aho byagurishirijwe cyangwa byakoresherejwe aho kuba aho byakorewe cyangwa bituruka. Ibicuruzwa na serivisi byose byagurishijwe mu gihugu byinjijwemo birasoreshwa, iyo bitasonewe by'umwihariko umusoro.[11]

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[10] ***The Destination principle in taxation stipulates that goods imported from a State are exempted from VAT and are instead taxed from VAT in the Destination State in which the goods are imported. It is in principle promoted by Organization for Economic Co-operation and Development (OECD)."*** *Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS), Appeal No. CA/556/2018, p. 23, https://lawpavilionplus.com/summary/judgments/?suitno=CA.*

[11] *Joseph J. Cordes, Robert D. Ebel, and Jane Gravelle, The Encyclopedia of Taxation & Tax Policy (The Urban Insitute, 2005), page 82-83.* ***Under the destination principle*** *of taxation, goods and services are taxed where they are*

[30] Ku bijyanye n'ihame ryo kureshya imbere y'amategeko, ingingo ya 7 y'Itangazo ry'Umuryango w'Abibumbye ku burenganzira bwa muntu, (*Universal Declaration of Human Rights*), ryo mu mwaka wa 1948, ivuga ko abantu bose bareshya imbere y'amatageko kandi barengerwa kimwe n'amategeko nta vangura iryo ari ryo ryose.[12] Naho ingingo ya 26 y'Amasezerano Mpuzamahanga ku burenganzira Mbonezamubano n'ubwa Politiki (*International Covenant on Civil and Political Rights, 1966*) igateganya ko abantu bose bareshya imbere y'amatageko kandi barengerwa kimwe n'amategeko nta vangura iryo ari ryo ryose.[13]

[31] Abahanga mu mategeko, nk'uko byanasobanuwe n'Inshuti y'Urukiko (*amicus curiae*),[14] bavuga ko ihame ryo kureshya imbere y'amategeko rivuga ko itegeko rifata nk'abareshya abantu bari mu cyiciro kimwe kandi rigashyirwa

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purchased or consumed, rather than where they are produced or originate. Destination-basis treatment can be contrasted with the origin principle, under which goods and services are taxed where they are produced. All goods and services sold in the destination jurisdiction are taxed, provided they are not specifically exempted from the tax base;

[12] *All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination''*

[13] *"All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status".*

[14] Reba Inyandiko ikubiyemo ibitekerezo by'Ishami ry'Amategeko rya Kaminuza y'u Rwanda (School of Law/University of Rwanda) nka Amicus Curiae mu rubanza RS/INCONST/SPEC/00004/2019/SC, ibika bya 8, 9 na 10.

mu bikorwa kimwe. Mu yandi magambo, ibisa bifatwa kimwe. Ni ukuvuga ko nta vangura rigomba kubaho ku bantu bari mu bihe bisa no mu buryo busa. Bikumvikana ko abantu batari mu cyiciro kimwe badashobora gufatwa kimwe.

[32] Rushingiye ku bimaze kuvugwa mu bika bibanza, Urukiko rurasanga kuba igihugu cyashyira abasoreshwa mu byiciro bidasobanura ko buri gihe ari ukubavangura dore ko uwo murongo ari nawo wemejwe n'Urukiko rw'Ikirenga mu rubanza RS/SPEC/0001/16/CS rwaciwe ku wa 23/09/2016 no mu rubanza RS/INCONST/SPEC 00001/2019/SC rwaciwe ku wa 29/11/2019, aho rwemeje ko: kureshya imbere y'amategeko no kutavangura bitavuze ko gutandukanya abantu ubwabyo mu bihe byose ari ivangura. Gutandukanya abantu cyangwa gushyiraho ibyiciro by'abantu bishobora kuba ngombwa bitewe n'ikigambiriwe, hari impamvu zumvikana zishingiye ku ntego ifite ireme (legitimate or rational purpose).

[33] Muri uru rubanza, bikaba byumvikanisha ko gutandukanya abasoreshwa bagura serivisi zivuye mu mahanga zitaboneka mu Rwanda n'icyiciro cy'abasoreshwa bagura serivisi zivuye mu mahanga ariko ziboneka no mu Rwanda bitafatwa nko kuvangura cyangwa kutarengerwa kimwe imbere y'amategeko kuko Leta yabikoze hari impamvu zumvikana zifite ireme, nko gushyiraho ingamba zigamije kugabanya icyuho mu bucuruzi n'imyishyuranire n'amahanga igihe u Rwanda rugenda rushyira mu bikorwa ibyo gufungura isoko rya serivisi mu rwego rw'ubucuruzi bwa serivisi bwambukiranya umupaka, nk'uko turi bubisobanure dusuzuma icyo kibazo.[15]

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[15] Ikibazo cyo kumenya niba ingingo ya 12, igika cya 3 n'icya 4 inyuranyije na GATS, AFCTA Protocol on Trade in Services na EAC Common Market Protocol

[34] Urukiko ruhereye ku bisobanuro byatanzwe mu bika bibanziriza iki, rukaba rusanga ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko n° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro itanyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015.

B. Kumenya niba ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko N° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'ingingo ya 95 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015

[35] Me bizimana Emmanuel avuga ko ingingo ya 12 (mu gika cyayo cya 3 n'icya 4) y'Itegeko N° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'ingingo ya 95 y'Itegeko Nshinga rya Repubulika y'u Rwanda kuko ivuguruza amasezerano mpuzamahanga yemejwe n'u Rwanda mu gihe ayo masezerano asumba itegeko rishyiraho umusoro ku nyongeragaciro kuko ari itegeko risanzwe kandi ingingo ya 95 y'Itegeko Nshinga iteganya uko amategeko asumbana iteganya ko nta tegeko rivuguruza iririsumba.

[36] Me Bizimana Emmanuel avuga ko ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko N° 37/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'amasezerano mpuzamahanga yemejwe n'u Rwanda akurikira: *Protocol on the Establishment of the East African Community Common Market (EAC Common Market)* mu ngingo yayo ya 17, *World Trade Organisation (WTO) General Agreement on Trade in Services ("GATS")* mu ngingo yayo ya17 na *Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services (AfCFTA Protocol on Trade in Services*) mu ngingo yayo ya 20.

Avuga ko izo ngingo z'ayo masezerano mpuzamahanga zihuriza ku ihame rya national treatment riba ritubahirijwe iyo ingamba zifashwe zituma habaho guhinduka kw'ihiganwa mu buryo butonesha serivisi cyangwa abatanga serivisi bo mu gihugu runaka ugereranije na serivisi cyangwa abatanga serivisi bo mu bindi bihugu.

[37] Me Bizimana Emmanuel akomeza avuga ko asanga umusoro ku nyongeragaciro umucuruzi yishyuye arangura ibintu cyangwa serivisi bikenewe mu bikorwa bye by'ubucuruzi (*input VAT*), aba agomba kwemererwa kuwukura mu musoro ku nyongeragaciro yakiriye mu bucuruzi bwe (*output tax*) cyangwa agasubizwa urengaho mu gihe umusoro ku nyongeragaciro ku kiranguzo yishyuye uruta umusoro ku nyongeragaciro yakiriye.

[38] Me Bizimana Emmanuel akomeza avuga ko ariko ingingo ya 12 (mu gika cyayo cya 3 n'icya 4 y'Itegeko n° 37/2012 rishyiraho umusoro ku nyongeragaciro idafata kimwe serivisi zo mu Rwanda ndetse na serivisi zitumizwa mu bindi bihugu, kandi uko kutazifata kimwe bishobora gutuma abacuruzi bo mu Rwanda batagura serivisi zo mu bindi bihugu (ahubwo bagahitamo kugura serivisi zo mu Rwanda) kuko baba bazi ko batazemererwa gukura umusoro ku nyongeragaciro ku kiranguzo bishyuye kuri izo serivisi mu musoro ku nyongeragaciro bakira mu gihe izo serivisi zishobora kuboneka mu Rwanda.

[39] Me Bizimana Emmanuel avuga ko ingaruka zikomoka kuri iyi ngingo ya 12 (igika cya 3 n'icya 4) ari uko bituma habaho guhinduka kw'ihiganwa mu buryo butonesha serivisi cyangwa abatanga serivisi bo mu Rwanda ugereranije na serivisi cyangwa abatanga serivisi bo mu bindi bihugu, bityo bikaba binyuranyije n'ihame rya *national treatment* riteganijwe mu ngingo ya 17 ya

EAC Common Market Protocol, ingingo ya 17 ya *GATS* ndetse n'ingingo ya 20 y'*AfCFTA Protocol on Trade in Services*.

[40] Me Nzafashwanayo Dieudonné na Me Bizimana Emmanuel umwunganira bavuga ko ibyo ari nabyo byanagarutsweho na *World Trade Organisation (WTO) Panel* isobanura ihame rya *national treatment* mu bucuruzi bw'ibintu mu rubanza[16] aho yemeje ko iryo hame rya *national treatment* risobanura ko ibintu bitumijwe mu mahanga bifatwa mu buryo bumwe n'iby'imbere mu gihugu igihe byamaze kuva muri gasutamo, kandi ko kuba itegeko runaka ridateganya ibijyanye n'uburyo ibintu bigurwa cyangwa bicuruzwa ntacyo bivuze kuko bitabaye ibyo ibihugu byashobora gukumira ibiva ku masoko yo hanze mu buryo buziguye.

[41] Bakomeza bavuga kandi ko *WTO Panel* isobanura ko ihame rya *national treatment* ritareba amategeko agena igura n'igurisha gusa ahubwo rireba n'andi mategeko ashobora kugira ingaruka (*adverse effects*) ku ipiganwa ryo ku isoko ryo mu gihugu hagati y'iby'imbere mu gihugu ndetse n'ibyatumijwe mu mahanga, ko ibyo bagaragaje haruguru ari nabyo *WTO Panel* yashingiyeho maze yemeza ko itegeko ryatowe n'Inteko Ishingamategeko y'u Butaliyani ryemerera inyunganizi (*subsidisation*) abahinzi bagura imashini zakorewe mu Butaliyani ariko ntiriyemerere abagura izitumijwe mu mahanga, n'ubwo bitanditse muri iryo tegeko byari bigamije kurengera mu buryo butemewe imashini zikorerwa mu Butaliyani bityo bikaba binyuranyije n'ihame rya *national treatment*.

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[16] Reba *Italian Discrimination against Imported Agricultural Machinery, Report adopted on 23 October 1958* (L/833 - 7S/60

[42] Me Kabibi Spéciose avuga ko ibiteganywa n'ingingo ya 12 (igika cya 3 n'icya 4 y'Itegeko rishyiraho umusoro ku nyongeragaciro ntaho binyuranyije n'ingingo ya 95 y'Itegeko Nshinga ndetse bitanavuguruza ihame rya *national treatment* riri mu masezerano mpuzamahanga u Rwanda rwemeje, kubera ko kuba uburenganzira buhabwa uwatumije serivisi zitaboneka mu gihugu ariko ntibuhabwe uwatumije hanze serivisi ziboneka mu gihugu ari uburyo bwo kurengera abashoramari bo mu gihugu imbere hatumizwa gusa serivisi zitaboneka mu gihugu, kandi ubwo buryo bukaba bwemewe na WTO/GATS kuko itanga irengayobora ku ihame rya *national treatment.*

[43] Me Kabibi Spéciose akomeza avuga ko ingingo ya 12 (igika cya 3 n'igika cya 4 yavuzwe haruguru ntaho inyuranyije n'ihame rya *national treatment* ahubwo ishimangira iryo hame, kubera ko serivisi z'imbere mu gihugu n'izatumijwe mu mahanga zose zifatwa kimwe kuko zisoreshwa umusoro ku nyongeragaciro kuzigomba gusoreshwa n'ubusanzwe cyangwa zigasonerwa kuri serivisi zisanzwe zisonerwa. Asobanura kandi ko kuba kuri serivisi zitaboneka mu Rwanda umusoro kunyongeragaciro umusoreshwa yemerewe wakurwamo cyangwa umusoreshwa waranguye izo serivisi zitaboneka mu Rwanda yawusubizwa, bitica ihame rya *national treatment* kuko izo serivisi n'ubusanzwe imbere mu gihugu ntazihari ngo byitwe ko zahawe amahirwe make kuruta izavuye hanze zemererwa gukuramo uwo musoro.

[44] Mu izina ry'Inshuti y'Urukiko (*amicus curiae*), Me Habimana Pie avuga ko kuba uwatanze ikirego avuga ko ingingo ya 12 (mu gika cyayo cya 3 n'icya 4 y'Itegeko n° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'ingingo ya 95 y'Itegeko Nshinga rya Repubulika

y'u Rwanda kuko ivuguruza amasezerano mpuzamahanga yemejwe n'u Rwanda ataribyo kubera ko uretse no kuba igihe cyose ingingo y'itegeko itubahirijwe cyangwa inyuranyije n'ingingo y'itegeko ririsumba bidashobora kwitwa ko habayeho kwica Itegeko Nshinga, nta n'aho iyo ngingo ya 12 inyuranya n'ingingo ya 95 y'Itegeko Nshinga.

[45] Me Habimana Pie yakomeje avuga ko ashingiye ku ihame rya *reciprocity* nka rimwe mu mahame akomeye cyane agenga amasezerano Mpuzamahanga risobanura ko ibihugu bigenzereza ibindi bihugu uko nabyo byabigenzereje kandi bibyitwaraho nk'uko nabyo byabyitwayeho,[17] nta muntu ukwiye gusaba igihugu kimwe ko ingingo iyi n'iyi y'amasezerano mpuzamahanga yubahirizwa ahubwo akwiye kubisaba ibihugu byose birebwa n'ayo masezerano cyangwa se urundi rwego mpuzamahanga rubifitiye ububasha kuruta uko byafatwa nk'ikibazo cyo kunyuranya n'Itegeko Nshinga.

UKO URUKIKO RUBIBONA

[46] Mu gusesengura ikibazo cyo kumenya niba ingingo ya 12 (igika cya 3 n'icya 4 y'Itegeko n° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'ingingo ya 95 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, Urukiko rurasanga hagomba kubanza gusuzumwa niba ingingo ya 12, igika cya 3 n'icya 4 y'itegeko ryavuzwe inyuranyije n'amasezerano mpuzamahanga urega yavuze kuko ariho ahera avuga ko ibiteganyijwe muri ibi bika by'iyi ngingo bivuguruza ayo masezerano kandi ayo masezerano

[17] F Paris and N Ghei, "*The Role of Reciprocity in International Law" (2003) Cornell International LJ* 36 (93), p. 94.

ari hejuru y'itegeko rishyiraho umusoro ku nyongeragaciro, ukurikije ibiteganywa n'ingingo ya 95 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015.

a. Kumenya niba ingingo ya 12, igika cya 3 n'icya 4 y'Itegeko No. 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro inyuranyije n'Amasezerano rusange ku bucuruzi muri serivisi (GATS), Amasezerano y'Isoko rusange ry'Afurika ku bucuruzi muri serivisi (*African Continental free Trade Area Protocol on Trade in Services*) n'Amasezerano y'Isoko rusange ry'Umuryango w'Afurika y'Iburasirazuba (*EAC Common Market Protocol*).

[47] Amasezerano rusange y'ubucuruzi muri serivisi (*GATS*) agizwe n'Ingingo z'Amasezerano, Imigereka n'Ingengabihe (*Schedule*) igaragaza ubwokobwa serivisi buri gihugu cyiyemeje gufungurira ibindi bihugu n'ibyo cyiyemeje kutabifungurira mu gihe runaka. Kugira ngo rero umenye uburyo igihugu kiri muri *GATS* cyubahiriza amahame remezo *GATS* yubakiyeho harimo n'ihame ryo gufata ibintu cyangwa serivisi nk'ibindi byo mu gihugu nyiri zina (*national treatment*), ugomba kureba kuri iyo Ngengabihe (*Schedule*) yavuzwe haruguru.

[48] Ku byerekeye ibyo gufata serivisi nk'iz'inyagihugu (*national treatment*) nk'uko biteganyijwe n'ingingo ya XVII[18] ya *GATS*, ibyo bivuga ko buri gihugu kigomba gufata serivisi

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[18] ***Article XVII: National Treatment***

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

cyangwa abatanga serivisi bakomoka mu bindi bihugu ku buryo budatandukanye n'uburyo gifata serivisi cyangwa abatanga serivisi bo muri icyo gihugu. Iyo igihugu gishaka kugira ibyo gikumira muri urwo rwego, ni ukuvuga gufata ingamba zimwe zituma serivisi zituruka hanze cyangwa abazitanga zifatwa ku buryo butari bumwe n'uko izo mu gihugu zifashwe, igihugu kigomba kubigaragaza mu nkingi ya gatatu y'Ingengabihe (*Schedule*) yacyo.

[49] Urukiko rusanga ko no mu Ngengabihe (*Schedule*) y'ibyo u Rwanda rwiyemeje mu rwego rw'Amasezerano Rusange yerekeye ubucuruzi muri serivisi (*GATS*), rwagejeje ku Muryango Mpuzamahanga w'Ubucuruzi (*World Trade Organization)* muri 1995, hagaragara ko hari serivisi rutiyemeje gufungura harimo zimwe muri serivisi z'ubucuruzi, zimwe muri serivisi z'uburezi, zimwe muri serivisi z'ubukerarugendo na serivisi zijyanye n'ingendo.[19]

[50] Urukiko rusanga kandi ingingo ya XII[20] y'ayo Masezerano iteganya ko igihugu gishobora gufata ibyemezo

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[19] *World Trade Organization. Communication from Rwanda, Schedule of Specific Commitments under the General Agreement on Trade in Services, 30 August 1995*

[20] *Article XII GATS:* ***Restrictions to Safeguard the Balance of Payments***

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

Part III. Specific Commitment.

bikumira serivisi z'inyamahanga mu rwego rwa politiki yacyo yo kuziba icyuho mu bucuruzi n'ubwishyuranire bwacyo n'amahanga (*restrictions to safeguard the balance of payments)*.

[51] Muri urwo rwego, muri politiki zitandukanye harimo n'iyitwa '*Made in Rwanda Policy'*,[21] u Rwanda rwagiye rugaragaza ingamba zo kugabanya icyuho hagati y'ibyo rugura mu mahanga n'ibyo rwohereza mu mahanga ndetse no kugabanya icyuho mu buryo bw'imyishyuranire mpuzamahanga.

[52] Ruhereye ku bimaze kuvugwa mu bika bibanza, Urukiko rusanga ibyo urega avuga ko mu gushyiraho ingingo ya 12, igika cya 3 n'icya 4, y'Itegeko rishyiraho umusoro ku nyongeragaciro u Rwanda rutubahirije inshingano rwiyemeje nk'umunyamuryango wa *GATS*, akabivuga kuri serivisi zose atitaye ku byo igihugu cyitemeye gufungura, cyangwa ngo yite ku burenganzira gifite bwo kuba cyafata ingamba zigamije kugabanya icyuho mu bucuruzi bwacyo cyangwa mu myishyuranire yacyo n'amahanga, bitafatwa nk'ukuri. Bityo akaba atabiheraho avuga ko iyo ngingo inyuranyije n'ayo masezerano.

[53] Ku byerekeye Amasezerano y'isoko rusange ry'Afurika areba ubucuruzi muri serivisi (*African Continental free Trade Area Protocol on Trade in Services*), ingingo ya 18 yayo yerekeye ihame ry'uko ibihugu bigomba kugenda bifungura amasoko yabyo (*progressive liberalization)*, ivuga ko ibihugu byiyemeje gufatanya mu gushyiraho amategeko n'amabwiriza ndetse n'imirongo ngenderwaho mu kureba uko buri serivisi

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[21] MINICOM, *Made in Rwanda Policy*, 2017, pp. 1-2, *http://www.minicom.gov.rw/fileadmin/minicom_publications/documents/SEZ_Policy_-_January_2018_v2.pdf.*

yafungurirwa ibindi bihugu hashingiye ku mikorere myiza isanzwe igenderwaho ndetse n'ibyemejwe muri buri muryango w'ubukungu mu karere k'Afurika (*Regional Economic Community*). Ibihugu byemeje ko porogamu y'uburyo ibiganiro bizakomeza izemezwa na Komite y'ubucuruzi kuri serivisi.

[54] Ikindi ni uko iyo ngingo iteganya ko Lisiti ya za serivisi za ngombwa ndetse n'uburyo ubucuruzi bwa serivisi buzakorwamo bizaba bigize umugereka ku Masezerano kandi uwo mugereka ukaba igice cyayo. Ayo Masezerano kandi ateganya ko ibiganiro hagati y'ibihugu bizakomeza ku byo batari bumvikanyeho.

[55] Urukiko rusanga mu nama y'Abakuru b'Ibihugu bigize *AfCFTA* yabaye muri Gashyantare 2020 yaremeje ibyo Inama y'Abaminisitiri yari yatanzeho ibitekerezo ko hagombaga kuba inama idasanzwe y'Abakuru b'Ibihugu ku wa 30 Gicurasi 2020 kugira ngo yemeze ibintu byose bya ngombwa bikenewe kugira ngo Isoko rusange rya Afurika (*AfCFTA*) ritangire gukora ku itariki ya 1 Nyakanga 2020.[22]

[56] Urukiko rusanga kandi iyo nama yarasabye Abaminisitiri b'ubucuruzi gukora inama za ngombwa kugira ngo habe isozwa ry'imishyikirano ku byerekeye aho ibintu bituruka (*Rule of origin*), ingengabihe y'ubwumvikane ku mahoro (*schedules of tariff concessions*) n'ingengabihe y'ibyo ibihugu byiyemeje ku buryo bwihariye ku bireba inzego z'ingenzi eshanu za serivisi,

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[22] *Decision on the African Continental Free Trade Area (AfCFTA), 33rd Ordinary Session of the Assembly of the Union, 9-10 February 2020, Addis Abeba, Ethiopia, https://www.tralac.org/documents/resources/cfta/3176-au-assembly-decision-on-the-afcfta-february- 2020/file.html*

isaba ko ibihugu byaba byerekanye ibyo byiyemeje ku nzego za serivisi zari zisigaye n'uburyo bwo gufatanya mu bucuruzi muri serivisi bitarenze ukwezi kwa Kamena 2020.[23]

[57] Uhereye rero ku bimaze kuvugwa mu bika bibanza kuri iki kibazo, Urukiko rusanga imvugo y'urega y'uko u Rwanda rutubahirije ibikubiye mu Masezerano y'Isoko rusange ry'Afurika yerekeye ubucuruzi muri serivisi, nta shingiro ifite, igihe hakiri imishyikirano igomba kuba kugira ngo ibihugu byemeze bimwe mu byangombwa bizashingirwaho mu gushyira mu bikorwa ayo Masezerano. Bityo rero, Urukiko rukaba ntacyo rwashingiraho rwemeza ko ingingo ya 12, igika 3 n'icya 4 y'Itegeko rishyiraho umusoro ku nyongeragaciro inyuranyije n'Amasezerano y'isoko rusange ry'Afurika yerekeye ubucuruzi muri serivisi (*AfCFTA Protocol on Trade in Services*).

[58] Urega kandi avuga ko ingingo ya 12, igika cya 3 n'icya 4 y'Itegeko rishyiraho umusoro ku nyongeragaciro inyuranije n'Amasezerano y'Umuryango w'Afurika y'Iburasirazuba yerekeye ibyo guhuza amasoko (*East African Community Common Market Protocol*). Ingingo ya 16, igika cya mbere[24] cy'ayo Masezerano, ivuga ko ibihugu bigomba gutuma habaho ubwisanzure mu bucuruzi bwa serivisi mu buryo umuturage w'igihugu kimwe ashobora gutanga izo serivisi mu kindi gihugu kigize uwo muryango.

[59] Igika cya gatanu cy'iyo ngingo giteganya ko kugira ngo ibivugwa mu gika cya mbere bigerweho, ibihugu bizagenda

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[23] *Ibidem*

[24] *The Partner States hereby guarantee the free movement of services supplied by nationals of Partner States and the free movement of service suppliers who are nationals of the Partner State within the Community*.

bikuraho imbogamizi zose ziriho kandi ntabwo bizashyiraho izindi mbogamizi nshya ku byerekeranye no gutuma abaturage b'igihugu kimwe kigize Umuryango bashobora gutanga serivisi mu kindi gihugu, uretse aho aya masezerano abiteganya ukundi.[25]

[60] Na none ingingo ya 17 y'ayo Masezerano yerekeye ifatwa nk'iz'inyagihugu (national treatment) iteganya ko buri gihugu kizafata serivisi cyangwa abatanga serivisi bo mu bindi bihugu ku buryo budaciye munsi y'uburyo icyo gihugu gifata serivisi cyangwa abatanga serivisi bari muri icyo ghugu.[26]

[61] Aya masezerano kandi ateganya mu ngingo yayo ya 20, igika cya mbere ko ibihugu bishobora gushyiraho amategeko areba inzego za serivisi hakurikijwe intego za politiki zabyo ariko ku buryo ingamba zifatwa ziba zihuje n'ibiteganyijwe muri aya masezerano kandi ku buryo butazitira ubucuruzi.[27]

[62] Ku byerekeye uburyo bwo gushyira mu bikorwa ubwisanzure mu rujya n'uruza rwa serivisi, ingingo ya 23 y'Amasezerano iteganya ko ibyo bizakorwa ku buryo bugenda bwiyongera hakurikijwe gahunda y'uburyo ifungura rya serivisi rigenda ryiyongera iteganyijwe ku Mugereka wa Gatanu w'aya

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[25] *For the purposes of paragraph 1, the Partner States shall progressively remove existing restrictions and shall not introduce any new restrictions on the provision of services in the Partner States, by nationals of other Partner States except as otherwise provided in this Protocol.*

[26] *Each partner State shall accord to services and service suppliers of other partner States treatment no less favorable than that accorded to similar services and services suppliers of the Partner States*

[27] *The Partner State may regulate their services sectors provided the measures are consistent with the provisions of this Protocol and do not constitute barriers to trade.*

Masezerano.[28]Ikindi ni uko ingingo ya 32 y'aya Masezerano yerekeye ihuzwa ry'amategeko na Politiki y'imisoro iteganya ko buri gihugu cyiyemeza kugenda gihuza amategeko na politiki yacyo y'imisoro ku buryo bukuraho itandukanyirizo ry'imisoro hagamijwe koroshya urujya n'uruza rw'ibicuruzwa, serivisi n'imari no guteza imbere ishoramari mu Muryango.[29]

[63] Byongeye kandi, ingingo ya 47 y'Amasezerano iteganya ko ibihugu bigomba gusuzuma imiterere y'amategeko yabyo ugereranyije n'ay'ibindi bihugu biri mu Muryango no guhuza politiki na sisiteme zabyo mu rwego rwo gushyira mu bikorwa aya masezerano. Ikindi ni uko Inama y'Abamanisitiri y'Umuryango igomba gushyiraho amabwiriza (*Council Directives*) agamije gushyira mu bikorwa aya Masezerano.[30]

[64] Urukiko rusanga kandi ku Mugereka wa gatanu w'Amasezerano yavuzwe haruguru, werekeye Ingengabihe y'ibyo ibihugu byiyemeje mu kugenda bifungura isoko rya serivisi,[31] u Rwanda kimwe n'ibindi bihugu bigize Umuryango hari ibyo rwari rwariyemeje kuba rwakoze kugeza mu mwaka wa 2015.

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[28] *The implementation of Article 16 of this Protocol shall be progressive and in accordance with the Schedule on the progressive liberalization of services specified in Annex V of this Protocol.*

[29] *The Partner States undertake to progressively harmonize their tax policies and laws to remove tax distortions in order to facilitate the free movement of goods, services and capital and to promote investment within the Community*

[30] *The Partner States undertake to approximate their national laws and to harmonize their policies and systems, for purposes of implementing this Protocol.The Council shall issue directives for purposes of implementing this Article*

[31] *East African Community Common Market Protocol – Schedule of Commitments on the Progressive Liberalization of Services, November 2009.*

[65] Rusanga kandi ibihugu bigize Umuryango byaragiye bihura bigasuzuma uburyo bwo gufungura amasoko yabyo ku bintu cyangwa serivisi zambukiranya umupaka. Muri urwo rwego, Ubunyamabanga bw'Umuryango, mu kubahiriza icyemezo cy'Inama y'Abaminisitiri, bwakoresheje inyingo[32] y'uburyo bwo guhuza politiki y'imisoro mu Muryango. Ibyo byaje kugerwaho ubwo mu nama yayo yo muri Gicurasi 2019, Inama y'Abaminisitiri b'Umuryango w'Afurika y'Iburasirazuba yemeje Politiki yo guhuza imisoro y'imbere mu bihugu bigize uwo Muryango (EAC Domestic Tax Harmonization Policy) inasaba Ubunyamabanga bwa EAC n'ibihugu bigize Umuryango kuyishyira mu bikorwa.[33]

[66] Urukiko kandi rusanga muri Politiki yo guhuza imisoro y'imbere, ibihugu byaremeranyijwe ko uburyo bwo kugenda batera intambwe (progressive approach) aribwo buzakoreshwa mu guhuza imisoro, bahereye ku misoro ku byaguzwe (excise tax), bagakomereza ku musoro ku nyongeragaciro (value added tax), nyuma hakaza umusoro k'umusaruro (income tax). Banemeje ko ibyo bizakorwa hafatwa ibyemezo by'Inama y'Abaminisitiri (Council Directives), ku buryo hazaba icyemezo cyihariye kuri buri rwego rw'umusoro kandi ibyo byemezo bikazanagena igihe buri gihugu kizaba cyarangije guhuza

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[32] *Consultants' Report on the Harmonization of Income Taxes within the East African Community, 1 November 2014; East African Community, Report of the Meeting to validate the studies on development of Policy frameworks for the harmonization of VAT, Excise duties and Income tax in EAC, Mombasa, 23rd – 25th October 2014; PWC, Policy for harmonization of VAT and Excise duties, 28 October 2014.*

[33] *East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, pp. 30-31.*

amategeko yacyo na buri cyemezo kireba buri rwego rw'umusoro.[34]

[67] Ruhereye ku bimaze kuvugwa haruguru rero, Urukiko rurasanga iby'urega avuga ko u Rwanda rwishe amasezerano areba isoko rusange mu Muryango w'Afurika y'Iburasirazuba rushyiraho ingingo ya 12, igika cya 3 n'icya 4 y'Itegeko rishyiraho umusoro ku nyongeragaciro nta shingiro bifite, kuko hari ibigomba kubanza gukorwa mu rwego rwo gushyira mu bikorwa Politiki yo guhuza imisoro y'imbere, harimo no gushyiraho amabwiriza (Council Directives) y'Inama y'Abaminisitiri b'Umuryango ku musoro ku nyongeragaciro.

[68] Rushingiye ku byo rumaze kwemeza ko ingingo ya 12, igika cya 3 n'icya 4 y'Itegeko rishyiraho umusoro ku nyongeragaciro itanyuranyije n'amasezerano mpuzamahanga urega avuga, ariyo *GATS*, *AfCFTA Protocol on Trade in Services na EAC Common Market Protocol*, kandi rumaze kubona ko aribyo urega yashingiragaho avuga ko ingingo ya 12, igika cya 3 n'icya 4 inyuranyije n'ingingo ya 95 y'Itegeko Nshinga ryo mu 2003 ryavuguruwe mu 2015, Urukiko rurasanga ingingo ya 12, igika cya 3 n'icya 4 y'Itegeko rishyiraho umusoro ku nyongeragaciro itanyuranyije n'ingingo ya 95 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015.

III. ICYEMEZO CY'URUKIKO

[69] Rwemeje ko ikirego cyatanzwe na Me NZAFASHWANAYO Dieudonné nta shingiro gifite.

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[34] *East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, Annex IV: EAC Domestic Tax Harmonization Policy, pp. 8-9.*

[70] Rwemeje ko ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko n° 37/2012 ryo kuwa 09/11/2012 rishyiraho umusoro ku nyongeragaciro itanyuranyije n'ingingo ya 15 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015.

[71] Rwemeje ko ingingo ya 12 (igika cya 3 n'icya 4) y'Itegeko N° 37/2012 ryo ku wa 09/11/2012 rishyiraho umusoro ku nyongeragaciro itanyuranyije n'ingingo ya 95 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015.

IKIREGO GISABA KUBUNGABUNGA CYANGWA GUKURAHO IMBOGAMIZI ZIBANGAMIYE INYUNGU RUSANGE

ASSOCIATION DES ASSUREURS DU RWANDA (ASSAR) v. LETA Y'U RWANDA (MIFOTRA)

[Rwanda URUKIKO RW'IKIRENGA – RS/PIL/SPEC 00001/2019/SC – (Ntezilyayo, P.J., Nyirinkwaya, Cyanzayire, Hitiyaremye na Rukundakuvuga., J.) 19 Kamena 2020]

Amategeko agenga imiburanishirize y'imanza zihariye – Ikirego kigamije kurengera inyungu rusange – Uruhare rwa Leta mu birego birebana n'inyungu rusange – Ikirego kirebana n'inyungu rusange kigomba kuba kigamije ko hubahirizwa uburenganzira bw'abandi bantu aho kwita ku kibazo bwite cy'urega n'ubwo urega yaba afite inyungu ku kiregerwa, izo nyungu agomba kuba azisangiye n'abandi bantu. – Muri ibi birego Leta ihamagazwa mu rubanza gutanga ibitekerezo; ntihamagazwa nk'umuburanyi ushobora kugira ibyo aryozwa cyangwa aca urundi ruhande.

Amategeko agenga imiburanishirize y'imanza zihariye – Ikirego kigamije kurengera inyungu rusange – Ibigize inyungu rusange – Inyungu rusange iba iyo hari igikorwa cyabaye cyangwa kitabaye kikavutsa abantu benshi uburenganzira bwabo cyangwa se kikabagiraho ingaruka mbi, gikosorwa hatanzwe ikirego mu rukiko rubifitiye ububasha.

Incamake y'ikibazo: Association des Assureurs du Rwanda (muri uru rubanza rikaba riri bwitwe ASSAR) yatanze ikirego mu Rukiko rw'Ikirenga irega Leta y'u Rwanda (MIFOTRA) isaba gutegeka ko imbogamizi zose zituma hadashyirwaho umushahara fatizo (SMIG/Minimum Wage) mu Rwanda

zikurwaho kubera ko Itegeko N° 66/2018 ryo ku wa 30/08/2018 rigenga umurimo, mu ngingo ya 68 riteganya ko umushahara fatizo (SMIG/Guaranteed Minimum Wage) ushyirwaho n'Iteka rya Minisitiri ufite umurimo mu nshingano ze n'andi mategeko y'umurimo yaribanjirije yabiteganyaga ariko ko bitigeze bikorwa, ntihanasobanurwa impamvu yumvikana ituma bidakorwa. Isobanura ko isanga kuba umushahara fatizo utariho ari ikibazo kibangamiye inyungu rusange z'abanyarwanda kandi bikaba binyuranye n'ingingo ya 49 n'iya 121 z'Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 04/06/2003 ryavuguruwe mu mwaka wa 2015.

Habanze gusuzumwa ikibazo kijyanye no kuba ASSAR yarareze Leta y'u Rwanda. Kuri iyi ingingo, ASSAR ivuga ko Leta igomba kuba umuburanyi muri uru rubanza kubera ko ikiregerwa ari ikibazo cy'inyungu rusange kandi ikaba ariyo ishinzwe kubungabunga imibereho y'abantu.

Naho, Intumwa ya Leta ikavuga ko ubusanzwe muri bene ibi birego, Leta itazamo nk'umuburanyi ahubwo itanga ibitekerezo, ariko mu gihe Urukiko rwasanga Leta atari umuburanyi muri uru rubanza, rwakwifashisha ibitekerezo byayo.

Inshuti y'Urukiko nayo ivuga ko ibirego birebana no kurengera inyungu rusange bitagomba kugira ubiregwa, bityo, Leta yafatwa nk'ije gutanga ibitekerezo.

Nyuma yo gukemura ikibazo kijyanye no kumenya uburyo Leta ifatwa muri uru rubanza, iburanisha ryibanze gusa ku kibazo cyo kumenya niba iki ikirego gikwiye kwakirwa ngo gisuzumwe hakurikije ibiteganyijwe n'Itegeko.

ASSAR, ivuga ko kuba kugeza ubu mu Rwanda nta mushahara fatizo uhari, ari ikibazo kibangamiye inyungu rusange z'abanyarwanda muri rusange ndetse by'umwihariko ku ruhande

runini rw'igice cy'abanyarwanda aribo ibigo bikora umwuga wo gucuruza ubwishingizi kandi ko kubera ibura ry'akazi, umukozi ushaka akazi aba adafite ubushobozi bwo kumvikana n'umukoresha umushahara, ibyo bikamugiraho ingaruka mbi kuko ashobora guhabwa umushahara w'intica ntikize kuko nta mushahara fatizo uriho, iki akaba ari ikindi kigaragaza ko iki kibazo kibangamiye inyungu rusange

Intumwa ya Leta ivuga ko kuba Iteka rigena umushahara fatizo (SMIG/Minimum Wage) ritarajyaho bitabangamiye inyungu rusange z'abanyarwanda kuko kugeza ubu nta cyuho kiri mu mategeko (legal vacuum) kubera ko mu rubanza rwaciwe, Urukiko rw'Ikirenga rwatanze umurongo kuri iki kibazo aho rwagennye umushahara fatizo, Urukiko rw'Ikirenga rukaba rwarabishingiye ku kuba rufite ububasha bwo kwitwara nk'Umushingamategeko mu gihe nta tegeko rihari. Akomeza avuga ko amafaranga ya pansiyo atangwa hashingiwe ku Iteka rya Perezida Nº 31/01 ryo ku wa 25/08/2003 rishyiraho uburyo bwo kwishyura indishyi ku bubabare bw'umubiri buturutse ku mpanuka zitewe n'ibinyabiziga riteganya amafaranga y'ubwiteganyirize bwa pansiyo n'ay'ibyago bikomoka ku kazi ahabwa uwiteganyirije atagombwa kujya munsi.

Inshuti y'Urukiko ivuga ko kuvuga ko nta mushahara fatizo uriho mu Rwanda atari ukuri kuko kuva mu mwaka wa 2012, Urukiko rw'Ikirenga rwashyizeho umushahara fatizo ndetse no mu mwaka wa 2016 uravugururwa hashingiwe ku biciro biri ku isoko.

Ku birebana n'inyigo yashyizwe ku mugereka w'ikirego, Urega avuga ko iyo inyigo igaragaza ko nta mushahara fatizo uhari, kuko MIFOTRA yakoresheje iyo nyigo ishaka gukemura ikibazo kijyanye n'umushahara fatizo kandi kandi ko mbere y'uko iregera Urukiko yari yarageraageje gushaka uburyo ikibazo

kijyanye n'igenwa ry'umushahara fatizo cyakemuka ariko birananirana.

Intumwa ya Leta ivuga ko urega atagaragaza inyigo yakozwe n'abahanga igaragaza uburemere bw'ikibazo kuko inyigo yashize ku mugereka wayo itashingirwaho kuko ikorwa itari igamije kugaragaza uburemere bwo kutagira umushahara fatizo mu gihugu n'ingaruka byagira cyangwa ikintu gifatika yakoze kugira ngo ikibazo kijyanye no gushyiraho umushahara fatizo gikemuke. Kuruhande rw'Inshuti y'Urukiko, nayo ivuga ko raporo urega ashingiraho yakozwe na Minisiteri ifite umurimo mu nshingano zayo mu gihe iyo raporo itagaragaza uburemere bwo kuba nta mushahara fatizo uhari

Incamake y'icyemezo: 1. Mu birego birebana n'inyungu rusange, Leta ihamagazwa mu rubanza gutanga ibitekerezo; ntihamagazwa nk'umuburanyi ushobora kugira ibyo aryozwa cyangwa aca urundi ruhande.

2. Ikirego kirebana n'inyungu rusange kigomba kuba kigamije ko hubahirizwa uburenganzira bw'abandi bantu aho kwita ku kibazo bwite cy'urega, n'ubwo urega yaba afite inyungu ku kiregerwa, izo nyungu agomba kuba azisangiye n'abandi bantu.

3. Inyungu rusange iba iyo hari igikorwa cyabaye cyangwa kitabaye kikavutsa abantu benshi uburenganzira bwabo cyangwa se kikabagiraho ingaruka mbi, gikosorwa hatanzwe ikirego mu rukiko rubifitiye ububasha.

4. Intego zibanzweho mu nyigo yashyizwe ku mugereka w'ikirego ntabwo zigamije kugaragaza uburemere bwo kuba nta mushahara fatizo uriho, ahubwo zasuzumaga ibyashingirwaho hagenwa umushaharafatizo mu byiciro bitandukanye by'imirimo kandi ntinagaragaza ingaruka ziterwa no kutagira umushahara

fatizo. Bityo kuba iyo inyigo itagaragaza ibyo byose, iba itujuje ibisabwa n'Itegeko

Ikirego nticyakiriwe.

Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 49 n'iya 121.

Itegeko N° 66/2018 ryo ku wa 30/08/2018 rigena umurimo mu Rwanda, ingingo ya 2 n'iya 3.

Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko, ingingo ya 68 n'iya 80.

Itegeko No 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'imirimo n'iz'ubutegetsi, ingingo ya 12.

Itegeko Nº 005/2015 ryo kuwa 30/03/2015 rigenga imitunganyirize y'ubwiteganyirize bwa pansiyo, ingingo ya 27.

Minimum wage-fixing machinery convention, 1928 n° 26" yashyizweho umukono mu mwaka wa 1976.

Iteka rya Perezida N°069/01 ryo ku wa 13/04/2018 ryongera amafaranga ya pansiyo n'ay'ibyago bikomoka ku kazi, ingingo ya 2.

Iteka rya Perezida Nº 31/01 ryo ku wa 25/08/2003 rishyiraho uburyo bwo kwishyura indishyi ku bubabare bw'umubiri buturutse ku mpanuka zitewe n'ibinyabiziga.

Imanza zifashishijwe:

Nyetera Jean Baptiste v. CORAR, RCAA 0202/07/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 09/04/2009

SORAS AG Ltd v. Umuhoza Pacifique n'Abandi, RCAA 0049/14/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 25/11/2016

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236

Inyandiko z'Abahanga:

Albert Ruturi & Another v. Minister for finance and others, (2002) IK.LR 61 (Kenya) and Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General) 2012 SCC 45 (2012) 2 S.C.R 524.

Something in which the public as a whole has a stake (…), Blacks Law Dictionary, Nineth Edition, p. 1350.

Wadehra, Basant Lal. Public Interest Litigation: A Handbook, with Model PIL Formats. Universal Law Publishing, 2009, p. 46.

A Study on the Establishment and the Determination of the Minimum Guarantee Wage (MGW/SMIG) per Occupational Categories, Last Version, July 2018.

Urubanza

I. IMITERERE Y'IKIBAZO

[1] Association *des* Assureurs du Rwanda (ASSAR) yatanze ikirego mu Rukiko rw'Ikirenga irega Leta y'u Rwanda (MIFOTRA), isaba gutegeka ko imbogamizi zose zituma hadashyirwaho umushahara fatizo (*SMIG/Minimum Wage*)[1] mu

[1] *Salaire Minimum Interprofessionnel Guaranti*

Rwanda zikurwaho kuko isanga kuba utariho ari ikibazo kibangamiye inyungu rusange z'abanyarwanda.

[2] ASSAR ivuga ko ingingo ya 2[2] y'Itegeko N° 66/2018 ryo ku wa 30/08/2018 rigena umurimo mu Rwanda mu gace kayo ka 27 isobanura icyo umushahara fatizo aricyo, ikavuga ko ari umushahara muto wemewe n'itegeko hashingiwe kuri buri cyiciro cy'umurimo, ko icyo gisobanuro cyenda gusa n'icyatanzwe n'Umuryango Mpuzamahanga wita ku murimo (*International Labor Organization*) aho wavuze ko umushahara fatizo (*SMIG/Minimum Wage*) ari amafaranga umukozi ahembwa yayakoreye mu gihe runaka, kandi ayo mafaranga akaba atagomba kugabanywa n'amasezerano ayo ariyo yose y'umurimo.

[3] ASSAR inavuga ko Itegeko N° 66/2018 ryo ku wa 30/08/2018 rigenga umurimo, mu ngingo ya 68 riteganya ko umushahara fatizo (*SMIG/Guaranteed Minimum Wage*) ushyirwaho n'Iteka rya Minisitiri ufite umurimo mu nshingano ze, kandi ko n'andi mategeko y'umurimo yabanjirije iririho ubu, nk'ingingo ya 76 y'Itegeko N° 13/2009 ryo ku wa 27/05/2009 ndetse n'ingingo ya 83 y'Itegeko N° 51/2001 ryo ku wa 30/12/2001, nayo yateganyaga ko Minisiteri ifite umurimo mu nshingano zayo ariyo yari ifite inshingano yo gushyiraho uwo mushahara fatizo, ariko ko bitigeze bikorwa ntihanasobanurwe impamvu yumvikana ituma bidakorwa.

[4] ASSAR ivuga ko usibye n'Itegeko rigenga umurimo ku rwego rw'Igihugu riha Minisiteri ifite umurimo mu nshingano zayo ububasha bwo gushyiraho umushahara fatizo, hari

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[2] Ubundi n'ingingo ya 3y'Itegeko n° 66/2018 ryo ku wa 30/08/2018 rigenga umurimo

n'amasezerano mpuzamahanga yitwa "*Minimum wage-fixing machinery convention, 1928 n° 26*" u Rwanda rwashyizeho umukono mu mwaka wa 1976 nayo ateganya mu ngingo yayo ya mbere ko ibihugu byiyemeje kuyashyiraho umukono byiyemeje kuyabungabunga kandi bigashyiraho umushahara fatizo hashingiwe ku byiciro by'imirimo biri muri ibyo bihugu.

[5] ASSAR ikomeza isobanura ko kuba nta mushahara fatizo uriho mu Rwanda, kandi itegeko ribiteganya binyuranye n'ingingo ya 49 n'iya 121 z'Itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 04/06/2003 ryavuguruwe mu mwaka wa 2015 iteganya ko umunyarwanda wese afite inshingano yo kubaha Itegeko Nshinga, ko kandi abayobozi babifite mu nshingano bashyira mu bikorwa amategeko bakoresheje amateka, isanga ari ikibazo gikomeye cy'inyungu rusange, ikaba ariyo mpamvu yahisemo gutanga ikirego mu Rukiko rw'Ikirenga isaba ko imbogamizi izo arizo zose ziriho zikurwaho, umushahara fatizo ugashyirwaho.

[6] Urubanza rwaburanishijwe mu ruhame ku wa 19/05/2020, ASSAR ihagarariwe na Me Butare Emmanuel na Me Umugwaneza Claudine hari na Leta y'u Rwanda (MIFOTRA) ihagarariwe na Me Kabibi Spéciose.

[7] Nyuma yo gusuzuma ubusabe bw'Ishuri ry'Amategeko rya Kaminuza y'u Rwanda (*School of Law*) burebana no kuba Inshuti y'Urukiko (*Amicus Curiae*) muri uru rubanza, mu rwego rwo gutanga ibitekerezo, no kumva ko abahagaririye ASSAR n'uhagariye Leta y'u Rwanda bemera ko iryo shuri ryakwemererwa kuba Inshuti y'Urukiko kuko amategeko abiryemerera, Urukiko rwemeje ko iryo shuri ryujuje ibisabwa, bityo ubusabe bwaryo bukaba bwemewe.

[8] Urukiko rwasuzumye kandi ikibazo kijyanye no kuba ASSAR yarareze Leta y'u Rwanda mu gihe ingingo ya 80, igika cya 4 y' Itegeko N°30/2018 ryo ku wa 02/06/2018 rigenga ububasha bw'inkiko ivuga gusa ko muri izi manza, iburanisha rikorwa hari uhagarariye Leta. Kuri iyi ngingo, Me Kabibi Spéciose avuga ko ubusanzwe muri bene ibi birego, Leta itazamo nk'umuburanyi ahubwo itanga ibitekerezo, ko ariko ashingiye ku buryo abahagarariye ASSAR basobanura ikirego, asanga basa nk'aho barega Leta, asaba Urukiko kutakira ikirego cya ASSAR, ko ariko mu gihe Urukiko rwasanga Leta atari umuburanyi muri uru rubanza, rwakwifashisha ibitekerezo byayo.

[9] Me Butare Emmanuel we avuga ko impamvu Leta yazanywe muri uru rubanza ari ukubera ko ikiregerwa ari ikibazo kijyanye n'inyungu rusange, kandi Leta ikaba ariyo ishinzwe kubungabunga imibereho y'abantu, ko ari nayo mpamvu Umushingamategeko yateganyije ko muri bene izi manza, Leta igomba kuba ihagarariwe. Me Umugwaneza Claudine we asobanura ko kuba ikibazo cy'ishyirwaho ry'umushahara fatizo kireba MIFOTRA, Leta itari kuza mu rubanza gutanga ibitekerezo gusa kuko byari kuba binyuranyije n'ingingo ya 13 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.

[10] Me Sebucensha Leonard uhagarariye Ishuri ry'Amatgeko yavuze ko ibirego birebana no kurengera inyungu rusange bitagomba kugira ubiregwa kuko bibaye bityo, byaba ari nko kugaragaza ko hari ugomba gusubiza uburenganzira bw'urega, ko ahubwo Leta yafatwa nk'ije gutanga ibitekerezo.

[11] Nyuma yo kumva impande zose kuri iki kibazo, Urukiko rwarihereye rufata icyemezo ko Leta iza muri uru rubanza

gutanga ibitekerezo, ko itaza nk'umuburanyi ushobora kugira ibyo aryozwa cyangwa aca urundi ruhande.

[12] Nyuma yo gukemura ikibazo cy'Ishuri ry'amategeko cyo kwemererwa kuba Inshuti y'Urukiko (*Amicus curiae*) n'ikijyanye no kumenya uburyo Leta ifatwa muri uru rubanza, Urukiko rwemeje ko iburanisha ryibanda gusa ku kibazo cyo kumenya niba ikirego cya ASSAR gikwiye kwakirwa ngo gisuzumwe hakurikije ibiteganyijwe n'ingingo ya 80 y'Itegeko N° 30/2018 ryavuzwe haruguru.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

[13] Rushingiye ku biteganyijwe n'ingingo ya 80 y'Itegeko No. 30/2018 ryavuzwe haruguru kandi rumaze kubona imyanzuro ya ASSAR no kubona ibitekerezo byayitanzweho n'uhagarariye Leta y'u Rwanda, Urukiko rurasanga ibibazo bigomba gusuzumwa ari ibi bikurikira:

a. Kumenya niba ikirego cya ASSAR kigaragaza inyungu rusange zemewe iharanira n'aho ikomora mu mategeko ishingiro ry'uburenganzira iharanira

b. Kumenya niba inyigo ASSAR yashyize ku mugereka w'ikirego cyayo yujuje ibiteganyijwe n'ingingo ya 80, igika cya 2 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigenga ububasha bw'inkiko.

Urukiko rugiye gusuzuma ibyo bibazo kimwe ku kindi.

a. Kumenya niba ikirego cya ASSAR kigaragaza inyungu rusange zemewe iharanira n'aho ikomora mu mategeko ishingiro ry'uburenganzira iharanira

[14] Me Kabibi Speciose, uhagarariye Leta y'u Rwanda, avuga ko n'ubwo bikwiye ko Iteka rigena umushara fatizo (*SMIG/Minimum Wage*) rijyaho kubera ko Itegeko ryabitegetse, kuba ritarajyaho bitabangamiye inyungu rusange z'abanyarwanda nk'uko ASSAR ishaka kubyumvikanisha kubera impamvu zikurikira:

- Nta cyuho kiri mu mategeko (legal vacuum) bitewe no kuba uwo mushahara fatizo udahari kubera ko Urukiko rw'Ikirenga mu rubanza RCAA 0049/14/CS rwaciwe ku wa 25/11/2016, rwemeje ko umushahara fatizo ari amafaranga ibihumbi bitatu (3.000 Frw) ku munsi. Ibyo Urukiko rw'Ikirenga rukaba rwarabishingiye ku kuba rufite ububasha bwo kwitwara nk'Umushingamategeko mu gihe nta tegeko rihari.

- Atanga urugero mu bijyanye no kugena indishyi zikomoka ku mpanuka n'ibindi, ko amafaranga 3.000 yemejwe n'Urukiko rw'Ikirenga ashingirwaho n'ibigo by'ubwishingizi mu kugena indishyi.

- Naho ku bijyanye na pansiyo, asobanura ko iyo babona amafaranga ya pansiyo ari munsi ya 13.000 Frw, azamurwa akajya kuri 13.000Frw kugira ngo hirindwe ko uri muri pansiyo ajya munsi y'umurongo w'ubukene. Ibyo bakaba babishingira ku Iteka rya Perezida Nº 31/01 ryo ku

wa 25/08/2003 rishyiraho uburyo bwo kwishyura indishyi ku bubabare bw'umubiri buturutse ku mpanuka zitewe n'ibinyabiziga riteganya ko amafaranga y'ubwiteganyirize bwa pansiyo n'ay'ibyago bikomoka ku kazi ahabwa uwiteganyirije adashobora kujya munsi y'ibihumbi cumi na bitatu (13.000 Frw) ku kwezi.

[15] Me Kabibi Speciose yakomeje avuga ko ashingiye ku bisobanuro yatanze, asanga nta nyungu rusange zihungabanywa no kuba hatarajyaho Iteka rigena umushahara fatizo kuko ibishingirwaho mu kuwugena bihari. asobanura ko ubundi umushahara fatizo ujyaho ku bakozi bahembwa, hagamijwe ko abakozi badahembwa umushahara utuma bajya munsi y'umurongo w'ubukene.

[16] Agaragaza ko ubushakashatsi ku bakora n'abashomeri (Labour Force Survey) bwakozwe mu mwaka wa 2018, bwagaragaje ko impuzandengo y'umushahara uhembwa abakora ku kwezi ari amafaranga 56.982 (Average monthly salary from paid employment) naho ubushakashatsi bwa "*The Fifth Integrated Household Living Conditions Survey"* (EICV5) ku mibereho y'ingo bwo bugaragaza ko hakenerwa byibura amafaranga angana na 159.375 ku mwaka kugira ngo uyahembwa abe atari munsi y'umurongo w'ubukene. Ubu bushakashatsi bukaba bugaragaza ko mu Rwanda abakorera umushahara bahembwa amafaranga atari munsi y'umurongo w' ubukene (poverty line).

[17] Asoza avuga ko ashingiye kuri ibyo bisobanuro byose, asanga nta kibazo gifite ingaruka ku bantu muri rusange giterwa n'uko Iteka rigena umushahara fatizo ritarajyaho, ko ahubwo binagaragara neza ko imbaraga zo guciririkanya hagati

y'abashaka akazi n'abagatanga (*force of demand and supply*) ubwazo zishyiriraho umushahara fatizo ujyanye n'akazi umuntu yakoze kandi ujyanye n'igihe. Bityo akavuga ko kuba Iteka ritarajyaho atari ikibazo kibangamiye inyungu rusange z'abanyarwanda.

[18] Me Umugwaneza Claudine avuga ko kuba kugeza ubu mu Rwanda nta mushahara fatizo uhari, ari ikibazo kibangamiye inyungu rusange z'abanyarwanda muri rusange ndetse by'umwihariko ku ruhande runini rw'igice cy'abanyarwanda aribo ibigo bikora umwuga wo gucuruza ubwishingizi. Akomeza avuga ko inyungu rusange zibangamiwe zigaragarira mu kuba Itegeko N° 66/2018 ryo ku wa 30/08/2018 rigenga umurimo mu Rwanda mu ngingo yaryo ya 68 riteganya ko umushahara fatizo ushyirwaho n'Iteka rya Minisitiri ufite umurimo mu nshingano ze, kandi Itegeko ry'umurimo rikaba rimaze guhinduka inshuro eshatu zose, ariko kugeza ubu umushahara fatizo ukaba utarashyirwaho.

[19] Ku bijyanye n' ingaruka zikomoka ku kuba nta mushahara fatizo uriho mu Rwanda, Me Umugwaneza Claudine avuga ko bibangamira mu buryo bukomeye inyungu rusange z'ibigo bitanga serivisi z'ubwishingizi, kuko kuba uwo mushahara kugeza ubu udahari, byatumye inkiko zitandukanye harimo n'Urukiko rw'Ikirenga, zigenda zishyiraho amafaranga ashingirwaho mu kugenera abaregera indishyi zikomoka ku mpanuka.

[20] Atanga urugero ku rubanza RCAA 0202/07/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 09/04/2009 hagati ya Nyetera Jean Baptiste na CORAR aho muri urwo rubanza, mu gika cya 78, Urukiko rw'Ikirenga rwemeje ko umushahara fatizo rwawugereranyiriza ku mafaranga 2.500 Frw ku munsi. Mu rundi

rubanza RCAA 0049/14/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 25/11/2016 hagati ya SORAS AG Ltd na Umuhoza Pacifique, Izabayo Sylvie, Niyoyita Jacques, aho mu gika cya 27 n'icya 28 rwemeje ko kugeza ubu nta tegeko rishyiraho umushahara fatizo (SMIG), ariko ko hari imanza zagiye zicibwa zemeza amafaranga yafatwa nk'umushahara fatizo, ndetse narwo rwemeza ko hafatwa 3.000 Frw.

[21] Asobanura kandi ko mu bigo by'ubwishingizi, abantu batanga imisanzu ikaba ari nayo ikurwamo amafaranga y'indishyi zihabwa abakoze impanuka zikomoka ku binyabiziga. Ibarwa ry'izo ndishyi rishingiye ku mafaranga yemejwe n'Urukiko rw'Ikirenga rikaba riteye ikibazo kuko ridafite aho rishingiye (*base de calcul*), ahubwo ashingiye ku bushishozi bw'Urukiko.

[22] Akomeza avuga kandi ko no mu Itegeko Nº 005/2015 ryo ku wa 30/03/2015 rigenga imitunganyirize y'ubwiteganyirize bwa pansiyo mu ngingo ya 27 hateganyijwe ko amafaranga ya pansiyo y'izabukuru, ay'ubumuga cyangwa ay'imburagihe adashobora kujya munsi ya mirongo itanu ku ijana (50%) y'umushahara fatizo wose w'ukwezi ugenwa n'Iteka rya Minisitiri ufite umurimo mu nshingano ze. Akavuga ko ibyo byumvikanisha ko mu gihe cyose uwo mushahara utarajyaho bizagira ingaruka ku rwego rushinzwe gutanga amafaranga ya pansiyo, cyangwa se ku muntu ugenewe kuyahabwa kuko bitoroshye kumenya ingano yayo.

[23] Me Butare Emmanuel yongeyehoko *Labor Force Survey* (2018) uhagarariye Leta yashingiyeho mu bisobanuro bye, igaragaza ko abantu badafite akazi ari 15.2%, inagaragaza umubare w'abarangije kaminuza badafite akazi, ibyo bikumvikanisha ko kubera ibura ry'akazi, umukozi ushaka akazi aba adafite ubushobozi bwo kumvikana n'umukoresha

umushahara, ibyo bikamugiraho ingaruka mbi kuko ashobora guhabwa umushahara w'intica ntikize kuko nta mushahara fatizo uriho, iki akaba ari ikindi kigaragaza ko iki kibazo kibangamiye inyungu rusange.

[24] Mu izina ry'inshuti y'Urukiko (*amicus curiae*), Me Sebucensha Leonard avuga ko amasosiyeti y'ubucuruzi kimwe n'izindi sosiyeti ziharanira inyungu zayo n'iz'abanyamuryango bayo, ko asanga ikirego cya ASSAR kidaharanira inyungu rusange kuko abanyarwanda bose badafite inyungu mu masosiyeti y'ubwishingizi. Yanavuze kandi ko ikirego kigamije inyungu rusange ari ikirego gitangwa mu rukiko rubifitiye ububasha kigamije kurengera inyungu z'abantu bose muri rusange, anatanga ingero z'uburyo inkiko zitandukanye zakemuye ikibazo kijyanye no kumenya ushobora kwemererwa gutanga ikirego cy'inyungu rusange.[3]

[25] Me Sebucensha Leonard avuga kandi ko n'ubwo Minisiteri y'umurimo yahawe inshingano yo gushyiraho umushahara fatizo, kuba kugeza ubu ritarashyirwaho bitari ukwica amategeko, harimo n'ingingo z'Itegeko nshinga zavuzwe na ASSAR cyangwa amasezerano mpuzamahanga yasinywe n'u Rwanda kuko itegeko ritigeze rigena igihe ntarengawa iryo Teka rigomba kuba ryashyizweho kandi Leta itagomba kotswa igitutu kuko gushyiraho iryo Teka bisaba ibintu byinshi bigomba kwitonderwa.

[26] Me Sebucensha Leonard avuga kandi ko ibyo ASSAR ivuga ko nta mushahara fatizo uriho mu Rwanda atari ukuri kuko

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[3] *Albert Ruturi & Another v. Minister for finance and others, (2002) IK.L. R 61 (Kenya) and Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General) 2012 SCC 45(2012) 2 S.C.R 524*

kuva mu mwaka wa 2012, Urukiko rw'Ikirenga rwashyizeho umushahara fatizo ndetse no mu mwaka wa 2016 uravugururwa hashingiwe ku biciro biri ku isoko nk'uko bigaragara mu manza RCAA 0202/07/CS, RCAA 0003/11/CS, RSOCAA 0112/10/CS, RCAA 0049/14/CS.

UKO URUKIKO RUBIBONA

[27] Ingingo ya 80 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'Inkiko, iteganya ko "umuntu ku giti cye cyangwa urwego rwa Leta, umutwe wa Politiki, isosiyeti y'ubucuruzi, umuryango utegamiye kuri Leta n'ishyirahamwe bifite ubuzima gatozi ashobora gutanga ikirego gisaba kubungabunga cyangwa gukuraho imbogamizi zibangamiye inyungu rusange z'igihugu, umutungo kamere wacyo, abagituye cyangwa igice cyabo. Urega agomba kugaragaza mu mwanzuro we inyungu rusange zemewe aharanira (…).

[28] Mu gusesengura ibikubiye mu gice cy'ingingo ya 80 yavuzwe haruguru, turasanga ari ngombwa kubanza kumenya icyo inyungu rusange zemewe bivuze kuko umushingamategeko atabisobanuye. Abahanga mu mategeko kimwe n'Inkiko basesenguye icyo kibazo bagaragaje ibisabwa kugira ngo ikirego gisaba kubungabunga cyangwa gukuraho imbogamizi zibangamiye inyungu rusange z'igihugu gishobore kwakirwa, bikaba aribyo bigomba gushingirwaho hasuzumwa niba ASSAR ihagarariye inyungu rusange zemewe muri uru rubanza.

[29] Inyungu rusange yumvikana nk'ikintu abaturage muri rusange bafitemo inyungu.[4] Muri urwo rwego kandi, umuhanga mu mategeko witwa Wadehra, Basant Lal. asobanura ko urubanza rurebana n'inyungu rusange ari urubanza rugamije inyungu rusange. Ni urubanza rugamije guharanira uburenganzira bw'abantu benshi, bashobora kugera ku mamiliyoni, cyangwa gukosora igikorwa cyose kibi cyabangamiye abo bantu. Avuga kandi ko urubanza rurebana n'inyungu rusange rugomba gushingira ku mpamvu enye z'ingenzi:

a. Kuba hari igikorwa cyabaye, kuba hari igikorwa kitabaye cyangwa imiterere y'ibintu uko biri;

b. Icyo gikorwa kibi kikaba cyaratumye abantu benshi bavutswa uburenganzira bwabo cyangwa kikabagiraho ingaruka mbi;

c. Uburenganzira buharanirwa hagamijwe ko bwubahirizwa cyangwa ko icyo gikorwa kibi gikosorwa, binyuze mu kirego cyatanzwe mu nkiko zibifitiye ububasha;

d. N'umuntu ugamije inyungu z'abantu benshi cyangwa ishyirahamwe ry'abantu bahagarariye abagizweho ingaruka.

Avuga kandi ko ihame ntakuka rigenga urubanza rurebana n'inyungu rusange ari uko ruba rugamije ko hubahirizwa uburenganzira bw'abandi bantu aho kwita ku kibazo bwite cy'urega. N'ubwo urega yaba afite inyungu ku kiregerwa, izo nyungu agomba kuba azisangiye n'abandi bantu. Umwanzuro

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[4] *Something in which the public as a whole has a stake (...), Blacks Law Dictionary, Nineth Edition, p. 1350*

w'urubanza utanzwe ugomba kugirira inyungu igice kinini cy'abantu aho kuba itsinda ryabo.[5]

[30] Urukiko rurasanga kandi ibivugwa n'umuhanga Wadehra, Basant Lal ku bijyanye n'impamvu z'ingezi zishingirwaho mu rubanza rurebana n'inyungu rusange ari nabyo byemejwe n'Urukiko rw'Ikirenga rwa Canada mu rubanza *Canadian Council of Churches v. Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236, aho urwo Rukiko rwemeje ko kwemera ko hari impamvu yo guha umuntu ububasha bw'umuburanyi urengera inyungu rusange, byaba bitewe n'uburemere bw'uburenganzira rusange cyangwa gushaka kubahiriza amahame y'Itegeko nshinga ryo muri 1982 (*Constitution Act, 1982)*[6], rimwe na rimwe ntibivuga kwemerera bisesuye ubwo burenganzira abantu bose bifuza kugira icyo baregera. Hagomba

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[5] *Wadehra, Basant Lal. Public Interest Litigation: A Handbook, with Model PIL Formats. Universal Law Publishing, 2009, pg 46, "Public interest litigation (or social action or class action litigation as it is various called) means a litigation which serves public interest. It is a litigation which vindicates a right of a large number of people, perhaps millions, or redresses a wrong done to them. For the existence of a public interest litigation, four conditions are necessary: Some action, inaction or state of affairs; Which causes the deprivation of a right of large number of people, or causes a large number of people to suffer a similar wrong; The right is sought to be enforced or the wrong redressed, through a petition to the appropriate courts; By a public spirited person or an association of person acting on behalf of those injured.*

In public interest litigation, the sine qua non is that it must be for the enforcement of rights of others not the individual grievances of the petitioner. Even if the petitioner is interested in the matter, it must be an interest which he/she shares with other members of the public. The relief, if granted must benefit large section of society not a handful of individuals.

[6] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236 (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/835/index.do)*

kubaho gushyira mu gaciro mu kubahiriza uburenganzira bwo kuregera inkiko ndetse no kubungabunga umutungo wazo. Inkiko ntizigomba kuremererwa n'umutwaro w'ubwinshi butari ngombwa bw'imanza zidafite ishingiro cyangwa zidakenewe zitangwa n'amashyirahamwe abigiranye umutima mwiza ariko agamije gukurikirana ibibazo byayo bwite.[7]

[31] Ku birebana n'ikirego cya ASSAR, nk'uko bigaragara mu mwanzuro wayo no mu nyandiko ziri muri dosiye, ASSAR ni ishyirahamwe rifite ubuzima gatozi kandi nk'uko ingingo ya 4 mu gace ka 1, 2 n'aka 4 y'amategeko shingiro yaryo ibiteganya, ASSAR ifite intego yo guteza imbere umwuga w'ubwishingizi, kurengera inyungu z'abanyamuryango zifitanye isano n'umwuga wabo, guhagararira abanyamuryango imbere y'inzego za Leta kimwe n'izindi nzego zarengerwamo inyungu rusange.

[32] Urukiko rurasanga igikwiye kumvikana mu ngingo ya 4 imaze kuvugwa mu gika kibanziriza iki, ni uko ASSAR ari ishyirahamwe riharanira inyungu z'abanyamuryango bayo, aho kuba inyungu z'abanyarwanda muri rusange, ibyo kandi bikanashimangirwa n'ibivugwa na Me Umugwaneza Claudine uyiburanira aho yasobanuye ko kuba nta mushahara fatizo uhari bigira ingaruka zikomeye ku bigo bitanga serivisi z'ubwishingizi kuko byatumye inkiko ziwushyiraho zishingiye ku bushishozi bwazo, nta bipimo bifatika zishingiyeho, atanga ingero z'imanza zaciwe n'Urukiko rw'Ikirenga nk'urubanza RCAA 0202/07/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 09/04/2009 rwemeje ko umushahara fatizo ari 2.500 Frw n'urubanza RCAA 0049/14/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 25/11/2016 rwemeje ko umushahara fatizo ari 3.000 Frw.

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[7] *Ibidem*

[33] Urukiko rusanga kandi na Banki Nkuru y'u Rwanda mu ibaruwa yandikiye MIFOTRA ku wa 14/11/2016 yarashimangiye ko kutagira umushahara fatizo bibangamiye ibigo by'ubwishingizi, aho yasobanuye ko kuba Minisitiri ufite umurimo mu nshingano ze atarashyiraho iteka rigena umushahara fatizo mu Rwanda bibangamiye ibigo by'ubwishingizi cyane cyane ku bijyanye no kwishyura indishyi zikomoka ku binyabiziga zitangwa hashingiwe ku murongo watanzwe n'Urukiko rw'Ikirenga mu rubanza RCAA 0202/07/CS rwo ku wa 09/04/2009 rwemeje amafaranga 2500 ku munsi, ndetse n'izindi nkiko zigenda zigena amafaranga ari hejuru.

[34] Ku byo Me Umugwaneza Claudine avuga y'uko ASSAR ihagarariye inyungu rusange z'abanyarwanda ashingiye ku kuba indishyi zikomoka ku mpanuka zatewe n'ibinyabiziga Ibigo by'ubwishingizi byishyura ziva mu misanzu yatanzwe n'abanyarwanda, Urukiko rurasanga ibi bisobanuro atanga ataribyo bigaragaza ko ihagarariye inyungu rusange zemewe, kuko nk'uko byasobanuwe n'Uhagarariye Leta y'u Rwanda kimwe n'Inshuti y'Urukiko, atari abanyarwanda bose bafite ibinyabiziga ku buryo batanga imisanzu mu bigo by'ubwishingizi, ahubwo ari igice gito cy'abanyarwanda cyane ko nta n'ikimenyetso ASSAR yatanze kigaragaza ko abishingiwe baba barayigejejeho ikibazo kirebana no kuba nta mushahara fatizo wagenwe n'Iteka rya Minisitiri ufite umurimo mu nshingano ze.

