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ICYEGERANYO CY'IBYEMEZO BY'INKIKO

Icyegeranyo V. 3 - 2021
Nyakanga, 2021



RWANDA LAW REPORTS

Law Reports V. 3 - 2021
July, 2021



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ABAGIZE KOMITE Y’UBWANDITSI

I. ITSINDA RY’ABANYAMATEGEKO BATEGUYE IMANZA

KAGABO U. Stephanie

KAVUTSE M. Claude

KUBWIMANA Jean Claude

MUJABI K. Naphtal

UWINKINDI Angelique

II. KOMITE YEMEZA IMANZA

- Prof. Dr. NGAGI M. Alphonse** : Perezida wa Komite,
Umucamanza mu Rukiko
rw'Ubujurire
- Dr. MUHIRE G. Yves** : Visi Perezida wa Komite,
Umwarimu muri
Kaminuza y'u Rwanda
- NSENGIYUMVA Jean Claude** : Umwanditsi wa Komite,
Umugenzuzi w'Inkiko
- RUKUNDAKUVUGA F. Regis** : Perezida w'Urukiko
rw'Ubujurire
- Dr. KARIMUNDA M. Aimé** : Umucamanza mu Rukiko
rw'Ikirenga
- NDAHAYO Xavier** : Perezida w'Urukiko Rukuru
- RUTAZANA Angeline** : Umugenzuzi Mukuru w'Inkiko
- KALIWABO Charles** : Umucamanza w'
Urukiko rw'Ubujurire
- Dr. KAYIHURA Didas** : Umuyobozi wa ILPD
- BURAYOBERA UMUZAYIRE
Bibiane** : Visi Perezida wa Komisiyo
y'u Rwanda ishinzwe
Ivugururwa ry'Amategeko

| | |
|-----------------------------------|---|
| BWIZA N. Blanche | : Umugenzuzi w'Inkiko |
| KIBUKA Jean Luc | : Umucamanza w'Urukiko Rukuru rw'Ubucuruzi |
| HABARUREMA Jean Pierre | : Umushinjacyaha ku Rwego rw'Igihugu |
| BUNYOYE Grace | : Umushinjacyaha ku Rwego rw'Igihugu |
| KABIBI Specioza | : Intumwa ya Leta |
| MUREREREHE Saouda | : Umucamanza mu Rukiko Rukuru |
| Lt. col. MADUDU A. Charles | : Umucamanza mu Rukiko rwa Gisirikare |
| GIRANEZA Clémentine | : Umucamanza mu Rukiko Rwisumbuye |
| Dr. NSHIMIYIMANA Didace | : Umucamanza mu Rukiko Rwisumbuye |

| | |
|---------------------------|---|
| BAGABO Faustin | : Avoka mu Rugaga rw'Abavoka |
| GAPARAYI Idi | : Umwarimu muri University of Kigali |
| Dr. SHEMA Pierre | : Umwarimu muri ULK |
| KARAKE Canisius | : Umwarimu muri UNILAK |
| HABIMANA Pie | : Avoka mu Rugaga rw'Abavoka |
| RWIGEMA Royck | : Umucamanza mu Rukiko rw'Ubucuruzi |
| YANKURIJE Dorothée | : Perezida w'Urukiko rw'Ibanze |

IRIBURIRO

Basomyi bacu,

Tunejewe no kubagezaho icyegeranyo cy'Ibyemezo by'Inkiko, Volime 3 [2021]. Nk'uko mubizi, tubahitiramo imanza zikubiyemo bimwe mu bisubizo by'ibibazo muhura nabyo kenshi, haba mu mirimo yanyu ndetse no buzima bwa buri muni.

Muri iyi numero murasangamo imanza zirindwi (7) zirimo esheshatu (6) zaburanishijwe mu mizi zikurikira: urubanza rumwe (1) rw'ubutegetsi, imanza eshatu (3) z'imbonezamubano, imanza ebyiri (2) z'ubucuruzi n'urundi rumwe (1) rwerekeranye n'imiburanishirize y'imanza.

Nk'uko mumaze kubimenyera imanza ziri muri iki cyegeranyo ziboneka no ku rubuga 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.

INYITO

Imanza ziri muri iyi volime zikoreshwa muri ubu buryo:

[2021] 3 RLR

AMATEGEKO YASHINGIWEHO

a. Amategeko akoreshwa ubu

Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi;
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Itegeko N°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, ingingo ya 64.....167

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b. Amategeko yakuweho ariko yakoreshejwe igihe ikibazo cyavukaga

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ingingo ya 815

ingingo za 33, 78, 79, 80 na 81108

Itegeko Ngenga N°08/2005 ryo ku wa 14/07/2005 rigena imikoreshereze n'imicungire y'ubutaka mu Rwanda, ingingo ya 34 na 35167

Itegeko N° 86/2013 ryo ku wa 11/09/2013 rishyiraho Sitati rusange igenga abakozi ba Leta, ingingo ya 76, 77 na 7936

Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi;

ingingo ya 9167

ingingo ya 9 n'ya 11108

ingingo ya 11 n'ya 815

Itegeko N° 12/2007 ryo ku wa 27/03/2007 rigenga amasoko ya Leta nk'uko ryahinduwe kandi rikuzuzwa n'Itegeko N° 05/2013 ryo ku wa 13/2/2013, ingingo ya 88 n'ya 89149

Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuzza Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe;

ingingo ya 19 n'ya 24108

ingingo ya 21167

Iteka N° 01/81 ryo ku wa 16 Mutarama 1981 ryerekeye ibarura ry'abaturage, ikarita ndangamuntu, ingingo ya 5,6 n'ya 758

*Iteka ryo ku wa 04/05/1895 rishyiraho Urwunge rw'Amategeko
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IMANZA ZIFASHISHIJE

Forest Company Volcanoes Gorillas (FCVG) Ltd v Ikigo cy'Imisoro n'Amahoro (RRA), RCOMAA 00055/2016/SC rwaciwe n'Urukiko rw'Ikirenga ku wa 29/9/2017.....149

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- 1. Amategeko agenga amasezerano** – Amasezerano y’ubugure – Inshingano y’umugurisha – Umugurisha yishingira ko umuguzi atazavutswa uburenganzira bwe ku cyo yaguze (garantie contre l’éviction).

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Amasezerano y’ubwishingizi – Inshingano z’uwinshingiye umwenda – Inshingano z’uwishingiye umwenda zikurwaho n’uko umwenda wishingiwe urangije kwishyurwa cyangwa se n’uko umwishingizi asimujwe undi mwishingizi mu buryo bwemewe n’amategeko; ntizivanwaho no kuba igihe cyo kwishyura giteganijwe mu masezerano y’ubwishingizi kirangiye

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Amasezerano y’inguzanyo – Inshingano zo kwishyura inyungu zikomoka ku masezerano yo kurangiza neza imirimo z’amafaranga yishyurwe na banki mu mwanya w’uwahawe umwenda – Nta kosa banki iba ikoze iyo yishyuye inyungu ku mafaranga yishyuriye rwiyezeza mirimo nk’ingwate yo kurangiza neza imirimo (performance guaranty) ku rwego rwatanze isoko iyo uwaritsindiye atarangije imirimo neza – Itegeko N°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, ingingo ya 64.

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Amasezerano y’inguzanyo – Kudahakana umwenda umwishingizi yasinyiye – Umwishingizi washakanye n’uwahawe umwenda na banki ntiyahakana umwenda

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- 2. Amategeko agenga amasoko ya Leta – Amafaranga ahabwa uwatsindiye isoko rya Leta kugirango atangire imirimo (Avansi) – Isubizwa rya avansi ntibireberwa ku gaciro k'imirimo imaze gukorwa kuko Avansi ubwayo atari ubwishyu.**

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- 3. Amategeko agenga imanza z'ubutegetsu – Gutanga igihano ku mukozi wa Leta – Umukozi wa Leta utubahirije ibyo ashinzwe cyangwa udakoze ibyo asabwa – Iyo umukozi wa Leta atubahirije inshingano ze agakora amakosa atari ateganyijwe mu mategeko afatirwa ibihano byo mu rwego rw'akazi hakurikijwe uburemere bw'ikosa bigenwa n'umuyobozi w'urwego umukozi yakoragamo abanje kugezwaho raporo n'akanama gashinzwe gukurikirana amakosa – Iteka rya Perezida N° 65/01 ryo ku wa 04/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi, ingingo ya 15.**

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ashobora guhanirwa mu rwego rw'akazi ibikorwa yagizweho umwere mu manza nshinjabyaha.

SALIMINI v LETA Y'U RWANDA (MINISITERI Y'UBUZIMA)

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4. Gusubirishamo urubanza ku mpamvu z'akarengane –

Imbibi z'ikiburanwa – Ibyemejwe mu rundi rubanza rwaciwe ku rwego rwa nyuma, ntibishobora kuvuguruzwa binyuze mu nzira yo gusubirishamo ku mpamvu z'akarengane urubanza rutari mu ruhererekane rumwe narwo hashingiwe gusa ku kuba zifitanye isano.

NDITIRIBAMBE v GATERA N'UNDI.....1

Imbibi z'ikiburanwa – Ibirego bishya bitari mu murongo w'ibyaburanywe urubanza rugishingwa mu rwego rwa mbere cyangwa ingingo zitasuzumwe mu rubanza rusubirishwamo ntibyakirwa mu rubanza rwasabiwe gusuburwamo ku mpamvu y'akarengane

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5. Amategeko agenga imiburanishirize y'imanza z'ubucuruzi

– Igihembo cy'avoka – Amafaranga y'ikurikiranarubanza, n'igihembo cya avoka agenwa mu bushishozi bw'urukiko n'ubwo impande zombi zaba zarabyumvikanyeho mu masezerano iyo bigaragaye ko ari ukwihesha indonke ikabije kandi n'uyasaba ntagaragaze ikimenyetso cy'uburyo yayakoresheje.

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- 6. Amategako agenga umuryango** – Ishyingirwa mu buryo bukurikije amategako – Ikimenyetso cy'ishyingirwa – Ikimenyetso cyemeza nta mpaka ko abantu bashyingiranywe ni icyemezo cy'ishyingirwa, iyo cyatakaye cyangwa ibitabo by'ishyingirwa bidashoboka kuboneka, muri icyo gihe hashyingirwa ku buhamya – Kuba umwe mu babanaga nk'umugore n'umugabo yanditse mu ikarita ndangamuntu ya kera nk'umugabo cyangwa umugore wa kanaka, si ikimenyetso cyashyingirwaho mu kwemeza ko bashyingiranywe mu buryo bukurikije amategako.

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Ubutane – Kugabana imitungo – Iyo abashyingiranywe mu buryo bw'ivangamutungo batanye, ihame ni uko bagabana umutungo ku buryo bungana; yaba ukugurisha umutungo basangiye bakagabana amafaranga avuyemo, yaba kugabana ibintu uko bimeze hatagize ikigurishwa cyangwa se kuba umwe yaha undi agaciro k'umutungo ubazwe mu mafaranga akawugumana batagombye kugabana – Mu gihe batumvikanye muri bumwe muri ubwo buryo, umucamanza niwe utegeka igikwiye kitagize uwo kibangamiye mu bashakanye.

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Umutungo w'abashyingiranwe – Ivangamutungo – Kugabana umutungo – Amasezerano y'ubwumvikane yo kugabana umutungo akozwe hagati y'abashyingiranye

ivangamutungo rusange, nta gaciro aba afite igihe atakozwe hagamijwe guhinduza uburyo bwo gucunga umutungo hagati yabo, kuko ivangamutungo riba rigikomeje igihe cyose batari bahabwa ubutane.

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**IMANZA ZEREKERANYE
N'IMIBURANISHIRIZE Y'IMANZA**

**URUBANZA RWEREKERANYE
N'IMIBURANISHIRIZE Y'IMANZA
ZASABIWE GUSUBIRISHAMO KU
MPAMVU Z'AKARENGANE**

NDITIRIBAMBE v GATERA N’UNDI

[Rwanda URUKIKO RW’IKIRENGA – RS/ INJUST/ RC
00007/2018/ SC (Mukamulisa, P.J, Nyirinkwaya, Cyanzayire,
Rukundakuvuga na Hitiyaremye, J.) 13 Werurwe 2020]

Gusubirishamo urubanza ku mpamvu z’akarengane – Imbibizi z’ikiburanwa – Ibyemejwe mu rundi rubanza rwaciye ku rwego rwa nyuma, ntibishobora kuvuguruzwa binyuze mu nzira yo gusubirishamo ku mpamvu z’akarengane urubanza rutari mu ruhererekane rumwe narwo hashingiwe gusa ku kuba zifitanye isano.

Amategeko agenga imiburanishirije y’imanza zasabiwe gusubirishamo ku mpamvu z’akarengane – Imbibizi z’ikiburanwa – Ibirego bishya bitari mu murongo w’ibyaburanywe urubanza rugishingwa mu rwego rwa mbere cyangwa ingingo zitasuzumwe mu rubanza rusubirishwamo ntibyakirwa mu rubanza rwasabiwe gusuburwamo ku mpamvu y’akarengane.

Amategeko agenga amasezerano – Amasezerano y’ubugure – Inshingano y’umugurisha – Umugurisha yishingira ko umuguzi atazavutswa uburenganzira bwe ku cyo yaguze (garantie contre l’éviction).

Incamake y’ikibazo: Urubanza rwahereye mu Rukiko Rwisumbuye rwa Gasabo, Nditiribambe arega Gatera asaba indishyi zirebana n’inzu ye yari mu kibanza yamugurishije yasenywe barangiza urubanza Gatera yaburanyemo na Nyamaswa wamureze ko yagurishije ikibanza cye Urukiko rwemeza ko icyo kibanza ari icya Nyamaswa nibwo urubanza rwarangijwe inzu Nditirimana yubatsemo zirasenywa. Muri urwo

rubanza Nditiribambe yarezemo Gatera, Urukiko rwafashe icyemezo ko Gatera agomba gusubiza Nditiribambe ikiguzi cy'inzu yashenywe ndetse n'amafaranga y'igihombo cy'ubukode yabonaga. Kubera ko urubanza rwaciwe Gatera adahari yaje gusubirishamo urwo rubanza muri urwo Rukiko maze rufata icyemezo rushingiye ku rubanza Nditiribambe yari yatambamiye rwaburanagamo Gatera na Nyamaswa aho Urukiko rutakiriye ikirego cye, ariko mu myanzuro akaba yaragaragazaga ko ajya kugura icyo kibanza yari azi ibibazo birimo kuko yari azi ko yari yarigeze ku kigurisha Nyamaswa, bityo Urukiko ruvuga ko ibi bigaragaza ko Gatera atamugurishije azi ko ibyo agurisha atari ibye, bityo akaba ataryozwa ibyashenywe harangizwa urubanza yatsinzwe na Nyamaswa.

Nditiribambe ntiyishimiye imikirize ajurira Urukiko Rukuru avuga ko Urukiko Rwisumbuye rwirengagije ko yaguze ikibanza na Gatera nta buryarya, ndetse ko mafaranga yahise ayishyura banki bitewe n'uko inzu yari mu bugwate kubera umwenda Gatera yari ayibereyemo, akaba yarumvaga nta wundi ikibanza cyanditseho kuko Gatera atari kugitangaho ingwate atari icye, Urukiko Rukuru rwafashe icyemezo rwemeza ko ubujurire bwe nta shingiro bufite kubera ko amasezerano ya Gatera yemera gusubiza Nyamaswa amafaranga baguze atasimbura ay'ubugure bakoze mbere.

Nditiribambe yandikiye Urwego rw'Umuvunyi asaba ko urwo rubanza rwasubirishwamo ku mpamvu z'akarengane. Urwego rw'Umuvunyi, rwandikiye Perezida w'Urukiko rw'Ikirenga rumusaba ko urwo rubanza rwasubirwamo kubera impamvu zakarengane. Perezida w'Urukiko rw'Ikirenga yemeje ko urwo urubanza rugomba kongera kuburanishwa. Muri uru rubanza hagobokeshejwemo Nyamaswa,

Mu gusobanura akarengane yagiriwe, uregwa avuga ko inkiko zakoze amakosa kuko zemeje ko habaye amasezerano y'ubugure hagati ye na Nyamaswa kandi uyu atarigeze agaragaza amasezerano y'ubugure yanditse baba baragiranye cyangwa agaragaze igiciro bemeranyijeho n'ingano z'ikibanza baguze, ariyo mpamvu nawe asanga urubanza rwakimweguriye rukwiye gusubirishwamo ku mpamvu z'akarengane kuko ibyakozwe binyuranyije n'amategeko.

Mu kwiregura kuri iyi mpamvu, Gatera avuga ko inkiko zakoze amakosa kuko zemeje ko habaye amasezerano y'ubugure hagati ye na Nyamaswa kandi uyu atarigeze agaragaza amasezerano y'ubugure yanditse baba baragiranye cyangwa agaragaze igiciro bemeranyijeho n'ingano z'ikibanza baguze, ariyo mpamvu nawe asanga urubanza RCA0086/09/HC/KIG rwakimweguriye rukwiye gusubirishwamo ku mpamvu z'akarengane, akaba asanga nta karengane kari mu rubanza RCA0379/12/HC/KIG rwasabiwe kusubirishwamo, kuko urukiko rutari kumutegeka gusubiza ikibanza kandi atagifite, ariko ko Urukiko rusanze imanza zose zasubirwamo, hasuzumwa urubanza RCA0086/09/HC/KIG yaburanye na Nyamaswa rwamweguriye icyo kibanza. Ku bijyanye nindishyi arasanga we atazibazwa ahubwo zabazwa Nyamaswa weguriwe ikibanza mu buriganya inzu zigasenywa.

Iyindi mpamvu, uregwa avuga ko akwiye guhabwa indishyi zishingiye ku nzu ye yasenywe harangizwa urubanza RCA0086/09/HC/KIG, kuko yaguze icyo kibanza nta buryarya.

Kuri iyi mpamvu, Gatera yiregura avuga ko nta ndishyi akwiye gutegekwa kwishyura, ahubwo zakwishyurwa na Nyamaswa waburanye amahugu agahabwa umutungo utari uwe, naho Nyamaswa avuga ko, Nditiribambe atagombye kumurega kubera ko yagiranye amasezerano y'ubugure na Gatera azi neza ko

uwamugurishije yari atararangiza ikibazo cyari hagati yabo kuko cyagombaga kurangira amaze kumwishyura amafaranga bumvikanye mu masezerano yo kwikiranura. Urega asoza asaba amafaranga yatanze ku manza yaburanye.

Naho uregwa avuga ko amafaranga yatanze yose yagiye ayategekwa n'inkiko harangizwa imanza yatsinzwe kandi ko izo ndishyi zose atari ko zose zashyizwe mu nyandiko isaba gusuzuma akarengane, bityo nta ndishyi akwiye gutegekwa kumwishyura.

Incamate y'icyemezo: 1. Ibyemejwe mu rundi rubanza rwaciwe ku rwego rwa nyuma, ntibishobora kuvuguruzwa binyuze mu nzira yo gusubirishamo ku mpamvu z'akarengane urubanza rutari mu ruhererekane rumwe narwo hashingiwe gusa ku kuba zifitanye isano, bityo icyemezo cyafashwe murubanza Gatera yaburanye na Nyamaswa rwabaye itegeko ntabwo bigomba kuburanwaho cyangwa guhindurwa mu rubanza Nditiribambe yasubirishijemo ku mpamvu z'akarengane.

2. Umugurisha yishingira ko umuguzi atazavutswa uburenganzira bwe ku cyo yaguze (garantie contre l'éviction).

3. Ibirego bishya bitari mu murongo w'ibyaburanywe urubanza rugishingwa mu rwego rwa mbere cyangwa ingingo zitasuzumwe mu rubanza rusubirishwamo ntibyakirwa mu rubanza rwasabiwe gusubirwamo ku mpamvu y'akarengane bityo Nditiribambe ntagomba gusaba mu rubanza ruburanishwa ku mpamvu z'akarengane ko ahabwa ibyo atigeze asaba mbere muri urwo rubanza.

Gusubirishamo urubanza kumpamvu z'akarengane bifite ishingiro.

Imikirize y'urubanza rwasubirishijwemo irahindutse.

Amategeko yashingiweho:

Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 9 n'ya 63

Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha bw'Urukiko rw'Ikirenga (ryakoreshwaga icyo gihe), ingingo ya 81

Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi (ryakoreshwaga icyo gihe), ingingo ya 11 n'ya 81

Nta manza zifashishijwe.

Inyandiko z'abahanga:

François Collart Dutilleul et Philippe Delebecque, Contrats civils et commerciaux, Dalloz, 7ème éd., 2004, n°246 p.230

Urubanza

I. IMITERERE Y'URUBANZA

[1] Ku wa 10/10/2004, Nditiribambe Samuel yaguze na Gatera Jason ikibanza ku mafaranga 850.000. Nyuma ariko Nditiribambe Samuel yaje kwamburwa icyo kibanza n'inzu yari yubatsemo bitewe n'imanza zabaye hagati ya Gatera Jason na

Nyamaswa Faustin, Urukiko Rwisumbuye rwa Gasabo mu rubanza RCA 0096/06/TGI/GSBO rwaciye ku rwego rwa nyuma ku wa 15/06/2006 rukemeza ko ikibanza inzu yubatsemo ari icya Nyamaswa Faustin, Nditiribambe Samuel yatambamira urwo rubanza agatsindwa ku rwego rwa nyuma mu rubanza RCA 0086/09/HC/KIG rwaciye n'Urukiko Rukuru ku itariki ya 21/10/2009.

[2] Urubanza RCA 0086/09/HC/KIG rwararangijwe, Nditiribambe Samuel ategukwa gusenya inyubako zari mu kibanza cyeguriwe Nyamaswa Faustin, nyuma arega Gatera Jason mu Rukiko Rwisumbuye rwa Gasabo asaba indishyi zirebana n'inzu ye yari mu kibanza yamugurishije yasenywe barangiza urubanza rwavuzwe.

[3] Ku wa 17/12/2010, urwo rukiko rwaciye urubanza RC 0389/10/TGI/GSBO, rwemeza ko ikirego cya Nditiribambe Samuel gifite ishingiro kuko Gatera Jason yamugurishije inzu n'ikibanza atamumenyesheje ko ikibanza cyubatseho iyo nzu yari yarakigurishije Nyamaswa Faustin, rutegeka Gatera Jason kumwishyura amafaranga yasabye angana na 9.450.000 Frw, akubiyemo 8.000.000 Frw y'agaciro k'inzu ye yashenywe na 1.200.000 Frw kubera igihombo cy'ubukode yabonaga na 250.000 y'igihombo cya Avoka.

[4] Gatera Jason yasubirishijemo urwo rubanza rwaciye adahari, maze Urukiko Rwisumbuye rwa Gasabo, mu rubanza RC 0069/11/TGI/GSBO rwo ku wa 24/05/2012, rwemeza ko ikirego cya Nditiribambe Samuel nta shingiro gifite kubera ko mu rubanza RC 0026/08/TGI/GSBO yatambamiragamo imikirize y'urubanza RCA 0096/06/TGI/GSBO yasobanuye mu myanzuro no mu mvugo ye ko ajya kugura na Gatera Jason yashingiye ku masezerano yo ku wa 03/10/2004, aho Gatera Jason yemeraga

gusubiza Nyamaswa Faustin amafaranga bakiguze, agaragaza ko nta kibazo Gatera Jason agifitanye na Nyamaswa Faustin no ku byangombwa byose yamuhaye, bivuze ko agura yari azi amateka y'icyo kibanza, ibi bikaba bigaragaza ko Gatera Jason atamugurishije azi ko ibyo agurisha atari ibye, bityo akaba ataryozwa ibyashenywe harangizwa urubanza yatsinzwe na Nyamaswa Faustin.

[5] Nditiribambe Samuel yajuriye mu Rukiko Rukuru avuga ko Urukiko Rwisumbuye rwa Gasabo rwirengagije ko yaguze ikibanza na Gatera Jason nta buryarya, Se n'umugore ba Gatera Jason bamusinyiye kimwe n'abagize nyobozi ya Ruhura ya II bese, ndetse ko ayo mafaranga yahise ayishyura banki bitewe n'uko inzu yari mu bugwate kubera umwenda Gatera Jason yari ayibereyemo, akaba yarumvaga nta wundi ikibanza cyanditseho kuko Gatera Jason atari kugitangaho ingwate atari icye, ko yagombye kumwishyura ibyo yavukijwe kubera kwikungahaza agurisha icyo kibanza abantu babiri.

[6] Urwo rukiko rwaciye urubanza RCA 0379/12/HC/KIG ku wa 19/07/2013, rwemeza ko ubujurire bwe nta shingiro bufite ku mpamvu zikurikira:

- Amasezerano yo ku wa 03/10/2004, aho Gatera Jason yemera gusubiza Nyamaswa Faustin amafaranga bakiguze, ntabwo asimburira ayo bari baragiranye mbere Nyamaswa Faustin akigura kandi muri ayo masezerano nta hagaragaramo ko uyu yemeye gusesa amasezerano y'ubugure bw'ikibanza bagiranye mbere;
- Ababajijwe bemeje ko Nditiribambe Samuel yaguze azi neza ko ikibanza kiri mu bibazo kuko cyari cyaraguzwe na Nyamaswa Faustin;

- Nditiribambe Samuel yubatse muri icyo kibanza agendeye ku byangombwa Gatera Jason yamuhaye mbere kandi byarateshejwe agaciro n'Abunzi mu rubanza rwaburanywe hagati ya Nyamaswa Faustin na Gatera Jason.

[7] Nyuma yo gusubirishamo urwo rubanza ingingo nshya (urubanza RCA 0494/13/HC/KIG rwaciwe ku wa 16/05/2015), ikirego cye nticyakirwe, Nditiribambe Samuel yandikiye Urwego rw'Umuwunyoni asaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane.

[8] Nyuma yo gusuzuma icyo kibazo, Urwego rw'Umuwunyoni rwasanze urubanza RCA 0379/12/HC/KIG, arirwo rukwiriye gusubirwamo ku mpamvu z'akarengane kubera ko arirwo rwaburanishijwe mu mizi bwa nyuma, maze ku wa 03/02/2018, rwandikira Perezida w'Urukiko rw'Ikirenga, rumusaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane.

[9] Perezida w'Urukiko rw'Ikirenga, nyuma yo gusuzuma raporo y'Ubugenzuzi Bukuru bw'Inkiko kuri urwo rubanza, yemeje ko rwandikwa mu bitabo byabugenewe kugira ngo ruzongere ruburanishwe.

[10] Urubanza rwahamagawe ku wa 26/02/2019, ntirwaburanishwa kubera ko ababuranyi basabye Urukiko ko Nyamaswa Faustin yagobokeshwa, maze Urukiko rwemera ubwo busabe, rutegeka ko Nyamaswa Faustin agobokeshwa mu rubanza, ndetse ko ababuranyi bagomba guhererekanya nawe imyanzuro, urubanza rwimurirwa ku wa 14/05/2019.

[11] Uwo munsu ugeze, ababuranyi baritabye, Nyamaswa Faustin nawe aritaba ariko aza nta mwunganizi. Haje n'uwitwa

Uwimana Coloneria wasabye kugoboka mu rubanza ku bushake avuga ko arufitemo inyungu zirebana n'uko hari ikibanza Gatera Jason yari yaramuhaye akubakamo inzu nayo yashenywe mu gihe harangizwaga urubanza RCA 0086/09/HC/KIG. Nyuma yo kumva ababuranyi icyo babivugaho, Urukiko rwemeye ubusabe bwe, rusubika iburanisha kugira ngo we na Nyamaswa Faustin bashake ba Avoka babunganira kandi batange imyanzuro.

[12] Nyuma urubanza rwagiye rusubikwa ku mpamvu ziturutse ku baburanyi, ruburanishwa mu ruhamwe ku wa 07/11/2019, Nditiribambe Samuel ahagarariwe n'umugore we Nyirahabimana Rehema, uyu nawe yunganiwe na Me Nzabamwita Jean Claude, Gatera Jason yunganiwe na Me Katushabe Mary, Nyamaswa Faustin yunganiwe na Me Mulingande Jean Claude, Uwimana Coloneria yunganiwe na Me Murekatete Marigarita.

[13] Nyuma yo kumva imiburanire y'ababuranyi, Urukiko rwasanze hari ibyo rugomba gusobanukirwa kurushaho ku bijyanye n'imiterere y'ikibanza n'amazu yari muri icyo kibanza yasenywe harangizwa urubanza RCA 0086/09/HC/KIG rwaciwe n'Urukiko Rukuru tariki ya 21/10/2009, maze ku wa 13/01/2020 rujya aho ikiburanwa kiri, rwumva abatangabuhamya runakora igishushanyo cy'ahaburanwa cyemeranyijweho n'ababuranyi, ku wa 06/02/2020, ababuranyi bongera guhamagarwa mu rukiko kugira ngo niba hari icyo bongeraho bakivuge, bose baritaba bahagarariwe cyangwa bunganiwe nka mbere, usibye Uwimana Coloneria wivanye mu rubanza.

[14] Mu miburanire ye, Nditiribambe Samuel yasobanuye ko akarengane ke mu rubanza RCA 0379/12/HC/KIG gashingiye ku kuba yarimwe indishyi zishingiye ku nzu ye yashenywe no ku manza 13 yaburanye, asaba ko yarenganurwa maze akazihabwa,

ndetse akanasubizwa ikibanza cye cyeguriwe Nyamaswa Faustin mu buryo bunyuranyije n'amategeko mu rubanza n° RCA 0086/09/HC/KIG.

[15] Gatera Jason yasobanuye ko Nyamaswa Faustin yaburanye amahugu, inkiko zimwegurira umutungo utari uwe, ariyo mpamvu nawe asanga urubanza rwamweguriye icyo kibanza rukwiye gusubirishwamo ku mpamvu z'akarengane kuko ibyakozwe binyuranyije n'amategeko, maze Nditiribambe Samuel agasubizwa ikibanza cye.

[16] Nyamaswa Faustin we yaburanye avuga ko Nditiribambe Samuel atagombye kumurega kubera ko yagiranye amasezerano y'ubugure bw'ikibanza na Gatera Jason azi neza ko kitari kikiri mu maboko ye. Yasabye kandi ko Nditiribambe Samuel yategekwa kumusubirizaho bornes z'ikibanza yarimbuye, akanategekwa gutanga igice cy'ikibanza yasigaranye cya metero 3 kuri 20 ubwo harangizwaga RCA 0086/09/HC/KIG .

[17] Ibibazo byasuzumwe muri uru rubanza ni ibi bikurikira:

- Kumenya niba Nditiribambe Samuel yasubizwa ikibanza Nyamaswa Faustin yeguriwe mu rubanza n° RCA 0086/09/HC/KIG;
- Kumenya niba Nditiribambe Samuel yahabwa indishyi asaba zishingiye ku nzu ye yashenywe;
- Kumenya niba Nditiribambe Samuel yahabwa indishyi asaba zishingiye ku manza yaburanye na Gatera Jason na Nyamaswa Faustin;
- Kumenya niba Nyamaswa Faustin yahabwa ibyo asaba.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO:

A. Kumenya niba Nditiribambe Samuel yasubizwa ikibanza Nyamaswa Faustin yeguriwe mu rubanza RCA 0086/09/HC/KIG

[18] Me Nzabamwita Jean Claude wunganira Nyirahabimana Rehema uhagarariye Nditiribambe Samuel avuga ko amasezerano yo kwikiranura yabaye ku wa 3/10/2004 hagati ya Gatera Jason na Nyamaswa Faustin agaragaza neza ko ikibanza yakiguze mu buryo bukurikije amategeko, ko rero akwiye kugisubizwa.

[19] Gatera Jason avuga ko inkiko zakoze amakosa kuko zemeje ko habaye amasezerano y'ubugure hagati ye na Nyamaswa Faustin kandi uyu atarigeze agaragaza amasezerano y'ubugure yanditse baba baragiranye cyangwa agaragaza igiciro bemeranyijeho n'ingano z'ikibanza baguze, ariyo mpamvu nawe asanga urubanza rwakimweguriye rukwiye gusubirishwamo ku mpamvu z'akarengane kuko ibyakozwe binyuranyije n'amategeko.

[20] Asobanura ko Nyamaswa Faustin yamuguriye amafaranga, mu kumwishyura amusigaramo 50,000 Frw, bumvikana ko namara kubona icyangombwa bazagura ikibanza amwongeye andi mafaranga, ariko ko batigeze bumvikana ku ngano y'ikibanza kizagurishwa n'ingano y'amafaranga kizagurwa, ko rero nta kuntu Nyamaswa Faustin yavuga ko yaguze.

[21] Akomeza avuga ko nyuma bananiwe kumvikana ku kuntu kigomba kugurishwa, ndetse no ku mafaranga y'ikiguzi, ubugure

bunaniranye bagirana amasezerano y'ubwumvikane ku wa 3/10/2004, bemeranya ko azishyura Nyamaswa Faustin amafaranga 50.000 yari amubereyemo, akamuha n'amafaranga 67.272 bitarenze ku wa 30/1/2015 kuko yari yaratindanye amafaranga yamuguriye, ko bamaze kubyumvikanaho yagurishije ikibanza Nditiribambe Samuel kugira ngo yishyure amafaranga yose abereyemo Nyamaswa Faustin, ariko agiye kuyamwishyura uyu arayanga, ahubwo ajya kurega.

[22] Avuga ko n'ubwo inkiko zakoze amakosa, Nditiribambe Samuel atagomba kuburana ikibanza cyose baguze cya metero 20 kuri 30 kuko abizi neza ko hari igice cyacyo agifite. Asobanura ko ikibanza Nyamaswa Faustin yatwaye kirimo ibice bibiri, igice atamugurishije gifite metero 15 kuri 10 n'igice cya Nditiribambe Samuel gifite metero 15 kuri 20. Asoza avuga ko kugira ngo habeho ubutabera ari uko Nyamaswa Faustin yasubiza buri wese igice cy'ikibanza yabatwaye.

[23] Me Katushabe Mary umwunganira avuga ko inyandiko y'ubwumvikane yo ku wa 3/10/2004 hagati ya Gatera Jason na Nyamaswa Faustin yerekana ko uyu ataguze ikibanza kiburanwa, akaba asanga nta karengane kari mu rubanza RCA 0379/12/HC/KIG kuko urukiko rutari gutegeka Gatera Jason gusubiza ikibanza kandi atagifite, ariko ko Urukiko rusanze imanza zose zasubirwamo, hasuzumwa urubanza RCA 0086/09/HC/KIG rwacyeguriye Nyamaswa Faustin.

[24] Nyamaswa Faustin avuga ko mu mwaka wa 2003, Gatera Jason yamubwiye ko afite ikibanza kigurishwa, amaze kukimwerekana bumvikana ku mafaranga 50.000, aramwishyura, amubwiye ngo bakorane inyandiko Gatera Jason akomeza kumubeshya agenda abisunika, abonye ko ari kumuryarya ahamagara abaturanyi, babaza Gatera Jason niba hari amafaranga

yamusigayemo, avuga ko ari ntayo, bamubajije niba yarayamuhaye amuguriza, avuga ko bateganyaga kugura ikibanza, bamubaza impamvu atamuha inyandiko, avuga ko ashaka gusubiza ayo yahawe n'inyungu zayo gusa, bakorana amasezerano y'ubwumvikane ku wa 03/10/2004, Gatera Jason yemera ko azamusubiza 50.000Frw, yongeyeho 67.272 Frw y'inyungu bitarenze ku wa 30/01/2005.

[25] Akomeza avuga ko Nditiribambe Samuel atagombye kumurega kubera ko yagiranye amasezerano y'ubugure na Gatera Jason ku wa 10/10/2004 azi neza ko kuri iyo tariki Gatera Jason yari atararangiza ikibazo cyari hagati yabo kuko cyagombaga kurangira ku wa 30/01/2005 amwishyuye amafaranga yemeye mu masezerano yo kwikiranura, ubutaka bukaba rero bwari bukiri mu maboko ye igihe yaguraga na Gatera Jason.

[26] Me Muligande Jean Claude umwunganira avuga ko ibivugwa mu nyandiko yo ku wa 03/10/2004, Nyamaswa Faustin yabyemeye nk'amaburakindi kuko yabonye abuze ikibanza bari baguze yemera gusubizwa amafaranga.

UKO URUKIKO RUBIBONA:

[27] Mu rubanza RCA 0379/12/HC/KIG rwasabiwe gusubirishwamo ku mpamvu z'akarengane, Nditiribambe Samuel yaregaga Gatera Jason asaba indishyi zishingiye ku nzu ye yashenywe harangizwa urubanza RCA 0086/09/HC/KIG rwemeje ko ikibanza iyo nzu yubatsemo ari icya Nyamaswa Faustin kubera ko yakiguze na Gatera Jason.

[28] Iyo ariko Nditiribambe Samuel asobanura akarengane abona mu rubanza RCA 0379/12/HC/KIG rusubirishwamo ku

mpamvu z'akarengane n'ibyo asaba ko bikosorwa cyangwa bihindurwa, ndetse n'iyi Gatera Jason yiregura, bigaragara ko bombi bagaruka ku byo batsindiwe mu rubanza RCA 0086/09/HC/KIG kuko basaba ko uru rukiko rwemeza ko nta bugure bw'ikibanza bwabaye hagati ya Gatera Jason na Nyamaswa Faustin, ko ahubwo habaye kuguza amafaranga.

[29] Ikibazo rero kigomba gusobanuka kikaba ari kumenya niba ibyemejwe mu rundi rubanza rwaciwe ku rwego rwa nyuma bishobora kuvuguruzwa binyuze mu nzira yo gusubirishamo ku mpamvu z'akarengane urubanza rutari mu ruhererekane narwo hashingiwe ku kuba zifitanye isano.

[30] Ingingo ya 11 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi yateganyaga ko urubanza rwaciwe ku rwego rwa nyuma, n'inziya yo kurubirishamo ku mpamvu z'akarengane yararangiye, ntirushobora kongera kuburanishwa bundi bushya ku mpamvu zimwe no ku kiburanwa kimwe hagati y'abaturanyi bamwe baburana ikirego kimwe.

[31] Ku birebana no gusubirishamo urubanza ku mpamvu z'akarengane, ingingo ya 81 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha bw'Urukiko rw'Ikirenga yateganyaga ko umuburanyi utishimiye imikirize y'urubanza rwaciwe ku rwego rwa nyuma ashobora gusaba ko rusubirishwamo ku mpamvu z'akarengane¹.

¹Urubanza rwaciwe ku rwego rwa nyuma rushobora gusubirwamo ku mpamvu z'akarengane kubera impamvu zikurikira:

[32] Iryo Tegeko Ngenga ryanateganyaga uburyo n'ibihe isubirwamo ry'imanza ku mpamvu z'akarengane zaciwe ku rwego rwa nyuma bikorwamo, ndetse mu ngingo zaryo z'inziyacyaho n'izisoza ryanateganyaga uko byakorwa ku manza zaciwe ku rwego rwa nyuma mbere y'uko ritangazwa. Ingingo ya 86 y'iryo tegeko yateganyaga ko imanza zivugwamo akarengane zaciwe burundu nyuma y'ishyirwaho ry'Urwego rw'Umuvunyi mu mwaka wa 2003 zaba izarangijwe cyangwa izitararangizwa zizashyikirizwa Urwego rw'Umuvunyi mu gihe kitarenze umwaka umwe (1) kuva iri Tegeko Ngenga ritangajwe mu Igazeti ya Leta ya Repubulika y'u Rwanda. Ibi bivuze ko kuva iryo tegeko ritangajwe, umuburanyi waburanye urubanza rukaba itegeko mbere y'uko iri tegeko risohoka, ariko akumva rwabayemo akarengane, nawe yahawe inzira yo kuba yarusubirishamo.

[33] Urukiko rurasanga rero mu gihe iyo nzira yari ihari ariko ntikoreshe ngo Nditiribambe Samuel cyangwa Gatera Jason basubirishemo urubanza RCA 0086/09/HC/KIG rweguriye ikibanza Nyamaswa Faustin, ibyaburanyweho hagati yabo muri urwo rubanza rwaciwe ku rwego rwa nyuma byarabaye ndakuka. Ibi bivuze ko icyo kibanza cyeguriwe Nyamaswa Faustin ku buryo budasubirwaho, Nditiribambe Samuel akaba nta burenganzira akigifiteho kuko kudasubirishamo urwo rubanza byatumye rudashobora kongera kuburanishwa bundi bushya

1° iyo hari ibimenyetso simusiga bigaragaza ruswa, ikimenyane cyangwa icyenewabo, byagize ingaruka ku mikirize y'urubanza bikaba bitarigeze bimenywa n'uwatsinzwe mu gihe cy'iburana;

2° iyo mu icibwa ry'urubanza hirengagijwe amategeko cyangwa ibimenyetso bigaragarira buri wese; 3° iyo urubanza rudashobora kurangizwa hakurikije imikirize yarwo

nk'uko byateganywaga n'ingingo ya 11 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryavuzwe.

B. Kumenya niba Gatera Jason na Nyamaswa Faustin bategekwa guha Nditiribambe Samuel indishyi zishingiye ku nzu ye yasenywe harangizwa urubanza RCA 0086/09/HC/KIG

[34] Me Nzabamwita Jean Claude avuga ko Urukiko Rukuru rwemeje ko Nditiribambe Samuel adakwiye guhabwa indishyi zishingiye ku nzu ye yasenywe harangizwa urubanza RCA 0086/09/HC/KIG ngo kuko yaguze ikibanza inzu yari yubatseho azi ko cyari cyaramaze kugurwa na Nyamaswa Faustin, rwirengagije ko amasezerano yo kwikiranura yabaye ku wa 3/10/2004 hagati ya Gatera Jason na Nyamaswa Faustin agaragaza neza ko ikibanza yakiguze nta buryarya mu buryo bwemewe n'amategeko.

[35] Gatera Jason yiregura avuga ko nta ndishyi akwiye gutegekwa kwishyura, ahubwo zakwishyurwa na Nyamaswa Faustin waburanye amahugu Urukiko rukamwegurira umutungo utari uwe, ko we nta ruhare yagize mu karengane Nditiribambe Samuel yagiriwe kuko ntako atagize ngo yereke inkiko ko ikiburanwa ari icye ariko bombi bagatsindwa.

[36] Me Katushabe Mary umwunganira avuga ko Nditiribambe Samuel atagombye kuba yarareze Gatera Jason kuko nawe yemera ko nta bugure bwabaye hagati ye na Nyamaswa Faustin, akaba nta ruhare yagize kugira ngo atsindwe urubanza RCA 0086/09/HC/KIG cyangwa mu kurangiza urwo rubanza, ibyabaye byose bikaba byarashingiwe ku byemezo by'inkiko, bitarashingiye ku gikorwa cyangwa ku mabwiriza ya Gatera Jason.

[37] Me Muligande Jean Claude wunganira Nyamaswa Faustin avuga ko uyu atigeze aba mu rubanza rusubirishwamo, ko uwaba yararangije imanza nabi ariwe wakwishyura indishyi zisabwa, ko uwo yunganira ntacyo yaryozwa kuko nta ruhare yagize mu gusenyza inzu ya Nditiribambe Samuel.

UKO URUKIKO RUBIBONA

[38] Nk'uko byasobanuwe haruguru, ibyemejwe mu rubanza RCA 0086/09/HC/KIG ko ikibanza kiburanwa ari icya Nyamaswa Faustin byabaye itegeko. Ibi bisobanuye ko ataryozwa ibyasenywe mu irangiza ry'urwo rubanza kuko nta ruhare yabigizemo ku giti cye. Ibi kandi bisobanuye ko Gatera Jason yagurishije Nditiribambe Samuel ikibanza kitari kikiri icye kuko kubitwara ukundi byaba ari ukuvuguruzwa icyemezo cy'urukiko cyabaye itegeko. Mu ngingo zikurikira, hakaba hariye gusuzumwa niba Gatera Jason yategekwe kubitangira indishyi.

[39] Nta ngingo y'itegeko mu Rwanda isobanura uko bigenda mu gihe umuntu yaguze ikintu n'utari nyiracyo, nyuma akagomba kugisubiza nyiracyo. icyakora ingingo ya 9 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 iyo nta tegeko rijyanye n'ikiburanwa gihari umucamanza ashobora kwifashisha amahame rusange agenga amategeko (*principes généraux du droit*)².

² Iyo ngingo igira iti 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,

[40] Muri urwo rwego, Urukiko rurasanga hari ihame rusange ryakwifashishwa mu gukemura iki kibazo. Iryo hame rivuga ko ugurishije (*vendeur*) yishingira ko uwo agurishije ikintu atagira ikimuhungabanya mu butunzi b'icyaguzwe (*garantie contre l'éviction*). Mu yandi magambo, iyo umuguzi avukijwe uburenganzira bwe ku cyo yaguze, ashobora gusaba uwamugurishije gusubizwa amafaranga y'ikiguzi, umusaruro yategetswe gusubiza, amafaranga yatanze ku kirego, indishyi (*dommages et intérêts*), ndetse n'amafaranga yatanze hakorwa amasezerano. Birumvikana ariko ko uwagurishije atabisabwa iyo umuguzi yari azi ko ashobora kwamburwa icyo yaguze igihe yaguraga. Abahanga mu mategeko basobanura ko inkomoko y'iryo hame ari ubwubahane n'ubunyangamugayo mu masezerano (*obligation de loyauté*)³.

[41] Ku bireba uru rubanza, Urukiko rurasanga Gatera Jason wagurishije Nditiribambe Samuel ikibanza akaba abisabirwa indishyi, nawe ubwe yemera ko Nditiribambe Samuel yaguze ikibanza cyaburanyweho mu rubanza RCA 0086/09/HC/KIG azi ko akiguze na nyiracyo, ibi ubwabyo bikaba byumvikanisha ko yakiguze nta buryarya, atazi ko yacyamburwa. Kuba rero yaracyambuwe n'uwabaye nyiracyo byemejwe n'inkiko, bikaba bimuhesha uburenganzira bwo gusaba indishyi uwamugurishije hashingiwe ku ihame ryavuzwe rivuga ko ugurisha yishingira ko uwo agurishije atagira ikimuhungabanya mu butunzi bw'icyaguzwe, ikibazo akaba ari icyo kumenya ingano yazo, ari nabyo bigiye gusuzumwa mu gice cy'urubanza gikurikira.

umuco, amahame rusange agenga amategeko n'inyandiko z'abahanga mu mategeko.

³François Collart Dutilleul na Philippe Delebecque, Contrats civils et commerciaux, Dalloz, 7ème éd., 2004, n° 246 p.230

C. Kumenya ingano y'indishyi zishingiye ku nzu za Nditiribambe Samuel zashenywe Gatera Jason yategekwa kwishyura

[42] Me Nzabamwita Jean Claude asaba ko hashingiwe ku karengane Nditiribambe Samuel yagiriwe yakwishyurwa agaciro k'inzu ze zasenywe kangana na 3.867.000 Frw nk'uko kagaragazwa n'igenagaciro yashyize muri IECMS, akishyurwa na 1.200.000 Frw yavanaga mu bukode bw'izo nzu zari zifite ibyumba bitanu, bitatu bikodeshwa buri cyumba 25.000 Frw ku kwezi, bibiri bikodeshwa buri cyumba 15.000 Frw ku kwezi.

[43] Ubwo Urukiko rwageraga aho ikiburanwa kiri, rwabajije ababuranyi uko inyubako zasenywe zari ziteye, bemeranya ko inzu imwe yari ifite imiryango itatu, indi ifite imiryango ibiri n'umusarani, ko zari zubakishije rukarakara, inzu imwe isakaje ibati rimwe, indi isakaje amabati abiri.

[44] Ku birebana n'agaciro k'inzu za Nditiribambe Samuel zasenywe, Gatera Jason yavuze ko agereranyije asanga ubu zaba zifite agaciro ka 3.000.000 Frw ariko ko kuri ako gaciro hagombye kvanwamo agaciro k'ibyo yaramuye kangana na 500.000 Frw agereranyije.

[45] Me Katushabe Mary umwunganira yavuze ko amafaranga 3.867.000 Nditiribambe Samuel asaba y'agaciro k'inzu zashenywe akubiyemo ibikoresho yaramuye igihe urubanza rwarangizwaga, birimo amabati, inzugi n'idirishya nk'uko bibaruwe mu igenagaciro yatanze, ko atakagombye gusaba agaciro kabyo, ko ahubwo icyagombye kuba gisabwa ari ubutaka na *main d'oeuvre*.

[46] Nyamaswa Faustin yavuze ko agereranyije asanga inzu za Nditiribambe Samuel zashenywe ubu zaba zifite agaciro ka 3.000.000 Frw ariko ko kuri ako gaciro hagomba kuvianwamo 300.00 Frw y'agaciro k'ibikoresho byaramuwe.

[47] Umutangabuhamya Ngarambe Félix, akaba n'Umunyamabanga Nshingwabikorwa w'Akagari ka Ruhuha, ari nawe warangije urubanza RCA 0086/09/HC/KIG yavuze ko agereranyije asanga inzu zaba ubu zifite agaciro ka 4.500.000 Frw ariko ko kuri ako gaciro hagomba kuvianwamo 500.00 Frw y'agaciro k'ibikoresho byaramuwe.

[48] Umutangabuhamya Gasana Athanase, ari nawe wakiraga amahoro yaturukaga kuri izo nzu, yavuze ko inzu zashenywe yari azizi, ko abona zahabwa agaciro ka 5.000.000 Frw.

[49] Ku birebana n'ibikoresho yaba yararamuye igihe inzu zasenywaga, Nditiribambe Samuel yavuze ko iyo umuntu bamusenye, ibyashenywe nta mumaro bigira.

[50] Ku birebana n'amafaranga y'ubukode Nditiribambe Samuel asaba, Gatera Jason yavuze ko yagaragaza amasezerano yaba yaragiranye byibuze n'umuntu umwe ngo abe yaherwaho hasuzumwa indishyi asaba.

[51] Yavuze kandi ko asanga ibyumba bitatu byabariirwa buri cyumba ku mafaranga 7.000 Frw ku kwezi, ibindi bibiri bikabariirwa buri cyumba ku mafaranga 4.000F ku kwezi, ariko ko amazu yashenywe ibyo byumba byose bitagikodeshwa kuko nta cyashara cyabonekaga, ko iyo biza kuba bigikodeshwa byose Nditiribambe Samuel atari gusaba amafaranga y'ubukode bw'umwaka umwe gusa kuko urubanza rwarangijwe mu mwaka

wa 2010 arega mu mwaka wa 2013, ahubwo yari gukuba n'iyo myaka yose.

[52] Nyamaswa Faustin yavuze ko amafaranga Nditiribambe Samuel asaba ari umurenge, ko we yumvaga bavuga ko icyumba kimwe cyakodeshwaga 10.000 Frw ku kwezi, kandi yabonaga hari igihe habaga hakora umuryango umwe indi idakora.

UKO URUKIKO RUBIBONA

[53] Ababuranyi baremeranywa ku miterere y'inzu zashenywe, ku ngano yazo no ku byumba byari bizigize, ikibazo akaba ari icyo kumenya agaciro izo nzu zaba zifite ubu n'uko ibyumba byari bizigize byakodeshwaga niba byaranakodeshwaga.

[54] Ku birebana n'agaciro k'inzu zashenywe, mu gihe nta genagaciro ryakozwe inzu zitarasenywa, Urukiko rurasanga mu bushishozi bwarwo, hagendewe ku byo ababuranyi bemeranywaho ku miterere yazo, ibyumba byari bizigize, rukurikije kandi aho zari zubatse muri centre y'ubucuruzi, hakwemezwa ko ako gaciro kangana na 3.500.000 Frw.

[55] Ku birebana n'ibikoresho byaba byararamuwe igihe inzu zasenywaga, Urukiko rurasanga usibye Nditiribambe Samuel ubihakana, ababajijwe bese, haba ababuranyi, haba abatangabuhamy, bese bemeza ko byari bihari, hakaba rero hagomba kugenwa agaciro kabyo kakavanwa mu gaciro k'amazu yashenywe.

[56] Mu gihe nta bindi bimenyetso rushobora kwifashisha mu kugena ako gaciro, harebwe ibiciro byatanzwe n'ababuranyi n'abatangabuhamyi kandi hazirikanywe ko ibikoresho bita agaciro iyo byavanwe ku nzu, Urukiko rurasanga, mu bushishozi bwawo ibikoresho byaramuwe byahabwa agaciro ka 150.000 Frw.

[57] Hakurikijwe ibisobanuro byatanzwe mu bika bibanziriza iki, Urukiko rurasanga Gatera Jason agomba guha Nditiribambe Samuel 3.350.000 Frw y'agaciro k'inzu ze zasenywe (3.500.000 Frw-150.000 Frw).

[58] Ku birebana n'indishyi zishingiye ku mafaranga y'ubukode Nditiribambe Samuel yavanaga ku nzu ze zasenywe, Urukiko rurasanga kuba inzu ze zari zigamije ubucuruzi kandi ziri ahantu hakorerwa ubucuruzi byumvikanisha ko hari igihombo yatejwe no kubura amafaranga yavanaga mu bukode bwazo.

[59] Urukiko rurasanga kandi n'ubwo nta masezerano y'ubukode Nditiribambe Samuel yatanze ngo abe yaherwaho hagaragazwa uko buri cyumba cyakodeshwaga, mu bushishozi bwawo, hakurikijwe imiterere yabyo, aho biherereye muri centre y'ubucuruzi, hakwemezwa ko buri cyumba cyakodeshwaga 8.000Frw ku kwezi, bityo igihombo yagize mu gihe cy'umwaka umwe kubera kubura amafaranga y'ubukode yavanaga mu nzu ze zasenywe akaba ari 480.000 Frw (8.000 Frw x 5 x amezi 12), ayo mafaranga nayo Gatera Jason akaba agomba kuyamwishyura

[60] Muri rusange rero Urukiko rukaba rusanga Gatera Jason agomba kwishyura Nditiribambe Samuel 3.830.000 Frw (3.350.000 Frw +480.000Frw).

D. Ku birebana n'amafaranga Nditiribambe Samuel asaba ashingiye ku manza yaburanye

[61] Nzabamwita Jean Claude asaba ko hashingiwe ku karengane Nditiribambe Samuel yagiriwe yakwishyurwa 402.000 Frw yahaye Gatera Jason harangizwa urubanza RC 0196/13/TB/RHHA⁴, 235.000 Frw yamuhaye harangizwa urubanza RCA 0084/14/TGI/GSBO⁵ nk'uko bigaragazwa n'inyandikomvugo y'irangizwa ry'izo manza, na 73.200 Frw yatanze harangizwa urubanza RCA 0086/09/HC/KIG aho yategetswe gukuraho inyubako ku neza bitarenze tariki ya 03/02/2010 kandi ko ibirebana n'ivanwaho ry'iyo nyubako ariwe ugomba kubyishyura, 6.000.000 Frw yishyuye aba Avoka bamuburaniye mu manza 13 yaburanye na Gatera Jason na Nyamaswa Faustin, 1.000.000 Frw yishyuye Avoka umuburanira uru rubanza rusubirishwamo ku mpamvu z'akarengane na 1.000.000 Frw y'ikurikiranarubanza.

[62] Gatera Jason avuga ko amafaranga Nditiribambe Samuel yatanze yose yagiye ayategekwa n'inkiko harangizwa imanza yatsinzwe, ku buryo nta ndishyi akwiye gutegekwa kumwishyura.

[63] Me Katushabe Mary umwunganira avuga ko imanza zose Nditiribambe Samuel avuga ko yaburanye atazisabira indishyi

⁴Ni urubanza rwo ku wa 31/10/2013, Gatera Jason yareze Nditiribambe Samuel asaba indishyi zishingiye ku manza yamushoyemo, Urukiko rukemeza ko Nditiribambe Samuel agomba kumuha 400.000 Frw y'ikurikiranarubanza.

⁵ Ni urubanza rwo ku wa 29/07/2015, rukomoka ku kirego Gatera Jason yareze Nditiribambe Samuel asaba indishyi zishingiye ku rubanza n°RCA 0494/13/HC/KIG rwasubirishagamo ku ngingo nshya urubanza n° RCA 0379/12/HC/KIG, Urukiko rukemeza ko Nditiribambe Samuel agomba kumuha 235.000 Frw y'igihembo cya Avoka n'ikurikiranarubanza.

kuko atari ko zose zashyizwe mu nyandiko isaba gusuzuma akarengane.

UKO URUKIKO RUBIBONA

[64] Muri uru rubanza hasuzumwa niba urubanza RCA 0379/12/HC/KIG Nditiribambe Samuel yasabagamo indishyi zijyanye n'inzu ze zasenywe, igihombo cy'ubukode "igihembo cya Avoka rurimo akarengane. Iyo ariko harebwe ibyo Nditiribambe Samuel asaba, Urukiko rurasanga hakubiyemo ibyo atigeze asaba mu rubanza rusubirishwamo ku mpamvu z'akarengane. Muri byo, harimo amafaranga yahaye Gatera Jason harangizwa imanza zavuzwe, amafaranga yatanze harangizwa urubanza RCA 0086/09/HC/KIG, ndetse n'amafaranga yishyuye aba Avoka bamuburanyie mu manza yaburanye na Gatera Jason na Nyamaswa Faustin zitari mu ruhererekane rw'uru rusubirishwamo ku mpamvu z'akarengane.

[65] Ikibazo kigomba gusobanuka ni icyo kumenya niba ibivugwa mu ngingo ya 63 y'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko ko Urukiko rushyikirijwe urubanza rusabirwa gusubirwamo ku mpamvu z'akarengane, rurusuzuma mu mizi bundi bushya, binemerera umuburanyi kuzana ibirego bishya bitaburanweho mu rubanza rusubirishwamo.

[66] Urukiko rurasanga kuba umuburanyi wumva ko urubanza yaburanye rwabayemo akarengane yarahawe inzira yo kuba yarusubirishamo rukaburanishwa bundi bushya nk'uko byateganywaga mu ngingo ya 81 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, bitavuga ko yakwitwaza iyo

nzira kugira ngo abe yazana ibirego bishya bitari mu murongo w'ibyaregewe urubanza rugishingwa mu rwego rwa mbere cyangwa ingingo zitasuzumwe mu rubanza rusubirishwamo kuko yaba avuye mu mbibi z'urwo rubanza.

[67] Urukiko rurasanga rero, hashingiwe ku bisobanuro bivuzwe mu gika kibanziriza iki, ibirebana n'amafaranga Nditiribambe Samuel yahaye Gatera Jason:

- a. 402.000 Frw harangizwa urubanza n°RC 0196/13/TB/RHHA;
- b. 235.000 Frw yamuhaye harangizwa urubanza n° RCA 0084/14/TGI/GSBO;
- c. 73.200 Frw yatanze harangizwa urubanza n° RCA 0086/09/HC;
- d. Amafaranga yishyuye aba Avoka mu manza zitari mu ruhererekane rw'uru rusubirishwamo ku mpamvu z'akarengane; bitasuzumwa muri uru rubanza kuko bitari mu mbibi zarwo.

[68] Ku birebana n'amafaranga y'ikurikiranarubanza n'igihembo cya Avoka angana na 2.000.000 Frw Nditiribambe Samuel asaba ashingiye kuri uru rubanza rusubirishwamo ku mpamvu z'akarengane, Urukiko rurasanga akwiye kuyahabwa kuko hari ibyo yatakaje akurikirana uru rubanza, akaba atsinze urubanza, kandi rukaba rusanga ayo asaba ari mu rugero harebwe inzego eshatu yaburaniyemo.

E . Ku birebana n'ibyo Nyamaswa Faustin asaba

[69] Nyamaswa Faustin asaba ko Nditiribambe Samuel yategekwa gusubizaho imbibi z'ikibanza (*bornes*) yarimbuye atangira kuburana, agategekwa no gutanga igice cy'ikibanza

yasigaranye cya metero 3 kuri 20 kuko atagitanze ubwo harangizwaga urubanza RCA 0086/09/HC.

[70] Arasaba kandi ko yakwishyurwa ibyo yatakaje aburana, birimo: 200.000 frw y'ingendo, 100.000 Frw y'ifunguro, 200.000 Frw y'igihombo, 500.000 Frw yo kumushora mu manza, 1.000.000 Frw y'indishyi z'akababaro na 500.000 Frw y'igihembo cya Avoka, yose hamwe akaba 2.500.000 Frw.

[71] Abo baburana ntacyo bavuze ku bisabwa na Nyamaswa Faustin, haba ku bijyanye n'imbibi z'ikibanza, haba ku bijyanye n'indishyi, nyamara biri mu mwanzuro w'inyongera yashyize muri IECMS.

UKO URUKIKO RUBIBONA

[72] Urukiko rurasanga ibijyanye no gusubirizwaho imbago bitari mu mbibi z'ikiburanwa muri uru rubanza rusubirishamo urubanza RCA 0379/12/HC/KIG ku mpamvu z'akarengane, bikaba rero bitagomba gusuzumwa.

[73] Urukiko rurasanga ariko Nyamaswa Faustin akwiye kugenerwa amafaranga y'igihembo cya Avoka n'ay'ikurikiranarubanza kuko byabaye ngombwa ko yishyura Avoka wo kumuburanira akagira n'ibyo atakaza akurikirana urubanza yagobokeshejwemo, mu bushishozi bwawo rukaba rumugeneye 800.000 Frw akubiyemo 500.000 frw y'igihembo cya Avoka na 300.000 Frw y'ikurikiranarubanza, akaba agomba kuyishyurwa na Nditiribambe Samuel na Gatera Jason bafatanyije kuko ari bo basabye ko agobokeshwa muri uru rubanza.

[74] Ku bijyanye na 200.000 Frw y'igihombo, 500.000 Frw yo kumushora mu manza na 1.000.000 Frw y'indishyi z'akababaro, Urukiko rurasanga ntayo yagenerwa kuko atayatangiyeye ibisobanuro.

III. ICYEMEZO CY'URUKIKO:

[75] Rwemeje ko ikirego cya Nditiribambe Samuel cyo gusubirishamo ku mpamvu z'akarengane urubanza RCA 0379/12/HC/KIG rwaciwe n' Urukiko Rukuru ku wa 19/07/2013 gifite ishingiro kuri bimwe.

[76] Rwemeje ko urubanza RCA 0379/12/HC/KIG rwaciwe n' Urukiko Rukuru ku wa 19/07/2013 ruhindutse kuri byose;

[77] Rutegetse Gatera Jason guha Nditiribambe Samuel 5.830.000 Frw, akubiyemo:

-3.350.000 Frw y'agaciro k'inzu ze zashenywe;

-480.000 Frw yavanaga mu bukode bw'inzu ze zashenywe;

-2.000.000 Frw y'igihembo cy'Avoka n'ikurikiranarubanza.

[78] Rutegetse Gatera Jason na Nditiribambe Samuel guha Nyamaswa Faustin 800.000 Frw, akubiyemo 500.000 Frw y'igihembo cy'Avoka na 300.000 Frw y'ikurikiranarubanza, buri wese akamuha 400.000 Frw.

IMANZA ZACIWE MU MIZI

URUBANZA RW'UBUTEGETSI

SALIMINI v LETA Y’U RWANDA (MINISITERI Y’UBUZIMA)

[Rwanda URUKIKO RW’IKIRENGA – RADA 0002/16/CS–
(Nyirinkwaya, P.J., Mukandamage na Rugabirwa, J.) 23
Gashyantare 2018]

Amategako agenga imanza z’ubutegetsi – Gutanga igihano ku mukosi wa Leta – Umukosi wa Leta utubahirije ibyo ashinzwe cyangwa udakoze ibyo asabwa – Iyo umukosi wa Leta atubahirije inshingano ze agakora amakosa atari ateganyijwe mu mategeko afatirwa ibihano byo mu rwego rw’akazi hakurikijwe uburemere bw’ikosa bigenwa n’umuyobozi w’urwego umukosi yakoragamo abanje kugezwaho raporo n’akanama gashinzwe gukurikirana amakosa – Iteka rya Perezida N° 65/01 ryo ku wa 04/03/2014 rigena uburyo bwo gutanga ibihano ku bakosi ba Leta bakoze amakosa mu kazi, ingingo ya 15.

Amategako agenga imanza z’ubutegetsi – Ibihano mu rwego rw’akazi – Gushyingura dosiye y’inshinjabyaha – icyemezo gifashwe mu rwego rw’imanza nshinjabyaha ntikibangamira cyangwa ngo gikureho ko umukosi wa Leta atakurikiranwa ngo anafatirwe n’ibihano mu rwego rw’akazi kuko aba ashobora guhanirwa mu rwego rw’akazi ibikorwa yagizweho umweme mu manza nshinjabyaha.