[35] Ku bivugwa n'abahagarariye ASSAR ko kuba nta mushahara fatizo uriho bigira ingaruka ku rwego rushinzwe gutanga amafaranga ya pansiyo no ku muntu ugenewe

kuyihabwa, hashingiwe ku ngingo ya 27 y'Itegeko[8] Nº 005/2015 ryo ku wa 30/03/2015 rigenga imitunganyirize y'ubwiteganyirize bwa pansiyo, iteganya ko amafaranga ya pansiyo y'izabukuru, ay'ubumuga cyangwa ay'imburagihe agenwa hashingiwe ku mushahara fatizo, Urukiko rurasanga, uretse kubivuga mu magambo, ASSAR itagaragaza uko izo ngaruka ziteye bitewe n'uko nta mushahara fatizo washyizweho n'Iteka rya Minisitiri ufite umurimo mu nshingano ze. Ikindi kandi, n'iyo haba hari impungenge ko abafata pansiyo bashobora guhabwa amafaranga make kuko nta mushahara fatizo uriho wagena amafaranga atagibwa hasi, Urukiko rusanga icyo kibazo cyarakemuwe n'Iteka rya Perezida N°069/01 ryo ku wa 13/04/2018 ryongera amafaranga ya pansiyo n'ay'ibyago bikomoka ku kazi atangwa n'Ikigo cy'ubwiteganyirize mu Rwanda, mu ngingo yaryo ya 2 aho ivuga ko amafaranga y'ubwiteganyirize bwa pansiyo n'ay'ibyago bikomoka ku kazi adashobora kujya munsi y'ibihumbi cumi na bitatu (13.000 Frw) ku kwezi.

[36] Ku byo ASSAR ivuga ko ikirego cyayo kigamije kurengera inyungu rusange kubera ko ishyirwaho ry'umushahara fatizo n'Iteka rya Minisitiri ufite umurimo mu nshingano biri mu rwego rwo kubahiriza Itegeko rigengamurimo n'amasezerano

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[8] Ingingo ya 7 y' Itegeko Nº 005/2015 ryo kuwa 30/03/2015 rigenga imitunganyirize y'ubwiteganyirize bwa pansiyo iteganya ko ku muntu witeganyiriza uvugwa mu gika cya 2 cy'ingingo ya 5 y'iri tegeko, umushahara ubarirwaho umusanzu ntushobora kujya munsi y'umushahara fatizo kandi ntushobora kwiyongera birenze mirongo itatu ku ijana (30%) mu gihe cy'imyaka itatu (3).

Ingingo ya 27 y'iryo Tegeko nayo ikavuga ko amafaranga ya pansiyo y'izabukuru, ay'ubumuga cyangwa ay'imburagihe ntashobora kujya munsi ya mirongo itanu ku ijana (50%) y'umushahara fatizo wose w'ukwezi ugenwa n'Iteka rya Minisitiri ufite umurimo mu nshingano ze.

mpuzamahanga u Rwanda rwasinye, ndetse ko kutabyubahiriza binyuranyije n'Itegeko nshinga, Urukiko rurasanga koko ingingo ya 68 y'Itegeko N°. 30/2018 ryavuzwe haruguru iteganya ko Minisitiri ufite umurimo mu nshingano ze agomba gushyiraho iryo Teka, ariko nk'uko Inshuti y'Urukiko yabivuze, iryo Tegeko ntabwo rigena igihe ntarengwa ibyo bigomba kuba byakozwemo, kandi nk'uko bigaragara muri dosiye, hari imirimo MIFOTRA yakoze igamije gushyiraho iryo Teka kandi na ASSAR yagizemo uruhare.`

[37] Dushingiye ku bisobanuro byatanzwe mu bika bibanziriza iki, Urukiko rurasanga mu kirego ASSAR yashyikirije uru Rukiko isaba gutegeka ko imbogamizi izo arizo zose zituma hatajyaho umushahara fatizo (*SMIG/Minimum Wage*) mu Rwanda zivaho, itagaragaza inyungu rusange zemewe iharanira nk'uko biteganywa n'ingingo ya 80 y'Itegeko N° 30/2018 ryavuzwe haruguru.

b. Kumenya niba inyigo ASSAR yashyize ku mugereka w'ikirego cyayo yujuje ibiteganyijwe n'Ingingo ya 80, igika cya 2, y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigenga ububasha bw'inkiko

[38] Me Kabibi Speciose avuga ko ikirego cya ASSAR kitagaragaza inyigo yakozwe n'abahanga igaragaza uburemere bw'ikibazo ivuga, uburyo ASSAR yagerageje kugikemura yifashishije inzego za Leta bikananirana, n'ingaruka kutacyitaho byateye. Akomeza avuga ko inyigo ASSAR yashyize ku mugereka w'ikirego cyayo ivuga ko yakozwe na Minisiteri y'abakozi ba Leta n'umurimo (MIFOTRA) ari umushinga w'inyigo ugaragaza imishahara iri ku isoko ijyanye n'inzego z'umurimo zitandukanye, *practices* zihari mu kugena umushahara fatizo n'umusaruro mbumbe w'imbere mu gihugu,

umushahara fatizo mu kugabanya ubusumbane bw'inyungu, ubukene n'ibindi. Agaragaza ko iyo nyigo itashingirwaho kuko ikorwa itari igamije kugaragaza uburemere bwo kutagira umushahara fatizo mu gihugu n'ingaruka byagira. Asaba Urukiko kutakira ikirego cya ASSAR kuko kitubahirije ibiteganywa n'ingingo ya 80 igika cya 2 y'Itegeko n° 30/2018 ryavuzwe haruguru.

[39] Me Kabibi Speciose avuga kandi ko ASSAR itagaragaza ikintu gifatika yakoze kugira ngo ikibazo kijyanye no gushyiraho umushahara fatizo gikemuke, ko iterekana niba hari ubushakashatsi yakoze ku kutagira umushahara fatizo, ngo igaragaze ingaruka byateye abanyarwanda n'icyatuma bikemuka, asoza yongera gusaba Urukiko kutakira ikirego cyatanzwe na ASSAR kuko kitubahirije ibiteganywa n'Itegeko.

[40] Mu kuvuguruza ibyavuzwe na Me Kabibi Speciose, Me Butare Emmanuel avuga ko inyigo yakozwe na Minisiteri ifite umurimo mu nshingano zayo igaragaza ko nta mushahara fatizo uhari, aho mu iriburiro hagaragara ikibazo gihari n'ibibazo biterwa no kuba nta mushahara fatizo, ko byumvikana ko MIFOTRA yakoresheje iyo nyigo ishaka gukemura ikibazo kijyanye n'umushahara fatizo. Asobanura ko yaba Leta y'u Rwanda ndetse n'Inshuti y'Urukiko bose bemera ko nta mushahara fatizo uhari, bakanavuga ko Minisiteri bireba ikibyigaho, ko ariko ushingiye ku gihe Itegeko ry'umurimo ryateganyirije ko hagomba gushyirwaho umushahara fatizo ntibikorwe, asanga MIFOTRA itarabihaye ubwihutire.

[41] Mu kumwunganira, Me Umugwaneza Claudine avuga ko inyigo ijyanye n'umushahara fatizo yakozwe na Minisiteri y'abakozi ba Leta n'umurimo ubwayo mu kwezi kwa 7/2018, kandi ko ku rupapuro rwa 33 rwayo hagaragara ko umushahara

fatizo wagakwiye kuba amafaranga 1.400 ku munsi, banagaragaza akamaro ko kugira umushahara fatizo aho bavuga ko ari ukurandura ubukene n'ibindi bibazo bivugwa muri iyo nyigo, ko iyo nyigo igaragaza uburyo amategeko y'umurimo atandukanye yateganyaga ishyirwaho ry'umushahara fatizo n'uburyo n'icyo umaze mu iterambere ry'Igihugu n'abaturage muri rusange, akaba asanga iyo nyigo ihagije mu kugaragaza uburemere bw'ikibazo cy'uko nta mushahara fatizo uriho mu Rwanda.

[42] Me Umugwaneza Claudine avuga kandi ko mbere y'uko ASSAR ifata icyemezo cyo gutanga ikirego mu Rukiko rw'Ikirenga, yari yarageragaje gushaka uburyo ikibazo kijyanye n'igenwa ry'umushahara fatizo cyakemuka ariko birananirana, ko ibyo bigaragazwa n'amabaruwa atandukanye yandikiwe Minisiteri ifite umurimo mu nshingano zayo, arimo ibaruwa Banki Nkuru y'u Rwanda nk'umugenzuzi w'ibigo by'ubwishingizi, yandikiye Minisitiri w'Abakozi ba Leta n'Umurimo ku wa 14/11/2016, imugaragariza ko kuba nta mushahara fatizo urashyirwaho (SMIG/MGW) kandi ari inshingano Minisiteri ayobora ihabwa n'Itegeko ry'umurimo bituma inkiko zishyiraho amafaranga ashingirwaho mu kugena indishyi zihabwa abagiriye ibyago mu mpanuka zatewe n'ibinyabiziga byishingiwe, bikaba bigira ingaruka zikomeye ku bigo bitanga serivisi z'ubwishingizi mu Rwanda

[43] Me Umugwaneza Claudine asobanura kandi ko Minisiteri y'abakozi ba Leta n'umurimo yasubije iyo baruwa ku wa 23/01/2017, aho mu gika cya 2 yavuze ko ishyirwaho ry'umushahara fatizo ritegereje ivugururwa ry'Itegeko Nº 13/2009 ryo ku wa 27/05/2009 ryagengaga umurimo mu Rwanda. Avuga ko n'ubwo iyo baruwa yatangaga icyizere, ariko

Itegeko rigenga umurimo mu Rwanda ryatangajwe mu Igazeti ya Leta ku wa 30/08/2018, hakaba hashize igihe cy'umwaka n'ubundi ikibazo cy'umushahara fatizo kitarakemuka, kandi ingingo ya 68 y'iryo Tegeko iteganya ko Iteka rya Minisitiri ufite umurimo mu nshingano ze ariryo rigena umushahara fatizo.

[44] Asobanura kandi ko hari indi baruwa yandikiwe MINECOFIN ku wa 05/06/2019, imenyeshwa MIFOTRA ndetse na MINIJUST aho ASSAR yongeye kugaragaza ikibazo gikomeye iterwa no kuba nta mushahara fatizo uhari mu Rwanda. Bityo ko kuba ASSAR yarageragaje kugeza icyo kibazo mu nzego zitandukanye, ariko kugeza ubu kikaba kitarakemuka, ASSAR isanga Urukiko rw'Ikirenga arirwo rwakemura icyo kibazo.

[45] Mu myanzuro yabo, Me Serugo Jean Baptiste na Me Sebucensha Leonard bavuga ko ASSAR ishingira kuri raporo yakozwe na Minisiteri ifite umurimo mu nshingano zayo mu gihe iyo raporo itagaragaza uburemere bwo kuba nta mushahara fatizo uhari, ko iyo raporo itakozwe mu rwego rwo kugaragaza ko nta mushahara fatizo uhari. Basobanura ko iyo raporo itafatwa nk'iyakozwe n'abahanga, banagaragaza ko kugira ngo bihure n'ibiteganywa n'ingingo ya 80 y'Itegeko N° 30/2018 ryavuzwe haruguru, raporo igomba gukorwa n'umuntu ufite ubumenyi mu kibazo kigomba kwigwa, bityo ko raporo yatanzwe na ASSAR itujuje ibisabwa mu ngingo ya 80 yavuzwe haruguru.

[46] Bakomeje bibutsa ko ingingo ya 80 y'Itegeko N°30/2018 ryavuzwe haruguru iteganya ko inyigo yomekwa ku mwanzuro w'urega mu birego bijyanye n'inyungu rusange hagaragazwa uko yarageraje gukemura ikibazo n'inzego za Leta zibishinzwe bikananirana.

Aha bavuga ko amabaruwa atandukanye ASSAR yatanze nk'ikimenyetso cy'uburyo yagerageje gukemura ikibazo cy'igenwa ry'umushahara fatizo, atafatwa nk'ikimenyetso kibyemeza. Basobanura ko kuba Banki Nkuru y'u Rwanda, nk'ishinzwe kugenzura ibigo by'ubwishingizi yarandikiye MIFOTRA ku kibazo cyo gushyiraho umushahara fatizo, cyangwa kuba ASSAR yarandikiye MINECOFIN ikagenera kopi MIFOTRA na MINIJUST, ataribyo bigaragaza ko ASSAR ubwayo yagerageje gukemura ikibazo cy'ishyirwaho ry'umushahara fatizo n'urwego rubishinzwe, arirwo MIFOTRA, bikananirana. Bahereye kuri ibyo basaba Urukiko kutakira ikirego cya ASSAR kuko cyitujuje ibisabwa n'amategeko.

UKO URUKIKO RUBIBONA

[47] Ingingo ya 80 y'Itegeko N° 30/2018 ryavuzwe haruguru iteganya ko urega [.....]. Agomba gushyira ku mugereka w'imyanzuro inyigo yakozwe n'abahanga igaragaza uburemere bw'ikibazo avuga, uburyo yagerageje kugikemura yifashishije inzego za Leta bikananirana n'ingaruka kutabyitaho byagira.

[48] Urukiko rusanga inyigo ivugwa muri iyi ngingo ifite ibice bine biyiranga Umushingamategeko yifuje ko bigomba kuyigaragaramo kugira ngo ikirego cyakirwe:

a. Kuba yarakozwe n'umuhanga

b. Kuba igaragaza uburemere bw'ikibazo urega avuga;

c. Kugaragaza ko urega yagerageje gukemura ikibazo aregera yifashishije inzego za Leta bikananirana;

d. Kugaragaza ingaruka kutabyitaho bifite cyangwa byagira ku nyungu rusange aharanira.

[49] Urukiko rusanga kandi buri cyose mu bice bivugwa mu gika kibanziriza iki, gifite impamvu zumvikana cyashyiriweho, zigomba kubahirizwa n'utanga ikirego:

a. Inyigo igomba gukorwa n'umuhanga. Ibi bivuze ko igikenewe atari inyigo iyo ari yo yose. Ni inyigo ahubwo ikozwe kinyamwuga, yakozwe n'umuntu ubifitemo ubuzobere, ishingiye ku makuru afite gihamya kandi igamije kumvikanisha koko ikibazo kiriho ngo kibonerwe igisubizo.

b. Kuba agaragaza uburemere bw'ikibazo urega avuga. Ibi bivuze ko iyo nyandiko itagarukira ku kuvuga ikibazo gusa, ahubwo igomba kugaragaza mu buryo bwa gihanga uburemere gifite (ubunini bwacyo) ugereranyije n'inyungu rusange uwayiteguye ashaka kurengera.

c. Kugaragaza ko urega yagerageje gukemura ikibazo aregera yifashishije inzego za Leta bikananirana. Ibi bisobanuye ko urega agaragaza uburyo we ubwe cyangwa abo ahagarariye bagerageje uko bashoboye ngo ikibazo gikemuke bifashishije inzego za Leta, nyamara bikananirana.

d. Kugaragaza ingaruka kutabyitaho bifite cyangwa byagira. Ingaruka zivugwa aha si izo urega yibwira ko zabaho kuko ariko abitekereza gusa. Ahubwo zigomba gushingira ku isesengura ry'ibintu no ku ngero zifatika zerekana ko ibibazo ashaka gukemura bigira, ku rugero runaka, ingaruka mbi ku nyungu rusange urega agamije kurengera.

[50] Dosiye y'uru rubanza igaragaza ko inyigo ASSAR yashyize ku mugereka w'ikirego cyayo ivuga ko yakozwe na MIFOTRA, ariyo mu kwezi kwa Nyakanga 2018 ikaba isuzuma

ishyirwaho n'igenwa ry'umushahara fatizo ku byiciro by'umurimo.[9] Iyo nyigo ikaba yari igamije gukora ubushakashatsi ku rwego rw'Igihugu ku birebana no gushyiraho no kubara umushahara fatizo ku byiciro by'imirimo no gutegura umushinga w'iteka rya Minisitiri riteganya umushahara fatizo kuri buri cyiciro cy'umurimo cyagaragajwe. Hashingiwe ku ngero zitandukanye ndetse n'izihuriweho zerekana inzira zifashishwa mu kugena umushahara fatizo, intego ubwo bushakashatsi bwibanzeho zikaba ari izi zikurikira:

i) Gukora ubushakashatsi bucukumbuye ku miterere y'imishahara mu mirimo itandukanye ku Isoko ry'Umurimo mu Rwanda hitabwa ku byiciro by'imirimo;

ii) Gusesengura uburyo butandukanye bukoreshwa ubu mu kugena umushahara fatizo ku isi;

iii) Gukora ubushakashatsi bugereranya umushahara fatizo n'ibindi bigereranyo bishingiye ku mushahara n'umusaruro nk'umusaruro mbumbe w'imbere mu gihugu ku muturage (*GDP per capita*), umusaruro mbumbe w'imbere mu gihugu ku mukozi

iv) Gusesengura ingaruka z'umushahara fatizo ku isaranganya ry'umutungo, ku igabanuka ry'ubukene, ku busumbane bw'umutungo, ku nzego z'imirimo;

v) Hashingiwe ku bizaba byagaragajwe n'ubushakashatsi ku mushahara fatizo, gutegura

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[9] *A Study on the Establishment and the Determination of the Minimum Guarantee Wage (MGW/SMIG) per Occupational Categories, Last Version, July 2018*.

umushinga w'iteka rya Minisitiri rigena umushahara fatizo hakurikijwe ibyiciro by'imirimo mu Rwanda.

[51] Mu gusesengura inyandiko yavuzwe haruguru ASSAR yashyikirije Urukiko, Urukiko rurasanga iyi nyandiko igaragara nk'inyandiko yari itararangira ngo itangazwe kuko ku mpapuro zayo zibanza, hari aho ibice bimwe bitujujwe aribyo, *Disclaimer, Inquiries, Acknowledgments, Abstract,* ibi bikaba byafatwa y'uko iyi nyigo yari ikiri umushinga nk'uko uhagarariye Leta abivuga. Ikindi ni uko iyi nyigo igaragaza ku rupapuro rwayo rwa mbere amagambo 'Minisiteri y'Abakozi ba Leta n'Umurimo', *Ministry of Public Service and Labor'*. Me Butare Emmanuel asubiza ikibazo cyo kumenya umuhanga wakoze iyi nyigo, yavuze ko ari MIFOTRA, ibi Urukiko rukaba rubona bidahagije kugira ngo rwemeze ko inyigo yakozwe n'umuhanga uteganyijwe n'ingingo ya 80 y'Itegeko N°. 30/2018.

[52] Urukiko rurasanga kandi intego zibanzweho mu nyigo yavuzwe haruguru zitari zigamije kugaragaza uburemere bwo kuba nta mushahara fatizo uriho mu Rwanda, ahubwo zasuzumaga ibyashingirwaho hagenwa umushaharafatizo mu byiciro bitandukanye by'imirimo. Iyo nyigo kandi ntinagaragaza ingaruka ziterwa no kutagira umushahara fatizo haba muri rusange, cyangwa by'umwihariko ku bigo by'ubwishingizi, kuko aribyo ASSAR ivuga ko aricyo gice cy'abaturage iharanira inyungu zacyo. Nk'uko Urukiko rwabigaragaje mu bika bibanza, ASSAR ivuga gusa ko kuba nta mushahara fatizo uriho bituma hakoreshwa uwashyizweho n'Urukiko rw'Ikirenga, bikayitera igihombo, ariko ntisobanure uko icyo gihombo giteye, ingano yacyo n'ingaruka kigira kuri ibyo bigo. Iyo ijya gukoresha inyigo kuri icyo kibazo, byashoboraga kwereka Urukiko uburemere bwacyo ndetse n'impamvu kigomba gukemurwa kugirango kitabagamira inyungu

z'igice cy'abaturage (i.e. ibigo by'ubwishingizi) ASSAR iharanira ndetse n'abaturage muri rusange cyane cyane abafata ubwishingizi muri ibyo bigo. Kuba rero inyigo yatanzwe na ASSAR itagaragaza ibyo byose, turasanga itujuje ibisabwa n'ingingo ya 80 y'Itegeko N°. 30/2018 ryavuzwe haruguru.

[53] Ku birebana n'ibyakozwe na ASSAR mu gukemura ikibazo cyo kutagira umushahara fatizo yifashishije inzego za Leta bikananirana, dosiye y'urubanza yerekana ko mbere yuko Itegeko No. 66/2018 rigenga umurimo ritangazwa, Banki Nkuru y'u Rwanda yandikiye MIFOTRA ibaruwa yo ku wa 14/11/2016 ivuga ko kutagira umushahara fatizo bibangamiye ibigo by'ubwishingizi, kuko indishyi zikomoka ku mpanuka zatewe n'ibinyabiziga zitangwa hashingiwe ku murongo watanzwe n'Urukiko rw'Ikirenga mu rubanza RCAA 0202/07/CS rwo ku wa 09/04/2009 rwemeje amafaranga 2500 ku munsi, ndetse n'izindi nkiko zigenda zigena amafaranga ari hejuru. Mu ibaruwa yo ku wa 23/01/2017, MIFOTRA yasubije Banki Nkuru y'u Rwanda iyimenyesha ko ishyirwaho ry'Iteka rigena umushahara fatizo ritegereje isohoka ry'Itegeko rishya rigenga umurimo risimbura Itegeko N°. 13/2009 ry ku wa 27/05/2009. Itegeko N°. 66/2018 ryo ku wa 30/08/2018 rigenga umurimo mu Rwanda ryatangajwe ku itariki ya 06/09/2018, ariko mbere y'aho, ku wa 27/07/2018, MIFOTRA yari yandikiye ASSAR n'ibigo by'ubwishingizi ibitumira mu nama ngwishwanama ku mushinga w'Iteka rya Minisitiri rishyiraho umushahara fatizo, iyo nama yagombaga kuba ku wa 06/08/2018. Nyuma y'aho, ku itariki ya 29/08/2018, Umuyobozi wa ASSAR yandikiye MIFOTRA avuga ko ashingiye ku nama ngishwanama bakoranye na MIFOTRA kuwa 06/08/2018, ashimira Minisitiri ufite umurimo mu nshingano ze kuba yarabagejejeho umushinga w'Iteka rigena umushahara fatizo, asaba ko muri iryo Teka hagira ibintu bimwe byajya ku

mugereka waryo aribyo: ibyiciro by'imirimo hakurikijwe ibikorwa mbonezabukungu; umushahara fatizo kuri buri kiciro; umubare w'iminsi y'akazi mu kwezi; abakozi bakora mu rwego rw'imirimo yanditse ariko batarebwa n'Iteka rya Minisitiri.

[54] Bigaragara kandi ko ku wa 05/06/2019, Umuyobozi wa ASSAR yandikiye MINECOFIN ibaruwa ayigezaho umushinga w'Itegeko ryerekeye indishyi zikomoka ku mpanuka ziterwa n'ibinyabiziga, anavuga ko imwe mu mbogamizi ibigo bitanga serivisi z'ubwishingizi bihura nazo ari izamuka ry'indishyi zigenwa mu bushishozi bw'Urukiko kuko nta mushahara fatizo uriho.

[55] Urukiko rurasanga isesengura ry' amabaruwa yavuzwe mu bika bibanziriza iki, rigaragaza ko mbere y'itangazwa ry'Itegeko rishya rigenga umurimo mu Rwanda, nta kigaragaza ko ASSAR hari icyo yakoze ubwayo ngo igeze kuri MIFOTRA, nk'urwego rushinzwe gushyiraho Iteka rigena umushahara fatizo, ikibazo cyo kuba uwo mushahara fatizo utariho n'ingaruka cyagira. Nyuma y'uko Itegeko rishya ritangarijwe, ibaruwa ASSAR yandikiye MIFOTRA ku wa 29/8/2018 yari iyo kuyishimira ko yayigejejeho umushinga w'Iteka rya Minisitiri rishyiraho umushahara fatizo inatanga ibitekerezo kubyashyirwa ku mugereka w'iryo Teka.

[56] Rushingiye kubyavuzwe mu bika bibanza, Urukiko rurasanga usibye ibaruwa imwe ASSAR yandikiye MIFOTRA ku wa 27/7/2018 iyishimira ko yayohererereje umushinga w'Iteka rya Minisitiri rigena umushahara fatizo ikanatanga ibyo yifuzaga ko byashyirwa ku mugereka w'iryo Teka, nta yindi baruwa yagejeje kuri MIFOTRA yerekeye ishyirwaho ry'umushahara fatizo. Mu gusobanura ko ASSAR yagize icyo ikora kugirango ikibazo cy'umushahara fatizo gikemuke bikananira, ASSAR

ihera ku ibaruwa yanditswe na Banki Nkuru y'u Rwanda ku wa 14/11/2016, ngo kuko ariyo ishinzwe kugenzura ibigo by'ubwishingizi. Aha Urukiko rurasanga icyo gisobanuro kidahagije kuko Banki Nkuru y'u Rwanda atariyo mu buranyi muri uru rubanza usabwa kugaragaza icyo yakoze kugirango ikibazo gikemuke. Ni muri urwo rwego kandi ASSAR itakwitwaza ibaruwa yandikiye MINECOFIN ku wa 05/06/2019 kuko, usibye n'uko iyo baruwa itasabaga MINECOFIN ishyirwaho ry'umushahara fatizo, ahubwo yayohereza imishinga y'amategeko yerekeye indishyi z'imvune z'umubiri, nta cyayibuzaga kwandikira Minisiteri ibishinzwe ariyo MIFOTRA.

[57] Urukiko rurasanga MIFOTRA yaratangiye gahunda yo gushyiraho Iteka rya Minisitiri rigena umushahara fatizo kandi ASSAR ikaba yarabimenyeshejwe ikanatanga ibitekerezo byayo, bityo ikaba itabona aho ihera ivuga ko MIFOTRA ntacyo yakoze cyangwa itahaye iki kibazo ubwihutirwe, cyane cyane ko n'Itegeko N°.66/2018 rigenga umurimo ritigeze riteganya igihe ntarengwa iryo Teka rigomba kuba ryagiyeho.

[58] Rushingiye ku bisobanuro byatanzwe haruguru, Urukiko rurasanga kuba mu gihe cyo gutanga ikirego gisaba kubungabunga cyangwa gukuraho imbogamizi ASSAR ivuga ko zibangamiye inyungu rusange, itarashoboye kugaragaza inyungu rusange zemewe iharanira, kandi ikaba itaratanze inyigo yakozwe n'umuhanga igaragaza uburemere bwo kuba nta mushahara fatizo uhari, icyo yabikozeho igamije gushaka uburyo icyo kibazo cyakemuka bikananirana n'ingaruka cyateye ku banyarwanda muri rusange, no ku bigo bw'ubwishingizi by'umwihariko, ikirego cyayo kitagomba kwakirwa kubera ko kitujuje ibiteganywa n'itegeko.

III. ICYEMEZO CY'URUKIKO

[59] Rwemeje ko ikirego cyatanzwe na Association des Assureurs du Rwanda (ASSAR) kitakiriwe kubera ko kitujuje ibiteganywa n'amategeko.

IMANZA ZACIWE MU MIZI

IMANZA MBONEZAMUBANO

CARPENTIER v. UWAMAHORO

[Rwanda URUKIKO RW'UBUJURIRE – RCA 00006/2019/CA (Kanyange, P.J, Ngagi na Gakwaya) 06 Werurwe 2020

Amategeko agenga ububasha bw'inkiko – Inkiko z'Ibanze – Urukiko rufite ububasha bwo kuburanisha ibirego bisaba guhindura cyangwa ikurwaho ry'icyemezo cyafashwe mu buryo bw'ingereka n'ubw'agateganyo mu rubanza rw'ubutane, nyuma y'icibwa ry'urubanza rw'ubutane ku rwego rwa nyuma – Mu gihe Urukiko ruburanishije urubanza rw'iremezo rujyanye n'Ubutane ku rwego rwa nyuma, rukagira icyemezo rufata mu buryo bw'ingoboka kandi bw'agateganyo, impamvu nshya zose zigamije guhindura icyo cyemezo cy'agateganyo cyafashwe, zishyikirizwa Urukiko rw'Ibanze kuko nirwo rufite ububasha bwo kuburanisha imanza z'abantu n'umuryango ku rwego rwa mbere – Itegeko n° 30/2018 ryo ku wa 2/6/2018 02/06/2018 rigena ububasha bw'inkiko, ngingo ya 27(5).

Incamake y'Ikibazo: Carpentier yashakanye na Uwamahoro babyarana abana babiri. Nyuma yo kutabana neza batanze ikirego mu Rukiko basaba ubutane ndetse baza kubuhabwa kuburyo bwa burundu n'Urukiko Rukuru. Mu byemezo by'agateganyo, Uwamahoro yahawe inshingano zo kurera abana, Carpentier ategekwa kujya atanga indezo no kuvuza abana mu gihugu cy'Ububirigi. Aba bombi mu bihe bitandukanye bagiye bagana Urukiko Rukuru nk'Urukiko rwaciye urubanza ku rwego rwa nyuma basaba ko hari ibyahinduka mu myanzuro yafashwe. Cyakora haza kubaho kutishimira imwe mu myanzuro yafashwe bityo bombi bajuririra Urukiko rw'Ubujurire. Mbere yo

gusuzuma urubanza mu mizi, Urukiko rw'Ubujurire rwabanje gusuzuma niba koko Urukiko Rukuru nk'Urukiko rwaciye urubanza ku rwego rwa nyuma ari narwo rwagombaga gusuzuma ibindi bibazo bigendanye no kutubahiriza ibyavuzwe muri izo manza cyangwa guhindura bimwe mu byemezo rwari rwarafashe.

Uwajuriye avuga ko kuba Urukiko Rukuru ari rwo rwaciye urubanza rw'ubutane hagati yabo kandi muri urwo rubanza akaba ari naho hafashwe ibyemezo birebana n'abana urwo Rukiko Rukuru ari rwo rufite ububasha bwo gusuzuma ibyo birego byose harimo n'urubanza rujuririrwa.

Mu kwisobanura kuri iyo ngingo, Uregwa nawe asanga Urukiko Rukuru ari rwo rwari rufite ububasha bwo kuburanisha urubanza rujuririrwa kuko ibyemezo byafashwe ku bana n'ubundi ari rwo rwari rwabifashe, ko rero rwanagombaga gusuzuma niba bikwiye guhinduka cyangwa kugumaho.

Incamake y'icyemezo: 1. Mu gihe Urukiko ruburanishije urubanza rw'iremezo rujyanye n'Ubutane ku rwego rwa nyuma, rukagira icyemezo rufata mu buryo bw'ingoboka kandi bw'agateganyo (nko ku bijyanye no kurera abana cyangwa indezo), impamvu nshya zose zigamije guhindura icyo cyemezo cy'agateganyo cyafashwe, zishyikirizwa Urukiko rw'Ibanze kuko nirwo rufite ububasha bwo kuburanisha imanza z'abantu n'umuryango ku rwego rwa mbere, bityo ibyemezo byafashwe mu manza RC 00004/2019/HC/KIG, RC 00010/2019/HC/KIG no mu rubanza RC00023-00024/2019/HC/KIG rujuririrwa, bigomba kuvanwaho, umuburanyi ubifitemo inyungu agatanga ikirego cye imbere y'Urukiko rufite ububasha bwo kukiburanisha.

Urukiko Rukuru ntirufite ububasha bwo kuburanisha urubanza rujuririrwa;
Ibyemezo byafashwe mu manza N° RC 00004/2019/HC/KIG, N° RC 00010/2019/HC/KIG na N° RC00023-00024/2019/HC/KIG bivanyweho.

Amategeko yashingiweho:
Itegeko N° 30/2018 ryo ku wa 2/6/2018 rigena ububasha bw'inkiko, ingingo ya 27 (5)
Itegeko N° 22/2018 ryo ku wa 29/4/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo 194
Itegeko Nº 32/2016 ryo ku wa 28/8/2016 rigenga abantu n'umuryango, ingingo ya 243.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Carpentier Raymond Marcel Patrick yashakanye na Uwamahoro Dalida Waldha babyarana abana babiri, aribo Carpentier Patrick Junior na Carpentier Carl Philippe. Nyuma baje guhabwa ubutane mu rubanza n° RCAA 00013/2018/HC/KIG rwaciwe n'Urukiko Rukuru ku wa 7/12/2018, Uwamahoro Dalida Waldha ahabwa inshingano zo kurera abana, Carpentier Raymond Marcel Patrick ategekwa kujya atanga indezo, ahabwa n'uburenganzira bwo kujya kuvuza abana mu gihugu cy'Ububirigi nk'uko yari yabisabye, ariko

agaherekezwa na Uwamahoro Dalida Waldha, runagena uburyo bagabana umutungo wabo.

[2] Nyuma y'aho urubanza RCAA 00013/2018/HC/KIG rociriwe n'Urukiko Rukuru, Carpentier Raymond Marcel Patrick yagarutse muri urwo Rukiko asaba ko icyemezo cyafashwe muri urwo rubanza ku byerekeye abana cyahinduka, hagasuzumwa ibyerekeye uburenganzira bwo kujya kuvuza abana, indezo z'abana n'uburenganzira bwo kubona ababyeyi babo bombi uko bikwiye. Mu rubanza RC 00004/2019/HC rwaciwe ku wa 20/2/2019, Urukiko Rukuru rwemeje ko ikirego cya Carpentier Raymond Marcel Patrick gifite ishingiro, rugena ibihe agomba kubonana cyangwa gusurwa n'abana, ruvuga ko yajya abajyana muri *week-end*, akabafata ari ku wa gatanu saa tanu (11h00), akabagarurira Uwamahoro Dalida Waldha ku cyumweru saa kumi za nimugoroba(16h00), naho ku byerekeye uburenganzira bwo kurera abana no kujya kubavuza, hemezwa ko ibyo yasabye nta shingiro bifite, ko hagumyeho ibyemejwe mu rubanza RCAA 00013/2018/HC/KIG, rwibukijwe haruguru.

[3] Carpentier Raymond Marcel Patrick na none yongeye gutanga ikirego mu Rukiko Rukuru avuga ko hari ibyahindutse bitagenda neza ku byerekeye uburenganzira bw'abana, kuko bahawe nyina ngo abarere, ariko akaba atabitaho, ko akenshi ajya asohoka akabasiga mu rugo, ko atitwara neza, kuko kenshi asohoka ari n'ijoro akabasiga no kuba akina umukino wa *Hiking* yambaye ubusa, asaba ko yabamburwa akaba ari we uhabwa inshingano zo kubarera cyangwa bakajya ibihe byo kubarera (garde alternée), anasaba ko Uwamahoro Dalida Waldha yagira uruhare mu burere bw'abana, kuko afite akazi akora, bakanafatanya kwishyura amashuri yabo, kuko Uwamahoro Dalida Waldha ari we wasigaranye umutungo wose, anasaba na

none ko hakongera gusuzumwa uburenganzira bwo kujya kuvuza abana, kuko Uwamahoro Dalida Waldha nta bushake agaragaza bwo kugira ngo bikorwe n'ubwo byemejwe n'Urukiko Rukuru.

[4] Mu rubanza RC 00010/2019/HC/KIG rwaciwe ku wa 14/6/2019, Urukiko Rukuru rwemeje ko Carpentier Raymond Marcel Patrick ahawe uburenganzira bwo kujyana abana babo Carpentier Patrick Junior na Carpentier Carl Philipe kubavuza mu Bubirigi akanabakorera ibisabwa byose kugira ngo bagende banavurwe, akabagarura bitarenze ku wa 6/8/2019. Yahawe kandi uburenganzira bwo kubarera (garde des enfants), kugeza ku itariki ya 6/8/2019, nyuma y'iyo tariki bakongera kurerwa na nyina nk'uko byari bisanzwe.

[5] Uwamahoro Dalida Waldha nawe yaje gutanga ikirego mu Rukiko Rukuru, gihabwa RC 00023/2019/HC/KIG, asaba Urukiko guhindura ibyemezo byafashwe muri urwo rubanza ku birebana no kurera abana no kubavuza, ariko aza gusanga bimwe mu byo yasabye bitakiri ngombwa, ahitamo gusaba Urukiko gutegeka Carpentier Raymond Marcel Patrick kubahiriza icyemezo ku bijyanye n'indezo n'amafaranga y'ishuri, bigakorwa adategereje ko urubanza ruba itegeko, kuko abikora uko ashaka n'igihe ashakiye bikaba bibangamye.

[6] Carpentier Raymond Marcel Patrick nawe yatanze ikirego mu Rukiko Rukuru, gihabwa RC 00024/2019/HC/KIG, asaba guhindura ibyemezo byafashwe mu manza RCAA 00013/2018/HC/KIG, RC 00004/2019/HC, RC 00010/2019/HC/KIG mu nyungu z'abana ku byerekeye kubarera no kubavuza, asaba ko hatangwa *garde alternée* nk'igisubizo cyo gukemura amakimbiraneahoraho hagati ye na UWAMAHORO Dalida Waldha, agahabwa uburenganzira bwo kujya kuvuza abana mu Bubirigi bidasabye uruhushya rwa nyina n'indishyi zo

gushorwa mu manza n'ibindi amaze gutakaza, nk'amatike y'indege amaze gupfa ubusa kubera gutambamira ivuzwa ry'abana.

[7] Imanza zombi zahurijwe hamwe mu rubanza RC 00023/2019/HC/KIG-RC 00024/2019/HC/KIG, rucibwa ku wa 11/10/2019. Urukiko Rukuru rwasanze Uwamahoro Dalida Waldha avuga ko bitakiri ngombwa ko abana bajya kuvurirwa hanze kuko indwara ya *autism* barwaye itavurwa ngo ikire, ko na Minisiteri y'ubuzima yemeje ko ibirebana n'indwara ya *autism* bishobora gusuzumirwa mu Rwanda, rusanga ibisabwa na Carpentier Raymond Marcel Patrick byo kujya kuvuza abana mu Bubirigi bidasabye uruhushya rwa nyina bidafite ishingiro, kuko atigeze agerageza kubavuza mu Rwanda ngo aho bazageza abe ariho ahera ajya kugerageza mu Bubirigi, rwemeza ko ibirego rwashyikirijwe na Uwamahoro Dalida Waldha na Carpentier Raymond Marcel Patrick nta shingiro bifite.

[8] Carpentier Raymond Marcel Patrick ntiyishimiye imikirize y'urubanza ajuririra Urukiko rw'Ubujurire, arusaba gusuzuma ibyerekeye kurera abana Carpentier Patrick Junior na Carpentier Carl Philippe ku bufatanye bw'ababyeyi bombi hifashishijwe *garde partagée* mu nyungu z'abana ndetse n'uburyo bwo gukemura amakimbirane ari hagati y'ababyeyi babo, gusuzuma niba yajya kuvuza abana mu Bubirigi bidasabye ubushake n'uruhushya bya nyina Uwamahoro Dalida Waldha, gutegeka Uwamahoro Dalida Waldha gutanga *passeports* nyarwanda z'abo bana yafatiriye no gusuzuma ibirebana n'uburenganzira umubyeyi agira ku bana n'ubwo abana bamugiraho.

[9] Urubanza rwahamagawe kuburanishwa ku wa 4/2/2020, ariko uwo munsi ntirwaburanishwa, kuko Me Munyaneza Remy,

uburanira Uwamahoro Dalida Waldha, atari yitabye, acibwa ihazabu yo gutinza urubanza. Iburanisha ryimuriwe ku wa 13/2/2020, ababuranyi basabwa gukora imyanzuro irebana n'ububasha bw'Urukiko Rukuru rwaciye urubanza rujuririrwa n'ubw'Urukiko rw'Ubujurire. Iburanisha mu ruhame ryongeye kuba ku wa 13/2/2020, Carpentier Raymond Marcel Patrick yunganiwe na Me Musasangohe Illuminée na Me Kazeneza Théophile, Uwamahoro Dalida Waldha ahagarariwe na Me Munyaneza Remy, haburanishwa ikibazo kirebana n'Ububasha bw'Urukiko Rukuru n'ubu Urukiko rw'Ubujurire bwo kuburanisha ikirego cy'ubujurire cyatanzwe na Carpentier Raymond Marcel Patrick.

II. IKIBAZO KIGIZE URUBANZA N'ISESENGURWA RYACYO

a. Kumenya Urukiko rufite ububasha bwo kuburanisha ibirebana n'abana nyuma y'uko ubutane bw'abashyingiranywe bwemejwe n'urubanza rwabaye ndakuka

[10] Me Musasangohe Illuminée, wunganira Carpentier Raymond Marcel Patrick, avuga ko urubanza rujuririrwa n'izindi zarubanjirije zaciwe n'Urukiko Rukuru hashingiwe ku ngingo ya 243 y'Itegeko Nº 32/2016 ryo ku wa 28/8/2016 rigenga abantu n'umuryango, ko ibikubiye muri iyo ngingo bishatse kuvuga ko iyo urukiko rwafashe icyemezo ruyishingiyeho, icyo cyemezo kiba ari agateganyo, ko rushobora kwisubiraho rukagihindura ku nyungu z'abana.

[11] Me Musasangohe Illuminée avuga ko hashingiwe kuri iyo ngingo na none, kuba Urukiko Rukuru ari rwo rwaciye urubanza

rw'ubutane hagati ya Carpentier Raymond Marcel Patrick na UWAMAHORO Dalida Waldha kandi muri urwo rubanza akaba ari naho hafashwe ibyemezo birebana n'abana, no kuba urwo Rukiko ari rwo rwanaciye urubanza RC 00004/2019/HC/KIG, RC 00010/2019/HC/KIG n'urubanza n° RC 00023/2019/HC/KIG- RC 00024/2019/HC/KIG, ibyo birego bigatangwa binyuze mu nzira y' ikirego gitanzwe n'umuburanyi umwe nk'uko bisobanurwa n'ingingo ya 194 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, Urukiko Rukuru ari rwo rwari rufite ububasha bwo gusuzuma ibyo birego byose harimo n'urubanza rujuririrwa.

[12] Me Musasangohe Illuminée avuga na none ko ku birebana n'ububasha bw'Urukiko rw'Ubujurire, urubanza rujuririrwa rwatangiriye mu Rukiko Rukuru, ko rwaregewe mu buryo bw'ikirego gitanzwe n'umuburanyi umwe nk'uko biteganywa n'ingingo ya 189 y'Itegeko N° 22/2018 ryo ku wa 29/4/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi. Avuga ko imanza zirebana n'abana ziba zifite umwihariko, kuko zisaba ko haboneka ikintu kigaragaza ko inyungu z'umwana zibangamiwe, ko rero umuntu wese ubifitemo inyungu yemererwa gusaba Urukiko rwafashe icyo cyemezo kugikuraho cyangwa kugihindura mu nyungu z'abana.

[13] Me Musasangohe Illuminée avuga kandi ko Urukiko rw'Ubujurire ari rwo rufite ububasha bwo kuburanisha ubujurire ku cyemezo cy'Umucamanza cyafatiwe mu Rukiko Rukuru, kuko ingingo ya 192 y'Itegeko N° 22/2018 ryo ku wa 29/4/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, yemera ko ibyemezo

byafashwe mu manza zikomoka ku birego bitanzwe n'umuburanyi umwe bishobora kujuririrwa, kandi ko kuba Urukiko Rukuru ari rwo rwaciye urubanza rw'ubutane rukanafata icyemezo ku birebana n'abana, bafite uburenganzira bwo kurujuririra inshuro imwe, akaba ari nabyo bakoze.

[14] Ku birebana n'Urukiko ruregerwa ikirego gitanzwe n'umuburanyi umwe ku bibazo birebana n'umuryango n'ubwihutirwe kuri byo, Me Musasangohe Illuminéeavuga ko ingingo ya 189 y'Itegeko N° 22/2018 ryo ku wa 29/4/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko ibirego bitanzwe n'umuburanyi umwe biba bidafite urubanza bishingiyeho, ko batanga ikirego bwa mbere cyari gishingiye ku byategetswe umwe mu babyeyi b'abana undi bitamutegetswe, ko Urukiko ari rwo rwabonye ko n'undi ahamagazwa.

[15] Ku birebana n'ingingo ya 27 y'Itegeko N° 30/2018 ryo ku wa 2/6/2018 rigena ububasha bw'inkiko, iha ububasha Urukiko rw'Ibanze ku bibazo byerekeye abantu n'umuryango, Me Musasangohe Illuminée avuga ko mu gihe Urukiko rw'Ibanze rwafashe icyemezo ku kibazo runaka, kikajuririrwa hakagira ibikurwaho mu bujurire, umuburanyi adasubira mu Rukiko rw'Ibanze gusaba ko hagira ibihinduka, kuko ruba rwariyambuye ububasha, kandi ko muri iki kibazo, Urukiko Rukuru ari rwo rwafashe icyemezo cy'agateganyo, nabo baregera ko gihinduka, bidakozwe barakijuririra.

[16] Me Kazeneza Théophile, nawe wunganira Carpentier Raymond Marcel Patrick, avuga ko ibyemezo Umucamanza yafashe ku bana ku birego bidafite urubanza bishingiyeho, ashobora kubihindura cyangwa kubikuraho, ko Umushingamategeko yateganyije ko biburanishwa nk'ibirego

bitanzwe n'umuburanyi umwe (requête unilatérale), bikaba bishobora no kujuririrwa. Avuga ko Umucamanza w'Urukiko rw'Ibanze uregewe *requête unilatérale* ku bijyanye n'ibyemezo byafashwe n'Urukiko Rukuru, ashobora kuvuga ko ibikubiye muri iyo dosiye atabifite, ko adashobora no guhindura icyemezo cyafashwe n'Urukiko Rukuru.

[17] Me Kazeneza Théophile avuga kandi ko mu gihe Urukiko rw'Ubujurire ruzaburanisha uru rubanza, kugira ngo icyemezo rwafashe gihinduke, byasaba ko biregerwa na none uru Rukiko rw'Ubujurire rwagifashe.

[18] Me Munyaneza Remy, uburanira Uwamahoro Dalida Waldha, avuga ko nabo basanga Urukiko Rukuru ari rwo rwari rufite ububasha bwo kuburanisha urubanza rujuririrwa hashingiwe ku ngingo ya 243 y'Itegeko Nº 32/2016 ryo ku wa 28/8/2016 rigenga abantu n'umuryango, n'iya 189 kugeza ku ya 195 z'Itegeko N° 22/2018 ryo ku wa 29/4/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi. Akomeza avuga ko Urukiko Rukuru rwari rufite ububasha bwo kwakira no kuburanisha urubanza rujuririrwa, kuko ibyemezo byafashwe ku bana n'ubundi ari rwo rwari rwabifashe, ko rero rwanagombaga gusuzuma niba bikwiye guhinduka cyangwa kugumaho.

[19] Me Munyaneza Remy avuga na none ko Urukiko rw'Ibanze rwafashe ibyemezo mu mizi y'urubanza ku bana, Urukiko Rwisumbuye rwa Gasabo rurabyemeza, Urukiko Rukuru rufata n'ibindi, ko rero ibyo byemezo bidashobora gukurwaho n'Urukiko rw'Ibanze, ahubwo ko Urukiko Rukuru rwaregewe ari rwo gusa rwashobora kubihindura. Avuga ko mu ngingo ya 243 y'Itegeko rigenga abantu n'umuryango, mu rurimi rw'igifaransa bakoresheje ijambo *''les mesures''* mu

Kinyarwanda bakavuga ‘’Urukiko’’, ko ari byo bitera urujijo, kandi ko mu gihe ababuranyi babiri baburanye mu bujurire bidashoboka ko hatangwa inyandiko nsobanurakirego itanzwe n’umuburanyi umwe (*requête unilatérale)*.

UKO URUKIKO RUBIBONA

[20] Ingingo ya 243, igika cya gatanu, y’Itegeko N° 32/2016 ryo ku wa 28/8/2016 rigenga abantu n’umuryango, ku birebana n’inkurikizi z’ubutane ku bana igira iti: ‘’ *Ibyemezo urukiko rufata rushingiye kuri iyi ngingo bihora ari agateganyo, rushobora buri gihe kubikuraho bisabwe n’ubifitemo inyungu mu buryo bw’ikirego gitanzwe n’umuburanyi umwe’’*.

[21] Ingingo ya 27, agace ka gatanu (5), y’Itegeko n° 30/2018 ryo ku wa 2/6/2018 rigena ububasha bw’inkiko, iteganya ko ‘’ *Inkiko z’Ibanze ziburanisha imanza zerekeye imimerere y’abantu n’umuryango’’*.

[22] Ingingo ya 194 y’Itegeko N° 22/2018 ryo ku wa 29/4/2018 ryerekeye imiburanishirize y’imanza z’imbonezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi iteganya ko *‘’ Uwatanze inyandiko nsobanurakirego cyangwa uwayigobotsemo ashobora, mu gihe hari ibyahindutse, gutanga ikirego gisaba umucamanza wafashe icyo cyemezo kugira ibyo ahindura cyangwa akura ku byo yari yemeje mbere, ariko bitabangamira uburenganzira bw’abandi ku byo bahawe n’icyo cyemezo’’*.

[23] Dosiye y’urubanza igaragaza ko urubanza rujuririrwa, rwaregewe Urukiko Rukuru, aho Carpentier Raymond Marcel Patrick yareze arusaba guhindura ibyemezo byafashwe mu

manza RCAA 00013/2018/HC/KIG, RC 00004/2019/HC, RC 00010/2019/HC/KIG mu nyungu z'abana ku byerekeye kubarera no kubavuza, asaba ko bajya bajy'ibihe byo kurera abana babo (*garde alternée)* nk'igisubizo cyo gukemura amakimbirane ahoraho hagati ye na Uwamahoro Dalida Waldha, uyu nawe asaba Urukiko gutegeka Carpentier Raymond Marcel Patrick kubahiriza icyemezo ku bijyanye n'indezo n'amafaranga y'ishuri, narwo rwari rwaregewe nk'ikirego cy'inyandiko nsobanurakirego itanzwe n'umuburanyi umwe, bikaba byumvikana ko nacyo cyari ikirego gishya, kidafite ikindi gishamikiyeho.

[24] Dosiye y'urubanza igaragaza kandi ko Urukiko Rukuru ari rwo rwafashe ku rwego rwa nyuma icyemezo ku rubanza rw'ubutane rwa Carpentier Raymond Marcel Patrick na Uwamahoro Dalida Waldha, mu rubanza RCAA 00013/2018/HC/KIG, rwaciwe ku wa 7/12/2018, runafata mu rwego rw'ingereka (accessoirement) ibyemezo ku birebana n'abana, ibyo byemezo bikaba ku bw'amategeko ari iby'agateganyo kugeza igihe ababuranyi bazagaragariza Urukiko rubifiteye ububasha, ko hari ibyahindutse, bakanarusaba guhindura ibyari byemejwe mbere.

[25] Hashingiwe ku byagaragajwe mu gika kibanziriza iki, Urukiko rw'Ubujurire rurasanga kuba ibyemezo bisabwa guhinduka mu manza RC 00004/2019/HC, RC 00010/2019/HC/KIG na RC 00023/2019/HC/KIG-RC00024/2019/HC/KIG, byarafashwe mu buryo bw'ingereka n'ubw'agateganyo n'Urukiko Rukuru mu rubanza RCAA 00013/2018/HC/KIG, aho rwaburanishaga mu mizi ku bw'ibanze (à titre principal) ibirebana n'ubutane hagati ya Carpentier Raymond Marcel Patrick na Uwamahoro Dalida Waldha, kandi

urwo rubanza rwaciwe ku rwego rwa nyuma rukaba rwarabaye ndakuka, bivuze ko icyo gihe Urukiko Rukuru rwarangije kuruca burundu, ku buryo rutarusubiraho (dessaisissement), bityo rukaba atari rwo rwakongera kuburanisha ibirebana n'abana mu gihe hari impamvu nshya (circonstances nouvelles) zatuma ibyemezo birebana n'abana byafashwe mu rubanza rw'ubutane bihinduka, kuko byarwambuye ububasha bwo kwongera kuburanisha icyo kirego. Ibi bishimangirwa no kuba imanza zirebana n'abana ari ndemyagihugu (umudendezo rusange), ku bw'ibanze, hakaba hagomba kubahirizwa inyungu zabo no guha ababyeyi uburenganzira bwo kujurira (principe du double degré de juridiction) no gukoresha izindi nzira z'ubujurire ziteganywa n'Itegeko.

[26] Urukiko rw'Ubujurire rurasanga iyo hasesenguwe amategeko y'ibindi bihugu, usanga ateganya ko Umucamanza w'Urukiko Rwisumbuye ushinzwe kuburanisha imanza zirebana n'umuryango ku rwego rwa mbere ari we ufite ububasha bwo kuburanisha, nyuma y'uko urubanza rw'ubutane rwabaye ndakuka, ibirebana n'ububasha bwa kibyeyi[1], bivuze ko

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[1] *L'article 247, alinéa 4, du code civil franÇais dispose que '' Il (juge du tribunal de grande instance délégué aux affaires familiales) est seul compétent, après le prononcé du divorce, quelle qu'en soit la cause, pour statuer sur les modalités de l'exercice de l'autorité parentale et sur la modification de la pension alimentaire, ainsi que pour décider de confier les enfants à un tiers. Il statue alors sans formalité et peut être saisi par les parties intéressées sur simple requête''. L'article 1084 du code de procédure civile franÇais dispose que '' Quand il ya lieu de statuer, après le prononcé du divorce, sur l'exercice de l'autorité parentale, la pension alimentaire ou la contribution à l'entretien et à l'éducation de l'enfant, la demande est présentée, même si un pourvoi en cassation a été formé, au juge aux affaires familiales selon les modalités prévues à la section III du*

ababuranyi bagomba kugaruka imbere y'Urukiko rufite ububasha bwo kuburanisha ku rwego rwa mbere imanza z'abantu n'umuryango, mu gihe basanga hari impamvu nshya zatuma ibyemezo ku bana byafashwe n'Urukiko rwaciye burundu ubutane, bigomba guhinduka.

[27] Urukiko rw'Ubujurire rurasanga kandi muri uru rubanza, ababuranyi barashoboraga gusaba Urukiko Rukuru guhindura ibyemezo by'agateganyo byafashwe ku bana igihe cyose rwari rukiri kuburanisha urubanza rw'ubutane, ni ukuvuga mbere yo gufata icyemezo ku butane, nk'ukobivugwa mu ngingo ya 224 n'iya 225 z'Itegeko N° 32/2016 ryo ku wa 28/8/2016 rigenga abantu n'umuryango[2].

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présent chapitre'', Code procédure civile annoté, Edition limitée, 108 édition, Dalloz, Paris, 2017, P. 1084.

L'article 302 du code civil belge édicte que '' Après la dissolution du mariage par le divorce, l'autorité sur la personne de l'enfant et de l'administration de ses biens sont exercés conjointement par les père et mère ou par celui à qui elles ont été confiées, soit par l'accord des parties dûment entériné conformément à l'article 1258 du code judiciaire, soit par décision ordonnée par le président statuant en référé conformément à l'article 1280 du code judiciaire, sans préjudice de l'article 387 bis du présent code''. L'article 1280 du code judiciaire belge dispose que '' Le Président du tribunal ou le juge qui en exerce les fonctions statuant en référé, connaît jusqu'à la dissolution du mariage à la demande, soit des parties ou l'une d'elles, soit du procureur du Roi, en tout état de cause, des mesures provisoires relatives à la personne, aux aliments et aux biens, tant des parties que des enfatnts''.

[2] Ingingo ya 224 iteganya ko '' Aho urubanza rw'ubutane rwaba rugeze hose, umucamanza ashobora gufata ibyemezo by'agateganyo byerekeye ababuranyi, abana babyaranye ndetse n'umutungo'', naho ingingo ya 225 iteganya ko '' Kugira ngo arengere inyungu z'abana mu gihe urubanza rw'ubutane rukiburanishwa, umucamanza ashobora kubashinga by'agateganyo umwe mu bashyingiranwe cyangwa undi muntu akanagena uruhare rwa buri wese mu bashyingiranywe ku bitunga abana''.

[28] Urukiko rw'Ubujurire rurasanga na none ibivugwa mu ngingo ya 194 y'Itegeko N° 22/2018 ryo ku wa 29/4/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, byumvikanisha ko mu gihe hari ibyahindutse, ikirego gisaba umucamanza wafashe icyemezo ku nyandiko nsobanurakirego itanzwe n'umuburanyi umwe, kugira ibyo ahindura cyangwa akura ku byo yari yemeje mbere, bikorwa ku miburanishirize irebana n'inyandiko nsobanurakirego gusa, haba ku rwego rwa mbere, haba ku rwego rw'ubujurire cyangwa ku rwego rwo gutambamira urubanza, bivuze ko gusaba ihinduka ry'ibyemezo byafashwe ku birebana n'abana bidakorwa imbere y'Urukiko rwarangije gufata icyemezo cyabaye ndakuka ku birebana n'ubutane, bityo iyi ngingou ya 194 y'Itegeko N° 22/2018 ryo ku wa 29/4/2018 ryavuzwe haruguru idakoreshwa muri uru rubanza.

[29] Urukiko rw'Ubujurire rurasanga bigomba kumvikana ko Urukiko ruvugwa mu gika cya gatanu cy'ingingo ya 243, y'Itegeko N° 32/2016 ryo ku wa 28/8/2016 ryavuzwe haruguru, ari Urukiko rufite ububasha bwo kuburanisha ku rwego rwa mbere imanza zerekeye abantu n'umuryango, bivuze ko hashingiwe ku ngingo ya 27, agace ka gatanu (5) y'Itegeko n° 30/2018 ryo ku wa 2/6/2018, ryavuzwe haruguru, ari Urukiko rw'Ibanze rufite ububasha bwo kuburanisha ibirego biregera gufata ibyemezo ku bijyanye no kurera abana kubera ko hari ibyahindutse.

[30] Urukiko rw'Ubujurire rurasanga kandi, ibyo abunganira Carpentier Raymond Marcel Patrick bavuga, ndetse bikanashimangirwa n'uburanira Uwamahoro Dalida Waldha, ko mu gihe Urukiko Rukuru rwaciye urubanza rw'ubutane rukanafata icyemezo ku birebana n'abana, Urukiko rw'Ibanze

rutaregerwa ikirego cy'inyandiko nsobanurakirego itanzwe n'umuburanyi umwe ku birebana n'abana ngo ruruce kuko Urukiko Rukuru ruri hejuru yarwo, nta shingiro bifite, kuko muri uru rubanza, Urukiko Rukuru rwaciye urubanza ku kirego cy'ubutane mu rwego rw'ubujurire bwa kabiri, runafata mu rwego rw'ingereka (accessoirement) icyemezo ku byerekeye abana nk'uko rwari rwabisabwe, bikaba rero bitafatwa ko Urukiko rw'Ibanze rwaba rugiye guhindura icyemezo cy'Urukiko Rukuru, kuko icyo kirego kitaba gishamikiye ku rubanza rw'ubutane Urukiko Rukuru rwaciye, ahubwo rusuzuma impamvu nshya (circonstances nouvelles ou faits nouveaux) zatuma ibyemezo byafashwe ku bana bihinduka, bivuze ko izo mpamvu ziba zinatasuzumwe n'Urukiko Rukuru igihe rwaburanishaga ubutane.

[31] Kubera izo mpamvu zose, Urukiko rw'Ubujurire rurasanga Urukiko Rukuru rutari rufite ububasha bwo kuburanisha ibirego byatanzwe na Carpentier Raymond Marcel Patrick na Uwamahoro Dalida Waldha nk'inyandiko nsobanurakirego itanzwe n'umuburanyi umwe (requête unilatérale) ku birebana no kurera abana, nyuma y'uko urubanza rw'ubutane bwabo ruciwe burundu, bityo ibyemezo byafashwe mu manza RC 00004/2019/HC/KIG, RC 00010/2019/HC/KIG no mu rubanza RC00023-00024/2019/HC/KIG rujuririrwa, bikaba bigomba kuvanwaho, umuburanyi ubifitemo inyungu agatanga ikirego cye imbere y'Urukiko rufite ububasha bwo kukiburanisha.

III. ICYEMEZO CY'URUKIKO

[32] Rwemeje ko Urukiko Rukuru rutari rufite ububasha bwo kuburanisha rubanza RC00023-00024/2019/HC/KIG rujuririrwa.

[33] Rwemeje ko ibyemezo byafashwe mu manza RC 00004/2019/HC/KIG, RC 00010/2019/HC/KIG na RC00023-00024/2019/HC/KIG rujuririrwa, bivanweho.

[34] Rutegetse ko amagarama y'urubanza ahwanye n'ibyakozwe mu rubanza.

NISHIMWE N'UNDI v. MUGENGA N'UNDI

[Rwanda URUKIKO RW'IKIRENGA – RCAA 00031/2016/SC (Nyirinkwaya P.J., Cyanzayire, Kayitesi Rusera, Rukundakuvuga na Hitiyaremye J.) 25 Nzeri 2019]

Umutungo – Umutungo utimukanwa – Gusubizwa ibyongewe ku mutungo utimukanwa n'utari nyirawo – Mu gihe umuntu yaguze umutungo utimukanwa n'utari nyirawo, bikaba ngombwa ko awusubiza nyirawo w'ukuri kandi hari ibyo yongeyeho bitari ibyo yubatse cyangwa yateye bishya, abisubizwa na nyir'umutungo hakurikijwe imiterere yabyo – Asubizwa agaciro k'ibyakozwe biri ngobwa n'ibyakozwe bifite akamaro hatitawe ku kureba niba yarawubonye mu buryarya cyabgwa nta buryarya – Ntacyo asubizwa na nyir'umutungo w'ukuri ku byakozwe by'umurimbo.

Incamake y'ikibazo: Mugenga yagiranye amasezerano y'ubugure bw'inzu na Kabagema, yaje guteshwa agaciro n'Urukiko rwa Mbere rw'Iremezo rwa Kigali nyuma yo gusanga Kabagema yaragurishije ibitari ibye, kuko yari iy'umuvandimwe we Rwamanywa.

Mugenga amaze gusubiza uwo mutungo, yahise arega abazungura ba Rwamanywa mu Rukiko Rwisumbuye rwa Nyarugenge avuga ko yasubije inzu ariko ntiyishyurwa agaciro k'ibikorwa yari amaze kuyikoraho, asaba Nishimwe na Mashami inyungu z'amafaranga yashyize kuri iyo nzu, amafaranga y'ubukode bayibonamo, n'amafaranga aturuka ku guta agaciro k'ifaranga; urwo Rukiko rwemeza ko hari ibikorwa Mugenga

yakoze kuri iyo nzu, rutegeka ko asubizwa agaciro kabyo kagenywe mu bushishozi bwarwo, runategeka abazungura ba Rwamanywa gusubiza Mugenga amafaranga y'igihembo cya Avoka n'ay'ikurikiranarubanza.

Ababuranyi bombi bajuririye urwo rubanza, mu rubanza rwahurije hamwe ubwo bujurire bwombi, rwemeza ko ubujurire bwombi nta shingiro bufite.

Nishimwe yongeye kujuririra urwo rubanza mu Rukiko rw'Ikirenga avuga ko habayeho kwivuguruza urukiko rukavugisha itegeko ibyo ritavuga, ko rwemeje ko Mugenga asubizwa inyongeragaciro yashyize ku nzu mu gihe amakosa ariwe wayakoze, ko kandi ibimenyetso byashingiweho mu kugena ibyo yongeye ku nzu bishidikanywaho.

Mu iburanisha ry'urubanza, Mugenga yazamuye inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga avuga ko Nishimwe wajuriye yatsinzwe kabiri ku mpamvu zimwe, ndetse ko n'ikiburanwa ubwacyo kitagejeje kuri 50.000.000Frw, asaba Urukiko kutakira ubujurire. Urukiko rwemeza ko inzitizi y'iburabubasha yatanzwe nta shingiro ifite.

Nyuma Mugenga yongeye gutanga indi nzitizi avuga ko Nishimwe yahinduye ababuranyi mu rwego rw'ubujurire, kuko Mashami aza mu baregwa mu gihe mu nkiko zibanza yari afatanyije urubanza na Nishimwe, bituma Urukiko rubyutsa inzitizi yo kumenya niba ubujurire bwa Nishimwe butagira ingaruka ku bandi bazungura, nyuma y'impaka kuri izo nzitizi Urukiko rwemeza ko kubireba Mashami, ikirego cya Nishimwe kidakwiye kwakirwa, Mashami avanwa mu rubanza nk'uregwa, ahubwo ahamagazwa ku ruhande rw'uwajuriye nubwo atajuriye, iburanisha rikomeza mu mizi.

Mu miburaniye ye, Mugenga avuga ko haribyo yongeye kunzu nyuma yo kuyigura agira n'ibindi bishya yubaka muri icyo kibanza, mu gihe Nishimwe na Mashami bo bavuga ko ntacyo yongeyeho, ko nubwo byaba biriho ataribo babimwishyura kubera ko yaguze mu buryarya.

Hitabajwe umuhanga mu igenagaciro wagennywe yumvikanyweho n'ababuranyi, asabwa kugaragariza Urukiko ibyongewe ku nzu no mu kibanza bivugwa mu kiburanwa nyuma y'umwaka wa 1997 kugeza mu mwaka wa 2008 Mugenga ayivamo, raporo umuhanga yakoze mbere igibwaho impaka, biba ngombwa ko urukiko rutegeka ko hakorwa iy'inyongera.

Incamake y'icyemezo: 1. Mu gihe umuntu yaguze umutungo utimukanwa n'utari nyirawo, bikaba ngombwa ko awusubiza nyirawo w'ukuri kandi hari ibyo yongeyeho bitari ibyo yubatse cyangwa yateye bishya, asubizwa na nyir'umutungo ibyo yongeyeho hakurikijwe imiterere yabyo.

2. Asubizwa agaciro kose k'ibyakozwe biri ngombwa n'ibyakozwe bifite akamaro hatitawe ku kureba niba yarawubonye mu buryarya cyangwa nta buryarya. Ntacyo asubizwa na nyir'umutungo w'ukuri ku byakozwe by'umurimbo.

Ubujurire bwa Nishimwe na Mashami bufite ishingiro kuri bimwe;
Amagarama y'urubanza ahwanye n'ibyakozwe.

Amategeko yashingiweho:
Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015, ingingo ya 34.

Itegeko Ngenga N° 03/2013/OL ryo ku wa 16/06/2013 rikuraho Itegeko Ngenga N° 08/2005 ryo kuwa 14/07/2005 rigenga imikoreshereze n'imicungire y'ubutaka mu Rwanda, ingingo ya 35, igika cya 3;
Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 9.
Itegeko N° 42/1988 rishyiraho Interuro y'ibanze n'Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano (ryavuyeho), ingingo ya 388 na 389.

Imanza zifashishijwe:

Kayitsinga v. Kanyamibwa, RS/REV/INJUST/CIV 0012/2015/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 18/01/2019,
Nibasenge v. Nahayo, RS/INJUST/RC 0006/2018/SC rwaciwe n'Urukiko rw'Ikirenga ku wa 18/01/2019.

Inyandiko z'abahanga:

Gérard Cornu, Vocabulaire juridique, 6ème éd., Paris, Presses Universitaires de France, 1996, p. 312, 388 na 418.
Christian Larroumet, Droit Civil, Les Biens, Droits réels, Principaux, 5ème Ed., T.II, Paris, Economica, 2006, p. 311, 312, 372, 373.
Patrice Jourdain, Droit Civil, Les biens, Paris, Dalloz, 1995, p.229, p. 282.

Urubanza

I. IMITERERE Y'URUBANZA.

[1] Mugenga Joseph yaguze na Kabagema Ferdinand inzu mu mwaka wa 1994. Amasezerano y'ubugure bwabo yaje guteshwa agaciro n'Urukiko rwa Mbere rw'Iremezo rwa Kigali, mu rubanza N° RC 36.294/01 rwaciwe ku wa 12/02/2003. Muri urwo rubanza, Urukiko rwasanze Kabagema Ferdinand yaragurishije ibitari ibye kuko byari iby'umuvandimwe we Rwamanywa Jérémie, akabigurisha mu buryo budakurikije amategeko, kubera iyo mpamvu Urukiko rwemeza ko amasezerano y'ubugure yabaye hagati ya Kabagema Ferdinand na Mugenga Joseph avuyeho.

[2] Mugenga Joseph amaze gusubiza iyo nzu, yatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge, arega abazungura ba Rwamanywa bagizwe na Nishimwe Claudine na Mashami Gisèle, avuga ko yasubije inzu ariko ibikorwa yari amaze kuyongeraho ntiyasubizwa agaciro kabyo, asaba inyungu z'amafaranga yari kubona ku mafaranga yashyize kuri iyo nzu, amafaranga y'ubukode abazungura ba Rwamanywa Jérémie bayibonamo, n'amafaranga aturuka ku guta agaciro k'ifaranga (inflation), byose bingana na 137.056.112 Frw.

[3] Urukiko Rwisumbuye rwaciye urubanza rwemeza ko, koko hari ibikorwa Mugenga Joseph yakoze kuri iyo nzu, ndetse agira n'ibindi yubaka muri icyo kibanza; Rutegeka "Succession" Rwamanywa Jérémie igizwe na Nishimye Claudine na Mashami Gisèle gusubiza Mugenga Joseph amafaranga 15.591.362 Frw, runabategeka kumuha amafaranga 800.000 Frw y'igihembo cya Avoka n'amafaranga 100.000 Frw y'ikurikiranarubanza.

[4] Mugenga Joseph n'abazungura ba Rwamanywa Jérémie ntibishimiye imikirize y'urubanza, buri ruhande rujurira mu Rukiko Rukuru, ubujurire bwabo buhurizwa hamwe mu rubanza Nº RCA 0517/15/HC/KIG-0538/15/HC/KIG, rwaciwe ku wa 22/04/2016. Urukiko rwemeje ko ubujurire bw'abazungura ba Rwamanywa n'ubwa Mugenga Joseph nta shingiro bufite, rwemeza ko imikirize y'urubanza rwajuririwe idahindutse.

[5] Nishimwe Claudine yongeye kujuririra urwo rubanza mu Rukiko rw'Ikirenga, urubanza ruhabwa Nº RCAA 00031/2016/SC, avuga ko arega Mugenga Joseph na Mashami Gisèle. Asobanura ko yajurijwe n'impamvu zikurikira:

- Kuba harabaye kwivuguruza bigatuma Urukiko ruvugisha itegeko ibyo ritavuga;
- Kuba Urukiko rwaremeje ko Mugenga Joseph asubizwa inyongeragaciro yashyize ku nzu mu gihe ariwe wakoze amakosa ;
- No kuba ibimenyetso byashingiweho mu kugena ibyo yongeye kuri iyo nzu, bishidikanywaho.

[6] Iburanisha ry'urubanza ryabereye mu ruhame ku wa 27/03/2018. Iburanisha rigitangira, Mugenga Joseph yibukije inzitizi yatanze ishingiye ku kuba Nishimwe Claudine wajuriye yaratsinzwe kabiri ku mpamvu zimwe, n'iyo kuba ikiburanwa ubwacyo kitagejeje kuri 50.000.000 Frw, bityo ko hashingiwe ku ngingo ya 28 igika cya 2, agace ka 7º no ku gika cya 5 y'Itegeko Ngenga Nº 03/2012 ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ubujurire budakwiye kwakirwa kubera ko butari mu bubasha bw'Urukiko rw'Ikirenga.

[7] Ku wa 20/04/2018, Urukiko rwafashe icyemezo mu rubanza rubanziriza urundi, rwemeza ko inzitizi y'iburabubasha yatanzwe na Mugenga Joseph nta shingiro ifite, ko urubanza ruzasubukurwa ku wa 12/06/2018. Kuri iyi tariki, ntirwaburanishijwe kubera impinduka mu rwego rw'amategeko, ruburanishwa ku wa 09/10/2018. Mugenga Joseph yongeye gutanga inzitizi avuga ko Nishimwe Claudine yahinduye ababuranyi mu rwego rw'ubujurire, kubera ko Mashami Gisèle aza mu baregwa kandi yari afatanyije urubanza na Nishimwe Claudine mu nkiko zibanza, icyo kibazo kigibwaho impaka, hamwe n'icyabyukijwe n'Urukiko cyo kumenya niba ubujurire bwa Nishimwe Claudine butagira ingaruka ku bandi bazungura.

[8] Ku wa 09/12/2018, Urukiko rwemeje ko ikirego cy'ubujurire cya Nishimwe Claudine ku bireba Mashami Gisèle kidakwiye kwakirwa ngo gisuzumwe, rwemeza ko Mashami avanwa mu rubanza nk'uregwa. Rwemeje kandi ko hashingiwe ku kuba Nishimwe Claudine na Mashami Gisèle basangiye inyungu mu kiburanwa nk'abazungura ba Rwamanywa Jérémie ku buryo icyemezo cyafatwa cyabagiraho ingaruka bose, Mashami Gisèle n'ubwo we atajuriye agomba kuzanwa mu rubanza ku ruhande rwa Nishimwe Claudine wajuriye. Rwategetse ko iburanisha mu mizi y'urubanza rizakomeza ku wa 08/01/2019.

[9] Ku wa 08/01/2019, iburanisha ryabereye mu ruhame, rirapfundikirwa, Urukiko rumenyesha ababuranyi ko urubanza ruzasomwa ku wa 15/02/2019. Mu mwiherero warwo, rwasanze mbere yo guca urubanza ari ngombwa ko hashyirwaho umuhanga mu igenagaciro hashingiwe ku ngingo ya 77 y'Itegeko No 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, iteganya ko "kugira ngo urukiko ruce

urubanza rwaregewe rushobora gutegeka umuhanga cyangwa abahanga gusuzuma no gutanga ibitekerezo ku bintu bifitanye isano n'urwo rubanza kandi bijyanye n'umwuga wabo."

[10] Iburanisha ryo gushyiraho umuhanga mu igenagaciro ryabaye ku wa 26/02/2019, imbere y'Urukiko ababuranyi bose bemeranywa ku mugenagaciro witwa Ir Havugimana Justin. Uwo muhanga, yifashishije igenagaciro N° 17/97 ryo ku wa 07/03/1997 ryakozwe n'umukozi wa Minisiteri yari ishinzwe Ibikorwaremezo n'Ingufu, ndetse n'ibisobanuro by'ababuranyi ku mpande zombi, yasabwe kugaragariza Urukiko ibyongewe ku nzu no mu kibanza bivugwa mu kiburanwa nyuma y'umwaka wa 1997 kugeza mu mwaka wa 2008 Mugengaayivamo, n'agaciro byari bifite muri uwo mwaka wa 2008.

[11] Umuhanga washyizweho n'Urukiko yagejeje raporo ye mu Bwanditsi bw'Urukiko rw'Ikirenga ku wa 25/04/2019, iburanisha ry'urubanza ryongera gushyirwa ku wa 17/07/2019. Kuri iyi tariki, urubanza rwaraburanishijwe, Nishimwe Claudine ahagarariwe na Me Abasa Fazil, Mashami Gisèle ahagarariwe na Me Nsengiyumva Abel naho Mugenga Joseph yunganiwe na Me Nzabahimana Augustin Néto, ababuranyi bahabwa umwanya wo kugira icyo bavuga kuri raporo y'Umuhanga.

[12] Mugenga Joseph yavuze ko ibyakozwe n'umuhanga abyemera, uretse aho yibeshye ku bijyanye na "annexe" akavuga ko "maçonnerie" iri "en briques adobes"(rukarakara) kandi iri "en briques cuites"; bigatuma aho kubarira m^2 kuri 50 000 Frw, ayibarira kuri 5 600 Frw. Yasobanuye kandi ko Umugenagaciro yavuze ko "charpente" iri "en bois" aho kuvuga ko ari "métallique".

[13] Me AbasA Fazil uburanira Nishimwe Claudine na Me Nsengiyumva Abel uburanira Mashami Gisèle bavuze ko batumva aho ibiciro byakoreshejwe mu igenagaciro byavuye, basaba ko umugenagaciro yabagaragariza imibare yagendeyeho abara igiciro cya buri kintu, bagahabwa n'umwanya wo kugira icyo babivugaho.

[14] Nyuma yo kumva ibisobanuro by'impande zombi ku bijyanye na raporo y'Umuhanga, Urukiko rwemeje ko hazakorwa raporo y'inyongera, ikazaba yagejejwe mu Bwanditsi bw'Urukiko ku wa 25/07/2019, iburanisha rigakomeza ku wa 31/07/2019 saa mbili za mu gitondo. Kuri iyo tariki ababuranyi bose baritabye, hari n'Umuhanga washyizweho n'Urukiko, buri muburanyi agira ibyo avuga kuri raporo y'inyongera, Urukiko rupfundikira iburanisha, rumenyesha ababuranyi ko urubanza ruzasomwa ku wa 25/09/2019.

[15] Mu miburanire yabo, Nishimwe Claudine na Mashami Gisèle bavuga ko ntacyo Mugenga Joseph yongeye ku nzu iburanwa nyuma yo kuyigura, kandi ko niba hari n'ibyo yongeyeho ataribo babimwishyura kuko yaguze mu buryarya. Muri uru rubanza rero, iby'ingenzi bigomba gusuzumwa bikaba ari ukumenya niba hari ibyo Mugengayongeye ku mutungo yasubije abo baburana ugizwe n'inzu n'ikibanza yubatsemo, no kumenya niba ibyo yaba yarongeyeho yabyishyurwa n'uwabimwishyura.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

A. Kumenya niba hari ibyo Mugenga Joseph yongeye ku mutungo yasubije Abazungura ba Rwamanywa Jérémie.

[16] Avoka uburanira Nishimwe Claudine, hamwe n'uburanira Mashami Gisèle bavuga ko batemera ko hari ibyo Mugenga Joseph yongeye ku nzu iburanwa, ibi bakabishingira ku mpamvu zikurikira :

> Kuba mu Rukiko Rukuru, umucamanza yaravuze ko yagiye ku kiburanwa agasanga hari inzu imwe yo mu 2004 n'indi nshya, ariko akaba yaragiye atamenyesheje ababuranyi, ariyo mpamvu batemera imvugo z'abatangabuhamya babajijwe;
>
> Kuba inzu iburanwa ari iyo Rwamanywa Jérémie yasize mbere ya 1994, uko yari imeze ikaba ariko ikimeze. Avuga ko icyo Mugenga Joseph yakoze ari ugufata neza ibyari biyirimo nko gusana inzugi z'ibyumba no gusiga amarangi.

[17] Me Nsengiyumva Abel uburanira Mashami Gisèle avuga ko haramutse hari ibyongewe ku nzu, byahwana (compensation) no kuba Mugenga Joseph yarabaye muri iyo nzu kuva mu 1994 kugeza 2008. Avuga ko Urukiko rubishoboye narwo rwakora ipereza rukareba koko niba hari ibyongewe ku nzu iburanwa, rukanareba niba ibyo abatangabuhamya bavuze aribyo. Yongeraho ko inzu yiswe "Annexe" batayikeneye, ko Mugenga Joseph wayishyizeho yayikuraho agatwara ibikoresho bye kubera ko yayihashyize mu buryo bw'uburiganya. Avuga kandi ko igenagaciro ryagendeweho n'inkiko zibanza ataryemera kuko ari Mugenga Joseph waryikoreshereje uko abishaka.

[18] Mugenga Joseph avuga ko mu nyandiko zigize urubanza harimo igenagaciro rimwe ryakozwe na MINITRAP ryerekana agaciro umutungo wari ufite igihe yawuguraga hakaba n'irindi genagaciro ryakozwe muri 2008 ryerekana agaciro umutungo wari ufite igihe wasubizwaga Abazungura ba Rwamanywa. Avuga ko igenagaciro rya nyuma (2008) ryerekana ko ubu Abazungura ba Rwamanywa bari mu mutungo ufite agaciro ka miliyoni 64, mu gihe umutungo wabo wari ufite agaciro ka miliyoni 3.

[19] Avuga ko ibyo yongeye kuri uwo mutungo bigaragazwa n'ibintu bitatu:

> Inyandiko z'igenagaciro zavuzwe haruguru, kandi zashyizwe muri dosiye;
>
> Urubanza N° RC 36. 294/01 rwaciwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali ku wa 12/02/2003, muri rusanze yarwo ya 7, urupapuro rwa 5. Avuga ko muri urwo rubanza, hemejwe ko hari ibyo yongeye ku nzu;
>
> Imvugo z'abatangabuhamya bose bemeje ko hari ibyongewe kuri uwo mutungo ndetse n'ubuyobozi bw'aho inzu iherereye bukaba ariko bubyemeza.

[20] Me Nzabahimana Augustin Néto wunganira Mugenga Joseph avuga ko Nishimwe Claudine na Mashami Gisèle bitiranya amafaranga yaguzwe inzu iburanwa no kwikungahaza nta mpamvu, ko icyo Mugenga Joseph asaba ari amafaranga y'ibyo yongeye ku nzu basubijwe, ko atishyuza amafaranga yayiguze. Avuga kandi ko Mugenga Joseph atubatse "annexe" gusa, ko ahubwo n'inzu yayivuguruye, icyo asaba akaba ari agaciro k'ibyo byose yongeyeho, atari ukuyisenya.

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[21] Ibimenyetso Mugenga Joseph atanga ahamya ko hari ibyo yongeye ku nzu, bigizwe n'inyandiko y'igenagaciro yakozwe na Minisiteri y'Ibikorwaremezo n'Ingufu ku wa 07/03/1997, inyandiko y'igenagaciro yakozwe na Ir Batanage Louis ku wa 31/10/2008 ku busabe bwa Mugenga Joseph, inyandiko y'ubuhamya bwatanzwe ku wa 15/10/2014 n'abitwa Habimana Pierre, Busogi Emmanuel na Hakizabera Louis imbere y'Umunyamabanga Nshingwabikorwa w'Akagari ka Rukiri ya I Mukasano Gaudence, n'urubanza N° RC 36. 294/01 rwaciwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali ku wa 12/02/2003, muri rusanze yarwo ya 7, urupapuro rwa 5. Mu bika bikurikira, urukiko rurasuzuma agaciro ka buri cyose muri ibi bimenyetso.

i. Inyandiko y'igenagaciro yakozwe na Ir Batanage Louis

[22] Ku bijyanye n'inyandiko y'igenagaciro yakozwe na Ir Batanage Louis ku wa 31/10/2008, Urukiko rusanga itagenderwaho muri uru rubanza kuko yakozwe ku busabe bwa Mugenga Joseph, abandi baburanyi batabigizemo uruhare. Icyakora, n'ubwo igenagaciro ryakozwe na Minisiteri y'Ibikorwaremezo n'Ingufu ku wa 07/03/1997 ryari ryasabwe na Mugenga Joseph, nta cyabuza ko ryifashishwa n'Umugenagaciro washyizweho n'Urukiko amaze kumvikanwaho n'ababuranyi, kugirango agaragaze ibyaba byarongewe ku nzu kuva mu mwaka wa 1997, kugeza igihe Mugenga Joseph yayiviriyemo mu mwaka wa 2008 n'agaciro kabyo, kuko ryakozwe imanza zitarabaho kandi rigakorwa n'Urwego rwa Leta.

[23] Umugenagaciro Havugimana Justin washyizweho n'Urukiko, muri raporo yarushyikirije ku wa 25/04/2019,

yagaragaje ko hari ibyongewe ku nzu iburanwa bifite agaciro ka 10.577.136 Frw, inzu ntoya (annexe) yongewe mu kibanza ifite agaciro ka 6.328.659 Frw, n'ibyakozwe mu rwego rwo gutunganya igipangu ku gaciro ka 7.633.672 Frw bigizwe ahanini n'urugo rw'amatafari ahiye, urugi rw'igipangu, parikingi, umuyoboro w'amazi n'ikigega cy'amazi.

[24] Ibyo ababuranira Nishimwe Claudine na Mashami Gisèle bavuga ko raporo y'umugenagaciro itashingirwaho atabanje kugaragaza "échantillon" y'ibiciro yahereyeho byo mu mwaka wa 2008, Urukiko rurasanga bitahabwa ishingiro kuko umugenagaciro yasobanuye ko yagendeye ku biciro byari ku isoko muri uwo mwaka, yifashishije ibyo yakoreshaga nk'umunyamwuga icyo gihe, ibi bisobanuro bikaba byumvikana. Urukiko rurasanga nta cyatuma rutifashisha iyi raporo y'umugenagaciro, cyane ko abavuga ko idakwiye gukoreshwa badahakana ko yakozwe n'umunyamwuga ubifitemo ubumenyi, bakaba batanagaragaza ibindi biciro byifashishwaga n'abanyamwuga bivuguruza ibyo uwashyizweho n'Urukiko yagendeyeho.

ii. Inyandiko yasinyiwe imbere y'Umunyamabanga

[25] Inyandiko igaragaza ko yasinyiwe imbere y'Umunyamabanga Nshingwabikorwa w'Akagari ka Rukiri ya I Mukasano Gaudence ku wa 15/10/2014, ikubiyemo imvugo z'abatangabuhamya Habimana Pierre, Busogi Emmanuel na Hakizabera Louis, bemeza ko bari baturanye na Mugenga Joseph mu Mudugudu w'Ukwezi, nyuma y'uko ahaguze ikibanza kirimo inzu ituzuye, akayikoraho ibikorwa bigaragara byayongereye agaciro. Bavuga ko bimwe muri ibyo bikorwa ari ukuvugurura inzu ashyiraho ibikoresho biramba, kubaka "annexe" no kubaka uruzitiro rw'amatafari ahiye yasimbuje imiyenzi. Urukiko

rurasanga nta cyatuma izi mvugo zidahabwa agaciro, mu gihe zakorewe imbere y'umuyobozi wemeje ko abo baturage bari batuye mu Kagari ka Rukiri ya I aho inzu iburanwa ihereye. Izi mvugo zihuza n'ibyagaragajwe n'umugenagaciro washyizweho n'Urukiko, ahereye ku byo yabwiwe n'ababuranyi ku mpande zombi.

iii. Urubanza N° RC 36. 294/01 rwaciwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali

[26] Ku bijyanye n'urubanza N° RC 36. 294/01 rwaciwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali ku wa 12/02/2003, Urukiko rurasanga ibivugwa muri rusanze yarwo ya 7, ku rupapuro rwa 5 atari ikimenyetso ko hari ibyongewe ku nzu, kuko umucamanza yavuze gusa ko ntacyo yabivugaho mu gihe bitari byaregewe Urukiko.

[27] Hashingiwe ku byagaragajwe n'Umugenagaciro washyizweho n'Urukiko, no ku mvugo z'abatangabuhamya, Urukiko rurasanga hari ibyo Mugenga Joseph yongeye ku nzu no mu kibanza yasubije abazungura ba Rwamanywa Jérémie, aribo Nishimwe Claudine na Mashami Gisèle. Mu ngingo zikurikira, harasuzumwa niba ibyo Mugenga Joseph yongeye ku mutungo uburanwa yabyishyurwa n'uwabimwishyura.

B. Kumenya niba Mugenga Joseph agomba kwishyurwa ibyo yongeye ku mutungo yasubije n'uwabimwishyura.

[28] Me Rwabukamba Moussa uburanira Nishimwe Claudine na Me Nsengiyumva Abel uburanira Mashami Gisèle bavuga ko niba hari ibyo Mugenga Joseph agomba kwishyurwa, atari abo bunganira babyishyura kubera impamvu zikurikira:

Hashingiwe ku rubanza Nº RC 24.199/95/S1 rwaciwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali ku wa 16/01/1996, ku rupapuro rwarwo rwa kabiri, ugomba kubazwa ibyongewe ku mutungo wasubijwe Nishimwe Claudine na Mashami Gisèle ni Kabagema Ferdinand; kubera ko muri urwo rubanza hemejwe ko yagurishije ibitari ibye ;

Urukiko Rukuru rwagaragaje ko Mugenga Joseph yaguze mu buryarya, nyuma rurivuguruza, ruvugisha ingingo za 311 na 312 z'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano icyo zitavuga, kuko iyo ruzishingiraho, ibivugwa ko byongewe ku nzu byari kuryozwa Kabagema. Mugenga yaguze azi neza ko inzu atari iya Kabagema, uyu nawe azi neza ko inzu atari iye kuko yari yanditse kuri Rwamanywa Jérémie;

Kuba nta masezerano y'ubugure Mugenga Joseph yigeze agirana n'abazungura ba Rwamanywa Jérémie ntacyo akwiye kubasaba; haramutse hari n'ibyo yabaza ntiyabihabwa kubera ko yabaye muri iyo nzu nta mafaranga y'ubukode yishyura kuva mu 1994 kugeza mu 2008 ayikurwamo

Ibyo Mugenga Joseph avuga ko Nishimwe Claudine na MASHAMI Gisèle baramutse badasubije inyongeragaciro yashyize ku mutungo basubiranye byaba ari ukwikungahaza nta mpamvu, basanga atari byo, kandi biramutse binabaye byaba bireba Kabagema Ferdinand wagurishije ibitari ibye.

[29] Mugenga Joseph yasubije kuri izo mpamvu avuga ko:

Ibijyanye n'uko Abazungura ba Rwamanywa aribo bagomba kwishyura byasobanuwe mu manza baburanye, amategeko yashingiweho akaba arengera uwaguze mu buryo bwemewe n'amategeko aho guha Abazungura ba Rwamanywa uburyo bwo kwikungahaza nta mpamvu ;

Umucamanza mu Rukiko Rukuru yasobanuye neza ko kuba yaraguze mu buryarya, n'ubwo we atabyemera, bitatuma atakaza ibyo yakoze. Umucamanza wabyemeje gutyo akaba atarivuguruje nk'uko abarega babivuga, ahubwo akaba yaragaragaje ko abungukiye mu byo yakoze aribo bagomba kwishyura ibyo yakoresheje;

Agura nta buryarya yagize; "fiche cadastrale" yari yanditse kuri Rwamanywa Jérémie, hakorwa "transfert" kuri Kabagema Ferdinand. Avuga ko ashobora kuba atarashishoje, ngo arebe icyo amategeko ateganya ku bubasha bwa "tuteur", kuko Kabagema yavugaga ko ari we "tuteur" w'abana.

[30] Mugenga Joseph yongeraho ko inkiko zabanje zamuhaye amafaranga make ugereranyije n'ibyo yongeye ku nzu iburanwa, ko ashingiye ku rubanza Nº RCAA 0018/13/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 24/02/2012, haburana Harerimana Emmanuel na Sebukayire, asanga akwiye gusubizwa agaciro k'ibyo yongeye ku mutungo uburanwa nk'uko amategeko abiteganya. Avuga ko urubanza Nishimwe Claudine na Mashami Gisèle bitwaza ntaho ruhuriye n'ibirimo kuburanwa ubu, kubera ko ibyo yishyuza ari amafaranga yashyize ku nzu yeguriwe Nishimwe na Mashami akaba ataburana amafaranga yahaye Kabagema.

[31] Me Nzabahimana Augustin Néto wunganira Mugenga Joseph avuga ko Abazungura ba Rwamanywa bagomba gusubiza

Mugenga Joseph ikinyuranyo cya miliyoni 64 arenga ku gaciro k'inzu yaguzwe kugira ngo batikungahaza nta mpamvu, ko kandi kuba aribo bahawe umutungo uburanwa aribo bagomba gusubiza icyo kinyuranyo.

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i. Ibyongewe ku mutungo bitari inyubako nshya

[32] Nta ngingo y'amategeko isobanura uko bigenda mu gihe umuntu yaguze umutungo utimukanwa n'utari nyirawo, nyuma nyirawo agasaba gusubizwa umutungo we, kandi hari ibyo uwari wawuguze yongeyeho adashaka guhomba. Ingingo ya 9 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, "umucamanza aca urubanza ashingiye ku ngingo z'amategeko zirebana n'ikirego yaregewe. Iyo nta tegeko rijyanye n'ikiburanwa ashingira ku mategeko asanga yashyiraho mu gihe yaba ashinzwe kuyashyiraho, yifashishije ibyemezo byagiye bifatwa n'inkiko, umuco, amahame rusange agenga amategeko n'inyandiko z'abahanga mu mategeko".

[33] Hari ihame rusange mu rwego rw'amategeko rivuga ko umugurisha(vendeur) yishingira ko uwo agurishije atagira ikimuhungabanya mu butunzi bw'icyaguzwe(garantie en cas d'éviction)[1] . Hagendewe kuri iryo hame, umugurisha agomba

[1] "*obligation pour le vendeur de défendre l'acquéreur contre le trouble apporté par autrui à sa possession et de l'indemniser au cas où la propriété de la chose vendue serait reconnue appartenir à un tiers ou grevée de droits réels"; Gérard CORNU, Vocabulaire juridique, 6ème éd., Paris, Presses Universitaires de France, 1996, p.388*.

kwishyura cyangwa agasaba ko umuguzi yishyurwa n'umuvutsa ibyo yaguze (ushobora kuba ari nyirabyo w'ukuri/ "le véritable proriétaire"), ibintu byose by'ingirakamaro yatanze asana cyangwa yongerera agaciro ibyaguzwe bitimukanwa(fonds). Ibi bisobanura ko, mu gihe uwaguze avukijwe inzu yaguze, atagomba guhomba ibyo yashyizeho by'ingirakamaro ayisana cyangwa ayongerera agaciro. Icyo gihe, uwamugurishije agomba kubimwishyura cyangwa agasaba ubimuvutsa kumwishyura. Iyo umugurisha yagurishije mu buryarya, agomba kwishyura ubwe ibyashyizweho bitari ingirakamaro (dépenses non utiles), ahubwo by'umurimbo (voluptuaires ou d'agrément), kandi ntashobora gusaba uwavukije inzu uwo yayigurishije kuba ariwe ubyishyura.

[34] Ibimaze kuvugwa, bigomba guhuzwa n'ihame ryo kutikungahaza nta mpamvu nk'uko n'Urukiko Rukuru rwabisobanuye. Mu gihe umugurisha atariwe uzagira inyungu (tirer profit) yo gukoresha ibyongeweho muri ubwo buryo, n'iyo yabyishyura mu rwego rw'ubwishingire aba yarijeje uwaguze ko ntawe uzamuvana mu mutungo we, yasubira inyuma akishyuza ubifite kugirango hatabaho kwikungahaza nta mpamvu (enrichissement sans cause); bivuga rero ko ugomba kubyishyura ari uzabikoresha akabigiramo inyungu. Icyakora, mu gihe umugurisha yagurishije iby'undi mu buryarya, niwe ubwe wishingira ibyongewe ku mutungo wagurishijwe by'umurimbo nk'uko byasobanuwe haruguru.

[35] Ibyavuzwe mu bika bibanza bihura n'ibyo Abahanga mu mategeko basobanura mu buryo burambuye, babihuza n'icyo bita

"la théorie des impenses" bishatse kuvuga ibyakozwe ku mutungo utimukanwa n'umuntu ugomba kuwusubiza nyirawo[2].

[36] Umuhanga mu mategeko Christian LARROUMET asobanura ko, inkiko zagiye zikoresha "théorie des impenses" ikomoka mu Baromani, zigendeye ku ihame ry'uko ntawe ugomba kwikungahaza nta mpamvu, mu gukemura ibibazo hagati ya nyiri ikintu (propriétaire) n'uwagize icyo acyongeraho[3]. Asobanura ko muri iyo ntekerezo (théorie), hatabaho gutandukanya uwagize icyo yongera ku mutungo utari uwe nta buryarya (de bonne foi) cyangwa mu buryarya(de mauvaise foi)[4]. Umuhanga mu mategeko Patrice JOURDAIN nawe asobanura ko usaba gusubizwa umutungo utimukanwa, agomba kwishyura uwambuwe uwo mutungo ibyo yashyizeho byitwa "impenses". Avuga ko inkiko zasobanuye ibigenderwaho mu kwishyura, bidaturuka ku kuba uwambuwe umutungo yarawubonye nta buryarya (de bonne foi) cyangwa mu buryarya (de mauvaise foi), ahubwo bituruka ku miterere y'ibyakozwe [5]. Ibi ni nabyo

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[2] *Dépenses faites sur un immeuble par une personne qui est tenue de le restituer"; ibidem, p.418*

[3] *"Se fondant sur la notion d'enrichissement sans cause……, la jurisprudence a appliqué la théorie romaine des impenses……. Cette théorie, intervenant dans les rapports du propriétaire et de celui qui a effectué des réparations ou améliorations….; CHRISTIAN LARROUMET, Droit Civil, Les Biens, Droits réels Principaux, 5ème Ed., T.II, Paris, ECONOMICA ,2006, p. 311-312.*

[4] *"Dans la théorie des impenses aucune distinction n'est faite entre celui qui, de bonne foi, c'est à dire dans la croyance d'en être le propriétaire, effectue des travaux sur un bien et celui qui effectue les mêmes travaux alors qu'il est de mauvaise foi"; ibidem, p.312*

[5] "*Le revendiquant doit indemniser le défendeur évincé des dépenses de celui-ci qui ont été incorporées à l'immeuble et qui portent le nom d'impenses. La jurisprudence a défini les conditions de cette indemnisation, qui ne dépendent pas de la bonne ou de mauvaise foi du possesseur évincé mais qui varient*

bigarukwaho n'abahanga mu mategeko nka François TERRE na Philippe SIMLER[6].

[37] Aba Bahanga mu mategeko bashyira mu byiciro bitatu imiterere y'ibyakozwe ku mutungo utimukanwa n'umuntu ugomba kuwusubiza nyirawo (nature des impenses) :

> Ibyakozwe biri ngombwa (les impenses nécessaires), ni ukuvuga ibyari ngombwa gukora mu rwego rwo kubungabunga umutungo, ku buryo iyo bidakorwa umutungo wari kwangirika cyangwa ugatakaza agaciro. Ibyo bigomba gusubizwa uko biri uwabyongeye ku mutungo utari uwe, n'ubwo yaba yarawubonye mu buryarya[7] ;

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suivant la nature des impenses »; Patrice JOURDAIN, Droit Civil, Les biens, Paris, Dalloz, 1995, p.282

[6] *"La jurisprudence, s'inspirant de la tradition romaine……a retenu le principe d'une indemnisation du possesseur évincé, en fonction, non plus, cette foi, de sa bonne ou mauvaise foi, mais de la nature des travaux entrepris ou des frais exposés, appelés impenses"; François TERRE et Philippe SIMLER, Droit Civil, les biens, 9ème éd, Paris, Dalloz, 2014, p.412.*

[7] *« Les impenses nécessaires sont celles qu'imposait la conservation de la chose: à leur défaut, l'immeuble eût péri ou eût certainement perdu en valeur (….). Le possesseur, même de mauvaise foi, a droit au remboursement intégral des impenses de cette nature »; ibidem., p. 412*

« Les impenses nécessaires correspondent aux travaux qui devaient être faits pour assurer la conservation de la chose (…). En ce cas, le propriétaire doit rembourser le coût des travaux »; Christian LARROUMET, op.cit., p. 372. « *Les impenses nécessaires, à défaut desquelles la conservation de l'immeuble aurait été compromise (comme les réparation d'une charpente menaçant ruine), donnent lieu au remboursement intégral »; Patrice JOURDAIN, op.cit., p. 282.*

Ibyakozwe bifite akamaro (les impenses utiles), ni ukuvuga ibyakozwe bitari ngombwa ariko bikongerera agaciro umutungo.

Uwabikoze asubizwa agaciro k'ibyo yongeye ku mutungo, karebewe igihe byemejwe ko asubiza uwo mutungo[8]

Ibyakozwe by'umurimbo, ni ukuvuga ibyakozwe bitari ngombwa, bigakorwa gusa mu rwego rwo gushaka ibinogeye ijisho. Uwabikoze ntashobora gusaba

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[8] *« Les impenses utiles sont celles qui, sans être indispensables, ont procuré une plus-value à l'immeuble (par exemple, extension de la surface utile ou surélévation, installation du chauffage central, de l'eau courante, d'un ascenseur, travaux de drainage du sol). La restitution en est due au possesseur, même de mauvaise foi, mais seulement jusqu'à concurrence de la plus-value appréciée au jour où la revendication est admise »; François TERRE et Philippe SI « Les impenses voluptuaires ou somptuaires sont des dépenses de pur luxe ou agrément, effectuées en vue de satisfaire les goûts personnels de celui qui les a engagées……Le possesseur ne peut jamais demander l'indemnité pour de telles impenses, mais il a la faculté d'enlever les objets apposés sur le fonds, s'il est possible de le faire sans dégradation » ; François TERRE et Philippe SIMLER, op.cit., p. 413.*
« Les impenses voluptuaires ou somptuaires sont des améliorations de pur agrément pour celui qui les a effectuées. Elles n'apportent aucune plus-value appréciable à l'immeuble. Aucune indemnisation n'est due et le propriétaire peut même exiger la disparition des travaux » ; Christian LARROUMET, op.cit., p. 373.
« Les impenses voluptuaires qui ont un caractère de luxe ou de pur agrément et satisfont surtout le gout personnel de celui qui les a engagées, ne donnent pas lieu à indemnité. Le possesseur évincé pourrait d'ailleurs enlever les ornements qu'il aurait ajoutés au fonds, à charge de ne pas détériorer celui-ci » ; Patrice JOURDAIN, op.cit., p. 282. MLER, op. cit., p. 413.

gusubizwa agaciro kabyo, ariko afite uburenganzira bwo kubivanaho igihe yashobora kubikora ntacyangiritse[9].

[38] Ibi bisobanuro by'Abahanga mu mategeko, bihujwe n'ibikubiye mu bika bya 33 na 34 by'uru rubanza, byumvikanisha ko:

> Mu gihe umuntu yaguze umutungo utimukanwa n'utari nyirawo, bikaba ngombwa ko awusubiza nyirawo w'ukuri kandi hari ibyo yongeyeho bitari ibyo yubatse cyangwa yateye bishya, asubizwa ibyo yongeyeho hakurikijwe imiterere yabyo;
>
> Abisubizwa na nyiri umutungo w'ukuri wawusubiranye kugirango hatabaho kwikungahaza nta mpamvu;
>
> Ntihabaho kureba niba yarawubonye mu buryarya cyangwa nta buryarya;

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[9] *« Les impenses voluptuaires ou somptuaires sont des dépenses de pur luxe ou agrément, effectuées en vue de satisfaire les goûts personnels de celui qui les a engagées……Le possesseur ne peut jamais demander l'indemnité pour de telles impenses, mais il a la faculté d'enlever les objets apposés sur le fonds, s'il est possible de le faire sans dégradation » ; François TERRE et Philippe SIMLER, op.cit., p. 413.*
« Les impenses voluptuaires ou somptuaires sont des améliorations de pur agrément pour celui qui les a effectuées. Elles n'apportent aucune plus-value appréciable à l'immeuble. Aucune indemnisation n'est due et le propriétaire peut même exiger la disparition des travaux » ; Christian LARROUMET, op.cit., p. 373.
« Les impenses voluptuaires qui ont un caractère de luxe ou de pur agrément et satisfont surtout le gout personnel de celui qui les a engagées, ne donnent pas lieu à indemnité. Le possesseur évincé pourrait d'ailleurs enlever les ornements qu'il aurait ajoutés au fonds, à charge de ne pas détériorer celui-ci » ; Patrice JOURDAIN, op.cit., p. 282.

Ku byakozwe biri ngombwa, asubizwa agaciro yabikoreshejeho (remboursement intégral);

Ku byakozwe bifite akamaro, asubizwa agaciro karebewe igihe byemejwe ko asubiza umutungo;

Ku byakozwe by'umurimbo, ntabyo yishyurwa na nyiri umutungo w'ukuri, icyakora ashobora gusaba ko uwamugurishije abyishyura iyo yamugurishije mu buryarya.

[39] Hakurikijwe ibyavuzwe mu bika bya 24 na 26 by'uru rubanza, Urukiko rurasanga hari ibyo Mugenga Joseph yongeye ku nzu yasubije abazungura ba Rwamanywa Jérémie, bigizwe n'ibi bikurikira:

Kubaka m^2 0.69 n'amatafari ya rukarakara, gushyiraho "claustra" na "moustiquaires", no gushyira urugarika ku muzenguruko w'inzu n'inkingi (389.950 Frw);

Gukora igisenge (1.115475 Frw):

- Ahindura amabati, akavanaho "tôles simples galvanisées" zari zisanzweho agashyiraho "*tôles autoportants"*;
- Yongeraho: "*vernes en tubes métallique*" kuri *"charpente", "planche de rive", "gouttière en plastique", na "tuyau de descente" ;*

Gukora "*pavement"* ya "*trottoir",* gushyira amakaro(*carreaux)* mu nzu, gushyiraho "*plinthe"* no gusiga karabasasu

"crepissage" (1.056.583 Frw);

Gushyira "*plafond*" mu nzu (1.217.487 Frw);

Gusiga irangi (2.693.612 Frw);

Gushyira inzugi mu nzu no gusiga irangi ku nzugi z'ibyuma n'amadirishya byari bisanzwe ku nzu (591.030 Frw);

Gushyira amashanyarazi mu nzu (588.000 Frw);

Gushyira "sanitaires" mu nzu na "*plomberie*" (2.925.000 Frw);

Gutunganya hanze mu gipangu hashyirwaho urugo rw'amatafari ahiye, urugi, parikingi, *rigole* na "*citerne"* y'amazi byagize uruhare mu kongerera inzu agaciro (7.633.672 Frw);

Ibyongewe ku nzu byose hamwe bifite agaciro ka 10.577.136 Frw + 7.633.672 Frw = 18.210.808 Frw, ako gaciro kakaba kabariwe ku mwaka wa 2008 igihe MUGENGA Joseph yasubizaga inzu.

[40] Harebwe imiterere y'imirimo yakozwe, Urukiko rurasanga ibyakozwe byose bifite akamaro (*impenses utiles*), bikaba byarongereye agaciro k'inzu. Ku bijyanye by'umwihariko n'igisenge cy'inzu, Inkiko zibanza zavuze ko ibyakozwe bitafatwa nk'ibyari bifite akamaro (*impenses utiles*) mu gihe inzu yari isanzwe isakaye(hariho "*charpente*" y'ibiti na *"tôles simples"),* ariko uru Rukiko rurasanga kuba *"charpente*" yarongewemo ibyuma, amabati asanzwe (*tôles simples*) agasimbuzwa "tôles autoportants" akomeye kandi aramba kurushaho, bitafatwa nk'ibyakozwe by'umurimbo *(impenses voluptuaires)* kuko byatumye inzu ikomera kurushaho kandi bikayongerera agaciro.

[41] Urukiko rurasanga, hashingiwe ku mategeko n'ibisobanuro by'abahanga byagaragajwe mu bika bibanza, Mugenga Joseph agomba gusubizwa agaciro k'ibyo yongeye ku nzu bifite akamaro (bitari inyubako nshya ziza kurebwa mu ngingo zikurikira), akabyishyurwa n'abazungura ba Rwamanywa Jérémie basubiranye inzu, aribo Nishimwe Claudine na Mashami Gisèle. Urukiko rurasanga rero Nishimwe Claudine na Mashami Gisèle bagomba gusubiza Mugenga Joseph 18.210.808 Frw.

ii. Inyubako nshya zashyizwe mu kibanza

[42] Ingingo ya 35 y'Itegeko Ngenga N° 03/2013/OL ryo ku wa 16/06/2013 rikuraho Itegeko Ngenga N° 08/2005 ryo ku wa 14/07/2005 rigenga imikoreshereze n'imicungire y'ubutaka mu Rwanda, igika cya 3, iteganya ko « mu gihe inyubako cyangwa se ibihingwa byashyizwe n'undi muntu ku butaka butari ubwe, hadakurikijwe ibisabwa n'amategeko cyangwa amasezerano (procedures that are contrary to laws or agreement with land owner), nyir'ubutaka afite uburenganzira bwo gusaba uwabishyizeho kubikuraho bitabujije no gusaba impozamarira cyangwa indishyi mu gihe hari ibikorwa bye byangijwe ».

[43] Ibivugwa muri iyi ngingo, bireba inyubako cyangwa ibihingwa byashyizwe ku butaka bw'undi, bikaba bitandukanye n'ibyongerewe ku mutungo usanzweho mu rwego rwo kuwusana cyangwa kuwongerera agaciro. Ibi nibyo bisobanurwa n'Umuhanga mu mategeko Patrice JOURDAIN avuga ko inyubako nshyashya n'ibihingwa bidafatwa nk'ibyakozwe/ibyongerewe ku mutungo utimukanwa (les impenses)[10]. Ni nabyo kandi bisobanurwa n'abahanga mu

[10] *les constructions neuves et les plantations ne sont pas considérées comme des impenses….", Patrice JOURDAIN, op. cit., p.282*

mategeko nka François TERRE na Philippe SIMLER[11], mu gusesengura ingingo ya 555 y'amategeko mbonezamubano y'abafaransa ikubiyemo ibitekerezo bihura n'ibiteganywa n'ingingo ya 35 y'Itegeko rigenga imikoreshereze n'imicungire y'ubutaka mu Rwanda yavuzwe haruguru.

[44] Ku bijyanye n'inyubako nshya cyangwa ibihingwa byashyizwe ku butaka bw'undi, igitekerezo cy'umushingamategeko mu ngingo ya 35 y'Itegeko Ngenga No 03/2013/OL ryo ku wa 16/06/2013 ryavuzwe haruguru ni uko mu gihe byashyizweho mu buryo budakurikije amategeko, nyir'ubutaka afite uburenganzira bwo gusaba ko uwabishyizeho abikuraho. Hakurikijwe ibiteganywa muri iyi ngingo, birumvikana ko mu gihe umuntu yashyize inyubako nshya ku butaka yaguze n'utari nyirabwo, azi neza ko uwo baguze atari nyirabwo, aba yashyizeho izo nyubako mu buryo budakurikije amategeko kuko kugurisha umutungo w'undi ari uguhungabanya uburenganzira awufiteho, kandi bikaba bibujijwe n'ingingo ya 34 y'Itegeko Nshinga rya Repubulika y'u Rwanda iteganya ko buri muntu afite uburenganzira ku mutungo bwite, kandi ko umutungo bwite w'umuntu ari ntavogerwa[12]. Ibi bikaba bitandukanye

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[11] *"Les mots « plantations, constructions et ouvrages » doivent être entendus de manière assez large. Il résulte cependant de la jurisprudence qu'il doit s'agir d'ouvrages nouveaux. Elle écarte donc l'application du texte s'il n'y a eu que de simples travaux de réparation et d'amélioration, voire de transformation de constructions existantes, serait-ce sous la forme d'une surélévation »; François TERRE et Philippe SIMLER, op.cit, p.229*

[12] "Buri muntu afite uburenganzira ku mutungo bwite, waba uwe ku giti cye cyangwa uwo asangiye n'abandi.
Umutungo bwite, uw'umuntu ku giti cye cyangwa uwo asangiye n'abandi ntuvogerwa.
Uburenganzira ku mutungo ntibuhungabanywa keretse ku mpamvu z'inyungu rusange kandi hakurikijwe ibiteganywa n'amategeko"; Ingingo ya 34

n'igihe uwaguze atigeze amenya ko uwo baguze atari nyir'ubutaka, akagura azi ko yanyuze mu nzira zikurikije amategeko.

[45] Muri uru rubanza, Mugenga Joseph yaguze na Kabagema Ferdinand inzu iri mu kibanza cyanditse kuri Rwamanywa Jérémie. Mugenga Joseph yemereye mu Rukiko ko « fiche cadastrale » yari yanditse kuri Rwamanywa Jérémie, bivuga ko yaguze na Kabagema Ferdinand azi neza ko inzu baguze n'ikibanza yubatseho atari ibye. Ibyo Mugenga Joseph avuga ko Kabagema Ferdinand yari « tuteur de droit » w'abana ba Rwamanywa Jérémie, ntacyo bihindura ku kuba yaraguze n'utari nyiri umutungo kandi abizi, kuko umwishingizi w'abana adafite ububasha bwo kugurisha umutungo wabo atabiherewe uburenganzira n'Inama y'Ubwishingire, ahubwo ashinzwe kuwurinda no kuwubacungira nk'uko biteganywa n'ingingo za 389[13] na 388[14] z'Itegeko N° 42/1988 rishyiraho Interuro y'ibanze n'Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano yakoreshwaga igihe ubugure bwabaga.

[46] Hakurikijwe ibyagaragajwe na raporo y'umuhanga mu igenagaciro washyizweho n'Urukiko, Mugenga Joseph yashyize inyubako nshya yiswe « annexe » mu kibanza cyarimo inzu yaguze. Urukiko rusanga iyo nyubako yarashyizwe mu kibanza hadakurikijwe ibisabwa n'amategeko, kuko yashyizwe ku butaka

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y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015.

[13] « Ibikorwa bigamije gutanga kugurisha n'ibindi byose bishobora kubangamira umutungo w'umwana, umwishingizi ntaboshobora kubikora atabiherewe uburenganzira n'inama y'ubwishingire…… »

[14] « Umwishingizi akora ubwe ibya ngombwa byose byo kurinda no gucunga umutungo bigamije inyungu z'umwana kandi akabikoresha ku buryo bushobotse bumubyarira inyungu ».

Mugenga Joseph yaguze n'utari nyirabwo kandi abizi nk'uko byasobanuwe mu gika kibanza.

[47] Urukiko rurasanga rero, hashingiwe ku biteganywa n'ingingo ya 35 y'Itegeko Ngenga No 03/2013/OL ryo ku wa 16/06/2013 ryavuzwe haruguru, nyir'ubutaka ni ukuvuga abazungura ba Rwamanywa Jérémie aribo Nishimwe Claudine na Mashami Gisèle, bafite uburenganzira bwo gusaba Mugenga Joseph gukuraho inyubako nshya yiswe « annexe » yashyize mu kibanza basubijwe. Icyakora, mu gihe basanga atari ngombwa gukoresha ubwo burenganzira bagahitamo kugumana iyo nyubako, bagomba kumvikana na Mugenga Joseph ku gaciro bamusubiza. Uyu murongo, ugendeye ku ihame rya "equity/équité", ni nawo wafashwe mu zindi manza zaciwe n'Urukiko rw'Ikirenga, by'umwihariko:

> Urubanza No RS/REV/INJUST/CIV 0012/15/CS rwaciwe ku wa 18/01/2019, haburana Kayitsinga Alexis, Kanyamibwa Immaculée na Nsangineza Célestin (igika cya 52 na 66);
>
> Urubanza N° RS/INJUST/RC 0006/2018/SC rwaciwe ku wa 18/01/2019, haburana Nibasenge Anathalie na Nahayo François Xavier (igika cya 33 na 43).

[48] Hashingiwe ku bisobanuro byatanzwe ku bijyanye no kumenya niba Mugenga Joseph agomba kwishyurwa ibyo yongeye ku mutungo yasubije n'uwabimwishyura, Urukiko rurasanga Nishimwe Claudine na Mashami Gisèle bagomba kumwishyura ibyo yongeye ku nzu bifite akamaro, bihwanye na 18.210.808 Frw. Naho ku bijyanye n'inyubako nshya yashyizwe mu kibanza yiswe "annexe", Urukiko rurasanga mu gihe Nishimwe Claudine na Mashami Gisèle bahitamo kuyigumana,

bakumvikana na Mugenga Joseph ku gaciro bamusubiza, bitashoboka Mugenga Joseph akayivanaho.

C. Gusuzuma Indishyi zasabwe

i. Indishyi zasabwe na Nishimwe Claudine na Mashami Gisèle

- **Amafaranga y'ubukode bw'inzu kuva Mugenga Joseph ayigiyemo mu buryo bunyuranyije n'amategeko kugeza ayivuyemo**

[49] Me Nsengiyumva Abel wunganira Nishimwe Claudine na Me Abasa Fazil wunganira Mashami Gisèle bavuga ko Mugenga Joseph agomba gutanga indishyi zingana na 97.250.000 Frw kuko batigeze bamwishyuza amafaranga y'ubukode bw'igihe cyose yamaze mu nzu iburanwa, ni ukuvuga kuva mu 1994 kugeza mu 2008, zibazwe ku mafaranga 450.000 ku kwezi mu myaka 14 yamaranye iyo nzu.

[50] Mugenga Joseph avuga ko izi ndishyi asabwa nta shingiro zifite, kuko yabaye muri iyo nzu kubera ko yari yarayiguze, kandi ikaba yari imwanditseho kugeza mu 2008 ubwo yayikurwagamo bitegetswe n'Urukiko, akaba rero yarabaga mu mutungo we kandi akaba atarawukodeshaga. Avuga ko atagomba kuryozwa indishyi zo kuba mu mutungo yafataga nk'uwe kugeza awukuwemo, ko kandi 450.000 Frw bita ko ari ay'ubukode atumva ishingiro ryayo kubera ko nta n'amasezerano y'ubukode Nishimwe Claudine na MashamI Gisèle berekana uretse kubivuga gusa.

UKO URUKIKO RUBIBONA

[51] Hashingiwe ku buhamya bwatanzwe na Habimana Pierre, Busogi Emmanuel na Hakizabera Louis, Mugenga Joseph yaguze inzu iburanwa ituzuye, ibyo bigahura n'ibivugwa muri raporo y'igenagaciro yakozwe na Minisiteri y'Ibikorwaremezo n'Ingufu ku wa 07/03/1997. Urukiko rurasanga Nishimwe Claudine na Mashami Gisèle batagaragaza uko inzu ituzuye, ifite agaciro ka 3.169.145 Frw, yashoboraga gukodeshwa 450.000 Frw ku kwezi nk'uko babiburanisha, ngo babe barayatakaje mu gihe bamaze batayifite. Urukiko rukaba rusanga Nishimwe Claudine na Mashami Gisèle batarabashije kugaragaza uko babara igihombo baba baratewe no kudashobora gukoresha inzu yabo. Urukiko rukaba rusanga rero 97.250.000 Frw basaba batayahabwa. Icyakora kubera igihe bamaze baravukijwe inzu yabo (perte de jouissance), kandi MUGENGA Joseph yarayibonye mu buryo budakurikije amategeko, Urukiko rurasanga bagenerwa mu bushishozi bwarwo indishyi zingana na 2.000.000 Frw.

- **Indishyi z'akababaro, ikurikiranarubanza n'igihembo cya Avoka**

[52] Nishimwe Claudine na Mashami Gisèle basaba Mugenga Joseph kubishyura indishyi z'akababaro zingana na 10.000.000 Frw kubera ko nawe yemera ko ibyo yaguze atabiguze na nyirabyo, akanabishyura 3.000.000 Frw y'igihembo cya Avoka na 200.000 Frw y'ikurikiranarubanza.

UKO URUKIKO RUBIBONA

[53] Urukiko rurasanga mu rubanza N° RC 36.294/01 rwaciwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali ku wa 12/02/2003, "Succession" Rwamanywa Jérémie yaregagamo Mugenga Joseph isaba gusubizwa inzu ivugwa muri uru rubanza, uwari uhagarariye abazungura ba Rwamanywa Jérémie yarabasabiye indishyi z'akababaro kubera ko bandagaye kandi bari bafite aho batuye, Urukiko rubagenera 300.000 Frw. Urukiko rukaba rusanga rero, mu gihe indishyi z'akababaro zamaze gutangwa mu rubanza rumaze kuvugwa rwabaye itegeko, zitakongera kugarukwaho muri uru rubanza.

[54] Ku bijyanye n'amafaranga y'ikurikiranarubanza n'igihembo cya Avoka, Urukiko rurasanga Nishimwe Claudine na Mashami Gisèle batayahabwa kuko hari ibyo batsindiwe mu rubanza.

iii. Indishyi zasabwe na Mugenga Joseph mu bujurire bwuririye ku bundi

[55] Mugenga Joseph asaba ko Nishimwe Claudine na Mashami Gisèle bamuha indishyi z'akababaro kubera guhozwa mu nkiko zingana na 2.000.000 Frw, 1.500.000 Frw y'igihembo cya Avoka, na 200.000 Frw y'ikurikiranarubanza.

UKO URUKIKO RUBIBONA

[56] Urukiko rurasanga indishyi z'akababaro kubera guhozwa mu manza Mugenga Joseph asaba atazihabwa kuko gusiragizwa mu manza bitangirwa amafaranga y'ikurikiranarubanza, kandi uretse n'ibyo, abo azisaba bakaba bafite ibyo batsindiye.

[57] Urukiko rurasanga amafaranga y'ikurikiranarubanza n'igihembo cya Avoka Mugenga Joseph asaba atayahabwa kuko hari ibyo atsindiwe mu rubanza.

III. ICYEMEZO CY'URUKIKO

[58] Rwemeje ko ikirego cy'ubujurire cyatanzwe na Nishimwe Claudine na Mashami Gisèle gifite ishingiro kuri bimwe;

[59] Rwemeje ko urubanza N° RCA 0517/15/HC/KIG-RCA 0538/15/HC/KIG rwaciwe n'Urukiko Rukuru ku wa 22/04/2016, ruhindutse kuri bimwe;

[60] Rwemeje ko hari ibyo Mugenga Joseph yongeye ku nzu no mu kibanza yasubije abazungura ba Rwamanywa Jérémie, aribo Nishimwe Claudine na Mashami Gisèle;

[61] Rutegetse Nishimwe Claudine na Mashami Gisèle kwishyura Mugenga Joseph 18.210.808 Frw y'agaciro k' ibyo yongeye ku nzu;

[62] Rutegetse Nishimwe Claudine na Mashami Gisèle kwishyura Mugenga Joseph amafaranga bazaba bumvikanyeho y'agaciro k'inzu yongewe mu kibanza yiswe « annexe », mu gihe bahisemo kuyigumana, bitashoboka Mugenga Joseph akayivanaho;

[63] Rutegetse Mugenga Joseph kwishyura Nishimwe Claudine na Mashami Gisèle 2.000.000 Frw y'indishyi z'igihe bamaze baravukijwe inzu yabo;

[64] Rutegetse ko ingwate y’amagarama yatanzwe muri uru rubanza ihwanye n’ibyarukozwemo.

IMANZA Z'UBUCURUZI

ANGEL PHARMACY Ltd v. NDABATEZE

[Rwanda URUKIKO RW'IKIRENGA – RS/REV/INJUST/COM 0005/15/CS (Kayitesi Z, P.J., Nyirinkwaya na Ngagi, J.) 15 Mutarama 2016]

Amategeko agenga amasosiyete – Icyemezo cy'iyandikisha ry'isosiyete – Icyemezo cy'iyandikisha ry'isosiyete n'ikimenyetso kigaragaza ko isosiyete ishinzwe kandi ifite ubuzima gatozi uhereye ku itariki icyemezo cyanditsweho kugeza igihe izasibirwa mu gitabo cy'amasosiyete n'ibikorwa by 'ubucuruzi.

Amategeko agenga amasosiyete – Isosiyete icuruza imiti (farumasi) – Ikigaragaza ko iriho – Agaciro k'icyangombwa gitangwa na MINISANTE – Icyo cyangombwa si cyo cyemeza ko farumasi iriho ko kandi ari iya kanaka ahubwo n'inyandiko ituma farumasi yateguwe, irimo n'ibicuruzwa itangira gukora.

Incamake y'ikibazo: Uru rubanza rukomaka ku makimbirane aho Umukumburwa avuga ko yashinze Angel Pharmacy Ltd afatanyije n'abana bimfubyi arera ariko kubera ko itegeko ryariho icyo gihe ritemereraga umuntu utarize farumasi kuyifungura, yiyambaza Ndabateze wari warabyize kugirango abasabire ibyangobwa MINISANTE. Nyuma yo guhabwa uburenganzira bwo gufungura iyo farumasi, Ndabateze yabaye Managing Director akajya ahembwa 300,000Frw ku kwezi.

Ndabateze yaje kuvuga ko Angel pharmacy ari iye; izo mpaka zatumye Angel Pharmacy Ltd itanga ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge maze iratsinda, ndetse Urukiko rugaragaza ko Angel pharmacy itabaho, ahubwo ko mu rwego

rw'amategeko habaho Angel Pharmacy Ltd, rwemeza ko abayishinze ari abayifitemo imigabane, naho Ndabateze akaba atari umunyamigabane.

Ndabateze yajuriye mu Rukiko Rukuru rw'Ubucuruzi urwo Rukiko rwemeza ko Umukumburwa uhagarariye Angel Pharmacy Ltd agomba gusubiza Ndabateze Angel pharmacy nk'uko babyumvikanyeho bagitangira gukorana.

Umukumburwa yandikiye Urwego rw'Umuvunyi asaba ko urubanza rwaciwe n'Urukiko Rukuru rw'Ubucuruzi rwasubirishwamo ku mpamvu z'akarengane. Umuvunyi Mukuru yandikiye Perezida w'Urukiko rw'Ikirenga asaba ko urwo urubanza rwasubirwamo kubera impamvu z'akarengane zikurikira kuko urukiko rwategetse ko Umukumburwa uhagarariye Angel pharmacy Ltd agomba gusubiza Ndabateze Angel pharmacy kandi itarigeze ibaho nkuko bigaragazwa n'ibaruwa yanditswe n'Ubuyobozi bwa RDB ndetse no kuba Urukiko rwarategetse Umukumburwa gusubiza Angel pharmacy bikaba byatera ingaruka yo kudashobora kurangiza urubanza kuko mu gihe cyo kurangiza urubanza, ishobora kuzashakwa ngo isubizwe nyirayo ntiboneke.

Kuri izo mpamvu, Ndabateze Adéline yahakanye kuba yari umukozi w'Umukumburwa Alice. Yavuze ahubwo ko ashaka kwitiranya ANGEL PHARMACY na ANGEL PHARMACY Ltd. Yavuze ahubwo ko 300.000 Frw yarayahabwaga kubera icyangombwa cye yari yaratanze mu gusaba "autorisation"

Umukumburwa uhagarayiye Angel Pharmacy Ltd yasabye indishyi zinyuranye harimo iz'ikurikiranarubanza, mbonezamusaruro nizo kuba Ndabateze yarakoresheje izina Angel hakiyongeraho igihembo cy'Avoka mu rubanza rw'akarengane.

Incamake y'icyemezo: 1. Icyemezo cy'iyandikisha ry'isosiyete n'ikimenyetso kigaragaza ko isosiyete ishinzwe kandi ifite ubuzima gatozi uhereye ku itariki icyemezo cyanditsweho kugeza igihe izasibirwa mu gitabo cy'amasosiyete n'ibikorwa by'ubucuruzi.

2. Icyangombwa gitangwa na MINISANTE si cyo cyemeza ko farumasi iriho ko kandi ari iya kanaka ahubwo n'inyandiko ituma farumasi yateguwe, irimo n'ibicuruzwa itangira gukora.

3. Igikorwa cyose cyangirije undi gitegeka nyir'ugukora ikosa kuriha ibyangiritse

Ikirego gifite ishingiro kuri bimwe;
Amagarama y'urubanza ahereye kuri Ndabateze.

Amategeko yashingiweho:

Itegeko Nº 07/2009 ryo ku wa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi (ryavuyeho), ingingo ya 2(39, b) ,4, 17(2) niya 18.

Iteka rya Minisitiri Nº 20/15 ryo ku wa 03/05/2005 rigena ibyangombwa bisabwa mu gufungura, gukoresha no kwimura farumasi igenewe kudandaza imiti n'inzu icuruzwamo imiti, ingingo 6

Itegeko ryo kuwa 30/07/1888 rigenga amasezerano cyangwa imirimo nshinganwa (ryavuyeho), ingingo ya 258

Nta manza zifashishijwe:

Urubanza

I. IMITERERE Y'URUBANZA

[1] Umukumburwa Alice avuga ko kuwa 21/10/2011 yashinze sosiyete y'ubucuruzi bw'imiti yitwa Angel Pharmacy Ltd afatanyije n'abana b'imfubyi arera kandi yari abereye umwishingizi, ari bo Akizanye Alaine, Nduwawe Ange na Umuhoza Aimée. Bitewe n'uko itegeko ryariho icyo gihe ritemereraga umuntu utarize farumasi kuyifungura, Umukumburwa Alice yiyambaje umuntu w'inshuti ye witwa Ndabateze Adeline wari warabyize, aba ari we usaba ibyangombwa muri MINISANTE, hanyuma ahabwa uburenganzira bwo gufungura farumasi nka "Managing Director", ariko akaba atari umunyamigabane, ahubwo farumasi imaze gutangira, Umukumburwa Alice na bagenzi be bakaba barahaga Ndabateze Adeline 300.000 Frw buri kwezi nka "Managing Director" wayo.

[2] Nyuma y'uko havutse impaka hagati ya Ndabateze Adeline na Umukumburwa Alice zerekeranye no kuba Ndabateze Adeline yaravugaga ko Angel Pharmacy ari iye, Angel PHARMACY Ltd yatanze ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge kuri N° RCOM 0480/14/TC/NYGE, iratsinda, ndetse Urukiko rugaragaza ko Angel Pharmacy itabaho, ahubwo ko mu rwego rw'amategeko habaho Angel Pharmacy Ltd, rwemeza ko abayishinze ari abayifitemo imigabane, naho Ndabateze Adeline akaba atari umunyamigabane.

[3] Ndabateze Adeline yajuririye mu Rukiko Rukuru rw'Ubucuruzi kuri N° RCOMA 0465/14/HCC, urwo Rukiko ruca urubanza ku wa 23/10/2014, rwemeza ko Umukumburwa Alice

uhagarariye Angel Pharmacy Ltd agomba gusubiza Ndabateze Adeline Angel Pharmacy nk'uko babyumvikanyeho bagitangira gukorana.

[4] Kuwa 04/11/2014, Umukumburwa Alice uhagarariye Angel Pharmacy Ltd yandikiye Urwego rw'Umuvunyi asaba ko urubanza N° RCOMA 0465/14/HCC rwasubirishwamo ku mpamvu z'akarengane. Kuwa 01/12/2014, Umuvunyi Mukuru yandikiye Perezida w'Urukiko rw'Ikirenga asaba ko urubanza N° RCOMA 0465/14/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi rwasubirwamo kubera impamvu z'akarengane zikurikira:

1) Urukiko rwategetse ko Umukumburwa Alice uhagarariye Angel Pharmacy Ltd asubiza Ndabateze Adeline Angel Pharmacy, ariko ko ibyo bitashoboka kuko, nk'uko bishimangirwa n'ibaruwa N° RDB/3/RH/0238/02/2014 yanditswe n'Ubuyobozi bwa RDB aho yasubizaga Umukumburwa Alice wayisabaga gusobanura ibijyanye na Angel Pharmacy Ndabateze Adeline avuga ko ari iye na Angel Pharmacy Ltd, hanyuma ubwo buyobozi bukamusubiza ko Ndabateze Adeline yanditse kuri Pharmacie Bethel ifite code 101808806, ibyo bigaragaza ko niba na Angel Pharmacy yarabayeho, yabayeho mu bitekerezo ariko ko mu rwego rw'amategeko itigeze ibaho;

2) Kuba Urukiko rwaremeje ko Umukumburwa Alice uhagarariye Angel Pharmacy Ltd asubiza Ndabateze Adeline Angel Pharmacy, ibyo bitera ingaruka yo kudashobora kurangiza urubanza kuko mu gihe cyo kurangiza urubanza, hashobora kuzashakwa Angel

Pharmacy ngo isubizwe nyirayo nk'uko Urukiko rwabitegetse ariko ntiboneke.

[5] Kuwa 21/11/2014,na none Angel Pharmacy Ltd ihagarariwe na Umukumburwa Alice yajuririye urubanza N° RCOMA 0465/14/HCC (kuri EFS)[1], ikirego cye gihabwa N° RCOMAA 0054/14/CS, bigeze ku wa 12/06/2015, Urukiko rw'Ikirenga rwemeza ko ubujurire bwayo butari mu bubasha bwarwo.

[6] Iburanisha rya mbere ry'uru rubanza (RS/REV/INJUST/COM 0005/15/CS) ryabereye mu ruhame ku wa 13/10/2015, Angel Pharmacy Ltd ihagarariwe na Umukumburwa Alice yunganiwe na Me Niyondora Nsengiyumva, naho Ndabateze Adeline ahagarariwe n'umugabo we Ngwabije Murihano Ephrem yunganiwe na Me Ngabonziza Julien na Me NDAYAMBAJE Iyamuremye Simon.

[7] Iryo buranisha rigitangira, Ngwabije Murihano Ephrem yazamuye inzitizi zo kutakira ikirego kubera ko hiyambajwe inzira ebyiri z'ubujurire kandi bibujijwe mu ngingo ya 12 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ndetse n'ingingo z'akarengane zikaba zidahuye n'ibiteganywa n'ingingo ya 81 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigenga imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga. Kuri izo nzitizi, Urukiko, mu rubanza rubanziriza urundi rwaciwe ku wa 20/11/2015, rwasanze nta shingiro zifite, rwemeza ko iburanisha rizakomeza mu mizi kuwa 09/12/2015.

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[1] *Electronic Filing System.*

[8] Iburanisha ryo ku wa 09/12/2015 ryabereye mu ruhame, Angel Pharmacy Ltd ihagarariwe na Umukumburwa Alice yunganiwe na Me Niyondora Nsengiyumva, naho Ndabateze Adeline yunganiwe na Me Ndayambaje Iyamuremye Simon.

II.IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO

Kumenya farumasi iriho mu rwego rw'amategeko hagati ya Angel Pharmacy Ltd na Angel Pharmacy, ndetse no kumenya nyirayo

[9] Umukumburwa Alice uhagarariye Angel Pharmacy Ltd avuga ko bashinze farumasi nk'imfubyi, bifashisha Ndabateze Adeline wari warize ibya farumasi kugira ngo abafashe kuyishinga, babona "autorisation" nyuma y'umwaka, hanyuma batangiye gukora Ndabateze Adeline abasaba "autorisation" kugira ngo ajye gushinga farumasi ye, ibibazo biratangira, bashaka undi mukozi, ndetse na Ndabateze Adeline ashaka undi mukozi witwa Mutabazi Serge.

[10] Me Niyondora Nsengiyumva wunganira Umukumburwa Alice avuga ko Urukiko rwazasuzuma niba Rejisitiri (Registre) y'ubucuruzi yahawe Sosiyete y'ubucuruzi ari yo ituma Sosiyete ibaho cyangwa niba ibeshwaho na "Licence d'exploitation" yahawe na MINISANTE, ko Angel Pharmacy Ltd yemejwe mu rwego rw'amategeko kuwa 21/10/2011 ikaba inagaragaza abayifitemo imigabane, kandi ko iyo sosiyete imaze kwandikwa ari bwo isaba "Licence d'exploitation" ya farumasi. Avuga ko Ndabateze Adeline yemera ko yahabwaga 300.000 Frw, ko niba koko ari nyiri farumasi nta mpamvu yagombaga guhabwa ayo

mafaranga, ko ahubwo yayafataga kubera ko yari umukozi wayo nka "Director Manager".

[11] Ndabateze Adéline avuga ko Umukumburwa Alice ashaka kwitiranya Angel PHARMACY na Angel Pharmacy Ltd, ko atigeze aba umukozi wa Umukumbubwa Alice. Avuga ko, nk'umuntu wize ibijyanye na farumasi, yafunguye Pharmacie Bethel, hanyuma Umukumburwa Alice aza kumutakambira ngo bakorane muri farumasi, afungura Angel PHARMACY kuri "Registre" ye y'ubucuruzi, akajya atuma Umukumburwa Alice ndetse ko uyu yagiye asinya mu mwanya we (P.O), bityo ko iyo aza kuba ari umukoresha we atari kujya amutuma, naho 300.000 Frw akaba yarayahabwaga kubera icyangombwa cye yari yaratanze mu gusaba "autorisation ". Avuga ko yumvikanye na Umukumburwa Alice ko azajya akora ibijyanye n'ibaruramari (comptabilité), naho nyina (wa Ndabateze Adeline) akajya kuri "caisse", kandi ko bazajya bagabana ku kwezi, ko nyuma y'umwaka umwe bari gutandukana, agasubiza Umukumburwa Alice amafaranga ya "Comptoir", n'ay'imiti yari kuba isigayemo, hanyuma agakomeza imirimo ya farumasi muri "Entreprise" ye.

[12] Me Iyamuremye Simon wunganira Ndabateze Adeline avuga ko Umukumburwa Alice uhagarariye Angel Pharmacy Ltd yashatse ibyangombwa arabibura, yifashisha ibyangombwa bya Ndabateze Adeline. Avuga ko ufite uburenganzira kuri farumasi ari ufite uburenganzira bwatanzwe na MINISANTE.

Ku byerekeye kumenya farumasi iriho mu rwego rw'amategeko hagati ya Angel Pharmacy Ltd na Angel Pharmacy

[13] Ingingo ya 4 y'Itegeko Nº 07/2009 ryo ku wa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi iteganya ko: "Kwandikisha isosiyete mu biro by'Umwanditsi Mukuru mu by'ubucuruzi ni itegeko". Naho ingingo ya 17, agace ka 2º, y'iri Tegeko rivuzwe haruguru, iteganya ko icyemezo cy'iyandikisha ry'isosiyete kiba ari ikimenyetso kigaragaza ko isosiyete ishinzwe uhereye ku itariki icyemezo cyanditsweho. Ingingo ya 18 nayo iteganya ko isosiyete yanditswe hakurikijwe iri tegeko iba ifite ubuzima gatozi bwite n'izina yanditsweho, kandi ikomeza gukora kugeza igihe izasibirwa mu gitabo cy'amasosiyete n'ibikorwa by'ubucuruzi.

[14] Dosiye y'uru rubanza igaragaza ko Angel Pharmacy Ltd yanditswe mu biro by'Umwanditsi Mukuru mu by'ubucuruzi (Office of the Registrar General) muri "Rwanda Development Board" (RDB) kuwa 21/10/2011 haza kuba "amendment" ku wa 09/10/2012 nkuko bigaragazwa na "*Full Registration for Domestic Company*". Dosiye igaragaza na none ko abanyamigabane ba sosiyete ari Umukumburwa Alice, Akizanye Alaine, Nduwawe Ange na Umuhoza Aimée; Umukumburwa Alice akaba ariwe uyihagarariye mu rwego rw'amategeko, naho Ndabateze Adeline utagaragara mu banyamigabane, akaba "Managing Director" wayo. Inyandiko y'Ubwumvikane (Memorandum of Association) ya Angel Pharmacy Ltd yo ku wa 07/10/2011, ari nacyo cyemezo gishinga sosiyete, yatanzwe na RDB, nayo igaragaza ko Umukumburwa Alice, Akizanye Alaine, Nduwawe Ange na Umuhoza Aimée aribo banyamigabane muri

Angel Pharmacy Ltd, Ndabateze Adeline akaba "Managing Director"; kandi ko sosiyete igamije ibikorwa byo kudandaza no kugurisha ibicuruzwa byo muri farumasi, imiti n'iby'isuku (*Retail sale of pharmaceutical and medical goods, cosmetics and toilet articles in specialised stores),* ko n'imari shingiro (capital) ari 2.500.000 Frw yatanzwe ku buryo bungana n'abanyamigabane uko ari bane (4).

[15] Dosiye igaragaza na none ko mu ibaruwa yo ku wa 19/02/2014, Umwanditsi Mukuru mu by'ubucuruzi muri RDB yandikiye Alice Umukumburwa, ivuga neza ko Angel Pharmacy Ltd ariyo sosiyete yanditswe muri "Rwanda Development Board", ko Ndabateze Adeline ari umucuruzi ku giti cye ukoresha izina ry'ubucuruzi "Pharmacie Bethel".

[16] Hashingiwe ku bisobanuro bimaze gutangwa mu bika bibanza, Urukiko rurasanga Angel Pharmacy Ltd ihagarariwe na Umukumburwa Alice ariyo farumasi yanditswe muri RDB, nk'uko bisabwa n'ingingo ya 4 y'Itegeko ryerekeye amasosiyete mu Rwanda; ni nayo ifite ubuzima gatozi kandi iriho mu buryo bwemewe n'amategeko, kuko ariyo yubahirije ibisabwa n'amategeko, naho Angel Pharmacy, Ndabateze Adeline avuga ko ari ye, niyo yaba ikora, nta na hamwe bigaragara ko yaba iriho mu rwego rw'amategeko; kuko uvuga ko iriho, atigeze ayandikisha muri RDB.

Ku byerekeye kumenya nyiri Angel Pharmacy Ltd

[17] Ingingo ya 2, agace ka 32º, b, y'Itegeko Nº 07/2009 ryo ku wa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi iteganya ko umunyamigabane (actionnaire) ari umuntu uvugwa mu nyandiko isaba kwandikwa kw'isosiyete mu gihe cy'ishingwa

ryayo kandi agafatwa nk'umunyamigabane kugeza aho izina rye ryandikiwe mu gitabo cy'imigabane.

[18] Ingingo ya 6 y'Iteka rya Minisitiri Nº 20/15 ryo ku wa 03/05/2005 rigena ibyangombwa bisabwa mu gufungura, gukoresha no kwimura farumasi igenewe kudandaza imiti n'inzu icuruzwamo imiti iteganya ko iyo umufarumasiye akorera abandi, inyandiko isaba gufungura farumasi igomba guherekezwa n'icyemezo kigaragaza ubwo bufatanye cyitwa "Amasezerano mbonera y'ubufatanye" ariho umukono w'umufarumasiye n'uw'umuntu wemerewe n'amategeko gukora mu izina ry'icyo kigo.