Incamate y’ikibazo: Salimini wari umutekinisiye wa “maintenance” mu bitaro bya Byumba yareze mu Rukiko Rukuru Leta y’u Rwanda (Minisiteri y’ubuzima) avuga ko yamwirukanye mu buryo budakurikije amategako, asaba ko

yasubizwa mu kazi, ikamuhemba ibirarane by'imishahara atahembwe mbere y'uko yirukanwa burundu ku kazi, ikanamuha n'indishyi zinyuranye zirimo iz'uko atahawe icyemezo cy'umurimo.

Leta y'u Rwanda yireguye ivuga ko yirukanye Salimini mu buryo bukurikije amategeko kubera amakosa akomeye yakoreye muri ibyo bitaro ajyanye no guhindura moteri nshyashya na'''*amortisseurs*''' bya moto yakoresheye mu kazi, kugira uburangare bwatumye moteri yacaniraga ibyo bitaro "*groupe électrogène*" ihagarara kandi byashoboraga kugira ingaruka zikomeye kuri serivisi zitangirwa muri ibyo bitaro ndetse no ku barwayi bari barwariye muri ibyo bitaro harimo n'abana bari muri za "*couveuses*".

Urukiko Rukuru nyuma yo kwemeza ko Salimini agomba kwirukanwa burundi ku kazi, rwanemeje ko ikirego cye gifite ishingiro kuri bimwe kuko atahawe icyemezo cy'umurimo no ku mafaranga y'ikurikiranarubanza n'igihembo cy'Avoka, bituma rutegeka Leta y'u Rwanda kumuha amafaranga y'indishyi zijyanye nabyo.

Salimini yajuririye Urukiko rw'Ikirenga avuga ko Urukiko Rukuru rwemeje ko agomba kwirukanwa burundu ku kazi, rwirengagije ko yirukanwe mu buryo bunyuranyije n'amategeko kubera ko atakoze amakosa yaregwaga, kandi ko yirukanwe atabanje kuyisobanuraho, ndetse ko yaba yarahawe igihano kinyuraniye n'amategeko kandi dosiye yari yarezwe mu bugenzacyaha yari yarashyinguwe.

Leta y'u Rwanda yireguye ivuga ko kuba Urukiko Rukuru rwemeje ko Urega atasubizwa mu kazi ari uko rwasanze yarakoze amakosa yaregwaga yashoboraga kugira ingaruka kuri serivisi zatangirwaga mu bitaro no barwayi bari babirwarimo.

Ku kibazo kijyanye no kwisobanura, Leta y'u Rwanda yireguye ivuga ko Uwajuriye atirukanwe ku kazi mu buryo bunyuranyije n'amategeko kubera yahawe uburenganzira bwe bwo kwisobanura ku makosa akomeye yakoze yavuzwe haruguru.

Ku ngingo ijyanye no kwirukanwa mu buryo bunyuranyije n'amategeko no guhabwa ibihano binyuranyije nayo, Leta y'u Rwanda yabyisobanuyeho ivuga ko Urukiko Rukuru rwasanze Uwajuriye akwiye kwirukanwa burundu ku kazi kubera uburemere bw'amakosa akomeye yakoze ajyanye n'imicungire mibi y'ibikoresho bya Leta yari ashinzwe kurinda, kandi ayo makosa yashoboraga guteza ingaruka zikomeye ku buryo atareberwa gusa ku gaciro k'amafaranga y'igikoresho cyangijwe.

Leta y'u Rwanda yatanze ubujurire bwuririye kubwa Salimini isaba guhabwa indishyi z'ikurikiranarubanza zingana na 5.000.000 frw. Salimini yireguye avuga ko ntazo yatanga kuko Leta itigeze ijuririra ibyo yatsindiwe ku rwego rwa mbere.

Incamate y'icyemezo: 1. Umukozi wa Leta utubahirije inshingano ze agakora amakosa atari ateganyijwe mu mategeko afatirwa ibihano byo mu rwego rw'akazi hakurikijwe uburemere bw'ikosa bigenwa n'umuyobozi w'urwego umukozi yakoragamo abanje kugezwaho raporo n'akanama gashinzwe gukurikirana amakosa. Bityo, Salimini akaba yarakoze amakosa akomeye yaregwaga ajyanye n'imicungire mibi y'ibikoresho bya Leta byari mu nshingano ze.

2. Kuba ubushinjacyaha bushyinguye dosiye bwari bukurikiranyeho umukozi mu rwego rw'inshinjabyaha ntibikuraho kuba yakurikiranwa ngo afatirwe ibihano mu rwego rw'akazi. Bityo, Salimini yirukanwe burundu mu kazi mu buryo bukurikije amategeko kubera amakosa akomeye yakoze, n'ubwo yayagizweho umwere mu rwego rw'inshinjabyaha.

**Ubujurire nta shingiro bufite;
Ubujurire bwuririye ku bundi bufite ishingiro;
Amagarama ahwanye n'ibyakozwe mu rubanza.**

Amategeko yashingiweho:

Itegeko N° 86/2013 ryo ku wa 11/09/2013 rishyiraho Sitati rusange igenga abakozi ba Leta (ryakoreshwaga icyo gihe), ingingo ya 76, 77 na 79.

Itegeko ryo kuwa 30/07/1888, rigenga amasezerano cyangwa imirimo nshinganwa (ryakoreshwaga icyo gihe), ingingo ya 258.

Iteka rya Perezida N° 65/01 ryo ku wa 04/03/2014 rigenga uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi, ingingo ya 5 n'iya 15.

Inyandiko z'abahanga zifashishijwe:

Jean Rivero, « Droit Administratif », Dalloz, 2011, p. 374.

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko Rukuru, Salimini Saidi wari umutekinisiye wa “Maintenance” mu bitaro bya Byumba arega Leta y'u Rwanda (Minisiteri y'Ubuzima), asaba ko yamusubiza ku kazi kubera ko yamwirukanye mu buryo bunyuranije n'amategeko, ikamuhemba ibirarane by'imishahara atahembwe mbere y'uko yirukanwa burundu ku kazi, ikanamuha n'indishyi zinyuranye.

[2] Mu myiregurire ye, uburanira Leta y'u Rwanda (Minisiteri y'Ubuzima) avuga ko itirukanye Salimini Saidi mu buryo bunyuranije n'amategeko, ko ahubwo yamwirukanye

kubera amakosa akomeye yakoreye muri ibyo bitaro arimo kuba Moto Yamaha AG 100 (GPM) 319 B yakoresheye mu kazi ke yahinduriwe moteri nshashya yari ifite ishyirwamo ishaje, kandi ko yanahinduriwe za “*amortisseurs*” zayo, no kuba yaragize uburangare bwatumye moteri icanira ibyo bitaro “*groupe électrogène*” ihagarara kandi ko byashoboraga kugira ingaruka zikomeye ku barwayi bari barwariye muri ibyo bitaro harimo n’abana bari muri za “*couveuses*”.

[3] Urwo rukiko rwaciye urubanza RAD 0003/15/HC/KIG ku wa 30/11/2015, rwemeza ko ikirego cya Salimini Saidi gifite ishingiye kuri bimwe bijyanjye n’uko atahawe icyemezo cy’umurimo no ku mafaranga y’ikurikiranarubanza n’igihembo cy’Avoka, rutegeka Leta y’u Rwanda (Minisiteri y’Ubuzima) kumuha 460.000 Frw (ariko rwasobanuye ko agomba guhabwa 462.000 Frw) y’indishyi z’uko atahawe icyemezo cy’umurimo na 500.000 Frw y’ikurikiranarubanza n’igihembo cy’Avoka.

[4] Salimini Saidi yajuririye urwo rubanza mu Rukiko rw’Ikirenga avuga ko Urukiko Rukuru rwemeje ko agomba kwirukanwa burundu ku kazi, rwirengagije ko yirukanwe mu buryo bunyuranyije n’amategeko kubera ko atakoze amakosa yaregwaga, kandi ko yirukanwe atabanje kuyisobanuraho, ndetse ko yaba yarahawe igihano kinyuraniye n’amategeko mu gihe rwasanga yarakoze ayo makosa.

[5] Urubanza rwaburanishijwe mu ruhamwe ku wa 16/01/2018, Salimini Saidi yunganiwe na Me Nsengiyumva Enos, naho Leta y’u Rwanda (Minisiteri y’Ubuzima) ihagarariwe na Me Rubango Epimaque.

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO

**Kumenya niba Salimini Saidi yarirukanwe ku kazi mu
buryo bunyuranyije n'amategeko**

- 1. Kumenya niba Salimini Saidi yarirukanwe ku kazi
mu buryo bunyuranyije n'amategeko kubera ko
atakoze amakosa y'akazi.**

[6] Salimini Saidi n'umwunganira bavuga ko yirukanwe ku kazi mu buryo bunyuranyije n'amategeko kubera ko yirukanwe burundu ku kazi kandi atarakoze amakosa yaregwaga ajyanye no kwangiza moto Yamaha AG 100 (GPM 319 B) yakoresheye mu kazi ke kuko yangijwe na Biraguma, igihe yayimuhaga kugira ngo ayikorere “*entretien*”. Bavuga kandi ko atangije “*groupes électrogènes*” z'ibitaro bya Byumba, ko ahubwo bishoboka ko hari umukozi wa *Garage Tropical* washyize “*code*” muri “*groupe électrogène*” imwe y'ibyo bitaro kugira ngo azibonere amafaranga ya “*main d'oeuvre*” kuko ikimenyetso kigaragaza ko atakoze ayo makosa, ari uko yayagizweho umwera na Polisi ikorera kuri “*Station*” ya Byumba kuko yashyinyuye burundu dosiye ye.

[7] Bavuga na none ko Urukiko Rukuru rwemeje ko Salimini Saidi akwiye kwirukanwa burundu ngo kuko amakosa akomeye yakoze yateje ingaruka zikomeye ku barwayi bari barwariye mu bitaro bya Byumba, no ku bana bari muri za “*couveuses*”, rwirengagije ko nta kimenyetso kigaragaza ko izo ngaruka zabayeho koko. Basaba ko Leta y'u Rwanda (Minisiteri y'Ubuzima) ikwiye kumusubiza ku kazi, bitashoboka kubera ko umwanya yakoragamo utagihari, ikamuha 12.000.000 Frw

y'indishyi z'uko yamwirukanye mu buryo bunyuranyije n'amategeko.

[8] Uburanira Leta y'u Rwanda (Minisiteri y'Ubuzima) avuga ko Salimini Saidi atirukanwe ku kazi mu buryo bunyuranyije n'amategeko kubera ko Urukiko Rukuru rwasanze yarakoze amakosa akomeye yo guhindura moteri na “*amortisseurs*” bya moto yari ashinzwe kurinda, no kuba yaragize uburangare bwatumye moteri icanira ibitaro bya Byumba ihagarara ku buryo byashoboraga kugira ingaruka ku barwayi bari barwariye muri ibyo bitaro barimo ababagwaga n'abababwaga umwuka, ndetse n'abana bari muri za “*couveuses*”, bityo ko atasubizwa mu kazi cyangwa ngo ahabwe indishyi asaba zavuzwe haruguru.

UKO URUKIKO RUBIBONA

[9] Ingingo ya 77 y'Itegeko N° 86/2013 ryo ku wa 11/09/2013 rishyiraho Sitati rusange igenga abakozi ba Leta, iteganya ko “Igihe umukozi wa Leta adakoze ibyo ashinzwe cyangwa atubahirije ibyo asabwa biba ikosa rihanishwa kimwe mu bihano biteganyijwe mu ngingo ya 76 y'iri tegeko hakurikijwe uburemere bw'iryo kosa”. Naho ingingo ya 15 y'Iteka rya Perezida N° 65/01 ryo ku wa 04/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi, iteganya ko iyo umukozi akoze igikorwa cyangwa agize imyitwarire binyuranyije n'inshingano ze z'akazi bikabyara ikosa ridateganyijwe muri iri teka, umuyobozi w'urwego akorera ashingiye ku myanzuro y'Akanama gashinzwe gukurikirana amakosa, akena uburemere bw'icyabyaye ikosa n'ubwoko bw'igihano bikwiranye mu bihano biteganyijwe n'iri teka.

[10] Dosiye y'urubanza igaragaza ko Umuyobozi Mukuru w'ibitaro bya Byumba yandikiye Salimini Saidi, “*Technicien*” wa “*Maintenance*” wakoreraga muri ibyo bitaro, ibaruwa numero 20/02.1/OPH BY/2009 yo ku wa 27/12/2013, amusaba gutanga ibisobanuro ku makosa yakoze ajyanye n’uko moto GPM 319 B yatwaraga ikanamufasha kuzuza inshingano ze yahinduriwe moteri na “*amortisseurs*” byayo ku buryo moteri yayo nshya yasimbujwe ishaje, Salimini Saidi yamwandikiye ibaruwa yo ku wa 08/01/2014, amumenyesha ko atariwe wahinduye moteri na “*amortisseurs*” by’iyo moto, ko ahubwo byahinduwe na Biraguma, igihe yayimuhaga kugira ngo ayikorere “*entretien*” kubera ko Kevin wari usanzwe uyikorera “*entretien*” atari ahari. Ku bijyanye na “*groupe électrogène*”, avuga ko atariwe wayishyizemo “*code*” yatumaga itaka, ko ahubwo akeka ko yaba yarashyizwemo n’umukozi wa *Garaje Tropical* wazikoreraga “*entretien*” kugira ngo azibonere amafaranga ya “*main d’oeuvre*”.

[11] Nk’uko raporo ya Garaje Tropical yo ku wa 17/02/2014 ibigaragaza, “*Générateur*” ya mbere y’ibitaro bya Byumba yitwa SDM yibweho “*chargeur automatique*” yayo inangirika “*Solnoïde*” na “*démarrreur*” byayo, naho iya kabiri yitwa PRAMAC 65 KVA yashyizwemo “*code*” yayibuzaga kwaka no gutanga umuriro, kandi ko “*chargeur automatique*” yayo yahiye, nyamara ari Salimini Saidi wari ufite urufunguzo rw’ahantu zari ziri.

[12] Dosiye igaragaza kandi ko Umuyobozi Mukuru w’ibyo bitaro, ashingiye kuri raporo yo ku wa 17/02/2014 imaze kuvugwa haruguru, no ku mabaruwa menshi Salimini Saidi yagiye yandikirwa mu kazi ke yamumenyeshaga amakosa atandukanye yakoze, ariko ntiyikosore, yamuhagaritse

by'agateganyo ku kazi guhera ku wa 17/02/2014 kubera amakosa yakoze yatumye moto na “*Générateurs*” ebyiri z’ibyo bitaro zibwaho moteri n’ibindi byuma bigateza ingaruka mbi kuri ibyo bitaro kuko bitashoboraga gutanga serivisi nziza ku bakiriya babyo nk’uko bivugwa mu ibaruwa nimeru 20/87/OPH BY/2014 yo ku wa 17/02/2014.

[13] Raporo yo ku wa 02/05/2014 yakozwe n’itsinda rigizwe n’abakozi ba Minisiteri y’Ubuzima na Minisiteri y’Abakozi ba Leta n’Umurimo igaragaza na none ko Salimini Saidi akwiye kuryozwa amakosa akomeye yakoze yo kwangiza ibikoresho by’ibitaro bya Byumba yari ashinzwe kurinda kubera ko Moto Yamaha AG 100 (GPM 319 B) yahinduriwe moteri nk’uko bigaragazwa na nimeru za “chassis” zayo, kandi ariwe wari ushinzwe icyo kinyabiziga, ndetse ko “*Generateur*” yamurikiraga ibyo bitaro yananiwe gutanga ingufu z’amashanyarazi mu buryo bwa “automatisme” inahindurirwa “ceronoïde” yayo, kandi ari Salimini Saidi wabikaga imfunguzo zayo, maze iryo tsinda risaba ko yahanishwa igihano cyo guhagarikwa amezi atatu (3) adahemberwa kubera ayo makosa yakoze yo kutuzuzura inshingano ze no gufata nabi ibikoresho bya Leta.

[14] Muri dosiye hari raporo yo ku wa 17/06/2014 yatanze n’abagize Komite ya Discipline y’ibitaro bya Byumba, ishimangira na none ko Salimini Saidi akwiye guhagarikwa burundu ku kazi kubera ko amakosa akomeye yakoze yo kwangiza ku bushake Moto Yamaha AG 100 (GPM 319 B) n’imashini zitanga umuriro w’amashanyarazi z’ibitaro bya Byumba nk’uko bigaragazwa na raporo y’abatekinisiye ba *Garaje Tropical* yavuzwe haruguru, ku buryo ayo makosa yashoboraga gushyira ubuzima bw’abarwayi mu kaga

nk'ababaga bari ku iseta, abari mu byuma nk'ama “*Cuveuses*”, abahabwaga umwuka, bikanahesha ibitaro bya Byumba isura mbi, no kuba Salimini Saidi yaragiye yandikirwa amabaruwa menshi agaragarizwa amakosa y'imikorere mibi yakoraga mu kazi ke, ariko ntiyikosore.

[15] Ashingiye ku mabaruwa n'amaraporo atandukanye yavuzwe haruguru, Minisitiri w'Ubuzima yandikiye Salimini Saidi ibaruwa yo ku wa 03/07/2014, amumenyesha ko yirukanwe burundu ku kazi kubera amakosa akomeye yakoze yavuzwe haruguru.

[16] Urukiko rurasanga, amabaruwa n'amaraporo amaze kuvugwa haruguru agaragaza ko Salimini Saidi yakoze amakosa akomeye yaregwaga ajyanye n'imicungire mibi y'ibikoresho bya Leta byari mu nshingano ze kubera ko Moto Yamaha AG 100 (GPM 319 B) y'ibitaro bya Byumba yibweho moteri na “*amortisseurs*” zayo, kandi ko “*groupe électrogène*” ya mbere y'ibyo bitaro yibweho “*chargeur automatique*” yayo, inangirika “*Solnoïde*” na “*démarrreur*” byayo, naho iya kabiri ishyirwamo “*code*” ku buryo itashoboraga kwaka no gutanga umuriro w'amashanyarazi muri ibyo bitaro, kandi ariwe wari ushinze ibyo bikoresho kubera ko ariwe wakoreshaga iyo moto mu kazi ke ka buri munsu akanabika urufunguzo rw'aho “*groupes électrogènes*” zabaga nk'uko bivugwa muri raporo yo ku wa 17/02/2014 yatanze n'abatekinisiye ba *Garaje Tropical* yavuzwe haruguru.

[17] Ku bijyanye n'imvugo ya Salimini Saidi y'uko atahamwa n'amakosa y'akazi mu gihe yagizwe umwera ku cyaha cyo kwangiza moto na “*Générateurs*” yari akurikiranyweho kubera ko dosiye ye yashyinguwe burundu “*classement sans suite*” n'Ubugenzacyaha bukorera kuri Station ya Polisi iri i Byumba,

ingingo ya 78 y'Itegeko N° 86/2013 ryo ku wa 11/09/2013 rishyiraho sitati rusange igenga Abakozi ba Leta, iteganya ko igihano cy'umukozi wa Leta mu rwego rw'akazi ntikibangamira uburyozwe bw'icyaha n'igihano giteganywa n'amategeko ahana, ku buryo ikosa ry'umukozi wa Leta rishobora gukurikiranwa mu kazi no mu nkiko.

[18] Na none umuhanga mu mategeko witwa Jean Rivero, mu gitabo cye yise “*Droit Administratif*”, asobanura ko igikorwa kimwe gishobora gutuma umukozi akurikiranwaho icyarimwe ikosa mu rwego rw'akazi n'icyaha mu rwego rw'imanza nshinjabyaha, kandi ko icyemezo gifashwe mu rwego rw'imanza nshinjabyaha kitabangamira icyemezo gishobora gufatwa mu rwego rw'akazi, keretse ku birebana n'ibikorwa umucamanza uburanisha imanza nshinjabyaha yemeje ko byabaye cyangwa bitabaye mu buryo bwabaye ndakuka, ariko ko umukozi ashobora guhanirwa mu rwego rw'akazi ibikorwa yagizweho umwere mu manza nshinjabyaha¹.

[19] Hashingiwe ku biteganywa n'ingingo ya 78 y'Itegeko ryavuzwe haruguru no ku bisobanuro by'umuhanga bimaze kuvugwa haruguru, Urukiko rurasanga ntacyabuzaga ko Salimini Saidi akurikiranwa ngo anafatirwe ibihano mu rwego rw'akazi kabone n'ubwo atakurikiranwe mu rwego rw'imanza

¹ « (...) lorsqu'un même fait constitue, à la fois, une faute disciplinaire et une faute pénale, les deux formes de répression peuvent s'exercer parallèlement; si la décision pénale intervient la première, elle est sans conséquence sur la décision disciplinaire, sous une seule réserve: les constatations de fait du pénal juge, en vertu de l'autorité de la chose jugée, lient l'autorité disciplinaire; mais elle peut déclarer disciplinairement punissables les faits qui, au pénal, ont entraîné l'acquiescement, et inversement. C'est ce que l'on exprime en parlant de l'autonomie de la répression disciplinaire », par Jean Rivero, « *Droit Administratif* », Dalloz, 2011, p.374.

nshinjabyaha nk'uko abivuga, bityo ibyo Salimini Saidi aburanisha by'uko yirukanwe mu buryo bunyuranyije n'amategeko kubera ko nta makosa yakoze nta shingiro bifite.

2. Kumenya niba Salimini Saidi yarirukanwe ku kazi mu buryo bunyuranyije n'amategeko kubera ko atabanje kwisobanura ku makosa yaregwaga

[20] Salimini Saidi n'umwunganira bavuga ko Urukiko Rukuru rwemeje ko akwiye kwirukanwa burundu ku kazi, rwirengagije ko yirukanwe mu buryo bunyuranyije n'amategeko kubera ko yirukanwe atabanje kwisobanura ko makosa yaregwaga ajyanye no kwangiza moto na za “*groupes électrogènes*” z'ibitaro bya Byumba.

[21] Uburanira Leta y'u Rwanda (Minisiteri y'Ubuzima) avuga ko Salimini Saidi atirukanwe ku kazi mu buryo bunyuranyije n'amategeko kubera ko yisobanuye ku makosa akomeye yakoze yavuzwe haruguru.

UKO URUKIKO RUBIBONA

[22] Ingingo ya 79 y'Itegeko N° 86/2013 ryo kuwa 11/09/2013 rishyiraho Sitati rusange igenga abakozi ba Leta, iteganya ko nta kosa na rimwe umukozi wa Leta ashobora guhanirwa atabanje guhabwa umwanya wo kwisobanura mu nyandiko.

[23] Nk'uko byasobanuwe haruguru, nyuma y'uko Umuyobozi Mukuru w'ibitaro bya Byumba yandikiye Salimini Saidi ibaruwa nimeru 20/116/HOPBYABA 2014 yo ku wa 27/12/2013, amusaba kwisobanura ku makosa akomeye yakoze yavuzwe haruguru ajyanye n'uko Moto Yamaha AG 100 (GPM 319 B) y'ibyo bitaro yahinduriwe moteri na “amortisseurs”

byayo, kandi ariwe wari ushinzwe kuyirinda, Salimini Saidi yamwandikiye ibaruwa yo ku wa 08/01/2014, amumenyesha ko atakoze ayo makosa, ko ahubwo yakozwe na Biraguma, ubwo yamuhaga iyo moto kugira ngo ayikorere “*entretien*” kubera ko Kevin wari usanzwe uyikorera “*entretien*” atari ahari.

[24] Amaze kubona iyo baruwa, Umuyobozi Mukuru w’ibitaro bya Byumba yandikiye Salimini Saidi ibaruwa yo ku wa 17/02/2014, amumenyesha ko amuhagaritse ku kazi by’agateganyo kubera ko yakoze amakosa akomeye yavuzwe haruguru, bituma Salimini Saidi yandikira Umuyobozi w’Inama y’Ubutegetsi w’ibitaro bya Byumba ibaruwa yo ku wa 24/02/2014, amusaba kumurenganura, anamusobanurira ko Umuyobozi we atagombaga kumuhagarika ku kazi by’agateganyo, kandi nta ruhare yagize mu kwangiza moteri na “*amortisseurs*” bya Moto Yamaha AG 100 (GPM 319 B) kuko byahinduwe na Biraguma, kandi ko atangije “*groupes électrogènes*” z’ibyo bitaro kubera ko ku wa 14/02/2014, atari afite urufunguzo rw’umuryango winjira aho ziri, ko ahubwo rwari rufitwe na mugenzi we witwa Serge.

[25] Dosiye igaragaza na none ko nyuma y’aho, abagize itsinda ryari rigizwe n’abakozi ba Minisiteri y’Ubuzima na Minisiteri y’Abakozi ba Leta n’Umurimo batanze raporo yo ku wa 17/06/2014, aho basobanuye ko batanyuzwe n’ibisobanuro bahawe na Salimini Saidi kubera ko yikuragaho uburyozwe bw’amakosa yaregwaga yatumye “*Generateur*” na Moto bihindurirwa ibyuma “*pieces*” kandi ariwe wari ushinzwe kubirinda, ahubwo akayashyira kuri bagenzi be barimo “*Charroi*” w’ibyo bitaro na Serge, maze Minisitiri w’Ubuzima, ashingiye ku ma raporo atandukanye yavuzwe haruguru, yandikiye Salimini Saidi ibaruwa yo ku wa 03/07/2014,

amumenyesha ko yirukanwe burundu ku kazi guhera ku wa 17/02/2014, igihe yahagarikwaga by'agateganyo ku kazi, kubera amakosa akomeye yakoze yo kwangiza ibyo bikoresho bya Leta yari ashinzwe kurinda, no ku yandi makosa y'imikorere mibi yagiye agaragarizwa mu kazi ke, ariko ntiyikosore.

[26] Urukiko rurasanga, amabaruwa n'amaraporo yavuzwe haruguru agaragaza ko mbere y'uko Salimini Saidi yirukanwa burundu ku kazi na Minisitiri w'Ubuzima ku wa 03/07/2014, yari yabanje kwisobanura ku birebana n'amakosa yaregwaga yavuzwe haruguru imbere y'Umuyobozi we n'imbere y'Umuyobozi w'Inama y'Ubutegetsi w'ibitaro bya Byumba, ndetse n'imbere y'abagize itsinda ryari rigizwe n'abakozi ba Minisiteri y'Ubuzima na Minisiteri y'Abakozi ba Leta n'Umurimo nk'uko byasobanuwe haruguru, bityo imvugo ye y'uko yirukanwe mu buryo bunyuranyije n'amategeko kubera ko atisobanuye ku makosa yaregwaga nta shingiro ifite.

3. Kumenya niba Salimini Saidi yarirukanwe ku kazi mu buryo bunyuranyije n'amategeko kubera ko yahawe ibihano binyuranyije n'amategeko

[27] Salimini Saidi n'umwunganira bavuga ko yirukanwe mu buryo bunyuranyije n'amategeko kubera ko yahawe igihano kidakwiranye n'uburemere bw'amakosa yaregwaga, kuko iyo Urukiko Rukuru rugaragarizwa ibimenyetso by'uko yangije moto ifite agaciro kari hejuru ya 1.000.000 Frw, ariko katarengeje 1.500.000 Frw, yari guhanishwa igihano cyo gukererezwa kuzamurwa mu ntera giteganywa n'ingingo ya 12 y'Iteka rya Perezida N° 65/01 ryo ku wa 04/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi, cyangwa yari guhagarikwa ku kazi mu gihe kitarenze amezi atatu (3) adahemberwa giteganywa n'ingingo ya 13 y'Iryo Teka rya

Perezida, aho guhabwa igihano cyo kwirukanwa burundu ku kazi kuko kidakwiranye n'uburemere bw'amakosa ashobora kuba yarakoze yavuzwe haruguru.

[28] Uburanira Leta y'u Rwanda (Minisiteri y'Ubuzima) avuga ko Salimini Saidi atirukanwe ku kazi mu buryo bunyuranyije n'amategeko kubera ko Urukiko Rukuru rwashingiye ku ngingo ya 5 y'Iteka rya Perezida ryavuzwe haruguru, iteganya uburyo bwo gupima uburemere bw'ikosa, rusanga akwiye kwirukanwa burundu ku kazi kubera uburemere bw'amakosa akomeye yakoze ajyanye n'imicungire mibi y'ibikoresho bya Leta yari ashinzwe kurinda, kandi ayo makosa yashoboraga guteza ingaruka zikomeye ku buryo atareberwa gusa ku gaciro k'amafaranga y'igikoresho cyangijwe nk'uko n'Urukiko Rukuru rwabisobanuye mu gace ka 8 k'urubanza rwajuririwe muri uru rukiko.

UKO URUKIKO RUBIBONA

[29] Ingingo ya 5 y'Iteka rya Perezida N° 65/01 ryo ku wa 04/03/2014 rigena uburyo bwo gutanga ibihano ku bakozi ba Leta bakoze amakosa mu kazi, iteganya ko uburemere bw'ikosa ryo mu kazi bupimwa hitawe ku buryo ryabayemo n'ingaruka zaryo. Naho ingingo ya 15 y'iryo Teka rya Perezida, igateganya ko iyo umukozi akoze igikorwa cyangwa agize imyitwarire binyuranyije n'inshingano ze z'akazi bikabyara ikosa ridateganyijwe muri iri teka, umuyobozi w'urwego akorera ashingiye ku myanzuro y'Akanama gashinzwe gukurikirana amakosa, akena uburemere bw'icyabyaye ikosa n'ubwoko bw'igihano bikwiranye mu bihano biteganyijwe n'iri teka.

[30] Ku byerekeranye n'igihano Salimini Saidi agomba guhabwa, hashingiwe ku ngingo ya 5 na 15 z'Iteka rya Perezida ryavuzwe haruguru, Urukiko rurasanga, kuba Salimini Saidi yarakoze ikosa ry'imicungire mibi y'ibikoresho bya Leta nk'uko byasobanuwe haruguru, kandi iryo kosa rikaba ryaratumye “*groupes électrogènes*” ebyiri zangirika kubera ko zibweho ibyuma (ama pièces) zinashyirwamo “*code*” bituma zidashoboraga kwaka no gutanga umuriro w'amashanyarazi muri ibyo bitaro ku buryo byashoboraga guteza ingaruka zikomeye zirimo gutakaza ubuzima kw'abarwayi babagwaga, abahabwaga umwuka, n'abana bari muri za “*Couveuses*”, kandi ayo makosa akaba yaranatumye ibyo bitaro bigira isura mbi kuko bitashoboraga gutanga serivisi zinogeye abakiriya babyo nk'uko bivugwa muri raporo ya Komisiyo ya “*Discipline*” yo ku wa 04/06/2014 yavuzwe haruguru, bigaragara ko imvugo ye y'uko yirukanwe mu buryo bunyuranyije n'amategeko kubera ko yahawe igihano cyo kwirukanwa burundu ku kazi kinyuranyije n'amategeko nta shingiro ifite, bityo akaba atasubizwa mu kazi ngo anahabwe indishyi z'akababaro asaba zijyanye n'uko yirukanwe mu buryo bunyuranyije n'amategeko, kandi akaba atari ngombwa gusuzuma ibibazo bijyanye n'uko yahabwa ibirarane by'imishahara atahembwe igihe yari yarahagaritswe ku kazi by'agateganyo n'igihe cy'amezi 16 amaze yarirukanwe burundu ku kazi, ndetse n'imperekeza.

4. Kumenya niba Salimini Saidi yahabwa indishyi zihwanye n'umushahara we w'amezi 6 kubera ko atahawe icyemezo cy'umurimo

[31] Salimini Saidi n'umwunganira bavuga ko Leta y'u Rwanda (Minisiteri y'Ubuzima) ikwiye kumuha indishyi z'uko atahawe icyemezo cy'umurimo zihwanye n'umushahara we w'amezi 6, ni ukuvuga $154.000 \text{ Frw} \times \text{amezi } 6 = 924.000 \text{ Frw}$,

aho kuba izihwanye n'umushahara we w'amezi 3, zingana na 462.000 Frw yagenewe n'Urukiko Rukuru.

[32] Uburanira Leta y'u Rwanda (Minisiteri y'Ubuzima) avuga ko Salimini Saidi atahabwa 924.000 Frw ahwanye n'umushahara we w'amezi 6 kuko ntacyo anenga urubanza rwaciwe n'Urukiko Rukuru rwamugeneye indishyi zingana na 462.000 Frw zihwanye n'umushahara we w'amezi atatu (3) z'uko atahawe icyemezo cy'umurimo.