[19] Ku byerekeye kumenya niba uruhushya rwa MINISANTE rwo gufungura farumasi ari rwo rwerekana ko farumasi ibayeho mu rwego rw'amategeko, kandi ko uwo icyemezo cyanditseho ariwe nyiri iyo farumasi, Urukiko rurasanga Umukumburwa Alice yaremeranyije na Ndabateze Adeline gufatanya gufungura farumasi, ariko amasezerano mbonera y'ubufatanye akaba yarabaye mu magambo gusa, kuko nta nyandiko ibigaragaza nkuko biteganywa n'ingingo ya 6 y'Iteka rya Minisitiri Nº 20/15 ryo ku wa 03/05/2005 ryavuzwe haruguru iteganya ko umufarumasiye ashobora gukorera abandi bantu. Rurasanga mu bwumvikane bw'impande zombi, uruhande ruhagarariwe na Umukumburwa Alice arirwo rwashatse imari shingiro rugura imiti, ibikoresho, rwishyura inzu n'ibindi, naho uruhare rwa Ndabateze Adeline rukaba rwarabaye gushaka uruhushya akoresheje ibyangombwa bye birimo "registre de commerce", indangamuntu, impamyabumenyi n'ibindi, kugira ngo farumasi yemererwe gufungura imirimo y'ubucuruzi, Ndabateze Adeline akajya ahabwa 300.000 Frw buri kwezi ku bw'iyo "autorisation".

[20] Ikindi kigaragara n'uko igikorwa cyo gushakira farumasi uburenganzira bwo gutangira imirimo yayo cyatangiye ku wa 18/05/2012, aribwo Ndabateze Adeline yandikiye MINISANTE ayisaba uruhushya rwo gufungura farumasi, ku wa 08/06/2012 nibwo "*National Pharmaceutical Establishments Committee*" yatanze raporo y'igenzura ryakozwe yemeza uko ibisabwa kugira ngo farumasi yemererwe gufungura byuzuye, uburenganzira bwo gufungura farumasi butangwa ku wa 09/08/2012 nk'uko bigaragazwa n'ibaruwa n° 20/4265/PH/INSP/JK/2012 yo ku wa 09/08/2012 MINISANTE yandikiye Ndabateze Adeline imwemerera gufungura ibikorwa bya farumasi muri ANGEL. Ibi bikaba bishimangira ko farumasi yabanje kwandikishwa muri RDB mu mwaka wa 2011, uruhushya rwo gutangira ibikorwa ruza nyuma rusanga farumasi iriho, cyane cyane ko n'urwo ruhushya rutangwa nyuma yaho habaye igenzura mu buryo bwa tekenike ryemeje ko ibisabwa byose byuzuye.

[21] Urukiko rurasanga icyangombwa cya MINISANTE atari cyo gituma uwo cyanditseho yitwa nyiri farumasi kuko ingingo ya 6 y'Iteka rimaze kuvugwa haruguru yemera ko haba ubufatanye hagati y'umufarumasiye n'umuntu wemerewe n'amategeko gukora mu izina ry'ikigo, ko ahubwo icyo cyangombwa ari inyandiko ituma farumasi yateguwe, irimo n'ibicuruzwa itangira gukora, ko atari cyo cyemeza ko farumasi iriho ko kandi ari iya kanaka. Urukiko rurasanga Ndabateze Adeline atari kuba nyiri farumasi yasabiye ibyangombwa, na none ngo yongere ajye ahemberwa icyangombwa yahawe, kuko nyir'umugabane, iyo atari umukozi wa sosiyete atagenerwa umushahara, ko ahubwo agabana inyungu ku migabane nk'uko biteganywa n'ingingo ya 156 y'Itegeko N° 07/2009 ryo ku wa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi ryavuzwe haruguru ivuga ko abanyamigabane bafite uburenganzira ku

nyungu zitangwa n'imigabane (...); bityo, Angel Pharmacy Ltd ihagarariwe na Umukumburwa Alice akaba ariyo farumasi iriho mu buryo mwemewe n'amategeko nk'uko byavuzwe haruguru.

[22] Urukiko rurasanga Angel Pharmacy Ltd iriho mu buryo bwemewe n'amategeko, kandi ari yo igomba gukomeza imirimo ya farumasi, naho Angel Pharmacy itariho mu rwego rw'amategeko ikaba itagomba gukomeza gukorera kuri iryo zina kuko byaba binyuranije n'iki cyemezo cy'Urukiko.

[23] Hashingiwe ku bisobanuro n'amategeko byatanzwe haruguru, Urukiko rurasanga abanyamigabane bafunguye farumasi Angel Pharmacy Ltd, ari nabo ba nyirayo ari Umukumburwa Alice, Akizanye Alaine, Nduwawe Ange na Umuhoza Aimée, nk'uko bigaragara kuri "Memorandum of Association" yatanzwe na RDB ku wa 07/10/2011, kuko aribo bagaragara mu nyandiko isaba kwandikwa kw'isosiyete mu gihe cy'ishingwa ryayo kandi farumasi itakwitirirwa undi uretse uwashatse imari shingiro agakusanya n'ibyangombwa kugirango ibeho, naho Ndabateze Adeline akagaragara nka "Managing Director" utari mu banyamigabane.

Kumenya niba hari indishyi zagenwa muri uru rubanza

[24] Umukumburwa Alice uhagarariye Angel Pharmacy Ltd avuga ko indishyi asaba zisobanuye mu buryo bukurikira:

- Amafaranga y'ikurikiranarubanza angana na 5.955.000 Frw agizwe na 1.960.000 Frw yatakaje mu Rukiko rw'Ubucuruzi rwa Nyarugenge mu manza N° RCOM 0480/14/TC/NYAR na N° RCOM 0529/14/TC/NYAR, 550.000 Frw yatakaje mu Rukiko Rukuru rw'Ubucuruzi mu rubanza N° RCOMA 0465/14/HCC, 500.000 Frw yakoresheje ageza ikibazo cye ku Muvunyi, na

2.945.000Frw yakoresheje akurikirana mu Rukiko rw'Ikirenga urubanza RCOMA 0008/15/CS.

- Indishyi mbonezamusaruro zingana na 3.850.000Frw agizwe na 100.000Frw yo kwimuka na 3.750.000Frw y'inyungu yari kuzabona mu bucuruzi bwe kuva ku wa 28/08/2015, ariko agomba kwiyongera kugeza igihe urubanza rurangijwe;

-Indishyi zingana na 2.000.000Frw zijyanye no kuba Ndabateze Adeline akorera ku izina rye, bikazamura imisoro agomba gusora;

-Indishyi zingana na 3.000.000Frw kubera izina ANGEL Ndabateze Adeline yakoresheje kandi ryari ryarakoreshejwe nk'urwibutso rw'ababyeyi babo kuko ari izina rya murumuna we Nduwawe Ange wari ufite amezi 6 ubwo ababyeyi babo bapfaga;

Indishyi zose hamwe zikaba zingana na 14.805.000Frw, hiyongeyeho igihembo cya Avoka mu rubanza rw'akarengane kingana na 1.500.000Frw.

[25] Me Iyamuremye Simon wunganira Ndabateze Adéline avuga ko indishyi zisabwa nta shingiro zahabwa kuko Umukumburwa Alice arimo gukoresha inzira zidakwiye kugira ngo abone farumasi itari iye, ahubwo ko yamugira inama yo gushaka icyangombwa cya farumasi ye adakoresheje farumasi ya Ndabateze Adeline.

[26] Ingingo ya 258 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano iteganya ko: "Igikorwa cyose cyangirije undi gitegeka nyir'ugukora ikosa kuriha ibyangiritse".

[27] Muri uru rubanza, Umukumburwa Alice uhagarariye Angel Pharmacy Ltd asaba 1.960.000Frw y'indishyi z'ibyo yakoresheje mu manza N° RCOM 0480/14/TC/NYAR na N° RCOM 0529/14/TC/NYAR[2] zaciwe n'Urukiko rw'Ubucuruzi rwa Nyarugenge; dosiye y'urubanza igaragaza ariko ko mu rubanza N° RCOM 0480/14/TC/NYAR yari yagenewe 800.000Frw. Urukiko rurasanga Angel Pharmacy Ltd yagenerwa 800.000Frw yari yarahawe muri urwo rubanza rwa mbere kuko ari mu rugero rukwiye.

[28] Ku byerekeye amafaranga yatakajwe mu rubanza N° RCOMA 0465/14/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi, Urukiko rurasanga nayo agomba gutangwa uko ari 550.000 Frw nk'uko yasabwe, kuko Angel Pharmacy Ltd yayatakaje ikurikirana urwo rubanza. Naho ku bijyanye n'amafaranga angana na 500.000 Frw yakoreshejwe na Umukumburwa Alice ageza ikibazo ku Rwego rw'Umuvunyi, Urukiko rurasanga nayo akwiye gutangwa kuko akarengane yagiriye mu rubanza N° RCOMA 0465/14/HCC ariko katumye ayatakaza ashyikiriza ikibazo Urwego rw'Umuvunyi.

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[2] Uru rubanza rwerekeranye n'ikirego cyihutirwa mu rubanza N° RCOM 0480/14/TC/NYAR aho ikiregerwa cyari: "Gufungurirwa Pharmacy no kwandikwaho autorisation, tukaba dukora mu gihe dutegereje icyemezo cy'urukiko uku kirego cy'iremezo", kandi biragaragara ko ku bijyanye n'indishyi umucamanza yari yasobanuye ko indishyi zizasabwa mu rubanza rw'iremezo (RCOM 0480/14/NYAR).

[29] Ku byerekeye indishyi z'ibyo yatakaje akurikirana urubanza muri uru Rukiko,Urukiko rurasanga 2.940.000 Frw akomoka ku kirego cyihutirwa (Nº RCOM 0008/15/CS) yifujwe na Umukumburwa Alice uhagarariye Angel Pharmacy Ltd na 1.500.000 Frw ajyanye n'urubanza rw'iremezo (Nº RS/REV/INJUST/COM 0005/15/CS), ari ikirenga, bityo mu bushishozi bwarwo rukaba rugeneye Angel pharmacy Ltd kuri izo manza zombi[3] amafaranga ibihumbi magana inani (800.000Frw) y'ikurikiranarubanza n'igihembo cya Avoka.

[30] Ku byerekeye indishyi mbonezamusaruro zasabwe, Urukiko rurasanga zidakwiye gutangwa kuko Umukumburwa Alice uhagarariye Angel Pharmacy Ltd azisaba ashingiye ko atakoraga no kuba yarimutse aho yakoreraga, kandi mu miburanire ye hari aho asobanura ko Angel Pharmacy Ltd ikorera mu yindi nzu, bisobanuye ko, uretse kuba atarumvikanye na Ndabateze Adéline ku mikorere ya farumasi bari bahuriyeho, Umukumburwa Alice yakomeje ubucuruzi bwa farumasi. Ikindi, n'ubwo Angel Pharmacy Ltd yaba yarahagaritse ubucuruzi yakoraga, ntabwo yagaragaje ibimenyetso ishingiraho isaba indishyi mbonezamusaruro. Naho ku bijyanye n'amafaranga 100.000 yo kwimuka Umukumburwa Alice asaba, Urukiko rurasanga nayo adakwiye kuyahabwa kuko nta kigaragaza ko ari Ndabateze Adéline wamuvanye mu nyubako yakoreragamo, cyane cyane ko n'uru Rukiko (rw'Ikirenga) mu rubanza Nº RCOM 0008/15/CS rwaciwe ku wa 31/07/2015, rwari rwategetse ko irangiza ry'urubanza Nº RCOMA 0465/14/HCC riba rihagaze

[3] Ingingo ya 320, igika cya nyuma, y'Itegeko Nº 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 bijyanye n'amafaranga umuburanyi yakoresheje mu rubanza ku kirego cyihutirwa biregerwa hamwe n'ikirego cy'iremezo."

by'agateganyo kugeza igihe urubanza Nº RS/REV/INJUST/COM 0005/14/CS ruzacibwa.

[31] Ku byerekeye amafaranga n'indishyi zijyanye no kuba Ndabateze Adeline akorera ku izina rye, bikazamura imisoro agomba gusora, ndetse n'indishyi zo kuba Ndabateze Adeline yarakoresheje izina "Angel", Urukiko rurasanga izo ndishyi zose zitagomba gutangwa kuko, hakurikijwe ibisobanuro Umukumburwa Alice atanga, farumasi yatumye habaho impaka yari yashinzwe ku bwumvikane hagati ya Umukumburwa Alice (washoye amafaranga y'imiti, ayo gukodesha inyubako no kugura ibindi bikoresho) na Ndabateze Adeline (watanze icyangombwa cye mu gushaka uburenganzira bwo gufungura farumasi), bityo Umukumburwa Alice uhagarariye Angel Pharmacy ltd akaba atabyuririraho ngo abisabire indishyi.

[32] hakurikijwe ibimaze gusobanurwa haruguru, urukiko rurasanga Angel Pharmacy Ltd igomba guhabwa indishyi zingana na 2.650.000 Frw agizwe na 800.000 Frw zagenwe n'Urukiko rw'Ubucuruzi mu rubanza Nº RCOM 0480/14/TC/NYAR, 550.000 Frw yatakaje mu rubanza Nº RCOMA 0465/14/HCC mu Rukiko Rukuru rw'Ubucuruzi, 500.000 Frw yatakaje ishyikiriza ikibazo Urwego rw'Umuvunyi na 800.000 Frw yatakaje muri uru rubanza rw'akarengane (Nº RS/REV/INJUST/COM 0005/15/CS).

III. ICYEMEZO CY'URUKIKO

[33] Rwemeje ko ikirego cya Angel Pharmacy Ltd cyo gusubirishamo urubanza ku mpamvu z'akarengane gifite ishingiro kuri bimwe;

[34] Rwemeje ko Angel Pharmacy Ltd ariyo farumasi iriho mu buryo bwemewe n'amategeko, ikaba ari yo igomba gukomeza imirimo ya Farumasi;

[35] Rwemeje ko Angel pharmacy Ltd ari iy'abanyamigabane aribo Umukumburwa Alice, Akizanye Alaine, Nduwawe Ange na Umuhoza Aimée.

DRESOCECO Ltd v. MININTCO Ltd

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA 00086/2018/CA (Mukanyundo, P.J., Mukandamage na Kanyange, J.) 27 Nzeri 2019]

Amategeko arengera umutungo bwite mu by'ubwenge – Ikirango – Ibirango bitera urujijo – Ibirango bitera urujijo –Kwigana ikirango – Kugira ngo hamenyekane niba ibirango bisa ku buryo bitera urujijo, si ngombwa ko biba bisa ijana kw'ijana ahubwo harebwa ubwiganze bwo gusa (dominant test of similarity) kuri ibyo birango byombi ku buryo byateza urujijo ku muguzi.

Incamake y'ikibazo: MININTCO LTD ni sosiyete y'ubucuruzi yiyandikishijeho ikirango cya KANTA BRAND muri RDB, ikanakora ubucuruzi bwayo, yaje kumenya ko iyindi sosiyete yitwa DRESOCECO Ltd itumiza mu gihugu cy'Ubushinwa igicuruzwa gifite ikirango cya Wild Olive, ikavuga ko icyo gicuruzwa cyiganye ikirango cyayo, ikaba igicuruza mu buryo bw'uburiganya, akaba ariyo mpamvu yayireze mu Rukiko rw'Ubucuruzi rwa Nyarugenge isaba uru rukiko gutegeka guhagarika ikwirakwizwa ryicyo gicuruzwa, kubisenya no kubifatira ku buryo kitazongera kwinjizwa mu gihugu cy'Urwanda kuko gitera urujijo ku bicurizwa byayo, inasaba indishyi.

DRESOCECO Ltd yo yireguye ivuga ko nta kosa yakoze, kuko nta kimenyetso MININTCO Ltd itanga kigaragaza ko yiganye ikirango cyayo cya KANTA Brand, kuko atari yo ikora ibicuruzwa bya Wild olive, uretse ko n'ibyo birango byombi bitandukanye ku buryo abaguzi badashobora kubyitiranya, haba ku mabara, ibyanditseho n'ibishushanyijeho, ko ikirango ''Wild

olive'' cyari gutera urujijo mu gihe ahanditse ''Kanta Brand'' handitswe amagambo ahuye n'iryo jambo, ko ahubwo icyo MININTCO Ltd igamije ari ukwikubira isoko yonyine kandi bitemewe mu rwego rw'ubucuruzi. Uru Rukiko rwemeje ko ikirango ''Wild olive'' n'icya ''Kanta Brand'' bitandukanye, kandi icya ''Wild olive'' kitigana icya ''Kanta Brand'', ndetse kidatera urujijo mu baguzi.

MININTCO Ltd yajuririye Urukiko Rukuru rw'Ubucuruzi ivuga ko Urukiko rw'Ubucuruzi rwa Nyarugenge rutitaye ku bishingirwaho mu gupima ikirango kigana ikindi, ko rwemeje ko itagombaga kurega DRESOCECO Ltd kuko atari uruganda rukora ''Wild olive'' kandi ntaho rubishingiye, ko ndetse rutasuzumye ikibazo cyo kumenya niba ikirango ''Wild olive'' kidashobora kwifashishwa mu ihiganwa ririmo uburiganya ugereranyije n'icya ''Kanta Brand''.

Urukiko Rukuru rw'Ubucuruzi rwemeje ko ubujurire bufite ishingiro, ko imikirize y'urubanza rwajuririwe ihindutse mu ngingo zarwo zose, rutegeka ko ibicuruzwa bya ''Wild olive'' bizanwa mu Rwanda na DRESOCECO Ltd bihagarikwa kuhacururizwa, kuko birangwa n'ikirango gitera urujijo mu bicuruzwa mu buryo butubahiriza amategeko.

DRESOCECO Ltd yajuriye nayo mu Rukiko rw'Ikirenga ivuga ko ikirego cya MININTCO Ltd kijyanye no kuba ikirango cya ''Wild olive'' kigana cyangwa se kitigana icya ''Kanta Brand'' kitagombaga kwakirwa, kuko cyasuzumwe mu rundi rubanza haburana MININTCO Ltd na Unitex Rwanda Ltd rwaciwe n'Urukiko Rukuru rw'Ubucuruzi rwarabaye itegeko, kuko rutigeze rujuririrwa mu Rukiko rw'Ikirenga rwari rufite ububasha icyo gihe, ko ndetse rutigeze rusubirwamo ku mpamvu z'akarengane, n'ubu rukaba rukiriho, isaba guhabwa indishyi

z'igihombo yagize. Nyuma y'ivugurura ry'inkiko, urubanza rwoherejwe mu Rukiko rw'Ubujurire.

Mwiburanisha DRESOCECO Ltd isobanura ko ubusanzwe urubanza rwaciwe ku rwego rwa nyuma rudashobora kongera kuburanishwa bundi bushya ku mpamvu zimwe no ku kiburanwa kimwe hagati y'ababuranyi bamwe baburana ikirego kimwe, ko ariko mu birebana na bene ibi birego (class action cases), harebwa icyaburanwaga gusa, kuko bitabaye ibyo, impaka ku birebana no gusa cyangwa kudasa kw'ibicuruzwa zazajya zihoraho ntizirangire, kuko buri muntu wese yajya atanga ikirego atitaye ku rubanza rwabanje.

DRESOCECO Ltd ivuga ko n'ubwo Urukiko Rukuru rw'Ubucuruzi rwemeje ko ikirango Wild Olive gitera urujijo icya "KANTA Brand", nyamara siko bimeze kuko nta sano bifitanye kuko bidateye kimwe, ndetse n'amagambo agiye yanditseho si amwe. Ikomeza ivuga ko ikarito ya ''Kanta Brand'' hariho umunzani, ariko kuri ''Wild olive'' hariho ishami rifite imbuto ebyiri kandi ko n'ubwo amabara yakoreshejwe hari amwe ajya kumera kimwe, ariko atari yose, ko kandi hari amabara abantu kimwe n'inganda bakunze kwifashisha agaragara neza, ko rero ibicuruzwa bifite ikirango cya ''Wild olive'' bidatera urujijo mu baguzi ku buryo babyitiranya n'ibifite icya ''Kanta Brand''

Mu kwerekana uburyo ikirango "Wild olive" cyaba kigana ikirango "KANTA Brand", MININTCO Ltd yifashishije agakarito k'amavuta afite ikirango cya "Wild olive" akakagereranya n'akazamo amavuta afite icya "KANTA Brand", agaragaza ibintu bitandukanye kuri ko gakarito aho ikirango cya "Wild olive" cyagiye cyigana icya "KANTA Brand", ku buryo ari urwiganwa rukabije rw'ikirango "KANTA Brand" bityo abaguzi b'amavuta ahindura umusatsi umukara bashobora

kwibeshya byoroshye bakagura aya "Wild olive" bakeka ko ari aya "KANTA Brand".

MININTCO Ltd bavuga ko uru Rukiko rukwiye kwemeza ko ubujurire bwa DRESOCECO Ltd nta shingiro bufite, ko ikirango "Wild olive" ari urwiganwa rw'icya "KANTA Brand", maze rugategeka ko ibicuruzwa bifite ikirango cya "Wild olive" bitera urujijo mu baguzi. Maze rukanemeza ko bitemewe gucururizwa ku butaka bw'u Rwanda, rugategeka ko ibyafatiriwe muri Gasutamo bisenywa.

DRESOCECO Ltd bavuga ko irimo gukorerwa akarengane, kuko yaranguye amavuta afite ikirango cya "Wild Olive" yumva ko nta kosa irimo gukora, ko kandi n'iyo urukiko rwasanga icyo gicuruzwa ari urwiganwa rutera urujijo, uretse ko atari byo, yahabwa ibyo bicuruzwa byafatiriwe muri Gasutamo, kuko nta mugambi wo kubangamira MININTCO Ltd yari ifite.

Incamake y'icyemezo: 1. DRESOCECO Ltd ntiyakwitwaza urubanza RCOMA 00194/2016/HC/HCC, rwaciwe ku rwego rwa nyuma n'Urukiko Rukuru rw'Ubucuruzi, ngo ivuge ko ikirego yarezwe na MININTCO Ltd kitagombaga kwakirwa, kuko ababuranyi n'ikiburanwa atari bimwe.

2.Kugira ngo hamenyekane niba ibirango bisa ku buryo bitera urujijo, si ngombwa ko biba bisa ijana kw'ijana ahubwo harebwa ubwiganze bwo gusa (dominant test of similarity) kuri ibyo birango byombi ku buryo byateza urujijo ku muguzi.

Ubujurire nta shingiro bufite.
Amagarama ahwanye n'ibyakozwe mu rubanza.

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 111

Itegeko Nº 31/2009 ryo ku wa 26/10/2009 rigamije kurengera umutungo bwite mu by'ubwenge, ingingo ya 178, 180 n'iya 258.

Itegeko Nº15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 76

Nta manza zifashishijwe.

Inyandiko z'abahanga:

DEBORAH E. BOUCHOUX, La propriété intellectuelle, le droit des marques, le droit d'auteur, le droit des brevets d'invention et des secrets commerciaux, Nouveaux Horizons, p. 97.

Serge GUINCHARD, Droit et pratique de la procédure civile, Dalloz, cinquième édition, p.864.

Urubanza

I. IMITERERE Y'URUBANZA

[1] MININTCO Ltd yareze DRESOCECO Ltd mu Rukiko rw'Ubucuruzi rwa Nyarugenge isaba guhagarika ikwirakwizwa ry'ibicuruzwa itumiza mu Bushinwa biriho ikirango ''Wild Olive'' ivuga ko gitera urujijo ku bicurizwa byayo bifite ikirango kizwi nka ''Kanta Brand'', isobanura ko DRESOCECO Ltd yiganye icyo kirango, kuko iyo urebye imiterere y'ibyo birango

usanga nta tandukaniro bifite harebwe imiterere y'udukarito, ingano yatwo, imiterere y'amabara, imiterere y'ibindi bigize ikirango cya ''Kanta Brand'' (iminzani), amagambo agize ikirango, n'umwanya amagambo agize ikirango yanditsemo, ku buryo nta tandukaniro rihari mu maso y'abaguzi, ko kandi bibangamiye uburenganzira ku mutungo mu by'ubwenge bwa MININTCO Ltd, ndetse n'imicururize yayo kuko biyihombya, isaba ko ibicuruzwa bya DRESOCECO Ltd byafatiriwe muri Gasutamo bisenywa kandi igategekwa kutazongera kubyinjiza mu Rwanda, no gutanga indishyi zingana na 50.000.000Frw n'amafaranga y'ibyo yatanze ku rubanza.

[2] DRESOCECO Ltd yo yireguye ivuga ko nta kimenyetso MININTCO Ltd itanga kigaragaza ko yiganye ikirango cyayo cya ''KANTA Brand'', kuko atari yo ikora ibicuruzwa (produits) bya ''Wild olive'', kuko yabiguze nk'uko yari kugura n'ibya MININTCO Ltd, ko rero yo nta gihangano ifite cy'ibyo yaguze, ndetse atari yo yandikishije ikirango cya ''Wild olive'' ku Mwanditsi Mukuru wa RDB, ikaba mu rwego rw'amategeko n'urw'ibimenyetso nta kosa yakoze, ko ahubwo MININTCO Ltd ikwiye kurega uruganda rukora ''Wild olive'' mu gihe haba hari ibyo rwiganye ku kirango cya ''Kanta Brand'', uretse ko n'ibyo birango byombi bitandukanye ku buryo abaguzi badashobora kubyitiranya, haba ku mabara, ibyanditseho n'ibishushanyijeho, ko ikirango ''Wild olive'' cyari gutera urujijo mu gihe ahanditse ''Kanta Brand'' handitswe amagambo ahuye n'iryo jambo, ko ahubwo icyo MININTCO Ltd igamije ari ukwikubira isoko yonyine kandi bitemewe mu rwego rw'ubucuruzi. Nayo yasabye ko MININTCO Ltd itegekwa kuyishyura 50.000.000Frw y'indishyi, 18.750.000Frw y'igihombo yayiteje ifatira ibicuruzwa byayo ikabuzwa kubicuruza, n'amafaranga y'ibyo yatanze ku rubanza.

[3] Urwo rukiko rwaciye urubanza RCOM 00385/2017/TC/Nyge ku wa 20/04/2017, rwemeza ko ikirango ‘’Wild olive’’ n’icya ‘’Kanta Brand’’ bitandukanye, kandi icya ‘’Wild olive’’ kitigana icya ‘’Kanta Brand’’, ndetse kidatera urujijo mu baguzi, rutegeka MININTCO Ltd kwishyura DRESOCECO Ltd 500.000Frw y’igihembo cya Avoka na 200.000Frw y’ikurikiranarubanza.

[4] MININTCO Ltd yajuririye Urukiko Rukuru rw’Ubucuruzi ivuga ko Urukiko rw’Ubucuruzi rwa Nyarugenge rutitaye ku bishingirwaho mu gupima ikirango kigana ikindi, ko rwemeje ko itagombaga kurega DRESOCECO Ltd kuko atari uruganda rukora ‘’Wild olive’’ kandi ntaho rubishingiye, ahubwo runyuranya n’ibiteganywa n’ingingo ya 258 y’Itegeko nº 31/2009 ryo ku wa 26/10/2009 rigamije kurengera umutungo bwite mu by’ubwenge, ko ndetse rutasuzumye ikibazo cyo kumenya niba ikirango ‘’Wild olive’’ kidashobora kwifashishwa mu ihiganwa ririmo uburiganya ugereranyije n’icya ‘’Kanta Brand’’.

[5] Urukiko Rukuru rw’Ubucuruzi rwaciye urubanza RCOMA 00236/2017/CHC/HCC ku wa 16/11/2017, rwemeza ko ubujurire bwa MININTCO Ltd bufite ishingiro, ko imikirize y’urubanza rwajuririwe ihindutse mu ngingo zarwo zose, rutegeka ko ibicuruzwa bya ‘‘Wild olive‘‘ bizanwa mu Rwanda na DRESOCECO Ltd bihagarikwa kuhacururizwa, kuko birangwa n’ikirango gitera urujijo mu bicuruzwa mu buryo butubahiriza amategeko.

[6] DRESOCECO Ltd yajuriye mu Rukiko rw’Ikirenga urubanza ruhabwa nº RCOMAA 00014/2018/SC, nyuma ruza koherezwa mu Rukiko rw’Ubujurire hashingiwe ku biteganywa n’ingingo ya 105 y‘Itegeko Nº30/2018 ryo ku wa 02/06/2018

rigena ububasha bw'inkiko, ruhabwa no RCOMAA 00086/2018/CA.

[7] Mu bujurire bwayo DRESOCECO Ltd ivuga ko ikirego cya MININTCO Ltd kijyanye no kuba ikirango cya ''Wild olive'' kigana cyangwa se kitigana icya ''Kanta Brand'' kitagombaga kwakirwa, kuko cyasuzumwe mu rubanza RCOMA 00194/2016/HC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 12/10/2016 rwabaye itegeko, ko Urukiko Rukuru rw'Ubucuruzi rwirengagije amategeko n'ibimenyetso yatanze bigaragaza ko ikirango cyayo kitigana icya MININTCO Ltd, ikaba ikwiye guhabwa ibicuruzwa byayo byafatiriwe na Gasutamo, ikanahabwa indishyi z'igihombo yagize, naho MININTCO Ltd ikavuga ko ubujurire bwa DRESOCECO Ltd nta shingiro bufite.

[8] Habanje gusuzumwa inzitizi y'iburabubasha bw'Urukiko rwajuririwe yatanzwe na MININTCO Ltd ishingiye ku gaciro k'ikiburanwa, maze mu rubanza rubanziriza urundi rwaciwe ku wa 05/04/2019, Urukiko rwemeje ko ubujurire bwa DRESOCECO Ltd buri mu bubasha bw'Urukiko rw'Ubujurire, iburanisha mu mizi y'urubanza rikomeza ku wa 08/05/2019 no ku wa 30/04/2019, DRESOCECO Ltd ihagarariwe n'Umuyobozi wayo Sagatwa Anastase yunganiwe na Me Mutarindwa Félix afatanyije na Me Butare Godefrey, naho MININTCO Ltd ihagarariwe n'Umuyobozi wayo Rahul Gulab Jham yunganiwe na Me Nsengumuremyi Cyridion.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

a. Kumenya niba ikirego cya MININTCO Ltd kitaragombaga kwakirwa n'inkiko zabanje kubera ko mu rubanza RCOMA 00194/2016/CHC/HCC rwabaye itegeko, Urukiko Rukuru rw'Ubucuruzi rwemejemo ko ikirango cya ''Wild olive ''kitigana icya "KANTA Brand"

[9] Ababuranira DRESOCECO Ltd bavuga ko Urukiko Rukuru rw'Ubucuruzi rwirengagije gusuzuma ikibazo rwashyikirijwe kijyanye n'uko ikirego cyatanzwe na MININTCO Ltd kitagombaga kwakirwa ngo gisuzumwe ku rwego rwa mbere, kubera ko hari urundi rubanza RCOMA 00194/2016/HC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 12/10/2016 (mbere y'uru rwaciwe ku wa 16/11/2017), haburana MININTCO Ltd na Unitex Rwanda Ltd, rwemeje ko ikirango cya ''Wild olive'' gikoreshwa na Unitex Rwanda Ltd kidatera urujijo, kuko gifite byinshi bigitandukanya n'ikirango cya "KANTA Brand" cya MININTCO Ltd, ko rero urwo rubanza rwabaye itegeko, kuko rutigeze rujuririrwa mu Rukiko rw'Ikirenga rwari rufite ububasha icyo gihe, ko ndetse rutigeze rusubirwamo ku mpamvu z'akarengane, n'ubu rukaba rukiriho.

[10] Bavuga ko bashingiye ku ngingo ya 151 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu mwaka wa 2003 nk'uko ryavuguruwe kugeza ubu, iteganya ko *"ibyemezo by'ubucamanza bigomba kubahirizwa n'abo bireba bose, zaba inzego z'ubutegetsi bwa Leta cyangwa abantu ku giti cyabo. Ntibishobora kuvuguruzwa keretse binyuze mu nzira no mu buryo buteganywa n'amategeko (...)"*, basaba ko icyemezo cyafashwe kivuga ko ibyo birango byombi bidasa cyakubahirizwa, ko niba MININTCO Ltd ibona kibangamye, igomba kunyura mu nzira

zemewe n'amategeko igasaba ko kivaho, ko ariko mu gihe kikiriho ntacyabuza abacuruzi kurangura ibyo bicuruzwa bifite ikirango cya "Wild olive" kubikora, ko kandi nayo yabiranguye ari uko imaze kubona urwo rubanza, ikaba rero igomba kurengerwa nk'uko byakorewe Unitex Rwanda Ltd, kuko ingingo ya 15 y'iryo Tegeko Nshinga ivuga ko abantu bose bareshya.

[11] Bakomeza bavuga ko ubusanzwe urubanza rwaciwe ku rwego rwa nyuma rudashobora kongera kuburanishwa bundi bushya ku mpamvu zimwe no ku kiburanwa kimwe hagati y'ababuranyi bamwe baburana ikirego kimwe, ko ariko mu birebana na bene ibi birego (class action cases), harebwa icyaburanwaga gusa, kuko bitabaye ibyo, impaka ku birebana no gusa cyangwa kudasa kw'ibicuruzwa zazajya zihoraho ntizirangire, kuko buri muntu wese yajya atanga ikirego atitaye ku rubanza rwabanje.

[12] Ibyo bavuga banabishyigikiza ibyanditswe na Yves FAURE mu gitabo yanditse asoza amashuri y'icyiciro cy'ikirenga (Thèse de doctorat) cyitwa "Le contentieux de la contrefaçon. La réponse du droit français à l'atteinte aux droits de propriété intellectuelle", ku rupapuro rwa 403[1], banavuga ko

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[1] Bavuga ko muri icyo gitabo, Yves FAURE yavuze ko*: "L'autorité de la chose jugée constitue également une fin de non-recevoir tout à fait commune et n'est donc pas spécifique aux droits de la propriété intellectuelle, mais s'y intéresser spécialement est ici nécessaire car il se trouve également là une application particulière à la matière. De rappeler tout d'abord que le principe gouvernant l'autorité de la chose jugée est donné par l'article 1351 du code civil, il s'agit d'une présomption légale qui entraîne l'impossibilité d'un nouveau jugement sur une demande lorsque celle-ci a déjà tranchée du fait qu'il existe une identité de parties, d'objet et de la cause. Les conditions administrant la notion de l'autorité de la chose jugée sont donc restrictives*

urukiko rwa "TGI Paris" rwanze kwakira ikirego, ku mpamvu y'uko igicuruzwa kimwe (produit) cyari cyongeye kuburanwaho (voir TGI Paris, 23 févr.2007: PIBD 2007, nº 858, p.551 en matière de marque). Batanga na none urugero ku rubanza rwaciwe n'Urukiko Rusesa Imanza rwo mu gihugu cy'Ubufaransa haburana sosiyete "Merk Shap et Dhome".

[13] Me Nsengumuremyi Cyridion, uburanira MININTCO Ltd, avuga ko ibyo DRESOCECO Ltd ivuga ko ikirego cyayo kitagombaga kwakirwa kubera ko hari urubanza rwabaye itegeko nta shingiro bifite, kubera ko itagaragaza ko "autorité de la chose jugée" ivuga ari "absolue" cyangwa "relative".

[14] Akomeza avuga ko inyandiko DRESOCECO Ltd yashyize muri dosiye zijyanye n'amategeko y'Ubufaransa, nyamara ikibazo cy'urubanza rwabaye itegeko (autorité de la chose jugée) kirebwa n'uru rubanza giteganyijwe mu ngingo ya 14 y'Itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko ikibazo cyaciweho imanza n'inkiko kitongera kugaruka mu rukiko iyo ababuranyi ari bamwe, ikiburanwa ari kimwe kandi n'impamvu z'imiburanire akaba ari zimwe.

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mais se trouvent bien à s'appliquer en matière de contentieux de la contrefaçon. C'est ainsi qu'il faut s'apercevoir que c'est autour d'une problématique relative à l'objet que se cristallisent les difficultés, les questions d'identité de parties et des causes sont plus facilement expurgées du fait de l'objectivité de leur appréciation, là où les aspects relatifs à l'objet sont plus à même d'appeler à une interprétation. Il existe ainsi une identité d'objet ayant entrainé la reconnaissance de l'autorité de la chose jugée et conséquemment un fin de non-recevoir, lorsqu'il a déjà été statué une action en contrefaçon sur le même bien (...)".

[15] Asanga rero urubanza RCOMA 00194/2016/HC/HCC rutarabaye hagati y'ababuranyi bamwe n'ababurana ubu mu Rukiko rw'Ubujurire, kuko icyo gihe haburanaga MININTCO Ltd na Unitex Rwanda Ltd, naho ubu hakaba haburana MININTCO Ltd na DRESOCECO Ltd.

[16] Ku bijyanye n'urubanza rwa "Merk Shap et Dhome" rushingirwaho na DRESOCECO Ltd, Me Nsengumuremyi Cyridion avuga ko rwari rwerekeranye no gusaba gukuraho icyemezo cya "brevet d'invention" cyari cyatanzwe n'Urwego rwa Leta rubifitiye ububasha, gukuraho icyo cyemezo akaba ari ukwambura ubwo burenganzira uwari yagihawe, bisobanuye ko urubanza rwabaye itegeko rwagize agaciro ku bantu bose (autorité de la chose jugée absolue), atari gusa ku barubayemo ababuranyi (autorité de la chose jugée relative), ko nyamara atari cyo kiburanwa hagati ya MININTCO Ltd na DRESOCECO Ltd muri uru rubanza kuko MININTCO Ltd isaba ko hubahirizwa uburenganzira ku mutungo bwite mu by'ubwenge kubera icyemezo yahawe na RDB mu mwaka wa 2012.

UKO URUKIKO RUBIBONA

[17] Ku byerekeye agaciro k'urubanza rwaciwe ku rwego rwa nyuma (autorité de la chose jugée), ingingo ya 14 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 *''Urubanza rwaciwe ku rwego rwa nyuma ntirushobora kongera kuburanishwa bundi bushya ku mpamvu zimwe no ku kiburanwa kimwe hagati y'ababuranyi bamwe baburana ikirego kimwe''*.

[18] Nk'uko binasobanurwa n'umuhanga mu mategeko Serge GUINCHARD, avuga ko kugira ngo umuburanyi asabe ko ikirego kitakirwa ashingiye ku mpamvu y'uko hari urubanza rwaciwe ku rwego rwa nyuma, ibintu bitatu bigomba kuba byuzuye, ni ukuvuga: *impamvu zimwe, ikiburanwa kimwe, hagati y'ababuranyi bamwe baburana ikirego kimwe,* haba hari kimwe kibura, ikirego kigashobora kwakirwa, ko abacamanza baregewe bagomba kubisuzuma kugira ngo inzitizi yo kutakira ikirego ishingiye kuri iyo mpamvu ihabwe cyangwa se ibure ishingiro, bitaba ibyo urubanza rukaba rwashobora guseswa kubera kutagira aho rushingiye mu mategeko[2]. Ibyo uwo muhanga yasobanuye yabishingiye ku biteganywa n'ingingo ya 1351 Code civil y'Ubufaransa bihuye n'ibiteganywa n'ingingo ya 14 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryavuze haruguru.

[19] Bigaragara rero mu rubanza RCOMA 00194/2016/HC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 12/10/2016, haburana MININTCO Ltd irega Unitex Rwanda Ltd, ko ikiburanwa cyari "Kwemeza ko sosiyete Unitex Rwanda Ltd yakoresheje mu Bushinwa ndetse yinjiza mu Rwanda ibicuruzwa bya "Wild olive black hair dye" byigana ku buryo bugaragara ibicuruzwa by'ikirango cya "KANTA Brand" cya sosiyete MININTCO Ltd, bityo Unitex Rwanda Ltd ikaba

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[2] *"Pour que l'intéressé puisse opposer à la nouvelle demande la fin de non-recevoir tirée de l'autorité de la chose jugée, les trois éléments prévus par l'article 1351 du Code civil doivent être cumulativement réunis: si l'une d'entre eux est modifié, la demande pourra faire l'objet d'un jugement. Les juges saisis de la nouvelle demande sont dans l'obligation de constater l'existence ou l'absence de ces trois éléments pour admettre ou rejeter la fin de non-recevoir, à peine de casation pour manqué de base légale". Serge GUINCHARD, Droit et pratique de la procédure civile, Dalloz, cinquième édition, p.864.*

yarakoze ibikorwa bibujijwe by'ipiganwa mu bucuruzi burimo uburiganya binyuranyije n'imigirire y'ubunyangamugayo kandi bihungabanya uburenganzira bwa MININTCO Ltd nyiri ikirango *"KANTA Brand". (...)",* urwo Rukiko rwemeza ko ubujurire bwa MININTCO Ltd nta shingiro bufite, hagumaho imikirize y'urubanza RCOM 1105/TC/NYGE rwaciwe ku wa 16/02/2016 n'Urukiko rw'Ubucuruzi rwa Nyarugenge, rwemeje ko ikirego cya MININTCO Ltd nta shingiro gifite, rukayitegeka guha indishyi Unitex Rwanda Ltd.

[20] Naho muri uru rubanza MININTCO Ltd yareze DRESOCECO Ltd isaba urukiko "Guhagarika ikwirakwizwa ry'ibicuruzwa byatumijwe n'uregwa biriho ikirango ''Wild Olive'' gitera urujijo ku bicurizwa bifite ikirango cy'urega kizwi nka ''KANTA Brand'', ikaba yo itaregwa kuba yarakoresheje mu Bushinwa ibyo bicuruzwa nk'uko biri mu rubanza RCOMA 00194/2016/HC/HCC .

[21] Urukiko rurasanga, hashingiwe ku biteganywa n'ingingo ya 14 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru, DRESOCECO Ltd itakwitwaza ko hari urubanza Nº RCOMA 00194/2016/HC/HCC rwavuzwe haruguru, rwaciwe ku rwego rwa nyuma n'Urukiko Rukuru rw'Ubucuruzi, ngo ivuge ko ikirego yarezwe na MININTCO Ltd kitagombaga kwakirwa, kuko ababuranyi atari bamwe n'ikiburanwa atari kimwe mu ngingo zacyo zose, bityo kuba ikirego MININTCO Ltd yareze DRESOCECO Ltd cyarakiriwe kigasuzumwa n'inkiko zabanje bifite ishingiro. Ikigaragara ahubwo n'uko muri izo manza zombi, Urukiko Rukuru rw'Ubucuruzi rwasesenguye mu buryo butandukanye ikibazo cyo kumenya niba ibicuruzwa bifite ikirango cya "Wild Olive" gitera urujijo ku bifite ikirango cya

"KANTA Brand", uru rukiko rukaba rero rukwiye gutanga umurongo kuri iki kibazo.

[22] Ku birebana n'ibyo abahagarariye DRESOCECO Ltd baburanisha bavuga ko ihame ry'agaciro k'urubanza rwabaye itegeko ridakurikizwa mu manza zerekeye umutungo bwite mu by'ubwenge, Urukiko rurasanga umwanditsi Yves FAURE bashingiraho mu gika cya 12 cy'uru rubanza, nawe yarashimangiye iryo hame, avuga kandi ko rikurikizwa no mu manza zerekeye umutungo bwite mu by'ubwenge, asobanura ko muri izo manza ikigorana kugaragaza ari ikibazo kijyanye no gusobanura ikiburanwa (objet), naho ibyerekeye ababuranyi bamwe n'impamvu zimwe byo bitagoye gusesengura. Atanga urugero rw'igihe ikiburanwa aba ari kimwe ku buryo gishobora gutuma ikirego kitakirwa hashingiwe kuri iryo hame, avuga ko iyo hari urubanza rwemeje ko habayeho kwigana ikirango cy'undi ku gicuruzwa rwabaye itegeko, ntibyemewe ko hagira umuburanyi utanga ikindi kirego bundi bushya cyerekeranye no kuba hatarabayeho kwigana icyo kirango ku gicuruzwa kimwe, ko ibyo binashoboka ku rubanza rw'inshinjabyaha n'urw'imbonezamubano zerekeye kwigana ibirango[3].

[23] Urukiko rurasanga rero, kuba uyu mwanditsi yaratanze ingero ku kiburanwa kimwe, bitavuze ko nk'uko nawe abisobanura haruguru, iyo ikiburanwa ari kimwe, bitaba ngombwa no gusuzuma niba n'ababuranyi ari bamwe, ko kandi n'impamvu ikirego gishingiyeho ari zimwe.

[24] Ku byerekeye urubanza rwaciwe na "TGI Paris, 23 févr.2007" n'urubanza rwa "Merk Shap et Dhome",

[3] Ibyo Yves FAURE yanditse bigaragara hasi ku rupapuro rwa 4.

DRESOCECO Ltd iburanisha ishaka kugaragaza ko ihame ry'agaciro k'urubanza rwabaye itegeko ridakurikizwa mu manza zerekeye umutungo bwite, Urukiko rurasanga, uretse kuzivuga gusa, ntazo yashyikirije uru Rukiko ku buryo hamenyekana inkiko zaziciye n'ibyemezo zazifashemo, kandi nta sesengura yazikoreye ngo igaragaze ibitekerezo izikuramo, rukaba rero ntaho rwahera ruzishingiraho muri uru rubanza.

[25] Hashingiwe ku bimaze gusobanurwa, Urukiko rurasanga ubujurire bwa DRESOCECO Ltd bugamije kugaragaza ko ikirego cya MININTCO Ltd kitagomba kwakirwa nta shingiro bufite.

b. Kumenya niba Urukiko Rukuru rw'Ubucuruzi rwaremeje ko ibicuruzwa bifite ikirango cya ''Wild olive'' bitera urujijo ku bicuruzwa bifite ikirango cya "KANTA Brand" mu buryo budahura n'ibiteganywa n'ingingo z'Itegeko Nº 31/2009 ryo ku wa 26/10/2009 rigamije kurengera umutungo bwite mu by'ubwenge rwashingiyeho

[26] Ababuranira DRESOCECO Ltd bavuga ko mu Rukiko rw'Ubucuruzi rwa Nyarugenge basobanuye neza ko ibicuruzwa byayo bifite ikirango cya "Wild Olive" bitigana iby'ikirango cya "KANTA Brand", kubera ko n'ubwo MININTCO Ltd ivuga ko mu miterere yabyo nta tandukaniro bifite (signes distinctifs), nyamara siko bimeze, ko n'ubwo Urukiko Rukuru rw'Ubucuruzi rwemeje ko bisa, nyamara nta sano bifitanye, kuko bidateye kimwe, ndetse n'amagambo agiye yanditseho si amwe nk'uko Urukiko rw'Ubucuruzi rwa Nyarugenge rwari rwabibonye mu gace ka 6 k'urubanza RCOM 00385/2017/TC/Nyge.

[27] Bavuga na none ko ibyo MININTCO Ltd ivuga ko ku ikarito ya ''Kanta Brand'' hariho umunzani, ariko kuri ''Wild

olive'' hariho ishami rifite imbuto ebyiri naryo rijya kumera nk'umunzani ari ugucishiriza, naho ku bijyanye n'amabara, bakavuga ko n'ubwo hari amwe ajya kumera kimwe, ariko atari yose, ko kandi hari amabara abantu kimwe n'inganda bakunze kwifashisha agaragara neza, ko rero ibicuruzwa bifite ikirango cya ''Wild olive'' bidatera urujijo mu baguzi ku buryo babyitiranya n'ibifite icya ''Kanta Brand''.

[28] Basanga rero Urukiko Rukuru rw'Ubucuruzi rutaragombaga gushingira ku biteganywa n'ingingo ya 1, iya 3, iya 4 n'iya 5 z'Itegeko nº 31/2009 ryo ku wa 26/10/2009 rigamije kurengera umutungo bwite mu by'ubwenge, kuko isura z'ibirango byombi zidahuye, ko n'ubuhamya bwatanzwe n'umukozi wa RDB nta kuri kurimo. Bongeraho ko no mu rubanza RCOMA 00194/2016/CHC/HCC haburana MININTCO Ltd yaregaga Unitex Rwanda Ltd nayo yaranguye ibicuruzwa bya "Wild Olive" mu gihugu cy'Ubushinwa rwavuzwe haruguru, urwo Rukiko rwemeje ko ibirango byombi ntaho bihuriye, ko amavuta ya ''Wild olive'' adatera urujijo ku kirango cya ''KANTA Brand'', ariko mu rubanza rujuririrwa umucamanza ntiyagaragaje impamvu yanze gushingira ku byemejwe muri urwo rubanza.

[29] Bavuga na none ko kuba abahagarariye MININTCO Ltd biyemereye ko ikiburanwa atari igicuruzwa (produit), kuko n'izindi sosiyete nka SULFO RWANDA nayo y'Abahinde zikora amavuta ahindura umusatsi umukara, ko ikiburanwa ari ikirango (trade mark), nta kimenyetso batanga kigaragaza ko bataburana ibicuruzwa, kimwe gikorerwa mu Buhinde n'ikindi gikorerwa mu Bushinwa, ko ahubwo ikirego cyayo kigamije kwiharira isoko mu bucuruzi, ibyo bikaba binyuranyije n'ibiteganywa n'ingingo za 2, 4, 6 na 7 z'Itegeko Nº 31/2009 ryo

ku wa 26/10/2009 rigamije kurengera umutungo bwite mu by'ubwenge.

[30] Ku byerekeye urubanza HCT-00-CC-CS-0829-2007 rwaciwe n'Urukiko Rukuru rwa Uganda ku wa 16/05/2008, MININTCO Ltd ivuga ko rwemeje ko ikirango ''Smart Look'' ari urwiganwa rw'ikirango ''KANTA brand'', ababuranira DRESOCECO Ltd bavuga ko nta sano rufitanye n'ibiburanwa muri uru rubanza by'ikirango hagati ya ''Wild olive'' na ''KANTA Brand''.

[31] Uhagarariye MININTCO Ltd avuga ko ingingo z'amategeko Urukiko Rukuru rw'Ubucuruzi rwashingiye mu guca urubanza zijyanye n'icyaburanwaga, ko rwagaragaje ikiba kigamijwe mu kurengera umutungo bwite mu by'ubwenge nk'uko kigaragara mu ngingo za 1 - 5, z'Itegeko N° 31/2009 ryo ku wa 26/10/2009 rigamije kurengera umutungo bwite mu by'ubwenge, runagaragaza impamvu hakwiye gukumirwa ihiganwa ririmo uburiganya rikorwa na DRESOCECO Ltd (ingingo ya 178) rugendeye mu bikorwa byayo byo gutera urujijo mu bucuruzi bwa MININTCO Ltd bw'amavuta asigwa mu musatsi kugira ngo ube umukara (ingingo ya 180).

[32] Avuga ko ibyo DRESOCECO Ltd ivuga ko atariyo yakoze "Wild olive" ahubwo ko yayiranguye gusa, bityo ikaba idakwiye kuregwa, ko itigeze yandikisha ikirango cyigana "KANTA Brand" nta shingiro bifite, kubera impamvu zikurikira:

- Iki kirego cya MININTCO Ltd kigamije gusaba urukiko kubahiriza umutungo bwite mu by'ubwenge wandikishijwe (enforcement of IPRS), kandi DRESOCECO Ltd yafatanywe ibicuruzwa bifite ikirango cyigana ikirango "KANTA Brand" ikaba itagaragaza

ingingo n'imwe y'amategeko iyirengera ibuza ko yakurikiranwa.

- Kuba DRESOCECO Ltd ivuga ko itigeze yandikisha ikirango cyigana "KANTA Brand" ni impamvu ikomeye ishimangira ikirego cya MININTCO Ltd, ko kandi bitumvikana ukuntu DRESOCECO Ltd idashobora kwandikisha ikirango "Wild olive" ku rwego rubifitiye ububasha, ariko igaca ku ruhande ikagikoresha mu bucuruzi bwayo.

[33] Uhagarariye MININTCO Ltd akomeza avuga ko n'ubwo DRESOCECO Ltd ivuga ko ikirango "Wild olive" kitigana ikirango "KANTA Brand", ingingo ya 136 y'Itegeko N° 31/2009 ryo ku wa 26/10/2009 ryavuzwe haruguru, ivuga ko ikirango kiba kigana ikindi iyo: 1° "gifite isura ihwanye, cyangwa isura isa ku buryo butera urujijo, n'iy'ikirango cyangwa izina ry'ubucuruzi, bisanzwe byaramamaye ku butaka bw'u Rwanda"; 2° "gifite isura ihwanye, cyangwa isura isa n'iy'ikirango cyanditswe undi muntu atunze (…) kikaba kiranga ibikorwa bimwe cyangwa imirimo imwe (…) ku buryo gishobora gutuma kwibeshya bishoboka, cyangwa kigatera urujijo".

[34] Umuyobozi wa MININTCO Ltd avuga ko yatanze ibimenyetso by'uko amavuta asigwa mu musatsi kugirango ube umukara afite "KANTA Brand" akorerwa mu gihugu cy'Ubuhinde mu ruganda rwashinzwe na Sekuruza witwa NANOOMAL ISSADRAS MOTIWALA mu mwaka wa 1929, rukaba rufite ibyangombwa kuri icyo kirango muri icyo gihugu, ko rwatangiye rufite izina ry'uwarushinze NANOOMAL ISSADRAS MOTIWALA, ariko nyuma ruza guhindura izina rwitwa RRG, izi akaba ari impine z'amazina ya ba nyiri imigabane barwo aribo sekuru (RAMCHAND Nanoomal Jham),

se (GULAB RAMCHAND Jham), na nyina (Usha GULAB Jham), ko ayo mavuta yageze muri Afrika y'Iburasirazuba n'u Rwanda rurimo mu myaka ya 1960, ko ababyeyi be bamuhaye ububasha bwo gukora ibyo amategeko yo muri ibi bihugu ateganya mu gusigasira ubucuruzi bw'ayo amavuta ubwo byari bimaze kugaragara ko butangiye gusubira inyuma kubera abayigana, maze ashinga sosiyete MININTCO Ltd yandikisha n'ikirango "KANTA Brand" mu Rwanda.

[35] Ku byerekeranye n'uko ikirango "Wild olive" cyaba kigana ikirango "KANTA Brand", Umuyobozi wa MININTCO Ltd yifashishije agakarito k'amavuta afite ikirango cya "Wild olive" akakagereranya n'akazamo amavuta afite icya "KANTA Brand", agaragaza ko ikirango "Wild olive" ari urwiganwa rukabije rw'ikirango "KANTA Brand" ku buryo abaguzi b'amavuta ahindura umusatsi umukara bashobora kwibeshya byoroshye bakagura aya "Wild olive" bakeka ko ari aya "KANTA Brand", kubera impamvu zikurikira:

> Ku bijyanye n'imiterere n'amabara by'udukarito duto tubamo utundi dukarito duto cyane cumi na tubiri (12):
>
> "Wild olive" ipfunyitse mu dukarito dufite imisusire (forme) n'ingano bimwe n'ibyo udukarito twa "KANTA Brand" dupfunyitsemo;
>
> Ku dukarito twa "Wild olive" n'utwa "KANTA Brand" usangaho amabara y'umutuku, ubururu, umweru n'umuhondo kandi ayo mabara ateye ku buryo bumwe (imisusire);
>
> amagambo "KANTA Brand" afite ibara ry'umutuku yanditse mu buso (background) bw'umuhondo, ibi ni nako bimeze kuri "Wild olive";

amagambo BLACK HAIR DYE afite ibara ry'ubururu yanditse mu buso (background) bw'umweru haba kuri "KANTA Brand" no kuri "Wild olive";

amagambo MADE IN INDIA kuri "KANTA Brand" na MADE IN CHINA kuri "Wild olive" yanditse mu ibara ry'ubururu mu buso (background) bw'umuhondo;

Ikirango cya "KANTA Brand" kigaragara mu buso bw'umweru kikaba kiri hagati mu ruhande rwo hejuru;

kuri "KANTA Brand" no kuri "Wild olive" uhasanga amagambo "BUY ORIGINAL" y'ibara ry'ubururu yanditse mu buso bw'umuhondo, mu nguni y'ibumoso hejuru.

Ku bijyanye n'imiterere n'amabara by'udukarito duto cyane tubamo agacupa kamwe kamwe

Ku ruhande rumwe:

kuri "KANTA Brand" no kuri "Wild olive" uhasanga amagambo "BUY ORIGINAL" y'ibara ry'ubururu yanditse mu buso bw'umuhondo, mu nguni y'ibumoso hejuru;

Amagambo "KANTA Brand" afite ibara ry'umutuku ryanditse mu buso (background) bw'umuhondo, ibi ni nako bimeze kuri "Wild olive";

Amagambo BLACK HAIR DYE afite ibara ry'ubururu bwanditse mu buso (background) bw'umweru haba kuri "KANTA Brand" no kuri "Wild olive";

Ikirango cya "KANTA Brand" kigaragara mu buso bw'umweru kikaba kiri hagati, ni nako bimeze kuri "Wild olive";

Kuri "Wild olive" uhasanga "NET: 4.5 g" mu mwanya umwe n'uwo usangaho "Nt: 4.5 g" kuri "KANTA Brand", ibyo kandi biri mu ibara ry'ubururu ku dukarito twombi;

Ku misozo yo hasi y'udukarito twa "KANTA Brand" n'utwa "Wild olive" uhasanga amagambo yanditse mu ibara ry'ubururu agize imirongo ibiri kandi ayo magambo ari mu buso bw'ubururu;

Ku rundi ruhande:

[36] Kuri "KANTA Brand" no kuri "Wild olive" uhasanga amagambo "NEW PACK" afite ibara ry'umuhondo yanditse mu buso bw'ubururu bufite ishusho y'inyenyeri;

uruhande ruteganye n'ururiho amagambo "Gives your grey Hair a Youthful & Natural Black Shine" yandikishijwe ibara ry'umuhondo

Ku bijyanye n'imiterere y'uducupa: uducupa twa "Wild olive" duteye ijana ku ijana nk'uducupa twa "KANTA Brand" ndetse n'ibirango biriho (étiquettes) birasa nk'uko bigaragara ku dukarito twatwo.

[37] Uhagarariye MININTCO Ltd avuga ko abahanga mu mategeko yerekeye umutungo bwite mu by'ubwenge M. F. Maraiss, na T. Lachacinski, mu gitabo cyabo "Application des droits de propriété intellectuelle", in OMPI, Recueil de jurisprudence, 2008, p. 65, bagaragaza ko ufite uburenganzira ku kirango yandikishije ku rwego rubifitiye ububasha ari we wenyine wemerewe gucuruza ibicuruzwa bigaragazwa n'icyo kirango mu ifasi yacyandikishijemo (principe de territorialité).

[38] Yongeraho ko n'urubanza HCT-00-CC-CS-0829-2007 rwaciwe n'Urukiko Rukuru rwa Uganda ku wa 16/05/2008, rwemeje ko ikirango "Smart Look" ari urwiganwa rw'ikirango "KANTA Brand", kuko n'ubwo amazina agize ibyo birango atandukanye, imisusire yabyo isa (aspect visuel).

[39] Ku byo abahagarariye DRESOCECO Ltd bavuga ko MININTCO Ltd idashaka ihiganwa, ko ishaka kwiharira isoko ryo gucuruza amavuta asigwa mu musatsi ngo ube umukara, ngo kuko ihiganwa ririmo uburiganya rigaragazwa na "imitation, parasitisme, dénigrement", cyangwa "désorganisation de l'entreprise", ngo ikaba kandi itumva niba iki kirego cyerekeye kwigana ikirango (action en contrefaçon) cyangwa ubucuruzi burimo uburiganya (action en concurence déloyale), Me Nsengumuremyi Cyridion avuga ko MININTCO Ltd idashaka kwiharira isoko, ko n'ikimenyimenyi hari abandi bacuruza amavuta ahindura umusatsi umukara ku isoko ry'u Rwanda, hakaba nta kibazo na kimwe bigeze bagirana nayo, barimo Sulfo Rwanda Industries ikoresheje ibirango byayo "BEAUTE" na "BLACK PEARL" byagaragarijwe uru Rukiko, kuko hagati y'aya masosiyete yombi hakorwa ihiganwa riciye mu mucyo ritarimo uburiganya, naho ihiganwa DRESOCECO Ltd yo yifuza ari iririmo uburiganya, kuko ibirango by'ibicuruzwa byayo ari urwiganwa rw'icya MININTCO Ltd ku bicuruzwa bimwe ku isoko rimwe, ikaba ishaka kuyuririraho mu buryo bw'uburiganya kugira ngo yigarurire isoko ryayo igendeye ku mabara n'ibindi bigize ikirango "KANTA Brand".

UKO URUKIKO RUBIBONA

[40] Uru rubanza rukomoka ku bicuruzwa by'amavuta ahindura umusatsi umukara DRESOCECO Ltd yatumije mu Bushinwa bifite ikirango cya "Wild olive", bifatirwa muri Gasutamo kubera ko MININTCO Ltd ivuga ko icyo kirango gitera urujijo ku mavuta ahindura umusatsi umukara icuruza ava mu gihugu cy'Ubuhinde afite ikirango cya "KANTA Brand" ifiteho uburenganzira bwihariye ihabwa n'uko yacyandikishije muri RDB, ko rero DRESOCECO Ltd ikora ubucuruzi burimo uburiganya, igasaba ko urukiko rwayitegeka guhagarika ikwirakwizwa ry'ibyo bicurizwa, ibyafatiriwe bigasenywa.

[41] Ingingo ya 178 y'Itegeko Nº 31/2009 ryo ku wa 26/10/2009 rigamije kurengera umutungo bwite mu by'ubwenge iteganya ko "Hejuru y'uburindwe bw'umutungo bwite mu by'ubwenge buteganywa n'iri tegeko, igikorwa cyose cy'ubucuruzi, cy'inganda, cyangwa cy'ubukorikori kirindwa ipiganwa ririmo uburiganya".

[42] Ku byerekeye ibikorwa by'ipiganwa birimo uburiganya, ingingo ya 180 y'iryo Tegeko iteganya ko "Gifatwa nk'igikorwa cy'ipiganwa ririmo uburiganya igikorwa cyangwa imigenzereze mu mirimo y'inganda cyangwa y'ubucuruzi, bitera cyangwa bikaba bishobora gutera urujijo, mu buryo ubwo ari bwo bwose, mu kigo cy'ukora imirimo imwe cyangwa ibicuruzwa bimwe nk'iby'undi cyangwa umuntu cyangwa ibikorwa bye cyane cyane mu rwego rw'ibyatunganyijwe cyangwa imirimo itangwa n'ikigo.

Urujijo rushobora kuba kuri ibi bikurikira:

1º ikirango cyandikishijwe cyangwa kitandikishijwe ;

2º izina ry'ubucuruzi ;

3º ikimenyetso cyihariye cy'ubucuruzi ;

4º isura y'icyatunganyijwe cyangwa y'umurimo ;

5º imiterere y'icyatunganyijwe ;

6º ukwamamara cyangwa ukumenyekana kw'akarango mpisho ; "

[43] Na none ingingo ya 179 y'iryo Tegeko iteganya ko "Umuntu wese urenganyijwe cyangwa ushobora kurenganywa n'igikorwa cy'ipiganwa ririmo uburiganya ashobora kuregera urukiko rubifitiye ububasha, iyo habaye ibikorwa by'ubuhemu mu rwego rw'inganda n'ubucuruzi, aho umunyenganda, umucuruzi, ukora imirimo yo gutunganya, umunyabukorikori, amutesha agaciro, amwambura abaguzi cyangwa se akabangamira ubushobozi bwe bwo gupiganwa. Urukiko rubifitiye ububasha ruhagarika icyo gikorwa kandi byaba ngombwa rukagena indishyi".

[44] Izi ngingo zumvikanisha ko hejuru y'uburindwe bw'umutungo bwite mu by'ubwenge, igikorwa cyose cy'ubucuruzi, cy'inganda, cyangwa cy'ubukorikori kirindwa ipiganwa ririmo uburiganya, ko umuntu wese urenganyijwe cyangwa ushobora kurenganywa n'igikorwa cy'ipiganwa ririmo uburiganya ashobora kuregera urukiko rubifitiye ububasha kugira ngo ruhagarike icyo gikorwa.

[45] Ku byerekeye ibishingirwaho kugira ngo hamenyekane niba hari urujijo hagati y'ibirango bibiri, umuhanga mu mategeko Deborah E.Bouchoux, avuga ko inkiko zimwe zo muri Leta Zunze Ubumwe z'Amerika zagiye zishyiraho ibigomba gushingirwaho mu kugaragaza ko hashobora kuba harabayeho

kwica amategeko hagati y'ibirango bibiri, ko muri rusange ikintu kimwe kitihagije ubwacyo kugira ngo hamenyekane ko harimo koko urujijo, ko ahubwo inkiko zigerageza gusesengura zikareba niba hari impamvu yaba ituma haba urujijo. Zimwe muri izo mpamvu ni izi[4]

- Ugusa kw'ibirango ku buryo bugaragara, mu buryo byumvikana mu majwi no mu buryo byanditswe mu bucuruzi ;
- Ugusa kw'ibicuruzwa na servisi zitangwa hashingiwe ku birango ;
- Ugusa kw'imimiyoboro ikoreshwa mu bucuruzi ;
- Uburyo bukoreshwa mu bucuruzi: hari abagura batabanje gushishoza cyane, hari n'abagura biturutse ku bumenyi bafite ku bicuruzwa runaka ;

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[4] *"Divers tribunaux, dans différentes circonscriptions judiciaires ont établi des tests pour déterminer la probabilité de confusion entre deux marques. En général, aucun facteur n'est à lui seul déterminant; les tribunaux examinant toutes les circonstances en tentant de déterminer l'existence éventuelle d'une violation. Généralement, pour déterminer s'il y a contrefaçon, ils prennent en considération les facteurs suivants: - la similitude des marques quant à l'apparence, au son, à la connotation et à l'impression commerciale; - la similitude des biens ou services proposés au titre des marques; - la similitude des réseaux commerciaux par lesquels transitent les biens ou services proposés; - les conditions de réalisations de ventes, à savoir: les achats sont-ils faits sur une impulsion ou après un examen approfondi par les acheteurs éclairés? - la force de la marque antérieure; - l'existence de la confusion antérieure effective; - le nombre et la nature des marques similaires sur des biens similaires; - la durée pendant laquelle l'exploitation des marques a été comcomittante sans confusion", DEBORAH E.BOUCHOUX, La propriété intellectuelle, le droit des marques, le droit d'auteur, le droit des brevets d'invention et des secrets commerciaux, Nouveaux Horizons, p. 97.*

- Ingufu ikirango gisanganywe ;
- Kuba hari ubundi higeze kubaho urujijo ku kirango ;
- Umubare n'ubwoko buhari bw'ibirango bisa cyangwa se ibicuruzwa bisa ;
- Igihe ibirango bimaze bikoreshwa hamwe bidatera urujijo.

[46] Nk'uko bigaragara mu buhamya bwatanzwe ku wa 19/07/2017 na Mbaraga Blaise, impuguke ya RDB, yagaragaje ibyo bashingiraho mu gusuzuma ikirango mbere y'uko cyandikwa ari byo: kureba uwandikishije bwa mbere ikirango, akaba ari we ufite uburenganzira ku kirango cy'ubucuruzi (first to file principle), ihame ry'itandukanya ry'ibirango (distinctivness principle), ihame ry'uburiganya (not imitativeness principle), ihame ryo gutera urujijo (not confucting principle) n'icyiciro cy'ikirango gikoresha mu bikorwa bitandukanye, harimo ibicuruzwa cyangwa sevisi (nice classification of good and service).

[47] Iyo mpuguke yasesenguye kandi ikirango cya "Wild Olive" n'icya "KANTA Brand", isanga "Wild Olive" itanditswe mu magambo cyangwa mu isura muri RDB, ariko "KANTA Brand" yaranditswe ku wa 15/02/2012 kuri RW-M100004413 yahinduwe ikaba RW/T/2012/413. Ku byerekeye amagambo akubiye mu birango, yavuze ko "KANTA Brand" na "Wild Olive" zitandukanye kandi zombi zishobora gukoreshwa ku isoko kandi "Wild" ikanakirwa muri Ofisi y'Umwanditsi mu magambo gusa ariko "Olive" ikangirwa kuko ari izina rusange.

[48] Ku byerekeye amagambo "black hair dye", yasobanuye ko ari amagambo rusange umuntu wese ashobora gukoresha

kandi atemewe kwandikishwa nk'ikirango, naho ku isura y'ibirango avuga ko byombi bisa hakurikijwe imirongo, amabara n'imimerere yabyo, ko "dominant test of similarity" iri hejuru cyane kuko byombi bifite imirongo isa 100%, n'amabara asa 100%, ko ukuyeho amagambo hagasigara isura (appearence), bigora umuguzi uwari wese kubitandukanya, ko kandi ibyo birango byombi biri mu byiciro bimwe ari byo *"bleaching preparation and other substances for laundry use, cleaning, polishing, scouring and abrasive preparation, soaps, perfumery, essential oil, cosmetics, hair lotions, dentifrices",* cyane cyane ko ari "hair dye".

[49] Urukiko Rukuru rw'Ubucuruzi, rushingiye kuri iri sesengura ry'impuguke ya RDB, rwemeje ko ikirango "Wild Olive" kiri ku bicuruzwa byatumijwe na DRESOCECO Ltd ari urwiganwa rw'ikirango cya "KANTA Brand" cyandikishijwe muri RDB na MININTCO Ltd, kubera ko ibicuruzwa byombi bifite isura isa (appearence) ndetse n'ibirango bifite isura zisa cyane (dominant test of similarity), ko kandi imirongo igize ikirango cya "KANTA Brand" imaze kwamamara cyane nk'akarango mpisho (a celebrity or well-known fictional mark), bityo ko nta wundi ugifiteho uburenganzira atari MININTCO Ltd, ko n'amabara y'umuhondo, ubururu n'umutuku ari ku birango byombi asa cyane (appearence and positionning) kandi bitagomba gusa.

[50] Urukiko rurasanga kuba Urukiko Rukuru rw'Ubucuruzi rwarashingiye kuri ubwo buhamya bw'umuhanga nta kosa rwakoze, kuko ari ikimenyetso cyemewe n'ingingo ya 76 y'Itegeko Nº15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, iteganya ko *"ubuhamya bw'abahanga ni ubugamije guha urukiko*

ibisobanuro bishingiye ku bumenyi kimwe n'umwanzuro urenze ubumenyi busanzwe bw'umucamanza mu kazi ke bitewe n'uko ibiburanwa bishingiye ku buhanga bwihariye".