UKO URUKIKO RUBIBONA

[33] Kopi y'urubanza RAD 0003/15/HC/KIG rwajuririwe muri uru rukiko, igaragaza ko Urukiko Rukuru rwageneye mu bushishozi bwawo, Salimini Saidi 460.000 Frw (ariko rwasobanuye ko agomba guhabwa 462.000 Frw = 154.000 Frw x 3) y'indishyi ahwanye n'umushahara we w'amezi atatu (3) z'uko Leta y'u Rwanda (Minisiteri y'Ubuzima) itamuhaye icyemezo cy'umurimo igihe yamwirukanaga burundu ku kazi.

[34] Urukiko rurasanga izo ndishyi Salimini Saidi yagenewe n'Urukiko Rukuru mu bushishozi bwawo z'uko atahawe icyemezo cy'umurimo ziri mu rugero rukwiye, bityo akaba atahabwa indishyi zihwanye n'umushahara we w'amezi 6 asaba kuko atagaragaza aho azishingira mu rwego rw'amategeko.

5. Kumenya niba Salimini Saidi yahabwa amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka

[35] Salimini Saidi n'umwunganira bavuga ko Leta y'u Rwanda (Minisiteri y'Ubuzima) ikwiye kumuha 800.000 Frw y'ikurikiranarubanza yo kuva ku rwego rwa mbere kugera muri

uru rukiko na 1.500.000 Frw y'igihembo cy'Avoka yakoresheje mu nkiko zose yaburaniyemo, yose hamwe akaba 2.300.000 Frw.

[36] Uburanira Leta y'u Rwanda (Minisiteri y'Ubuzima) avuga ko itaha Salimini Saidi ayo mafaranga kuko yakoze amakosa akomeye yavuzwe haruguru, arangije, yishora mu manza nta mpamvu.

UKO URUKIKO RUBIBONA

[37] Urukiko rurasanga Salimini Saidi atahabwa amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka asaba kubera ko ubujurire bwe nta shingiro bufite.

6. Kumenya niba ubujurire bwa Leta y'u Rwanda (Minisiteri y'Ubuzima) bwuririye ku bundi bufite ishingiro

[38] Uburanira Leta y'u Rwanda (Minisiteri y'Ubuzima) avuga ko atanze ubujurire bwuririye ku bundi asaba ko Salimini Saidi ayiha 5.000.000 Frw y'indishyi z'ikurikiranarubanza.

[39] Salimini Saidi n'umwunganira bavuga ko ataha Leta y'u Rwanda (Minisiteri y'Ubuzima) izo ndishyi kubera ko itajuririye ibyo yatsindiwe ku rwego rwa mbere.

UKO URUKIKO RUBIBONA

[40] Ingingo ya 258 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano, iteganya ko igikorwa cyose cy'umuntu cyangirije undi gitegeka nyirugukora ikosa rigikomokaho kuriha ibyangiritse.

[41] Hashingiwe kuri iyo ngingo, Urukiko rurasanga Salimini Saidi akwiye guha Leta y'u Rwanda (Minisiteri y'Ubuzima) 800.000 Frw y'ikurikiranarubanza agenwe n'urukiko mu bushishozi bwawo kuko hari ibyo yatakaje bitari ngombwa ikurikirana ubu bujuri inabuburana kandi byagaragaye ko ubujuri bwe nta shingiro bufite.

[42] Ku bijyanye no guhwanya imyenda, hakurikijwe ibisobanuro byavuzwe haruguru, Urukiko rurasanga Leta y'u Rwanda (Minisiteri y'Ubuzima) igomba guha Salimini Saidi 462.000 Frw y'indishyi z'uko itamuhaye icyemezo cy'umurimo na 500.000 Frw y'ikurikiranarubanza n'igihembo cy'Avoka yagenewe ku rwego rwa mbere, yose hamwe akaba 962.000 Frw, naho Salimini Saidi akayihaga 800.000 Frw y'ikurikiranarubanza. Hakozwe ihwanya ry'iyi myenda yombi, Urukiko rusanga Leta y'u Rwanda (Minisiteri y'Ubuzima) igomba guha Salimini Saidi ikinyuranyo cy'iyi myenda yombi, ni ukuvuga 962.000 Frw - 800.000 Frw = 162.000 Frw.

III. ICYEMEZO CY'URUKIKO

[43] Rwemeje ko ubujuri bwa Salimini Saidi nta shingiro bufite;

[44] Rwemeje ko ubujuri bwuririye ku bundi bwatanzwe na Leta y'u Rwanda (Minisiteri y'Ubuzima) bufite ishingiro;

[45] Rutegetse Leta y'u Rwanda (Minisiteri y'Ubuzima) guha Salimini Saidi 162.000Frw nyuma yo guhwanya imyenda nk'uko byasobanuwe haruguru;

[46] Rutegetse ko 100.000Frw y'ingwate y'amagarama yatanzwe na Salimini Saidi ajurira ahwanye n'ibyakozwe muri uru rubanza.

IMANZA MBONEZAMUBANO

MUKANKUBITO v NABIMANA

[Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RC
00009/2019/SC (Ntezilyayo, P.J, Mukamulisa, Nyirinkwaya;
Cyanzayire na Hitiyaremye, J.) 03 Werurwe 2020]

Amategako agenga umuryango – Ishyingirwa mu buryo bukurikije amategako – Ikimenyetso cy'ishyingirwa – Ikimenyetso cyemeza nta mpaka ko abantu bashyingiranywe ni icyemezo cy'ishyingirwa, iyo cyatakaye cyangwa ibitabo by'ishyingirwa bidashoboka kuboneka, muri icyo gihe hashyingirwa ku buhamya – Kuba umwe mu babanaga nk'umugore n'umugabo yanditse mu ikarita ndangamuntu ya kera nk'umugabo cyangwa umugore wa kanaka, si ikimenyetso cyashyingirwaho mu kwemeza ko bashyingiranywe mu buryo bukurikije amategako.

Incamake y'ikibazo: Uru rubanza rwahereye mu Rukiko rw'Ibanze rwa Nyarugenge, Mukankubito asaba urubanza rusimbura inyandiko y'ishyingirwa rye na Nabimana, Urukiko rwafashe icyemezo ko nta bimenyetso bidashidikanywaho yatanze byemeza ko habaye gushyingirwa hagati ye na Nabimana.

Mukankubito yajuriye mu Rukiko Rwisumbuye rwa Nyarugenge agaragaza ko Urukiko rw'Ibanze rwirengagije ibimenyetso yatanze byemeza ko yashyingiranywe mu buryo bwemewe n'amategako na Nabimana, Urukiko Rwisumbuye rwemeje ko ikirego cye gifite ishingiro ko habaye ishyingirwa hagati ye na Nabimana bityo ko urubanza rwajuririwe ruhindutse kuri byose, rwemeza ko Mukankubito ahabwa urubanza rusimbura inyandiko y'ishyingirwa, Urukiko mu gufata icyo cyemezo

rwasobanuye ko nta mpamvu yabuza Mukankubito guhabwa urubanza rusimbura inyandiko yo gushyingirwa, kuko yagaragarije Urukiko ibimenyetso bihamya ko yasezeranye byemewe n'amategeko na Nabimana, bigizwe n'amafoto yerekana uburyo basezeranye, ibyemezo by'Umurenge wa Kacyiru, icyemezo cya Paruwasi kigaragaza ko basezeranye mu Kiliziya, rusobanura ko abantu batashoboraga gusezerana mu kiliziya batabanje gusezerana muri Komini, ruvuga kandi ko bitashobokaga ko yandikwa mu irangamuntu ya kera nk'umugore we batarasezeranye.

Nabimana yaje kumenya imikirize y'urwo rubanza ararutambamira agaragaza gusa ko babanye na Mukankubito nk'umugore n'umugabo guhera mu mwaka w'1978, cyane ko Mukankubito yari ataruzuzwa imyaka y'ubukure kuko yari afite 17 gusa, ku buryo batari kubasezeranya imbere y'ubutegetsi, ko rero basezeranye imbere y'Imana mu Kiliziya mu mwaka wa 1983. Urukiko rwaciye urubanza rwemeza ko ikirego cya Nabimana gifite ishingiro, rutegeka ko urubanza rutambamirwa ruhindutse mu ngingo zarwo zose, ko nta bimenyetso bifatika bigaragaza ko habayeho ubushyingiranywe imbere y'ubutegetsi hagati ya Mukankubito na Nabimana. Mukankubito yaje gusubirishamo urwo rubanza ingingo nshya yifashishije icyemezo cyatanzwe n'Ikigo gishinzwe Indangamuntu (NIDA) ariko Urukiko Rwisumbuye rwemeza ko ikirego cye kitakiriwe hagumye imikirize y'urubanza rwasubirishijwemo ingingo nshya, rwasobanuye ko inyandiko yatanzwe na NIDA atari ikimenyetso gishya cyagaragaye nyuma y'iburanisha kuko ibiyikubiyemo ari nabyo biri mu nyandiko yindi nubundi yari yatanze.

Mukankubito yandikiye Urwego rw'Umuvunyi asaba ko urubanza rwasubirwamo ku mpamvu z'akarengane. Urwo rwego rumaze gusuzuma ubwo busabe, rwandikira Perezida w'Urukiko

rw'Ikirenga rumusaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengene. Perezida w'Urukiko rw'Ikirenga amaze kubisuzuma yafashe icyemezo ko urubanza rusubirwamo n'Urukiko rw'Ikirenga.

Mu Rukiko rw'Ikirenga Mukankubito yagaragaje ko Urukiko Rwisumbuye hari amategeko rwirengagije yakoreshwaga icyo gihe kuko ngo ubwo bashyingirwaga mu idini byari byemewe n'Itegeko Nshinga n'andi mategeko ko gushyingirwa mu idini byafatwaga nko kuba barashyingiwe imbere y'amategeko kuko bashyingiwe mu idini muri 1983, yakomeje avuga ko hari n'ibimenyetso byirengagijwe birimo irangamuntu ya Nabimana yanditswemo ko bashyingiranywe mu buryo bwemewe n'amategeko ndetse n'abana babo bakaba banditsemu, bityo ko ibyandikwaga mu irangamuntu byavanwaga mu bitabo by'irangamimerere bikaba ari icyemeza ko bashyingiranywe mu buryo bwemewe n'amategeko.

Nabimana we avuga ko ikirego cy'iremezo cyatanzwe mu Rukiko rw'Ibanze na Mukankubito cyasabaga Urukiko urubanza rusimbura inyandiko y'ishyingirwa ryabaye muri 1978 ariko ubu bakaba bagaragaza ko ibyakwemerwa ari ugushyingirwa kwabereye mu idini muri 1983, bakaba basanga ari uguhindura ikirego kandi bitemewe, ko kandi Itegeko Nshinga bavuze ntaho ryavugaga ko gushyingirwa mu idini byafatwaga nko gushyingirwa imbere y'amategeko kuko Iteka bavugaga ryabyemeraga atariko ryavugaga kandi ko iryo teka ryari ryanavanyweho. Nahimana avuga kandi ko indangamuntu atari ikimenyetso gishingirwaho mu kwemeza ko umuntu yashyingiranywe n'undi. Asoza avuga ko Urukiko nta tegeko rwirengagije.

Incamake y'icyemezo: 1. Ikimenyetso cyemeza nta mpaka ko abantu bashyingiranywe ni icyemezo cy'ishyingirwa, iyo cyatakaye cyangwa ibitabo by'ishyingirwa bidashoboka kuboneka, muri icyo gihe hashyingirwa ku buhamya, bityo izindi nyandiko zatangiwe mu Bubiligi Mukankubito agaragaza avuga ko yashyingiwe zikaba zitashyingirwaho ngo hemezwe ko habaye ishyingirwa ryemewe n'amategeko

2. Kuba umwe mu babanaga nk'umugore n'umugabo yanditse mu ikarita ndangamuntu ya kera nk'umugabo cyangwa umugore wa kanaka, si ikimenyetso cyashyingirwaho mu kwemeza ko bashyingiranywe mu buryo bukurikije amategeko, bityo kuba Mukankubito agaragaza ko yari yanditse mu ndangamuntu ya Nabimana atari ikimenyetso rwashyingiraho rwemeza ko bashyingiranywe mu buryo bukurikije amategeko.

**Gusubirishamo urubanza ku mpamvu z'akarengane nta shingiro bifite;
Imikirize y'urubanza rwasabiwe gusubirishwamo ku mpamvu z'akarengane ntihindutse.**

Amategeko yashingiweho:

Itegeko Nshinga ryo ku wa 20/12/1978 rya Repubulika y'u Rwanda (ryakoreshwaga icyo gihe), ingingo ya 25 na 98

Itegeko Nshinga ryo ku wa 24/11/1962, rya Repubulika y'u Rwanda (ryakoreshwaga icyo gihe), ingingo ya 28

Itegeko N° 15/2004 ryo ku wa 12/05/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 11;

Iteka ryo ku wa 04/05/1895 rishyiraho Urwunge rw'Amategeko Mbonezamubano, Igitabo cya mbere, ingingo ya 18,20 n'iya 117;

Iteka N° 01/81 ryo ku wa 16 Mutarama 1981 ryerekeye ibarura ry'abaturage, ikarita ndangamuntu, ingingo ya 5,6 n'iya
7

Nta manza zifashishijwe.

Inyandiko z'Abahanga zifashishijwe:

Ntampaka Charles, Droit des personnes et de la famille, Manuel de droit rwandais, 1993, pge 108:

Urubanza

I. IMITERERE Y'IKIBAZO

[1] Uru rubanza rukomoka ku kirego Mukankubito Daphrose yatanze mu Rukiko rw'Ibanze rwa Nyarugenge, asaba urubanza rusimbura inyandiko y'ishyingirwa rye na Nabimana Pierre, avuga ko bashyingiranywe mu buryo bukurikije amategeko ku wa 18/08/1978 mu cyahoze ari Komini Nyarugenge, ariko ko yagiye mu Murenge wa Nyarugenge gushaka icyemezo cy'uko yashyingiranywe nawe agasanga nta bitabo by'abashyingiranywe byo muri icyo gihe bihari.

[2] Ku wa 02/04/2015, Urukiko rw'Ibanze rwa Nyarugenge, rwacye urubanza RC0088/15/TB/NYGE, rwemeza ko nta bimenyetso Mukankubito Daphrose yagaragaje byerekana nta gushidikanya ko yashyingiranywe na Nabimana Pierre ku wa 18/08/1978. Rusobanura ko icyemezo cy'ubushyingiranywe cya Nabimana Pierre na Mukankubito Daphrose cyatanzwe na Komini ya Kacyiru ku wa 12/03/2003 kitaba ikimenyetso cyashingirwaho kuko cyatanzwe kera, urega akaba atagaragaza

umwimerere wacyo kandi n'Ubuyobozi bwagitanze nabwo butabifitiye amakuru kuko urega avuga ko yasezeraniye muri Nyarugenge, mu gihe icyemezo (*A qui de droit*) cyatanzwe n'Ubuyobozi bw'Umurenge wa Nyarugenge, kigaragaza ko nta bitabo by'abashyingiranywe bihari muri uwo Murenge byemeza ko Mukankubito Daphrose na Nabimana Pierre baba barashyingiranywe bikurikije amategeko. Ruvuga kandi ko ifoto igaragaza ko basezeranye mu idini nayo itaba ikemenyetso kuko itagaragaza ko bafotowe nibura bari imbere y'ubutegetsu bw'Igihugu bafashe ku ibendera ry'Igihugu nk'uko amategeko abiteganyaga, ndetse ko n'ibyangombwa by'ubutaka bitaba ikimenyetso gishingirwaho kuko umugore n'umugabo bashobora gutungana ubutaka batarashyingiranywe mu buryo bukurikije amategeko. Rusanga inyandiko zigaragaza ko bashyingiranywe mu idini zigizwe n'ifoto ndetse n'inyandiko zatanzwe n'Ikigo gishinzwe ubutaka (*Land center*) nta gaciro zahabwa kuko amategeko adafata abasezeraniye mu idini runaka nk'abashyingiranywe mu buryo bukurikije amategeko.

[3] Mukankubito Daphrose ntiyishimiye imikirize y'urwo rubanza arujurira mu Rukiko Rwisumbuye rwa Nyarugenge, avuga ko Urukiko rwirengagije ibimenyetso bitandukanye yarugaragarije, byemeza ko yashyingiranywe na Nabimana Pierre, birimo indangamuntu y'uyu ya kera igaragaza ko ayanditswemo nk'umugore we, icyemezo cyatanzwe na Komini Kacyiru ku wa 12/03/2003 cyemeza ko basezeranye, ikarita itangwa na Paruwasi igaragaza ko Mukankubito Daphrose yasezeranye na Nabimana Pierre muri Paruwasi Nyamirambo, amafoto basezerana, ndetse n'ibindi byangombwa byerekana ko aho batuye mu Bubiligi bemeza ko basezeranye. Ku wa 30/04/2015, Urwo Rukiko rwaciye urubanza RC0076/15/TGI/NYGE, rwemeza ko ubujurire bwa

Mukankubito Daphrose bufite ishingiro, rwemeza ko urubanza rwajuririwe ruhindutse kuri byose, rwemeza ko Mukankubito Daphrose ahabwa urubanza rusimbura inyandiko y'ishyingirwa, rwemeza ko uru rubanza rusimbura inyandiko y'ishyingirwa rwoherezwa mu Murenge wa Nyarugenge.

[4] Urukiko mu gufata icyo cyemezo rwasobanuye ko nta mpamvu yabuza Mukankubito Daphrose guhabwa urubanza rusimbura inyandiko yo gushyingirwa, kuko yagaragarije Urukiko ibimenyetso bihamya ko yasezeranye byemewe n'amategeko na Nabimana Pierre, bigizwe n'amafoto yerekana uburyo Mukankubito Daphrose na Nabimana Pierre basezeranye, ibyemezo by'Umurenge wa Kacyiru, icyemezo cya Paruwasi ya Nyamirambo kigaragaza ko basezeranye mu Kiliziya, rusobanura ko abantu batashoboraga gusezerana mu kiliziya batanyuze muri Komini, irangamuntu y'umugabo we yatanze kera, ruvuga ko bitashobokaga ko yandikwamo nk'umugore wa Nabimana Pierre batarasezeranye.

[5] Nabimana Pierre yatambamiye urwo rubanza, avuga ko atigeze asezerana na Mukankubito Daphrose mu buryo bwemewe n'amategeko, ko babanye nk'umugore n'umugabo gusa guhera mu mwaka w'1978, dore ko Mukankubito Daphrose yari ataruzura imyaka y'ubukure kuko yari afite 17 gusa, ku buryo batari kubasezeranya imbere y'ubutegetsi, ko rero basezeranye imbere y'Imana mu Kiliziya mu mwaka wa 1983, ariko ko batigeze basezerana mu buryo bwemewe n'amategeko. Ku wa 18/05/2015, Urukiko Rwisumbuye rwa Nyarugenge rwaciye urubanza RCA0106/15/TGI/NYGE, rwemeza ko ikirego cya Nabimana Pierre gifite ishingiro, rutegeka ko urubanza rutambamirwa RCA 0076/15/TGI/NYGE ruhindutse mu ngingo zarwo zose, rutegeka ko nta bimenyetso bifatika bigaragaza ko

habayeho ubushyingiranywe imbere y'ubutegetsi hagati ya Mukankubito Daphrose na Nabimana Pierre.

[6] Urukiko rwasobanuye ko ibimenyetso byashingiweho mu rubanza rutambamirwa rwasanze ari ibyo Mukankubito Daphrose ubwe yemeza ko yabonye mu mwaka wa 1983 asezerana mu idini (Kiliziya), ariko ibyo bimenyetso ubwabyo bikaba bitemeza ko yasezeranye mu 1978 mu butegetsi, ahubwo byemeza ko yasezeranye mu idini kandi atagaragaza itegeko ryamwemereraga ko kuba yarasezeranye mu idini mu mwaka wa 1983, byafatwa nk'amasezerano yo gushyingirwa mu butegetsi, ko rero ibimenyetso Urukiko rwashingiyeho bidahagije ku buryo byashingirwaho hemezwa ko basezeranye byemewe n'amategeko.

[7] Urukiko rwasanze kandi harashingiwe ku ngingo ya 13 y'Itegeko N°15/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, Urukiko rukemeza ko icyemezo cy'ishyingirwa cyo ku wa 12/03/2003 ari inyandikomvaho ikemura impaka kuri bose, mu gihe icyo cyemezo kitanditswe cyangwa ngo cyakiranywe imihango yabugenewe n'umukozi wa Leta ufite ububasha bwo gukora mu ifasi, rusobanura ko Mukankubito Daphrose avuga ko basezeraniye mu Murenge wa Nyarugenge, ariko icyemezo cy'ishyingirwa kikaba cyarakorewe mu cyahoze ari Komini Kacyiru, atari n'umwimerere, ko rero uwagikoze ntacyo yashingiyeho yemeza ko Mukankubito Daphrose na Nabimana Pierre bashyingiranywe.

[8] Urukiko rwasanze kandi hari abatangabuhamya bari baturanye nabo bemeza ko batigeze basezerana mu butegetsi ko ibyo bazi ari ugusezerana mu Kiliziya, ko batari gusezerana mu butegetsi ngo babiyoberwe, rusanga kandi na Mukankubito Daphrose nta mutangabuhamya atanga wemeza ibyo avuga

cyangwa se ngo agaragaze umutegetsi (*Officier de l'état civil*) waba waramusezeranyije cyangwa se umutangabuhamya wamusinyiye basezerana.

[9] Mukankubito Daphrose yasubirishijemo urubanza RCA0106/15/TGI/NYGE ingingo nshya, avuga ko hari ikimenyetso gishya kigizwe n'inyandiko yatanzwe na NIDA ku wa 05/10/2015. Urukiko Rwisumbuye rwa Nyarugenge rwaciye urubanza no RCA0222/15/TGI/NYGE ku wa 15/12/2015, rwemeza ko gusubirishamo urubanza ingingo nshya kwa Mukankubito Daphrose kutakiriwe, rutegeka ko urubanza n° RCA0106/15/TGI/NYGE rwaciye n'Urukiko Rwisumbuye rwa Nyarugenge rugumanye agaciro, rutegeka kandi Mukankubito Daphrose kwishyura Nabimana Pierre indishyi zihwanye n'amafaranga 2.000.000Frw zikubiyemo amafaranga y'ikurikiranarubanza n'igihembo cy'avoka.

[10] Urukiko rwasobanuye ko inyandiko yatanzwe na NIDA ku wa 05/10/2015 atari ikimenyetso gishya cyagaragaye nyuma y'iburanisha kuko ibiyikubiyemo ari nabyo biri mu nyandiko yo ku wa 21/05/2015, kandi zose zikaba zarasabwe na Mukankubito Daphrose, byumvikana ko mu gihe cyo kuburana Mukankubito Daphrose yari azi amakuru akubiye muri izo nyandiko ariko ntiyabiburanisha, akaba ataranagaragaje impamvu ntagobotorwa zatumye atagaragaza icyo kimenyetso, rwemeza rero ko inyandiko yo ku wa 05/10/2015 atari ikimenyetso gishya.

[11] Mukankubito Daphrose yandikiye Urwego rw'Umuvunyi asaba ko urubanza RCA0106/15/TGI/NYGE rwasubirwamo ku mpamvu z'akarengane. Urwo rwego rumaze gusuzuma ubwo busabe, rwandikira Perezida w'Urukiko rw'Ikirenga rumusaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane. Perezida w'Urukiko rw'Ikirenga amaze kubisuzuma yafashe icyemezo ko

urubanza RCA0106/15/TGI/NYGE rwoherezwa mu Bwanditsi bw'Urukiko rukandikwa mu bitabo byabugenewe kugirango ruzongere ruburanishwe, ikirego cyandikwa kuri RS/INJUST/RC00009/2019/SC.

[12] Me Mugeni Anita avuga ko Mukankubito Daphrose yasubirishijemo urubanza RCA0106/15/TGI/NYGE ku mpamvu z'akarengane kuko Urukiko rwirengagije amategeko n'ibimenyetso bigaragaza nta gushidikanya ko yasezeranye na Nabimana Pierre mu buryo bwemewe n'amategeko ku buryo byateje akarengane.

[13] Urubanza rwaburanishijwe mu ruhamwe ku wa 05/02/2020, Nabimana Pierre yunganiwe na Me Niyomugabo Christophe na Me Ndagijimana Emmanuel naho Mukankubito Daphrose ahagarariwe na Me Mugeni Anita. Mbere yo gusuzuma ibibazo bigize urubanza, Urukiko rwabanje gusuzuma ikibazo kijyanye n'uko hari urubanza RCA0034/03/2017/HC/KIG ruri mu bujirire mu Rukiko Rukuru, aho Mukankubito Daphrose yareze asaba kugabana umutungo na Nabimana Pierre nk'umuntu babanye nk'umugore n'umugabo, hakibazwa niba nta ngaruka urwo rubanza rushobora kugira kuri uru ruburanwa mu Rukiko rw'Ikirenga.

[14] Kuri icyo kibazo, Me Mugeni Anita yatangiye asobanura uko urwo rubanza rugamije kugabana umutungo hagati ya Mukankubito Daphrose na Nabimana Pierre nk'umuntu babanye nk'umugore n'umugabo. Avuga ko gutangiza urwo rubanza byatewe n'uko Mukankubito Daphrose yabonaga nta yindi nzira yari ashigaje amaze kubona ko Nabimana Pierre yatangiye kumwandukiza ku mitungo yabo. Avuga ko uru rubanza rw'akarengane rudashobora kugira ingaruka ku rubanza rwo mu Rukiko Rukuru kuko ngo icyemezo cy'Umuvunyi Mukuru

kimaze gusohoka, basabye ko urwo rubanza ruhagarara rugategereza icyemezo cy’Urukiko rw’Ikirenga.

[15] Ku ruhande rw’abunganira Nabimana Pierre, bo bavuga ko icyo kibazo bari bakigaragaje, bibaza ukuntu Mukankubito Daphrose asaba urukiko kwemeza ko yashyingiranywe ku buryo bwemewe n’amategeko na Nabimana Pierre ku ruhande rumwe, ku rundi ruhande agasaba ko bagabana umutungo nk’umuntu babanye nk’umugore n’umugabo kuko ibyo byemeza ko yemera ko batashyingiranywe ku buryo bwemewe n’amategeko. Bavuga ko ahubwo ibyo byafatwa nka *aveu judiciaire* itsindisha uwemeye, bagasanga ikirego cy’akarengane kitagomba kwakirwa kubera urwo rubanza.

[16] Nyuma yo kumva impande zombi kuri iki kibazo, Urukiko rwariherereye rufata icyemezo ko nyuma yo kubona ko hari urubanza RCA0034/03/2017/HC/KIG ruri mu bujurire mu Rukiko Rukuru haburanwa gusaba kugabana umutungo, mu nyungu z’ubutabera no kugira ngo hatazabaho kuvuguruzanya kw’imanza, urwo rubanza rwaba ruhagaze kugeza igihe Urukiko rw’Ikirenga ruzafatira icyemezo.

[17] Nyuma y’aho na none mbere yo gusuzuma ibibazo bigize urubanza, Urukiko rwabanje gusuzuma inzitizi yatanzwe n’abunganira Nabimana Pierre bavuga ko niba Me Mugeni Anita uhagarariye Mukankubito Daphrose yemeye ko azakomeza kuburanisha ikimenyetso cyitwa inyandiko yatanzwe na Paruwasi Nyamirambo, iyo nyandiko bayiregera kugira ngo hemezwe ko ari impimbano.

[18] Me Mugeni Anita yavuze ko, kubera ko uburyo bwo kuregera ko inyandiko ari impimbano butinda kandi akaba yari yasobanuye ko icyo kimenyetso atari cyo kamara ahubwo

gishimangira ibindi, iyo nyandiko yatanzwe na Paruwasi ya Nyamirambo aretse kuyiburanisha, bituma iburanisha rikomeza.

[19] Mu gusaba ko urubanza RCA0106/15/TGI/NYGE rusubirwamo kubera impamvu z'akarengane, Urukiko rusanga ibibazo bikurikira aribyo bigomba gusuzumwa, nk'uko byanasabwe n'ababuranyi:

i. Gusuzuma niba mu rubanza RCA0106/15/TGI/NYGE harirengagijwe amategeko yakoreshwaga mu gihe Mukankubito Daphrose yashyingiranwaga na Nabimana Pierre.

ii. Gusuzuma niba mu rubanza RCA0106/15/TGI/NYGE harirengagijwe ibimenyetso byatanzwe na Mukankubito Daphrose byemeza ugushyingirwa kwe na Nabimana Pierre.

iii. Kumenya niba indishyi ababuranyi basaba bazihabwa.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

(i) Gusuzuma niba mu rubanza RCA 0106/15/TGI/NYGE harirengagijwe amategeko yakoreshwaga mu gihe Mukankubito Daphrose yashyingiranwaga na Nabimana Pierre

[20] Hashingiwe ku myanzuro n'imiburanire ya Me Mugeni Anita uhagarariye Mukankubito Daphrose, ikigomba gusuzumwa kuri iki kibazo ni ukumenya niba ugushyingiranwa kwa Mukankubito Daphrose na Nabimana Pierre mu idini kwabaye tariki ya 17/12/1983 kwari kwemewe n'Itegeko Nshinga ryo ku wa 20/12/1978 nk'ugukurikije amategeko.

[21] Me Mugeni Anita avuga ko Mukankubito Daphrose na Nabimana Pierre bemeranya ko babanye kuva mu mwaka wa 1978 bamaze gusezerana imbere y’ubutegetsi kuko umwana wabo wa mbere yavutse muri 1979. Avuga kandi ko nyuma y’aho Nabimana Pierre arigitishirije inyandiko z’ubushyingiranwe bwabo imbere y’ubutegetsi, aribwo Mukankubito Daphrose yashakishije ibindi bimenyetso by’aho basezeraniye mu idini muri 1983, kandi ko na Nabimana Pierre yemera ko basezeraniye mu Kiliziya gusa akavuga ko bitari byemewe n’amategeko.

[22] Asobanura ko mu rubanza rusabirwa gusubirwamo, Umucamanza yirengagije amategeko yakoreshwaga icyo gihe yemezaga ko ugushyingirwa imbere ya Kiliziya Gatulika byari byemewe n’amategeko, avuga ko Itegeko Nshinga rya Repubulika y’u Rwanda ryo ku wa 24/11/1962 ingingo yaryo ya 28, yateganyaga ko Ugushyingirwa hagati y’umugabo umwe n’umugore umwe bikozwe imbere y’amategeko cyangwa imbere y’idini ari byo byemewe n’Itegeko Nshinga”, ko iryo Tegeko Nshinga ryaje gusimburwa n’iryo ku wa 20/12/1978, aho mu ngingo yaryo ya 25 ivuga ko Gushyingirwa hagati y’umugabo umwe n’umugore umwe bikozwe mu buryo bukurikije amategeko rusange aribyo byemewe”, kandi iyo ngingo ikaba ariyo yakurikizwaga mu gihe Mukankubito Daphrose na Nabimana Pierre basezeranaga mu idini muri 1983.

[23] Akomeza avuga ko amategeko rusange yakurikizwaga mu gushyingirwa hari Iteka ryo ku wa 04/05/1895 rishyiraho Urwunge rw’Amategeko Mbonezamubano, Igitabo cya mbere. Muri iryo teka, mu ngingo yaryo ya 17 hari hateganyijwe ko abamisiyoneri gatulika bari barahawe n’abakoloni ububasha bwo gusezeranya abaturage b’abenegihugu (*indigènes*), kandi iryo sezerano rikemerwa nk’iryakorewe imbere y’Ubutegetsi, ko rero

ugushyingirwa kwa Mukankubito Daphrose na Nabimana Pierre muri Kiliziya Gatulika kwabaye tariki ya 17/12/1983 kwemewe n'amategeko. Avuga ko Urukiko rwagombaga kubishingiraho rukemeza ko bashyingiranywe mu buryo bukurikije amategeko, cyane cyane ko ingingo ya 26 y'iryo Teka kimwe n'iya 476 n'iya 458 z'Itegeko ryo muri 1988 (ryasimbuye iryo muri 1948) ryahinduye Iteka ryo muri 1895, zavugaga ko ibyakozwe bigumana agaciro kabyo, bityo Mukankubito Daphrose akaba ariho ashingira asaba Urukiko rw'Ikirenga kwemeza ko ahabwa urubanza rusimbura inyandiko yo gushyingirwa (*Jugement Supplétif de l'acte de mariage*).