[51] Urukiko rurasanga kandi umwanzuro wagezweho n'impuguke ya RDB uhuje n'ukuri, hanashingiwe ku byo rwagaragarijwe n'Umuyobozi wa MININTCO Ltd igihe cy'iburanisha, kuko narwo rwiboneye ko udukarito turimo amavuta ahindura umusatsi dufite ikirango cya "Wild Olive" acuruzwa na DRESOCECO Ltd dusa cyane n'utw'amavuta nk'ayo afite ikirango cya "KANTA Brand" acuruzwa na MININTCO Ltd, haba ku mabara y'umuhondo, ubururu n'umutuku, amagambo yanditseho n'uburyo yanditse, n'imirongo ishushanyijeho, ku buryo umuguzi udasobanukiwe neza yakwitiranya ibicuruzwa bifite ibyo birango byombi.

[52] Urukiko rurasanga rero kuba DRESOCECO Ltd itumiza mu Bushinwa ibicuruzwa bifite ikirango cya "Wild Olive" kigaragara ko ari urwiganwa rw'ikirango cya "KANTA Brand" cyandikishijwe muri RDB na MININTCO Ltd, ikabicuruza mu Rwanda aho MININTCO Ltd yemerewe gucururiza ku kirango cya "KANTA Brand", bigize igikorwa cy'ipiganwa ririmo uburiganya mu mirimo y'ubucuruzi bwa MININTCO Ltd, kuko gitera urujijo ku kirango kimenyerewe cya "KANTA Brand" ku buryo abaguzi bashobora kwitiranya ibyo bicuruzwa byombi, bikaba bibangamiye ubucuruzi bwayo.

[53] Urukiko rurasanga ibyo DRESOCECO Ltd ivuga ko itiganye ikirango cya ''KANTA Brand'' nta shingiro bifite, kubera ko yarezwe ko ikwirakwiza ibicuruzwa itumiza mu mahanga biriho ikirango ''Wild Olive'' gitera urujijo ku bicuruzwa bya MININTCO Ltd bifite ikirango cya ''KANTA Brand'', ntabwo yarezwe ko ari yo yacyiganye, ndetse n'ibyo

ivuga ko yaranguye ibicuruzwa mu Bushinwa atari yo ibikora nta gaciro byahabwa, kuko ibyo ikora byo gutumiza ibicuruzwa bifite ikirango cya ''Wild Olive'' kigana icya ''KANTA Brand'' ni byo biteganywa n'itegeko ko bigize ipiganwa ririmo uburiganya.

[54] Urukiko rurasanga na none kuba DRESOCECO Ltd ivuga ko yatumije ibicuruzwa bifite ikirango cya ''Wild Olive'' ari uko imaze kubona urubanza RCOMA 00194/2016/HC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi rwavuzwe haruguru rwemeje ko ikirango cya ''Wild Olive'' kidatera urujijo ku cya '' 'KANTA Brand'', ikanabishingiraho isaba kurenganurwa nk'uko Unitex Rwanda Ltd yarenganuwe, bitafatwaho ukuri kubera ko, nk'uko bigaragazwa n'amasezerano y'ubuguzi (order contract) ari muri dosiye, DRESOCECO Ltd yaranguye ibyo bicuruzwa ku wa 29/09/2016, urubanza rucibwa ku wa 12/10/2016, bikaba rero bigaragara ko yabiguze mbere y'urwo rubanza, kandi nk'uko byagaragajwe haruguru ''Wild Olive'' ni urwiganwa rwa ''KANTA Brand'' nk'uko byemejwe mu rubanza rwajuririwe.

[55] Urukiko rurasanga, hejuru yo kuba MININTCO Ltd ifite uburenganzira bwihariye ku kirango cyayo "KANTA Brand" ihabwa n'Itegeko Nº 31/2009 ryo ku wa 26/10/2009 ryavuzwe haruguru, igomba no kurindwa ipiganwa ririmo uburiganya, bityo DRESOCECO Ltd ikaba igomba guhagarika itumizwa ry'ibicuruzwa bifite ikirango cya ''Wild Olive'' no kubicururiza mu Rwanda nk'uko byemejwe n'Urukiko Rukuru rw'Ubucuruzi.

[56] Harebwe imanza zaciwe mu bindi bihugu, icyemezo nk'iki cyafashwe mu rubanza rwaciwe ku wa 11/04/2018 n'Urukiko rw'ubucuruzi rwa Versaille, urugereko rwa kabiri, mu gihugu cy'ubufaransa aho sosiyete 3DVIA yahindutse Dassault

Systemes yareze sosiyete La SAS Wanadev, urwo rukiko rwemeza ko ibikorwa bya La SAS Wanadev bigize ipiganwa ririmo uburiganya ryakorewe Dassault Systemes kuri "Logiciel" yakoze yitwa "HomeByMe", kuko yayiganye imikorere, ishusho ndetse n'ibiyigize ku buryo bitera urujijo ikora iyayo yitwa "Wanaplan" yagurishije sosiyete Adéo, maze rwemeza ko iyo migenzereze igize ihiganwa ririmo uburiganya (concurrence déloyale), rutegeka La SAS Wanadev kwishyura Société Dassault Systemes indishyi zingana na 50.000 Euros, runayitegeka guhagarika gukoresha iyo "logiciel" itera urujijo, itabikora mu gihe cy'iminsi 30 urubanza rusomwe, igacibwa 1.000 euros buri munsi y'igihano, kandi urubanza rugashyirwa ku rubuga (website) rwa Dessault Systemes.

[57] Hashingiwe ku ngingo za 178-180 z'Itegeko Nº 31/2009 ryo ku wa 26/10/2009 ryavuzwe haruguru no kubimaze gusobanurwa, Urukiko rurasanga ubujurire bwa MININTCO Ltd kuri iyi ngingo nta shingiro bufite, bikaba rero atari ngombwa gusuzuma niba yahabwa indishyi z'igihombo ivuga ko yagize.

c. Kumenya niba ibicuruzwa bya DRESOCECO Ltd byafatiriwe na Gasutamo byasenywa

[58] Abahagarariye MININTCO Ltd bavuga ko uru Rukiko rukwiye kwemeza ko ubujurire bwa DRESOCECO Ltd nta shingiro bufite, ko ikirango "Wild olive" ari urwiganwa rw'icya "KANTA Brand", maze rugategeka ko ibicuruzwa bifite ikirango cya "Wild olive" bitera urujijo mu baguzi mu kubitandukanya n'ibicuruzwa by'amavuta asigwa mu misatsi kugira ngo ube umukara bifite ikirango cya "KANTA Brand" bya MININTCO Ltd, rukanemeza ko bitemewe gucururizwa ku butaka bw'u Rwanda, rugategeka ko ibyafatiriwe muri Gasutamo bisenywa.

[59] Ababuranira DRESOCECO Ltd bavuga ko irimo gukorerwa akarengane, kuko yaranguye amavuta afite ikirango cya "Wild Olive"yumva ko nta kosa irimo gukora, ko kandi n'iyo urukiko rwasanga icyo gicuruzwa ari urwiganwa rutera urujijo, uretse ko atari byo, yahabwa ibyo bicuruzwa byafatiriwe muri Gasutamo, kuko nta mugambi wo kubangamira MININTCO Ltd yari ifite.

UKO URUKIKO RUBIBONA

[60] Urukiko rurasanga ibyo MININTCO Ltd isaba ko ibicuruzwa bya DRESOCECO Ltd byafatiriwe na Gasutamo byasenywa, no mu Rukiko Rukuru rw'Ubucuruzi yari yabisabye ibishingiye ku ngingo ya 258 y'Itegeko Nº 31/2009 ryo ku wa 26/10/2009 ryavuzwe haruguru, ariko iyi ngingo yerekeranye no *"gusaba no gufata ibyemezo bikosora birebana n'umutungo mu by'inganda"*, kandi nk'uko byasobanuwe haruguru, icyo MININTCO Ltd ikurikiranye kuri DRESOCECO Ltd si uko ifite uruganda rukora ibiciruzwa byiganye ikirango cyayo ikwirakwiza (action en contrefaçon), ahubwo iyikurikiranyeho ibikorwa by'ipiganwa ririmo uburiganya (concurrence déloyale), ikaba rero ntaho yahera isaba ko ibicuruzwa byayo bisenywa, kubera ko ingingo ya 179 y'Itegeko Nº 31/2009 ryo ku wa 26/10/2009 yibukijwe haruguru iyemerera gusa gusaba guhagarikisha igikorwa cy'ipiganwa ririmo uburiganya, no kuba yagenerwa indishyi mu gihe izisabye, ariko muri uru rubanza ntazo MININTCO Ltd yasabye.

[61] Urukiko rurasanga rero, kuba DRESOCECO Ltd icururiza mu Rwanda ibicuruzwa byayo bifite ikirango cya "Wild Olive", bigize igikorwa cy'ipiganwa ririmo uburiganya, kubera ko bitera urujijo ku bicuruzwa bya MININTCO Ltd bifite

ikirango cya "KANTA Brand", ikaba rero igomba guhagarika ubwo bucuruzi nk'uko Urukiko Rukuru rw'Ubucuruzi rwabyemeje mu rubanza rwajuririwe.

d. Ku byerekeye amafaranga yo gukurikirana urubanza n'igihembo cya Avoka

[62] Ababuranira DRESOCECO Ltd bavuga ko bashingiye ku ngingo ya 111 y'Itegeko Nº 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, MININTCO Ltd igomba kuyishyura amafaranga y'igihembo cya Avoka angana na 5.000.000Frw n'andi 6.000.000Frw yishyuwe umuhanga yiyambaje ngo ayikorere raporo ku gihombo yagize.

[63] Uhagarariye MININTCO Ltd avuga ko amafaranga asabwa na DRESOCECO Ltd nta shingiro afite**.**

UKO URUKIKO RUBIBONA

[64] Ingingo ya 111 y'Itegeko Nº 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko ikirego cy'amafaranga y'ikurikiranarubanza ari igishamikiye ku kirego cy'iremezo kigamije kwishyuza ibyakoreshejwe mu rubanza, ko kiburanishwa rimwe n'ikirego cy'iremezo.

[65] Urukiko rurasanga nta mafaranga y'igihembo cy'Avoka cyangwa ay'ikurikiranarubanza DRESOCECO Ltd igomba kugenerwa, kuko ubujurire bwayo nta shingiro bufite.

III. ICYEMEZO CY'URUKIKO

[66] Rwemeje ko ubujurire bwa DRESOCECO Ltd nta shingiro bufite ;

[67] Rwemeje ko imikirize y'urubanza RCOMA 00236/2017/CHC/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 16/11/2017 idahindutse;

[68] Ruvuze ko amafaranga y'ingwate y'amagarama yatanzwe na DRESOCECO Ltd ahwanye n'ibyakozwe mu rubanza.

PHOENIX OF RWANDA ASSURANCE COMPANY Ltd v. TRANSCORP

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA 00096/2018/CA (Mukanyundo, P.J., Ngagi na Kanyange, J.) 19 Nyakanga 2019]

Amategeko agenga amasezerano – amasezerano y'ubwishingizi – Kutubahiriza amabwiriza yo gutanga ubwishingizi bigenerwa ibihano by'ubutegetsi ku ruhande rwa sosiyete y'ubwishingizi, ariko si impamvu yo gusesa amasezerano yakozwe mu buryo bwubahirije amategeko agenga amasezerano.

Amategeko agenga amasezerano – Amasezerano y'ubwishingizi – Ikimenyetso cy'ubwishyu –"Vignettes" si ikimenyetso cy'ubwishyu, ahubwo n'ikimenyetso cy'ubwishingizi bw'ikinyabiziga, uwagitanze akaba agomba kwirengera icyishingiwe igihe habaye impanuka hatitawe ko yishyuwe cyangwa atishyuwe.

Incamake y'ikibazo: Sosiyete y'ubwishingizi PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yahaye sosiyete TRANSCORP umwenda w'ubwishingizi bw'imodoka zayo mu bihe bitandukanye, impande zombi zikorana amasezerano y'inguzanyo ku bwishingizi, bumvikana no ku gihe umwenda uzaba wishyuwe. Amasezerano ntiyaje kwubahirizwa ku ruhande rw'uwahawe inguzanyo ku bwishingizi kuko itabashize kwishyura amafaranga yose, maze uwatanze inguzanyo ayirega Rukiko rw'Ubucuruzi rwa Nyarugenge isaba kwishyurwa, uru rukiko rwemeza ko ikirego nta shingiro gifite.

PHOENIX ntiyishimiye imikirize y'urubanza ijuririra Urukiko Rukuru rw'Ubucuruzi, ivuga ko TRANSCORP yemeje Urukiko ko iyo uwishingiwe atishyuye ikiguzi (prime) amasezerano ahita aseswa, kandi atari ko bimeze kuko umwishingizi afite uburenganzira bwo guhitamo icyo akora, avuga ko ubwishingizi bushobora kugurizwa. Urukiko Rukuru rw'Ubucuruzi rwemeje ko ubujurire nta shingiro bufite, ruhamishaho imikirize y'urubanza rwajuririwe.

PHOENIX yongeye ijuririra Urukiko rw'Ubujurire ivuga ko Urukiko Rukuru rw'Ubucuruzi rwitiranyije amasezerano y'ubwishingizi n'amategeko ku nguzanyo kuko nta tegeko ribaho ribuza umuntu gutanga ideni y'ubwishingizi, ivuga kandi ko impande zombi zakoze amasezerano y'ubwishingizi y'imodoka ku mwenda, zihabwa vignettes, bumvikana ko bazajya bagenda bishyura igiciro cy'ubwishingizi buhoro buhoro, ibi byose bikaba aribyo byemeza ko hari umwenda bayifitiye, bikagaragazwa kandi n'inyandiko yitwa "statement of unpaid premium" impande zombi zashyizeho umukono nk' ikimenyetso cy'umwenda ushingiye ku masezerano y'ubwishingizi.

TRANSCORP yiregura ivuga ko Urukiko Rukuru rw'Ubucuruzi rwatiranyije amasezerano y'ubwishingizi n'amategeko ku nguzanyo, ivuga ko iyi mpamvu y'ubujurire nta shingiro yahabwa kuko Amabwiriza ya Banki Nkuru y'u Rwanda abuza ibigo by'ubwishingizi gutanga ubwishingizi ku mwenda, ivuga ko mu gihe rero PHOENIX yaba yarishe aya Mabwiriza, igomba guhanwa.

TRANSCORP ivuga kandi ko Banki Nkuru y'u Rwanda ari yo ishinzwe imikorere y'amasosiyete y'ubwishingizi, ariko ko hari irengayobora ku bigo bya Leta kuko byo bishobora guhabwa ubwishingizi ku ideni gihe cy'amezi atandatu gusa.

Kubirebana n'ibimenyetso bigaragaza umwenda wishyuzwa, PHOENIX yisobanura ivuga ko hari amafaranga y'ubwishingizi TRANSCORP yagendaga isigaramo uko bahaga ubwishingizi imodoka zayo, igahabwa vignettes nubwo itishyuye, ibyo bikagaragazwa na "historique" ya banki hamwe n'inyandiko yitwa "Statement of Unpaid Premiums/ After Renewal in 2016 bigaragaza uko yagendaga yishyura buhoro buhoro, bityo ikaba isaba urukiko kuyitegeka kwishyurwa umwenda hamwe n'inyungu zawo zibariwe ku gipimo cya 21% guhera umunsi yayihanangirijeho bwa nyuma kugeza igihe izishyurirwa

TRANSCORP ku ruhande rwayo ikomeza ihakana umwenda yishyuzwa ivuga ko nta masezerano y'umwenda bagiranye kuko itari guhabwa vignettes itishyuye, akaba ari nacyo kimenyetso kigaragaza ko yishyuye, ivuga kandi ko ikomeje gushorwa mu manza nta mpamvu, bityo ikaba ibisabira indishyi.

Incamake y'icyemezo: 1. Kutubahiriza amabwiriza yo gutanga ubwishingizi bigenerwa ibihano by'ubutegetsi ku ruhande rwa sosiyete y'ubwishingizi, ariko si impamvu yo gusesa amasezerano yakozwe mu buryo bwubahirije amategeko agenga amasezerano.

2. *Vignettes* si ikimenyetso cy'ubwishyu, ahubwo n'ikimenyetso cy'ubwishingizi bw'ikinyabiziga, uwagitanze akaba agomba kwirengera icyishingiwe igihe habaye impanuka hatitawe ko yishyuwe cyangwa atishyuwe.

Ubujurire nta shingiro bufite;
Amagarama y'urubanza aherereye kuri TRANSCORP.

Amategeko yashingiweho:

Itegeko Nº 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, iteganya ko amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayigiranye, ingingo ya 64.

Amabwiriza N^{0}05/2009 yo ku wa 29/07/2009 yerekeye iyemerwa n'ibindi bisabwa mu murimo w'ubwishingizi, ingingo ya 23.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko rw'Ubucuruzi rwa Nyarugenge, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd irega TRANSCORP umwenda ungana na 83.739.236Frw ukomoka ku bwishingizi bw'amamodoka yayo iyi sosiyete yayihaye mu bihe bitandukanye guhera mu mwaka wa 2014 kugeza mu mwaka wa 2017, ivuga ko amafaranga y'ubwishingizi atishyuwe yose hasigara 83.739.236Frw.

[2] Ku wa 18/05/2018, Urukiko rw'Ubucuruzi rwa Nyarugenge rwaciye urubanza RCOM 01140/2017/TC/NYGE rwemeza ko ikirego cya PHOENIX OF RWANDA ASSURANCE COMPANY Ltd nta shingiro gifite, ruyitegeka kwishyura TRANSCORP 100.000Frw y'ikurikiranarubanza na 500.000Frw y'igihembo cya Avoka.

[3] PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ntiyishimiye imikirize y'urubanza ijuririra Urukiko Rukuru

rw'Ubucuruzi, ivuga ko TRANSCORP yemeje Urukiko ko iyo uwishingiwe atishyuye ikiguzi (prime) amasezerano ahita aseswa, nyamara atari ko bimeze kuko umwishingizi afite uburenganzira bwo guhitamo icyo akora, haba kwihanangiriza uwishingiwe, kumwishyuza ikirarane cya bwa bwishingizi yahawe cyangwa gusaba ko amasezerano aseswa; ko igihe nta mpamvu yo gusaba ko amasezerano aseswa, bitabuza umwishingizi kwishyuza nyuma y'ukwezi kumwe amaze gutanga integuza, nk'uko biteganywa mu ngingo ya 14 y'Itegeko N^{0} 20/75 ryo ku wa 20/06/1975, bityo rero ko ubwishingizi bushobora kugurizwa.

[4] Urukiko Rukuru rw'Ubucuruzi rwaciye urubanza RCOMA 00450/2018/HCC ku wa 20/09/2018, rwemeza ko ubujurire bwa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd nta shingiro bufite, ruhamishaho imikirize y'urubanza rwajuririwe.

[5] Urwo Rukiko rwasanze PHOENIX OF RWANDA ASSURANCE COMPANY Ltd nk'umunyamwuga mu by'ubwishingizi kandi izi neza ko mu mirimo yayo isanzwe isabwa kubahiriza amabwiriza ya Banki Nkuru y'u Rwanda, kuba yarishoye mu makosa yo gutanga ubwishingizi ku ideni nyuma ntiyishyurwe itari kwirirwa iregera Urukiko rufite inshingano yo gufasha mu iyubahirizwa ry'amategeko ngo ruyifashe kugira uwahatirwa kubahiriza ibyakozwe mu buryo bugaragarira buri wese ko byishe amategeko.

[6] PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yajuririye Urukiko rw'Ubujurire ivuga ko Urukiko Rukuru rw'Ubucuruzi rwitiranyije amasezerano y'ubwishingizi n'amategeko ku nguzanyo kuko nta tegeko ribaho ribuza umuntu gutanga ideni, rukaba rutaranubahirije itegeko rigenga

amasezerano cyane cyane mu ngingo yaryo ya 4, iteganya ibisabwa kugira ngo amasezerano abe yuzuye. PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ijurira kandi ivuga ko, aho gusuzuma ikigaragaza aho TRANSCORP yishyuriye, Urukiko Rukuru rw'Ubucuruzi rwasuzumye amabwiriza ya Banki Nkuru y'u Rwanda rwirengagije ubusumbane bw'amategeko, kandi ko aya mabwiriza atareba abagana abishingizi, ahubwo areba imikoranire hagati ya Banki Nkuru y'u Rwanda n'amasosiyete y'ubwishingizi.

[7] Urubanza rwabunishirijwe mu ruhame ku wa 14/05/2019 no ku wa 26/06/2019, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd iburanirwa na Me Buhuru Pierre Célestin afatanyije na Me Nsengiyumva Colette, naho TRANSCORP iburanirwa na Me Kayitare Serge afatanyije na Me Twiringiyemungu Joseph, ababuranira TRANSCORP babwira Urukiko ko baretse inzitizi bari batanze yerekeranye n'iburabubasha rw'Urukiko rw'Ubujurire.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

A. UBUJURIRE BWA PHOENIX OF RWANDA ASSURANCE COMPANY Ltd

Kumenya niba kuba PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yarahaye TRANSCORP ubwishingizi ku ideni byatuma itayishyura

[8] Ababuranira PHOENIX OF RWANDA ASSURANCE COMPANY Ltd bavuga ko Urukiko Rukuru rw'Ubucuruzi

rwitiranyije amasezerano y'ubwishingizi n'amasezerano y'inguzanyo, kuko nta tegeko ribaho ribuza umuntu gutanga ideni. Basobanura ko amasezerano PHOENIX OF RWANDA ASSURANCE COMPANY LTD yagiranye na TRANSCORP ari ay'ubwishingizi, kuko yatanze ubwishingizi bw'amamodoka yabo yose ku mwenda hagendewe ku rutonde rwazo itanga na "vignettes" zifite agaciro k'umwaka wose, bumvikana ko bazajya bagenda bishyura igiciro cy'ubwishingizi buhoro buhoro kubera imikoranire bari basanganywe, akaba ari ho bahera bavuga ko hari umwenda TRANSCORP ifitiye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd. Bavuga ko TRANSCORP ivuga ko nta mwenda w'ubwishingizi ifite, igasaba ibimenyetso byawo, yumvikanisha ko itahabwa "vignettes" itishyuye, ariko ikaba idatanga ibimenyetso by'uko yishyuye.

[9] Bakomeza bavuga ko ku birebana n'amasezerano y'ubwishingizi, ubwishyu (premium) butangwa mu minsi 30, bitaba ibyo, amasezerano akaba ashobora gusubikwa; bivuze ko iyo uwishingiwe atishyuye muri icyo gihe cy'iminsi 30, aba arimo umwenda. Bavuga ko ku birebana n'uru rubanza, "statement of unpaid premium" impande zombi zashyizeho umukono iri muri dosiye, ari ikimenyetso cy'ukoTRANSCORP ifitiye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd umwenda ushingiye ku masezerano y'ubwishingizi, mu rwego rwa mbere umucamanza akaba yaritiranyije ibintu avuga ko PHOENIX OF RWANDA ASSURANCE COMPANY Ltd itagaragaza amasezerano y'inguzanyo.

[10] Ku byerekeye Amabwiriza ya Banki Nkuru y'u Rwanda abuza gutanga ubwishingizi ku ideni yashingiweho n'Urukiko Rukuru rw'Ubucuruzi, abahagarariye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd bavuga ko areba imikoranire ya

Banki Nkuru y'u Rwanda n'amasosiyete y'ubwishingizi, akaba atareba amasezerano izo sosiyete zigirana n'abo zishingira. Bavuga kandi ko ayo mabwiriza yashyizweho umukono na Guverineri wa Banki Nkuru y'u Rwanda, akaba yakoreshwa ku bandi bantu ari uko ashyizweho umukono na Perezida wa Repubulika cyangwa Minisitiri, ko icyo Banki Nkuru y'u Rwanda yakora igihe hari sosiyete y'ubwishingizi itayubahirije, ari ukuyifatira ibihano gusa.

[11] Ababuranira TRANSCORP biregura bavuga ko ku birebana no kuba Urukiko Rukuru rw'Ubucuruzi rwaritiranyije amasezerano y'ubwishingizi n'amategeko ku nguzanyo, iyi mpamvu y'ubujurire nta shingiro ifite, kuko Amabwiriza ya Banki Nkuru y'u Rwanda N^{0} 05/2009 abuza ibigo by'ubwishingizi (n'uwajuriye arimo) gutanga ubwishingizi ku mwenda, mu gihe rero PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yaba yarishe aya Mabwiriza, igomba guhanwa, ndetse ko mu gihe yemera ko itayubahirije idakwiye gusaba Urukiko ngo rwemeze ko ibyo yakoze ari byo, hanyuma izajye guhanwa na Banki Nkuru y'u Rwanda; Urukiko rero rukaba mbere na mbere rukwiye kureba niba amasezerano yarakozwe mu buryo bwemewe n'amategeko.

[12] Bakomeza bavuga ko Banki Nkuru y'u Rwanda ari yo ishinzwe imikorere y'amasosiyete y'ubwishingizi (regulator), ari nayo mpamvu ishyiraho amabwiriza agomba gukurikizwa, agatangazwa mu Igazeti ya Leta, bikaba bivuze ko anareba abagana aya masosiyete, ariko ko hari irengayobora ku bigo bya Leta kuko byo bishobora guhabwa ubwishingizi ku ideni, nabwo mu gihe cy'amezi atandatu (6) gusa. Bavuga kandi ko imyenda y'igihe kirekire idashobora gusimbura ibiteganywa n'amategeko, hakaba nta mpaka zakagombye kugibwa kuri iki kibazo, mu gihe

Urukiko Rukuru rw'Ubucuruzi rwemeje ko n'iyo ibimenyetso by'umwenda byaboneka, bitahabwa agaciro kuko amasezerano yakozwe mu buryo bunyuranyije n'amategeko, kuko Amabwiriza yavuzwe haruguru yubahirizwa ku bakiriya, atari kuri Banki Nkuru y'u Rwanda (vis-à-vis des clients et non de la BNR).

[13] Basobanura ko kuva mu mwaka wa 2014, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yakoranaga na TRANSCORP, nyuma yaha hari ikamyo ya TRANSCORP yaje gukora impanuka muri Uganda, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yanga kwishyura, bituma ijya gushaka ubwishingizi ahandi, icyo gihe akaba ari bwo PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yahise itangira kwishyuza ibirarane yavugaga ko TRANSCORP iyibereyemo kuva mu mwaka wa 2014, ariko ko nta birarane TRANSCORP yari iyifitiye, kuko iyo biza kuba bihari itari gukomeza kuyiha ubundi bwishingizi kugeza muri miliyoni babarega.

UKO URUKIKO RUBIBONA

[14] Ingingo ya 64 y'Itegeko N° 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, iteganya ko amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayigiranye.

[15] Ingingo ya 23, igika cya 5, y'Amabwiriza N^{0}05/2009 yo ku wa 29/07/2009 yerekeye iyemerwa n'ibindi bisabwa mu murimo w'ubwishingizi, iteganya ko: "Ikiguzi cy'ubwishingizi kitemewe gutangwaho umwenda".

[16] Ingingo ya 6 y'Amabwiriza ya Banki Nkuru y'u Rwanda Nº 03/2017 yo ku wa 20/02/2017 yerekeye ibihano byo mu rwego rw'ubutegetsi n'amafaranga bifatirwa abishingizi iteganya ko: "Bitabangamiye ibiteganywa n'ingingo ya 3 hamwe n'iya 5 z'aya mabwiriza, iyo umwishingizi wigenga atubahirije ibiteganywa n'itegeko ryerekeye umurimo w'ubwishingizi cyangwa amabwiriza n'ibyemezo bya Banki Nkuru birishyira mu bikorwa, ibihano biberanye n'amakosa yakozwe bisobanuye mu mugereka bishobora gutangwa". Naho agace ka 9 k'umugereka wayo kagateganya ko gutanga ubwishingizi ku ideni bihanishwa 0.5% by'imisanzu igomba kwakirwa buri gihembwe.

[17] Inyandiko ziri muri dosiye zigaragaza ko ku wa 02/12/2014, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yagiranye na TRANSCORP amasezerano y'ubwishingizi bw'imodoka zayo 61, impande zombi zikaba zemeranya ko ayo masezerano yakomeje kujya avugururwa uko umwaka ushize kugeza mu mwaka wa 2017. Amasezerano ateganya kandi ko TRANSCORP yagombaga kwishyura ikiguzi cy'ubwishingizi mu minsi 30 uhereye igihe amasezerano atangiriye cyangwa igihe avugururiwe, ko iyo iminsi iramutse irenze TRANSCOP itarishyura, PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ishobora gusesa amasezerano, kandi TRANSCORP igategekwa kwishyura ikiguzi cy'ubwishingizi kijyanye n'icyo gihe, ko hagize ikibazo kivuka mbere y'uko amasezerano aseswa, umwishingizi agomba kwishyurwa ikiguzi cyose cy'ubwishingizi[1].

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[1] *It is hereby expressly agreed cover under this Policy is granted subject to full payment of premium within 30 days from inception/renewal. It is further declared and agreed that this Policy will be voidable at the insurer discretion if the premium is not paid within 30 days and the insured shall be compelled*

[18] Urukiko rurasanga, Amabwiriza ya Banki Nkuru y'u Rwanda N^{0}05/2009 yo ku wa 29/07/2009, ateganya ko ikiguzi cy'ubwishingizi kidashobora gutangwaho umwenda; ibi bikaba bivuze ko PHOENIX OF RWANDA ASSURANCE COMPANY Ltd itari yemerewe gutanga ikiguzi cy'ubwishingizi ku ideni. Urukiko rurasanga kandi ingingo ya 6 y'Amabwiriza ya Banki Nkuru y'u Rwanda Nº03/2017 yo ku wa 20/02/2017 yerekeye ibihano byo mu rwego rw'ubutegetsi n'amafaranga bifatirwa abishingizi, iteganya ko utubahirije ibiteganywa n'itegeko cyangwa amabwiriza n'ibyemezo bya Banki Nkuru agenerwa ibihano biberanye n'amakosa yakoze, naho agace ka 9º k'Umugereka w'ayo Mabwiriza gateganya, ibihano by'ubutegenzi bingana na 0.5% by'imisanzu igomba kwakirwa buri gihembwe.

[19] Urukiko rurasanga, isesengura ry'ingingo z'Amabwirizwa yibukijwe haruguru rigaragaza ko ayo mabwiriza yashyiriweho amasosiyete y'ubwishingizi, akaba atareba amasezerano ayo masosiyete agirana n'abakiliya bayo, ko ahubwo iyo hari ibitubahirijwe na sosiyete y'ubwishingizi harimo nko gutanga ubwishingizi ku ideni, bitagira inkurikizi ku masezerano y'ubwishingizi yakozwe mu buryo bwubahirije ibiteganywa n'ingingo ya 4 y'Itegeko Nº45/2011 ryo ku wa 25/11/2011 rigenga amasezerano[2], ahubwo iyo sosiyete ifatirwa ibihano byo mu rwego rw'ubutegetsi, ariko amasezerano

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to pay premium for the period he has been on cover provided that if a claim has arisen before termination is enforced, full premium shall be due to insurer.

[2] Ibisabwa by'ibanze mu ikorwa ry'amasezerano n'ibi bikurikira: 1º kwemerana kw'impande zigirana amasezerano; 2º ubushobozi bwo gukora amasezerano; 3º ishingiro ry'amasezerano; 4º impamvu yemewe n'amategeko.

akagumana agaciro kayo, bitabaye ibyo uwafashe ubwishingizi ku ideni abayikungahaje nta mpamvu (enrichissement sans cause).

[20] Ku byerekeranye n'uru rubanza, Urukiko rurasanga kuba PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yaba yaratanze ubwishingizi ku ideni, ari amakosa agenerwa ibihano byo rwego rw'ubutegetsi, bigamije kurwanya imikorere yateza amasosiyete y'ubushingizi kugwa mu gihombo, ariko ntabwo bitesha agaciro amasezerano impande zombi zagiranye mu gihe yakozwe hubahirijwe ibiteganywa n'ingingo ya 4 y'Itegeko Nº 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano ryibukijwe haruguru, ngo TRANSCORP ibe yabyuririraho yanga kubahiriza ibitenganyijwe mu masezerano, hakaba rero hagomba gusuzumwa niba koko hari ibimenyetso bigaragaza ko hari umwenda w'ubwishingizi bw'ibinyabiziga TRANSCORP yaba ibereyemo PHOENIX OF RWANDA ASSURANCE COMPANY Ltd.

[21] Urukiko rurasanga na none, imvugo ya TRANSCORP yuko PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yagombaga gusesa amasezerano nyuma yuko itishyuwe mu minsi 30 nta shingiro yahabwa, kuko mu masezerano byari biteganyijwe ko yaseswa ku bushake bwa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd (at the insurer discretion) kandi n'ingingo ya 14 y'Itegego Teka Nº 20/75 ryo ku wa 20 Kamena 1975 ryerekeye ubwishingizi muri rusange, ikaba idategeka byanze bikunze uwishingira gusesa amasezerano[3].

[3] Iyo ukwezi gushize, uwishingira ashobora gukurikirana ubwishyu bwe cyangwa gusaba iseswa ry'amasezerano.

2. Kumenya niba hari ibimenyetso bigaragaza ko TRANSCORP ibereyemo umwenda PHOENIX OF RWANDA ASSURANCE COMPANY Ltd

[22] Abahagarariye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd bavuga ko hari amafaranga y'ubwishingizi TRANSCORP yagendaga isigaramo uko bahaga ubwishingizi imodoka zayo kubera imikoranire myiza bari bafitanye, yose hamwe angana na 83.739.236 Frw. Bavuga ko kuba TRANSCORP yarahawe "vignettes" z'amamodoka yayo itarishyura amafaranga y'ubwishingizi byagiye biterwa n'imikoranire myiza bari basanganwe, ko kandi hari "historique" ya banki igaragaza uko TRANSCORP yagendaga yishyura buhoro buhoro, n'inyandiko yitwa "Statement of Unpaid Premiums/ After Renewal in 2016.

[23] Ababuranira TRANSCORP bavuga ko nta masezerano y'umwenda bagiranye na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ndetse ko nta n'uwo iyibereyemo, kuko itari guhabwa "vignettes" itishyuye, ko kuba TRANSCORP yarazibonye bigaragaza ko yishyuye, kuko iyo bitaba ibyo zitari gutangwa. Ku kibazo cyo kumenya niba hari ikigaragaza ko yishyuye, bavuga ko "vignettes" zigaragaza ko hari "présomption" ko yishyuye. Naho ku byerekeranye na " Statement of Unpaid Premiums/ After Renewal in 2016" ya 53.913.427 Frw yemejwe na TRANSCORP ku wa 02/12/2016, bavuga ko batemera ko uwayisinye yari ahagarariye TRANSCORP, ko abantu bari muri "statuts" ari bo bemerewe gusinya mu mwanya wa sosiyete aho TRANSCORP yafungura amashami hose.

[24] Ku birebana n'inyandiko igaragaza ibirarane (unpaid premium) PHOENIX OF RWANDA ASSURANCE

COMPANY Ltd iburanisha ivuga ko TRANSCORP yayishyizeho umukono, abayihagarariye bavuga ko ibyo atari ukuri, ko batigeze bayisinyaho.

UKO URUKIKO RUBIBONA

[25] 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". Ingingo ya 12, igika cya mbere, y'Itegeko Nº 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, nayo iteganya ko: "Urega agomba kugaragaza ibimenyetso by'ibyo aregera. Iyo abibuze uwarezwe aratsinda". Igika cya kabiri cyo giteganya ibikurikira: "Naho uvuga ko atagitegetswe gukora icyo yategekwaga cyagaragajwe n'ibimenyetso agomba kugaragaza impamvu zakimukuyeho.Iyo abiburiye ibimenyetso, uwo baburana aramutsinda".

[26] Mu bimenyetso PHOENIX OF RWANDA ASSURANCE COMPANY Ltd itanga ishaka kugaragaza ko hari ubwishingizi yahaye TRANSCORP ku deni, ariko hakaba hari amafaranga itayishyuye, harimo amasezerano y'ubwishingizi yo ku wa 08/04/2015 yo kwishingira imodoka 61 kuri 96.469.772Frw, hari "vignettes" TRANSCORP ibwayo yiyemerera ko yahawe na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, hari inyandiko yiswe "Statement of Unpaid Premiums/ After Renewal in 2016" yashyizweho umukono n'impande zombi, ku ruhande rwa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ku wa 28/11/2016, naho ku ruhande rwa TRANSCORP akaba ari ku wa 02/12/2016, aho impande zombi zemeranya ko umwenda

w'ubwishingizi TRANSCORP igomba PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ungana na 53.915.427 Frw, ndetse na "historique" ya konti ya PHOENIX OF RWANDA ASSURANCE COMPANY Ltd igaragaza uko TRANSCORP yagiye yishyura buhoro buhoro.

[27] Ku ruhande rwa TRANSCORP, nta kimenyetso na kimwe yerekana kigaragaza ko nyuma y'aho impande zombi zishyiriye umukono kuri iriya nyandiko yiswe "Statement of Unpaid Premiums/ After Renewal in 2016" yibukijwe haruguru, yigeze yishyura amafaranga yemera.

[28] Urukiko rurasanga ibyo TRANSCORP yireguza ko nta masezerano y'umwenda yabaye hagati yayo na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ko ahubwo icyabayeho ari amasezerano y'ubwishingizi bwatanzwe ku ideni, ntacyo byayimarira kuko nayo ubwayo yemera ko ifite "vignettes" zatanzwe na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, kandi hakaba hari ibimenyetso bigaragaza ko hari umwenda itishyuye, ibyo rero bikaba bihagije kugira ngo yishyure amafaranga itarishyura.

[29] Urukiko rurasanga na none, ibyo TRANSCORP ivuga ko kuba yarahawe "vignettes" ari ikimenyetso gicukumbuye (présomption) ko yishyuye, nabyo bitahabwa ishingiro, kuko "statement of unpaid premiums After Renewal in 2016" ari ikimenyetso cy'uko izo vignettes zatangwaga primes zose zitishyuwe kubera imikoranire y'impande zombi,"vignettes" rero zikaba atari ikimenyetso cy'ubwishyu, ahubwo ari icyemezo gihabwa uwahawe ubwishingizi bw'ikinyabiziga, uwagitanze akaba agomba kwirengera icyishingiwe igihe habaye impanuka, hatitawe ko yishyuwe cyangwa atishyuwe.

[30] Urukiko rurasanga na none ibyo TRANSCORP yireguza ko uwasinye kuri iriya nyandiko yiswe "Statement of Unpaid Premiums/ After Renewal in 2016" atari ahagarariye TRANSCORP, kuko ingingo ya 12 ya "statuts" zayo iteganya abasinya mu izina no mwanya wayo, nabyo bitahabwa ishingiro, kuko mu gihe TRANSCORP idahakana amasezerano y'ubwishingizi yakoranye na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ariho umukono usa n'uri kuri "Statement of Unpaid Premiums/ After Renewal in 2016", itagera aho ngo ihakane ko uwasinye kuri iyo nyandiko atari abifitiye ububasha kuko byaba ari ukwivuguruza kuyitsindisha.

[31] Hashingiwe ku biteganywa n'amategeko yibukijwe haruguru no ku bisobanuro bimaze gutangwa, Urukiko rurasanga hari ibimenyetso bigaragaza ko TRANSCORP ibereyemo PHOENIX OF RWANDA ASSURANCE COMPANY Ltd umwenda ushingiye ku bwishingizi bw'imodoka zayo, bityo ikaba igomba kuwishyura.

3. Kumenya ingano y'umwenda TRANSCORP igomba kwishyura PHOENIX OF RWANDA ASSURANCE COMPANY LTD n'izindi ndishyi isabwa

[32] Me Buhuru Pierre Celestin, mu mwanzuro we usobanura umwenda PHOENIX OF RWANDA ASSURANCE COMPANY Ltd iregera, asaba Urukiko gutegeka TRANSCORP kuyishyura 83.739.236Frw iyibereyemo, hamwe n'inyungu zawo zibariwe ku gipimo cya 21% guhera ku wa 03/03/2017, umunsi PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yihanangirijeho bwa nyuma TRANSCORP kugeza igihe izishyurirwa, ubu zikaba zigeze kuri 17.585.239 Frw x imyaka 2 = 35.170.497 Frw hamwe n'amafaranga y'ikurikiranarubanza n'igihembo cya Avoka angana na 5.000.000.

[33] Ababuranira TRANSCORP ntacyo bavuga ku ngano y'umwenda iyi sosiyete yishyuzwa, bavuga gusa ko nta mwenda ibereyemo PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, kuko itari kuyiha "vignettes" itishyuye ubwishingizi.

UKO URUKIKO RUBIBONA

[34] Urukiko rurasanga, hakurikijwe " Statement of Unpaid Premiums/ After Renewal in 2016" ya 53.913.427Frw atarishyuwe mu mwaka wa 2016 yakozwe na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, TRANSCORP ikayishyiraho umukono ku wa 02/12/2016, ndetse muri iyo nyandiko,impande zombi zikumvikana uko aya mafaranga azishyurwa (payment agreement), TRANSCORP igomba kuyishyura kuko nayo iyemera, Urukiko rukaba rusanga iyi nyandiko ya Statement of Unpaid Premiums/ After Renewal in 2016" ifite agaciro k'inyandiko bwite, kuko PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yagaragarije TRANSCORP amafaranga y'ubwishingizi yari isigayemo nayo irayemera ndetse iyishyiraho umukono[4].

[35] Ku birebana na 29.823.809,03Frw agaragara ku nyandiko ya "statement of unpaid premiums" yakozwe na Revenue Accountant wa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd ku wa 07/03/2016, Urukiko rurasanga rutahera

[4] Ingingo ya 14 y'Itegeko Nº15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo,iteganya ko " Inyandiko bwite ari urwandiko rufite umukono w'umwe cyangwa wa benshi mu barwanditse cyangwa se,hakabaho ibikumwe byabo.Amasezerano arukubiyemo,abera inshingano abayagiranye gusa.

kuri iyo nyandiko ngo rwemeze ko aya mafaranga TRANSCORP igomba nayo kuyishyura, kuko ari PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yayikoreye, kuba rero yarakozwe n'uruhande rumwe rukaba rutayiregesha mu gihe nta bindi bimenyetso bihari byemeza ko ayo mafaranga y'ubwishingizi ari yo TRANSCORP yasigayemo koko mu mwaka wa 2014-2015, ndetse ikaba itarayamenyeshejwe ngo igire icyo iyavugaho nk'uko byagenze ku mafaranga y'ubwishingizi yo mu mwaka wa 2016, nk'uko byagaragajwe haruguru, bityo TRANSCORP ikaba igomba kwishyura PHOENIX OF RWANDA ASSURANCE COMPANY Ltd amafaranga y'ubwishingizi angana na 53.913.427Frw gusa kuko ari yo afitiwe ibimenyetso.

[36] Ku birebana n'inyungu zibariwe ku gipimo cya 21% y'amafaranga TRANSCORP ifitiye PHOENIX OF RWANDA ASSURANCE COMPANY Ltd abayiburanira basaba Urukiko ko rwategeka ko yiyongera ku mafaranga agomba kwishyurwa, Urukiko rurasanga hakurikijwe ibiteganywa n'ingingo ya 144 y'Itegeko N^{0} 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano[5], bikwiye ko TRANSCORP yishyura PHOENIX OF RWANDA ASSURANCE COMPANY Ltd inyungu z'amafaranga 53.913.427 Frw kubera ko itayishyuye mu gihe no mu buryo yari yemeye, kuko bitabaye ibyo, byaba ari ukuyitera igihombo, kuko PHOENIX ASSURANCE COMPANY Ltd ari sosiyete y'ubwishingizi ikaba yari kuyakoresha mu mirimo yabo

[5] Iyo kwica amasezerano birebana no kutishyura amafaranga cyangwa kudakora igisabwa gishobora kubarwa mu mafaranga azwi cyangwa ashobora kumenyekana, inyungu zibarwa uhereye igihe igisabwa cyagombaga gukorwa hakuwemo ibyo uruhande rwishe amasezerano rufiteho uburenganzira.

y'ubucuruzi bw'ubwishingizi cyangwa akaba yarabyaye inyungu iyo aza kuba yarabitswe muri Banki.

[37] Urukiko rurasanga ariko mu kubara izi nyungu, hatagomba kugenderwa ku gipimo cya 21% ku mwaka gisabwa na PHOENIX ASSURANCE COMPANY Ltd, kubera ko kiri hejuru cyane ndetse kinarenze igipimo cy'inyungu gikoreshwa n'amwe mu mabanki akorera mu gihugu kandi yo idakora imirimo y'ubucuruzi bw'amafaranga nk'amabanki, ahubwo hakwiye kwifashishwa igipimo cy'ibitsa (deposit rate) cya 8.478% kigaragazwa na Banki Nkuru y'u Rwanda kugeza ku munsi w'isoma ry'urubanza, icyo gipimo akaba ari cyo cyanakoreshejwe mu rubanza RCOMAA 0032/15/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 22/09/2017, haburana RAHA TRADING Ltd na BAKHRESA GRAIN MILLING RWANDA Ltd (BGM).

[38] Urukiko rurasanga inyungu zigomba kubarwa uhereye ku wa 03/03/2017, umunsi PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yandikiye TRANSCORP iyihanangiriza bwa nyuma (final notice) nk'uko abahanga mu mategeko babivuga, ko kwihanangirizwa bituma uberewemo umwenda utarishyuriwe igihe ahabwa indishyi cyangwa inyungu z'ubukererwe, kandi ko ubereyemo undi umwenda adategetswe kwishyura indishyi z'ubukererwe, uretse igihe yihanangirijwe[6], kugeza ku wa 19/07/2019, umunsi w'isomwa ry'urubanza,

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[6] *La mise en demeure permet au créancier d'obtenir des dommages-intérêts ou des intérêts de retard (.....).En principe, le débiteur n'est tenu de dommages - intérêts moratoires, c'est-à-dire ceux qui réparent le retard, que s'il a été mis en demeure,le seul fait que le débiteur n'ait pas payé à l'échéance ne cause pas au créancier un préjudice tenant au retard, (Ph. Malaurie, L. Aynes et Ph. Stoffel-Munck, Droit des obligations,7e Edition, Paris, CUJAS, pp.529-530.*

bihwanye n'iminsi 855, bityo TRANSCORP ikaba igomba guha PHOENIX RWANDA ASSURANCE COMPANY Ltd inyungu z'ubukererwe zingana na 53.913.427 x 8.474 x iminsi 855/360x100=10.850.482Frw, bivuze ko umwenda n'inyungu zawo bingana na 53.913.427 Frw + 10.850.482 Frw, yose hamwe akaba angana na 64.763.908Frw.

B. UBUJURIRE BWURIRIYE KU BUNDI

Kumenya niba TRANSCORP ikwiye guhabwa indishyi isaba

[39] TRANSCORP ivuga ko ikomeje gushorwa mu manza nta mpamvu, bityo ikaba ibisabira indishyi zingana na 2.000.000Frw y'ikurikirana rubanza n'igihembo cya Avoka.

[40] PHOENIX OF RWANDA ASSURANCE COMPANY Ltd yireguye kuri izi ndishyi ivuga ko nta shingiro zifite kuko TRANSCORP itagaragaza aho yishyuriye umwenda.

UKO URUKIKO RUBIBONA

[41] Ingingo ya 111 y'Itegeko N^{0}22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko: "Ikirego cy'amafaranga y'ikurikiranarubanza ari ikirego gishamikira ku kirego cy'iremezo kigamije kwishyuza ibyakoreshejwe mu rubanza. Ikirego cy'amafaranga y'ikurikiranarubanza kiburanishirizwa rimwe n'ikirego cy'iremezo.Gishobora kandi kwakirwa kikanaburanishwa n'iyo ikirego cy'iremezo cyaba kitakiriwe".

[42] Urukiko rurasanga TRANSCORP nta mafaranga y'ikurikiranarubanza n'igihembo cya Avoka ikwiye, kubera ko itubahirije amasezerano yagiranye na PHOENIX OF RWANDA ASSURANCE COMPANY Ltd, bivuze ko itagenerwa amafaranga isaba kandi ari yo yakoze amakosa.

[43] Urukiko rurasanga ahubwo TRANSCORP ikwiye guha PHOENIX OF RWANDA ASSURANCE COMPANY Ltd amafaranga y'ikurikiranarubanza n'igihembo cya Avoka kubera ko uru rubanza rwatumye igira ibyo itakaza irukurikirana ndetse ishaka Avoka wo kuyiburanira, ariko kubera ko amafaranga yaka ari menshi hakurikijwe imirimo yakozwe kuri uru rubanza, TRANSCORP ikaba igomba kuyiha 700.000Frw y'igihembo cya Avoka, 300.000Frw y'ikurikiranarubanza, kuri uru rwego, no kuyisubiza 50.000Frw yatanzeho ingwate y'igarama ijurira.

III. ICYEMEZO CY'URUKIKO

[44] Rwemeje ko ubujurire bwa PHOENIX OF RWANDA ASSURANCE COMPANY Ltd bufite ishingiro;

[45] Rwemeje ko imikirize y'urubanza RCOMA 00450/2018/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 20/09/2018, ihindutse mu ngingo zarwo zose;

[46] Rutegetse TRANSCORP kwishyura PHOENIX OF RWANDA ASSURANCE COMPANY Ltd 64.763.908Frw y'umwenda w'ubwishingizi n'inyungu zawo;

[47] Rutegetse TRANSCORP guha PHOENIX OF RWANDA ASSURANCE COMPANY Ltd 700.000Frw y'igihembo cya Avoka na 300.000Frw y'ikurikiranarubanza, kuri

uru rwego, kandi ikayisubiza 50.000 Frw yatanzeho ingwate y'igarama ijurira.

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PREFACE

Dear Readers,

We are pleased to present to you the Law Reports Volume 1 [2021]. As usual, we select cases that solve some of the legal issues you encounter, either in your career or in your daily life.

This volume contains the following seven (7) cases; one (1) petition seeking to declare a law unconstitutional, one (1) public interest litigation petition, two (2) civil cases, and three (3) commercial cases.

These cases can be accessed on the website of the judiciary: http://decisia.lexum.com/rlr/en/nav.do.

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:

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from abroad but which are available in Rwanda is not discrimination or not according to the equal protection before the law because they are intended to promote service delivery and it was done on a justifiable ground of reducing on the quality of implementation of strategies to reduce the gap in trade and foreign exchange
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Value Added Tax (VAT) – The Reverse Charge Principle – The Reverse Charge Principle mandates the buyer of goods or services from outside Rwanda to pay the value-added tax for those goods and services
Re NZAFASHWANAYO……1

Value Added Tax (VAT) – Destination principle of taxation – The Destination Principle mandates that VAT on goods be paid in the country where the purchaser is resident (i.e. the country of consumption) and exempted from paying the VAT from the country of origin.
Re. ZAFASHWANAYO……..……1

PETITION SEEKING TO DECLARE A LAW UNCONSTITUTIONAL

Re. NZAFASHWANAYO

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00004/2019/SC – (Ntezilyayo, P.J., Nyirinkwaya, Cyanzayire, Hitiyaremye and Rukundakuvuga, J.) July 24, 2020]

Tax law – Value Added Tax (VAT) – Treating the taxpayers who buy services and goods which are not available in Rwanda different from those who buy services and goods from abroad but which are available in Rwanda is not discrimination or not according to the equal protection before the law because they are intended to promote service delivery and it was done on a justifiable ground of reducing on the quality of implementation of strategies to reduce the gap in trade and foreign exchange.

Tax law – Value Added Tax (VAT) – The Reverse Charge Principle – The Reverse Charge Principle mandates the buyer of goods or services from outside Rwanda to pay the value-added tax for those goods and services

Tax law – Value Added Tax (VAT) – Destination principle of taxation – The Destination Principle mandates that VAT on goods be paid in the country where the purchaser is resident (i.e. the country of consumption) and exempted from paying the VAT from the country of origin.

Facts: Nzafashwanayo filed a constitutional petition in the Supreme Court, arguing that article 12, paragraphs 3 and 4 of Law N ° 37/2012 of 09/11/2012 establishing the value added tax (VAT) is inconsistent with article 15 and 95 of the Constitution of the Republic of Rwanda of 04/06/2003 amended in 2015. The

University of Rwanda (School of Law) intervened as amicus curiae.

Explaining his petition, Nzafashwanayo argues that article 12, in paragraphs 3 and 4 of the above-mentioned law is inconsistent with the principles embedded in article 15 of the Constitution, as it does not treat taxpayers equally. A taxpayer who imports services is allowed to deduct VAT input from those services on VAT output only if those services are not available in Rwanda, yet the buyer of domestic services is allowed to deduct VAT on those services from the VAT received without any other requirement.

Based on the International Trade Agreements ratified by Rwanda (GATS, EAC Common Market Protocol and Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services), he also said that the principle of National treatment embedded in those agreements is contradicted by article 12 in paragraphs 3 and 4 of the law mentioned above, therefore it is inconsistent with article 95 of the Constitution. Thus the inequality and the discriminatory nature of the law makes domestic services less competitive vis-a-vis the foreign services that can be needed by business operators in Rwanda
The State argues that the legislature put the taxpayers in two categories that cannot be considered as discriminatory or being unequal before the law since it was done based on justifiable grounds.

The position of the State was emphasized by the Amicus Curiae's brief (School of Law of the University of Rwanda) that averred that in tax matters treating equally people who are not in the same category would be injustice or inequality. Furthermore, argues the impugned article of the Law on value added tax does not contradict article 15 of the Constitution, as the taxpayers in

question are two (2), different people. Taxing a person who buys goods or services abroad which are also available in Rwanda is intended to protect and promote traders and investors operating in Rwanda, which is acceptable in those agreements.

As to whether it is contrary to article 95 of the Constitution, the petitioner argues that article 12 of the above-mentioned law is inconsistent with article 95 of the Constitution because it contradicts the international treaty ratified by Rwanda when that treaty is higher in the hierarchy than the law on the Value Added Tax. The international treaty, in line with the principle of National Treatment, stipulates that imports are treated in the same way as domestic ones once they have been cleared from customs. Failure to comply with this principle would result in a change in the competitiveness of service providers or service providers in Rwanda compared to service providers in other countries, which is a consequence of article 12 of the impugned law.

The State argues that article 12 does not violate article 95 of the Constitution and does not contradict the principle of National Treatment but rather upholds that principle, because domestic and international services are treated the same because they are charged value added tax for those goods or services to which it applies or exempted on the goods or services for which they are exonerated.

The Amicus Curiae submits that article 12 of the aforementioned Law is not inconsistent with article 95 of the Constitution because apart from the fact that whenever an article of the law does not comply with an article that is higher in the hierarchy cannot be concluded that it is unconstitutional.

Held: 1. Treating the taxpayers who buy services and goods which are not available in Rwanda different from those who buy

services and goods from abroad but which are available in Rwanda is not discrimination or not according them equal protection before the law because they are intended to promote service delivery and it was done on a justifiable ground of reducing on the quality of implementation of strategies to reduce the gap in trade and foreign exchange

2. The Reverse Charge Principle mandates the buyer of goods or services from outside Rwanda to pay the value-added tax for those goods and services.

3. The Destination Principle mandates that VAT on goods be paid in the country where the purchaser is resident (i.e. the country of consumption) and exempted from paying the VAT from the country of origin.

4. While negotiations are yet to take place or what needs to be done first to get the countries to agree on the basis for the implementation of an international treaty that has been ratified, it is not considered a violation of that treaty.

The petition dismissed.

Statutes and statutory instruments referred to:

The constitution of the Republic of Rwanda of 2003 as it is amended in 2015, articles 15 and 95.

World Trade Organization General Agreement on Trade in services (GATS).

World Trade Organization. Communication from Rwanda, Schedule of Specific Commitments under the General Agreement on Trade in Services, 30 August 1995

Protocol on establishment of East African Community Common Market.

Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services.
Decision on the African Continental Free Trade Area (AfCFTA), 33rd Ordinary Session of the Assembly of the Union, 9-10 February 2020, Addis Abeba, Ethiopia,
Law N ° 37/2012 of 09/11/2012 establishing the value added tax, articles 11 and 12.

Cases referred to:

Conseil Constitutionnel, décision no 2009-599 DC du 29 décembre 2009, para 80
Gulf, Colorado & Santa Fe Ry. Co. v. Ellis 165 U.S. 150 (1897)
Vodacom Business Nigeria v. Federal Inland Revenue Service (FIRS), Appeal No. CA/556/2018, p.23
Re AKAGERA BUSINESS GROUP, RS/SPEC/0001/16/CS rendered by the Supreme Court on 23/09/2016
Re Murangwa, RS/INCONST/SPEC 00001/2019/ rendered by the Supreme Court on 29/11/2019

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P. Lampreave,' Fiscal Competitiveness Versus Harmful Tax Competition in the European Union" (2011) bfit 65 (6), p.4;

P T Scanlam, 'Globalization and Tax-Related Issues: What are the Concerns?' in R Biswas (ed), International Tax Competition: Globalization and Fiscal Sovereignty (commonwealth Secretariat 2002), p.45;

Victor Thuronyi (ed), Tax Law Design and Drafting, Volume 1 (International Monetary Fund, 1996), page 196

William B. Barker, 'The Three Faces of Equality: Constitutional Requirements in Taxation', (2006), Case W.Res.L.Rev. 57(1), p. 5

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Consultants 'Report on the Harmonization of Income Taxes within the East African Community, 1 November 2014; East African Community, Report of the Meeting to validate the studies on the development of policy frameworks for the harmonization of VAT, Excise duties and Income tax in EAC, Mombasa, 23rd – 25th October 2014; PWC, Policy for harmonization of VAT and Excise duties, 28 October 2014.

East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, pp. 30-31.

East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, Annex IV: EAC Domestic Tax Harmonization Policy, pp. 8-9.

Judgment

I. BACKGROUND OF THE CASE

[1] Counsel Nzafashwanayo Dieudonné filed a claim in the Supreme Court, sustaining that article 12, paragraph 3 and 4 of the Law N° 37/2012 of 09/11/2012 establishing the value added tax (VAT) is contrary to the articleS 15 and 95 of the Constitution of the Republic of Rwanda of 04/06/2003 revised in 2015.

[2] Counsel Nzafashwanayo Dieudonné further avers that the article 12, paragraphs 3 and 4 of the Law n° 37/2012 above mentioned herein against which he filed a claim as it is unconstitutional provides that:

a. If a taxpayer gets services from a person who is outside Rwanda, the taxpayer is considered as if he/she has delivered taxable services and has received an output tax from that person residing outside Rwanda.

b. The service delivery is treated as it was made on the date on which the services were performed by the person residing outside Rwanda for a value determined under Article 11 of this Law. The output tax is payable on the date of filing the value added tax declaration for the value added tax period in which those services were performed. The output tax must appear on the receipt that justified the payment to the foreign services provider, and that document is considered to be the value added tax invoice.

c. Notwithstanding the provisions of Paragraphs, One and 2 of this Article, recipients of foreign services that are not available in Rwanda are allowed to deduct input tax on output tax.

d. Services are considered not to be available in Rwanda if no person can deliver identical or similar services on the local market.

[3] Article 15 of the Constitution of the Republic of Rwanda provides that "All persons are equal before the law. They are entitled to equal protection of the law" and article 95 provides that "The hierarchy of laws is as follows :

1° Constitution ;

2° organic law ;

3° international treaties and agreements ratified by Rwanda ;

4° ordinary law ;

5° orders.

A law cannot contradict another law that is higher in hierarchy.

[4] The case was heard in public on 23/06/2020, Counsel Nzafashwanayo Dieudonné was assisted by Counsel Bizimana Emmanuel, in presence of the Republic of Rwanda represented by Counsel Kabibi Spéciose. In the course of the hearing, the Court firstly heard the parties about the request of the University of Rwanda (School of Law) to intervene in the case as *Amicus Curiae* for providing the ideas, and after having noticed that they accepted that it could be admitted to do so because it fulfilled the

requirements, it considered that its request was admitted, then it heard the case on the merits.

[5] As they explained in the submissions and the pleading before the Court, Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel who assists him sustain that on basis of the principle upheld under article 15 of the Constitution above mentioned herein, note that article 12, paragraphs 3 and 4 of Law N° 37/2012 above mentioned herein does not equally treat the taxpayers, whereby a recipient of foreign services for his/her business activity which is not available in Rwanda is allowed to deduct input tax on output tax when the services are considered not to be available in Rwanda, however, the recipient of domestic services is allowed to deduct the input tax on the services without any other requirement.

[6] They also support that the provision of such article 12, paragraphs 3 and 4 is contrary to the article 95 of the Constitution above mentioned, given that it violates the principle of the national treatment applied in the international trade in services provided under the World Trade Organization General Agreement on Trade in Services (GATS), Protocol on establishment of East African Community Common Market (EAC Common Market Protocol), and Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services, those international protocols had been signed and ratified by Rwanda.

[7] The Republic of Rwanda and *Amicus Curiae* do not concur with them. They aver that in taxation law, a State can make a classification of the citizens for reasonable grounds. Such procedure is not contrary to the principle of equality before the law, rather equally imposing the taxes on the citizens who are not

in the same category would amount to inequality. They sustain that allowing to deduct input tax on output tax to the recipients of foreign services which are not available in Rwanda but not to the recipients of foreign services which are available in Rwanda is a procedure of protecting the investors in the country and such procedure is provided under WTO/GATS as an exception to the principle of national treatment.

[8] The Court observes that the legal issues to be examined in this case are :

a. **Determine if article 12, paragraphs 3 and of the Law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.**

b. **Determine if article 12, paragraphs 3 and 4 of the Law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.**

II. LEGAL ISSUES OF THE CASE AND THEIR ANALYSIS

a. **Determine if the article 12, paragraphs 3 and of the Law N° 37/2012 of 09 /11/2012 establishing the value added tax is contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015**

[9] Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel sustain that article 12, paragraphs 3 and 4 of the Law n° 37/2012 of 09/11/2012 above mentioned is contrary to the article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 which provides that the persons who are in the same category are equal before the law, given that it does not equally consider the taxpayers whereby a recipient of foreign services for his/her business activity which is not available in Rwanda is allowed to deduct input tax on output tax when the services are considered not to be available in Rwanda, however, the recipient of domestic services is allowed to deduct the input tax on the services without any other requirement. They explain that even if the Republic is allowed to differently consider the taxpayers or classify them, there is a procedure to be applied on basis of a reasonable ground, and it should be done in respect of the constitutional principles as upheld by the Constitutional Court of France which ruled that "It is a duty of the legislator to determine, in respect of constitutional principles and by taking account of the features of each tax, the rules governing the taxpayers[1]".

[10] Counsel Bizimana Emmanuel supports that the Supreme Court of the United States of America upheld that "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases, it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground - something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection[2]".

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[1] See Conseil Constitutionnel, décision no 2009-599 DC du 29 Décembre 2009, para. 80.

[2] See Gulf, Colorado & Santa Fe Ry. Co. v. Ellis 165 U.S. 150 (1897)

[11] Basing on the decisions of the other Sates' high courts with jurisdiction of judicial review, Counsel Bizimana Emmanuel notes that there is no reasonable nor evident ground for which a recipient of foreign services for his/her business activity which is not available in Rwanda is allowed to deduct input tax on output tax when the services are considered not to be available in Rwanda, while the recipient of domestic services is allowed to deduct the input tax on the services without any other requirement.

[12] Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel who assists him observe that even if the Republic of Rwanda can sustain that the intention for enacting the article 12 (paragraphs 3 and 4) of the Law n° 37/2012 is to motivate the taxpayers to resort to domestic services more than foreign services in order to safeguard the services sector, the Court cannot consider it as the lawful ground as it is contrary to the principle of national treatment provided under the article 17 of East African Community Common Market Protocol, the article 17 of General Agreement on Trade in Services (GATS) and the article 20 of African Continental Free Trade Area Protocol on Trade in Services, and those Protocols should enforce the principle of no less favourable treatment for the same service suppliers, the country of the suppliers of the similar services.

[13] Basing on those grounds above mentioned, they conclude by sustaining that article 12 (paragraphs 3 and 4) of the Law N° 37/2012 brings about the inequality of taxpayers before the law and the unequal protection by the law as provided under article 15 of the Constitution and the domestic services cannot compete on the same level with the foreign services which can be needed

by the owners of the business activities in Rwanda because of the inequality.

[14] Counsel Kabibi Spéciose who represents the Republic of Rwanda avers that the classification of the taxpayers by a given organ does not always amount to discrimination, such guideline had been decided by the Supreme Court in the judgment n° RS/SPEC/0001/16/CS rendered on 23/09/2016 and the judgment n° RS/INCONST/SPEC 00001/2019/SC rendered on 29/11/2019.

[15] Counsel Kabibi Spéciose further sustains that in the judgment n° RS/INCONST/SPEC 00001/2019/SC rendered on 29/11/2019, the Supreme Court upheld that "concerning the taxation, the legislator has the full right to classify the taxpayers, especially because he/she is well placed than the judge to identify the needs of the Citizens and the Republic which can serve for him/her to set up the categories and the tax rate, he/she is entitled to do so, except when it is evident that the classification was done on basis of the discrimination meant for prejudicing some individuals".

[16] Counsel Kabibi Speciose explains that the fact that the legislator has classified the taxpayers into two categories including the category of the recipients of foreign services that are not available in Rwanda and the category of the recipients of foreign services available in Rwanda cannot be considered as the discrimination and the unequal protection before the law given that he/she did so for appropriate and reasonable grounds. Some of those grounds are the protection and the promotion of the small businessmen and investors operating in Rwanda, strengthening the value added tax sector, given that when a recipient gets the service in Rwanda, those who supply to him/her the service pay

the value added tax while for a recipient who gets the service not available in Rwanda, those who supply to him/her the service do not pay the tax in Rwanda, this means that when a recipient decides to get the service abroad he/she should pay such value added tax as he/she does not get the service from the supplier who would pay the tax in Rwanda while he/she is available.

[17] Counsel Kabibi Spéciose supports that the recipients of the services not available in Rwanda do not pay such tax (they are allowed to deduct input tax on output tax), given that they do not have any other alternative to get those services, except to get them abroad, and there is no businessman operating in Rwanda who could pay tax for those services, but who was denied the opportunity of supplying those services. She concludes by sustaining that the statements of Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel who assists him who maintain that article 12 (paragraphs 3 and 4) of the Law N° 37/2012 is contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 are baseless.

[18] As *Amicus curiae*, Counsel Habimana Pie avers that any State has the full independence to enact the laws governing the taxes in all their aspects. He supports that the independence as regards the taxes and the taxation is upheld by the legal scholars as to the fundamental element for the State existence as a State and it is inalienable[3]. He sustains that the independence relating to taxes is permanent even if those States are members of

[3] P. Lampreave,' Fiscal Competitiveness Versus Harmful Tax Competition in the European Union" (2011) bfit 65 (6),p.4;
P T Scanlam, 'Globalization and Tax-Related Issues: What are the Concerns?' in R Biswas (ed), International Tax Competition: Globalization and Fiscal Sovereignty (Commonwealth Secretariat 2002), p.45.

international organizations, he mentions the examples of the Organisation for Economic Cooperation and Development – (OECD) and the European Union (EU) where the taxation sector is based on each State independence and full right[4].

[19] Counsel Habimana Pie further sustains that even in the same State, it is possible that some districts or parts can have different tax laws, this applies in Rwanda to the immovable tax property where the tax rate is not identical, even the trade license tax is paid on basis of different rate according to the place where the taxpayers run their business activities and their nature.

[20] Counsel Habimana Pie also supports that equality or equal protection before the taxation law should be understood as the principle of the equal treatment of the persons in the same category and the unequal treatment of the persons in different categories. He bases his argumentation on the statement of the legal scholar called William B. Barker who wrote that "things that are alike should be treated alike and things that are unlike should be treated unlike in proportion of their un-likeness".[5] In this context, Counsel Habimana Pie further sustains that the equal treatment of the taxpayers who are unlike is rather the unequal treatment of taxpayers as upheld by the legal scholar William B. Barker who stated that "The truth is that a formally equal tax can be in some cases the most unequal of all taxes. [….] In the same

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[4] Hans Gribnau, "Equality, Legal Certainty and Tax Legislation in the Netherlands: Fundamental Legal Principles as Checks on Legislative Power: A Case Study", (2013) *Utrecht L. Rev.* 52 (9), p.62.

[5] William B. Barker, 'The Three Faces of Equality: Constitutional Requirements in Taxation', (2006), Case *W.Res.L.Rev.* 57(1), p. 5 – See paragraph 8 of the submissions of Amicus curiae.

token, it has been even argued that adhering to a strict standard of equality would result in a disaster".[6]

[21] Counsel Habimana Pie also maintains that article 12, paragraphs 3 and 4 of the law establishing the value added tax cannot be separately considered, rather it should be explained in relation with article 15 of the same law which provides under the allowance of input tax, therefore if these two articles are analysed together they can indicate that there are principle and exception in allowing to deduct or not the input value added tax.

[22] He concludes by supporting that article 12 (paragraphs 3 and 4) of the law n° 37/2012 of 09/11/2012 establishing the value added tax as modified and complemented to date is not contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015, given that in consideration of the taxpayer mentioned in the article 12 who gets service abroad available in Rwanda and the taxpayer who got the service in Rwanda, there are two different taxpayers so that there is no room to support that the article 15 of the Constitution was not enforced because the unlike taxpayers cannot be equally treated, especially that imposing a tax on the recipient who got abroad the service or goods available in Rwanda is a procedure of protecting and promoting the businessmen and the investors operating in Rwanda and it is provided under the international protocols mentioned by the claimant.

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[6] William B. Barker, op. cit., pp. 7,8,16. – See para. 9 of the submissions of *Amicus Curiae*.

DETERMINATION OF THE COURT

[23] In examining the issue related to determine if the article 12 (paragraphs 3 and 4) of the law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to the article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2915, the Court observes that it is necessary to first explain two principles related to the value added tax on transnational trade of goods and services including the Reverse Charge Principle and Destination Principle, then after it will examine the principle of equality before the law.

[24] Concerning the principle of the reverse charge in tax, the legal scholars explain that such principle "treats the customer being supplied with a service originating abroad as making the supply to itself. It must then account to its tax authorities for the VAT due as output tax on that supply[7]".

[25] A similar statement has been upheld by the Court of Appeal of Nigeria in *Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS) case which supported that* "The reverse charge applicable to European Union Countries whereby the buyer of goods or services from the supplier(s) in other EU countries assumes the responsibility of paying the applicable VAT rates instead of the Supplier. By this principle it is the buyer of goods or services that pays the VAT, put differently the VAT is paid by the person to whom the goods or services are supplied.[8]"

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[7] Victor Thuronyi (ed), *Tax Law Design and Drafting, Volume 1* (International Monetary Fund, 1996), page 196.

[8] "**The reverse charge applicable to European Union Countries whereby the buyer of goods or services from supplier(s) in other EU countries**

[26] Basing on the statements above mentioned, the Court observes that according to the principle of the reverse charge tax applicable to European Union Countries, if a person is supplied with goods or services by the suppliers operating in other countries of the European Union, the buyer of goods or services assumes the responsibility of paying the applicable VAT rates instead of the supplier of goods or services. The principle exempts or reduces the obligation of the suppliers to be registered for the value added tax in the Destination State in which the goods or services are imported. In case the suppliers are required to pay the value added tax on the imported goods or services on basis of the principle of the reverse charge tax, they can be entitled to be refunded such tax on basis of the procedure used for requesting to be refunded the value added tax established in the European Union[9].

[27] The Court observes that the principle of reverse charge tax above mentioned as applied in the European Union is provided under article 12, paragraph 1 of the law No. 37 of 09/04/2012 establishing the value added tax which stipulates that "If a taxpayer gets services from a person who is outside Rwanda, the taxpayer is considered as if he/she has delivered taxable services and has received an output tax from that person residing outside Rwanda".

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assumes the responsibility of paying the applicable VAT rates instead of the Supplier. By this principle it is the buyer of goods or services that pays the VAT, put differently the VAT is paid by the person to whom the goods or services are supplied." - Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS), Appeal No. CA/556/2018, p.23, https://lawpavilionplus.com/summary/judgments/?suitno=CA.

[9] KPMG International, VAT/GST Treatment of Cross-Border Services, 2017 Survey, p.20, https://assets.kpmg/content, 13-nov-17.pdf

[28] Concerning the Destination Principle in Tax Law, the Court observes that it has been explained in Vodacom Business Nigeria and Federal Inland Revenue Service (FIRS) case above mentioned herein whereby the Court of Appeal upheld that "The Destination principle in taxation stipulates that goods imported from a State are exempted from VAT and are instead taxed from VAT in the Destination State in which the goods are imported. It is in principle promoted by Organization for Economic Co-operation and Development (OECD)"[10].

[29] The legal scholars sustain that "Under the destination principle of taxation, goods and services are taxed where they are purchased or consumed, rather than where they are produced or originate. Destination-basis treatment can be contrasted with the origin principle, under which goods and services are taxed where they are produced. All goods and services sold in the destination jurisdiction are taxed, provided they are not specifically exempted from the tax base"[11].

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[10] **The Destination principle in taxation stipulates that goods imported from a State are exempted from VAT and are instead taxed from VAT in the Destination State in which the goods are imported. It is in principle promoted by Organization for Economic Co-operation and Development (OECD).**" Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS), Appeal No.CA/556/2018,p.23,https://lawpavilionplus.com/summary/judgments/?suitno=CA.

[11] Joseph J. Cordes, Robert D. Ebel, and Jane Gravelle, The Encyclopedia of Taxation & Tax Policy (The Urban Insitute, 2005), page 82-83. **Under the destination principle** of taxation, goods and services are taxed where they are purchased or consumed, rather than where they are produced or originate. Destination-basis treatment can be contrasted with the origin principle, under which goods and services are taxed where they are produced. All goods and services sold in the destination jurisdiction are taxed, provided they are not specifically exempted from the tax base;

[30] Concerning the principle of equality before the law, article 7 of the Universal Declaration of Human Rights, 1948 provides that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and any incitement to such discrimination".[12] The article 26 of *the International Covenant on Civil and Political Rights, 1966* provides that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status".[13]

[31] As explained by Amicus Curiae[14], the legal scholars sustain that the principle of equality before the law upholds that the law equally treats the persons in the same category and it is equally enforced. In other words, things that are alike should be treated alike. There should be no discrimination against the persons in the same circumstances and in the same conditions.

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[12] All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination''

[13] All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status"

[14] See the brief of the School of Law/University of Rwanda) as *Amicus curiae* for the judgment RS/INCONST/SPEC/00004/2019/SC, para. 8, 9 and 10.

The persons who are not in the same category should not be equally treated.

[32] Basing on the statements above provided, the Court observes that the classification of the taxpayers by a State does not always mean discrimination, such guideline has been adopted by the Supreme Court in the judgment N° RS/SPEC/0001/16/CS rendered on 23/09/2016 and the judgment n° RS/INCONST/SPEC 00001/2019/SC rendered on 29/11/2019 whereby it upheld that "the equality before the law and the non-discrimination do not mean that the distinction of the persons is always the discrimination. The distinction or the classification of the persons can be necessary on basis of the legitimate or rational purpose".

[33] In this case, the distinction between the taxpayers who get abroad the services not available in Rwanda and the taxpayers who get abroad the services available in Rwanda cannot be considered as discrimination nor unequal protection before the law, given that the State did it on basis of the legitimate or rational purpose, for example setting up the strategies to safeguard the balance of payments as Rwanda is liberalizing the services in the framework of the transnational trade in services, as we will explain it by analysing that issue[15].

[34] Basing on the explanations provided in the previous paragraphs, the Court observes that article 12 (paragraphs 3 and 4) of the Law n° 37/2012 of 09/11/2012 establishing the value

[15]The issue related to determining whether article 12, paragraphs 3 and 4 is contrary to GATS, AFCTA Protocol on Trade in Services and EAC Common Market Protocol

added tax is not contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

b. Determine if article 12, paragraphs 3 and 4 of the Law n° 37/2012 of 09/11/2012 establishing the value added tax is contrary to article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[35] Counsel Bizimana Emmanuel avers that article 12 (paragraphs 3 and 4) of the Law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to the article 95 of the Constitution of the Republic of Rwanda given that it is contrary to the international protocols ratified by Rwanda while those protocols prevail over the law establishing the value added tax as it is an ordinary law and the article 95 of the Constitution providing for the hierarchy of laws stipulates that a law cannot contradict another law that is higher in hierarchy.

[36] Counsel Bizimana Emmanuel sustains that article 12 (paragraphs 3 and 4) of the law N° 37/2012 establishing the value added tax is contrary to the international protocols ratified by Rwanda including Protocol on the Establishment of the East African Community Common Market (EAC Common Market) in its article 17, World Trade Organisation (WTO) General Agreement on Trade in Services ("GATS") in its article 17 and Protocol to the Agreement Establishing the African Continental Free Trade Area on Trade in Services (AfCFTA Protocol on Trade in Services) in its article 20. He sustains that the articles of those international protocols uphold that the principle of national treatment is not respected when the measures taken lead to the modification of the conditions of competition so as to privilege

services or service suppliers of a given country in comparison with services or service suppliers of other countries.

[37] Counsel Bizimana Emmanuel further supports that the businessman who pays the input tax should be allowed to deduct the input tax on the output tax or be refunded the additional tax in case the output tax is higher than the input tax.

[38] Counsel Bizimana Emmanuel further maintains that article 12 (paragraphs 3 and 4) of the Law n° 37/2012 establishing the value added tax does not equally treat services available in Rwanda and abroad, and such unequal treatment can make the businessmen operating in Rwanda to be disinterested in the services available abroad (rather they prefer the services available in Rwanda) because they are aware that they would not be allowed to deduct the input tax on the output tax in case those services are available in Rwanda.

[39] Counsel Bizimana Emmanuel supports that the effect caused by the article12 (paragraphs 3 and 4) is the modification of the conditions of competition to privilege services or service suppliers in Rwanda in comparison to the services and service suppliers in other countries, therefore such is contrary to the principle of the national treatment provided under the article 17 of EAC Common Market Protocol, the article 17 of GATS and the article 20 of AfCFTA Protocol on Trade in Services.

[40] Counsel Nzafashwanayo Dieudonné and Counsel Bizimana Emmanuel who assists him support that such has been upheld by World Trade Organisation (WTO) Panel which

explains in the case related to the product trade[16] that the products imported abroad are equally considered with those domestically produced when they have been cleared through customs, also the fact that a law does not provide about the sale or the purchase is not an issue because, if it is not the case, the countries can indirectly block the products from abroad.

[41] They further sustain that the WTO Panel explains that the principle of national treatment does not only concern the laws governing the sale and the purchase, but it also concerns other laws that can have adverse effects on the competition at the domestic market between the products domestically produced and those imported from abroad, the explanations they mentioned above also served as a basis for WTO Panel to decide that the law passed by the Italian Parliament allows the subsidization to the farmers who purchase the machines produced in Italy, but it does not allow it to those who buy the machines imported from abroad, even if it is not indicated in that law, the objective was to illegally protect the machines produced in Italy, therefore it is contrary to the principle of national treatment.

[42] Counsel Kabibi Spéciose avers that article 12 (paragraphs 3 and 4) of the law establishing the value added tax is not contrary to article 95 of the Constitution and it does not contradict the principle of national treatment included in the international protocols ratified by Rwanda, given that the fact that the rights are entitled to the recipient of the services not available in the country, but denied to the recipient of the services available in the country is the measure of protecting the domestic investors by only acquiring the services not available in the country, and such

[16] See Italian Discrimination against Imported Agricultural Machinery, Report adopted on 23 October 1958 (L/833 - 7S/60

measure is recognized by WTO/GATS as it admits the exception on the national treatment.

[43] Counsel Kabibi Spéciose further supports that article 12 (paragraphs 3 and 4) above mentioned is not contrary to the principle of national treatment, rather it highlights that principle, given that the domestic services and the services imported from abroad are alike treated as they are charged with the value added tax for those which should be normally taxed or exempted of taxes for those which should be normally exempted. She also explains that the fact that the taxpayer is allowed to deduct the input tax on the output tax for the services not available in Rwanda or the taxpayer who gets the services not available in Rwanda is refunded does not violate the principle of national treatment, because those services are never available in the country so as they are allegedly accorded less favourable treatment than the services imported from abroad for which it is allowed to deduct such tax.

[44] As Amicus Curiae, Counsel HABIMANA Pie sustains that the fact that the claimant maintains that the article 12 (paragraphs 3 and 4) of the law N° 37/2012 of 09/11/2012 establishing the value added tax is contrary to the article 95 of the Constitution of the Republic of Rwanda as it contradicts the international protocols ratified by Rwanda is not true given that, apart from when a legal provision is not enforced or contrary to the article of a superior law, such cannot be considered as the violation of the Constitution, there is no indication that the article 12 contradicts the article 95 of the Constitution.

[45] Counsel Habimana Pie further supports that the principle of reciprocity as one of the fundamental principles governing the international protocols upholds that the countries treat other

countries alike and they behave alike[17], no one can request a country to enforce a given article of the international protocol, rather he/she must request it to all countries parties to those protocols or to another international competent organ rather than being considered as an issue of unconstitutionality.

DETERMINATION OF THE COURT

[46] In examining the issue to determine if article 12 (paragraphs 3 and 4) of the Law n° 37/2012 of 09/11/2012 establishing the value added tax is contrary to the article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015, the Court observes that it is necessary to first examine if the article 12, paragraphs 3 and 4 of the law above mentioned herein is contrary to the international protocols mentioned by the claimant as he takes into account this issue for supporting that the provisions of these paragraphs of this article contradict the protocols while those protocols are higher than the law establishing the value added tax, according to the article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

c. Determine if the article 12, paragraphs 3 and 4 of the Law N^{0} 37/2012 of 09/11/2012 establishing the value added tax is contrary to the General Agreement on Trade in Services (GATS), African Continental Free Trade Area Protocol on Trade in

[17]F. Paris and N. Ghei, "The Role of Reciprocity in International Law" (2003) *Cornell International LJ* 36 (93), p. 94.

Services and East African Community Common Market Protocol

[47] General Agreement on Trade in Services (GTS) includes the Agreement articles, the Annexes and the Schedule which indicates the services each country member is committed to liberalizing or excluding to other countries in a given period. In order to determine how a country member of GATS is enforcing the fundamental principles of GATS including the principle of national treatment, it is necessary to consider the Schedule above mentioned.

[48] Concerning the national treatment, the article XVII[18] of GATS provides that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers". A country member wishing to exclude some services in this framework, meaning taking some measures for according to foreign services or service suppliers different treatment with the domestic services, the country must indicate it in the specific commitments of its schedule.

[49] The Court observes that according to the schedule commitments of Rwanda in the framework of GATS submitted to the World Trade Organization in 1995, there are limitations

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[18] ***Article XVII: National Treatment***

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

including some commercial services, some education services, some tourism services and transport services[19].

[50] The Court observes that article XII[20]. of GATS provides that a country can set up the restrictions to safeguard the balance of payments

[51] In this framework, basing on different policies including "Made in Rwanda Policy"[21], Rwanda set up policies for safeguarding the balance of payments

[52] Basing on the explanations provided in the previous paragraphs, the Court observes that the statements of the claimant who supports that by enacting article 12, paragraphs 3 and 4 of the Law establishing the value added tax, Rwanda did not fulfill its commitments as a member of GATS, and he pointed out that such concerns all services without considering its restrictions or its rights to take measures to safeguard the balance of payments,

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[19] World Trade Organization. Communication from Rwanda, Schedule of Specific Commitments under the General Agreement on Trade in Services, 30 August 1995

[20] *Article XII GATS:* ***Restrictions to Safeguard the Balance of Payments***
1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.
Part III. Specific Commitment.

[21] MINICOM, Made in Rwanda Policy, 2017, pp. 1-2, http://www.minicom.gov.rw, January_2018_v2.pdf

cannot be taken as true. Therefore, he cannot base his statements on that issue for maintaining that such article is contrary to that Protocol.

[53] Concerning the African Continental Free Trade Area Protocol on Trade in Services, its article 18 which provides for progressive liberalization stipulates that "State Parties shall negotiate sector specific obligations through the development of regulatory frameworks for each of the sectors, as necessary, taking account of the best practices and acquis from the RECs, as well as the negotiated agreement on sectors for regulatory cooperation. State Parties agree that negotiations for continuing the process shall commence following the establishment of the AfCFTA, based on the work program to be agreed by the Committee on Trade in Services".

[54] The same article provides that "The list of Priority Sectors and the Modalities on Trade in Services shall be annexed to this Protocol and shall form an integral part hereof". The Protocol also provides that the States will hold negotiations on the issues upon which they do not agree.

[55] The Court observes that the session of the Heads of State Members of AfCFTA held in February 2020 approved the resolutions of the Council of the Ministers which decided that the extraordinary session of the Heads of States should be held on 30 May 2020 to decide on all necessary requirements for launching the AfCFTA on 1 July 2020[22].

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[22] Decision on the African Continental Free Trade Area (AfCFTA), 33rd Ordinary Session of the Assembly of the Union, 9-10 February 2020, Addis Abeba, Ethiopia, https://www.tralac.org/documents/resources/cfta/3176-au-assembly-decision-on-the-afcfta-february2020/file.html

[56] The Court also observes that the Session requested the Ministers of Commerce to hold the necessary sessions to conclude the negotiations on the rule of origin, the schedules of tariff concessions and the schedules of specific commitments concerning five principal sectors of services, it requested the States to determine their commitments on the remaining sectors of services and the cooperation on the trade in services not later than June 2020[23].

[57] Basing on the explanations provided in the previous paragraphs on this issue, the Court observes that the statements of the claimant who maintains that Rwanda did not respect the provisions of the African Continental Free Trade Area Protocol on Trade in Services are not founded, as long as there are negotiations which should be held to decide on some requirements necessary for the implementation of that Protocol. Thus, the Court does not have any basis to decide that article 12, paragraphs 3 and 4 of the Law establishing the value added tax contradicts the African Continental Free Trade Area Protocol on Trade in Services.

[58] The claimant also avers that article 12, paragraphs 3 and 4 of the Law establishing the value added tax is contrary to the East African Community Common Market Protocol. The article 16 the first[24] paragraph of the Protocol provides for the Partner States to guarantee the free movement of services supplied by nationals of the Partner States and the free movement of service

[23] Ibidem

[24] The Partner States hereby guarantee the free movement of services supplied by nationals of Partner States and the free movement of service suppliers who are nationals of the Partner State within the Community.

suppliers who are nationals of the Partner State within the Community".

[59] The paragraph 5 of that article provides for the purposes of paragraph 1, the Partner States shall progressively remove existing restrictions and shall not introduce any new restrictions on the provision of services in the Partner States, by nationals of other Partner States except as otherwise provided in this Protocol[25].

[60] The article 17 of that Protocol concerning the national treatment provides for each Partner State to accord services and service suppliers of other Partner States treatment no less favourable than that accorded to similar services and services suppliers of the partner states"[26].

[61] The article 20, paragraph 1 of that Protocol provides that the partner state may regulate their services actors provided the measures are consistent with the provisions of this Protocol and do not constitute trade barriers[27].

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[25] For the purposes of paragraph 1, the Partner States shall progressively remove existing restrictions and shall not introduce any new restrictions on the provision of services in the Partner States, by nationals of other Partner States except as otherwise provided in this Protocol.

[26] Each partner State shall accord to services and service suppliers of other partner States treatment no less favorable than that accorded to similar services and services suppliers of the Partner States

[27] The Partner State may regulate their services sectors provided the measures are consistent with the provisions of this Protocol and do not constitute barriers to trade.

[62] Regarding the free movement of services, article 23 of that Protocol[28] provides that for the implementation of Article 16 of that Protocol shall be progressive and in accordance with the Schedule on the progressive liberalization of services specified in Annex V of this Protocol. The article 32 of that Protocol which provides for the harmonization of tax policies and laws provides for the Partner States undertake to progressively harmonize their tax policies and laws to remove tax distortions in order to facilitate the free movement of goods, services and capital and to promote investment within the Community[29].

[63] Moreover, article 47 of that Protocol provides for the partner states to undertake to approximate their national laws and to harmonize their policies and systems, for purposes of implementing this Protocol. Furthermore, the Community Council of the Ministers should set up the Council Directives for the implementation of this Protocol[30].

[64] The Court also observes that the Annex V of the Protocol above mentioned concerning the Schedule of Commitments on

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[28] The implementation of Article 16 of this Protocol shall be progressive and in accordance with the Schedule on the progressive liberalization of services specified in Annex V of this Protocol.

[29] The Partner States undertake to progressively harmonize their tax policies and laws to remove tax distortions in order to facilitate the free movement of goods, services and capital and to promote investment within the Community

[30] The Partner States undertake to approximate their national laws and to harmonize their policies and systems, for purposes of implementing this Protocol.The Council shall issue directives for purposes of implementing this Article

the progressive liberalization of services[31], Rwanda and other Partner States had made commitments up to 2015.

[65] It observe that the Partner States hold meetings for discussing the procedure of liberalization of transnational goods and services. In this framework, the Secretariat of the Community published the Consultants report[32] on the harmonization of income taxes within the East African Community. In its meeting of May 2019, the Council of the Ministers of East African Community validated the EAC Domestic Tax Harmonization Policy and requested the Partner States to implement it[33].

[66] The Court also observes that in the context of the harmonization of domestic tax policy, the Partner States agreed that the progressive approach would be used for the tax harmonization, starting with the excise tax, then the value added tax and the income tax. They decided that the Council Directives should be taken so that a specific directive should be taken on each tax category and the directives should indicate the period for which each Partner State should have harmonized its laws and each directive concerning each tax category[34].

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[31] East African Community Common Market Protocol – Schedule of Commitments on the Progressive Liberalization of Services, November 2009.

[32] Consultants' Report on the Harmonization of Income Taxes within the East African Community, 1 November 2014; East African Community, Report of the Meeting to validate the studies on development of Policy frameworks for the harmonization of VAT, Excise duties and Income tax in EAC, Mombasa, 23rd – 25th October 2014; PWC, Policy for harmonization of VAT and Excise duties, 28 October 2014.

[33] East African Community, Report of the 38th Meeting of the Council of Ministers, 6th – 10th May 2019, pp. 30-31.

[34] East African Community, Report of the 38th Meeting of the Council of Ministers, 6th -10th May 2019, Annex IV: EAC Domestic Tax Harmonization Policy, pp. 8-9.

[67] Basing on the explanations above mentioned, the Court observes that the statements of the claimant who maintains that Rwanda violated the East African Community Common Market Protocol by enacting the article 12, paragraphs 3 and 4 of the Law establishing the value added tax are baseless, given that there are the requirements necessary for the implementation of the domestic tax harmonization policy including the Directives of the Council of the Ministers of East African Community on the value added tax.

[68] Basing on its decision that the article 12, paragraphs 3 and 4 of the Law establishing the value added tax does not contradict the international protocols including GATS, AfCFTA Protocol on Trade in Services and EAC Common Market Protocol, and after realising that the claimant based on this issue to support that article 12, paragraphs 3 and 4 are contrary to the article 95 of the Constitution of 2003 revised in 2015, the Court observes that the article 12, paragraphs 3 and 4 of the Law establishing the value added tax is not contrary to the article 95 of the Constitution of the Republic of Rwanda of 2003 revised in2015.

III. THE COURT DECISION

[69] Decides that the claim filed by Counsel Nzafashwanayo Dieudonné is not founded.

[70] Decides that article 12, paragraphs 3 and 4 of the Law N^{0} 37/2012 of 09/11/2012 establishing the value added tax is not contrary to article 15 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[71] Decides that article 12, paragraphs 3 and 4 of the Law N^{0} 37/2012 of 09/11/2012 establishing the value added tax is not contrary to article 95 of the Constitution of the Republic of Rwanda of 2003 revised in 2015.

PUBLIC INTEREST LITIGATION PETITION

ASSOCIATION DES ASSUREURS DU RWANDA (ASSAR) v. GOVERNMENT OF RWANDA (MIFOTRA)

[Rwanda SUPREME COURT – RS/PIL/SPEC 00001/2019/SC – (Ntezilyayo, P.J., Nyirinkwaya, Cyanzayire, Hitiyaremye and Rukundakuvuga., J.) June 19, 2020]

Procedure for special claims – Public interest litigation – The role of the Government in the of public interest litigation – A public interest litigation must be aimed at respecting the rights of others rather than that of the petitioner's issues, even if the petitioner also has an interest in the subject matter, that interest must be shared by other people – In the petitions of public interest, the State is summoned to present an opinion but not as a party that may claim or charged costs

Procedure for special claims – Public interest litigation – The public interest arises when an action or omission infringes on the rights of many persons or adversely affects them, which is remedied by petitioning a competent court.

Facts: The *Association des Assureurs du Rwanda* (in this case to be referred to as ASSAR) filed a claim against the Government of Rwanda (MIFOTRA) to the Supreme Court requesting that the latter, should be compelled to remove all barriers that hinder the implementation of the Minimum Wage (SMIG) in Rwanda because article 68 of the Law N° 66/2018 of 30/08/2018 regulating labour in Rwanda provides that the Minimum Wage (SMIG) is established by a Ministerial order having labour in his/her attribution but it has not been established yet and there is

no explanation as to why it has not been done. It explains that the absence of a Minimum Wage affects the public interest of Rwandans and is contrary to articles 49 and 121 of the Constitution of the Republic of Rwanda of 04/06/2003 amended in 2015.

The Court first examined whether ASSAR sued the right party. Regarding this issue, ASSAR argues that the Government should be a party to this case because the gist of the action is of public interest and it is the one responsible for the wellbeing of Rwandans.

The State Attorney argues that normally in such cases, the State does not appear as a party but it only appears to give its opinion on the litigated issue and that if the Court finds that it is not a party, in this case, it can be guided by the opinion it will give.

The *Amicus curiae* also argues that public interest litigation is a unilateral petition, and therefore, the state should appear to give its opinion to the court.

After solving the issue of determining how the State should be treated in this case, the hearing focused solely on the issue of admissibility of the petition in accordance with the provisions of the law.

ASSAR, argues that currently there is no minimum wage in Rwanda, which affects the public interest of Rwandans in general and in particular to a large extent the part of the Rwandan population dealing in insurance business, which are insurance companies and that due to the lack of employment, the employees are not able to negotiate with the employer the wage to be paid, which has a negative impact as he or she may be paid meagre salary, which is another indication that this issue is detrimental to the public interest.

The State Attorney argues that the fact that the Ministerial Order establishing the Minimum Wage (SMIG) has not yet been enacted do not negatively affect the public interest because currently there is no legal vacuum because there is a case law of the Supreme Court in which it pronounced its position on that issue and determined the Minimum Wage, in doing this the Supreme Court based on its competence to act as a Legislature in the absence of a law. The State Attorney further added that the compensation is done in accordance with the Presidential Order Nº 31/01 of 25/08/2003 on compensation for personal injury due to accidents caused by a motor vehicle which provides for the minimum compensation for pension and accident related to work.

The *Amicus Curiae* argues that claiming that there is no Minimum Wage in Rwanda is misleading because since 2012, the Supreme Court through its judgment fixed the Minimum Wage and in the year 2016 it was revised based on market prices.

Concerning the study conducted which was annexed on the petition, the petitioner argues that the study demonstrates that there is no Minimum Wage because that study was used by MIFOTRA trying to solve the issue of Minimum Wage and that before petitioning the Court, it had tried to find a way the issue of establishing the Minimum Wage can be solved but failed.

The State Attorney argues that the petitioner did not produce the study conducted by the experts to demonstrate the seriousness of the issue because the study annexed was not carried out purposely to demonstrate the negative consequences of not having a Minimum Wage in the country. On the part of the *Amicus Curiae,* it also finds that the study annexed on the petition was carried out by the Ministry in charge of labour and it does not demonstrate the negative consequences of not establishing the minimum wage.

Held: 1. In public interest litigation, the State is summoned to present an opinion but not as a party that may claim or charged costs.

2. A public interest litigation must be aimed at respecting the rights of others rather than that of the petitioner's issues, even if the petitioner also has an interest in the subject matter, that interest must be shared by other people.

3. The public interest arises when an action or omission infringes on the rights of many persons or adversely affects them, which is remedied by petitioning a competent court.

4. The objectives of the study set out in the annex to the petition are not intended to demonstrate the dire consequences of not having a Minimum Wage, but to consider the basis for determining the base salary in various categories of work. Therefore, since that study does not indicate all that, means that it does not meet the requirements provided by the Law.

The petition dismissed.

Statute and statutory instruments referred to:

Constitution of the Republic of Rwanda of 4 June 2003 as amended in 2015, article 49 and 121.

Law N° 66/2018 of 30/08/2018 regulating labour in Rwanda (abrogated), articles 2 and 3.

Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts, article 68 and 80.

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article12.

Law Nº 005/2015 of 30/03/2015 governing the organization of pension schemes, article 27.

Minimum wage-fixing machinery convention, 1928 n° 26" ratified on 1976.

Presidential Order N°069/01 of 13/04/2018 increasing pension and occupational hazards benefits granted by Rwanda Social Security Board, article 2.

Presidential Order Nº 31/01 of 25/08/2003 on compensation for personal injury due to accidents caused by motor vehicle.

Cases referred to:

Nyetera Jean Baptiste v. CORAR, RCAA 0202/07/CS rendered by Supreme Court on 09/04/2009

SORAS AG Ltd v. Umuhoza Pacifique et, al. RCAA 0049/14/CS rendered by Supreme Court on 25/11/2016

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236

Author cited:

Albert Ruturi & Another v. Minister for finance and others, (2002) IK.LR 61 (Kenya) and Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General) 2012 SCC 45 (2012) 2 S.C.R 524.

Something in which the public as a whole has a stake (…), Black's Law Dictionary, Ninth Edition, p. 1350.

Wadehra, Basant Lal. Public Interest Litigation: A Handbook, with Model PIL Formats. Universal Law Publishing, 2009, p. 46.

A Study on the Establishment and the Determination of the Minimum Guarantee Wage (MGW/SMIG) per Occupational Categories, Last Version, July 2018.

Judgment

I. BACKGROUND OF THE CASE

[1] *Association des Assureurs du Rwanda* (ASSAR) filed a case in the Supreme Court against the Government of Rwanda (MIFOTRA) seeking that the respondent be compelled to remove all obstructions to the establishment of a minimum wage in Rwanda because not having it in place prejudices the public interest.

[2] ASSAR argues that paragraph 27[1] of article 2 of the law N°66/2018 of 30/08/2018 regulating labour in Rwanda explains what is meant by a minimum wage where it states that it is the minimum wage recognized by Law based on each category of occupation, and such definition is somehow similar to that of the International Labour Organization where it defined the minimum wage as the minimum amount of remuneration an employer is required to pay a wage earner for the work performed during a given period which cannot be reduced by collective agreement or an individual contract.

[3] ASSAR) submits that article 68 of the Law N° 66/2018 of 30/08/2018 regulating labour in Rwanda provides that an Order of the Minister in charge of labour determines minimum wage and that even the other previous labour laws also had similar provisions like article 76 of the Law N° 13/2009 of 27/05/2009 and article 83 of the law N° 51/2001 of 30/12/2001 both provided that the ministry in charge of labour has the duty

[1] It is article 3 of the law N° 66/2018 of 30/08/2018 regulating labour in Rwanda

to determine the minimum wage, however, this was not implemented, and no reasonable ground to that effect was given.

[4] SSAR maintains that apart from the national law that governs labour which mandates the Ministry having labour in its attributions to determine the minimum wage, there are is also the "*Minimum wage-fixing machinery convention, 1928 n° 26*" which was ratified by Rwanda in 1976 which also provided under article one that each member which ratifies this Convention undertakes to create or maintain machinery whereby minimum rates of wages can be fixed for workers employed in certain of trades or parts of trades existing in member states.

[5] Furthermore SSAR goes on to explain that the fact that there is no minimum wage in Rwanda yet the Law provides for it, is contrary to article 49 and 121 of the Constitution of Rwanda of 04/06/2003 revised in 2015, which provides that every Rwandan has the duty to respect the Constitution and all leaders implement laws through Orders when it is in their responsibilities and it finds this a serious public issue, therefore it decided to petition the Supreme Court seeking the removal of all existing barriers to the implementation of a minimum wage.

[6] The case was heard in public on 19/052020, ASSAR was represented by Counsel Butare Emmanuel and Umugwaneza Claudine whereas the Government of Rwanda was represented by State Attorney Kabibi Spéciose.

[7] After the examination of the application of the School of Law /University of Rwanda to appear as *Amicus Curiae* in this case, and after both counsels, for ASSAR and the Government of Rwanda not objecting to it, the court allowed its application.

[8] The Court also examined the issue related to the fact that ASSAR sued the Government of Rwanda yet according to paragraph 4 of article 80 of the Law N°30/2018 of 02/06/2018 governing the competence of courts provides that in such cases, the hearing is conducted in public and the in the presence of a government representative. On this matter counsel Kabibi Spéciose states that usually, in such petitions, the Government does not appear as a party to the case, but to give opinion, however, based on the spirit in which ASSAR's representatives are explaining, it is as if they lodged the claim against the Government, accordingly, she prays to the court to reject the petition of ASSAR, and in case the court finds that the Government is not a party to the petition she prays that this court can be guided by its opinion.

[9] Counsel Emmanuel argues that the reason as to why the Government was sued in this case is because the subject matter thereof is of public interest, and it is the government that is responsible for the wellbeing of the people, and it is the reason why the legislator provided that in such cases, the hearing is done in public and the presence of the Government representative. Counsel Umugwaneza Claudine explains that the fact that it's the responsibility of MIFOTRA to implement the minimum wage, the Government could not have appeared in the case to give opinion only because it would be contrary to article 13 of the Law N° 22/2018 of 29/04/2019 relating to the civil, commercial, labour and administrative procedure

[10] Counsel Sebucensha Leonard representing the School of law argues that petitions in connection with the rights relating to the general interest should not have respondents because if it's the case, it would imply that there should be someone liable and

have to restore those rights to the petitioner, but rather the Government should appear to give opinion.

[11] After hearing the submission of both parties on this issue, the court adjourned and held that the Government appears in this case to give its opinion on the matter, but not as a party to the case who might be liable or hold other party liable.

[12] After deciding on the issue of allowing the school of law to appear as *Amicus curiae* and the one relating to the status of the government in this case, the court held that the issue to be examined should only to determine whether ASSAR's petition is admissible pursuant to the provisions of article 80 of the Law N° 30/2018 mentioned hereinabove.

ANALYSIS OF THE LEGAL ISSUES

[13] Relying on the provisions of article 80 of the Law N° 30/2018 mentioned hereinabove, and after considering ASSAR's submissions and the School of law's representative opinion on the same, the court finds that the following are the legal issues to be examined:

a. **Whether ASSAR's petition demonstrates a public legitimate interest pursued, and the legal basis for its action.**

b. **Whether ASSAR's study report annexed to its submission complies with what is provided under paragraph 2 of article 80 of the law N° 30/2018 of 02/06/2018 governing the competence of the courts.**

The court shall therefore examine the legal issues one by one.

a. Whether ASSAR's petition demonstrates a public legitimate interest pursued, and the legal basis for the rights pursued/ the legal basis for its action.

[14] Counsel Kabibi Speciose, representing the Government of Rwanda submits that much as it is reasonable that the Order determining the Minimum wage be enacted because it is provided under the law, the fact that it is not yet enacted have not violated the general interest of Rwandans as purported by ASSAR for the following reasons:

- There is no legal vacuum created by the fact that there is no minimum wage put in place because the judgment RCAA 0049/14/CS rendered on 25/11/2016 by Supreme Court, the Court put the minimum wage to three thousand Rwandan Franc (3,000Frw) per day. The court based its ruling on the fact that it has inherent authority to act as a legislator in the event of the legal vacuum
- She gave an example that in determining the compensation for injuries due to accidents caused by motor vehicles etc. the 3000Frw put in place by the Supreme Court is based upon by the insurance companies in computing the compensation.
- Whereas on matters regarding pension, she maintains that in the event where a person earns below 13,000Frw, it is raised to 13,000 to avoid that the pensioner may not go below the poverty line, and in advancing this she relied on the Presidential Order nº 31/01 of 25/08/2003 on compensation for personal injuries due to

> accidents caused by motor vehicles which state that: Pension and occupational hazard benefits granted to the insured person cannot go below thirteen thousand Rwandan francs (13,000) per month

[15] The State Attorney KABIBI Speciose goes on to submit that based on the foregoing explanations, she is convinced that there is no general interest that is violated due to the absence of the Order determining the minimum wage given that the criteria for determining it, is available. She explains that normally; the minimum wage is determined for salaried workers to prevent workers from going below the poverty line.

[16] She demonstrates that a Labour force survey conducted in 2918, indicated that the average monthly salary from paid employment is 56,982, whereas "the Fifth Integrated Household Living Conditions Survey" (EICV5) on the wellbeing of the households shows that at least 159,375 a person has to earn for that person not to be below the poverty line. This survey demonstrates that the salaried workers in Rwanda, are paid the salary which is not below the poverty line.

[17] She concludes stating that given all the foregoing explanations, she is of the view that there is no serious issue with adverse effects to people in general caused by the fact that the order determining the minimum wage is not yet enacted, on the contrary, it demonstrates that the forces of demand and supply establish a minimum wage in proportion to the work performed by the worker, which is current. Therefore, she finds that the fact that the Order is not yet enacted does not by itself constitute a deprivation of general interests of Rwandans.

[18] Counsel Umugwaneza Claudine submits that, the fact that there is no minimum wage in Rwanda, prejudice the general interest of Rwandans in general and the Insurance companies in particular. She goes on to argue that the general interest deprived is manifested in the fact that article 68 of the Law N° 66/2018 of 30/08/2018 regulating labour in Rwanda provides that an order of the Minister in charge of labour determines minimum wage and moreover the labour law has been repealed three times, but still, the minimum wage has not been implimeted.

[19] On matters related to the effects resulting from the fact that there is no minimum wage in Rwanda, Counsel Umugwaneza Claudine states that it prejudices the general interests to the insurance companies, and as a result, different courts including the Supreme Court undertook to set an amount as a threshold in determining the compensation for the victim of accidents.

[20] She cited the judgment N° RCAA 0202/07/SC between NYETERA Jean Baptiste and CORAR rendered by the Supreme Court on 09/04/2009 as an example in which par.78 of that case the Supreme Court put the minimum wage at 2,500Frw per day. In another case N° RCAA 0049/14/CS between SORAS AG Ltd and Umuhoza Pacifique, Izabayo Sylvie, Niyoyita Jacques rendered by the Supreme Court on 25/11/2016, in par. 27 and 28 held that until now there is no law determining the minimum wage, much as there are decided cases wherein an amount of money was set to be construed as the minimum wage, and in the very case, the court set 3,000Frw as the minimum wage.

[21] She argues that in the insurance companies, affiliates pay their premiums from which compensations for personal injuries due to accidents caused by motor vehicles are got. The

computation of such compensation based on the amount determined by the Supreme Court is unjust because is only in the discretion of the court.

[22] She goes on to argue that even the Law N° 05/2015 OF 30/03/2015 governing the organization of pension schemes, article 27 provides that the old-age pension, disability, or early retirement benefits shall in no way be less than fifty percent (50%) of the minimum wage determined by an Order of the Minister in charge of labour. Accordingly, this implies that as long as the minimum wage is not yet determined, it will adversely affect the institution in charge of granting old age benefits, or the pension beneficiary given that it is hard to determine the amount.

[23] Counsel Butare Emmanuel added that the 2018 Labour force survey that the Government attorney relied upon her arguments demonstrate that the unemployed people are 15.2%, it also shows the number of unemployed graduates implying that because of lack of unemployment, a job seeking employee cannot bargain a salary with the employer and consequently prejudicial by reasons of a meagre salary as there is no determined minimum wage, hence another proof that this matter is a matter of general interest.

[24] Intervening as *amicus curiae*, Counsel Sebucensha Leonard contends that companies as well as other organisations, pursue their interests and those of their members, accordingly he finds ASSAR's petition not in the general interests because all Rwandans have no interest in insurance companies. He stressed that a general interest petition is one that is lodged before a competent court with the purpose of defending the general public interests and gave examples of how different jurisdictions

resolved the matter of the eligible party to lodge a petition on the matters related to general public interests.[2]

[25] Furthermore, Counsel Sebucensha Leonard submits that much as the of the Minister in charge of labour was mandated to determine the minimum wage, the fact that such Order is not yet enacted does not amount to a violation of laws, including Constitutional provisions cited by ASSAR or International conventions ratified by Rwanda given that the law did not determine the deadline for enacting such Ministerial Order, and the Government should in no way be pressured since enacting such an Order require a lot of things that need to be carefully considered.

[26] Lastly, Counsel Sebucensha Leonard argues that ASSAR's allegation that there is no minimum wage in Rwanda is not true because since 2012, the Supreme Court determined the minimum wage, and in 2016, the minimum wage was raised based on the market price as evident in judgments RCAA 0202/07/CS, RCAA 0003/11/CS, RSOCAA 0112/10/CS and RCAA 0049/14/CS.

DETERMINATION OF THE COURT

[27] Article 80 of Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts provides that a natural person or a government institution, a political organization, a company, a non-governmental organization or association with legal personality may bring an action for preservation or deprivation of

[2] Albert Ruturi & Another v. Minister for finance and others, (2002) IK.L.R 61 (Kenya) and Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General) 2012 SCC 45,(2012) 2 S.C.R 524

rights relating to the general interest of the country, its natural resources, it's entire or part of the population. **The applicant must demonstrate in his/her submission the public legitimate interest pursued (…)"**

[28] Following the analysis of the contents of article 80 mentioned hereinabove, the court finds it compelling to give the interpretation of public legitimate interest pursued. Legal scholars and courts who analyzed such issue demonstrated the requirements necessary for the admissibility of the action for preservation or deprivation of rights relating to the general interest of the country, and such must be the basis in examining whether ASSAR is representing a public legitimate interest in the case.

[29] Public interest is perceived as something in which the general public as a whole has a stake[3] it is in the light of the foregoing that a legal scholar called **Wadehra, Basant Lal.** explains that public interest litigation means litigation which serves the public interest. It is litigation that vindicates a right of a large number of people, perhaps millions, or redresses a wrong done to them. He furthermore emphasises that for the existence of public interest litigation, four conditions are necessary:

a. Some action, inaction, or state of affairs;
b. Such action causes the deprivation of right to a large number of people, or causes a large number of people to suffer a similar wrong;

[3] Something in which the public as a whole has a stake (…), Blacks Law Dictionary, Ninth Edition, p. 1350

c. Relief is sought by respecting that right or the wrong redressed, through a petition to the competent courts;

d. By a public-oriented person or an association acting on behalf of those injured.

He goes on to submit that in public interest litigation, the sine qua non is that it must be for the enforcement of rights of others not the individual grievances of the petitioner. Even if the petitioner is interested in the matter, it must be an interest that he/she shares with other members of the public. The relief, if granted must benefit a large section of society not a handful of individuals. [4]

[30] It is also in the finding of the court that the arguments of the legal scholar Wadehra, Basant Lal in respect with the conditions necessary for the existence of public interest litigation, were also held by the Canadian Supreme Court in case Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236, wherein the court held that the recognition of the need to grant public interest standing whether occasioned by either the gravity of the public rights or the desire to comply with the principles enshrined in the Constitution Act, *1982*[5], in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. A balance must be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant

[4] Wadehra, Basant Lal. Public Interest Litigation: A Handbook, with Model PIL Formats. Universal Law

[5] Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236 (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/835/index.do)

suits brought by well-meaning organizations, pursuing their particular cases.[6]

[31] Concerning the petition of SSAR as demonstrated in its submission and other documents in their case file, SSAR is an association with legal personality and as stipulated in clause 4 point 1, 2 and 4 of its Articles of Association, ASSAR's objective is to promote insurance business, defending the profession related interests of their members, to represent its members before Government organs and in other institutions wherein their general interests can be litigated.

[32] The court finds that what to be construed in Article 4 mentioned in the preceding paragraph is that ASSAR is an association that pursues the interests of its members rather than the interests of Rwandans in general and the foregoing is emphasised by its counsel, Advocate Umugwaneza Claudine when she explained that the fact that there is no determined minimum wage, it greatly affects companies that offer insurance services and as a result, courts were prompted to determine it, based on their sole discretion, without basing on well-established standards and gave an examples of the Supreme Court cases, such as the case N° RCAA 0202/07/CS on 09/04/2009 which held that the minimum wage is 2,500Frw, and case N° RCAA 0049/14/CS rendered on 25/11/2016 where it held that the minimum wage is 3,000Frw.

[33] It is also in the finding of the court that in its letter dated 14/11/2016 to MIFOTRA, the National Bank of Rwanda emphasised that not having the minimum wage is effects the insurance companies where it demonstrated that the Minister in

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[6] Ibidem

charge of labour has not yet determined the minimum wage in Rwanda is detrimental to insurance companies especially on matters regarding compensation for injuries due to accidents caused by motor vehicles that are awarded based on the precedent set by the Supreme Court in case N° RCAA 0202/07/CS rendered on 09/04/2009 that determined 2,500Frw per day moreover other courts undertook to determine a higher amount.

[34] In respect to counsel Umugwaneza Claudine's argument that ASSAR pursues the general interests of Rwandans based on the fact that compensation for injuries due to accidents caused by motor vehicles by the Insurance Companies come from the contributions paid by the Rwandans, it is in the finding of the court that her explanations do not prove that it pursues the public legitimate interest given that as explained by the Government representative as well as the *amicus curiae*, that all Rwandans don't own vehicles to the point that they pay premiums to the insurance companies, in lieu it is a small part of Rwandans, especially that ASSAR did not adduce any evidence proving that the insurance policy holders submitted to it the matter regarding the fact that there is no minimum wage determined by an Order of the Minister in charge of labour.

[35] Regarding the argument of the counsel for ASSAR that the absence of the minimum wage adversely affects the organ in charge of granting pension benefits and the beneficiary in accordance to article 27 of the Law[7] N° 05/2015 Of 30/03/2015

[7] Article 7 of the law nº 005/2015 of 30/03/2015 governing the Organization of Pension Schemes provides that for the member referred to under Paragraph One of Article 5 of this Law, the salary used as the basis for calculating the contribution shall not be less than the base salary and may not exceed one hundred and thirty percent (130%) of final salary used as the basis for

Governing the Organization of pension schemes which states that "the old-age pension, disability or early retirement benefits shall in no way be less than fifty percent (50%) of the minimum wage", the court finds that other than stating it verbally, ASSAR does not demonstrate the nature of such adverse effects caused by the absence of the minimum wage determined by an Order of the Minister in charge of labour. Moreover, even if there are fears that the beneficiaries of pension benefits may be granted little amount as a result of the absence of the minimum wage which would determine the minimum amount, it is in the finding of the court that such an issue was settled by article 2 of the Presidential Order N° 069/01 of 13/04/2018 increasing pension and occupational hazards benefits granted by Rwanda Social Security Board where it provides that pension and occupational hazard benefits granted to the insured person cannot be less than thirteen thousand Rwandan francs (FRW 13,000) per month.

[36] Regarding ASSAR's argument that their petition intends to protect the general interest because the determination of the minimum wage by an Order of the Minister in charge of labour is a way of complying with the law regulating labour and the international conventions ratified by Rwanda of which failure to comply, tantamount to violation of the Constitution, the court finds that it is indeed provided under article 68 of the above mentioned law that the Minister in charge of labour shall enact such Order, but as advanced by the *amicus curiae*, the same law does not give the deadline for such enactment to be effected and

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calculating contributions. This salary cannot increase by more than thirty percent (30%) every three (3) years.
Article 27 of the same law stipulates that The old-age pension, disability, or early retirement benefits shall in no way be less than fifty percent (50%) of the minimum wage determined by an Order of the Minister in charge of labour.

as evidenced in the case file, there some works done by MIFOTRA with the view of enacting such Order and in which ASSAR also participated

[37] Pursuant to the motivations given above, the Court finds that the petition of ASSAR seeking the declaration that all deprivations of any kind that hinder the implementation of the SMIG/Minimum Wage in Rwanda be removed, do not demonstrate the legitimate general interests pursue as provided by article 80 of the law N° 30/2018 mentioned hereinabove.

b. Whether ASSAR's study report annexed to its submissions fulfills all the requirements provided under article.80 paragraph 2 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of courts

[38] Counsel Kabibi Speciose submits that ASSAR's petition does not contain a study report by experts demonstrating the gravity of the issue, how it tried to solve it in cooperation with the government institutions and failed and the effects of not solving that issue. She states that the study report that ASSAR annexed to the petition which it alleges that it was made by the Ministry of labour and civil servants (MIFOTRA), is a draft study report showing the market salaries of different levels of employment, different practices in place in determining the minimum wage and the gross domestic product, the minimum wage in reducing profit inequalities, poverty and so forth. She contends that such a report cannot be relied upon given that its initial purpose was not to demonstrate the effects of not having a minimum wage. She prays to the Court to reject the petition of ASSAR on the ground that it does not fulfil the conditions

provided under article 80 paragraph 2 of the Law N° 30/2018 mentioned above.

[39] Counsel Kabibi Speciose further argues that ASSAR does not demonstrate anything tangible it did in an attempt to solve the issue of not having the minimum wage, nor does it demonstrate whether it carried out any research about it, so that it can show its effects and how it can be solved and she concludes by requesting the Court to reject the petition filed by ASSAR on the ground that it does not fulfil the conditions required by the law.

[40] In its defence against Counsel Kabibi Speciose's arguments, Counsel Butare Emmanuel argues that the study carried out by the Ministry in charge of labour demonstrates that there is no minimum wage, whereby in its preface the report highlights the problem and the problems caused by not having the minimum wage, implying that MIFOTRA referred to that study report in an attempt to solve the issue of the minimum wage. He argues that both the Government of Rwanda and the *Amicus curiae*, they concur that there is no minimum wage, and that the Ministry which has that responsibility is still studying the issue, however, considering the timeline set by the labour law to have implemented the minimum wage but which was not met, in his view he finds that MIFOTRA did not prioritize the matter.

[41] In supporting his arguments, Counsel Umugwaneza Claudine argues that the study report on the minimum wage was conducted by the Ministry of labour and civil servants in July 2018, and on page 33 of the report, it is demonstrated that the minimum wage should be 1,400Frw per day, and they also demonstrate the advantages of implementing the minimum wage, whereby they emphasized that facilitates in uprooting poverty

and other problems mentioned in that article, given that article demonstrates how different labour laws provided for the determination of the minimum wage and its importance in the national development and the citizens in general and accordingly finds such report sufficient to demonstrate the seriousness of the issue of not having the minimum wage in Rwanda.

[42] Counsel Umugwaneza Claudine furthermore submits that before ASSAR petitioned the Supreme Court, it had unsuccessfully tried to solve the issue related to the implementation of the minimum wage, this is demonstrated by various letters it wrote to the Ministry in charge of labour including the letter from the National Bank of Rwanda as the supervising organ of insurance companies that it wrote to the Minister of labour and civil servants on 14/11/29016 demonstrating that the fact that there is no standard minimum wage in place has led to different courts to determine the amount of money to be based on in determining the compensation for personal injuries due to accidents caused by insured motor vehicles, yet that is a duty entrusted to the Ministry in his charge by the labour law , and this have a negative impact on the insurance companies in Rwanda.

[43] Counsel Umugwaneza Claudine explains that the Ministry of labour and civil servants responded to the foregoing letter on 23/01/2017 whereby in paragraph two, it stated that the implementation of the minimum wage is pending until the amendment of the law Nº 13/2009 of 27/05/2009 governing labour in Rwanda. She maintains that much as that letter was promising, but the law governing labour was published in the official gazette 30/08/2018, and a year has elapsed when the matter relating to the minimum wage hasn't been solved, yet

article 68 of the that law provides that an Order of the Minister in charge of labour determines minimum wage.

[44] She goes on to explain that there is another letter that was written to MINECOFIN on 05/06/2019 and copied to MIFOTRA and MINIJUST, whereby ASSAR once again undertook to demonstrated the negative impact it suffers as a result of not having a standard minimum wage in Rwanda. Accordingly, the fact that ASSAR attempted to address this matter to different institutions, and the issue was not solved, ASSAR finds that only the Supreme Court can solve it.

[45] In their respective submissions, Counsel Serugo Jean Baptiste and Counsel Sebucensha Leonard submit that ASSAR relies upon the study report made by the Ministry in charge of labor yet such a report does not demonstrate the grave impact of not having the minimum wage, that such a report was not meant to demonstrate that there is no minimum wage. They explain that such a study report cannot be construed as one that was made by experts and they furthermore explain that in order to be in accordance with the provisions of article 80 of Law N° 30/2018 mentioned hereinabove, such a study report should be made by a person with expertise on the matter under examination and accordingly the study report submitted by ASSAR does not fulfil the requirements laid down under article 80 of the law mentioned hereinabove.

[46] They went on to remind that article 80 of the Law N° 30/2018 mentioned hereinabove strictly provides that the study report is annexed to the submissions of the applicant of a petition relating to the general interests demonstrating how he/she tried to solve the issue in cooperation with the government institutions and failed. On this point, they contend that the different letters

produced by ASSAR as the evidence to prove its attempt to solve the issue of implementing the minimum wage, should not be considered. They explain that the fact that the National Bank of Rwanda, the supervisory organ of the insurance companies, wrote to MIFOTRA concerning that issue, or the fact that ASSAR wrote to MINECOFIN and copied MIFOTRA and MINIJUST respectively, does not in itself demonstrate that ASSAR tried to solve the issue of the implementation of the minimum wage with the responsible institution which is MIFOTRA. Based on the foregoing explanations they request the court to reject the petition of ASSAR on the ground that it does not fulfil the conditions provided for by the law.

DETERMINATION OF THE COURT

[47] Article 80 of the Law N° 30/2018 mentioned hereinabove provides that […..]. He/she must annex to his/her submissions **a study report made by experts demonstrating the seriousness of the issue, its resolution attempts in cooperation with the institutions of the State that failed and the eventual consequences of the non-resolution**.

[48] The court finds that the study report alluded to in this Article is characterized by four parts which the legislator desired that they manifest therein for the action to be admitted:

- It was made by the expert;
- It demonstrates the seriousness of the issue;
- It demonstrates resolution attempts in cooperation with the institutions of the State that failed;

- It demonstrates the eventual consequences of the non-resolution on the general interests pursued

[49] It is also in the finding of the Court that each of the four parts mentioned in the preceding paragraph has reasonable grounds for its establishment which must be complied with by the applicant:

a. **The study report must be made by the expert.** This implies that it's not any kind of a study report. It's a study report done professionally, by an expert, based on substantiated information, to evidence the existence of the issue that a solution thereof be sought.

b. **To be demonstrating the seriousness of the issue raised by the applicant**; this implies that such a study report does not stop at revealing the issue only, but it should also professionally demonstrate the seriousness (the magnitude) of the issue in proportion to the general interest expert/ the maker of the report wants to defend.

c. **To demonstrate the applicant's resolution attempts in cooperation with the institutions of the State that failed.** This connotes that the applicant demonstrates how he/she personally or those that he/she represents attempted by all means possible to solve the issue in cooperation with the institutions of the state that failed.

d. **To demonstrate the eventual consequences of the non-resolution:** the eventual consequences alluded to herein are not those that the applicant thinks might occur just because he/she thinks so. Rather they should be premised on a critical analysis of the events

and substantial examples demonstrating that the issues he seeks to solve are to a certain degree, consequential on the general interests he/she seeks to defend.

[50] The case file demonstrate that the study report which ASSAR annexed to its petition was made by MIFOTRA, in July 2018 and it was assessing the establishment and the determination of the minimum Guarantee wage (MGW/SMIG) per occupational categories[8]. Such study intended to make a research on a national level on matters related to the establishment and computation of the minimum wage per occupational categories and the preparation of the draft of the Ministerial Order determining the minimum wage per every working category indicated. Based on different examples as well as common practices all establish the applicable procedures in determining the minimum wage, and the following are the main objectives the research focused on:

i. Doing deep research on the nature of the salaries in different categories of the profession on the Rwandan labour market taking into consideration of categories of occupation;

ii. Analysing different universal procedures applied in determining minimum wage;

iii. Making research that draws a comparison between the salary and the product like gross domestic product per capita and gross domestic product;

[8] A Study on the Establishment and the Determination of the Minimum Guarantee Wage (MGW/SMIG) per Occupational Categories, Last Version, July 2018.

iv. To analyse the effects of a minimum wage on the distribution of the resources, poverty reduction, economic inequality in occupation categories;

v. Based on the research results on the minimum guarantee wage, to prepare a draft of the Ministerial Order determining the minimum wage based on the categories of occupations in Rwanda.

[51] In analysing the document mentioned hereinabove that ASSAR submitted to the court, the court finds that the foregoing document was not yet complete for it to be published, given that in its introductory pages, some parts were not filled for example the *Disclaimer, Inquiries, Acknowledgments, Abstract* and thus leading to a conclusion that study report was still a draft as argued by the by the Government representative. Furthermore, page one of this document features the statement: '*Minisiteri y' Abakozi ba Leta n'Umurimo', Ministry of Public Service and Labor'*. On the question of the expert that made the study, in his response Counsel Butare Emmanuel replied that it was MIFOTRA, therefore the Court finds that this is not sufficient enough for the Court to declare that the foregoing study was made by an expert provided under Art.80 of the Law N° 30/2018.

[52] The Court also finds that the main objectives in the study report mentioned above was not to demonstrate the problem caused by not having minimum wage in Rwanda, instead they examined the basis for the determination of the minimum wage in different categories of occupation. Neither does such study report demonstrate the effect caused by not having a minimum wage whether in general or on the insurance companies in particular, which according to ASSAR, is the part of the citizens whose rights it is pursuing. As demonstrated by the Court in the

preceding paragraphs, ASSAR only claims that the minimum wage vacuum has triggered the application of the minimum wage that was determined by the Supreme Court and thus caused it losses but fails to explain the nature of such loss, its magnitude and the effects it had on those companies. If it had conducted a study report on such an issue it might have proved to the Court the seriousness of the issue and the reason it should be solved, so that it might not prejudice the rights of the part of the citizens (i.e. the insurance companies) whose interests ASSAR pursues and the citizens in general especially the insurance policy holders.

[53] With regards to ASSAR's resolution attempts in solving the issue of having no minimum guarantee wage in cooperation with the government institutions and failed to be solved, the case file demonstrates that before the Law N°. 66/2018 governing labour was published, the National Bank of Rwanda wrote to MIFOTRA on 14/11/2016 pointing out that the not having the minimum wage affects the insurance companies because the compensation for injuries due to accidents caused by motor vehicles are awarded based on the precedence of the minimum wage of 2,500Frw which was set by the Supreme Court in the Judgment N° RCAA 0202/07/CS of 09/04/2009 and other courts determined even a higher amount. In the letter dated 23/01/2017, MIFOTRA responded to the National Bank of Rwanda, informing it that the enactment of an Order of the Minister in charge of labour determining the minimum wage is pending to the publication of the new labour law which will replace law N°. 13/2009 of 27/05/2009. Law N°. 66/2018 of 30/08/2018 regulating labour in Rwanda was published on 06/09/2018 but before that on 27/08/2018 MIFOTRA wrote to ASSAR and the insurance companies inviting them to a consultative meeting on a draft of the Ministerial Order determining the minimum wage,

that meeting was supposed to be held on 06/08/2018. After that, on 29/08/2018 the director of ASSAR wrote to MIFOTRA informing them that following the consultative meeting they held on with MIFOTRA on 06/08/2018, he would like to appreciate the Hon. Minister in charge of labour for having presented to them the draft Ministerial Order determining the minimum wage, and requested that the following issues should be annexed to the Order: the occupation categories based on the economic activities; the minimum wage per category; the number of working days per month; employees working level of registered professions who are not in the scope of the Ministerial Order.

[54] It is also evident that on 05/06/2019, the Director of ASSAR wrote to MINECOFIN whereby he/she submitted the draft of the law on the compensation for personal injuries due to accidents caused by motor vehicles, and pointed out that one of the obstacles faced by the insurance companies is the increase of compensation determined in the discretion of the court given that there is no standard minimum wage.

[55] The Court finds that following the analysis of the letters mentioned in the preceding paragraphs, it is evident that before the publication of the new law governing labour in Rwanda, nothing proves that ASSAR made some attempts to address to MIFOTRA as the Ministry in charge of enacting the Order determining the minimum wage, the issue of not having the minimum wage and its effects. Following the publication of the new law, the letter ASSAR wrote to MIFOTRA on 29/08/2018 was to appreciate for sharing them the draft of the Ministerial Order determining the minimum wage, whereby it gave its opinion thereon on the annex of the Order.

[56] Pursuant to the motivations in the preceding paragraphs, the Court finds that apart from one letter that ASSAR wrote to MIFOTRA on 27/7/2018 thanking it for sharing with it the draft of the Ministerial Order determining the minimum wage and as a result gave its inputs, there is no other letter that it wrote to MIFOTRA concerning the determination of the minimum wage. In explaining what ASSAR did to solve the issue but in vain, ASSAR begins with the letter of the National Bank of Rwanda of 14/11/2016 given that it is the supervisory organ of all insurance companies. The court finds this argument with no merit since the National Bank of Rwanda is not a party to this case who is required to demonstrate its resolution attempts to solve the issue. It is in this context that ASSAR cannot use the letter it wrote to MINECOFIN on 05/06/2019 as an excuse because, apart from the fact that the letter was not requesting MINECOFIN to establish the minimum wage, rather it was sending the drafts of laws relating to compensation for bodily injury, nothing prevented it from writing to the relevant Ministry which is MIFOTRA.

[57] The Court finds that MIFOTRA already started the procedures of legislating the Ministerial Order determining the minimum wage and ASSAR was notified of that and it even gave its opinions accordingly, therefore it has no basis to claim that MIFOTRA did nothing on that issue nor that it did not prioritize it, especially that the Law N° 66/2018 governing labour did not set the time limit for enacting that Order.

[58] Based on the motivations given above, the Court finds in filing its petition, ASSAR requesting for the protection or removing the hindrances which it claims that they jeopardize the general interest, ASSAR was not able to demonstrate the

legitimate general interests pursued and did not submit a study report made by experts demonstrating the seriousness of not having the minimum wage, its resolution attempts to remedy the issue and failed and the effect it has on the Rwandans in general and on the insurance companies in particular, the petition is rejected on the ground that it does not fulfil the conditions provided by the law.

THE DECISION OF THE COURT

[59] Rejects the petition filed by *Association des Assureurs du Rwanda (ASSAR),* on the ground that it does not fulfil the conditions provided by the law.

CASES IN MERITS

CIVIL CASES

CARPENTIER v. UWAMAHORO

[Rwanda Court of Appeal – RCA 00006/2019/CA (Kanyange, P.J, Ngagi and Gakwaya) March 06, 2020]

Law determining the jurisdiction of courts – Primary Courts – The Court with jurisdiction to hear applications seeking modification or revocation of provisional orders which was issued by a court while presiding over a divorce case at the last instance, after the final disposition of the divorce case on the last instance level – In case a court issued some provisional orders while presiding over a divorce case at the last instance level, if circumstances have changed, the application seeking modification and revocation of those orders are submitted to the Primary Court since it is the one with jurisdiction to try cases related to persons and family at the first instance – Law N° 30/2018 of 2/6/2018 02/06/2018 determining the jurisdiction of Courts, article 27(5)

Facts: Carpentier married Uwamahoro with whom they gave birth to two children. After a long time of misunderstandings, they filed a claim of divorce before the Court, which was granted definitely by the High Court. As provisional decisions, Uwamahoro was given obligations of looking after the children, Carpentier was ordered to pay for alimony and health care in the country of Belgium. Both parties in various time went before the High Court as the Court which rendered the judgment at last instance to request a reversal of some decisions taken before. However, they were not contended by some of those decisions and appealed both before the Court of Appeal. Before examining the case in substance, the Court of Appeal examined in prior

whether the High Court which rendered the decision at last instance had jurisdiction to try issues related to no execution of the decisions rendered in those judgments or to reverse some decisions it rendered previously.

The appellant states that the High Court being the one which rendered the divorce case between them and in the latter case it was taken decisions related to children, that High Court has jurisdiction to try all those claims including the appealed judgment.

By responding on that issue, the accused found also that the High Court had jurisdiction to try the appealed judgment because it took decisions in relation to children too, thus it had jurisdiction to try whether to reverse or sustain those decisions.

Held: In case a court issued some provisional orders while presiding over a divorce case at the last instance level, (e.g: regarding the maintenance of the children and alimony), if circumstances have changed, the application seeking modification and revocation of those orders are submitted to the Primary Court since it is the one with jurisdiction to try cases related to persons and family at the first instance, thus the decisions taken in judgments RC 00004/2019/HC/KIG, RC 00010/2019/HC/KIG, and appealed judgment RC00023-00024/2019/HC/KIG are quashed, the interested party has to file a new claim before the competent.

The High Court has no jurisdiction to try the appealed judgment.
Orders taken in judgments n° RC 00004/2019/HC/KIG, N° RC 00010/2019/HC/KIG, and N° RC00023-00024/2019/HC/KIG are quashed.

Statutes and statutory instruments:

Law N° 30/2018 of 2/6/2018 determining the jurisdiction of courts, article 27 (5)

Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure, article 194

Law Nº 32/2016 of 28/8/2016 governing persons and family, article 243.

No cases referred to.

Judgment

I. BACKGROUND OF THE CASE.

[1] Carpentier Raymond Marcel Patrick married Uwamahoro Dalida Waldha with whom they gave birth to two children namely Carpentier Patrick Junior and Carpentier Carl Philippe. They were divorced afterward by the judgment RCAA00013/2018/HC/KIG rendered by the High Court on 7/12/2018, Uwamahoro Dalida Waldha was ordered to look after the children, whereas Carpentier Raymond Marcel Patrick was ordered to pay for alimony, the latter has also vested the rights to take children to Belgium for medication as he requested, but he will be escorted by Uwamahoro Dalida Waldha, the Court ordered them also to share their property.

[2] After the adjudication of the case RCAA00013/2018/HC/KIG by the High Court, Carpentier Raymond Marcel Patrick came back to that Court praying it to reverse the decision taken regarding the children, to examine the rights for the children as their medication abroad is concerned,

their alimony and their right to visit their both parents equally. In the judgment RC00004/2019/HC rendered on 20/2/2019, the High Court decided with merit the claim of Carpentier Raymond Marcel Patrick, it decided about the time to visit or to be visited by his children. It decided that he will be taking them during the weekend, from Friday 11 a.m and return them to Uwamahoro Dalida Waldha Sunday at 4 p.m, whereas, regarding the right to look after the children and taking them for health care, it was decided with no merit his requests, rather, it sustained the decision of the judgment RCAA00013/2018/HC/KIG aforementioned.

[3] Carpentier Raymond Marcel Patrick filed another claim before the High Court stating that there is a negative change regarding the children's rights because it was decided that their mother shall look after them but she hang out more often and leave them alone in the house, that she was ill-behaved because she used to stay out late at night and leave them and that she is a Hiking player which she plays naked, he requested the Court to decide that he should be the one to look after them or to have joint custody of children. He requested also that Uwamahoro Dalida Waldha should take part in the maintenance of the children because she has a job, also that they should jointly pay for their education, because Uwamahoro Dalida Waldha kept the entire property, he requested again to reexamine the right to take children for medical care, because Uwamahoro Dalida Waldha does not have the willingness to provide them with medical care though it was decided by the High Court.

[4] In the judgment RC00010/2019/HC/KIG rendered on 14/6/2019, the High Court decided that Carpentier Raymond Marcel Patrick will take their children Carpentier Patrick Junior

and Carpentier Carl Philipe to medical care in Belgium and all related requirements, and had to bring them back not later than 6/8/2019. He was also given the right of custody of the children, up to 6/8/2019, after that date they should be in the custody of their mother as usual.

[5] Uwamahoro Dalida Waldha also filed a claim before the High Court, which was numbered RC00023/2019/HC/KIG, praying the Court to reverse the decisions taken in that case as regards to the maintenance and medical care, but she abandoned some issues she chose to request to Court to order Carpentier Raymond Marcel Patrick to execute the decision as regards to alimony and school fee, without waiting for the judgment to acquire res judicata principle because he performs it the way and time he wants, which is disturbing.

[6] Carpentier Raymond Marcel Patrick also filed a claim before the High court, which was numbered RC00024/2019/HC/KIG, requesting to reverse the decisions taken in judgments RCAA00013/2018/HC/KIG, RC00004/2019/HC, RC00010/2019/HC/KIG for the well being of the children as regards to their maintenance and their medical care, he requested the Court to order for joint custody of the children as an answer to the permanent disputes between him and Uwamahoro Dalida Waldha, and be given the right to take children to Belgium for medical care without their mother's permission, he requested also damages for a frivolous lawsuit and economic loss, like air tickets canceled because she interfered for the children's medication.

[7] Both cases were combined in the case RC00023/2019/HC/KIG-RC00024/2019/HC/KIG, rendered on 11/10/2019. The High Court found Uwamahoro Dalida Waldha's

statement that is no longer necessary for the children to get medical care abroad because the sickness of autism which they suffer is incurable, even the ministry of health affirmed that the sickness of autism can be consulted in Rwanda, it found without merit the request of Carpentier Raymond Marcel Patrick that the children may be taken to Belgium without their mother's permission because he did not try and fail to seek for medical care in Rwanda, so that the Belgium medicine may continue where the Rwandan medicine failed from, it decided without merit the claims filed by Uwamahoro Dalida Waldha.

[8] Carpentier Raymond Marcel Patrick was not contended by the ruling of that judgment and appealed before the Court of appeal, he prayed the Court to examine the issue of maintenance of children namely Carpentier Patrick Junior and Carpentier Carl Philippe with regarding joint custody of both parents in the sake of children and means of solving disputes between their parents, examine whether he can take children to Belgium for medical care without their mother's permission Uwamahoro Dalida Waldha, to order the latter to handle Rwandan passports of those children which she confiscated, and examine the issue relating to the parent's right regarding children and vice versa.

[9] The case was scheduled to be heard on 4/2/2020 but was not heard on that day because Counsel Munyaneza Remy, who represents Uwamahoro Dalida Waldha, did not appear to Court and was fined for delaying tactic. The hearing was postponed to 13/2/2020, and parties were requested to prepare submissions regarding the jurisdiction either of the High Court which adjudicated the appealed judgment or the Court of Appeal. The hearing in public happened again on 13/02/2020, Carpentier Raymond Marcel Patrick assisted by Counsel Musasangohe

Illuminée and Counsel Kazeneza Théophile, whereas Uwamahoro Dalida Waldha was represented by Counsel Munyaneza Remy, the subject matter is either the jurisdiction of the High Court or that of Court of appeal to hear the appeal claim filed by Carpentier Raymond Marcel Patrick.

II. ANALYSIS OF LEGAL ISSUES.

To know the competent Court to hear issues relating to children after the divorce of the spouses decided in a judgment which acquired the res judicata.

[10] Counsel Musasangohe Illuminée, who assists Carpentier Raymond Marcel Patrick, states that the appealed judgment and related previous judgments rendered by the High Court basing on article 243 of the Law Nº 32/2016 of 28/8/2016 governing persons and family, that the content of that article means that if the Court took the decision based on that article, that decision is provisional, it can be reversed for the interest of the children.

[11] Counsel Musasangohe Illuminée states that based on that article also, the High Court being the one which rendered the judgment on the divorce between Carpentier Raymond Marcel Patrick and Uwamahoro Dalida Waldha, which contains the decisions regarding the children too, which Court rendered also, the judgments RC00004/2019/HC/KIG, RC00010/2019/HC/KIG and judgment RC00023/2019/HC/KIG-RC 00024/2019/HC/KIG, these claims where filed trough Exparte application procedure as explained by article 194 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, the High Court had

jurisdiction to hear all those claims including the appealed judgment.

[12] Counsel Musasangohe Illuminée states also that, as, regarding the jurisdiction of the Court of appeal, the appealed judgment began before the High Court, before which it was filed an exparte claim as provided by article189 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure. She states that as children's cases are concerned they have a particularity because they require to indicate the child's interest concerned, thus, any interested person is allowed to request the Court which took that decision to annul it or reverse it for the sake of the children.

[13] Counsel Musasangohe Illuminée states also that, the Court of Appeal has the jurisdiction to hear an appeal the decision rendered by the High Court, because article 192 the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, allow to appeal against the decisions taken in exparte application procedure, thus, the High Court being the one which decided the divorce case and cases concerning children, they have the right to appeal once, which they did.

[14] With regarding the competent Court to hear the exparte application, in relation to family issues and the interlocutory claims, Counsel Musasangohe Illuminée stated that article 189 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that exparte application does not require necessarily a principal claim, that, they filed in beginning a claim regarding a decision which concerns one of the children's parents and not the other, that the Court itself decided to summon the other.