[24] Asobanura ko ku birebana n'urubanza RC00258/2017/TGI/NYGE Mukankubito Daphrose yaregeye kugabana umutungo na Nabimana Pierre, nk'abantu babanye batarasezeranye, Urukiko rutabifata nk'ikimenyetso cy'uko uwo ahagarariye yemera ko atashyingiranywe na Nabimana Pierre mu buryo bukurikije amategeko, ahubwo yabitewe n'uko yabonye amaze gutsindwa mu manza zabanje, kandi ikibazo yashyikirije Urwego rw'Umuwunyi gitinda gusubizwa, kandi Nabimana Pierre yaratangiye kumwandukuza ku mitungo bafitanye, ahitamo gutanga icyo kirego kubera ko ariyo mahirwe yari asigaranye.

[25] Me Niyomugabo Christophe uhagarariye Nabimana Pierre, avuga ko intandaro y'uru rubanza ari ikirego Mukankubito Daphrose yaregeye urukiko rw'Ibanze rwa Nyarugenge asaba urubanza rusimbura inyandiko y'ishyingirwa yo ku wa 18/8/1978 kuko ariho yasezeranye mu butegetsi mu buryo bukurikije amategeko na Nabimana Pierre, urwo rubanza rukaba rwarahawe RC0088/15/TB/NYGE, ariko ko Mukankubito Daphrose ntaho agaragaza ko mu rubanza

RCA0106/15/TGI/NYGE, Urukiko rwirengagije ibimenyetso bigaragaza ko yashyingiranywe na Nabimana Pierre mu 1978, ahubwo agaragaraza ibimenyetso by'uko bashyingiranywe mu 1983 imbere ya Kiliziya, akaba asanga ari uguhindura ikirego mu gihe ingingo ya 6 y'Itegeko N° 21/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi itamwemerera kuba yahindura ikirego kuri uru rwego.

[26] Akomeza avuga ko, ku byerekeye ibyo uhagarariye Mukankubito Daphrose avuga ko Itgeko Nshinga ryo muri 1978 ryemeraga ko ugushyingirwa mu idini kwari kwemewe n'amategeko hashingiwe ku ngingo ya 25 y'iryo Tegeko Nshinga n'ingingo ya 17 y'Iteka ryo ku wa 04/05/1895 ryavuzwe haruguru, iyo ngingo ya 17 Me Mugeni Anita ayivuga igice kuko ivuga ko abamisiyoneri gatulika bari barahawe n'abakoloni ububasha bwo gusezeranya abaturage b'abenegihugu kandi iryo sezerano rikemerwa nk'iryakorewe imbere y'ubutegetsi. Akavuga kandi ko iyo ngingo isobanura neza uburyo abamisiyoneri gatulika bashoboraga gusezeranya abaturage, bakabasezeranya mu buryo bw'idini, barangiza bakabasezeranya mu buryo bw'amategeko, babihereye ububasha na Gouverneur General bikemerwa nk'ibikozwe imbere y'ubutegetsi,¹ kuko atari

¹*Dans chaque ressort, il peut en outre donner délégation aux agents de la colonie ou à des particuliers, aux fins de dresser ces actes dans l'étendue du territoire pendant le délai et aux conditions qu'il fixe. Ils remplissent ces fonctions sous la direction de l'officier du ressort qui veille à ce que les actes soient régulièrement dressés, constate les irrégularités commises et les signale au gouverneur général. La délégation dont il est question à l'alinéa précédent sera accordée sur leur demande aux missionnaires catholiques avec pouvoir pour eux de célébrer civilement le mariage des indigènes dont ils auront célébré l'union religieuse. Les particuliers et les missionnaires catholiques ne pourront recevoir délégation qu'aux fins de dresser les actes relatifs aux indigènes (du Congo ou des colonies limitrophes)*

umumisiyoneri wese wari ufite uburenganzira bwo gusezeranya ngo byemerwe kuko hari conditions ziteganyijwe n'iyi ngingo ya 17 zagombaga kuba zuzuye harimo kuba uwo mu misiyoneri yabisabye akabihabwa kandi akabikora mu buryo no mu bihe byateganyijwe muri urwo ruhushya, kandi agasezeranya abaturage babaga baramaze gusezerana mu kiliziya. Yongeraho ko nyuma yo kubasezeranya, ako kanya yabikorera inyandiko y'ishyingirwa (*acte de mariage*) yashyikirizwaga umwanditsi w'irangamimerere (*officier de l'état civil*) kugira ngo abasezeranye bandikwe mu gitabo cyabigenewe.

[27] Abunganira Nabimana Pierre bavuga kandi ko ibyateganywaga n'ingingo ya 17 y'Iteka ryavuzwe byavanyweho n'Itegeko Nshinga ryo muri 1962 kubera ko mu ngingo yaryo ya 28 iteganya ku buryo bweruye ko “ugushyingirwa hagati y'umugabo umwe n'umugore umwe bikoze imbere y'amategeko cyangwa y'idini,” bivuze ko abakuriye amadini yose yemewe bashoboraga gushyingira mu idini bigahabwa agaciro batiriwe bubahiriza imihango iteganywa n'amategeko yanditse, batiriwe kandi babisabira uburenganzira nk'uko byari biteganyijwe mu ngingo ya 17 y'Iteka ryo ku wa 04/05/1895.

[28] Bongeraho ko Itegeko Nshinga rya 1962 ryahinduwe n'Itegeko Nshinga rya 1978 ari naryo ryakurikizwaga muri 1983 igihe Mukankubito Daphrose yasezeranaga mu kiliziya na Nabimana Pierre, aho ingingo ya 25 yagiraga iti: “gushyingirwa hagati y'umugabo umwe n'umugore umwe bikoze mu buryo bukurikije amategeko rusange nibyo byemewe”, kandi mu ngingo yaryo ya 93 hateganywaga ko amategeko yose yakurikizwaga atanyuranyije naryo mu giheatavanyweho cyangwa ngo ahindurwe azakomeza gukurikizwa. Bakavuga rero ko ingingo zose z'amategeko yo mu Iteka ryo ku wa 04/05/1895

zinyuranyije n'iryo Tegeko Nshinga zavuyeho harimo n'ingingo ya 17 yavuzwe haruguru. Bavuga na none ko kuva taliki ya 28/12/1978 aba Burugumesitiri aribo bashyingiraga mu buryo bwemewe n'amategeko, bakaba barabikoraga mu buryo bukurikije amategeko rusange kuko Itegeko ryagengaga ama Komini aribo bonyine ryahaga uburenganzira bw'abakozi b'irangamimerere (*officier de l'état civil*). Abakuriye amadini ntibashoboraga gushyingira ku buryo bwemewe n'amategeko, babikoraga gusa mu rwego rw'idini.

[29] Bongeraho ko uwo murongo ari nawo wafashwe n'Urukiko rw'Ikirenga mu rubanza RS/INCONST.PEN0003/10/CS rwa Gatera Johnson na Kabarisa Teddy rwaciwe ku wa 07/01/2011, aho urukiko rwemeje ko ubushyingiranwe bw'umugabo umwe n'umugore umwe bikorewe mu butegetsi bwa Leta aribwo bwemewe," urwo rukiko rukaba rwarabyemeje rushingiye ku ingingo ya 26 y'Itegeko Nshinga rya Repubulika y'u Rwanda uko ryavuguruwe kugeza ubu, bakavuga ko mutatis mutandis ari uko ingingo ya 25 y'Itegeko Nshinga rya 1978 igomba kumvikana, kuko izo ingingo zivuga bimwe.

[30] Ikindi abunganira Nabimana Pierre bavuga ni uko ugushyingirwa kwa Mukankubito Daphrose na Nabimana kudashobora gufatwa nk'ukwemewe n'amategeko hashingiwe ku mafishi yatanzwe na Paruwasi Nyamirambo. Bongeye gusobanura ko iyo umumisiyoneri gatulika yahabwaga ububasha bwo gusezeranya, yakoraga nk'umukozi w'irangamimerere (*officier de l'état civil*) agatanga acte de mariage. Bongeyeho ko mu gihe Mukankubito Daphrose atagaragaza inyandiko y'ishyingirwa (*acte de mariage*) yaba yarahawe n'uwo mumisiyoneri akayihabwa hari abatangabuhamya babiri nk'uko

ingingo ya 20 y'Iteka ryo ku wa 04/05/1895 ibivuga,² ndetse akagaragaza ko abo batangabuhamya bayisinyeho, nawe akayisinyaho nk'uko ingingo ya 24 y'iryo Teka ibivuga,³ bakavuga ko ntaho Mukankubito Daphrose yahera avuga ko yashyingiwe mu buryo bukurikije amategeko ashingiye ku ifishi ya paruwasi ya Nyamirambo.

[31] Bashingiye kuri iyo myanzuro yabo yose, abunganira Nabimana Pierre bavuga ko nta mategeko urukiko rwirengagije mu ica ry'urubanza RCA0106/15/TGI/NYGE rwemeje ko gushyingiranwa mu kiliziya mu 1983 hagati ya Mukankubito Daphrose na Nabimana Pierre bitavuze ko bashyingiranywe mu buryo bwemewe n'amategeko yakurikizwaga icyo gihe.

[32] Naho ku birebana n'urubanza Mukankubito Daphrose yaregeye Urukiko asaba kugabana na Nabimana Pierre imitungo nk'abantu babanye batarashyingiranywe, abunganira Nabimana Pierre bavuga ko ibyo byemeza ko Mukankubito Daphrose yemereye Urukiko ko batasezeranye (*aveu judiciaire*), bityo ko atari akwiye kubirengaho ngo atange iki kirego

[33] Kuri ibi byose bimaze kuvugwa n'abunganira Nabimana Pierre, Me Mugeni Anita yavuze ko Iteka ryo ku wa 04/05/1895 ryavuzwe haruguru ritakuweho n'Itegeko Nshinga ryo mu 1962, ahubwo ryakuweho n'Itegeko N°42/1988 rishyiraho Interuro y'Ibanze n'Igitabo cya mbere cy'Urwunge rw'Amategeko mbonezamubano. Yanavuze kandi ko ku byerekeye ishyingirwa

² *Les actes de l'état civil sont reçus en présence de deux témoins »*

³ *Les actes sont signés par l'officier de l'état civil, par les comparants et les témoins, ou mention est faite de la cause qui empêche, les comparants et les témoins de signer*

mu kiliziya ryo muri 1983, abapadiri basimbuye abamisiyoneri mu bubasha bwose bari bafite.

[34] Naho ku bijyanye no kuvuga ko bahinduye ikirego imbere y’Urukiko rw’Ikirenga, avuga ko nabyo atari byo kuko kuva urubanza rwatangira basabaga inyandiko isimbura inyandiko y’ishyingirwa kandi ari nacyo bakomeje gusaba, ko umucamanza yasuzuma niba harabayeho gushyingirwa imbere y’amategeko.

UKO URUKIKO RUBIBONA

[35] Ingingo ya 25 y’Itegeko Nshinga ryo ku wa 20/12/1978 ryakurikizwaga mu mwaka wa 1983 ubwo Nabimana Pierre na Mukankubito Daphrose basezeranaga mu kiliziya, yateganyaga ko Gushyingirwa hagati y’umugabo umwe n’umugore umwe bikozwe mu buryo bukurikije itegeko n’uburyo bugenwa naryo aribyo byemewe”, naho ingingo yaryo ya 98 igira iti: Iri Tegeko Nshinga rikuyeho Itegeko – Nshinga ryo ku wa 24 Ugushyingo 1962 uko ryahinduwe kugeza ubu”.

[36] Isesengura ry’Itegeko Nshinga ryo ku wa 24/11/1962 cyane cyane ingingo ya 28 yavuzwe haruguru ryerekana ko ishyingirwa ryari ryemewe ari iry’umugore n’umugabo umwe, mu gihe iryo shyiringirwa ryakorewe imbere y’Ubutegetsu bwa Leta cyangwa barasezeraniye imbere y’idini. Ibi bihujwe n’ikibazo kirimo gusuzumwa, byumvikanisha ko iyo uhagarariye idini ryari ryemewe mu Rwanda yasezeranyaga abantu hakurikijwe amategeko y’idini, iryo shyiringirwa ryari ryemewe nk’irikoze ku buryo bwemewe n’amategeko. Mu Itegeko Nshinga ryo ku wa 20/12/1978, iyo ingingo ya 28 yavuzwe haruguru ntiyagarutsemo, kuko ingingo ya 25 y’Itegeko Nshinga ryo muri 1978 itongeye kuvuga kw’ishyingirwa rikoze imbere

y'idini, ahubwo ikavuga gusa ko ishyingirwa ry'umugabo umwe n'umugore umwe bikoze mu buryo bukurikije itegeko n'uburyo bugenwa naryo aribyo byemewe.

[37] Ku bijyanye n'uburyo amategeko yateganyaga ishyingirwa mu mwaka wa 1983 ubwo Mukankubito Daphrose na Nabimana Pierre basezeraniraga mu kiliziya, Me Mugeni Anita avuga ko amategeko yakurikizwaga yari Iteka ryo ku wa 04/05/1895 ryavuzwe haruguru, cyane cyane ingingo yaryo ya 17 nayo yavuzwe haruguru. Mu iburanisha ry'urubanza ku itariki ya 05/02/2020, Me Mugeni Anita yabajijwe guhuza ibivugwa mu ngingo ya 17, ndetse n'ibiteganyijwe n'ingingo ya 16 aho bavuga inzira umumisiyoneri yanyuragamo kugira ngo ishyingirwa yakoze ryemerwe amaze kubiharerwa ububasha, n'ishyingirwa mu kiliziya ryabaye muri 1983. icyibazwaga ahanini ni ukumenya niba ibyo izo ngingo zateganyaga byarashoboraga gukurikizwa muri 1983 kugira ngo iryo shyingirwa mu idini ribe ryemewe n'amategeko, cyane cyane ko, nka *Gouverneur Général* wagombaga guha umumisiyoneri ububasha bwo gushyingira ku buryo bwemewe n'amategeko, wariho mu gihe cya gikoloni, atari akiriho muri 1983. Me Mugeni Anita ntianavuze niba hari uwamusimbuye ngo abe yarakoze ibiteganyijwe n'ingingo za 16 na 17 zavuzwe haruguru. Kuri iki kibazo, abunganira Nabimana Pierre bo bavuga ko guhera ku itariki ya 20/12/1978, ishyingirwa mu idini ritari rigifatwa nk'ishyingirwa ryemewe n'amategeko, kuko kuva icyo gihe, aba Burugumesitiri aribo bonyine bari bafite ububasha bwo gushyingira ku buryo bwemewe n'amategeko, babishingiye ku itegeko rigenga amakomini ryo muri 1963.

[38] Itegeko ryo ku wa 23 Ukuboza 1963 rigenga amakomini, nk'uko ryahinduwe n'Itegeko-teka ryo ku wa 26 Nzeli 1977 rivuga mu ngingo yaryo ya 58 ko Burugumesitiri yari ashinzwe

gufata neza ibitabo by'imimerere n'iby'ibarura ry'abaturage. Muri urwo rwego, yari ashinzwe gukusanya no kwandika amakuru yose areba ibijyanye n'abaturage babaga muri Komini ye. Iyo mirimo ubundi ikorwa n'umukozi w'irangamimerere. Ku bijyanye no gusezeranya by'umwihariko, hari umuhanga mu mategeko uvuga ko muri Butare, yari imwe mu ma Perefegitura yari agize Igihugu, Perefefe wayo yatanze amabwiriza ku ba Burugumesitiri b'ama Komini yose yari agize iyo Perefegitura ko aribo bagombaga gukora imirimo yo gushyingira hakurikijwe ibiteganywa n'amategeko mbonezamubano. Hanatanzwe n'ibwiriza rivuga imihango yagomba gukurikizwa. Iyo mikorere yaje gukwira mu Gihugu cyose. Akomeza avuga ko Itegeko N° 42/1988 ryo ku wa 27 Ukwakira 1988 rishyiraho Interuro y'Ibanze n'Igitabo cya mbere cy'Urwunge rw'Amategeko mbonezamubano, mu ngingo yaryo ya 87, ryemeje ba Burugumesitiri muri iyo mirimo yo kuba umukozi w'irangamimerere, naho ingingo ya 456 y'iryo Tegeko ivuga ko ibyakozwe byose n'ubutegetsi bw'amaperefegitura n'ubw'amakomini mbere y'uko rijya mu bikorwa byemewe, n'ubwo nta tegeko ryihariye ryari ryarahaye Burugumesitiri ububasha bwo kuba umukozi w'irangamimerere.⁴

[39] Urukiko rushingiye ku bimaze kuvugwa mu bika bibanziriza iki, rurasanga ibyo Mukankubito Daphrose avuga ko ishyingirwa mu idini na Nabimana Pierre ryabaye muri 1983 muri Paruwasi Nyamirambo, rifatwa nk'iryabaye imbere y'ubutegetsi nta shingiro bifite.

⁴ NTAMPAKA, Charles, *Droit des personnes et de la famille*, *Manuels de droit rwandais*, 1993, pages 17, 66 et 67.

(ii) Gusuzuma niba mu rubanza RCA 0106/15/TGI/NYGE harirengagijwe ibimenyetso byatanzwe na Mukankubito Daphrose byemeza ugushyingiranwa kwe na Nabimana Pierre.

a. Indangamuntu ya Nabimana Pierre

[40] Me Mugeni Anita uhagarariye Mukankubito Daphrose avuga ko mu rubanza rusubirishwamo ku mpamvu z'akarengane, Urukiko rwirengagije ibimenyetso birimo indangamuntu ya Nabimana Pierre igaragaza ko bashyingiranywe, kuko yandikwagamo n'umukozi ushinze irangamimerere, ko kuba Mukankubito Daphrose yaranditswemo nk'umugore bashakanye ari ikimenyetso kidashidikanywaho cyane cyane ko hanagaragaramo abana Nabimana Pierre yabyaranye na Mukankubito Daphrose.

[41] Me Niyomugabo Christophe avuga ko Urwego rw'Umuvunyi mu bimenyetso rwavuze ko byirengagijwe, harimo indangamuntu kuko igaragaza ko Mukankubito Daphrose na Nabimana Pierre bashyingiranywe, ariko ko basanga atari ikimenyetso kigaragaza ko umuntu yashyingiranywe n'undi, ndetse ko n'Umucamanza mu gika cya 18 cy'urubanza rusubirishwamo ku mpamvu z'akarengane yabisobanuye. Avuga kandi ko n'ingingo ya 86 CCLI ivuga ko irangamimerere y'abantu yemezwa, ikanagaragazwa n'inyandiko zitangwa mu buryo buteganywa n'iyi nteruro, ko nta kimenyetso cyemeza ko umuntu yashyingiranywe n'undi uretse *acte de mariage* cyangwa *jugement supplétif d'acte de mariage*.

[42] Mw'iburanisha ryo ku wa 05/02/2020, Nabimana Pierre yahawe ijambo asobanura ko indangamuntu ye yari asanzwe akoresha mbere ya 1994 yayatswe muri jenocide yakorewe

abatutsi yo mu 1994, ko rero indangamuntu Mukankubito Daphrose akoresha ari inyandiko yahimbye ashaka kujya mu mahanga, dore ko atariyo nyandiko yahimbye yonyine, ahubwo ko yanahimbye ko yize amashuri yisumbuye ku Karubanda akahakura diplôme T-568/79 ku wa 25/7/1979, kandi yararangije amashuri abanza gusa, anahimba n'inyandiko y'urugendo (*titre de voyage*) avuga ko ari umunyekongo, agahindura amazina yiyita Caroline. Abamwunganira kandi bavuze ko mu rubanza rusubirishwamo, Urukiko rutirengagije iyo ndangamuntu ahubwo nk'uko bigaragara ku rupapuro rwa 9 mu gika cya 18 cy'urubanza RCA0106/15/TGI/NYGE, rwasobanuye ko itaba ikimenyetso cy'irangamimerere, hashingiwe ku by'amategeko ateganya, kuko ikimenyetso cyemewe n'amategeko ari inyandiko y'ishyingirwa cyangwa urubanza rusimbura iyo nyandiko, dore ko ngo avuga ko basezeraniye Nyarugenge, ariko iyo ndangamuntu ikaba yaratangiwe Kacyiru.

UKO URUKIKO RUBIBONA

[43] Ingingo ya 117 y'Iteka ryo ku wa 04/05/1895 ryavuzwe haruguru yateganyaga ko ikimenyetso cy'ugushyingiranwa gitangwa hakurikijwe ibiteganyijwe mu nteruro irebana n'ibyemezo by'irangamimerere, naho ingingo ya 109 y'iryo Teka ikavuga ibyerekeranye n'umuhango wo gusezeranya, aho bavugaga ko nyuma yo kwemeza ko babaye umugore n'umugabo, umwanditsi w'irangamimerere yahitaga akora icyemezo cy'ishyingirwa. Ibikubiye muri izi ngingo bihuza kandi n'ibivugwa n'umuhanga mu mategeko Ntampaka Charles, aho agaragaza ko muri rusange ikimenyetso cyemeza nta mpaka ko abantu bashyingiranywe ari icyemezo cy'ishyingirwa, keretse mu

gihe cyatakaye cyangwa ibitabo by'ishyingirwa bitashoboye kuboneka, muri icyo gihe hashingirwa ku buhamya.⁵

[44] Hagendewe ku bimaze kuvugwa mu gika kibanziriza iki, Urukiko rurasanga kuba Mukankubito Daphrose yanditse muri kopi y'ikarita ndangamuntu ya Nabimana Pierre nk'umugore we bitafatwa nk'ikimenyetso cyemeza ko bashyingiranywe mu buryo bukurikije amategeko, kuko ishyingirwa ryemezwa gusa n'icyemezo cy'ishyingirwa.

[45] Ku bijyanye n'ibivugwa na Me Mugeni Anita ko kugira ngo umugore yandikwe mu irangamuntu y'umugabo bagombaga kuba barashyingiranywe, Urukiko rurasanga nta shingiro bifite kuko mu Itegeko – Teka N° 01/81 ryo ku wa 16 Mutarama 1981 ryerekeye ibarura ry'abaturage, ikarita ndangamuntu, aho umuntu yandikwa n'aho aba, cyane cyane ko mu ngingo ya 5, iya 6 n'ya 7 hateganywaga ibisabwa kugira ngo umuntu ahabwe ikarita ndanga muntu harimo kuba yujuje imyaka 16, kuba uyisaba afite amafoto magufi abiri, imwe igashyirwa ku ikarita ndangamuntu, indi ku ifishi y'ibarura. Mu bisabwa hakaba ntahateganyijwe ko uyisaba yagombaga kubanza kugaragaza ko yashyingiranywe n'umugabo mu buryo bukurikije amategeko. Ahubwo ku mugereka w'iryo teka akaba ariho hagaragara amakuru agomba kuzuzwa mu ikarita ndangamuntu harimo amazina y'uwo bashyingiranywe n'amazina y'abana. Urukiko rusanga kandi irangamuntu Mukankubito Daphrose agaragaza ari kopi, akaba atarabashije kugaragaza umwimerere wayo yahereyeho akora iyo kopi, cyane ko Nabimana Pierre atayemera, akavuga ko yayibuze mu gihe cya Jenocide.

⁵ NTAMPAKA, Charles, Droit *des personnes et de la famille*, Manuel de droit rwandais, 1993, pge 108: « En général la preuve du mariage est faite à suffisance par un extrait de l'acte de mariage. La preuve sera faite par témoins en cas de perte ou d'inexistence de registres de mariage ».

[46] Urukiko rushingiye ku bisobanuro byatanzwe mu bika bibanziriza iki, rurasanga, nk’uko Urukiko Rwisumbuye rwa Nyarugenge rwabyemeje mu rubanza Mukankubito Daphrose asubirishamo ku mpamvu z’akarengane, kuba agaragaza ko yari yanditse mu ndangamuntu ya Nabimana Pierre atari ikimenyetso rwashingiraho rwemeza ko bashyingiranywe mu buryo bukurikije amategeko.

b. icyemezo cyo kuba warashyingiwe

[47] Me Mugeni Anita avuga kandi ko ikindi kimenyetso cyirengagijwe n’Urukiko ari icyemezo cyo kuba warashyingiwe cyatanzwe muri 1983 kigaragaza ko Mukankubito Daphrose na Nabimana Pierre bashyingiranywe, kikaba cyaratanzwe igihe Nabimana Pierre yasabaga kwandikwa nk’uwashakanye na Mukankubito Daphrose kugira ngo abone ibyangombwa byo mu Bubiligi. Avuga kandi ko nyuma yo guhabwa ubwo bwenegihugu bw’ababiligi, Ubuyobozi bwa Komini zo mu Bubiligi, bwagiye butanga inyandiko zitandukanye zigaragaza ko Nabimana Pierre yashakanye na Mukankubito Daphrose mu buryo bwemewe n’amategeko ariko urukiko rukaba rutarazihaye agaciro.

[48] Me Niyomugabo Christophe avuga ko ku bw’ibanze, icyemezo cyo kuba warashyingiwe cyatanzwe ku wa 12/3/2003 na Komini Kacyiru kitari gikwiriye gusuzumwa kuko Urwego rw’Umuvunyi rutagifashe nk’ikimenyetso cyirengagijwe, ko ariko Urukiko rusanze kigomba gusuzumwa kitafatwa nk’ikimenyetso cyemeza ko Mukankubito Daphrose yasezeranye na Nabimana Pierre kuko atari umwimerere, ndetse kikaba kitubahirije ibiteganywa n’ingingo ya 11 y’Itegeko N° 15/2004 ryo ku wa 12/05/2004 ryerekeye ibimenyetso mu manza n’itangwa ryabyo. Avuga kandi ko ari nako Umucamanza yabisobanuye mu gika cya 11 cy’urubanza

RCA0106/15/TGI/NYGE, aho yavuze ko icyo nyandiko itagombaga kwitwa inyandiko mvaho hashingiwe ko icya mbere atari umwimerere, icya kabiri ikaba itubahirije ibiteganywa n'ingingo ya 11 yavuzwe haruguru, kuko Mukankubito Daphrose avuga ko yasezeraniye muri Nyarugenge ariko akaba yaratse icyo cyemezo cyo kuba warashyingiwe muri Komini ya Kacyiru; bityo uwayikoze ubwe akaba ntacyo yashyingiyeho yemeza ko Mukankubito Daphrose yashyingiranwe na Nabimana Pierre. Bavuga kandi ko icyo cyemezo kitagombye gutangwa nk'ikimenyetso kuko ari icya kera muri 2003 kirengeje imyaka 12 gitanzwe.

[49] Mu iburanisha ryo ku wa 05/02/2020, Nabimana Pierre yavuze ko icyo cyemezo cyo kuba warashyingiwe yakiboneye bwa mbere mu rukiko ari Mukankubito Daphrose ukizanye.

UKO URUKIKO RUBIBONA

[50] Ingingo ya 18 y'Iteka ryo ku wa 04/05/1895 ryavuzwe haruguru yateganyaga ko muri biro y'irangamimerere, ibyemezo by'irangamimerere byandikwa mu bitabo by'irangamimerere naho ingingo ya 20 y'iryo Teka ikavuga ko ibyemezo by'irangamimerere byatangwaga hari abatangabuhamya babiri.

[51] Urukiko rusesenguye ingingo ya 18 imaze kuvugwa mu gika kibanziriza iki, rusanga impamvu yatumye Umushingamategeko ateganya ko ibyemezo by'irangamimerere bigomba kwandikwa mu bitabo (*Registres*) kwari ukugira ngo mu gihe ibyo byemezo bibuze, cyangwa haramutse havutse impaka ku ishyingirwa, abakozi b'irangamimerere bazabone aho bashingira bakora ibindi, no kugira ngo amakuru ari muri ibyo bitabo abe ariyo azafasha mu gukemura izo mpaka.

[52] Dosiye y'uru rubanza igaragaza icyemezo cyo kuba warashyingiwe cyatanzwe na Komini Kacyiru ku wa 12/03/2003 cyemeza ko Nabimana Pierre na Mukankubito Daphrose bashyingiranywe imbere y'Ubutegetsi muri Komini Nyarugenge ku wa 18/8/1978 ndetse banashyingiranwa imbere ya Kiliziya ku wa 17/12/1983.

[53] Urukiko rushingiye ku mvugo za Mukankubito Daphrose, rurasanga yemeza ko yashyingiranywe na Nabimana Pierre ku wa 18/8/1978 muri Komini Nyarugenge, akavuga ko Nabimana Pierre yarigishije icyo cyemezo, ari nayo mpamvu yaregeye Urukiko kugira ngo rumuhe inyandiko isimbura icyemezo cy'ishyingirwa. Rurasanga ariko Mukankubito Daphrose atarigeze arugaragariza byibura abatangabuhamya bazi iby'iryo shyingirwa bagombye kuba barabaherekeje gufata icyo cyemezo nk'uko byateganywaga n'ingingo ya 20 y'Iteka ryavuzwe haruguru, ikindi no mu Murenge wa Nyarugenge (wasimbuye icyahoze ari Komini Nyarugenge) avuga ko bashyingiraniwemo bakaba baremeje ko ibitabo by'irangamimerere by'icyo gihe byabuze, byumvikanisha ko Komini ya Kacyiru yatanze icyemezo cy'ishyingirwa idashingiye ku makuru mpamo.

[54] Urukiko rushingiye ku bisobanuro byatanzwe haruguru, rurasanga Urukiko Rwisumbuye rwa Nyarugenge rutarirengagije icyemezo cyo kuba warashyingiwe cyatanzwe na Komini Kacyiru ku wa 12/03/2003 cyemeza ko Nabimana Pierre na Mukankubito Daphrose bashyingiranywe imbere y'Ubutegetsi muri Komini Nyarugenge ku wa 18/8/1978 kuko cyatanzwe mu buryo budakurikije amategeko.

c. Inyandiko zitandukanye zatanze n'Ubuyobozi bwa Komini zo mu Bubiligi

[55] Me Mugeni Anita avuga ko ikindi kimenyetso ari uko mu mwaka wa 1999 Mukankubito Daphrose yagiye mu Bubiligi n'abana bose, ariko kugira ngo bakorerwe ihuzwa ry'umulyango (*regroupement familial*), byasabaga ko Nabimana Pierre agaragaza ko yashyingiranywe na Mukankubito Daphrose, arabikora ku buryo mu Bubiligi bafatwa nk'ababana bashyingiranywe, ko aramutse abihakanye yagaragaza ubundi buryo yaba yarabonyemo ubwenegihugu bw'Ubuyobozi.

[56] Me Niyomugabo Christophe avuga ko ku bw'ibanze iki kimenyetso kitari gikwiye gusuzumwa kuko Urwego rw'Umuvunyi rutagifashe nk'ikimenyetso cyirengagijwe, ko ariko Urukiko rubibonye ukundi, ibyo kuba Nabimana Pierre yarabonye ubwenegihugu bw'Ubuyobozi hashingiwe ko bashyingiranywe, atariko byagenze, kandi ko rwakwibaza impamvu, niba Mukankubito Daphrose avuga ko bashyingiranywe mu Bubiligi, atariho yasabye “*acte de mariage*”. Anasobanura ko ibizikubiyemo ari ibyavuzwe na Mukankubito Daphrose (*Simple déclarations*).

[57] Mu iburanisha ryo ku wa 05/02/2020, Nabimana Pierre yavuze ko ku bijyanye na *regroupement familial*, asaba Urukiko kubaza Mukankubito Daphrose kwerekana inyandiko igaragaza aho yaba yaramusabiye iyo *regroupement familial*, asobanura ko yari asanzwe agenda mu bihugu by'iburayi ku buryo batari kumukorera *regroupement familial*, kandi ko kuba ari ku nyandiko igaragaza abantu bagize urugo (*composition de ménage*) bitaba bivuze ko uba mu Bubiligi, atanga urugero kuri Me Mugeni Anita uba mu Rwanda ariko akaba agaragara kuri iyo *composition de ménage* ivugwa, ko rero nawe byitwaga ko aba

mu Bubiligi kandi atariho aba, ko regroupement familial ntayabayeho.