[15] with regarding article 27 of the Law N° 30/2018 of 2/6/2018 determining the jurisdiction of courts, which gives the Primary Court the jurisdiction to hear the issues regarding family and persons, Counsel Musasangohe Illuminée states that in case the Primary Court took the decision for any given issue and which is appealed and reversed in part in the appeal, the party to the case does not return to the Primary Court to request any reversal, because it relinquished the case, with regarding the current case, the High Court is the one which took the provisional decision, for which they filed a claim for its reversal but they lost the case, the reason why they appealed.

[16] Counsel Kazeneza Théophile, who also assists Carpentier Raymond Marcel Patrick, states that the decisions taken by the judge regarding the children don't have a principal claim, he/she can annul or reverse them, that, the legislature provided for exparte application to file them, and can be appealed. He states that the Primary Court judge to whom the exparte application is filed against the decision taken by High Court can argue that, he/she does not possess the concerned file and has no jurisdiction to reverse the High Court decision.

[17] Counsel Kazeneza Théophile states also that, whereas the Court of Appeal will hear this case, it will require to file a claim before the same Court for the decision taken to be reversed,

[18] Counsel Munyaneza Remy, who represents Uwamahoro Dalida Waldha, states that they find in their side that the High Court had jurisdiction to hear the appealed judgment based on article 243 of the Law Nº 32/2016 of 28/8/2016 governing persons and family, and article 189 to 195 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure. He continues stating that, the High

Court had jurisdiction to admit and hear the appealed judgment, because it is the same Court that took the decisions regarding the children, thus, it has jurisdiction to annul or reverse the concerned decision.

[19] Counsel Munyaneza Remy states also that, the Primary Court decided in merit the case regarding the children, the Intermediate Court of Gasabo sustained it, and High Court took further decisions, consequently, those decisions can not be annulled by the Primary Court, rather the High Court which heard the case, had jurisdiction to reverse it. He states that article 243 of the Law governing persons and family, in the french version they used the word ‘’les mesures’’ whereas in Kinyarwanda they stated ‘’Urukiko or Court’’, this is subject to confusion, also that if two opposed parties plead in appeal it is impossible to file for exparte application (requête unilatérale).

DETERMINATION OF THE COURT

[20] Article 243, paragraph five, of the Law N° 32/2016 of 28/8/2016 governing persons and family, as regarding consequences of the divorce on children provides that "Measures ordered by the court by virtue of this Article are always provisional and can be revoked upon request by any interested party by way of a unilateral petition".

[21] Article 27, litera five (5), of the Law N° 30/2018 of 2/6/2018 determining the jurisdiction of courts provides that “ Primary Courts try cases relating to the status of persons and family".

[22] Article 194 of the Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure, provides that The applicant or intervening party may, if circumstances have changed, file an application for modification or revocation of the order to the judge who issued it, provided the third party`s rights are secured".

[23] The case file indicates that the appealed judgment, filed before the High Court whereby Carpentier Raymond Marcel Patrick sued praying the Court to reverse the decisions taken in cases RCAA00013/2018/HC/KIG, RC00004/2019/HC, RC00010/2019/HC/KIG for the children's sake with regarding their maintenance and their health care, he requested for joint custody for the guard of the children as an answer to the permanent disputes between him and Uwamahoro Dalida Waldha, the latter prayed the Court to order Carpentier Raymond Marcel Patrick to execute the decision regarding the alimony and school fees, the claim was an exparte application too, it is obvious that it was a new claim too, which is not linked to the principal.

[24] The case file indicates also that the High Court is the one which decided at last instance about the divorce of Carpentier Raymond Marcel Patrick and Uwamahoro Dalida Waldha in the judgment RCAA00013/2018/HC/KIG, rendered on 7/12/2018, and took in subsidiary decisions regarding the children, those decisions according to the Law are provisional till the time parties to the case will indicate to the competent Court, that there is a change, and request to reverse the previous decisions.

[25] Basing on the motivations in the previous paragraph, the Court of Appeal finds that the decisions in judgments RC00004/2019/HC, RC00010/2019/HC/KIG, and RC00023/2019/HC/KIG- RC00024/2019/HC/KIG, for which the

reversal is requested, were taken in subsidiary and provisionally by the High Court in judgment RCAA00013/2018/HC/KIG, where it adjudicated in merit and principal a divorce case between Carpentier Raymond Marcel Patrick and Uwamahoro Dalida Waldha, that case was adjudicated at last instance and acquired res judicata principle, meaning that, the Court adjudicated it at last instance and thus withdrawn it from its jurisdiction, and cannot hear again issues relating to children in case there are new circumstances which may lead to change the decisions related to children taken in a divorce case, because it has no longer jurisdiction to hear that same case. This is emphasized by the fact that children-related cases are of public order, mostly their interests must be protected and provide the parents with the rights to appeal (Principe du double degré de jurisdiction) as established by the Law.

[26] The Court of Appeal finds that reference made to comparative Law, it provides that the judge of intermediate Court in charge of family cases for the first instance is competent to hear after the divorce case which became res judicata the cases related to parent's right[1], meaning that the parties to the case must

[1] L'article 247, alinéa 4, du code civil franÇais dispose que '' Il (juge du tribunal de grande instance délégué aux affaires familiales) est seul compétent, après le prononcé du divorce, quelle qu'en soit la cause, pour statuer sur les modalités de l'exercice de l'autorité parentale et sur la modification de la pension alimentaire, ainsi que pour décider de confier les enfants à un tiers. Il statue alors sans formalité et peut être saisi par les parties intéressées sur simple requête''. L'article 1084 du code de procédure civile franÇais dispose que '' Quand il ya lieu de statuer, après le prononcé du divorce, sur l'exercice de l'autorité parentale, la pension alimentaire ou la contribution à l'entretien et à l'éducation de l'enfant, la demande est présentée, même si un pourvoi en cassation a été formé, au juge aux affaires familiales selon les modalités prévues à la section III du présent chapitre'', Code procédure civile annoté, Edition limitée, 108 édition, Dalloz, Paris, 2017, P. 1084.

return to the competent Court to hear for the first instance the cases related to persons and family, in case there are new circumstances which may lead to change the decisions related to children taken by The Court in definitive divorce case.

[27] The Court of Appeal finds also that, in this case, the parties to case could request the High Court to reverse the provisional decisions taken in relation to the children all along the hearing of the divorce case, meaning at any time before deciding about divorce, as stated by article 224 and 225 of the Law N° 32/2016 of 28/8/2016 governing persons and family.[2]

[28] The Court of Appeal finds also that, the provisions of article 194 of the Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure, suggest that if there are changes, the claim praying the judge to reverse or

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L'article 302 du code civil belge édicte que '' Après la dissolution du mariage par le divorce, l'autorité sur la personne de l'enfant et de l'administration de ses biens sont exercés conjointement par les père et mère ou par celui à qui elles ont été confiées, soit par l'accord des parties dûment entériné conformément à l'article 1258 du code judiciaire, soit par décision ordonnée par le président statuant en référé conformément à l'article 1280 du code judiciaire, sans préjudice de l'article 387 bis du présent code''. L'article 1280 du code judiciaire belge dispose que '' Le Président du tribunal ou le juge qui en exerce les fonctions statuant en référé, connaît jusqu'à la dissolution du mariage à la demande, soit des parties ou l'une d'elles, soit du procureur du Roi, en tout état de cause, des mesures provisoires relatives à la personne, aux aliments et aux biens, tant des parties que des enfatnts''

[2] article 224 provides that « At any stage of the hearing, the judge may take provisional measures related to the parties, to their children and their property ». whereas article 225 provides that "During divorce proceedings, in the best interest of children, the judge may assign one of the spouses or third party the provisional custody of children and determine the contribution of each spouse to the support of children".

remove some decisions taken earlier in an exparte application, this is done with regarding the procedure of exparte application only, either for the first instance or at appeal level or even at intervention procedure, meaning that the reversal of the decision taken regarding the children is not processed before the Court which rendered a divorce decision which acquired res judicata principle, thus, this article 194 of the Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure, aforementioned is not applicable in this case.

[29] The Court of appeal finds that the Court referred to in paragraph five of article 243 of the Law N° 32/2016 of 28/8/2016 aforementioned, is the Court which has jurisdiction to try for first instance cases related to persons and family, meaning that basing on article 27, paragraph five (5) of the Law N° 30/2018 of 2/6/2018, aforementioned, is the Primary Court which has jurisdiction to try cases whose subject matter is to decide in relation to maintenance of the children because there are new circumstances.

[30] The Court of Appeal finds without merit the argument of the Lawyers for Carpentier Raymond Marcel Patrick and sustained by the Lawyer for Uwamahoro Dalida Waldha, that the High Court which rendered the divorce case and decided upon children, consequently the Primary Court is not competent to hear the exparte application as regards to children because the High Court is superior to it, because in this case the High Court rendered the divorce case at the second appeal level, and decided in subsidiary about issues related to children as it was requested, thus, it can not be considered as if the Primary Court is intended to change the decision of the High Court, because that claim is

not attached to the divorce case rendered by the High Court, rather it examines the new circumstances or new facts, which may lead to reverse the decisions taken relating to children, meaning that those circumstances were not examined by the High Court while hearing the divorce case.

[31] Based on all those motivations, the Court of Appeal finds the High Court has no jurisdiction to hear the claim filed by Carpentier Raymond Marcel Patrick and Uwamahoro Dalida Waldha as an exeparte application regarding the maintenance of the children, after adjudicating their divorce case, thus, the decisions are taken in appealed judgments RC00004/2019/HC/KIG, RC00010/2019/HC/KIG, and RC00023-00024/2019/HC/KIG, have to be removed, the interested party shall file a new claim before the competent Court.

DECISION OF THE COURT

[32] Decides that the High Court had no jurisdiction to try the appealed judgment RC00024/2019/HC/KIG.

[33] Decides to quash decisions taken in judgments to RC00004/2019/HC/KIG, RC00010/2019/HC/KIG, and RC00023-00024/2019/HC/KIG.

[34] It orders that the Court fee equal to the work done in this case.

NISHIMWE ET AL v. MUGENGA

[Rwanda SUPREME COURT – RCAA 00031/2016/SC (Nyirinkwaya P.J., Cyanzayire, Kayitesi Rusera, Rukundakuvuga and Hitiyaremye J.) September 25, 2019]

Property – Sale of immovable property – Sale of someone else's property – Reimbursement of the value added to the property in case of handing back the property to the real owner – When someone buys an immovable property with someone else who is not the owner, and when it becomes necessary to handle it back to the real owner whereas he/she added value on it rather than new buildings or plants, he/she has to be refunded by the owner the added works reference made to their nature – for necessary works, is reimbursed for a total value of the works (remboursement intégral) – for useful works, is reimbursed for the works evaluated at the time it was decided to handle back the property – for beautification works, there is no reimbursement by the real owner, rather he/she can ask the seller to reimburse for them if he /she sold in bad faith.

Facts: Mugenga concluded a sale contract of the house with Kabagema, which was nullified by the first instance court of Kigali after it was found that Kabagema sold the property which he is not the owner.

Mugenga after handing that property, sued Rwamanywa's heirs before Nyarugenge Intermediate Court stating that he has handed the house but did not receive compensation for the value he added on it, he asked Nishimwe and Mashami to pay interests for the money he spent on that house, the rent they get and the loss he suffered due to the devaluation of currency; that Court decided

that Mugenga completed some works on the house and ordered to refund him their value decided in court's discretion, it orders also Rwamanywa's heirs to reimburse Mugenga the Counsel and procedural fee.

Mugenga and Rwamanywa's heirs appealed for that judgment each party did not contend with its ruling, in case combined in appeal the Court decided that both appeals have no merit, to sustain the appealed judgment.

Nishimwe appealed again for that judgment before the Supreme Court stating that there was a contradiction, the Court misinterpreted the Law, whereby it decided to refund Mugenga the value added to the house whereas it is him who defaulted also that the evidence based on to evaluate the added works is doubtful.

During the hearing of the case, Mugenga raised the objection of lack of jurisdiction of the Supreme Court stating that Nishimwe who appealed lost two times for the same grounds, also that the value of the subject matter does reach 50,000,000Frw, he requested the Court to reject the appeal. The decision on the objection was rendered on 20/04/2018, the Court decided that the objection of lack of jurisdiction raised by Mugenga is rejected.

Afterward, Mugenga raised another objection stating that Nishimwe changed her opponents in appeal because Mashami is now accused whereas in previous Courts she shared interests with Nishimwe, this leads the court to raise the objection to know whether the appeal of Nishimwe has no consequences to other heirs, after pleadings on those objections, the Court decided as Mashami is concerned, the claim of Nishimwe can not be admitted, Mashami was removed from the case as an accused,

rather was summoned on the side of the appellant though she did not appeal, then the hearing resumed in substance.

In his pleadings, Mugenga stated that he did some works on the house after buying it and constructed a new building in that compound, whereas Nishimwe and Mashami state that there is nothing he added on their property, and in case he added something, they should not be the ones to reimburse him because he bought deceptively.

A property valuer expert was appointed with the agreement with parties to the case. and was asked to indicate to the Court the added value to the house and the value of new buildings in the compound mentioned in the subject matter after the year 1997 up to the year 2008 when Mugenga got out, they debated on the report made earlier by the expert then the Court found necessary to order an additional report.

Held: 1. When someone buys an immovable property with someone else who is not the owner, and when it becomes necessary to handle it back to the real owner whereas he/she added value on it rather than new buildings or plants, he/she has to be refunded by the owner for the added works reference made to their nature.

2. Is refunded for all necessary works (impasses necessaires), regardless of whether he/she got it by bad/good faith. Nothing is refunded by the real owner for the beautification works.

The appeal of Nishimwe and Mashami has merit in part. Court fee deposited for this case equal to work done for it.

Statutes and statutory instruments referred to:

The Constitution of the Republic of Rwanda of 2003 revised in 2015 article 34.

Organic Law N° 03/2013/OL of 16/06/2013 repealing Organic Law n° 08/2005 of 14/07/2005 determining the use and management of land in Rwanda, article 35, paragraph 3;

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure article 9.

Law N° 42/1988 instituting preliminary title of book one of civil code articles 388 and 389.

Cases referred to:

Kayitsinga Alexis, Kanyamibwa Immaculée v. Nsangineza Célestin, RS/REV/INJUST/CIV 0012/15/CS rendered by the Supreme Court on 18/01/2019.

Nibasenge Anathalie v. Nahayo François Xavier, RS/INJUST/RC 0006/2018/SC rendered by the Supreme Court on 18/01/2019,

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Judgment

I. BRIEF BACKGROUND OF THE CASE.

[1] Mugenga Joseph bought a house from Kabagema Ferdinand in 1994. Their sale contract was declared null and void by the first instance Court of Kigali, in the case N° RC 36.294/01 rendered on 12/02/2003. In that case, the Court found that Kabagema Ferdinand sold someone else's property which belongs to his brother Rwamanywa Jérémie and sold it illegally, for those reasons the Court declared the sale contract between Kabagema Ferdinand and Mugenga Joseph null and void.

[2] Mugenga Joseph after handing the house back, he filed a claim before Nyarugenge Intermediate Court against the heirs of Rwamanywa namely Nishimwe Claudine and Mashami Gisèle, stating that he handed the house back, however, he was not refunded the value he added to that house, he requested the interests on the money he spent for those works, the rent fee earned by Rwamanywa Jérémie's heirs and the money lost due to inflation, all amounting 137,056,112 Frw.

[3] The Intermediate Court found with merit the claim of Mugenga Joseph, as he added value on that house, and even built new boys' quarters within that plot, it ordered Rwamanywa Jérémie's heirs namely Nishimwe Claudine and Mashami Gisèle to refund Mugenga Joseph 15,591,362 Frw, it ordered them to pay also 800,000Frw of counsel fee and 100,000 Frw of the procedural fee.

[4] Mugenga Joseph and Rwamanywa Jérémie's heirs were not contended by that judgment, each party appealed before the High Court, their appeals were combined within the case RCA 0517/15/HC/KIG-0538/15/HC/KIG, rendered on 22/04/2016. The Court found without merit the appeal of each party and sustained the appealed judgment.

[5] Nishimwe Claudine made a second appeal before the Supreme Court, and the claim was registered on RCAA 00031/2016/SC, arguing that she is suing Mugenga Joseph and Mashami Gisèle: She explains that she appealed because on the following grounds;

> The fact that there was contradictions which led the Court to err in law;
>
> The fact that the court held that Mugenga Joseph must be refunded the value added on the house whereas he is the one who erred;
>
> And also the fact that the evidence based on to determine the value added on the house is dubious.

[6] The hearing of the case was in public on 27/03/2018. At the beginning of the hearing, Mugenga Joseph recalled the objection he raised based on the fact that Nishimwe Claudine who appealed has lost the case twice for the same grounds, and the fact that the value of the subject matter does not exceed 50,000,000Frw, thus, based on article 28 paragraph 2 litera 7 and paragraph 5 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, her appeal should not be admitted because it is not under the jurisdiction of the Supreme Court.

[7] On 20/04/2018, the Court overlured the objection of lack of jurisdiction raised by Mugenga Joseph, the hearing was scheduled on 12/06/2018. On that date, it was postponed due to restructuring of the judiciary, it was heard on 09/10/2018. Mugenga Joseph raised another objection, stating that Nishimwe Claudine changed her adversary in appeal level because Mashami Gisèle is now a respondent whereas she was on the same side as for Nishimwe Claudine at lower instances, that issue was adjudicated as well as the issue raised by the Court itself to know whether the appeal of Nishimwe Claudine has no consequences to other heirs.

[8] On 09/12/2018, the Court decided that the appeal claim of Nishimwe Claudine as Mashami Gisèle is concerned is not admissible, it decided to remove Mashami from the case as an accused. It decided also that based on the fact that Nishimwe Claudine shares interests with Mashami Gisèle as the subject matter is concerned because, they are both heirs of Rwamanywa Jérémie, thus any decision of the Court will affect both of them, Mashami Gisèle though she did not appeal she must be forced to be a party to the case, at the side of Nishimwe Claudine who appealed. It ordered to resume the hearing in merit on 08/01/2019.

[9] On 08/01/2019, the hearing was held in public, and was closed, the Court notified the parties that the judgment will be pronounced on 15/02/2019. In its deliberation the Court before adjudicating the case found it necessary to appoint a property valuer based on article 77 of the Law N° 15/2004 of 12/06/2004 relating to evidence and its production which provides that a court can, to resolve a case before it, order experts to examine and give

opinions on certain aspects of the case that are relevant to their domain of expertise.

[10] The hearing to appoint a property valuer took place on 26/02/2019, all parties agreed on the property valuer called Ir Havugimana Justin before the Court. That expert, based on the expertise report N° 17/97 of 07/03/1997 made by the employee of the Ministry of infrastructure, and on the pleadings of each party, the property valuer was tasked to establish to the Court the value added to the house and on the plot under litigation after the year 1997 up to the year 2008 when Mugenga moved from it, and the value they had in 2008.

[11] The expert appointed by the Court submitted his report to the Supreme Court Registrar's office on 25/04/2019, the hearing of the case was scheduled on 17/07/2019. On this date the case was heard, Nishimwe Claudine represented by Counsel Abasa Fazil, Mashami Gisèle represented by Nsengiyumva Abel whereas Mugenga Joseph was assisted by Counsel Nzabahimana Augustin Néto, the parties were given the time to comment on the aforementioned report.

[12] Mugenga Joseph concurred with the report of the expert, except where he erred as regards to the boys' quarter house where he stated that it was constructed with mud bricks commonly known as rukarakara whereas it was constructed with burnt bricks, this led to miscalculation whereby the square meter was calculated at 5 600 Frw whereas it is worths 50, 000 Frw, he explained also that the expert reported that the roofing is made with woods whereas it is made with metal.

[13] Counsel Abasa Fazil who represents Nishimwe Claudine and Counsel Nsengiyumva Abel who represents Mashami Gisèle

state that they don't understand how the property valuer got the prices used in the expertise, they requested the property valuer to provide the method he used to calculate each component and be given the time to respond to that.

[14] After hearing the explanations of each party as regards the expert report, the Court decided to conduct further expertise, which will be handed to the Court registrar's office not later than 25/07/2019, the hearing will be resumed on 31/07/2019 on eight a.m. on that date all parties attended the hearing, the expert appointed by the Court was also present, each party had a say on the additional report, the Court closed the hearing and notified the parties that the judgment will be pronounced on 25/09/2019.

[15] In their pleadings, Nishimwe Claudine and Mashami Gisèle state that Mugenga Joseph did not add value to the house under litigation after buying it, and in case he added any value, they are not the ones to refund him because he bought it deceptively. In this case, the main issues to be examined are to determine whether there is value added to the property that Mugenga Joseph handed back which is being litigated which is composed of a plot and a house and whether he can be remubursed with the value added and the person liable for it.

II. ISSUES TO BE ANALYSED IN THIS CASE

A. Whether Mugenga Joseph added value to the property he handed back to Rwamanywa Jérémie's heirs.

[16] The counsel for Nishimwe Claudine, together with the one who represents Mashami Gisèle state that they don't accept that Mugenga Joseph added value to the property under litigation, basing on the following grounds:

- Before the High Court, the judge stated that he visited the site of the subject matter without notifying the parties to the case and found one house built in 2004 and a new one, the reason why they don't agree with the testimony of the witnesses.
- The subject matter being a house left by Rwamanywa Jérémie before 1994, and its state has not changed until now. He states that, what Mugenga Joseph did, is just taking care of it as to repair its doors and painting.

[17] Counsel Nsengiyumva Abel who represents Mashami Gisèle states that, if there is any added value to the house, it must be compensated with the time Mugenga Joseph spent in it from 1994 up to 2008. He states that the Court should investigate to determine whether there is any added value to the house under litigation and verify the statements of the witnesses. He added that they don't need the boys' quarters, Mugenga Joseph who built it should remove it and take away his materials because he

built it deceptively. He states also that, he does not acknowledge the expert's report which the lower Courts referred to, because it was in Mugenga Joseph's favour

[18] Mugenga Joseph states that the case file contains the property value report made by MINITRAP indicating the value of the property at the time of the sale, there is another property value report made in 2008 which indicates the value of the property at the time when it was handed back to Rwamanywa's heirs. He states that the last property value report (2008) indicates that Rwamanywa's heirs possess a property worthy of 64 million, whereas their property had a value of 3 million.

[19] He states that the value he added to that property is evidenced by the following:

- The property valuers report aforementioned, contained in the case file.
- The Case RC 36. 294/01 rendered by the first instance Court of Kigali on 12/02/2003, in paragraph 7, page 5, in the latter it was decided, that he added value to the house;
- The statements of all witnesses affirmed that there is an added value to that property even the authorities where the house is located affirmed that.

[20] Counsel Nzabahimana Augustin Néto who assists Mugenga Joseph states that Nishimwe Claudine and Mashami Gisèle confuse the sale price for the house under litigation and the principle of unjust enrichment, thus, Mugenga Joseph is requesting the money for the value added to the house he handed

back to them, he is not requesting for the reimbursement of the sale price. He states also that, Mugenga Joseph did not build the boys' quarters only but he renovated also the main house, thus he is requesting the added value to the house not to demolish it.

DETERMINATION OF THE COURT

[21] The evidence provided by Mugenga Joseph to indicate that he added value to the house, are composed of property valuer report prepared by the ministry of infrastructure on 07/03/1997, the property valuer report prepared by Ir Batanage Louis on 31/10/2008 from Mugenga Joseph's request, the affidavits of Habimana Pierre, Busogi Emmanuel and Hakizabera Louis made on 15/10/2014 before the executive secretary of Rukiri I cell named Mukasano Gaudence, and the judgment RC 36. 294/01 rendered by the first instance Court of Nyarugenge on 12/02/2003, in its paragraph 7, page 5. In the following paragraphs, the Court will analyse the value of each of the aforementioned evidence.

i. The property valuer report prepared by Ir Batanage Louis.

[22] As regards to the property valuer report prepared by Ir Batanage Louis on 31/10/2008, the Court finds that it can not be referred to regarding this case because it was prepared on Mugenga Joseph's unilateral request without the participation of other parties of the case. Though the property valuer report made by the ministry of infrastructure on 07/03/1997, was requested by Mugenga Joseph, nothing prevents the property valuer report appointed by the Court after the agreement of the parties, to refer to it, so that he can indicate the value added to the house since

1997, up to 2008 when Mugenga Joseph left it, because it was conducted before the lawsuits began and it was made by a government institution.

[23] The property valuer Havugimana Justin appointed by the Court, in his report to the Court on 25/04/2019, indicated that the value added on the house is worthy 10,577,136 Frw, boys' quarter built on the plot is worthy 6.328.659 Frw, and the works for the fence worthy 7,633,672 Frw composed of burnt bricks, the gate, parking, water pipeline, and water tank.

[24] The Court finds without merit the statement of the counsels for Nishimwe Claudine and Mashami Gisèle that the report of the property valuer can not be based on, unless he indicates the samples of the prices he based on in the year 2008 because the property valuer explained that he referred to the prices on the market in that year which is satisfactory. The Court finds no grounds to reject that report mostly because those who reject it do not deny that it was made by a professional who has expertise in that specific field, they don't even indicate other prices based on by other professionals which contradict the prices referred to by the property valuer appointed by the Court.

ii. The document was signed before the Executive Secretary.

[25] The document which was signed before the Executive Secretary of Rukiri, Cell I, Mukasano Gaudence on 15/10/2014, contains the statements of witnesses Habimana Pierre, Busogi Emmanuel, and Hakizabera Louis, they state that Mugenga Joseph was their neighbour in Ukwezi village who bought a plot which had unfinished house and carried ou various renovations on the house. They state that some of those works were to

renovate the house by using more durable materials, building a boys' quarter and fenced it with burnt bricks which replaced the wooden stick fence. The Court finds that these statements cannot be ignored because they were made before the authority who testified that they have been living in Rukiri cell I where the house under litigation is located. These statements confirm the findings of the property valuer appointed by the Court, basing on the statements of each party.

iii. The Judgment RC 36. 294/01 rendered by the First Instance Court of Kigali.

[26] With regards to the Judgment RC 36. 294/01 rendered by the First Instance Court of Kigali on 12/02/2003, the Court finds that paragraph 7, on page 5 of that judgment is not a piece of evidence to prove that there is an added value to the house, because the judge only stated that he has nothing to decide upon that, because it was not part of the claim submitted to the Court.

[27] Basing on the findings of the property valuer appointed by the Court, and on the statements of the witnesses, the Court finds that Mugenga Joseph added value to the house and the plot he handed back to Rwamanywa Jérémie's heirs namely Nishimwe Claudine and Mashami Gisèle.The the following issues, the Court examines whether Mugenga Joseph should be reimbursed the value he added to the property under litigation and the person liable for that.

B. Whether Mugenga Joseph should be reimbursed the value he added to the property and the person liable.

[28] Counsel Rwabukamba Moussa who represents Nishimwe Claudine and Counsel Nsengiyumva Abel who represents

Mashami Gisèle state that if Mugenga Joseph is to be reimbursed for something, their clients are not to be held liable, for the following reasons:

- Basing on the judgment RC 24.199/95/S1 rendered by the first instance Court of Kigali on 06/01/1996, on page two, the person liable for the value added to the property handed to Nishimwe Claudine and Mashami Gisèle is Kabagema Ferdinand, because in that judgment it was decided that he sold someone else's property;
- The High Court indicated that Mugenga Joseph bought deceptively, then it contradicted itself and interpreted erroneously article 311 and 312 of civil code book three because if it based on those provisions, the added value would be paid by Kabagema. Mugenga bought the hosue well knowingly that the house does not belong to Kabagema, the latter knew exactly that he is not the owner because it was registered on Rwamanywa Jérémie;
- Mugenga Joseph for not having an agreement with Rwamanywa Jérémie's heirs he has nothing to claim to them; if there is something he may claim; it shall not be awarded because he lived in that house without paying the rent since 1994 to 2008 when he was forced to leave it.
- Is without merit the claim of Mugenga Joseph that Nishimwe Claudine and Mashami Gisèle if they don't refund him the value he added to the property he handed to them, this would be

unjustified enrichment, and if this would be the case, it will concern Kabagema Ferdinand who sold someone else's property.

[29] On those grounds, Mugenga Joseph argues that:

- Regarding the argument that Rwamanywa's heirs are liable to pay was well explained in previous judgments, the provisions of the Law based on, protect the buyer who bought legally, instead of awarding Rwamanywa's heirs a room for unjustified enrichment;
- The judge of the High Court motivated that for Mugenga to buy deceptively though he does not agree with him; does not imply for him to lose the value of the works he did. The judge who decided so did not contradict himself as the plaintiffs pretend, rather he indicated that the persons who benefited from his works must pay back its value.
- He bought in good faith as, the cadastral plan "fiche cadastrale" was registered on Rwamanywa Jérémie, then was made a transfer to Kabagema Ferdinand. He agrees that he was not conversant as regards the provisions of the Law regarding the Guardian, because Kabagema stated that he is the guardianship of the children.

[30] Mugenga Joseph added that the previous Courts, awarded him less money compared to the works he did to the house under litigation, that basing on the case RCAA 0018/13/CS rendered by the Supreme Court on 24/02/2012, parties being Harerimana Emmanuel versus Sebukayire, he finds that, he must be

reimbursed the value of the works he did on the property under litigation as provided by the Law. He states that that the precedent referred to by Nishimwe Claudine and Mashami Gisèle has no link with the actual subject matter because he is claiming the money he spent on the house owned by Nishimwe and Mashami, not the money he paid to Kabagema.

[31] Counsel Nzabahimana Augustin Néto who assists Mugenga Joseph states that the heirs of Rwamanywa have to reimburse Mugenga Joseph the difference of 64 million exceeding the real value of the house he bought so that they don't get unjustified enrichment, also that being the ones who were given the property under litigation, they should be the ones to reimburse that difference as well.

DETERMINATION OF THE COURT.

i. The works added to property other than the new buildings

[32] There is no legal provision explaining what to do when someone buys an immovable property with someone else who is not the owner, then the real owner comes up and claims back his/her property, whereas the buyer did some works on it and wants compensation. Article 9 of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that "A judge adjudicates a case on the basis of relevant rules of law. In the absence of such rules, the judge adjudicates according to the rules that he/she would establish if he/she had to act as legislator, relying on precedents, customs, general principles of law and doctrine".

[33] There is a general principle of law that states that the seller provides to the buyer a guarantee in case of eviction.[1] Reference made to that principle, the seller must pay or must request for the buyer to get paid by the person who evicts him/her about the property he/she bought (this may be the real owner), regarding any works he/she completed by adding value to the immovable property. This means that in case the buyer loses the ownership of the house he/she bought, he/she would not lose the necessary works he/she did while repairing it or adding to it some value. In that case, the seller must reimburse him/her or should ask the person who evicts him/her to reimburse him/her. When the seller sold the property deceptively, he/she must pay personally for the beautification works or unnecessary expenses, he can not rather ask the real owner who evicted the buyer to pay for that.

[34] The statement above must be considered together with the principle of unjust enrichment motivated by the High Court as well. In case the seller won't benefit from the value added to the property that way, though he/she may reimburse according to the guarantee he/she provided to the buyer that none will evict him/her from his/her property, he may get paid back by the real owner by application of the unjust enrichment principle; meaning that the debtor is the person who will benefit and use them. However, When the seller sold the property deceptively, he/she must pay personally for the beautification works or unnecessary expenses, as aforementioned.

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[1] Obligation pour le vendeur de défendre l'acquéreur contre le trouble apporté par autrui à sa possession et de l'indemniser au cas où la propriété de la chose vendue serait reconnue appartenir à un tiers ou grevée de droits réels"; Gérard CORNU, Vocabulaire juridique, 6ème éd., Paris, Presses Universitaires de France, 1996, p.388.

[35] The motivations in the paragraphs above are corroborated by explanations given by Law scholars who link it with what they qualify as "la théorie des impenses" meaning the works made by a person who is not the owner of the immovable property and has to handle it to the real owner[2]

[36] The Law scholar named Christian LARROUMET explains that the Courts used "la théorie des impenses" which originates from Romans basing on the principle of unjust enrichment, to solve the issue between the real owner of the property and the person who added value to it.[3] He explains in that theory that there should not be distinction between good or bad faith[4] as far as the works added to the property are concerned. Another Law scholar Patrice JOURDAIN explains also that, for the claimant requesting to get back his/her immovable property, he/she must reimburse, the person who gives back the property, the value he/she added on it known as "impenses". He states that the Courts motivated the grounds of the reimbursement, which have no link to whether the person with the property acquired it in good or bad faith rather the nature of the works done.[5] This is

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[2] Dépenses faites sur un immeuble par une personne qui est tenue de le restituer"; ibidem, p.418

[3] Se fondant sur la notion d'enrichissement sans cause……, la jurisprudence a appliqué la théorie romaine des impenses……. Cette théorie, intervenant dans les rapports du propriétaire et de celui qui a effectué des réparations ou améliorations…; CHRISTIAN LARROUMET, Droit Civil, Les Biens, Droits réels Principaux, 5ème Ed., T.II, Paris, ECONOMICA ,2006, p. 311-312.

[4] Dans la théorie des impenses aucune distinction n'est faite entre celui qui, de bonne foi, c'est à dire dans la croyance d'en être le propriétaire, effectue des travaux sur un bien et celui qui effectue les mêmes travaux alors qu'il est de mauvaise foi"; ibidem, p.312

[5] "Le revendiquant doit indemniser le défendeur évincé des dépenses de celui-ci qui ont été incorporées à l'immeuble et qui portent le nom d'impenses. La jurisprudence a défini les conditions de cette indemnisation, qui ne dépendent

furthermore collaborated by other Law scholars like François TERRE and Philippe SIMLER.[6]

[37] These Law scholars make three categories of works made to the immovable property and the person who has to handle back it to the real owner (nature des impenses):

- Necessary works (les impenses nécessaires), this means the necessary works to be done to maintain the property and if it was not done would result in damages or deterioration of the property[7];
- The useful works (les impenses utiles), means the works which are not necessary but add value to the property. Their author must be reimbursed for the works he/she added to the property valuated at

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pas de la bonne ou de mauvaise foi du possesseur évincé mais qui varient suivant la nature des impenses »; Patrice JOURDAIN, Droit Civil, Les biens, Paris, Dalloz, 1995, p.282

[6] "La jurisprudence, s'inspirant de la tradition romaine……a retenu le principe d'une indemnisation du possesseur évincé, en fonction, non plus, cette foi, de sa bonne ou mauvaise foi, mais de la nature des travaux entrepris ou des frais exposés, appelés impenses"; François TERRE et Philippe SIMLER, Droit Civil, les biens, 9ème éd, Paris, Dalloz, 2014, p.412.

[7] « Les impenses nécessaires sont celles qu'imposait la conservation de la chose: à leur défaut, l'immeuble eût péri ou eût certainement perdu en valeur (….). Le possesseur, même de mauvaise foi, a droit au remboursement intégral des impenses de cette nature »; ibidem., p. 412

« Les impenses nécessaires correspondent aux travaux qui devaient être faits pour assurer la conservation de la chose (…). En ce cas, le propriétaire doit rembourser le coût des travaux »; Christian LARROUMET, op.cit., p. 372. « Les impenses nécessaires, à défaut desquelles la conservation de l'immeuble aurait été compromise (comme les réparation d'une charpente menaçant ruine), donnent lieu au remboursement intégral »; Patrice JOURDAIN, op.cit., p. 282.

the moment it was ordered to get back his/her property.[8];

- The beautification works, this means the works which are not necessary, they are just done for the beauty. Their author shall not claim reimbursement for their value but has the right to remove them in case nothing can be damaged.[9]

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[8] « Les impenses utiles sont celles qui, sans être indispensables, ont procuré une plus-value à l'immeuble (par exemple, extension de la surface utile ou surélévation, installation du chauffage central, de l'eau courante, d'un ascenseur, travaux de drainage du sol). La restitution en est due au possesseur, même de mauvaise foi, mais seulement jusqu'à concurrence de la plus-value appréciée au jour où la revendication est admise »; François TERRE et Philippe SIMLER, op. cit., p. 413.
«Les impenses utiles correspondent à des travaux qui n'étaient pas indispensables, mais qui ont eu pour effet d'augmenter la valeur de la chose (…). L'immeuble profite de l'amélioration et il serait injuste que celui qui y a procédé ne soit pas indemnisé. C'est une application de l'idée d'enrichissement sans cause »; Christian LARROUMET, op.cit., p. 373.
« Les impenses utiles, qui n'étaient pas indispensables à la conservation de l'immeuble, mais qui ont augmenté sa valeur (…), donnent lieu aussi à indemnisation, mais celle-ci est calculée sur la base de la plus-value donnée à l'immeuble, telle qu'elle apparait au jour de la restitution »; Patrice JOURDAIN, op.cit., p. 282.

[9] « Les impenses voluptuaires ou somptuaires sont des dépenses de pur luxe ou agrément, effectuées en vue de satisfaire les goûts personnels de celui qui les a engagées……Le possesseur ne peut jamais demander l'indemnité pour de telles impenses, mais il a la faculté d'enlever les objets apposés sur le fonds, s'il est possible de le faire sans dégradation »; François TERRE et Philippe SIMLER, op.cit., p. 413. « Les impenses voluptuaires ou somptuaires sont des améliorations de pur agrément pour celui qui les a effectuées. Elles n'apportent aucune plus-value appréciable à l'immeuble. Aucune indemnisation n'est due et le propriétaire peut même exiger la disparition des travaux » ; Christian LARROUMET, op.cit., p. 373.

[38] These explanations of Law scholars, considered together with the content of paragraphs 33 and 34 of this judgment, suggests:

- In case someone buys a property with someone else who is not the owner, and ordered afterward to handle it to the real owner whereas he/she added value to it, which is not a new building, he/she must be reimbursed for the added value in accordance with their nature;
- Is reimbursed by the real owner who got back his/her property to avoid the unjust enrichment;
- No matter whether he/she got the property in good or bad faith;
- For necessary works, he/ she is reimbursed for their real value (remboursement intégral);
- For useful works, he/ she is reimbursed considering the moment it was ordered to get back his/her property;
- The beautification works, are not reimbursed for their value by the real owner but have the right to claim their value from the bad faith seller.

« Les impenses voluptuaires qui ont un caractère de luxe ou de pur agrément et satisfont surtout le gout personnel de celui qui les a engagées, ne donnent pas lieu à indemnité. Le possesseur évincé pourrait d'ailleurs enlever les ornements qu'il aurait ajoutés au fonds, à charge de ne pas détériorer celui-ci » ; Patrice JOURDAIN, op.cit., p. 282

[39] Basing on the content of paragraphs 24 and 26 of this judgment, the Court finds that Mugenga Joseph added value to the house he handed to Rwamanywa Jérémie's heirs which value is composed of:

- To build m^2 0.69 of adobes bricks put on "claustra" and "mosquito net", the stones around the house and beams (389,950Frw);
- Build up new roofing (1.115475 Frw):
  - changing from simple galvanized sheets to more modern sheets,
  - He added metal roofing, gutter in plastic, fascia board, downpipe,
- The pavement of the sidewalk, tiling of the house, baseboard and plastering the house." (1,056,583Frw);
- the ceiling of the house (1.217.487 Frw);
- painting (2.693.612 Frw);
- Inserting doors and painting them (591.030 Frw);
- electrify the house (588.000 Frw);
- installing sanitary and plumbing (2,925,000 Frw);
- Setting the courtyard of the house by building the fired bricks fence, gate, parking, channeling water and water thank which added value to the house (7.633.672 Frw);
- All additional works have a value of 10.577.136 Frw + 7.633.672 Frw = 18.210.808 Frw, that

value is of the year 2008, the year in which MUGENGA Joseph handled the house.

[40] Referring to the nature of works completed, the Court finds that all works done are essential, (impenses utiles), because they added value to the house. As regards the roofing of the house in particular, the previous Courts stated that the works done can not be considered as essential whereas the house had a wood roof before and simple sheets, this Court finds that in case the roofing wood was changed to metal roofing, simple sheets changed to more modern and durable sheets, this can't be considered as beautification (impenses voluptuaires) because the house became stronger and more valuable.

[41] This Court finds that basing on the law provisions and the explanations given by the Law scholars indicated in the above paragraphs, Mugenga Joseph must be reimbursed for the added value to the house which is necessary (excluding new building which will be examined in the following paragraphs), he will be reimbursed by Rwamanywa Jérémie's heirs to whom the house was handled back namely Nishimwe Claudine and Mashami Gisèle. The Court finds thus that, Nishimwe Claudine and Mashami Gisèle must refund Mugenga Joseph 18,210,808Frw.

ii. new building built in the compound

[42] Article 35 of the organic Law N° 03/2013/OL of 16/06/2013 repealing the Organic Law N° 08/2005 of 14/07/2005 determining the use and management of land in Rwanda, paragraph, provides that "When buildings or crops have been developed by a person on the land that is not his/hers through procedures that are contrary to laws or agreement with the landowner, the later has the right to request the person who

performed them to remove such development without prejudice to the landowner to claim indemnities for any damages suffered".

[43] The provision of this article concerns buildings and plants cultivated on someone's land, which is different from the value added to the existing property to maintain it or to add value to it. This is what is explained by the Law scholars Patrice JOURDAIN who states that new buildings and plants can not be considered as works done/added to immovable property (les impenses)[10] this is also explained by other Law scholars like François TERRE and Philippe SIMLER[11] , by interpreting article 555 of French Law on civil code which content it the same as for article 35 of the Law determining the use and management of land in Rwanda aforementioned.

[44] As regards new buildings or plants, illegally put on someone else's land, the idea of the legislature in article 35 of Organic Law above cited, is the rights invested in the owner of the land to request their author to remove them. Basing on the provisions of this article, it is obvious that if someone puts new buildings on the land he/she bought from someone else who is not the owner, whereas he/she knows that the seller is not the real owner, he/she has built illegally because selling someone else's property is to depriving him/her the right of ownership, whereas it is prohibited by article 34 of the Constitution of Republic of

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[10] les constructions neuves et les plantations ne sont pas considérées comme des impenses….", Patrice JOURDAIN, op. cit., p.282

[11] "Les mots « plantations, constructions et ouvrages » doivent être entendus de manière assez large. Il résulte cependant de la jurisprudence qu'il doit s'agir d'ouvrages nouveaux. Elle écarte donc l'application du texte s'il n'y a eu que de simples travaux de réparation et d'amélioration, voire de transformation de constructions existantes, serait-ce sous la forme d'une surélévation »; François TERRE et Philippe SIMLER, op.cit, p.229

Rwanda which provides that Everyone has the right to private property, and the Private property is inviolable.[12] This paragraph is different from the situation where the buyer did not notice whether the seller is not the owner of the land, and buys in good faith.

[45] In this case, Mugenga Joseph bought from Kabagema Ferdinand a house located in a plot registered on Rwamanywa Jérémie. Mugenga Joseph admitted before the Court that the cadastral plan « fiche cadastrale» was registered on Rwamanywa Jérémie. Meaning that he bought with Kabagema Ferdinand knowing that he is not the owner of the house and the plot where is located. The statement of Mugenga Joseph that Kabagema Ferdinand was the Guardian « tuteur de droit » of Rwamanywa Jérémie's children, this does not affect the fact that he knowingly bought with the seller who is not the owner of the property, because the guardian of the children has no rights to sell their property without the authorization of the guardian's counsel, rather he/she has to look after and manage it as provided by articles 389[13] and 388[14] of Law N° 42/1988 instituting preliminary title of book one of civil code which was in use at the time of sale agreement.

. "Everyone has the right to private property, whether individually or collectively owned.
Private property, whether owned individually or collectively, is inviolable.
The property right shall not be encroached upon except in public interest and in accordance with the provisions of the law". Article 34 of the Constitution of Republic of Rwanda of 2003 revised in 2015

[13] «Any act of donation, sale or any disposal act of the child's property by the guardian is prohibited unless is authorized by the council for the guardian"

[14]. « the Guardian complete him/herself all acts of management and protection of the property aiming at child's sake and he/she manage it to produce interests if possible».

[46] Basing on the result of the property valuer's report appointed by the Court, Mugenga Joseph put a new building named boys' quarters « annexe » in the plot where the house he bought was located. The Court finds that the house was built on land illegally, because, it was built on the land which Mugenga Joseph bought knowingly that the seller is not the owner as motivated above.

[47] The Court finds then, basing on the provisions of article 35 of the Organic Law N° 03/2013/OL of 16/06/2013 above stated, the landowner meaning Rwamanywa Jérémie's heirs namely Nishimwe Claudine and Mashami Gisèle, have the right to ask Mugenga Joseph to remove new house named « annexe » he built on the land they received back. However, if they find it not appropriate to opt that way, and choose to keep that house, they have to agree with Mugenga Joseph on the value they shall refund him. This holding is based on the equity" principle, this was also upheld in other judgments rendered by the Supreme Court.

- Case N° RS/REV/INJUST/CIV 0012/15/CS rendered on 18/01/2019, opposing Kayitsinga Alexis, Kanyamibwa Immaculée v. Nsangineza Célestin (paragraphs 52 and 66);
- Case N° RS/INJUST/RC 0006/2018/SC rendered on 18/01/2019, opposing Nibasenge Anathalie v. Nahayo François Xavier (paragraphs 33 and 43).

[48] Basing on motivations provided regarding know whether Mugenga Joseph has to be reimbursed for what he/she added on the property and the person liable, the Court finds that Nishimwe

Claudine and Mashami Gisèle have to refund him for necessary works, worthy18,210,808Frw whereas with regarding new house named "annexe" built in the compound, the Court finds that if Nishimwe Claudine and Mashami Gisèle choose to keep it, they shall make an arrangement with Mugenga Joseph on the value they shall refund him, otherwise he should remove it.

C. Examination of Damages Requested

i. Damages requested by Nishimwe Claudine and Mashami Gisèle

- **The rent since the time Mugenga Joseph lived illegally in the house up to the time he left it.**

[49] Counsel Nsengiyumva Abel who assists Nishimwe Claudine and Counsel Abasa Fazil who assists Mashami Gisèle state that Mugenga Joseph, must pay damages worthy 97,250,000 Frw because they did not claim to him the rent for the time he spent in the house under litigation, this concern the period since 1994 up to 2008, accounting for 450,000Frw per month for 14 years for which he kept the house.

[50] Mugenga Joseph states that these damages they are requesting have no merit, as he lived in that house because he had bought it, and was registered on him till in 2008 when he executed the Court decision, he was thus living in his property and was not renting it. He states that he can not be asked to pay damages for living in the property he believed himself as the owner till he was removed from it, also that, he does not understand where his opponents get the rent of 450,000Frw from because Nishimwe Claudine and Mashami Gisèle did not provide the rental contract unless just making a statement.

DETERMINATION OF THE COURT.

[51] Basing on the testimony of Habimana Pierre, Busogi Emmanuel, and Hakizabera Louis, Mugenga Joseph bought the unfished house under litigation, which is corroborated by the content of the property valuer report made by the ministry of infrastructure on 07/03/1997. The Court finds that Nishimwe Claudine and Mashami Gisèle can not indicate how an unfinished house value is 3,169,145 Frw, could rent 450,000Frw per month as they plead, and could lose such money during the time they did not have it. The court finds that Nishimwe Claudine and Mashami Gisèle could not indicate how they calculate their loss incurred due to not managing their house. The Court finds then that 97,250,000Frw they are requesting can not be awarded. However, due to the time they spent without enjoying their house (perte de jouissance), whereas MUGENGA Joseph bought it illegally, the Court finds that they may be awarded in its discretion damages worthy 2,000,000Frw.

- **Moral damages, procedural and Counsel fee.**

[52] Nishimwe Claudine and Mashami Gisèle ask Mugenga Joseph to pay for moral damages equal to 10,000,000Frw because he admits also that, he bought with the no owner, he has to refund them 3,000,000Frw of Counsel fee and 200.000 Frw of the procedural fee.

DETERMINATION OF THE COURT.

[53] The Court finds in judgment RC 36.294/01 rendered by the first instance Court of Kigali on 12/02/2003, Rwamanywa

Jérémie's heirs were accusing Mugenga Joseph requesting for getting back their house under litigation, the representative of the heirs requested moral damages for being homeless whereas they had one, the Court awarded them 300,000 Frw. The Court finds then that, in case moral damages were awarded in the case aforementioned which acquired res judicata, can not be an issue in this case.

[54] As regarding the procedural and Counsel fee, requested by Nishimwe Claudine and Mashami Gisèle the Court finds that they cannot be awarded as they lose the case in part.

ii. The damages requested by Mugenga Joseph in the cross appeal

[55] Mugenga Joseph requests from Nishimwe Claudine and Mashami Gisèle to pay for moral damages for unnecessary Lawsuits equal to 2,000,000Frw, counsel fee of 1,500,000Frw and 200,000Frw for the procedural fee.

DETERMINATION OF THE COURT

[56] The Court finds that the moral damages requested by Mugenga Joseph for unnecessary Lawsuits can not be awarded because procedural fees are awarded purposely for unnecessary Lawsuits also apart from that, his opponents have won for some issues.

[57] The Court finds that the procedural and Counsel fee requested by Mugenga Joseph can not be awarded because he has lost for some issues in the case.

III. DECISION OF THE COURT.

[58] Decides that the appeal claim of Nishimwe Claudine and Mashami Gisèle has no merit;

[59] Decides that the appealed judgment N° RCA 0517/15/HC/KIG-RCA 0538/15/HC/KIG rendered by the High Court on 22/04/2016, is reversed in part;

[60] Decides that Mugenga Joseph added value to the house and to the plot he handed back to Rwamanywa Jérémie's heirs namely Nishimwe Claudine and Mashami Gisèle;

[61] Orders Nishimwe Claudine and Mashami Gisèle to reimburse Mugenga Joseph 18,210,808Frw of the added value;

[62] Orders Nishimwe Claudine and Mashami Gisèle to pay Mugenga Joseph the money they will agree on, regarding the house built in the plot named « annexe », in case they choose to keep it, otherwise, Mugenga Joseph will remove it;

[63] Orders Mugenga Joseph to pay Nishimwe Claudine and Mashami Gisèle 2,000.000Frw for the time elapsed without enjoying their house;

[64] Orders that the Court fee deposited for this case equal to work done for it.

COMMERCIAL CASES

ANGEL PHARMACY Ltd v. NDABATEZE

[Rwanda SUPREME COURT – RS/REV/INJUST/COM 0005/15/CS (Kayitesi Z, P.J., Nyirinkwaya na Ngagi, J.) January 15, 2016]

Company law – Certificate of Incorporation – Certificate of incorporation is conclusive evidence that from the date of registration stated in the certificate, the company is incorporated until it is removed from the register of companies. `

Company law – Pharmacy – The value of the license issued by Ministry of Heath – The license issued by Ministry of Heath authorizes the pharmacy, which has been already stocked and prepared to start operating, but it is not proof of ownership of the pharmacy.

Facts: This case originates from the disputes between Umukumburwa and Ndabateze, whereby Umukumburwa argues that together with the orphans she was taking care of incorporated Angel Pharmacy Ltd, but because the law at the time did not allow a person who did not study pharmacology to start a pharmacy, she negotiated with Ndabateze who had studied it to apply for authorization from MINISANTE. After getting the authorization Ndabateze became the Managing Director and she was paid 300,000Frw per month.

Ndabateze later claimed that Angel pharmacy was hers; thus disagreement rose, which led to Angel Pharmacy Ltd filing a lawsuit in Nyarugenge Commercial Court and the judgment was in her favor, the Court ruled that Angel pharmacy did not exist,

but there was a legal entity called Angel Pharmacy Ltd, held that the shareholders are its founders and that Ndabateze was not its shareholder.

Ndabateze appealed to the Commercial High Court, it rendered the judgment and held that Umukumburwa, the representative of Angel Pharmacy Ltd should hand back Angel pharmacy to Ndabateze as agreed when they began to work together.

Umukumburwa uhagarariye Angel Pharmacy Ltd avuga ko akarengane yagiriwe gakubiye muri ibi bikurikira; kuba urukiko rwategetse ko agomba gusubiza Ndabateze Angel pharmacy kandi itarigeze ibaho, ahubwo mu rwego rw'amategeko hariho Angel Pharmacy Ltd nkuko ndetse bigaragazwa n'ibaruwa yanditswe n'Ubuyobozi bwa RDB ndetse no kuba urwo rubanza ntirushyobora kurangizwa kuko Angel Pharmacy itabaho.

Umukumburwa wrote to the Office of the Ombudsman requesting that the judgment rendered by the Commercial High Court be reviewed because it was vitiated with injustice. The Ombudsman wrote to the President of the Supreme Court requesting that the mentioned judgment be reviewed on the grounds of injustice.

Umukumburwa, the representative for Angel Pharmacy Ltd argues that the injustice is manifested in the following grounds; the court ordered that she should hand over Angel Pharmacy to Ndabateze which never existed as explained in the letter of RDB and the fact that the judgment can't be executed because Angel pharmacy does not exist.

In her defence, Ndabateze Adéline denied that she was an employee of Umukumburwa, that the latter is confusing ANGEL PHARMACY with ANGEL PHARMACY Ltd. She stated that

she was given 300,000 Frw per month because of the document she submitted when applying for the operating license.

Held: 1. Certificate of incorporation is conclusive evidence that: from the date of registration stated in the certificate, the company is incorporated until it is removed from the register of companies.

2. The license issued by Ministry of Heath authorizes the pharmacy, which has been already stocked and prepared to start operating, but it is not proof of ownership of the pharmacy.

3. Any act of a man, which causes damage to another obliges the person by whose fault it happened to repair it

The claim has merit in parts.
Court fees on Ndabateze.

Statutes and statutory instruments:

Law Nº 07/2009 of 27/04/2009 relating to companies (abrogated), article 2(39, b),4, 17(2) and 18.

Ministerial Order N ° 20/15 of 03/05/2005 determining the requirements in the opening, operating and transferring pharmaceutical sales, article 6

Law of 10/07/1888 governing contracts or obligations (abrogated), article 258

No cases referred to.

Judgment

I.BRIEF BACKGROUND OF THE CASE

[1] Umukumburwa Alice argues that on 21/10/2011, she founded the Angel Pharmacy Ltd in partnership with the orphans she was raising namely Akizanye Alaine, Nduwawe Ange and Umuhoza Aimée and was their guarantor. But since the law at the time did not allow a person who is not a pharmacist to start that business, Umukumburwa Alice requested her pharmacist friend Ndabateze Adeline to apply for a certificate from MINISANTE, and was given the authorization to open a pharmacy as a "Managing Director" but was not a shareholder, after the pharmacy started operating, Mukumburwa Alice and her colleagues were paying Ndabateze Adeline 300,000 Frw per month as its "Managing Director".

[2] Thereafter there were misunderstandings between Ndabateze Adeline and Umukumburwa Alice as Ndabateze Adeline claimed ownership of Angel Pharmacy, Angel PHARMACY Ltd filed a claim at the Commercial Court of Nyarugenge, in judgment N°. RCOM 0480/14 / TC / NYGE, the case was rendered in the favour of the plaintiff, whereby the Court held that Angel Pharmacy does not exist, but rather Angel Pharmacy Ltd is the one which exists legally, that the shareholders are its founders and that Ndabateze Adeline is not a shareholder.

[3] Ndabateze Adeline Adeline appealed to the High Court of Commerce, her appeal registered on N°. RCOMA 0465/14 / HCC and on 23/10/2014, the Court held that Mukumburwa Alice representing Angel Pharmacy Ltd must handover Angel

Pharmacy to Ndabelle Adeline as they agreed when they began to work together.

[4] On 04/11/2014, Umukumburwa Alice representing Angel Pharmacy Ltd wrote to the Office of the Ombudsman requesting that case No. RCOMA 0465/14 / HCC be reviewed due to injustice. On 01/12/2014, the Ombudsman wrote to the President of the Supreme Court requesting that judgment N°. RCOMA 0465/14 / HCC rendered by the Commercial High Court be reviewed due to the following grounds:

1) The court ordered that Umukumburwa Alice, who represents Angel Pharmacy Ltd, hand over Angel Pharmacy to Ndeline expect Adeline Angel Pharmacy, which is not possible because, as emphasized by the letter N°. RDB / 3 / RH / 0238/02/2014 written by RDB responding to Umukumburwa Alice, who had requested it to give information on Angel Pharmacy, which Ndabateze Adeline claims to be hers and Angel Pharmacy Ltd also claims it, and then it replied that Ndabateze Adeline is registered on Pharmacie Bethel with code 101808806, which implies that even if Angel Pharmacy also existed, it only existed theoretically but legally never existed;

2) The fact that the Court ruled that the Umukumburwa Alice representing Angel Pharmacy Ltd hands over Angel Pharmacy to Adeline Angel Pharmacy, will lead to failure to enforce the judgment because Angel Pharmacy does not exist.

[5] On 21/11/2014, Angel Pharmacy Ltd represented by Umukumburwa Alice appealed Judgment N° RCOMA

0465/14/HCC (through EFS)[1], the claim was registered on N° RCOMAA 0054/14/CS, and on 12/06/2015, the Supreme Court found that the claim does not fall within its jurisdiction.

[6] The first hearing of this case (RS / REV / INJUST / COM 0005/15 / CS) was held in public on 13/10/2015, Angel Pharmacy Ltd represented by Umukumburwa Alice assisted by Counsel Niyondora Nsengiyumva, while Ndabateze Adeline represented by her husband Ngwabije Murihano Ephrem represented by Counsel Ngabonziza Julien and Counsel NDAYAMBAJE Iyamuremye Simon.

[7] At the beginning of the hearing, Ngwabije Murihano Ephrem raised the objection of inadmissibility of the claim on the ground that the appealant availed two remedies at the same time while it's barred by article 12 of Law Nº 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, and also the grounds of injustice do not match with the provisions of article 81 of Organic Law N°. 03/2012 / OL of 13/06 / 2012 Law determining the organization, functioning and jurisdiction of the Supreme Court. Those objections were overlured by the Court, in its interlocutory judgment dated 20/11/2015, therefore the hearing in merit was scheduled on 09/12/2015.

[8] The hearing on 09/12/2015 was held in public, Angel Pharmacy Ltd represented by Umukumburwa Alice assisted by Counsel Niyondora Nsengiyumva, while Ndabateze Adeline assisted by Counsel Ndayambaje Iyamuremye Simon.

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[1] Electronic Filing System.

II.ANALYSIS OF THE LEGAL ISSUES

Determining which pharmacy holds a legal personality between Angel Pharmacy Ltd and Angel Pharmacy, and its owner

[9] Umukumburwa Alice, the representative of Angel Pharmacy Ltd, argues that they started the pharmacy when they are orphan, they sought the assistance of Ndabateze Adeline, who had studied pharmacology, got an "authorization" a year later, and they started working. Later Ndabateze Adeline asked them to give her the authorization (permit) so that she begins her pharmacy, then conflicts rose, they got another employee, and Ndabateze Adeline also got another employee called Mutabazi Serge.

[10] Counsel Niyondora Nsengiyumva, assisting Umukumburwa Alice, argues that the Court examines whether the Commercial Company exists because of the Commercial Register issued to it or whether it is subject to the authorization license issued by MINISANTE, that Angel Pharmacy Ltd was legally approved on 21/10/2011, it demonstrates its shareholders, and that once the company is registered that is when it is given the license to operate the pharmacy. She further argues that Ndabateze Adeline admits that she was paid 300,000 Frw per month, that if she was the owner of the pharmacy she should not have been paid that money, that she received it because she was an employee of the company working as a Director Manager.

[11] Ndabateze Adeline argues that Umukumburwa is confusing Angel Pharmacy with Angel Pharmacy Ltd, that she has never been an employee of Umukumburwa Alice. She further argues that, as a pharmacist, she started Pharmacie Bethel, and

Umukumburwa Alice approached her and requested her to work together in the pharmacy, she started Angel Pharmacy on her business register, and she used to send Umukumburwa on her behalf and she used to sign on her behalf (P.O), if she was her employer she would not have sent her on errands and 300,000 Frw was given to her because of her document which she submitted in applying for authorization to begin the pharmacy. She further argues that they greed with Umukumburwa Alice that she will be the accountant while her mother (of Adeline Ndabateze) will be the cashier and that they would share the profit every month and after a year they will separate, and she gives Umukumburwa the money for “Comptoir", and that of the remaining drugs, and she continues her pharmaceutical business under her Enterprise.

[12] Counsel Iyamuremye Simon assisting Ndabateze Adeline argues that Umukumburwa Alice the representative of Angel Pharmacy Ltd, applied for the documents to open the pharmacy but failed and used Ndabateze Adeline's documents. He claims that the owner of the pharmacy is the one who has the authorization granted by MINISANTE.

DETERMINATION OF THE COURT

On the issue of determining the pharmacy which holds legal personality between Angel Pharmacy Ltd and Angel Pharmacy

[13] Article 4 of the Law Nº 07/2009 of 27/04/2009 relating to companies provides that "It shall be compulsory to register a company in the Registrar General's office.". And for article 17,2º of that Law provides that a certificate of registration of a

company is conclusive evidence that from the date of registration stated in the certificate, the company is incorporated. Article 18 also provides that A company registered under this Law shall be a company with a separate legal status and with the name by which it is registered and continues to exist until it is removed from the register of companies.

[14] The case file indicates that Angel Pharmacy Ltd was registered in the Office of the Registrar General in the Rwanda Development Board (RDB) on 21/10/2011 and was amended on 09/10/2012, as indicated by "Full Registration for Domestic Company". The file also shows that the company's shareholders are Umukumburwa Alice, Akizanye Alaine, Nduwawe Ange and Umuhoza Aimée; Umukumburwa Alice is the legal representative whereas Ndabateze Adeline, who is not among the shareholder, is its Managing Director. The Memorandum of Association of Angel Pharmacy Ltd dated 07/10/2011, which is also the company's founding certificate, issued by RDB, also indicates that Umukumburwa Alice, Akizanye Alaine, Nduwawe Ange and Umuhoza Aimée are shareholders in Angel Pharmacy Ltd, Ndabateze Adeline as Managing Director; and that the company is engaged in the retail sale of pharmaceutical and medical goods, cosmetics and toilet articles in specialized stores and that the capital is 2,500,000 Frw which was contributed in equal proportions to all four (4) shareholders.

[15] The case file also indicates that in a letter dated 19/02/2014, the Secretary General of Commerce at RDB wrote to Alice Umukumburwa, states clearly that Angel Pharmacy Ltd is a company registered with the Rwanda Development Board, and that Nabateze Adeline has a personal business in the name of "Pharmacie Bethel".

[16] Based on the motivations provided in the preceding paragraphs, the Court finds that Angel PHARMACY Ltd represented by Umukumburwa Alice is the one registered in the RDB, as required by Article 4 of the Company law, it is also the one with legal personality since it is the one that complies with the legal requirements, and Angel Pharmacy, Ndabateze Adeline claims to be hers, even if its operating, it doesn't appear to be legally incorporated; because it was never registered in RDB.

The issue of determining the ownership of Angel Pharmacy Ltd

[17] Article 2,32º,b of the Law Nº 07/2009 of 27/04/2009 relating to companies provides that person whose name appears in a request for company registration at the time of its incorporation and who is regarded as a shareholder until his/her name is. entered in the share register;

[18] Article 6 of the Ministerial Order N ° 20/15 of 03/05/2005 determining the requirements in the opening, operating and transferring pharmaceutical sales provides that when the pharmacist works for others, the pharmacy opening document must be accompanied by a document proving that partnership called the "Partnership Agreement" which is signed by the pharmacist and the legal person representing the company.

[19] On the issue of determining whether the license issued by MINISANTE to operate a pharmacy is a legal document with incorporates it and that the one in whose names the license is written is the owner of the pharmacy, the Court finds that Umukumburwa Alice consented with Ndabateze Adeline to co-operate the pharmacy, but the agreement of cooperation was only verbal, as there is no document proving it as provided for in

article 6 of the Ministerial Order Nº 20/15 of 03/05/2005 mentioned above which provides that the pharmacist may work for other persons. The Court finds that in the agreement between the two parties, the party represented by the Umukumburwa Alice was the one who sought the capital to buy medicine, equipment, pay the house rent, and so on, while the role of Ndabateze Adeline was to seek a license through her documents which include a trade license, ID, diploma, etc., in order for the pharmacy to be authorized to start business activities and Ndabateze Adeline was paid 300,000 Frw per month for that authorization.

[20] It is also clear that applying for the license of the pharmacy started on 18/05/2012, when Adeline Ndabateze wrote to MINISANTE requesting the authorization to open the pharmacy, on 08/06/2012, the National Pharmaceutical Establishments Committee submitted an audit report confirming the fulfillment of the requirements for the pharmacy to be allowed to begin operating, the license was granted on 09/08/2012 as evidenced by letter Nº 20/4265 / PH / INSP / JK / 2012 of 09/08/2012, which MINISANTE wrote to Ndabateze Adeline authorizing her to open pharmacy activities in ANGEL. This confirms that the pharmacy was first registered with the RDB in 2011, and the operating license was issued later and the pharmacy was already in place, especially since it is also licensed after a technical inspection to ensure that all requirements are met.

[21] The Court finds that the license issued by MINISANTE does not confer ownership of the pharmacy on the one whose name is written on it because article 6 of the ministerial Order allows for a partnership between the pharmacist and another person to work on behalf of the company, rather the license is a document that authorizes the pharmacy, which has been already

stocked and prepared to start operating, that it is not a proof that the pharmacy exists and that it belongs to so and so. The Court finds that Ndabateze Adeline could not be the owner of the pharmacy and then be paid for the license she acquired for her pharmacy, but also to be reimbursed for the license she was given, because the shareholder, if she is not an employee of the company is not entitled to a salary, but instead, dividends interest on the shares as provided for in article 156 of the aforementioned Law Nº 07/2009 of 27/04/2009 on companies states that shareholders are entitled to dividends (...); therefore, Angel Pharmacy Ltd is represented by the Umukumburwa Alice which is a legally existing pharmacy as described above

[22] The Court finds that Angel Pharmacy Ltd is legally incorporated, and is the one that had to continue with the pharmaceutical activities and that Angel Pharmacy does not exist legally and must not continue to operate under that name because it would be contrary to this decision of the court.

[23] Based on the motivations and the legal provisions given above, the Court finds that the shareholders who are the founders of the Angel Pharmacy Ltd and the owners are Umukumburwa Alice, Akizanye Alaine, Nduwawe Ange and Umuhoza Aimée, as indicated by the Memorandum of Association issued by RDB on 07/10/2011, as they are the ones who requested for its incorporation and the pharmacy cannot be claimed by any other person other than the one who put together the capital and collected the documents for its existence and Ndabateze Adeline is its Managing Director who is not among the shareholders.

Whether damages should be awarded in this case

[24] Umukumburwa Alice, representing Angel Pharmacy Ltd, claims for the following damages:

- Procedural fees of 5,955,000 Frw which includes 1,960,000 Frw incurred in the Commercial Court of Nyarugenge in the cases N° RCOM 0480/14 / TC / NYAR and N° RCOM 0529/14 / TC / NYAR, 550,000 Frw incurred in the Commercial High Court the case N°. RCOMA 0465/14 / HCC, 500,000 Frw incurred to follow-up on the case at the Ombudsman office and 2,945,000 Frw spent to follow-up the case at the Supreme Court in the case RCOMA 0008/15 / CS.

- Income damage amounting to 3,850,000Frw, consisting of 100,000Frw for relocation and 3,750,000Frw of interest he would have received from her business from 28/08/2015, which increases until the case is over;

- Damages amounting to 2,000,000Frw related to the fact that Ndabateze Adeline is carrying her activities her which raises the taxes she must pay;

- Damages amounting to 3,000,000Frw for the name ANGEL, which Ndabateze Adeline used while it was used as a memorial to their parents as it was the name of her young sister Nduwawe Ange who was 6 months old when their parents died;

The total amount of damages is 14,805,000 Frw, plus the Advocate's fee in the case for the review of the judgment due to injustice amounting to 1,500,000 Frw.

[25] Advocate Iyamuremye Simon, the counsel for Ndabateze Adéline, argues that the damages claimed are unfounded because Umukumburwa Alice is using improper means to obtain a pharmacy which belongs to another person, he advises her to apply for the legal documents of her pharmacy without using the pharmacy of Ndabateze Adeline.

DETERMINATION OF THE COURT

[26] Article 258 of Book Three of the Civil Code provides that: "Any act of a man, which causes damage to another obliges the person by whose fault it happened to repair it".

[27] In this case, Umukumburwa Alice, the representative of Angel Pharmacy Ltd is claiming for 1,960,000Frw in damages for the expenses she incurred in case N°. RCOM 0480/14 / TC / NYAR and N°. RCOM 0529/14 / TC / NYAR[2] decided by the Commercial Court of Nyarugenge; the case file however demonstrates that she was awarded 800,000Frw in the case N° RCOM 0480/14 / TC / NYAR. The court finds that Angel Pharmacy Ltd should be awarded 800,000Frw that had been awarded in the previous case because it is a reasonable amount.

[28] Concerning the costs in judgment N°. RCOMA 0465/14 / HCC rendered by the Commercial High Court, the Court also finds that 550,000 requested should be awarded because Angel

[2] This case relates to a summary claim in Case N°. RCOM 0480/14 / TC / NYAR whereby the subject matter was: " Requesting to open the Pharmacy and having the authorization to operate to be written in my names so that we operate as we await the ruling of the court on the principal claim ", and it is obvious that concerning damages the judge had explained that they should be claimed in the principal case (RCOM 0480/14 / NYAR).

Pharmacy Ltd incurred expenses to follow up on this case Regarding the 500,000Frw requested by Umukumburwa which she spent to take the matter to the Ombudsman Office, the Court also finds that it should be awarded because the injustice in the judgment N°. RCOMA 0465/14 / HCC caused those costs while taking the matter to the Ombudsman Office.

[29] Concerning the procedural fees for the case before this Court, the Court finds that 2,940,000 Frw arises from the summary procedure (N°. RCOM 0008/15 / CS) requested by Umukumburwa Alice the representative Angel Pharmacy Ltd, and 1,500,000 Frw originating from the principal claim (N° RS / REV / INJUST / COM 0005/15 / CS), is excessive, and therefore in its discretion it awards Angel pharmacy Ltd eight hundred thousand francs (800,000Frw) for prosecution and counsel fees for both cases[3].

[30] Regarding pecuniary damages claimed, the Court finds that they should not be awarded because Umukumburwa Alice representing Angel Pharmacy Ltd claims them on the ground that she did not work during that period and was removed from her place of work, and in her oral submissions there is a point in she explains that Angel Pharmacy Ltd was operating in another house, which means that, except the misunderstandings with Ndabateze Adéline on the functioning of the pharmacy they had, Umukumburwa Alice continued to conduct her pharmaceutical business. Also, even if Angel Pharmacy Ltd had suspended its operations, there is no proof for her claim of economic damages.