UKO URUKIKO RUBIBONA

[58] Dosiye igaragaza inyandiko zitandukanye zatanzwe na Komini ya Molenbeek yo mu Bubiligi zanditsemo ko Mukankubito Daphrose yashyingiranywe na Nabimana Pierre, izo nyandiko zikaba ari *Certificat de résidence historique, légalisation, Composition de ménage, avertissement – extrait de rôle Impôt des personnes physiques et taxes additionnelles*.

[59] Urukiko, rushingiye ku ngingo ya 117 y'Iteka ryo ku wa 04/05/1895 ryavuzwe haruguru, nk'uko byasobanuwe mu bika bibanziriza iki rugaragaza impamvu icyemezo cyo kuba warashyingiwe kitashyingirwaho hemezwa ko Mukankubito Daphrose na Nabimana Pierre bashyingiwe ku buryo bwemewe n'amategeko, rurasanga kuba mu nyandiko zinyuranye zatangiwe mu Gihugu cy'Ububiligi hagaragaramo ko Mukankubito Daphrose yashakanye na Nabimana Pierre, atari ikimenyetso cyemeza ko bashyingiranywe mu buryo bukurikije amategeko, bityo akaba ari nta kosa Urukiko Rwisumbuye rwa Nyarugenge rwakoze rutazishingiraho.

d. Inyandiko zavuye mu Kigo cy'Igihugu gishinzwe irangamuntu (NIDA) n'izavuye mu Kigo cy'abinjira n'abasohoka.

[60] Me Mugeni Anita avuga ko ikindi kimenyetso cyirengagijwe ari icyavuye muri NIDA kigizwe n'inyandiko yemeza ko bashyingiranywe mu buryo bukurikije amategeko. Avuga kandi ko Urwego rw'Umuvunyi rwakoze iperereza rugera no mu Kigo cy'abinjira n'abasohoka, aho rwasanze mu nyandiko

Nabimana Pierre yujuje, ahanditse statut yaruzuzagaho ko yashyingiranywe na Mukankubito Daphrose.

[61] Ku birebana n'inyandiko zatanze na NIDA, ababuranira Nabimana Pierre bavuga ko nazo zitaba ikimenyetso gituma urubanza rusubirishwamo ku mpamvu z'akarengane kuko ibizikubiyemo by'uko Nabimana Pierre yashakanye na Mukankubito Daphrose, byakosowe muri data base za NIDA, ubu bikaba bigaragara neza ko Nabimana Pierre ari ingaragu nk'uko attestation de célibat yahawe ku wa 20/4/2016 ibigaragaza ndetse na attestation de célibat nshyashya yo ku wa 31/10/2019. Naho ku bijyanye n'inyandiko zo mu kigo gishinzwe abinjira n'abasohoka, aho Nabimana Pierre yagiye yandika ko yashakanye na Mukankubito Daphrose, bavuga ko ibyo yabyujuje ashingiye ko bashyingiranywe mu Kiliziya, ariko ko atemera ko bashyingiranywe muri Komini.

UKO URUKIKO RUBIBONA

[62] Bigaragara ko Mukankubito Daphrose yandikiye Urwego rw'Igihugu rushinzwe iby'irangamuntu asaba amakuru y'irangamimerere rya Nabimana Pierre maze ku wa 21/5/2015 NIDA imusubiza mu nyandiko ishingiyeye kuri National ID Data ko Nabimana Pierre yashakanye na Mukankubito Daphrose. Ikindi ni uko ku wa 18/12/2019, Umuyobozi Mukuru w'Ikigo cy'Igihugu gishinzwe Irangamuntu (NIDA), yasohoye inyandiko igenewe uwo bireba imenyesha ko Mukankubito Daphrose yashakanye na Nabimana Pierre. Na none ku wa 28/12/2019, icyo Kigo cyandikiye Umunyamabanga Nshingwabikorwa w'Umurenge wa Kimihurura ibaruwa isubiza iye yabazaga amakuru kuri Nabimana Pierre, ivuga ko uyu yubatswe akaba yarashakanye na Mukankubito Daphrose. Urukiko

rusanga izi nyandiko zitafatwa nk'ikimenyetso cyemeza ko bashyingiranywe mu buryo bukurikije amategeko kuko zidasimbura inyandiko yo gushyingirwa nk'uko byateganywaga mu ngingo ya 117 y'Iteka ryo ku wa 04/05/1895 ryavuzwe haruguru, bityo ibivugwa na Me Mugeni Anita ko Urukiko Rwisumbuye rwirengagije ibyo bimenyetso nta shingiro bifite.

(iii) Ku bijyanye n'indishyi zisabwa muri uru rubanza

Gusuzuma indishyi zasabwe na Mukankubito Daphrose na Nabimana Pierre

[63] Mukankubito Daphrose avuga ko nk'uko byagaragaye ko urubanza rusubirwamo rwabayemo akarengane ku ruhande rwe, asaba Urukiko gutegeka Nabimana Pierre kumwishyura amafaranga yo gukurikirana urubanza ahwanye na 15.000.000Frw (akubiyemo ingendo z'indege n'amacumbi) kuri buri rwego urubanza rwanyuzemo (Urukiko rw'Ibanze, Urukiko Rukuru, Urwego rw'Umuvunyi, Urukiko rw'Ikirenga), ndetse n'igihembo cy'Avoka kingana na 1.500.000Frw kuri buri rubanza, akavuga ko habayemo imanza zigera kuri 9, bityo akaba asaba 13.500.000 Frw.

[64] Nabimana Pierre avuga ko asaba Urukiko gutegeka Mukankubito kumwishyura indishyi zo kumushora mu manza ku maherere zingana na 10.000.000Frw n'indishyi z'ikurikiranarubanza zingana na 2.000.000 Frw, akanamwishyura amafaranga y'igihembo cy'aba Avoka angana na 10.000.000Frw.

UKO URUKIKO RUBIBONA

- **Ku bijyanye n'indishyi zo gushorwa mu manza nta mpamvu**

[65] Urukiko rurasanga indishyi zo gushorwa mu manza nta mpamvu Nabimana Pierre asaba atazihabwa kuko ari uburenganzira bwa Mukankubito Daphrose bwo kuregera Urukiko ngo rusuzume niba akarengane avuga yagiriwe na Nabimana Pierre gafite ishingiro.

- **Ku bijyanye n'amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka**

[66] Urukiko rurasanga Mukankubito Daphrose nta mafaranga y'ikurikiranarubanza n'igihembo cy'Avoka yabona kuko Urukiko rwasanze nta karengane yagiriwe biturutse ko haba hatarubahirijwe amategeko cyangwa ngo habe harirengagijwe ibimenyetso mu rubanza asubirishamo ku mpamvu z'akarengane.

[67] Urukiko rurasanga Nabimana Pierre akwiye guhabwa amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka kuko byabaye ngombwa ko akurikirana urubanza yarezwemo na Mukankubito Daphrose, akishyura n'Abavoka bamwunganiye muri uru rubanza. Urukiko rurasanga ariko atahabwa 2.000.000 Frw asaba kuko atayagaragarije ibisobanuro kandi akaba ari menshi, rukaba mu bushishozi bwarwo, rumugeneye 300.000Frw y'ikurikiranarubanza. Ku bijyanye n'igihembo cy'Avoka, Urukiko rusanga rutamugenera 10.000.00Frw asaba kuko atayagaragarije ibisobanuro byayo kandi akaba ari menshi, mu bushishozi bwarwo rumugeneye 500.000 Frw.

III. ICYEMEZO CY'URUKIKO

[68] Rwemeje ko ikirego cyo gusubirishamo ku mpamvu z'akarengane, urubanza RC0106/15/TGI/NYGE rwaciwe ku wa 18/05/2015 n'Urukiko Rwisumbuye rwa Nyarugenge, cyatanzwe na Mukankubito Daphrose, nta shingiro gifite;

[69] Rwemeje ko urubanza RC0106/15/TGI/NYGE rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge ku wa 18/05/2015, rudahindutse;

[70] Rwemeje ko indishyi Mukankubito Daphrose asaba nta shingiro zifite;

[71] Rwemeje ko Nabimana Pierre nta ndishyi zo gushorwa mu manza agenewe;

[72] Rutegetse Mukankubito Daphrose guha Nabimana Pierre amafaranga 300.000Frw y'ikurikiranarubanza n'amafaranga 500.000Frw y'igihembo cy'Avoka, yose hamwe akaba amafaranga 800.000Frw.

RIZIKI v MUBIRIGI

[Rwanda URUKIKO RW'IKIRENGA –
RS/INJUST/RC00001/2019/SC (Kayitesi Z, P.J, Nyirinkwaya,
Cyanzayire, Rukundakuvuga na Hitiyaremye, J.) 29
Ugushyingo 2019]

Amategeko agenga umuryango – Ubutane – Kugabana imitungo – Iyo abashyingiranywe mu buryo bw'ivangamutungo batanye, ihame ni uko bagabana umutungo ku buryo bungana; yaba ukugurisha umutungo basangiye bakagabana amafaranga avuyemo, yaba kugabana ibintu uko bimeze hatagize ikigurishwa cyangwa se kuba umwe yaha undi agaciro k'umutungo ubazwe mu mafaranga akawugumana batagombye kugabana – Mu gihe batumvikanye muri bumwe muri ubwo buryo, umucamanza niwe utegeka igikwiye kitagize uwo kibangamiye mu bashakanye.

Incamake y'ikibazo: Uru rubanza rwahereye mu Rukiko rw'Ibanze rwa Nyarugunga aho Riziki yatanze ikirego asaba ubutane agaragaza ko uwo bashakanye Mubiligi amuhoza ku nkenke ko imibanire yabo yabaye mibi, asaba ko bahabwa ubutane maze kuko basezeranye ivangamutungo bakagabana imitungo bari bafitanye; Urukiko rwaciye urubanza rwemeza ko batanye burundu, abana babyaranye bakarerwa na nyina, Se akabasura nabo bakamusura, rutegeka ko imitungo bafitanye igurishwa amafaranga avuyemo bakayagabana.

Uwareze ntiyishimiye imikirize y'urwo rubanza ajuririra Urukiko Rwisumbuye agaragaza ko impamvu zose yatanze asaba ubutane zitasuzumwe, ko hari ibimenyetso Urukiko rwirengagije, ko mu kubagabanya umutungo Urukiko rutitaye ku nyungu z'abana no kuba nta ndezo rwategetse uwo baburana kuzajya

atanga. Urukiko Rwisumbuye rwemeje ko ubujurire bwe bufite ishingiro kuri bimwe, rutegeka uregwa kuzajya atanga indezo buri kwezi ndetse no gufatanya kwishyurira abana amashuri.

Urega kandi yongeye ajuririra Urukiko Rukuru ariko ikirego cye nticyakirwa. Yaje kwandikira Perezida w'Urukiko Rukuru asaba ko urubanza RCA00110/2017/TGI/NYGE rwaciwe n'urukiko Rwisumbuye rwasubirwamo ku mpamvu z'akarengene, Perezida w'Urukiko Rukuru yandikira Perezida w'Urukiko rw'Ikirenga amugaragariza ko muri urwo rubanza harimo akarengane ko rwasubirwamo, maze nawe yemeza ko urwo rubanza rusubirwamo.

Uwasabye gusubirishamo urubanza avuga ko yahabwa inzu aho kuyigurisha akayireramo abana kubw' inyungu zabo, kuko iyo nzu igurishijwe abana babura aho kuba, bityo kuba ariwe urera abana, yagombye kugumana inzu, maze umugabo we akagumana indi mitungo inarusha agaciro iyo nzu.

Mu kwiregura, Mubiligi avuga ko kuba Urukiko rwarategetse ko imitungo igurishwa bakayigabana nta karengane karimo, kuko mu gihe bagabanye buri wese akabona uruhare rwe, yagura indi inzu, ko abana yitwaza bamaze gukura, kandi ko niba indi mitungo avuga bafitanye ifite agaciro kanini kuruta inzu ko nawe yayitwara yose maze we akagumana inzu gusa kugirango azabone aho aba mu kiruhuko cy'izabukuru ari hafi kujyamo.

Incamake y'icyemezo: 1. Iyo abashyingiranywe mu buryo bw'ivangamutungo batanye, ihame ni uko bagabana umutungo ku buryo bungana; yaba ukugurisha umutungo basangiye bakagabana amafaranga avuyemo, yaba kugabana ibintu uko bimeze hatagize ikigurishwa cyangwa se kuba umwe yaha undi agaciro k'umutungo ubazwe mu mafaranga akawugumana batagombye kugabana; mu gihe batumvikanye muri bumwe muri

ubwo buryo, umucamanza niwe utegeka igikwiye kitagize uwo kibangamiye mu bashakanye, bityo kubera ko ababuranyi bananiwe kumwikana kuburyo bagabanamo umutungo bafitanye, Urukiko nirwo rugomba gufata icyemezo, bityo imitungo bari batunze igomba kugurishwa, bakagabana kuburyo bungana amafaranga avuyemo.

Gusubirishamo urubanza ku mpamvu z’akarengane nta shingiro bifite.

Amategeko yashingiweho:

Itegeko N° 32/2016 ryo ku wa 28/08/2016 rigenga abantu n’umuryango nk’uko ryahinduwe kandi ryujijwe kugeza ubu, ingingo 8 n’iya 242

Imanza zifashishijwe:

Murayire v Sindikubwabo, RS/REV/INJUST/CIV 0029/16/CS
rwaciwe n’Urukiko rw’Ikirenga ku wa 01/06/2018.

Urubanza

I. IMITERERE Y’IKIBAZO

[1] Riziki Nicole yashakanye byemewe n'amategeko na Mubirigi Rwamfizi Jean Paul ku wa 03/07/1999, mu cyahoze ari Komini Rubavu (ubu ni mu Murenge wa Gisenyi), babyarana abana 3 aribo: Mugisha Daniel, Singiza Prisca, na Ntwari Arnold Peace. Basangiye imitungo ikurikira:

- a. ikibanza UPI N⁰ 1/03/05/04/596 kirimo inzu na “*annexe*” yayo iherereye mu Kagali ka Rubirizi, Umurenge wa Kanombe, Akarere ka Kicukiro;
- b. ikibanza UPI N⁰ 1/03/05/03/4108 kiri mu Kagali ka Karama, Umurenge wa Kanombe, Akarere ka Kicukiro;
- c. ikibanza UPI N⁰ 1/02/10/04/3037 giherereye mu Kagali ka Murama, Umurenge wa Kinyinya, Akarere ka Gasabo;
- c. umutungo wimukanwa ugizwe n'imodoka Toyota Corolla RAA 864 N, n'ibikoresho byo mu nzu.

[2] Riziki Nicole avuga ko imibanire yabo yaje kuba mibi, Mubirigi Rwamfizi Jean Paul akamuhoza ku nkeke, bituma atanga ikirego asaba ubutane mu Rukiko rw'Ibanze rwa Nyarugunga. Urubanza rwanditswe kuri RC0296/16/TB/NYRGA, rucibwa ku wa 06/07/2017.

[3] Urukiko rwemeje ko Mubirigi Rwamfizi Jean Paul na Riziki Nicole batanye burundu, ko abana bafitanye bakomeza kurerwa na Riziki Nicole, se akajya abasura nabo bakamusura. Rwategetse ko:

- a. umutungo utimukanwa wavuzwe haruguru ugurishwa Riziki Nicole na Mubirigi Rwamfizi Jean Paul bakagabana mu buryo bungana amafaranga avuyemo;
- b. umutungo wimukanwa ugizwe n'imodoka n'ibikoresko binyuranye ugurishwa bakagabana mu buryo bungana amafaranga waguzwe.

[4] Riziki Nicole yajuririye urwo rubanza mu Rukiko Rwisumbuye rwa Nyarugenge, atanga impamvu zikurikira:

- a. kuba hatarasuzumwe impamvu zose zaregewe mu gusaba ubutane;
- b. kuba Urukiko rwarashingiye ku mpamvu zitarizo kandi zivuguruzanya;
- c. Kuba Urukiko rwarirengagije ikimenyetso cy'urubanza RC00447/16/TB/NYRGA rwategetse umugabo kuva mu rugo;
- d. kuba rutarumvise ubuhamya bw'abana, no kuba rutaritaye ku nyungu zabo mu igabana ry'umutungo;
- e. Kuba rwaratanze ubutane bushingiye ku makosa yabo bombi, no kuba nta ndezo rwaciye Mubirigi Rwamfizi Jean Paul.

[5] Urubanza mu bujurire rwanditswe kuri RCA00110/2017/TGI/NYGE rucibwa ku wa 31/05/2018, Urukiko rwemeza ko ubujurire bwa Riziki Nicole bufite ishingiye kuri bimwe, rutegeka Mubirigi Rwamfizi Jean Paul kujya atanga amafaranga y'u Rwanda ibihumbi ijana na makumyabiri (120.000Frw) buri kwezi y'indezo y'abana no kujya afatanyana na Riziki Nicole kubarihira amafaranga y'ishuri.

[6] Riziki Nicole yongeye kujurira mu Rukiko Rukuru ariko ikirego nticyakirwa, ku wa 13/02/2019 yandikira Perezida w'Urukiko Rukuru amusaba gusuzuma akarengane kari mu rubanza RCA00110/2017/TGI/NYGE. Perezida w'Urukiko Rukuru amaze gusuzuma ubusabe bwa Riziki Nicole, yandikiye Perezida w'Urukiko rw'Ikirenga amusaba ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane.

[7] Perezida w'Urukiko Rukuru yasobanuye ko akarengane gashingiye ku kuba:

a. mw'icibwa ry'urubanza RCA00110/2017/TGI/NYGE, Urukiko rutarigeze rugira icyo ruvuga ku mafaranga angana na 5.000.000Frw Riziki Nicole avuga ko ari kuri konti, kandi yaravuzweho mu bigomba kugabanwa nk'uko bigaragazwa n'inyandikomvugo y'iburanisha ryo ku wa 01/03/2018;

b. Urukiko rutarigeze rugaragaza ingano y'amafaranga y'ishuri buri wese azajya yishyurira abana hakurikijwe ubushobozi bwe, bikaba byatuma urubanza rudashobora kurangizwa mu gihe ubwabo batabyumvikanyeho.

[8] Ku wa 07/05/2019, Perezida w'Urukiko rw'Ikirenga yafashe icyemezo numero 096/CJ/2019 cyo gusubirishamo ku mpamvu z'akarengane urubanza RCA00110/2017/TGI/NYGE rwaciwe bwa nyuma n'Urukiko Rwisumbuye rwa Nyarugenge, ateguka ko ikirego cyandikwa mu bitabo by'Urukiko, gihabwa numero RS/INJUST/RC00001/2019/SC. Iburanisha ry'urubanza ryashyizwe ku wa 11/09/2019.

[9] Ku wa 11/09/2019, iburanisha ryabereye mu ruhame, Riziki Nicole yunganiwe na Me Mukandera Clothilde naho Mubirigi Rwamfizi Jean Paul yunganiwe na Me Subukonoke Emmanuel. Ababuranyi bagiye impaka ku bijyanye n'igabana ry'inzu iri mu kibanza UPI No 1/03/05/04/596 gihereye mu Kagali ka Rubirizi, Umurenge wa Kanombe, Akarere ka Kicukiro. Riziki Nicole yagaragarije Urukiko ko ashaka kugumana inzu mu nyungu z'abana, kugirango abarereremo. Mubirigi Rwamfizi Jean Paul nawe yabwiye Urukiko ko ariwe ukwiye kuyigumana kugirango azabone aho aba mu kiruhuko cy'izabukuru ari hafi kujiyamo. Ikindi cy'ingenzi cyagiweho impaka, ni amafaranga y'ubwizigame ahabwa abasilikare igihe bafashe ikiruhuko cy'izabukuru. Riziki Nicole avuga ko ayo mafaranga atashyizwe mu bigomba kugabanwa, Mubirigi

Rwamfizi Jean Paul akavuga ko ibyo bitigeze biregerwa mu nkiko zibanza.

[10] Iburanisha ry’urubanza ryarapfundikiwe, ababuranyi bamenyeshwa ko ruzasomwa ku wa 18/10/2019. Mu mwiherero warwo, Urukiko rwasanze mbere yo guca urubanza burundu, ari ngombwa kubanza kubaza muri Zigama CSS ibijyanye n’ amafaranga ari kuri konti numero 0049633 y’ubwizigame ahabwa abasilikare igihe bafashe ikiruhuko cy’izabukuru, by’umwihariko umubare w’amafaranga yashyizwe kuri iyo konti kuva ku itariki ya 13/07/2016 ubwo hatangwaga ikirego cy’ubutane, kugeza ku itariki ya 10/05/2019.

[11] Zigama CSS yashyikirije Urukiko “historique” igaragaza ko ku wa 26/07/2016 konti no 0049633 yariho 5.021.920Frw, naho ku wa 25/04/2019 ikaba yariho 6.741.856 Frw. Urubanza rwasubukuwe ku wa 11/11/2019 kugirango ababuranyi bagire icyo bavuga ku byagaragajwe na Zigama CSS. Mu iburanisha, Riziki Nicole yabwiye Urukiko ko atagikurikiranye ayo mafaranga, ko ayahebeye Mubirigi Rwamfizi Jean Paul, akaba ariyo mpamvu iki kibazo kitirirwa gisuzumwa.

[12] Ikibazo nyamukuru kiri muri uru rubanza akaba ari ugusuzuma niba mu kugabanya imitungo, inzu iri mu kibanza UPI No 1 /03/05/04/596 yaherera kuri Riziki Nicole kugirango akomeze kuyireramo abana mu rwego rwo kurengera inyungu zabo.

II. IKIBAZO KIGIZE URUBANZA N'ISESENGURA RYACYO

Gusuzuma niba mu kugabanya imitungo, inzu iri mu kibanza UPINo1/03/05/04/596 yaherera kuri Riziki Nicole kugira ngo akomeze kuyireramo abana mu rwego rwo kurengera inyungu zabo.

[13] Kuri iki kibazo, Riziki Nicole asobanura akarengane muri aya magambo:

a. Urukiko rw'Ibanze rwari rwategetse ko umutungo Riziki Nicole afatanyije na Mubirigi Rwamfizi Jean Paul ugurishwa, rwirengagije ko abana bose bakiri bato bakaba bagomba kugira aho babana n'umubyeyi ubarera;

b. Urukiko Rwisumbuye rwagombaga gukosora ayo makosa rugategeka ko inzu imuhereraho; rukaba rwarirengagije ibikubiye mu ngingo ya 3 y'Amasezerano mpuzamahanga ku burenganzira bw'umwana ivuga ko ibyemezo byose bifatirwa umwana byaba bifashwe n'inzego zitandukanye cyangwa inkiko hitabwa ku nyungu z'ikirenga ze;

c. iyo ngingo imaze kuvugwa yunganirwa n'ingingo ya 4 y'Amasezerano nyafurika ku burenganzira n'imibereho myiza by'umwana, nayo ivuga ko mu byemezo byose bireba umwana bifashwe n'uwari we wese cyangwa n'urwego urwo arirwo rwose, hitabwa mu nyungu ze. icyemezo cyafashwe n'Inkiko zombi kinyuranye kandi n'ibiteganywa n'ingingo ya 227 y'Itegeko N° 32/2016 ryo ku wa 28/08/2016 rigenga abantu n'umuryango¹;

¹Uretse igihe abashyingiranywe basezeranye ivangura mutungo risesuye, iyo urukiko rutegetse kuba ahandi, umutungo wimukanwa n'utimukanwa ugabanywa abashyingiranywe mu buryo bw'agateganyo nyuma yo

d. kuba Urukiko rwarategetse ko imitungo igurishwa, bivuze ko hazakoreshwa inzira ya cyamunara, bikaba bibangamiye ituze ry'abana kuko harimo umwe warwaye ihungabana akaba akurikiranwa n'ibitaro bya Ndera. Undi nawe arwaye umutima akaba yarabagiwe i Burayi, kubera iyo mpamvu Urukiko Rwisumbuye rwagombaga guhindura icyemezo cyafashwe n'Urukiko rw'Ibanze rukemeza ko umutungo ugizwe n'inzu iri mu kibanza UPI No1/03/05/04/596, ifite agaciro ka 36 500 000 Frw iherezwa kuri Riziki Nicole, Mubirigi Rwamfizi Jean Paul agahabwa ibibanza bifite agaciro karenze 50.000.000Frw, agasubiza ikinyuranyo;

e. mu mibanire ye na Mubirigi Rwamfizi Jean Paul yahuye n'ihohotera ryo mu rugo rikabije, ari naryo ryatumye atanga ikirego cy'ubutane, ariko nta butabera yabonye kuko mu guca urubanza Urukiko rwemeje ko ubutane butanzwe ku makosa yabo bombi bituma inzu babagamo itamuhereraho

f. kumuha inzu ntaho binyuranyije n'itegeko, kuko ariwe ubana n'abana kandi bakaba bakiri bato. Avuga ko n'ubwo Singiza Prisca afite imyaka 20 afite ikibazo cy'uburwayi bw'umutima, uwa kabiri ufite imyaka 17 we akaba afite ihungabana, uwarangije kwiga amashuri yisumbuye akaba akiri mu rugo. Inzu babamo igurishijwe mu cyamunara abana bajya mu muhanda, bikabatera ihungabana rirushije iryo bagize amaze gutandukana na Mubirigi Rwamfizi Jean Paul.

g. Asoza avuga ko indi impamvu y'akarengane ari uko Urukiko rwirengagije ikimenyetso kijyanye n'igenagaciro yatanze ryagaragaje ko agaciro k'inzu iri mu kibanza UPI:1/03/05/04/596 ari 36.523.640Frw, agaciro k'ikibanza UPI: 1/03/05/03/4108

kuwukorera ibarura rishyirwaho umukono n'impande zombi kandi hagomba kwitabwaho inyungu z'umwana n'iz'umwuga w'abashyingiranywe”.

akaba ari 46.426.000Frw, ikindi kibanza kiri kuri UPI: 1/10/04/3037 kikaba gifite agaciro ka 5.096.000Frw, ku buryo harebwe inyungu z'abana, Mubirigi Rwamfizi Jean Paul yagombaga guhabwa ibyo bibanza byose bifite agaciro ka 51.522.000Frw karenze kure agaciro k'inzu, hanyuma we agasigarana inzu kugira ngo arereremo abana.

[14] Me Mukandera Clothilde umwunganira avuga ko ingingo ya 245 y'Itegeko rigenga abantu n'umuryango mu Rwanda itubahirijwe, ko inzu y'ababyeyi igurishijwe abana bajya mu muhanda inyungu zabo zikaba zibangamiwe. Avuga ko ashingiye kuri iyo ngingo, asanga kuba Riziki Nicole ariwe urera abana, yagombye kugumana inzu y'ababyeyi, Mubiligi Rwamfizi Jean Paul akugumana indi mitungo inarusha agaciro inzu Riziki Nicole asaba ko imuherezawaho.

[15] Mubirigi Rwamfizi Jean Paul asubiza ku ngingo Riziki Nicole aburanisha avuga ko:

a. kuba Urukiko rwarategetse ko umutungo bafitanye ugurishwa nta karengane karimo, kuko byubahirije ibiteganywa n'ingingo ya 8 y'Itegeko N° 27/2016 ryo ku wa 08/07/2016 rigenga imicungire y'umutungo w'abashyingiranywe, impano n'izungura², ndetse n'inyandiko z'abahanga mu mategeko zikaba zivuga ko ibigabanwa mu gihe cy'ubutane ari imitungo iriho muri icyo gihe, n'imyenda bafitiye abandi bantu (...*La masse à partager se compose des biens existants au jour du divorce, sur base de l'inventaire, tout en déterminant le passif commun*; Alain

² Iyo uburyo bw'ivangamutungo rusange busheshwe ku mpamvu z'ubutane cyangwa guhindura uburyo bw'imicungire y'umutungo, abari barashyingiranywe kuvanga umutungo bagabana ku buryo bungana cyangwa mu bundi buryo bumvikanye imitungo n'imyenda

Duelz, Le droit du divorce, 3 éd., Bruxelles, De Boeck & Larcier, 2002).

b. abana bamaze gukura, kuko Singiza Prisca afite imyaka 21, Ntwari Peace Arnold 18, bombi bakaba barangije amashuri yisumbuye bategereje kujya muri Kaminuza. Uwa gatatu Mugisha Daniel ufite imyaka 15 agiye kurangiza “Tronc commun”, bityo akaba asanga icyemezo cyafashwe n’Inkiko zombi (TB Nyarugunga na TGI/Nyarugenge) cyo kugurisha imitungo basangiye no kugabana mu buryo bungana cyarakurikije amategeko. Avuga ko mu gihe bagabanye buri wese akabona uruhare rwe, yagura indi inzu, abana bakaba aho bashatse cyane ko bamaze gukura;

c. imitungo asangiye na Riziki Nicole atari imitungo itimukanwa gusa (inzu n’ibibanza bibiri), ko hari n’imitungo yimukanwa basangiye (ibikoresho byo munzu, n’ imodoka) nkuko bikubiye mu cyemezo cy’Urukiko rw’Ibanze rwa Nyarugunga, akaba atumva impamvu Riziki Nicole atsimbaraye gusa ku mutungo utimukanwa cyane cyane inzu;

d. niba Riziki Nicole asanga ibibanza bibiri bafatanyije bifite agaciro kanini karenze inzu, asaba Urukiko rw’Ikirenga ko rwategeka Riziki Nicole ko yagumana ibyo bibanza bibiri, ndetse akagumana n’ibikoresho byose byo mu nzu hamwe n’imodoka, maze we agasigarana inzu gusa kugirango bombi hatagira urengana. Avuga ko ubu afite imyaka 47, akaba asigaje imyaka itatu gusa ngo ajye mu kiruhuko cy’izabukuru, akaba rero akeneye kugira aho asazira;

e. ibyo Riziki Nicole avuga by’uko yahohotewe bikabije ari amarangamutima kubera inzu ashaka, kuko iyo aba yarabikoze yari kubihanirwa mu Rukiko Rwisumbuye rwa Gasabo kuko byaburanyweho Asobanura ko inzu ariwe wayiguze ku ideni yari

yahawe na Zigama CSS, ariko ko iryo deni ryishyuwe kuko yagize amahirwe akajya mu butumwa mu mahanga

f. kuvuga ko inzu igurishijwe abana bahungabana ataribyo kuko abana bameze neza, na Singizwa wigeze kubagwa ku mutima nta kibazo afite ubu, n'ubwo Riziki Nicole yamwohereje muri Canada atamubwiye;

g. n'ubwo atemera igenagaciro Riziki Nicole yakoresheje, kugira ngo ibintu bigende neza, yamuha 50% by'agaciro k'inzu, ibikoresho byose byo mu nzu n'imodoka, hanyuma bakagabana ibibanza bisigaye, abana akabarera nawe kuko abishoboye kandi bakaba ari bakuru. Avuga ko atumva impamvu yanga ko bagurisha bakagabana, mu gihe baramutse bagurishije bakuramo amafaranga menshi akaba yanagura inzu irenze iyo bari bafite.

[16] Me Sebukonoke Emmanuel wunganira Mubirigi Rwamfizi Jean Paul avuga ko mu rubanza rusabirwa gusubirwamo nta karengane karimo, kuko hagendewe ku mategeko. Avuga ko iyo abashakanye batanye bagabana imitungo bari bafitanye ku buryo bungana, bakagira inshingano zo kurera abana babo uko babishoboye, ko ntaho itegeko ryateganyije ko babanza kureba abana mbere y'uko bagabana.

UKO URUKIKO RUBIBONA

[17] Ingingo ya 242 y'Itegeko N° 32/2016 ryo ku wa 28/08/2016 rigenga abantu n'umuryango iteganya ko ubutane busesa ishyingirwa n'amasezerano agenga imicungire y'umutungo w'abashyingiranywe, igabana ry'umutungo rigakorwa hakurikijwe amategeko abigenga. Naho ingingo ya 8, igika cya mbere, y'Itegeko N° 27/2016 ryo ku wa 08/07/2016 rigenga imicungire y'umutungo w'abashyingiranywe, impano

n'izungura, igateganya ko «iyo uburyo bw'ivangamutungo rusange busheshwe ku mpamvu z'ubutane cyangwa guhindura uburyo bw'imicungire y'umutungo, abari barashyingiranywe kuvanga umutungo bagabana ku buryo bungana cyangwa mu bundi buryo bumvikanye imitungo n'imyenda. icyakora, Urukiko rushobora gutegeka ko agaciro k'ibyangijwe n'umwe mu bashyingiranywe gakurwa mu mugabane we.

[18] Isesengura ry'izi ngingo ryumvikanisha ko iyo abashyingiranywe mu buryo bw'ivangamutungo batanye, ihame ari uko bagabana umutungo ku buryo bungana. Itegeko ntirateganyije uburyo bagabanamo, niba ari ukugurisha umutungo bakagabana amafaranga avuyemo, kugabana ibintu uko bimeze hatagize ikigurishwa cyangwa se kuba umwe yaha undi agaciro k'umutungo ubazwe mu mafaranga akawugumana batagombye kugabana. Mu gihe abashakanye batagize icyo bumvikanaho, umucamanza mu bushishozi bwe, akaba ariwe ureba igikwiye kitagize uwo kibangamiye mu bashakanye, kandi abona ko aricyo gitanga ubutabera.

[19] Ku byerekeye uru rubanza, Urukiko rurasanga ababuranyi bari basangiye imitungo igizwe:

- a. n'inzu ifite “annexe” biri mu kibanza gifite UPI: 1/03/05/04/596, gihereye mu Murenge wa Kanombe, Akarere ka Kicukiro;
- b. ikibanza kiri kuri UPI: 1/03/05/03/4108 gihereye mu Murenge wa Kanombe, Akarere ka Kicukiro;
- c. ikibanza kiri kuri UPI: 1/02/10/04/3037 gihereye mu Murenge wa Kinyinya, Akarere ka Gasabo;

d. imitungo yimukanwa inyuranye, n'imodoka Toyota Corolla RAA 864.

[20] Riziki Nicole avuga ko yiteguye guhara ibindi bibanza, akagumana ikibanza kirimo inzu, akarereramo abana. Mubirigi Rwamfizi Jean Paul nawe avuga ko atiteguye guhara iyo nzu, kuko ariwe uyikeneye cyane, kandi ko yiteguye kurera abana kuko ari bakuru, Urukiko rukaba rusanga nta n'umwe mu bashakanye witeguye guharira undi, akaba ariyo mpamvu arirwo rugomba gufata icyemezo rusanga ko gikwiye.

[21] Urukiko rurasanga, nk'uko Urukiko rw'Ibanze n'Urukiko Rwisumbuye zabibonye, icyemezo gikwiye kandi kidateje impaka, kinatuma hadakomeza kubaho imanza za hato na hato, ari uko imitungo Riziki Nicole Mubirigi Rwamfizi Jean Paul bari batunze igurishwa, bakagabana ku buryo bungana amafaranga avuyemo, buri wese agakomeza inshingano za kibyeyi ku bana babyaranye.

[22] Urukiko rurasanga ibyo Riziki Nicole avuga ko inzu iramutse igurishijwe mu cyamunara byagira ingaruka ku bana, bikaba byatuma bahungabana, nta shingiro byahabwa kuko ari ibyiyumviro bidafite ikibyemeza (*hypothétique*). Urukiko rurasanga kandi nta kibuzwa ko nyuma yo kugabana amafaranga avuye mu igurisha ry'imitungo, buri wese yashakamo indi nzu yo guturamo, ku buryo abana batabura aho baba.

[23] Urukiko rurasanga kandi, kuba bagurisha imitungo bakagabana amafaranga avuyemo mu buryo bungana, ari byo byemejwe no mu rubanza RS/REV/INJUST/CIV0029/16/CS rwaciye n'Urukiko rw'Ikirenga ku wa 01/06/2018, haburana Murayire Marie Aimable na Sindikubwabo Louis.

[24] Urukiko rurasanga rero, hashingiwe ku bisobanuro bimaze gutangwa, no ku ngingo ya 242 y'Itegeko N° 32/2016 ryo ku wa 28/08/2016 rigenga abantu n'umuryango, n'iya 8 igika cya mbere y'Itegeko N° 27/2016 ryo ku wa 08/07/2016 rigenga imicungire y'umutungo w'abashyingiranywe, impano n'izungura, imitungo Riziki Nicole na Mubirigi Rwamfizi Jean Paul bari batunze igomba kugurishwa, bakagabana ku buryo bungana amafaranga avuyemo, nk'uko byari byemejwe n'Inkiko zibanza.

III. ICYEMEZO CY'URUKIKO

[25] Rwemeje kwakira ikirego cyatanzwe na Riziki Nicole kigamije gusubirishamo, ku mpamvu z'akarengane, urubanza RCA00110/2017/TGI/NYGE, rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge ku wa 31/05/2018;

[26] Rwemeje ko nta karengane kari mu rubanza RCA 00110/2017/TGI/NYGE, rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge ku wa 31/05/2018;

[27] Rwemeje ko imikirize y'urubanza N° RCA 00110/2017/TGI/NYGE, rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge ku wa 31/05/2018, idahindutse;

[28] Rwemeje ko ikibanza UPI:1/03/05/04/596 kirimo inzu na *annexe* yayo, nabyo bigurishwa, Riziki Nicole na Mubirigi Rwamfizi Jean Paul bakagabana mu buryo bungana amafaranga avuyemo.

UWAMWEZI v RANGHELLA

[Rwanda URUKIKO RW'IKIRENGA –
RS/REV/INJUST/CIV.0012/16/CS (Kayitesi Z, P.J,
Hatangimbabazi na Kanyange, J.) 1 Kamena 2018]

Amategeko agenga umuryango – Umutungo w'abashyingiranwe – Ivangamutungo – Kugabana umutungo – Amasezerano y'ubwumvikane yo kugabana umutungo akozwe hagati y'abashyingiranywe ivangamutungo rusange, nta gaciro aba afite igihe atakozwe hagamijwe guhinduza uburyo bwo gucunga umutungo hagati yabo, kuko ivangamutungo riba rigikomeje igihe cyose batari bahabwa ubutane.

Incamake y'ikibazo: Uru rubanza rwahereye mu Rukiko rw'Ibanze rwa Kacyiru, Ranghella arega umugore we Uwamwezi asaba ubutane ngo kuko yamuhozaga ku nkeke, anasaba ko contrat de partage bagiranye yo kugabana umutungo, Urukiko rwayirekera uko babyumvikanyeho. Urukiko rwaciye urubanza rwemeza ko nta butane bahawe kubera ko nta bimenyetso Ranghella yagaragarije Urukiko by'uko Uwamwezi amuhoza ku nkeke, Urukiko rwemeje kandi ko contrat de partage bagiranye, nta gaciro ifite.

Ranghella ntiyishimiye imikirize y'uwo rubanza maze ajuririra Urukiko Rwisumbuye rwa Gasabo, rwemeza ko ubwo bujurire bufite ishingiro kuri bimwe, rwemeza ko nta butane butanzwe, ko ariko contrat de partage bagiranye igumana agaciro kayo.

Nyuma y'imyaka ibiri Ranghella yongeye gutanga ikirego mu Rukiko rw'Ibanze rwa Kacyiru asaba nanone ubutane, ku mpamvu y'uko we n'umugore we Uwamwezi bamaze imyaka

itatu batabana, Urukiko rwaciye urubanza rwemeza ko batanye burundu, naho kubijyanye n'umutungo hakurikizwa contrat de partage yemejwe n'urukiko Rwisumbuye mu rubanza RCA0180/08/TGI/GSBO kuko rwabaye itegeko.

Uwamwezi ntiyishimiye imikirize y'urubanza ajuririra mu Rukiko rw'Isumbuye rwa Gasabo avuga ko igabana ry'umutungo ritakurikije amategeko kuko ngo Urukiko rutagombaga gushingira kuri contrat de partage kandi barasezeranye ivangamutungo rusange hagombaga gushingirwa ku itegeko. Urukiko rwemeje ko ubujurire bwe nta shingiro bufite ko iby'uko ayo masezerano adakuraho ivangamutungo nta shingiro byahabwa kuko ari amasezerano yabaye hagati y'ababuranyi, akaba atarateshejwe agaciro.

Uwamwezi ntabwo yishimiye imikirize y'urubanza yandikira Umuvunyi Mukuru agaragaza ko urubanza rurimo akarengane asaba ko rwasubirwamo, Urwego rw'Umuvunyi nyuma yo gusuzuma ubusabe bwe rwandikiye Perezida w'Urukiko rw'Ikirenga rumusaba ko urubanza RCA0127/12/TGI/GSBO rwasubirwamo ku mpamvu z'akarengane. Perezida w'Urukiko na we yemeza ko urwo rubanza rwongera rukaburanishwa kugirango hasuzumwe akarengane karubayemo.

Mu iburanisha Uwamwezi yagaragaje ko urubanza asubirishamo rugaragaramo akarengane gashingiye kubijyanye n'igabana ry'umutungo aho Urukiko rwashingiye ku masezerano y'igabana nayo batemera kuko yayasinye atazi ibyo asinyiye, avuga ko ayo masezerano atagombaga gushingirwaho kuko adasimbura uburyo bw'ivangamutungo basezeranyemo kandi batigeze bahindura ko rero bakagombye kugabana umutungo hakurikijwe itegeko ry'uko abatandukanye barasezeranye ivangamutungo rusange bagabana umutungo kuburyo bungana.

Ranghella yiregura avuga ko ibyo Uwamwezi avuga ko urubanza rwamurenganiye atari ukuri kuko ntaho Urukiko rwanyuranyije n'itegeko rwemeza ko ibyo kugabana imitungo hagati y'abashakanye byakemuwe mu rubanza rwabaye itegeko, akaba asanga icyo kibazo cy'igabana ry'umutungo kitari gikwiye kugarurwa mu manza, kuko cyasuzumwe mu manza zabanje. Ranghella avuga kandi ko ibyo Uwamwezi avuga by'uko atemera contrat de partagekuko ngo yayishyizeho umukono atazi ibiyikubiyemo, bidakwiye guhabwa agaciro, kuko atagaragaza aho ayo masezerano yamurenganyije cyangwa ngo agaragaze aho anyuranyije n'amategeko.

Incamake y'icyemezo: 1. Amasezerano y'ubwumvikane yo kugabana umutungo akozwe hagati y'abasezeranye ivangamutungo rusange, nta gaciro aba afite igihe atakozwe hagamijwe guhinduza uburyo bwo gucunga umutungo hagati yabo, kuko ivangamutungo riba rigikomeje igihe cyose batari bahabwa ubutane, bityo amasezerano yo kugabana umutungo yakozwe hagati ya Ranghella na Uwamwezi nta shingiro afite, ahubwo igabana ry'umutungo rigomba gushingira kuburyo bw'icungamutungo bahisemo basezerana.

**Gusubirishamo urubanza kumpamvu z'akarengane bifite
ishingiro;**

**Imikirize y'urubanza rwasubirishijwemo irahindutse
kubijyanye no kugabana umutungo.**

Amategeko yashingiweho:

Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga

(ryakoreshwaga icyo gihe), ingingo za 33, 78, 79, 80 na 81

Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets (ryakoreshwaga icyo gihe), ingingo ya 9 n'ya 11

Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe (ryakoreshwaga icyo gihe), ingingo ya 19 n'ya 24;

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Mu rubanza RC0377/08/TB/KCY rwaciwe n'Urukiko rw'Ibanze rwa Kacyiru, Ranghella Giussepe, washakanye na Uwamwezi Joséphine, yareze umugore we asaba ubutane kubera kumuhoza ku nkeke, anasaba ko *contrat de partage* bakoranye ku wa 06/07/2007, Urukiko rwayirekera uko babyumvikanyeho (reba igika cya 7, icya 26, icya 28, n'icya 31 cy'urwo rubanza RC0377/08/TB/KCY).

[2] Mu kwiregura ku bijyanye n'ubutane, Uwamwezi Joséphine yavuze ko ubwo butane atabushaka, naho ku bijyanye na *contrat de partage* avuga ko atayemera kuko Avoka we yayimusinyishije atazi ibiyikubiyemo kubera ko atumva neza igifaransa yanditsemo, byongeye kandi bakaba batarashyizemo

imitungo iri i Burayi, ndetse bakaba baramushyizeho imyenda yose y'urugo, akaba ari kugurisha amazu avugwa muri iyo *contrat de partage* umugabo we yigaramiye (reba igika cya 9, icya 27, icya 29, n'icya 30 cy'urwo rubanza RC0377/08/TB/KCY).

[3] Urukiko rw'Ibanze rwa Kacyiru rwaciye urubanza RC0377/08/TB/KCY ku wa 28/11/2008, rwemeza ko nta butane bahawe kubera ko nta bimenyetso by'uko Uwamwezi Joséphine ahoza ku nkeke Ranghella Giuseppe yeretse Urukiko, rwemeza kandi ko "contrat de partage" yo ku wa 06/07/2007, nta gaciro kayo.

[4] Ranghella Giuseppe ntiyishimiye imikirize y'urubanza, ajuririra Urukiko Rwisumbuye rwa Gasabo, urubanza rwandikwa kuri RCA0180/08/TGI/GSBO, muri ubwo bujuriye, Ranghella Giuseppe akomeza gusaba ubutane, naho ku bijyanye na *contrat de partage* avuga ko umucamanza atagombaga kuyisenya mu gihe atatanze divorce, kandi Uwamwezi Joséphine atarigeze abisaba (*ultra petita*). Yavuze kandi ko ibyavuzwe na Uwamwezi Joséphine by'uko atayemera kuko atazi igifaransa atari byo, kuko *correspondances* ze ziri mu gifaransa, kandi bikaba bitari na ngombwa ko abana basinya kuri iyo *contrat de partage*, kuko n'ubundi bazazungura aho umutungo wose wajya (reba igika cya 4 n'icya 5 by'urubanza RCA0180/08/TGI/GSBO).

[5] Mu kwiregura kuri ubwo bujuriye bwa Ranghella Giuseppe, uhagarariye Uwamwezi Joséphine yavuze ko kuvuga ko umucamanza yashenye *contrat de partage* Uwamwezi Joséphine atarigeze abisaba, itari no mu cyaregewe (*ultra petita*), atari byo, kuko ari Ranghella Giuseppe wazanye iyo *contrat de partage* mu Rukiko, iburanwaho, umucamanza akaba atari kubura kuyivugaho. Yongeyeho ko *partage des biens* ku bashakanye,

igomba kwemerwa n'Urukiko igihe cya *divorce par consentement mutuel*, kandi Urukiko rukaba atari yo rwatanze, ari yo mpamvu *contrat de partage* nta gaciro ifite (*nul et nul effet*).

[6] Nyuma yo gusuzuma ibisobanuro by'impane zombi, Urukiko Rwisumbuye rwa Gasabo, rwaciye urubanza RCA0180/08/TGI/GSBO tariki ya 07/08/2009, rwemeza ko ubwo bujuriye bwa Ranghella Giuseppe bufite ishingiro kuri bimwe, rwemeza ko nta butane butanzwe, ko ariko “*contrat de partage*” bakoranye igumana agaciro kayo¹. Uru rubanza ntirwigeze rujuririrwa.

[7] Ranghella Giuseppe, nyuma y'uko yimwe ubutane mu rubanza rumaze kuvugwa, yasubiye mu Rukiko rw'ibanze rwa Kacyiru, atanga bundi bushya ikindi kirego muri urwo Rukiko gifite RC0422/10/TN/KCY asaba nanone ubwo butane, ku mpamvu y'uko we n'umugore we Uwamwezi Joséphine bamaze imyaka itatu batahana.

[8] Urukiko rw'ibanze rwa Kacyiru, rwaciye urubanza ku wa 13/02/2012, rwemeza ko Ranghella Giuseppe atandukanye

¹ Urukiko Rwisumbuye rwa Gasabo, rwavuze, mu gika cya 33, cy'urubanza RCA0180/08/TGI/GSBO, ko « Ingingo y'itegeko N° 22/99 ryo kuwa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategako mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashakanye, impano n'izungura iteganya ko ivangamutungo rusange cyangwa w'umuhahano rirangira ari uko habaye ugutana burundu, kutabana by'agateganyo, guhindura uburyo bw'icungamutungo, bityo igihe cyose Uwamwezi Joséphine na Ranghella Giuseppe batarajya imbere y'Umwanditsi w'irangamimerere ngo bahinduze ubunyo bwo gucunga umutungo wabo, n'ubwo basinyanye kontaro igaragaza ubunyo bagabanye umutungo wabo, ivangamutungo basezeranye riracyaniho »

burundu na Uwamwezi Joséphine, rwemeza kandi ko ikibazo cy'imitungo cyacyemuwe mu rubanza RCA0180/08/TGI/GSBO kuko rwemeje ko *contrat de partage* yo ku wa 07/06/2007 igumaho kandi urwo rubanza rukaba rwarabaye Itegeko, bityo buri wese akagumana ibyo yabonye icyo gihe n'inyungu zabyo.

[9] Uwamwezi Joséphine yajuririye Urukiko Rwisumbuye rwa Gasabo, maze mu rubanza RCA0127/12/TGI/GSBO rwaciwe ku wa 27/01/2014, urwo Rukiko rwemeza ko ubutane butanzwe, kandi ko ku bijyanye n'umutungo, hakurikizwa *contrat de partage* yo ku wa 07/06/2007 kuko ari amasezerano ababuranyi bakoranye kandi *contrat de partage* ikaba itarigeze iteshwa agaciro, rusobanura ko ibivugwa na Uwamwezi Joséphine by'uko ayo masezerano adakuraho ay'ivangamutungo nta shingiro byahabwa kuko ari amasezerano yabaye hagati y'ababuranyi, akaba atarateshejwe agaciro nk'uko urubanza RC 0180/08/TGI/GSBO rwabisobanuye.

[10] Urukiko Rwisumbuye rwa Gasabo rwasobanuye ko ibyo Uwamwezi Joséphine avuga by'uko igabana ry'umutungo ryashingiye ku masezerano yo ku wa 06/07/2007 adakurikije amategeko nta shingiro byahabwa, kuko ntacyo ashingiraho abivuga, rusanga iby'uko ayo masezerano adakuraho ay'ivangamutungo nta shingiro byahabwa kuko ari amasezerano yabaye hagati y'ababuranyi, akaba atarateshejwe agaciro nk'uko n'abahagarariye uregwa babisobanuye.

[11] Uwamwezi Joséphine ntiyishimiye imikirize y'urubanza, ashidikiriza ikirego cye Urwego rw'Umuvunyi, avuga ko yagiriwe akarengane mu rubanza rumaze kuvugwa RCA0127/12/TGI/GSBO. Yasobanuriye urwo Rwego ko akarengane ke gashingiye ku kuba Urukiko Rwisumbuye rwa Gasabo rwaraciye urubanza rukamutanya n'umugabo we, ariko

rukaba rutarabagabanyije neza umutungo w'abashakanye mu buryo bw'ivangamutungo rusange, ko ibyo binyuranije n'ibiteganywa n'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura.

[12] Urwego rw'Umuvunyi rumaze gusesengura ikirego rwashyikirijwe, rwasanze mu rubanza RCA0127/12/TGI/GSBO ruvuzwe haruguru harimo akarengane, kuko Ranghella Giuseppe na Uwamwezi Joséphine basezeranye mu buryo bw'ivangamutungo rusange, igihe cyo gutanga ubutane, Urukiko rukaba rutarabagabanyije imitungo n'imyenda byabo nk'uko biteganywa n'ingingo ya 24 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryavuzwe haruguru, kandi hatarigeze habaho guhindura uburyo bw'imicungire y'umutungo wabo, ruvuga kandi ko Urukiko rwaciye urubanza rushingiye kuri *contrat de partage* kandi idasimbura amasezerano y'ivangamutungo rusange ababuranyi basezeranye, rusaba Perezida w'Urukiko rw'Ikirenga ko urwo rubanza rwasubirwamo ku mpamvu z'akarengane, na we yemeza ko urwo rubanza rwongera rukaburanishwa kugirango hasuzumwe akarengane karubayemo.

[13] Urubanza rwaburanishijwe mu ruhame, ku wa 26/09/2017, Uwamwezi Joséphine ahagarariwe na Me Ndagijimana Emmanuel, naho Ranghella Giuseppe ahagarariwe na Me Nkurunziza François Xavier, uyu atanga inzitizi yo kutakira ikirego kubera ko hari urubanza RC0180/08/TGI/GSBO rwabaye Itegeko rwagumishijeho amasezerano yo ku wa 06/07/2007 y'igabana ry'umutungo yakozwe hagati ya Uwamwezi Joséphine na Ranghella (*contrat de partage*), avuga ko mu igabana ry'umutungo w'abashakanye nta tegeko

ryirengagijwe, ko rero Uwamwezi Joséphine uregera akarengane nta nyungu afite mu rubanza.

[14] Urukiko rwafashe icyemezo kuri iyo nzitizi rushingiye ku biteganywa n'ingingo ya 78 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, agace ka 4, rutegeka ko iburanisha rikomeza, inzitizi ikazasuzumirwa hamwe n'urubanza mu mizi.

[15] Urukiko rwakomeje iburanisha ry'urubanza, ariko bigeze hagati, rusanga hari ibimenyetso bindi ndetse n'ibisobanuro bikenewe mbere y'uko rusaza iburanisha, rusaba Me Ndagijimana Emmanuel kuzashaka imibare igaragaza ko hari amafaranga yasigaye ku mazu yagurishijwe hishyurwa ideni Uwamwezi Joséphine afitiye Banque Rwandaise de développement (BRD), no kuzerekana *comptes* bwite za Uwamwezi Joséphine n'iza Sosiyete La Comète, kuva igihe urubanza rwatangiraga kugeza ubu, naho Me Nkurinziza François Xavier asabwa kuzagaragaza uburyo ikibanza numero 99 cyageze kuri Sosiyete ya Ranghella Giuseppe yitwa SOGIS n'amafaranga cyagurishijwe; kuzagaragaza ibyangombwa by'inzu ziba mu Bubiligi n'i Roma hamwe na *expertises* yazo no kuzerekana uko *comptes* za Ranghella Giuseppe ku giti cye n'iza Sosiyete SOGIS zihagaze mu gihe nibura cy'inyaka ibiri kuva igihe urubanza rwavuzwe rusabirwa gusubirwamo ku mpamvu z'akarengane rwacibwaga. Urukiko rwasabye kandi abaturanyi b'impane zombi gushyira muri dosiye imanza bagiye bavuga no kuzatanga ibindi bimenyetso babona ari ngombwa ko byafasha Urukiko.

[16] Ibi byose byatumye Urukiko rufata icyemezo cyo kwimurira iburanisha ry'urubanza tariki ya 05/12/2017, ryongera

kwimurirwa ku wa 06/02/2018, uwo munsu ugeze ababuranyi bose baritabye, bahagarariwe nka mbere, urubanza ruraburanishwa, rurapfundikirwa, isomwa ryarwo rishyirwa ku wa 16/03/2018.

[17] Nyuma y'uko rwiherereye kugira ngo rufate icyemezo, Urukiko rwasanze hari ibigikenewe gusobanuka ku mitungo yimukanwa n'itimukanwa ababuranyi batunze, rusaba ababuranyi ibikurikira:

1. Rangelia Giuseppe agomba kugeza ku Rukiko, mu nyandiko, amateka y'inzu ya SOGIS Ltd iri i mu kibanza numero 2603 ku Kamonyi, ivuye mu igurishwa ry'ikibanza numero 99/Nyarugenge, cyaje guhinduka ikibanza n° 778/Nyarugenge, kandi akageza ku Rukiko inyandiko zose z'icyo kibanza kuva akikibona, n'izerekeye *mutations* zagiye zigikorwaho;

2. Rangelia Giuseppe agomba kugeza ku Rukiko agaciro mu mafaranga k'imigabane afite muri SOGIS Ltd, umutungo wimukanwa n'utimukanwa wa SOGIS Ltd n'agaciro kawo mu mafaranga;

3. Rangelia Giuseppe na Uwamwezi Joséphine bagomba kugeza ku Rukiko, buri wese ku giti cye, agaciro mu mafaranga k'imigabane bafite cyangwa bari bafite muri *La Comète*, umutungo wimukanwa n'utimukanwa wa *La Comète* n'agaciro kawo mu mafaranga, bakanagaragaza konti zayo mu mabanki n'amafaranga ariho;

4. Uwamwezi Joséphine agomba kugeza ku Rukiko urubanza avuga ko yatsindiwe n'uwitwa Kayitesi Monique amafaranga 120.000.000Frw n'ibisobanuro ku isano urwo rubanza rufitanye n'uru rubanza;

5. Uwamwezi Joséphine agomba kugeza ku Rukiko ingano y'amadeni avuga ko agaragazwa n'ianza yatsindiwe mu Rukiko rw'Ikirenga, n'isano afitanye n'uru rubanza;

6. Ranghella Giuseppe na Uwamwezi Joséphine bagomba kugeza ku Rukiko ingano y'amafaranga bafite mu mabanki yo mu Rwanda n'ayo hanze y'u Rwanda, bakanagaragaza numero za konti bafite n'amabanki izo konti zirimo;

7. Ranghella Giuseppe na Uwamwezi Joséphine bagomba kugeza ku Rukiko, buri wese ku giti cye, ibijyanye na Gestion Concession Carlo Mo (Giti cy'inanyi) ivugwa muri uru rubanza.

[18] Tariki ya 09/04/2018 Me Nkurunziza François Xavier uhagarariye Ranghella Giuseppe yatanze inyandiko zikubiyemo ibisobanuro byasabwe ku mitungo, naho tariki ya 12/04/2018, Me Ndagijimana Emmanuel uhagarariye Uwamwezi Joséphine nawe atanga ibisobanuro kuri icyo mitungo, agira n'icyo avuga ku bisobanuro byatanze na Me Nkurunziza François Xavier uhagarariye Ranghella Giuseppe.

[19] Iburanisha ryongeye gusubukurwa tariki ya 17/04/2018 nk'uko byari byategetswe mu rubanza rubanziriza urundi rwo ku wa 16/03/2018, uwo munsu Me Ndagijimana Emmanuel na Uwamwezi Josephine ahagarariye bitaba Urukiko, Me Nkurunziza François Xavier uhagarariye Ranghella Giuseppe nawe aritaba, urubanza ruraburanishwa rurapfundikirwa, isomwa ryarwo rishyirwa tariki ya 01/06/2018.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO.

Kumenya niba inzitizi yatanzwe na Ranghella Giuseppe yo kutakira ikirego cya Uwamwezi Joséphine gisaba gusubirishamo urubanza RCA0127/12/TGI/GSBO ku mpamvu z'akarengane ifite ishingiro.

[20] Uburanira Ranghella Giuseppe, avuga ko ikirego cy'akarengane cyatanzwe na Uwamwezi Joséphine kidakwiye kwakirwa, kubera ko atagaragaza aho Urukiko rwaciye urubanza RCA 0127/12/TGI/GSBO asabira gusubirwamo rwanyuranyije n'Itegeko. Asobanura ko ikibazo cy'igabana ry'umutungo kitagombaga kugarurwa mu manza, kuko cyasuzumwe mu manza RCA0180/08/TGI/GSBO, RC0422/10/TB/KCY, na RCA 0127/12/TGI/GSBO, zikaba zaragumishijeho amasezerano yo ku wa 06/07/2007 yo kugabana umutungo (*contrat de partage*), akaba asanga ibyo Uwamwezi Joséphine adakwiye kubyita akarengane yagiriwe kuko urubanza RCA0180/08/TGI/GSBO rwaciye n'Urukiko Rwisumbuye rwa Gasabo, ari rwo rwemeje bwa nyuma iyo *contrat de partage*, rukaba rwarabaye ndakuka, kuko nta rundi rubanza rwigeze rurukuraho.

[21] Uburanira Ranghella Giuseppe avuga ko ibyo Uwamwezi Joséphine avuga by'uko atemera iriya *contrat de partage* ngo kuko yayishyizeho umukono atazi ibiyikubiyemo kubera ko atumva igifaransa bidakwiye guhabwa agaciro, kuko atagaragaza aho ayo masezerano yamurenganyije cyangwa ngo agaragaze aho anyuranyije n'amategeko, byongeye kandi ayo masezerano akaba ateganya mu ngingo yayo ya 5 ko impaka zose zakemurwa binyuze muri *arbitrage*, iyi *arbitrage* ikaba itarigeze ibaho ngo ibe yaratesheje agaciro ayo masezerano.

[22] Uburanira Ranghella Giuseppe avuga ko yemera ko urubanza rwaciwe ku rwego rwa nyuma rushobora gusubirwamo, ko ariko asanga nta mategeko yirengagijwe, kuko, nk'uko amaze kubivuga haruguru, hari Inkiko zakemuye ku buryo ndakuka ikibazo cy'umutungo Ranguella Giuseppe na Uwamwezi Joséphine baburana, akaba asanga nta karengane kabaye mu rubanza rusabirwa gusubirwamo, mu gihe kuri icyo kibazo cy'igabana, hari icyemezo cyafashwe cyabaye Itegeko.

[23] Uburanira Uwamwezi Joséphine mu kwiregura ku nzitizi, avuga ko urubanza rwaciwe bwa nyuma, rusubirishwamo ku mpamvu z'akarengane ari RCA0127/12/TGI/GSBO, ari na rwo rwahaye Ranguella Giuseppe n'umugore we Uwamwezi Joséphine ubutane bwa burundu, rukavuga ko ikibazo cy'igabana ry'imitungo cyacyemuwe mu rubanza RCA0180/08/TGI/GSBO rwabaye Itegeko nk'uko uburanira Ranghella Giuseppe abivuga, kuko rwemeje ko amasezerano (*contrat de partage*) yo ku wa 07/06/2007 agumaho, ariko ibi bikaba ari byo byatumye Uwamwezi Joséphine arengana, ako karengane kakaba karabonywe n'Urwego rw'Umuvunyi kuko urwo rubanza rutagabanyije ku buryo bungana abashakanye imitungo yabo yimukanwa n'itimukanwa ndetse n'amadeni bafite kandi barashyingiranywe mu buryo bw'ivangamutungo rusange, ibyo bikaba binyuranije n'ingingo ya 24 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuzwa Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura hamwe n'ingingo ya 3 y'iryo Tegeko, iteganya ko ivangamutungo rusange ari amasezerano abashyingiranywe bagirana bumvikana gushyira hamwe umutungo wabo wose, ibyimukanwa n'ibitimukanwa kimwe n'imyenda yabo yose, ndetse n'ingingo ya 4 y'iryo Tegeko iteganya ko iyo

abashyingiranywe bahinduye uburyo bw'ivangamutungo rusange, hakurikizwa ibiteganywa n'ingingo ya 19 y'Itegeko rimaze kuvugwa, bakagabana umutungo rusange n'imyenda ku buryo bungana.

[24] Uburanira Uwamwezi Joséphine asoya avuga ko nta mpamvu ikirego cy'akarengane cya Uwamwezi Joséphine kitakwagirwa kigasuzumwa, mu gihe ako karengane kabonywe n'Urwego rw'Umuvunyi, ko rero inzitizi itangwa n'uburanira Ranghella Giuseppe, nta shingiro ifite, mu gihe avuga ko hari urubanza RCA0180/08/TGI/GSBO rwabaye Itegeko, nyamara urwo rubanza rukaba ntacyo rwigeze ruvuga ku butane, ndetse rukaba rwaremeje ko imicungire y'umutungo w'abashakanye ikomeza kuba iy'ivangamutungo rusange.

UKO URUKIKO RUBIBONA

[25] Ingingo ya 33, y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, iteganya ibikurikira: [...] Urukiko rw'Ikirenga rushobora kandi gusubirishamo ku mpamvu z'akarengane imanza zaciwe burundu n'urwo Rukiko cyangwa n'izindi nkiko, hakurikijwe ibiteganywa n'iri Tegeko Ngenga.

[26] Ingingo ya 78, y'Itegeko Ngenga N° 03/2012/OL rimaze kuvugwa, iteganya ko: Urukiko rw'Ikirenga ni rwo ruburanisha ibirego byerekeranye no gusubirishamo ku mpamvu z'akarengane imanza zaciwe ku rwego rwa nyuma byemejwe na Perezida w'Urukiko rw'Ikirenga.

[27] Ingingo ya 79, y'Itegeko Ngenga N° 03/2012/OL rimaze kuvugwa iteganya ko: Iyo Urwego rw'Umuvunyi rusanze uburyo

urubanza rwaciwe birimo akarengane, rwandikira Perezida w'Urukiko rw'Ikirenga rumusaba ko urubanza rwakongera kuburanishwa. Rumushyikiriza raporo ikubiyemo imiterere y'icyo kibazo n'ibimenyetso bigaragaza ako karengane. Ikirego gisaba gusubirishamo urubanza ku mpamvu z'akarengane ntigikorwa ibanzirizasuzuma.