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[3] Article 320, the last paragraph of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides that "damages and related expenses incurred by the party during the hearing of summary procedure shall be claimed together with the principal application."

As for the $ 100,000 relocation fee requested by the Umukumburwa Alice, the Court also finds that it should not be awarded because there is no evidence that it was Ndabateze Adéline who removed her from her office, especially since this Court (of the Supreme Court) in case N°. RCOM 0008/15 / CS rendered on 31/07/2015, had ordered for the temporary stay of the execution of the judgment N°. RCOMA 0465/14 / HCC pending trial of Case N°. RS / REV / INJUST / COM 0005/14 / CS.

[31] Regarding the costs and damages resulting from Ndabateze Adeline using her name in her business which raises the taxes she is liable to pay and also the damages resulting from Ndabateze Adeline using the name of Angel, the Court finds that all such damages should not be awarded because, according to the explanation of Umukumburwa Alice, the pharmacy which sparked a dispute between Umukumburwa Alice (who invested in medicine, the rent of the building and the purchase of other equipment) and Ndabateze Adeline (who used her documents to seek the operating permit of the pharmacy), therefore, Umukumburwa Alice representing Angel Pharmacy ltd cannot claim damages for it.

[32] According to the motivations given above, the Court finds that Angel Pharmacy Ltd is awarded damages equivalent to 2.650.000Frw including 800.000Frw awarded by the Commercial Court in judgment N° RCOM 0480/14/TC/NYAR, 550.000 Frw spent on the case N° RCOMA 0465/14/HCC in the Commercial High Court, 500.000 Frw spent taking her issue to the Ombudsman Office and 800.000 Frw spent on the case being reviewed due to injustice (N° RS/REV/INJUST/COM 0005/15/CS).

III. DECISION OF THE COURT

[33] Holds that the claim of Angel Pharmacy Ltd for the review of the judgment on the grounds of injustice has merit in parts.

[34] Holds that Angel Pharmacy Ltd is the one existing legally, it is the one which should continue to operate the pharmaceutical activities.

[35] Holds that the shareholders of Angel pharmacy Ltd are Umukumburwa Alice, Akizanye Alaine, Nduwawe Ange and Umuhoza Aimée.

DRESOCECO Ltd v. MININTCO Ltd

[Rwanda COURT OF APPEAL – RCOMAA 00086/2018/CA
(Mukanyundo, P.J., Mukandamage and Kanyange, J.)
September 27, 2019]

Intellectual property rights – Trademark – Confusingly similar trademarks – Colorable imitation – When assessing the risk of confusion, it is not necessary to consider the existence of exact duplication but greater weight is given to the similarity of the appearance of the product arising from the adoption of the dominant features of the registered mark (dominant test of similarity), disregarding minor differences.

Facts : MININTCO LTD is a commercial company which registered the trademark of KANTA BRAND in Rwanda Development Board (RDB) and it deals in that product, thereafter, it came to its notice that another commercial company called DRESOCECO Ltd imports from China a product which has the trademark of Wild Olive, MININTCO LTD claims that it had imitated its trademark, that DRESOCECO Ltd sells the product with that trademark fraudulently, on that ground, it sued that company before the Commercial Court of Nyarugenge requesting the Court to ban that product on the Rwandan market, seize and destroy them so that they will not be imported again because it is confusingly similar with its trade mark, it also claimed for the damages.

In its defence, DRESOCECO Ltd argues that it did not imitate the trademark of KANTA Brand, and the appellant does not produce any evidence to prove that it imitated its trademark of KANTA Brand, because it is not the one that manufactures the

products of Wild olive, it further argues that the factory which manufactures those products is the one to be sued, it also claimed for damages stating that it incurred a loss because of seizure of its products. The Court held that the trademark of Wild olive is not confusingly similar with the trademark of Kanta Brand and also that it does not create any confusion to buyers.

MININTCO Ltd appealed to the Commercial High Court stating that the Commercial Court of Nyarugenge disregarded the factors which are considered in assessing the corolable imitation, that the Court held that it should not sue DRESOCECO Ltd since it is not the one that manufactures Wild olive, and lastly that the Court failed to examine the issue of whether the trademark Wild olive can be used in unfair competition in comparison to that one of Kanta Brand.

The Commercial High Court found appeal with merit, it quashed the rulings of the appealed judgment, it ordered that the products of Wild olive which are imported to Rwanda by DRESOCECO Ltd be banned in Rwanda, because their trademark is illegaly confusing.

DRESOCECO Ltd appealed to the Supreme Court stating that the Court should have dismissed MININTCO Ltd's claim relating to whether the trademark Wild olive is confusingly similar to the trademark of Kanta Brand, because that issue was settled in the previous judgment between MININTCO Ltd and Unitex Rwanda Ltd rendered by the Commercial High Court, which already acquired the force of *res judicata* since it was not appealed to the Supreme Court which had the jurisdiction at that time, and also, the case was not reviewed on the ground of injustice and lastly it requests to be awarded the damages for the loss it incurred. After judicial reform the case was transferred to the Court of Appeal.

During the hearing DRESOCECO Ltd argues that normally the case which was rendered in last instance should not be heard again on the same grounds, the same cause and between the same parties, that with regard to these cases (class action cases), what is considered is the subject matter of the case, if not, cases concerning corolable imitation will not end as people would sue without considering the previous judgments.

DRESOCECO Ltd argues that though the Commercial High Court ruled that the trademark Wild Olive is confusingly similar to that of KANTA Brand, it's not true, because there are no similarities and words which appear on those trademarks are not similar. It further states that on Kanta Brand's box, there is weighing machine but on Wild olive there is a sign of a tree branch with two fruits, and on the colours, it states that though some are almost the same but it's not all, and that there are colours which are often used by people and factories, thus, the trademark of 'Wild olive'' is not confusing the buyers to the extent of not distinguishing them from the trademark of "Kanta Brand"

In proving that the trademark of Wild olive is confusingly similar with the trademark of KANTA Brand, MININTCO Ltd compared the packaging box of the products with the trademark of Wild olive and the box of the trademark of KANTA Brand, and indicated where and how Wild Olive imitated the trademark of KANTA BRAND and that the clients of KANTA Brand can easily be confused and buy the products of Wild olive.

Furthermore, MININTCO Ltd argues that the Court should rule that the appeal DRESOCECO Ltd is not founded, that the trademark of Wild olive is confusingly similar to the trademark of KANTA Brand, and that the products with trademark Wild olive confuse the buyers, and therefore orders that those products

are banned from the market of Rwanda and also orders the products seized in customs to be destroyed.

DRESOCECO Ltd argues state that it is being unfairly treated because it imported the hair dye with a trademark of "Wild Olive" without knowing that it had issues, and that though the Court found that product to be imitating and confusing, except that it's no true, DRESOCECO Ltd should be given its goods confiscated in the custom because it had no bad faith towards MININTCO Ltd.

Held: 1. When assessing the risk of confusion, it is not necessary to consider the existence of exact duplication but greater weight is given to the similarity of the appearance of the product arising from the adoption of the dominant features of the registered mark (dominant test of similarity), disregarding minor differences.

Appeal is without merit.
Court fees covers the expenses in case.

Statutes and statutory instruments:

Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative, article 111

Law Nº 31/2009 of 26/10/2009 on the protection of intellectual property, article 178, 180 and 258

Law Nº15/2004 of 12/06/2004 relating to evidence and its production, article 76.

No cases referred to.

Authors cited:

DEBORAH E. BOUCHOUX, La propriété intellectuelle, le droit des marques, le droit d'auteur, le droit des brevets d'invention et des secrets commerciaux, Nouveaux Horizons, p. 97.
Serge GUINCHARD, Droit et pratique de la procédure civile, Dalloz, cinquième édition, p.864.

Judgment

BACKGROUND OF THE CASE

[1] MININTCO Ltd sued DRESOCECO Ltd before the Commercial Court of Nyarugenge praying to ban the supplying of products which the latter imports from China that bear the trademark of Wild Olive due to the colorable imitation with the trademark of Kanta Brand, it explains that DRESOCECO Ltd had imitated its trademark considering how those trademarks are formulated, it is obvious that they are similar. The boxes, size, colours, as well as other specifications of the trademark of Kanta Brand such as weighing machines, words on the trademark and space in which those words are written, they argue that the buyers cannot differentiate the products and that it infringes on MININTCO Ltd's rights in terms of intellectual property and its business because it incurs the loss, it further prays for the destruction of DRESOCECO Ltd's products which were confiscated in custom and DRESOCECO Ltd be banned further importing such products to Rwanda, it also claimed damages worth 50.000.000Frw as the cost of the lawsuit.

[2] DRESOCECO Ltd argued that MININTCO Ltd does not prove that it imitated its trademark of KANTA Brand because it

does not manufacture the products of Wild olive because it only bought them as it would buy the products of MININTCO Ltd, therefore it does not have a trademark for the products it bought, and its not the one which registered Wild olive at the Registrar General in RDB, it adds that it has no fault in terms of laws and evidence, that MININTCO Ltd should sue the factory which manufactures Wild olive in case that factory imitated the trademark of Kanta Brand, except that those trademarks are not similar, they cannot confuse the buyers either with their colours, words or images marked on it, Wild olive would be confusing if where the word Kanta Brand is written there is written Wild olive, it argues that MININTCO Ltd intends to monopolise the market which is not allowed in business. DRESOCECO Ltd requested that MININTCO Ltd be ordered to pay 50.000.000Frw for damages, 18.750.000Frw for the loss incurred because of confiscating its products and procedural fees.

[3] On 20/04/2017, that Court rendered the judgment RCOM 00385/2017/TC/Nyge, holding that there is no similarity between the two trademarks of Wild olive and that of Kanta Brand and that Wild olive does not imitate Kanta Brand, and that it does not confuse the buyers, It ordered MININTCO Ltd to pay DRESOCECO Ltd 500.000Frw for counsel fees and 200.000Frw for procedural fees.

[4] MININTCO Ltd appealed to the Commercial High Court stating that the Commercial Court of Nyarugenge disregarded the main elements in assessing the colorable imitation, that the Court deliberately held that MININTCO Ltd should not sue DRESOCECO Ltd since it is not the factory that manufactured the Wild olive, that the Court breached the provisions of article 258 of the Law Nº 31/2009 of 26/10/2009 on the protection of

intellectual property and that it failed to examine the issue of whether the trademark Wild olive can be used in unfair competition in comparison to that one of Kanta Brand.

[5] The Commercial High Court rendered the judgment RCOMA 00236/2017/CHC/HCC on 16/11/2017, it found MININTCO Ltd's appeal with merit, it quashed the rulings of the appealed judgment, the Court ordered that the products of Wild olive imported to Rwanda by DRESOCECO Ltd should not be supplied on the Rwandan market because they are confusingly similar.

[6] DRESOCECO Ltd appealed to the Supreme Court and the case was recorded Nº RCOMAA 00014/2018/SC but it was transferred the Court of Appeal basing on article 105 of the Law Nº30/2018 of 02/06/2018 on jurisdiction of Courts the case was recorded on RCOMAA 00086/2018/CA.

[7] In its appeal, DRESOCECO Ltd argues that MININTCO Ltd.'s claim concerning the issue that the trademark of Wild olive imitates or not the trademark of Kanta Brand, that the claim should not be dismissed because it was examined in the case RCOMA 00194/2016/HC/HCC rendered by the Commercial High Court on 12/10/2016 which has acquired force of res judicata, that the Commercial High Court disregarded the laws and evidence produced which prove that its trademark does not imitate that one of MININTCO Ltd, it claims to be given back its products confiscated in custom and damages for the loss incurred, whilst MININTCO Ltd argues that DRESOCECO Ltd.'s appeal lacks merit.

[8] The Court first examined the objection of lack of jurisdiction raised by MININTCO Ltd in relation to the value of

the subject matter in litigation, thereafter, in interlocutory judgment rendered on 05/04/2019, the Court found the appeal of DRESOCECO Ltd is in the jurisdiction of the Court of Appeal, the hearing of the case in merit resumed on 08/05/2019 and on 30/04/2019 DRESOCECO Ltd was represented by its Managing Director Sagatwa Anastase assisted by Counsel Mutarindwa Félix and Counsel Butare Godefrey whilst MININTCO Ltd was represented by its Managing Director Rahul Gulab Jham assisted by Counsel Nsengumuremyi Cyridion.

II. ANALYSIS OF LEGAL ISSUES

a. Whether MININTCO Ltd's claim should not have been admitted in previous Courts because the Judgment RCOMA 00194/2016/CHC/HCC had acquired the force of *res judicata*, the Commercial High Court affirmed that the trademark Wild olive does not imitate that of KANTA Brand.

[9] The advocates for DRESOCECO Ltd state that the Commercial High Court disregarded to examine the issue regarding the fact that MININTCO Ltd's claim should not have been admitted at the first instance because of another judgment RCOMA 00194/2016/HC/HCC rendered by the Commercial High Court on 12/10/2016 (the judgment which was rendered before this that was rendered on 16/11/2017), between MININTCO Ltd and Unitex Rwanda Ltd, whereby the Court held that the trademark Wild olive used by Unitex Rwanda Ltd does not make any confusion because its specifications differ from that of KANTA Brand owned by MININTCO Ltd, that the judgment had acquired the force of *res judicata* because it was not appealed

before the Supreme Court which had jurisdiction at the time, and it was not reviewed due to injustice, thus, it is still binding.

[10] They state that basing on article 151 of the Constitution of the Republic of Rwanda of 2003 revised in 2015 provides that court rulings are binding on all parties concerned, be they public authorities or individuals. They cannot be challenged except through procedures determined by law (...), they pray to honour the judgment for which it decided that those trademarks are not confusingly similar, that if MININTCO Ltd find it necessary, it should use legal remedies for requesting that the court decision be quashed, but as long as it exists, nothing should avoid traders to import products with that trademark of Wild olive, that DRESOCECO Ltd imported those products after consulting that judgment, thus it must be protected as it was the case for Unitex Rwanda Ltd because article 15 of the Constitution states that all persons are equal before the law. They are entitled to equal protection of the law.

[11] They further argue that a judgment rendered on the last instance decided cannot again be litigated on the same facts, between the same parties acting with respect to the same cause, but as far as this case is concerned, subject matter is only considered, because if not, misunderstanding on imitation of the products would persist with no end, because everyone would file a claim disregarding the previous court judgment.

[12] They also base their argument on the position of the author Yves FAURE in his Dissertation of PhD titled *Le contentieux de la contrefaçon. La réponse du droit français à*

l'atteinte aux droits de propriété intellectuelle on page 403[1], they add that the High Instance Tribunal of Paris refused to admit a case because the same product was again brought to court litigation (seeTGI Paris, 23 févr.2007: PIBD 2007, nº 858, p.551 en matière de marque). They also give an example of the case rendered by Court of cassation in France, a case between two companies, Merk Shap and Dhome.

[13] Counsel Nsengumuremyi Cyridion representing MININTCO Ltd, argues that the statements of DRESOCECO Ltd that its claim should not be admitted because there was a case that was definitively decided, that it should not be considered because DRESOCECO Ltd does not prove that res judicata force is absolute or not.

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[1] They argue that Yves FAURE stated*: "L'autorité de la chose jugée constitue également une fin de non-recevoir tout à fait commune et n'est donc pas spécifique aux droits de la propriété intellectuelle, mais s'y intéresser spécialement est ici nécessaire car il se trouve également là une application particulière à la matière. De rappeler tout d'abord que le principe gouvernant l'autorité de la chose jugée est donné par l'article 1351 du code civil, il s'agit d'une présomption légale qui entraîne l'impossibilité d'un nouveau jugement sur une demande lorsque celle-ci a déjà tranchée du fait qu'il existe une identité de parties, d'objet et de la cause. Les conditions administrant la notion de l'autorité de la chose jugée sont donc restrictives mais se trouvent bien à s'appliquer en matière de contentieux de la contrefaçon. C'est ainsi qu'il faut s'apercevoir que c'est autour d'une problématique relative à l'objet que se cristallisent les difficultés, les questions d'identité de parties et des causes sont plus facilement expurgées du fait de l'objectivité de leur appréciation, là où les aspects relatifs à l'objet sont plus à même d'appeler à une interprétation. Il existe ainsi une identité d'objet ayant entrainé la reconnaissance de l'autorité de la chose jugée et conséquemment un fin de non-recevoir, lorsqu'il a déjà été statué une action en contrefaçon sur le même bien (...)".*

[14] He further states that the documents produced by DRESOCECO Ltd in the case file with regard to French laws, while the issue of the case with *res judicata* force concerning the present case, is provided in article 14 of the Law relating to the civil, commercial, labour and administrative procedure which provides that a case having been definitively decided cannot again be litigated for the same facts, between the same parties acting with respect to the same cause.

[15] He finds that the judgment RCOMA 00194/2016/HC/HCC was not between the same parties with the ones now litigating at the Court of Appeal because at that time, the parties were MININTCO Ltd and Unitex Rwanda Ltd, while in this case the parties are MININTCO Ltd and DRESOCECO Ltd.

[16] Concerning the case of Merk Shap and Dhome which is being relied on by DRESOCECO Ltd, Counsel Nsengumuremyi Cyridion argues that the case was about challenging a patent which was issued by the competent organ, to annul that patent is to remove rights from the beneficiary, this implies that a case which had res judicata force is absolute (autorité de la chose jugée absolue), not only to those who were parties (autorité de la chose jugée relative), but this is what is litigated between MININTCO Ltd and DRESOCECO Ltd in this case because MININTCO Ltd seeks to honour rights over intellectual property because of certificate issued by RDB IN 2012.

DETERMINATION OF THE COURT

[17] With regard to the force of the case which has been definitively decided, article 14 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that a case having been definitively decided cannot again be litigated for the same facts, between the same parties acting with respect to the same cause.

[18] As explained by legal scholar Serge GUINCHARD, he states that for the party to the court case to raise an objection of not admitting the claim basing on ground that there was case that was definitively decided, there must be the following three precondition: same facts, same cause, between the same parties, when one of the conditions is missing, the claim may be admitted, that judges have to examine those conditions before they decide on admitting the claim or not, if it is not done so, the judgment can be quashed because of not complying with the law[2]. The explanations of the legal scholar were based on article 1351 of the French civil code which is the same as the provisions of article 14 of the Law N° 22/2018 of 29/04/2018 mentioned above.

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2 "Pour que l'intéressé puisse opposer à la nouvelle demande la fin de non-recevoir tirée de l'autorité de la chose jugée, les trois éléments prévus par l'article 1351 du Code civil doivent être cumulativement réunis: si l'une d'entre eux est modifié, la demande pourra faire l'objet d'un jugement. Les juges saisis de la nouvelle demande sont dans l'obligation de constater l'existence ou l'absence de ces trois éléments pour admettre ou rejeter la fin de non-recevoir, à peine de casation pour manqué de base légale". Serge GUINCHARD, Droit et pratique de la procédure civile, Dalloz, cinquième édition, p.864.

[19] It is obvious that in the judgment RCOMA 00194/2016/HC/HCC rendered by the Commercial High Court on 12/10/2016, the case between MININTCO Ltd and Unitex Rwanda Ltd, that the claim was "To declare that the company named Unitex Rwanda Ltd ordered and imported from China to Rwanda, products of Wild olive black hair dye which imitate products with the trademark of KANTA Brand of MININTCO Ltd, thus Unitex Rwanda Ltd carried out unfair competition on the market which is prohibited and it also infringed on the rights of MININTCO Ltd, the owner of the trademark ''KANTA Brand". The Court held that MININTCO Ltd's appeal lacks merit, thus sustained the rulings of the judgment RCOM 1105/TC/NYGE rendered on 16/02/2016 by the Commercial Court of Nyarugenge which decided that MININTCO Ltd's claim has no merit and ordered it to pay damages to Unitex Rwanda Ltd.

[20] Whilst in this case, MININTCO Ltd sued DRESOCECO Ltd requesting that the court orders that the products with the trademark of Wild Olive which were imported by the defendant be banned on the market because those products have a colourable imitation with its products of KANTA Brand, thus, it is not sued for having ordered those products in China as it is the case in the judgment RCOMA 00194/2016/HC/HCC.

[21] The Court finds, pursuant to article 14 of the Law N° 22/2018 of 29/04/2018 mentioned above, DRESOCECO Ltd should not invoke that there is a judgment RCOMA 00194/2016/HC/HCC mentioned above rendered at the last instance by the Commercial High Court to justify that MININTCO Ltd's claim should be dismissed because the parties are not the same and the subject matter is not the same too,

therefore, the claim of MININTCO Ltd against DRESOCECO Ltd had to be admitted in previous courts. What is obvious, is that in both judgments, analysis of the Commercial High Court is different with regard to the issue of determining whether the trademark ‘’ Wild Olive’’ is confusingly similar with trademark “KANTA Brand”, hence, this Court should preside over this case and decide on that issue.

[22] Concerning the statements of counsel for DRESOCECO Ltd, that *res judicata* force does not apply to intellectual property related cases, the Court finds, the author Yves FAURE stated in paragraph 12 of this judgment, the author emphasized that principle, he explained that it is also useful in cases of intellectual property, he explains that what is complicated in those cases is to justify the cause of the case, while concerning the same parties and the same subject matter, he states that it’s not difficult to analyse it. He gives an example of the case when the subject matter is the same which can lead to inadmissibility of that claim due to that principle, he adds that when there was a final judgment which decided that someone’s trademark was imitated, it is not allowed for the parties to file a new claim with regard to whether trademark on the product was not imitated, that this scenario is also possible for the criminal and civil cases regarding imitation of the trademark[3].

[23] The Court finds, the fact that the scholar gave examples on the issue of the same subject matter, does not imply that it is not necessary to examine whether the parties are also the same and that the grounds of the claim are same.

[3] what was written by Yves FAURE is found on page 4.

[24] With regard to the judgment rendered by TGI Paris on 23 February 2007 between Merk Shap and Dhome cited by DRESOCECO Ltd supporting that the principle of *res judicata* force does not apply to intellectual property related cases, the Court finds, except citing those cases, it did not produce them to the Court to enable knowing the Courts which rendered them and decisions taken, and also, it did no analysis to justify arguments found in those cases, the Court finds no reason of considering them in rendering this judgment.

[25] In light of the above motivations, the Court finds that DRESOCECO Ltd's appeal which intends to prove that MININTCO Ltd's claim should not be admitted, is without merit.

b. Whether the Commercial High Court ruled that the products with the trademark ''Wild olive'' are confusingly similar with the products with the trademark "KANTA Brand" contrary to the provisions of the Law Nº 31/2009 of 26/10/2009 on the protection of intellectual property.

[26] Advocates for DRESOCECO Ltd state that before the Commercial High Court they clearly explained that its products with the trademark of Wild Olive do not imitate the trademark of "KANTA Brand", because though MININTCO Ltd argues that those trademarks are not different considering their signs, but it is not true, that though the Commercial High Court held that they are similar but there is no colourable imitation between them because they do not look alike and words written on them are not the similar as held by the Commercial Court of Nyarugenge in paragraph 6 of the judgment RCOM 00385/2017/TC/Nyge.

[27] They also argue that the statement of MININTCO Ltd that there is a weighing machine on the box of "Kanta Brand'' while on 'Wild olive'' there is a sign of a branch with two fruits, which also looks like a weighing machine is guessing, regarding the colours, they state that though some are almost the same but not all, and that there are colours which are often used by persons and factories, thus, products with trademark of 'Wild olive'' is not confusingly similar to that of "Kanta Brand''

[28] They find that the Commercial High Court should not have based on articles 1,3,4 and 5 of the Law Nº 31/2009 of 26/10/2009 on the protection of intellectual property because the two trademarks are not similar and that the statement of RDB employee is not reliable. They add that in the judgment RCOMA 00194/2016/CHC/HCC of MININTCO Ltd against Unitex Rwanda Ltd which imported products of Wild Olive from China, the same Court held that those trademarks are completely different, that the products of Wild olive are not similar to the trademark of KANTA Brand, that in the appealed judgment the judge did not motivate why he refused to be guided by the precedent of that judgment.

[29] They also argue, the fact that the advocates for MININTCO Ltd admit that the gist of the case is not the product because even other companies such as SULFO RWANDA which is also owned by the Indians, they manufacture hair dying products too, that the gist of the case at hand is the trademark, they do not have evidence that the gist of this case is not the products one manufactured in India and the other in China, rather its claim intends monopolise the market, which contravenes the provisions of the articles 2,4,6 and 7 of the Law Nº 31/2009 of 26/10/2009 on the protection of intellectual property.

[30] With regard to the judgment HCT-00-CC-CS-0829-2007 rendered by the High Court of Uganda on 16/05/2008, MININTCO Ltd states that the Court held that the trademark ''Smart Look'' imitates the trademark "KANTA brand'', advocates for DRESOCECO Ltd argue that the facts in that case are not similar with the case for the trademarks between "Wild olive'' and ''KANTA Brand''.

[31] The advocate for MININTCO Ltd states that articles of laws based on by the Commercial High Court in rendering the judgment are in relation with the cause of the case, that the Court explained the purpose of the protection of the intellectual property as provided in articles 1-5 of the Law Nº 31/2009 of 26/10/2009 on the protection of intellectual property, the Court also demonstrated why there is a need of avoiding unfair competition which is done by DRESOCECO Ltd (article 178) considering its unfair acts against MININTCO Ltd's business of hair dye (article 180).

[32] He states that DRESOCECO Ltd' statement that it did not manufacture "Wild olive" but it simply imported it, for that it should not be sued and that it did not register the trademark which is confusingly similar with "KANTA Brand" has no merit due to the following grounds:

- This claim of MININTCO Ltd is aimed at requesting the Court to protect a registered intellectual property (enforcement of IPRS), and DRESOCECO Ltd was found with products that possess trademark which similarly imitates another trademark named "KANTA Brand", and it does not prove any legal basis for not being sued.

- The fact that DRESOCECO Ltd state that it did not register the trademark which imitates that of "KANTA

Brand" it's a sufficient ground to support MININTCO Ltd's claim and that it's not reasonable how DRESOCECO Ltd cannot register the trademark "Wild olive" before competent organ, and with bad faith it uses it in its business.

[33] Counsel for MININTCO Ltd further states that though DRESOCECO Ltd denies that the trademark "Wild olive" imitates that of "KANTA Brand", article 136 of the Law Nº 31/2009 of 26/10/2009 mentioned above provides that a mark is confusing if: 1° it is identical with, or confusingly similar, to a trademark or trade name which is well known in the Republic of Rwanda(…), 2° it is identical with or similar to a trademark belonging to another owner and which is already registered, or the filing or priority date of which is earlier, for the same products or services, or for very similar products or services, or if it so nearly resembles such a trademark as to be likely to deceive or cause confusion. In the case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed.

[34] The Managing Director of MININTCO Ltd states that he produced elements of evidence that the black hair dye which has atrademark of "KANTA Brand" are manufactured in India in the factory which was founded by his great grandfather NANOOMAL ISSADRAS MOTIWALA in 1929, that factory possesses official document in that Country proving ownership of that trademark, that at the beginning the factory had the name of the founder NANOOMAL ISSADRAS MOTIWALA but it changed that name later to RRG as a name, this is an abbreviation of the shareholders names, these include his grandfather (RAMCHAND Nanoomal Jham), his father (GULAB

RAMCHAND Jham), his mother (Usha GULAB Jham), that this product of hair dye was first imported to East Africa where Rwanda is located in 1960, that he was authorised by his parents to pursue all legal means in these countries to protect the companies interest because it had been realized that the bussiness was about to collapse because of those who imitate its products, as a result he founded the company called MININTCO Ltd and registered the trademark "KANTA Brand" in Rwanda.

[35] With regard to the issue whether the trademark "Wild olive" is confusingly similar with the trademark of "KANTA Brand", the managing Director of MININTCO Ltd used a box of the "Wild olive" hair dye to compare it with that of "KANTA Brand", he demonstrated that the trademark of "Wild olive" is confusingly similar with that of the trademark of "KANTA Brand", to the extent that buyers may easily be confused and buy the hair dye of Wild olive thinking that its KANTA Brand because of the following reasons :

> Regarding the form and colours of small boxes which contain other 12 very small boxes :
>
> Wild olive is packaged in boxes with similar form and size of those of "KANTA Brand"
>
> On both boxes of "Wild olive" and those of "KANTA Brand" there are red, blue white and yellow colours with similar form;
>
> Words"KANTA Brand" with red colour are written in yellow background, this is the same to "Wild olive";
>
> Words BLACK HAIR DYE in blue colour are written in white background, this is how it is on the trademark of

"KANTA Brand" and also on the trademark of "Wild olive";

Words MADE IN INDIA on "KANTA Brand" and MADE IN CHINA on "Wild olive" are written in blue colour in yellow background;

The trademark "KANTA Brand" is in white background in middle of the top part;

To "KANTA Brand" as well as to "Wild olive" there are words "BUY ORIGINAL" with blue colour written in yellow colour in left side,

With regard to the form of colours of small boxes which contain 1 bottle :

On one side:

On "KANTA Brand" and on "Wild olive" there are words "BUY ORIGINAL" of blue colour written in yellow background at the top on the left side;

Words "KANTA Brand" in red colour with a yellow background, this is the same on the "Wild olive";

Words BLACK HAIR DYE of blue colour are written in white background to"KANTA Brand" as to "Wild olive";

The trademark "KANTA Brand" which is found in white background in the middle this is also similar to "Wild olive";

On "Wild olive" there is "NET: 4.5 g" at the same location where "Nt: 4.5 g" is written on the trademark of "KANTA Brand", and on both trademarks they are written in the blue colour;

> At the end of boxes at the below side of boxes for "KANTA Brand" and for "Wild olive" there are words of blue colour composed of two lines written in blue background;

On the other side of the box:

> On both boxes of "KANTA Brand" and "Wild olive" there are words "NEW PACK" written in yellow with a a blue background with a form of a star;
>
> The side which is opposite with the words "Gives your grey Hair a Youthful & Natural Black Shine" are written, it is in yellow colour.

Concerning the form of bottles: the bottles of "Wild olive" are hundred percent similar with those of "KANTA Brand" including signs (étiquettes) as seen on those boxes.

[36] The counsel for MININTCO Ltd states that the legal scholars in matters of intellectual property M. F. Maraiss, na T. Lachacinski, in their book "*Application des droits de propriété intellectuelle*", in OMPI, *Recueil de jurisprudence*, 2008, p. 65, they argue that the one who has rights on the trademark which is registered with a competent organ, is the only one who has the rights of trading in products with that trademark on the territory where that trademark is recognised (territorial principle)

[37] He adds that in the judgment HCT-00-CC-CS-0829-2007 rendered by the High Court of Uganda on 16/05/2008, the court held that the trademark "Smart Look" is confusingly similar with the trademark "KANTA Brand", because though names of those trademarks are different, the form is similar.

[38] With regard to the statements of DRESOCECO Ltd's counsel that MININTCO Ltd wants to monopolise the market because it wants to be the sole trader of black hair dye, they argue that unfair competition consists of imitating, parasitism, disparagement or disorganising the company, they state that they do not understand whether this claim concerns colorable imitation or unfair competition, Counsel Nsengumuremyi Cyridion states that MININTCO Ltd does not wish to monopolize the market, because this can be proved by the fact that in Rwanda, there are other traders dealing in black hair dye and they don't have any issue with them, those include, Sulfo Rwanda Industries that uses the trademarks "BEAUTE" and "BLACK PEARL" which were shown to this court, because there is fair competition between those companies, but DRESOCECO Ltd is carrying out unfair competition because the trademarks of its products are confusingly similar with those of MININTCO Ltd on the same products and at the same market, that it wants to be a parasite on MININTCO Ltd and again the market using the latter's colours and other signs of the "KANTA Brand" trademark.

DETERMINATION OF THE COURT

[39] This case originates from the products of black hair dye under the trademark of "Wild olive", that DRESOCECO Ltd imported from China, which were seized in the customs because MININTCO Ltd claimed that the trademark of Wild olive is confusingly similar to the trademark of "KANTA Brand" of the same product which is imported from India which has exclusive rights on the ground that it registered that trademark in RDB, thus DRESOCECO Ltd is practicing unfair competition, MININTCO Ltd requested the Court to ban the importation of

those products, it also prays for the destruction of those which were confiscated.

[40] Article 178 of the Law Nº 31/2009 of 26/10/2009 on the protection of intellectual property provides that in addition to the protection of the intellectual property provided by this Law, any commercial, industrial or handcraft-related activity shall be protected against acts of unfair competition.

[41] With regard to acts of unfair competition, article 180 that Law provides that any act or practice, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion by any means with respect to a competitor's or another's enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.

Confusion may, in particular, be caused with respect to:

1° a trademark, whether registered or not;

2° a trade name;

3° a business identifier other than a trademark or trade name;

4° the appearance of a product;

5° the presentation of products or services;

6° a celebrity or a well-known fictional character.

[42] And also, article 179 of the same law provides that any person harmed, or likely to be harmed, by an act of unfair competition, may refer the matter to the competent tribunal,

where through an act contrary to honest industrial and commercial use, a manufacturer, trader, producer or craftsman damages his credibility, takes away his customers or harms his capacity for competition. The competent tribunal shall order the cessation of this act and, where necessary, shall fix the level of damages.

[43] These articles imply that in addition to the protection of the intellectual property provided by this Law, any commercial, industrial or handcraft-related activity shall be protected against acts of unfair competition, that any person harmed, or likely to be harmed, by an act of unfair competition, may refer the matter to the competent tribunal for the cessation of the act.

[44] In assessing the colorable imitation between two trademarks, a legal scholar Deborah E.Bouchoux states that some courts in United States of America set precedent on the grounds of determining whether the two trademarks are confusingly similar, that in general only one factor cannot be based on to determine the colorable imitation, rather the Courts examine all circumstances to assess the risk of confusion. Some of the factors are as follow:[4]

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[4] *"Divers tribunaux, dans différentes circonscriptions judiciaires ont établi des tests pour déterminer la probabilité de confusion entre deux marques. En général, aucun facteur n'est à lui seul déterminant; les tribunaux examinant toutes les circonstances en tentant de déterminer l'existence éventuelle d'une violation. Généralement, pour déterminer s'il y a contrefaçon, ils prennent en considération les facteurs suivants: - la similitude des marques quant à l'apparence, au son, à la connotation et à l'impression commerciale; - la similitude des biens ou services proposés au titre des marques; - la similitude des réseaux commerciaux par lesquels transitent les biens ou services proposés; - les conditions de réalisations de ventes, à savoir: les achats sont-ils faits sur une impulsion ou après un examen approfondi par les acheteurs*

- the similarity of the marks in terms of appearance, sound and connotation;

- the similarity of the products and services offered in the title of the trademarks;

- the similarity of commercial networks;

- conditions of doing sales: some of the buyers do not take care, some of the buyers purchase due to knowledge they have on certain product;

- the strength of the previous trademark;

- existence of actual prior confusion;

- the number and nature of similar trademarks on similar products;

- the length of time during which exploitation of the trademarks happened without confusion.

[45] In the testimony of Mbaraga Blaise on 19/07/2017, an expert in RDB, he demonstrated what is examined before a trademark is registered, those conditions are: to examine who registered the trademark for the first time and is the one with rights to that trademark (first to file principle), distinctiveness principle, not imitativeness principle, not confusing principle and nice classification of good and service.

éclairés? - la force de la marque antérieure; - l'existence de la confusion antérieure effective; - le nombre et la nature des marques similaires sur des biens similaires; - la durée pendant laquelle l'exploitation des marques a été comcomittante sans confusion", DEBORAH E.BOUCHOUX, La propriété intellectuelle, le droit des marques, le droit d'auteur, le droit des brevets d'invention et des secrets commerciaux, Nouveaux Horizons, p. 97.

[46] That expert also assessed the trademark of "Wild Olive'' and that of "KANTA Brand and observed that "Wild Olive" is not registered in terms of words or image in RDB, but "KANTA Brand" was registered on 15/02/2012 on RW-M100004413 revised to RW/T/2012/413. Concerning words which compose those trademarks, he states that KANTA Brand and "Wild Olive'' are different and it's possible that all those trademarks can be used at the market, that the words of "Wild'' was accepted by the office of Registrar General but "Olive'' was rejected because it's a common name.

[47] Concerning words "black hair dye'', he explained that those words are common and can be used by any one and cannot be subject to registration as a mark, whereas the image of the trademarks, he states that they are similar, colours, and their forms that dominant test of similarity is very high because they all possess similar lines 100%, and similar colours 100%, that when considering form without words, it would be hard for any buyer to distinguish those trademarks, in addition those trademarks are in the same category which is "bleaching preparation and other substances for laundry use, cleaning, polishing, scouring and abrasive preparation, soaps, perfumery, essential oil, cosmetics, hair lotions, dentifrices" especially that it's "hair dye''.

[48] The Commercial High Court basing on that analysis of the expert of RDB, it held that the trademark "Wild Olive'' which is on the products imported by DRESOCECO Ltd imitates the trademark of "KANTA Brand" registered in RDB by MININTCO Ltd, because all products have the similar appearance and the trademarks have dominant test of similarity and that the lines which compose the trademark of "KANTA

Brand" has become so common or well-known fictional mark, thus, except MININTCO Ltd, no one else has rights over it, and that colours of yellow, blue, red which are on both trademarks are very similar (appearance and positioning) whereas they should be distinct.

[49] The Court finds, the fact that the Commercial High Court did not err in relying on that experts testimony, because it is an element of evidence provided by article 76 of the Law N°15/2004 of 12/06/2004 relating to evidence and its production that provides that evidence by experts is that which is intended to give to the court, explanations based on expertise as well as conclusion which is beyond the ordinary knowledge of a judge in his or her duties, depending on the underlying special expertise.

[50] The Court finds, the outcome of the expertise reflects the truth, in addition to what has been demonstrated by the Managing Director of MININTCO Ltd during the hearing, because the Court had itself seen boxes containing ointment which turn hair into black with trademark of "Wild Olive" sold by DRESOCECO Ltd, those boxes are very similar to those with trademark "KANTA Brand" sold by MININTCO Ltd, whether it is on yellow, blue and red colours, words indicated on them and how they are written , ligns drawn, the buyer who is not vigilant would be confused on products with those both marks.

[51] The Court finds, the fact that DRESOCECO Ltd imports products with mark of "Wild Olive" from China, the mark which obviously imitates the trademark of "KANTA Brand" registered in RDB by MININTCO Ltd and carries out business in Rwanda whereby MININTCO Ltd is authorized for trading on the trademark of "KANTA Brand", this constitutes an act of unfair competition in business of MININTCO Ltd, because it makes

confusion on well-known mark of "KANTA Brand" to the extent that the buyers cannot differentiate both products, this is to its business.

[52] The Court finds, DRESOCECO Ltd's statement that it did not imitate the mark of "KANTA Brand" has no merit, because it was sued that it spreads products it imports from abroad with the mark ''Wild Olive'' which confuses MININTCO Ltd's products with mark of ''KANTA Brand'', it was not sued on the ground it imitated the trademark, and also its statement that it imports products from China and not manufacturing them, should not be considered because importing products with the trademark of Wild Olive'' which imitates "KANTA Brand", this is what provided by the law that it constitutes unfair competition.

[53] The Court also finds that DRESOCECO Ltd stated that it imported the products which bear the trademark of "Wild Olive'' after it had seen the judgment RCOMA 00194/2016/HC/HCC rendered by the Commercial High Court, whereby the Court held that the trademark "Wild Olive" is confusingly similar to the trademark of "KANTA Brand" and relies on it to requesting that justice should be rendered in its favour as it was done for Unitex Rwanda Ltd, this argument is misleading , because as indicated on the order contract which is the case file, DRESOCECO Ltd bought those products on 29/09/2016, while the judgment was rendered on 12/10/2016, obviously, the products were bought before that judgment, and as demonstrated above, "Wild Olive" is a colorable imitation of "KANTA Brand" as previously held in the appealed judgment.

[54] The Court finds, in addition to exclusive rights of MININTCO Ltd on the trademark of "KANTA Brand" endowed to it by the Law Nº 31/2009 of 26/10/2009 cited above, it also has

to be protected against unfair competition, therefore DRESOCECO Ltd should be banned from importing products with the trademark of "Wild Olive" and selling them in Rwanda as it was held by the Commercial High Court.

[55] Considering the judgments rendered in other countries, the same decision was held on 11/04/2018, by the Commercial Court of Versaiile, second chamber in France whereby a company named 3DVIA which later came to be known as Dassault Systemes sued La SAS Wanadev, that Court held that acts of La SAS Wanadev constitute unfair competition against Dassault Systemes against its software "Home By Me", because it imitated how it works, form and the components so that it creates confusion and La SAS Wanadev made its own "Wanaplan" and sold it to the company named Adéo, the Court held that those behaviors consitute unfair competition, and ordered La SAS Wanadev to pay Dassault Systemes damages worth 50.000 Euros, and banned the use of that software because it creates confusion, that if it fails to comply with it within 30 days from the pronouncement of the judgment, it shall be sanctioned to payment 1.000 euros every day and that the judgment shall be published on Dessault Systemes website.

[56] Pursuant to articles 178-180 of the Law Nº 31/2009 of 26/10/2009 mentioned above and motivations given, the Court finds this ground of the appeal of MININTCO Ltd with no merit, thus, it's not necessary to examine whether it should be awarded damages for the loss which it states to have incurred.

c. Whether the products of DRESOCECO Ltd which were seized in the customs should be destroyed.

[57] The counsel for MININTCO Ltd argue that this Court should hold that the appeal of DRESOCECO Ltd lacks merit, that "Wild olive" is a colorable imitation of "KANTA Brand", and thus orders that the products with a trademark of "Wild olive" which confuses the buyers in distinguishing them from the products of black hair dye under the trademark of "KANTA Brand "registered by MININTCO Ltd, they also pray to the Court to order that those products are not allowed to be sold in Rwanda and to order for the destruction of those seized in the custom.

[58] Counsels for DRESOCECO Ltd state that it is being unfairly treated because it imported the hair dye with a trademark of "Wild Olive" without knowing that it had issues, and that though the Court found that product to be imitating and confusing, except that it's no true, DRESOCECO Ltd should be given its goods confiscated in the custom because it had no bad faith towards MININTCO Ltd.

DETERMINATION OF THE COURT

[59] The Court finds that the request of MININTCO Ltd to destroy the products of DRESOCECO Ltd which were seized in the customs, it had also requested it before the Commercial High Court basing on article 258 of the Law Nº 31/2009 of 26/10/2009 cited above, but that article refers to the application and ordering corrective measures for industrial property, and as motivated above, what MININTCO Ltd claims against DRESOCECO Ltd it's not an issue of having a factory which manufactures products

that imitate its trademark, rather, it claims that DRESOCECO Ltd has acts of unfair competition, thus, there is no basis for requesting the destruction of its products because article 179 of the Law Nº 31/2009 of 26/10/2009 mentioned above allows it only to request to stop the acts of unfair competition and to be awarded damages when requested so, but in this case MININTCO Ltd did not claim for damages.

[60] The Court finds that because DRESOCECO Ltd sells its products with a trademark of "Wild Olive'' on the Rwandan market, which constitute an act of unfair competition, because they are confusingly similar to that of MININTCO Ltd's products which bears the trademark of "KANTA Brand", it should stop those bussiness activities as it was decided in the appealed judgment by the Commercial High Court.

d. With regard to procedural and counsel fees.

[61] The counsel for DRESOCECO Ltd states that pursuant to article of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, MININTCO Ltd should give counsel fees equal to 5.000.000Frw and 6.000.000Frw paid to the expert who did a report on the loss it incurred.

[62] The counsel for MININTCO Ltd states that procedural fees claimed by DRESOCECO Ltd are with no merit**.**

DETERMINATION OF THE COURT

[63] Article 111 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that the claim for representation fees is an incidental

claim to the principal claim aiming to repay expenses incurred during judicial proceeding.

[64] The Court finds, DRESOCECO Ltd should not be awarded counsel and procedural fees because its appeal lacks merit.

III. THE DECISION OF THE COURT

[65] Finds the appeal filed by DRESOCECO Ltd without merit;

[66] Sustains the rulings of the judgment RCOMA 00236/2017/CHC/HCC rendered by the Commercial High Court rendered on 16/11/2017;

[67] Decides that the court fees paid by DRESOCECO covers the expenses of the court.

PHOENIX OF RWANDA INSURANCE COMPANY Ltd v. TRANSCORP

[Rwanda COURT OF APPEAL – RCOMAA 00096/2018/CA (Mukanyundo, P.J., Ngagi and Kanyange, J.) July 19, 2019]

Laws governing contracts – Insurance contract – When an insurance company fails to comply with regulations of insurance is sanctioned with administrative penalties, however, it is not a ground of terminating a legally concluded contract.

Laws governing contracts – Insurance contract – Proof of payment –"Vignettes" is not proof of payment, rather, it's proof of insurance of the vehicle, the one who issued it, shall be liable when an accident occurs regardless of whether the premium was paid or not.

Facts: PHOENIX OF RWANDA INSURANCE COMPANY Ltd offered insurance policy on credit to the company called TRANSCORP for its cars on various occasions, both parties concluded a contract on the loan of insurance policy, they also agreed on the period for which the loan should have been paid. The insured breached the contract because it failed to pay all premiums, and the insurer filed a suit to the Commercial Court of Nyarugenge claiming to be paid, that Court held that the claim has no merit.

PHOENIX was not contented with the rulings and appealed to the Commercial High Court stating that TRANSCORP affirmed to the court that when the insured does not fully pay the premiums, that the contract is instantly terminated, while it is not true because the insurer has the right of choice, it added that insurance

may be given on loan. The Commercial High Court decided that the appeal lacks merit, and It sustained the rulings of the appealed judgment.

PHOENIX appealed again before the Court of Appeal stating that the Commercial High Court confused the contract of insurance with the laws governing the loan because there is no law prohibiting to offer insurance on loan, it also states that both parties concluded a loan contract of the vehicles insurance and *vignettes* were issued, that they agreed that the premiums will be paid progressively, that all these prove that TRANSCORP has debt, that it is also proven by a document titled "statement of unpaid premium" which was signed by both parties as a proof a loan based on insurance contract.

In its defense, TRANSCORP states that the Commercial High Court confused insurance contract with laws governing loans, it argues that this ground of appeal should not be considered because the regulations of the National Bank of Rwanda prohibit the insurance companies to offer insurance by credit, hence, it states that if PHOENIX would be sanctioned if it breached those regulations.

TRANSCORP also states that the National Bank of Rwanda is in charge of insurance companies but there is an exception to public institutions because they can be offered insurance by credit for the period of six months only.

With regard to the elements of evidence to prove the amount of the debt claimed, PHOENIX explains that TRANSCORP used to pay part of the premiums when its cars were covered, that *vignettes* were also issued though there was no payment, that this is proven by bank statement and a document titled Statement of Unpaid Premiums/ After Renewal in 2016, that this proves that

TRANSCORP paid progressively, thus PHOENIX prays to the Court for ordering the payment of debt and its interests calculated on 21% from the moment of the last warning until the debt paid.

For TRANSCORP, it keeps denying the debt which is being claimed stating that they did not conclude the loan agreement because it would not have been given vignettes without first having paid, that this is the proof that it paid, it adds that it is still dragged in the unnecessary lawsuit, hence it claims damages for that.

Held: 1. When an insurance company fails to comply with regulations of insurance is sanctioned with administrative penalties, however, it is not a ground of terminating a legally concluded contract.

2. "Vignettes" is not proof of payment, rather, it's proof of insurance of the vehicle, the one who issued it, shall be liable when an accident occurs regardless of whether the premium was paid or not.

The appeal has no merit.
Court fees to TRANSCORP.

Statutes and statutory instruments:
Law Nº 45/2011 of 25/11/2011 governing contracts, article 64.
Regulation N°05/2009 of 29/07/2009 on licensing requirements and other requirements for carrying out insurance business, article 23.

No case referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] This case started before the Commercial Court of Nyarugenge whereby PHOENIX OF RWANDA INSURANCE COMPANY Ltd sued TRANSCORP for the debt worth 83.739.236Frw originating from the insurance of its cars which PHOENIX gave it on different occasions from 2014 up to 2017, it states that premium was not fully paid, that the arrears worth 83.739.236Frw.

[2] On 18/05/2018, the Commercial Court of Nyarugenge rendered the judgment RCOM 01140/2017/TC/NYGE holding that PHOENIX OF RWANDA INSURANCE COMPANY Ltd's claim has no merit, the Court ordered it to pay TRANSCORP, 100.000Frw for procedural fees and 500.000Frw for counsel fees.

[3] PHOENIX OF RWANDA INSURANCE COMPANY Ltd was not satisfied with the rulings of the judgment and appealed to the Commercial High Court stating that TRANSCORP affirmed to the court that when the insured does not pay the premiums, that the contract is instantly terminated while it is not true because the insurer has right of choosing what he can opt for, whether warning the insured, claiming the arrears or insurance given or requesting for the termination of the contract, that when there is no reason for terminating the contract, does not prevent the insurer to claim payment after one month of notification as provided by article 14 of the law N° 20/75of20/06/1975, therefore, the insurance may be given on the loan.

[4] The Commercial High Court rendered the judgment RCOMA 00450/2018/HCC on 20/09/2018, holding that PHOENIX OF RWANDA INSURANCE COMPANY'appeal lacks merit, It sustains the rulings of the appealed judgment.

[5] That court found that PHOENIX OF RWANDA INSURANCE COMPANY Ltd as professional in insurance knowing that in its works it has to comply with regulations of the National Bank of Rwanda, the fact that it erred and offering the insurance on the debt, it should not have filed a claim in the court which has obligations to help in compliance with the laws, praying to the court for ordering to honour what is unlawful.

[6] PHOENIX OF RWANDA INSURANCE COMPANY Ltd appealed to the Court of Appeal stating that the Commercial High Court confused insurance contract with laws governing loans because there is no law prohibiting to offer debt, it adds that the Court did not comply with the law governing the contracts especially in its article 4 which provides the requirements for the contract to be valid. In its appeal, PHOENIX OF RWANDA INSURANCE COMPANY Ltd also states instead of examining proofs of TRANSCORP's payment, the Commercial High Court examined the regulations of the National Bank of Rwanda disregarding the hierarchy of the laws and that, those regulations do apply to the clients, but the National Bank of Rwanda vis a vis insurance companies.

[7] The case was heard in public on 14/05/2019 and 26/06/2019, PHOENIX OF RWANDA INSURANCE COMPANY Ltd being represented by Counsel Buhuru Pierre Célestin and Counsel Nsengiyumva Colette, while TRANSCORP was represented by Counsel Kayitare Serge together with Counsel Twiringiyemungu Joseph, counsel for

TRANSCORP state that they withdrawal the objection relating to lack of jurisdiction of the Court of Appeal.

II. ANALYSIS OF THE LEGAL ISSUES.

The fact that PHOENIX OF RWANDA INSURANCE COMPANY Ltd offered TRANSCORP insurance on the debt implies that the latter should not pay.

[8] Counsel for PHOENIX OF RWANDA INSURANCE COMPANY Ltd state that the Commercial High Court confused the contract of insurance with that of the loan because there is no law prohibiting offering a debt. They explain that the contract concluded between PHOENIX OF RWANDA INSURANCE COMPANY LTD and TRANSCORP was an insurance contract because the former covered the latter's cars on the debt basing their list and it offered vignettes valid for whole one year, that they agreed that the payment will be made progressively because of good working relationship they had before, they rely on that to prove that TRANSCORP has a debt to PHOENIX OF RWANDA INSURANCE COMPANY Ltd. They state that TRANSCORP denies insurance debt because it asks to prove it under the pretext that it cannot be given vignettes without payment but it does not produce proofs of payment.

[9] They keep stating that regarding insurance contract, the premium is paid within 30 days, if not, the contract may be suspended, this implies that when the insurer does not pay within that period of 30 days, it has debt. They state that concerning the case at hand, statement of unpaid premium signed by both parties which are in the case file is proof of the debt that TRANSCORP has to PHOENIX OF RWANDA INSURANCE COMPANY Ltd

which is based on the debt of insurance agreement, that on the first instance, the judge was mistaken by stating that PHOENIX OF RWANDA INSURANCE COMPANY Ltd does not produce the contract of the loan.

[10] With regard to the regulations of the National Bank of Rwanda, prohibiting the provision of insurance on the debt, the regulations considered by the Commercial Court, counsel for PHOENIX OF RWANDA INSURANCE COMPANY Ltd states that they refer to how the National Bank of Rwanda cooperates with insurance companies and not with the agreement concluded between insurance companies and their clients. They further state that those regulations were signed by the Governor of the National Bank of Rwanda and they can apply to others when are signed by the President of the Republic or Minister, that what the National Bank of Rwanda does when an insurance company breaks them, is to simply apply sanctions.

[11] Counsel for TRANSCORP argues that concerning the Commercial High Court' mixing up of the insurance and laws governing loans, this ground of appeal lacks merit because the regulations N° 05/2009 of the National Bank of Rwanda prohibits insurance companies (including the appellant) to provide insurance on the debt, if PHOENIX OF RWANDA INSURANCE COMPANY Ltd would have breached those regulations, should face sanctions and when it agrees that it did not comply with them, it should not pray to the Court to validate what it did and be sanctioned by the National Bank of Rwanda later, the court should, first of all, examine whether the contract was lawfully concluded.

[12] They also state that the National Bank of Rwanda is the regulator, that's why it puts in place regulations which are

published in the official gazette, this implies that the companies' clients are also concerned but there is an exception to public institutions because they can be given insurance on debt but for six months only. They add that long term debt cannot replace the provisions of the law, that this issue should not be debatable while the Commercial High Court affirmed that though proofs of the debt would be produced, it should not be considered because the contract was unlawfully concluded because the regulations mentioned above also apply to the clients and not to the National Bank of Rwanda.

[13] They explain that from 2014 PHOENIX OF RWANDA INSURANCE COMPANY Ltd had working relation with, thereafter, TRANSCORP's truck had an accident in Uganda, and PHOENIX OF RWANDA INSURANCE COMPANY Ltd refused to pay, due to that reason, TRANSCORP sought another insurance, from that moment PHOENIX OF RWANDA INSURANCE COMPANY Lt started to claim payment of arrears from 2014, they state that the truth was that there were no arrears because if it was the case, the insurer would not have continued to grant insurance to the extent of millions being claimed.

THE DETERMINATION OF THE COURT

[14] Article 64 of the Law Nº 45/2011 of 25/11/2011governing the contracts provide that contracts made in accordance with the law shall be binding between parties.

[15] Article 23, paragraph 5 of the regulation N°05/2009 of 29/07/2009 on licensing requirements and other requirements for

carrying out insurance business provides that debt of premium is not authorized.

[16] Article 6 of regulation of the National Bank of Rwanda N° 03/2017 of 22/02/2017 on administrative and pecuniary sanctions applicable to insurers stipulates that without prejudice to the provisions of Articles 3 and 5 of this regulation, where a private insurer or a public insurer where applicable fails to comply with the provisions of the Law governing insurance business or its implementing regulations instructions, directives, and decisions of the Central Bank, relevant sanctions specified in the appendix may apply. Whereas part 9 of the appendix states that issuing an insurance policy on credit to an individual policyholder is sanctioned to payment of 0.5% of premium receivables of every quarter.

[17] The documents of the case file demonstrate that on 02/12/2014, PHOENIX OF RWANDA INSURANCE COMPANY Ltd concluded with TRANSCORP an insurance agreement for the latter's 61vehicles, both parties agree that they kept amending that agreement every year up to 2017. The contract also stipulates that TRANSCORP should have paid premiums within 30 days from the moment of commencement of the contract or from when it is amended, that when that period is exceeded without payment, PHOENIX OF RWANDA INSURANCE COMPANY Ltd had the option of terminating the contract and TRANSCORP be ordered to pay a premium equivalent to that period, that when the issue arises before terminating the contract, the insurer shall be paid the full premium[1].

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1 It is hereby expressly agreed cover under this Policy is granted subject to full payment of the premium within 30 days from inception/renewal. It is further

[18] The court finds, regulations of the National Bank of Rwanda N° 05/2009 of 29/07/2009 stipulates that that debt of premium is not authorized, this implies that PHOENIX OF RWANDA INSURANCE COMPANY Ltd should not have issued an insurance policy on credit. The Court also finds that article 6 of regulation of the National Bank of Rwanda N° 03/2017 of 22/02/2017 on administrative and pecuniary sanctions applicable to insurers states that where a private insurer or a public insurer where applicable fails to comply with the provisions of the Law governing insurance business or its implementing regulations instructions, directives and decisions of the Central Bank, relevant sanctions specified in the appendix may apply. Whereas part 9 of the appendix states that issuing an insurance policy on credit to an individual policyholder is sanctioned to payment of 0.5% of premium receivables of every quarter.

[19] The Court finds, analysis of articles of regulations mentioned above, it is evident that those regulations were put in place for insurance companies and does not concern the contract concluded between those companies and their clients, rather, when an insurance company fails to comply with those regulations such as issuing an insurance policy on credit does not affect contract lawfully concluded in accordance with article 4 of the law N°45/2011 of 25/11/2011governing contracts[2], rather,

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declared and agreed that this Policy will be voidable at the insurer discretion if the premium is not paid within 30 days and the insured shall be compelled to pay a premium for the period he has been on the cover provided that if a claim has arisen before termination is enforced, the full premium shall be due to insurer.

2 The general requirements for the formation of a contract are the following: 1° mutual assent; 2° capacity to contract; 3° object matter of the contract; 4° licit cause

administrative sanctions shall apply and the contract remains valid, if not, it would be illicit enrichment for the insured who was covered on debt.

[20] As far as this case is concerned, the Court finds, the fact that PHOENIX OF RWANDA INSURANCE COMPANY Ltd issued an insurance policy on credit, is a fault which is sanctioned by administrative sanctions that aiming to avoid that insurance company becoming bankrupt but it does not invalidate the contract between parties which was concluded pursuant to article 4 of the law Nº45/2011 of 25/11/2011governing contracts mentioned above, so that TRANSCORP may invoke it in refusing to honour the provisions of the contract, thus, there is a need of examining whether there are elements of evidence to prove the debt of insurance which TRANSCORP might have to PHOENIX OF RWANDA INSURANCE COMPANY Ltd.

[21] The Court also finds TRANSCORP's statement that PHOENIX OF RWANDA INSURANCE COMPANY Ltd should have terminated the contract within 30 days after the failure of payment because in the contract it was provided that at PHOENIX OF RWANDA INSURANCE COMPANY Ltd's discretion the contract may be terminated and also article 14 Decree law Nº 20/75 of 20/06/1975 relating to insurance, in general, does not strictly obligate the insurer to terminate the contract.[3].

[3] when a month elapses the insurer may opt for claiming the payment or requesting for the termination of the contract.

2. Whether there are elements of evidence to prove that the debt of TRANSCORP to PHOENIX OF RWANDA INSURANCE COMPANY Ltd

[22] Council for PHOENIX OF RWANDA INSURANCE COMPANY Ltd states that some of the premiums used to remain every moment of securing TRANSCORP's cars because of good practice among them, arrears are amounting to 83.739.236Frw. They state, the fact that TRANSCORP was given vignettes for its vehicles without paying premiums was due to good practice they used to have and that there is a bank statement which demonstrates that TRANSCORP paid progressively and a document titled Statement of Unpaid Premiums/ After Renewal in 2016.

Council for TRANSCORP states that there is no loan agreement concluded with PHOENIX OF RWANDA INSURANCE COMPANY Ltd and that it has even no debt for the former because it would not have been given vignettes without payment, the fact that it found those vignettes implies that it paid. Concerning the issue of proofs of payment, they argue that because of vignettes there is a presumption that the payment was done. Whereas regarding a document titled Statement of Unpaid Premiums/ After Renewal in 2016 of 53,913,427 Frw which was approved by TRANSCORP, that signatories are those indicated in company statute, wherever TRANSCORP may open a branch.

[23] Regarding a document which indicates arrears of premium produced by PHOENIX OF RWANDA INSURANCE COMPANY Ltd as proof, that it was signed by TRANSCORP, council for the latter denies it.

DETERMINATION OF THE COURT

[24] Article 3 of the Law Nº 15/2004 of 12/06/2004 relating to evidence and its production provides that each part has to prove the truthfulness of his/her argument. Article 12, paragraph one of Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that the claimant must prove a claim, failing to do so, the respondent wins the case. Paragraph 2 provides that likewise, a party who alleges that he/she has been discharged from an obligation established by evidence must justify the cause as a result of which the obligation has extinguished. Failure to do so, the other party wins the case.

[25] Among elements of evidence produced by PHOENIX OF RWANDA INSURANCE COMPANY Ltd with intention of proving that it issued an insurance policy to TRANSCORP on credit though it did not pay some of the premium policy, there is also an insurance agreement dated 08/04/2015 to cover its 61 vehicles for 96.469.772Frw, that TRANSCORP admits some of the vignettes to have been given by PHOENIX OF RWANDA INSURANCE COMPANY Ltd and a document titled Statement of Unpaid Premiums/ After Renewal in 2016 signed respectively by both parties on 28/11/2016 for PHOENIX OF RWANDA INSURANCE COMPANY Ltd and 02/12/2016 for TRANSCORP, whereby both parties agreed that the debt of insurance that TRANSCORP owes PHOENIX OF RWANDA INSURANCE COMPANY Ltd worth 53,915,427Frw and bank statement of PHOENIX OF RWANDA INSURANCE COMPANY Ltd which proves that TRANSCORP was paying progressively.

[26] For TRANSCORP, it does not produce any proof that after signing that document titled Statement of Unpaid Premiums/ After Renewal in 2016 mentioned above, that it paid the debt it admits.

[27] The Court finds, TRANSCORP's statement that there is no loan agreement concluded between it and PHOENIX OF RWANDA INSURANCE COMPANY Ltd, that rather, the insurance agreement was done on the debt, this cannot be helpful to it because it admits itself to have received vignettes from PHOENIX OF RWANDA INSURANCE COMPANY Ltd and there are some elements of evidence which prove that there is a debt which it failed to pay, this is sufficient to hold it liable for the remained payment.

[28] The Court also finds TRANSCORP's statement that the fact of receiving vignettes should be presumed that it paid, this should not be considered too, because a document titled statement of unpaid premiums After Renewal in 2016 is proof that vignettes were issued before the full premium is paid because of good practice of both parties, thus those vignettes are not proofs of payment, but those are proofs issued to those who are given vehicle insurance, the one who has issued them shall be responsible when an accident occurs regardless whether he/she was paid or not.

[29] The Court also finds, TRANSCORP's defense stating that a document named Statement of Unpaid Premiums/ After Renewal in 2016 was signed by a person who was not representing TRANSCORP because clause 12 of its statute stipulates those who are signatories who represent it, this should not be considered since TRANSCORP does not deny insurance agreement with PHOENIX OF RWANDA INSURANCE

COMPANY Ltd which bears the same signature with that of the document titled Statement of Unpaid Premiums/ After Renewal in 2016, should not invoke that the one who signed that document was not competent to do so because it would be a contradiction.

[30] In light of the laws as well as motivation mentioned above, the Court finds, there are elements of evidence to prove that TRANSCORP owes to PHOENIX OF RWANDA INSURANCE COMPANY Ltd a debt based on insurance of their cars, thus, it has to pay.

3. To identify the amount of the debt which TRANSCORP owes to PHOENIX OF RWANDA INSURANCE COMPANY LTD and damages requested.

[31] In his submissions, Counsel Buhuru Pierre Celestin explains that the debt claimed by PHOENIX OF RWANDA INSURANCE COMPANY Ltd, he prays to the Court to order TRANSCORP for payment of 83.739.236Frw, and related interests calculated on 21% from 03/03/2017, the day for which PHOENIX OF RWANDA INSURANCE COMPANY Ltd warned TRANSCORP for the last time until payment, all totaling to 17.585.239 Frw x 2yeaars = 35.170.497 Frw, procedural fees and counsel fees amounting to 5.000.000Frw.

[32] Council for TRANSCORP does not respond on the amount claimed, they state that it has no debt for PHOENIX OF RWANDA INSURANCE COMPANY Ltd, because it would not have been given vignettes without payment.

DETERMINATION OF THE COURT

[33] The court finds, considering Statement of Unpaid Premiums/ After Renewal in 2016" of 53.913.427Frw which was not paid in 2016, a document prepared by PHOENIX OF RWANDA INSURANCE COMPANY Ltd and signed by TRANSCORP on 02/12/2016, also in that document, both parties agreed on how that amount will be paid, TRANSCORP has to pay since it admits that document, the Court finds, that this document (Statement of Unpaid Premiums/ After Renewal in 2016) has the value of private deed because PHOENIX OF RWANDA INSURANCE COMPANY Ltd proved the remained amount of premium and TRANSCORP had agreed and signed[4].

[34] With regard to the amount of 29.823.809,03Frw indicated in a document titled "statement of unpaid premiums" prepared by Revenue Accountant of PHOENIX OF RWANDA INSURANCE COMPANY Ltd on 07/03/2016, the Court finds that It should not consider that document in ordering TRANSCORP to pay that amount because it was prepared by PHOENIX OF RWANDA INSURANCE COMPANY Ltd itself, the fact that the document was prepared by one party, it should not serve as evidence since there are no other corroborating elements of evidence to prove if that amount was arrears of premium which were not paid by TRANSCORP in 2014-2015, the latter was not even notified so that it may react as it was done for the premium of 2016 as demonstrated above, therefore,

[4] Article 14 of the Law N° 15/2004 of 12/06/2004 relating to evidence and its production provides that A private deed is a text, which bears a signature or a thumbprint of one or several of the parties. Only the parties to the deed are bound by the agreements within.

TRANSCORP has to pay PHOENIX OF RWANDA INSURANCE COMPANY Ltd premium equivalent to 53.913.427Frw because that amount was solely proven.

[35] Concerning the interests calculated on 21% of the money which TRANSCORP owes to PHOENIX OF RWANDA INSURANCE COMPANY Ltd, their advocates state that those interests be added on the amount to be paid, the Court finds, in light of article 144 of the Law N° 45/2011 of 25/11/2011governing contracts[5], it is right that TRANSCORP pays PHOENIX OF RWANDA INSURANCE COMPANY Ltd interests from the amount worth 53.913.427Frw since TRANSCORP failed to pay in due time and in conditions it agreed if not, it would make a loss to the insurer because PHOENIX INSURANCE COMPANY Ltd is an insurance company and it would have used that money in its insurance business or it would have got interests from saving of that money in a bank.

[36] The Court finds, in calculating those interests, the rate of 21% per year should not be considered, the rate claimed by PHOENIX INSURANCE COMPANY Ltd, because it is excessive, it also exceeds the rate of some of the banks in the country while it does not carry out the business of money such as banks, rather, deposit rate of 8.478% which is considered by the National Bank of Rwanda should be taken into account until the pronouncement of the case, that rate was also the one considered in the judgment RCOMAA 0032/15/CS rendered by the Supreme

[5] If the breach of the contract consists of a failure to pay a sum of money or to render performance with fixed or ascertainable monetary value, interests are calculated from the time for performance was due to less all deductions to which the party in breach is entitled.

Court on 22/09/2017, between RAHA TRADING Ltd and BAKHRESA GRAIN MILLING RWANDA Ltd (BGM).

[37] The Court finds the interests should be computed from 03/03/2017, the day for which PHOENIX OF RWANDA INSURANCE COMPANY Ltd warned (final notice) TRANSCORP as stated by legal scholars that being warned implies that the creditor who was not paid on due time, shall be given damages or interests for the delay and that the debtor shall not be compelled to pay interests for the delay except when he/she has been notified[6], up to 19/07/2019, the day of the pronouncemet which are 855 days, therefore TRANSCORP has to pay PHOENIX RWANDA INSURANCE COMPANY Ltd, interests for the delay worth 53.913.427 x 8.474 x days 855/360x100=10.850.482Frw, that is to say, that the debt and its interests worth 53.913.427 Frw + 10.850.482 Frw, all totaling to 64.763.908Frw.

B. Cross appeal

Whether TRANSCORP has to be awarded damages

[38] TRANSCORP states that it is still being dragged into an unnecessary lawsuit, thus it claims damages equivalent to 2.000.000Frw for procedural fees and counsel fees.

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[6] *La mise en demeure permet au créancier d'obtenir des dommages-intérêts ou des intérêts de retard (.....).En principe, le débiteur n'est tenu de dommages - intérêts moratoires, c'est-à-dire ceux qui réparent le retard, que s'il a été mis en demeure,le seul fait que le débiteur n'ait pas payé à l'échéance ne cause pas au créancier un préjudice tenant au retard, (Ph. Malaurie, L. Aynes et Ph. Stoffel-Munck, Droit des obligations,7e Edition, Paris, CUJAS, pp.529-530.*

[39] PHOENIX OF RWANDA INSURANCE COMPANY Ltd responds that these damages are baseless because TRANSCORP does not produce proofs for payment of the debt.

DETERMINATION OF THE COURT

[40] Article 111 Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that the claim for representation fees is an incidental claim to the principal claim aiming to repay expenses incurred during judicial proceedings. The claim for legal costs is adjudicated at the same time as the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted.

[41] The Court finds, TRANSCORP should not be given procedural and counsel fees because it failed to honour an agreement it concluded with PHOENIX OF RWANDA INSURANCE COMPANY Ltd, it should not be given damages it claims since it is the one with liabilities.

[42] The Court finds TRANSCORP should give PHOENIX OF RWANDA INSURANCE COMPANY Ltd, procedural and counsel fees because it incurred expenses for following up the case and hiring a lawyer, but because what it claims are excessive, TRANSCORP should give it 700.000Frw for counsel fees, 300.000Frw for procedural fees on this instance, as well as 50.000Frw of the court fees paid the moment of lodging the appeal.

III. DECISION OF THE COURT

[43] Finds PHOENIX OF RWANDA INSURANCE COMPANY Ltd's appeal with merit;

[44] The rulings of the judgment RCOMA 00450/2018/HCC rendered by the Commercial High Court on 20/09/2018, are quashed ;

[45] Orders TRANSCORP to pay PHOENIX OF RWANDA INSURANCE COMPANY Ltd 64.763.908Frw for the debt and related interests;

[46] Orders TRANSCORP to give PHOENIX OF RWANDA INSURANCE COMPANY Ltd 700.000Frw for counsel fees and 300.000Frw for procedural fees on this instance, as well as 50.000Frw of the court fees, paid the moment of lodging the appeal.

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