[28] Ingingo ya 80 y'Itegeko Ngenga N° 03/2012/OL rimaze kuvugwa ko "iyi Perezida w'Urukiko rw'Ikirenga asuzumye raporo y'Ubugenzuzi Bukuru bw'Inkiko akemeza ko urubanza rwongera kuburanishwa, yohereza dosiye Umwanditsi Mukuru w'Urukiko rw'Ikirenga kugira ngo ayandike mu bitabo byabugenewe, akanagena kandi n'itariki y'iburanisha n'inteko y'abacamanza bazaruburanisha. Agena kandi muri abo bacamanza uzakora raporo.

[29] Ingingo ya 81 y'iryo Tegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 iteganya mu gika cya kabiri cyayo ko: umuburanyi wari ufite uburenganzira bwo kwiyambaza izindi nzira z'ubujurire zisanze n'izidasanze ariko ntabwo mu gihe giteganyijwe n'amategeko ntiyemerewe gusaba ko urubanza yatsinzwe rusubirishwamo hakurikijwe ibiteganywa n'ingingo zivugwa muri iki cyiciro.

[30] Ku bijyanye n'impamvu ituma ikirego kitakirwa, ingingo ya 77, igika cya 4, y'Itegeko N° 21/2012 ryo ku wa 14/06/2012, ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi, iteganya ko: Impamvu ituma ikirego kitakirwa ni ingingo yose isaba kutakira ikirego cy'umuburanyi, hatinjiwe mu mizi yacyo, kubera ko adafite uburenganzira bwo kurega, nko kuba adafite ububasha n'inyungu zo kurega, ubusaze bw'ikirego, kurenza igihe cyo kurega, urubanza rwabaye Itegeko cyangwa kudatanga amagarama.

[31] Ku bijyanye n'urubanza rwabaye Itegeko, ingingo ya 11 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 rimaze kuvugwa, igaragaza ko 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, iyo inzira yo kurusubirishamo ku mpamvu z'akarengane yarangiye, aho igira iti: Urubanza rwaciwe ku rwego rwa nyuma, n'inzira yo kurusubirishamo ku mpamvu z'akarengane yararangiye, ntirushobora kongera kuburanishwa bundi bushya ku mpamvu zimwe no ku kiburanwa kimwe hagati y'ababuranyi bamwe baburana ikirego kimwe.

[32] Nk'uko byavuzwe haruguru, dosiye y'uru rubanza igaragaza ko nyuma y'uko mu rubanza RCA0127/12/TGI/GSBO rwaciwe ku wa 27/01/2014, Urukiko Rwisumbuye rwa Gasabo rwemeje ko Uwamwezi Joséphine atandukanye n'umugabo we Ranguella Giuseppe, kandi ko ku bijyanye n'umutungo, hakurikizwa *contrat de partage* yo ku wa 07/06/2007 kuko ari amasezerano ababuranyi bakoranye kandi *contrat de partage* ikaba itarigeze iteshwa agaciro, nk'uko urubanza RC0180/08/TGI/GSBO rwabisobanuye, Uwamwezi Joséphine yashyikirije ikirego cye Urwego rw'Umuvunyi, avuga ko yagiriwe akarengane mu rubanza rumaze kuvugwa RCA0127/12/TGI/GSBO, kuko rutamugabanyije n'umugabo we imitungo bafitanye ku buryo bungana, Urwego rw'Umuvunyi ruza gusanga mu rubanza RCA0127/12/TGI/GSBO rwaciwe harimo koko akarengane, rusaba Perezida w'Urukiko rw'Ikirenga ko urwo rubanza rwasubirwamo, Perezida w'Urukiko rw'Ikirenga na we yemeza ko urwo rubanza rwongera rukaburanishwa kugirango hasuzumwe akarengane karubayemo.

[33] N'ubwo bigaragara koko, ko urubanza RC0180/08/TGI/GSBO rwaciwe tariki ya 07/08/2009 n'Urukiko Rwisumbuye rwa Gasabo rwaciwe ku rwego rwa nyuma, kuko yaba Uwamwezi Joséphine, yaba Ranguella Giuseppe ntawigeze yiyambaza izindi nzira z'ubujurire zisanzwe cyangwa zidasanzwe, kugirango urwo rubanza ruhinduke nk'uko bivugwa mu ngingo ya 81, igika cya kabiri, y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, Urukiko rurasanga, hakurikijwe ibiteganywa n'ingingo ya 78, iya 79, iya 80, n'iya 81, z'iryo Tegeko Ngenga zibukijwe haruguru, urubanza Urwego rw'Umuvunyi rwasanzemo akarengane, ari RCA0127/12/TGI/GSBO, bityo kuba hari urubanza N° RC0180/08/TGI/GSBO rwaciwe tariki ya 07/08/2009 n'Urukiko Rwisumbuye rwa Gasabo uburanira Ranguella Giuseppe avuga rwabaye itegeko kuko rutajuririwe, bitaba impamvu yo kutakira ikirego kirebana n'urubanza RCA0127/12/TGI/GSBO, ahubwo bigomba gusuzumwa nk'ingingo yo kwiregura (*moyen de défense*) ya Ranguella Giuseppe ku bijyanye n'akarengane Uwamwezi Joséphine avuga yagiriwe.

[34] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rurasanga inzitizi yatanzwe na Ranguella Giuseppe yo kutakira ikirego cya Uwamwezi Joséphine gisaba gusubirishamo urubanza RCA0127/12/TGI/GSBO ku mpamvu z'akarengane nta shingiro ifite.

Kumenya niba Ranguella Giuseppe na Uwamwezi Joséphine bakwiye kugabana umutungo wabo mu buryo bungana, hatitawe kuri "*contrat de partage*".

[35] Uburanira Uwamwezi Joséphine avuga ko akarengane uyu yagiriwe mu rubanza RCA0127/12/TGI/GSBO

rusubirishwamo ku mpamvu z'akarengane ari uko Urukiko rwahaye Ranguella Giuseppe n'umugore we Uwamwezi Joséphine ubutane bwa burundu, ariko rukavuga ko ikibazo cy'igabana ry'imitungo cyacyemuwe mu rubanza N° RCA 0180/08/TGI/GSBO rwabaye itegeko, rukemeza ko amasezerano (*contrat de partage*) yo ku wa 07/06/2007 agumaho, aho kubagabanya ku buryo bungana imitungo yabo yimukanwa n'itimukanwa ndetse n'amadeni bafite kandi barashyingiranywe mu buryo bw'ivangamutungo rusange, ibyo bikaba binyuranije n'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuzwa Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura.

[36] Uburanira Uwamwezi Joséphine akomeza avuga ko ibyo umucamanza yavuze mu rubanza RCA0127/12/TGI/GSBO rusubirishwamo ku mpamvu z'akarengane by'uko hari urubanza RCA0180/08/TGI/GSBO rwabaye itegeko ku bijyanye no kugabana imitungo, atari ukuri kuko urwo rubanza atari rwo rwatanze ubutane, byongeye kandi rukaba rwaravuze ko imicungire y'umutungo w'abashakanye ikomeza kuba iy'ivangamutungo rusange².

²Byavuzwe mu gika cya 33 cy' urubanza RCA 0180/08/TGI/GSBO, aho kigira giti : « Ingingo ya 24 y'itegeko N° 22/99 ryo kuwa 12/11/1999 [...] rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashakanye, impano n'izungura iteganya ko ivangamutungo rusange cyangwa w'umuhahano rirangira ari uko habaye ugutana burundu, kutabana by'agateganyo, guhindura uburyo bw'icungamutungo, bityo igihe cyose Uwamwezi na Langhela batarajya imbere umwanditsi w'irangamimerere ngo bahinduze ubunyo bwo gucunga umutungo wabo, n'ubwo basinyanye kontaro igaragaza ubunyo bagabanye umutungo wabo, ivangamutungo basezeranye riracyaniho

[37] Mu kwiregura, uburanira Ranghella Giuseppe, avuga ko urubanza RCA0127/12/TGI/GSBO Uwamwezi Joséphine avuga ko rwamurenganiye ntaho rwanyuranyije n'itegeko rwemeza ko ibyo kugabana imitungo hagati y'abashakanye byakemuwe mu rubanza RCA0180/08/TGI/GSBO rwabaye itegeko, akaba asanga icyo kibazo cy'igabana ry'umutungo kitari gikwiye kugarurwa mu manza, kuko cyasuzumwe mu manza zose zabanjirije urubanza RCA0127/12/TGI/GSBO, urwa nyuma, ari rwo RCA0180/08/TGI/GSBO, akaba ari rwo rwagumishijeho amasezerano yo ku wa 06/07/2007 yo kugabana umutungo (*contrat de partage*), akaba asanga rero ibyo Uwamwezi Joséphine aburanisha by'uko yagiriwe akarengane mu rubanza RCA0127/12/TGI/GSBO nta shingiro bifite, mu gihe nta rundi rubanza rwigeze rukuraho urubanza RCA0180/08/TGI/GSBO.

[38] Uburanira Ranghella Giuseppe akomeza avuga ko ibyo Uwamwezi Joséphine avuga by'uko atemera *contrat de partage*, ngo kuko yayishyizeho umukono atazi ibiyikubiyemo kubera ko atumva igifaransa, bidakwiye guhabwa agaciro, kuko atagaragaza aho ayo masezerano yamurenganyije cyangwa ngo agaragaze aho anyuranyije n'amategeko, byongeye kandi ayo masezerano akaba ateganya mu ngingo yayo ya 5 ko impaka zose zakemurwa binyuze muri "arbitrage", iyi "arbitrage" ikaba itarigeze ibaho ngo ibe yaratesheje agaciro ayo masezerano.

[39] Uburanira Ranghella Giuseppe asoya avuga ko yemera ko urubanza rwaciwe ku rwego rwa nyuma rushobora gusubirwamo, ko ariko asanga nta mategeko yirengagijwe, kuko, nk'uko yabivuze haruguru, hari Inkiko zakemuye ku buryo ndakuka ikibazo cy'umutungo Ranguella Giuseppe na Uwamwezi Joséphine baburana.

UKO URUKIKO RUBIBONA

[40] Ingingo ya 19 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura iteganya ko: Bisabwe n'abashyingiranywe cyangwa umwe muri bo igihe bakibana, imicungire y'umutungo wabo ishobora guhindurwa. Ubishaka agomba kugaragaza ko ihinduka rifitiye inyungu urugo cyangwa hari ikintu cyahindutse cyane mu mibereho yabo cyangwa y'umwe muri bo. Ikirego gitangwa mu buryo bw'ibirego byihutirwa kigashyikirizwa Urukiko rwa Mbere rw'Iremezo rw'aho abashyingiranywe baba. Iyo iryo saba ritemewe mu cyemezo ntakuka, ikirego gishobora kwongera gutangwa nyuma y'imyaka ibiri gishingiye ku ngingo nshya.

[41] Ingingo ya 24 y'Itegeko N°22/99 ryo ku wa 12/11/1999 rimaze kuvugwa ivuga ko: Ivangamutungo rusange cyangwa w'umuhahano rirangira ari uko habaye ugutana burundu kw'abashyingiranywe, kutabana by'agateganyo, uguhindura uburyo bw'icungamutungo. Iyo ivangamutungo rirangiye abashyingiranywe bagabana ku buryo bungana umutungo n'imyenda bahuriyeho.

[42] Dosiye y'uru rubanza igaragaza ko mbere y'uko Ranguella Giuseppe na Uwamwezi Joséphine bahabwa ubutane bwatanzwe mu rubanza RC0422/10/TN/KCY rwaciwe n'Urukiko rw'Ibanze rwa Kacyiru ku wa 13/02/2012, ubwo butane bukaza kwemezwa n'Urukiko Rwisumbuye rwa Gasabo, mu rubanza RCA0127/12/TGI/GSBO rwaciwe ku wa 27/01/2014, bari baragiranye amasezerano yiswe “contrat de

partage” yo ku wa 07/06/2007 yanditse mu gifaransa, akubiyemo ibikurikira:

Article 1: Les soussignés se conviennent d’une façon de partager les biens en commun de la manière suivante:

a. Les biens suivants reviennent à Mme Uwamwezi Joséphine:

Maison d’habitation parcelle n° 736 Kacyiru;

1. Immeuble ex Eden Garden parcelle n° 533 à Nyarugenge;

2. Parcelle (marché) n° 2270 à Nyarugenge;

3. Société la COMETE S.A.R.L;

4. Gestion Concession Carlo Mo (Giti cy’inyoni) à 90%;

5. Maison de Bruxelles sise 22, Rue de la Sympathie (Anderlecht) à 50%;

b. Les biens suivants reviennent à Monsieur Ranguella Giuseppe:

7. Immeuble sis dans la parcelle n° 99 à Nyarugenge;

8. La Société SOGIS S.A.R.L;

9. Gestion Concession Carlo Mo (Giti cy’inyoni) à 10%;

10. Maison de Bruxelles sise 22, Rue de la Sympathie (Anderlecht) à 50%;

Article 2:

Concernant le crédit de la BRD sur Mme Uwamwezi Joséphine, la partie Ranguella Giuseppe accepte de payer les intérêts encourus jusqu'à concurrence de 30.000.000 Frw par chèque de Fina Bank dont le présent contrat constitue bonne et valable quittance.

Article 3:

Mme Uwamwezi Joséphine reconnaît par la présente convention de partage qu'elle reste seule responsable des engagements pris à la BRD en relation avec l'immeuble sis dans la parcelle n° 533, étant donné qu'elle est unique propriétaire.

Article 4:

Les parties s'engagent d'informer la BRD du retrait de la caution solidaire de Monsieur Ranguella Giuseppe sur le crédit octroyé à Mme Uwamwezi Joséphine, étant donné qu'elle était donnée en sa qualité de co-propriétaire des biens donnés en garantie avant la convention.

En cas de refus du retrait de cette caution par la Banque, les parties trouveront une solution d'apurement de ce crédit par la réalisation des biens donnés en garantie.

Article 5:

En cas de litige ».

[43] Dosiye y'uru rubanza igaragaza kandi ko ayo masezerano yiswe “contrat de partage” yo ku wa 07/06/2007 yemejwe n'imanza zavuzwe haruguru (RC 0422/10/TN/KCY na RC0127/12/TGI/GSBO) ko ari yo agomba gukurikizwa hagati ya

Ranguella Giuseppe na Uwamwezi Joséphine ku bijyanye no kugabana imitungo basangiye ngo kuko ari amasezerano ababuranyi bakoranye kandi *contrat de partage* ikaba itarigeze iteshwa agaciro nk’uko urubanza RC0180/08/TGI/GSBO rwabisobanuye.

[44] Isuzumwa ry’urubanza RC0180/08/TGI/GSBO rumaze kuvugwa, uhagarariye Ranghela yita ko rufite agaciro k’itegeko ku kibazo cya “*contrat de partage*” yo ku wa 07/06/2007, rigaragaza ko n’ubwo Urukiko Rwisumbuye rwa Gasabo rwemeje, mu gika 37, ko *contrat de partage* yo ku wa 07/06/2007 ihamyeho, ariko mu gika cya 33 cy’urwo rubanza (RCA0180/08/TGI/GSBO), rwasobanuye ko igihe cyose Uwamwezi Joséphine na Ranghela batarajya imbere y’umwanditsi w’irangamimerere ngo bahinduze uburyo bwo gucunga umutungo wabo, n’ubwo basinyanye kontaro igaragaza uburyo bagabanye umutungo wabo, ivangamutungo basezeranye riracyariho, ibyo kandi rubivuga rushingiye ku ngingo ya 24 y’Itegeko N°22/99 ryo ku wa 12/11/1999 [...] rishyiraho igice cya gatanu cyerekeye imicungire y’umutungo w’abashakanye, impano n’izungura iteganya ko ivangamutungo rusange cyangwa w’umuhahano rirangira ari uko habaye ugutana burundu, kutabana by’agateganyo, guhindura uburyo bw’icungamutungo, ibi bikumvikanisha ko n’urwo Rukiko rwari rwemeye ko iyo ngingo ari yo igomba gukurikizwa, mu gihe abashakanye mu buryo bw’ivangamutungo batanye burundu, bikumvikanisha rero ko icyemezo rwafashe cy’uko *contrat de partage* yo ku wa 07/06/2007 ihamyeho, kinyuranije n’imyumvire rwari rumaze kugaragaza, kandi ihura n’ingingo ya 24 y’Itegeko N°22/99 ryo ku wa 12/11/1999 rwashingiyeho.

[45] Urukiko rurasanga rero kuba mu rubanza N° RCA0127/12/TGI/GSBO Uwamwezi Joséphine asubirishamo ku mpamvu z'akarengane, Urukiko Rwisumbuye rwa Gasabo rwaravuze ko ikibazo cya *contrat de partage* yo ku wa 07/06/2007 cyakemuwe ku buryo budasubirwaho mu rubanza RCA0180/08/TGI/GSBO rwabaye Itegeko, nk'uko na Me Nkurunziza François Xavier uburanira Ranghella Giussepe abyuririraho, atari ukuri, kubera ko nk'uko byari bimaze gusobanurwa, Urukiko rwerekanye mu gika 33 cy'urwo rubanza RCA 0180/08/TGI/GSBO, ko ivangamutungo rigikomeje ku bashakanye batari bahabwa ubutane burundu, bikumvikanisha rero ko hakurikijwe ingingo ya 24 y'Itegeko N°22/99 ryo ku wa 12/11/1999 yibukijwe haruguru, iyo ivangamutungo rirangiye kubera ubutane bahawe, icyo gihe ari ho abashyingiranywe bagomba kugabana ku buryo bungana umutungo n'imyenda bahuriyeho, bityo ibyo kugabana byabaye mbere nk'uko bikubiye muri “*contrat de partage*” yo ku wa 07/06/2007, bikaba nta gaciro bigomba guhabwa kuko binyuranije n'amategeko, cyane cyane ko iyo *contrat de partage* itakozwe mu rwego rwo guhindura ivangamutungo rusange, Uwamwezi Joséphine na Ranghella Giussepe bari basanganywe, kuko ibyo bikorwa mu buryo buteganywa n'ingingo ya 19 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 yavuzwe haruguru.

[46] Hakurikijwe ingingo z'amategeko n'ibisobanuro bimaze gutangwa, kuba urubanza RCA0127/12/TGI/GSBO rwaciye n'Urukiko Rwisumbuye rwa Gasabo rwaranze kugabanya Ranghella Giussepe na Uwamwezi Joséphine ku buryo bungana umutungo n'imyenda bahuriyeho, ahubwo rukemeza ko *contrat de partage* yo ku wa 07/06/2007 ihamyeho, Urukiko rurasanga urwo rubanza rwararenganije ku buryo bugaragarira buri wese Uwamwezi Joséphine wabitangiye ikirego, kuko ikibazo cya

“contrat de partage” kitigeze kiba itegeko (*autorité de la chose jugée*) nk’uko byasobanuwe haruguru.

[47] Urukiko rurasanga rero mu rwego rwo kuvanaho akarengane kari mu rubanza RC0127/12/TGI/GSBO, ibyemejwe muri urwo rubanza ku bijyanye n’igabana ry’imitungo y’abashakanye « ivangamutungo rusange », bigomba guhindurwa, hakemezwa ko abatandukanye barashakanye muri ubwo buryo bagabana ku buryo bungana imitungo yabo yose harimo n’imyenda (*actif et passif*), nk’uko biteganywa n’ingingo ya 24 y’Itegeko N 22/99 ryo ku wa 12/11/1999 yibukijwe haruguru.

c. Ku bijyanye no kumenya imitungo Ranghella Giuseppe na Uwamwezi Joséphine bagomba kugabana nyuma yo gutana burundu.

[48] Me Ndagijimana Emmanuel, uhagarariye Uwamwezi Joséphine, mu mwanzuro we wo gutanga ikirego, ndetse no mu ibaruwa ye yo ku wa 29/01/2018 ashyikiriza Urukiko ibimenyetso byasabwe mu iburanisha ryo ku wa 08/02/2018, hamwe n’ibisobanuro yatanze muri iryo buranisha no mu ryabaye ku wa 17/04/2018, avuga ko umutungo rusange n’imyenda Ranghella Giuseppe na Uwamwezi Joséphine bari basangiye nk’abashyingiranywe ivangamutungo bagomba kugabana, ugizwe n’umutungo utimukanwa, uwimukanwa n’imyenda.

[49] Ku bijyanye n’umutungo utimukanwa, Me Ndagijimana Emmanuel avuga ko ugizwe n’ibikurikira:

A. Umutungo utimukanwa

1. Inzu iri mu kibanza numero 533 Nyarugenge (ifite agaciro ka 395.000.000Frw) yagurishijwe mu cyamunara kuri 301.000.000

Frw, hishyurwa umwenda wa BRD, ikagurwa na Nduwumwami Victor;

2. Ikibanza cyubatsemo isoko mu Gakinjoro gifite n° 2270 Nyarugenge, nacyo cyagurishijwe mu cyamunara hishyurwa umwenda wa BRD;

- Me Ndagijimana Emmanuel asobanura mu ibaruwa ye yo ku wa 29/01/2018 yavuzwe haruguru, ko amazu ari muri ibyo bibanza byombi bya Ranghella Giuseppe na Uwamwezi Joséphine byagurishijwe ku wa 22/11/2012 kuri 610.622.000Frw kugirango hishyurwe umwenda wa BRD, kandi ko nyuma yo kwishyura, Uwamwezi Joséphine yasubijwe 65.926.589 Frw, yemera kugabana na Ranghella Giuseppe, buri wese agatwara icya kabiri cyayo kingana na 33.790.794Frw.

3. Inzu iri mu kibanza n° 99 Nyarugenge, cyaje guhinduka ikibanza n° 778 Nyarugenge, ikaza kugurishwa, amafaranga avuyemo akagurwa indi nzu ku Kamonyi, mu kibanza gifite n° 2603;

- Me Ndagijimana Emmanuel asobanura mu ibaruwa ye yo ku wa 29/01/2018 yavuzwe haruguru, ko iyo nzu ifite agaciro ka 571.262.000Frw hakurikijwe igenagaciro bashyikirije Urukiko, ariko ko iyo nzu yari yanditse kuri Ranghella Giuseppe, uyu yaje kuyihindurira muri Sosiyete SOGIS Ltd, nyuma ayigurisha Rugenera Marc mu mwaka wa 2014, amafaranga avuyemo Ranghella Giuseppe ayaguramo indi nzu ku Kamonyi, mu kibanza gifite n° 2603, nayo akomeza kuyandika kuri Sosiyete SOGIS Ltd, ihagarariwe na Ranghella Giuseppe n'umukobwa we, Ranghella Giuseppe akaba afitemo imigabane ya 99, 03%, umukobwa we akagira 0,07%, akaba asanga kandi amasezerano y'ubugure bw'inzu n° 778 Nyarugenge Ranghella Giuseppe agaragaza ko yayigurishije Rugenera Marc kuri 120.000.000 frw,

atari ukuri, kuko bidahuye n’agaciro kayo kavuzwe ka 571.262.000Frw hakurikijwe igenagaciro bashyikirije Urukiko .

- Me Ndagijimana Emmanuel asaba ko iyo nzu yanditse kuri Sosiyete SOGIS Ltd mu buryo butemewe, ngo kuko byakozwe hakurikijwe ya “contrat de partage” itemewe n’amategeko, yagurishwa bakagabana amafaranga azayivamo hakurikijwe imigabane ya 99,03%, Ranghella Giussepe afite muri iyo Sosiyete. Yongeraho ariko ko ubugure bwa Rugenera Marc batabwemera, ari yo mpamvu hari urubanza rukiburanwa mu Rukiko.

4. Inzu yari ku Kacyiru yashenywe n’umuhanda mu kibanza n° 736;

- Me Ndagijimana Emmanuel asobanura ko Uwamwezi Joséphine yahawe kuri iyo nzu 161.273.432Frw, akaba yemera kuyagabana na Ranghella Giussepe, buri wese agatwara icya kabiri cyayo kingana na 80.636.716Frw.

5. Amazu agizwe na “dépôts” 3 akomoka kuri *Gestion Concession Carlo Mo* (Giti cy’inyoni) ;

- Me Ndagijimana Emmanuel asobanura ko n’ubwo mu nyandiko yashyikirije Urukiko, yavugaga ko ayo mazu ari aya Uwamwezi Joséphine, asanga adakwiye kujya mu mitungo itimukanwa igomba kugabanwa, kuko ayo mazu ari ay’undi muntu (Carlo Mo), akaba yisigura ku kuba harabaye kwibeshya mu byanditse mu nyandiko imaze kuvugwa.

- Inzu iri Bruxelles mu gihugu cy’Ububiligi kuri Rue de la Sympothesie, n°22, Anderlecht;

6. Inzu iri i Roma mu gihugu cy’Ubutaliyani Via Casali du Vallera n°18 Roma.

[50] Kuri iki kibazo cy'umutungo utimukanwa, uburanira Ranghella Giuseppe avuga mu mwanzuro we wo kwiregura, ko nta mutungo utimukanwa wa Uwamwezi Joséphine na Ranghella Giuseppe ukiraho, bitewe n'uko inzu yari ku Kacyiru yashenywe n'umuhanda mu kibanza n° 736, Uwamwezi Joséphine agahabwa amafaranga ya “expropriation”, amazu ari mu kibanza n° 533 na n° 2270 agatezwa cyamunara kugirango hishyurwe umwenda wa BRD, Concession Carlo Mo” akaba atari umutungo wa Uwamwezi Joséphine na Ranghella Giuseppe, ahubwo bawucunga, inzu iri i mu kibanza n° 2603 ku Kamonyi, (ivuye mu igurishwa ry'ikibanza n° 99 Nyarugenge, cyaje guhinduka ikibanza n° 778 Nyarugenge) ikaba ari iya Sosiyete SOGIS Ltd.

[51] Uburanira Ranghella Giuseppe avuga ko inzu iri Bruxelles impande zombi zumvikanye kuyigabana kuri 50%, naho inzu y'i Roma ikaba itagabanywa kubera ko hatarabaho izungura, akaba asanga rero igihe ikibazo cy'izungura kikiri aho, kuyigabana haba harimo imbogamizi.

B. Umutungo wimukanwa

[52] Ku bijyanye n'umutungo wimukanwa, Me Ndagijimana Emmanuel uhagarariye Uwamwezi Joséphine avuga ko ugizwe n'ibikurikira:

1. Amafaranga yari kuri konti za Banki ya Kigali n'i Burayi, ariko Uwamwezi Joséphine akaba adashobora kuyamenya kuko ari kuri konti y'umugabo we, ko Urukiko rwasaba *situation bancaire* yazo, by'umwihariko izo muri I&M Bank.
2. Amafaranga 65.926.589Frw yasigaye ku mazu yagurishijwe bishyura imyenda, nk'uko yavuzwe haruguru, Uwamwezi Joséphine yemera kugabana na Ranghella Giuseppe;

3. Amafaranga yavuye ku nzu iri mu kibanza n° 736 cya Kacyiru Uwamwezi Joséphine yahawe angana na 161.273.432Frw, na yo yemera kuyagabana na Ranghella Giuseppe, buri wese agatwara icya kabiri cyayo kingana na 80.636.716Frw.

4. Imodoka Sosiyete SOGIS Ltd yari itunze, ikaba itakigaragara.

[53] Mu iburanisha ryo ku wa 17/04/2018, Me Ndagijimana Emmanuel uhagarariye Uwamwezi Joséphine yongeraho ko uyu yamuhaye "extrait bancaire " ya Banki ya Kigali igaragaza ko ku wa 29/01/2018, Uwamwezi Joséphine yari afite kuri konti 182.000.000Frw akubiyemo ayo yasubijwe n'ayavuye muri *expropriation*. Naho Uwamwezi Joséphine avuga ko nyuma y'uko hari amafaranga yakoresheje avuye kuri konti ye, asigaranye 253.000.000Frw.

[54] Ku bijyanye na Sosiyete *La Comete*, Me Ndagijimana Emmanuel uhagarariye Uwamwezi Joséphine avuga ko iyo Sosiyete yahombye itakibaho, Uwamwezi Joséphine akaba yarakorewe *constat de stock mort*, ko n'inzu yakoreragamo yatejwe cyamunara nk'uko bigaragazwa n'inyandiko mvugo y'iyi cyamunara yashyikirije Urukiko, amafaranga 14.000.000Frw iyo Sosiyete yari ifite kuri konti, Rwanda Revenue Authority ikaba yarayatawaye.

[55] Kuri iki kibazo cy'umutungo wimukanwa, uburanira Ranghella Giuseppe avuga mu mwanzuro we wo kwiregura, ko amafaranga yari mu mabanki y'i Kigali ni Burayi, adashobora kuyamenya kuko Ranghella arwariye mu gihugu cy'Ubutaliyani, Uwamwezi Joséphine uyavuga akaba ari we ugomba kuyatangira ibimenyetso kuko we adafite uburyo yagera kuri konti za Ranghella Giuseppe.

[56] Uburanira Ranghella Giuseppe akomeza avuga ko imigabane ya Ranghella Giuseppe muri Sosiyete SOGIS ari yo Ranguella Giuseppe yagabana na Uwamwezi Joséphine, kuko Sosiyete ubwayo idashobora kugabanywa, ibyo bikaba ari kimwe n'imigabane iri muri Sosiyete La Comete, kuko iyo Sosiyete nayo idashobora kugabanywa, Uwamwezi Joséphine akaba agomba gutegekwa n'Urukiko kugaragaza imigabane afite muri Sosiyete La Comete. Mu iburanisha ryabaye ku wa 17 /04/2018, yongeyeho ko niba Urukiko rwemeje ko Uwamwezi Joséphine agabana n'umugabo we Ranghella Giuseppe, ibyo umuburanira avuga by'uko Sosiyete *La Comete* nta mutungo igira kuko yahombye atabyemera, kuko iyo biba byarabaye, iba itarashyizwe mu mitungo igaragara muri “contrat de partage”, byongeye kandi ikaba itarigeze yandukurwa mu bitabo by'ubucuruzi, ndetse no kugurisha inzu mu cyamunara na byo bikaba bidasobanuye ko Sosiyete La Comete idafite indi mitungo, mu gihe batagaragaza aho ”stock” n'ibindi bikoresheho byagiye.

[57] Avuga nanone ko atemera ko ibyo Uwamwezi Joséphine avuga by'uko afite gusa 253.000.000 Frw, kuko ayongayo ari agaragara gusa kuri konti yo muri Banki ya Kigali, nyamara ahisha amafaranga ari ku zindi konti afite.

C. Imyenda

[58] Ku bijyanye n'imyenda Ranghella Giuseppe na Uwamwezi Joséphine bafite bagomba kugabana, Me Ndagijimana Emmanuel uhagarariye Uwamwezi Joséphine avuga ko igizwe n'ibikurikira:

1. Umwenda wa BRD ungana na 363.757.476 Frw agaragara mu rubanza RCOM0161/09/HCC- RCOM0165/09/HCC;

2. Umwenda ungana na 120.000.000 Frw yatsindiwe mu rubanza n'uwitwa Kayitesi Monique;
3. N'indi myenda igaragazwa n'imanza yatsindiwe mu Rukiko rw'Ikirenga.

[59] Me Ndagijimana Emmanuel uhagarariye Uwamwezi Joséphine asobanura ko ikigaragaza ko umwenda wa 120.000.000Frw ari uw'umuryango, ari uko waguzwe imashini ababuranyi bakibana, ko rero bwari ubucuruza bari bahuriyeho bombi. Mu iburanisha ryabaye ku wa 17/04/2018, yongeraho ko n'ubwo yakomeje gusaba uwo ahagarariye kumuzanira imanza zijyanye n'iyi myenda, kugeza kuri iyi tariki atashoboye kuzimuzanira, ko ariko kopi y'urubanza ahawe ari iy'urwo mu Rukiko Rukuru rugaragaza icyo Uwamwezi Joséphine yaciriwe 120.000.000Frw.

[60] Ku kibazo cyo kumenya icyo Uwamwezi Joséphine ashaka, mu gihe asaba ko hagabanwa imitungo yari ahuriyeho n'umugabo we, nyamara avuga ko atazi agaciro k'imitungo bari bafite, Me Ndagijimana Emmanuel umuhagarariye avuga ko bavuze ko hari imitungo ifitwe n'umugabo adafitiye uburenganzira bwo kumenya, ko ariko Urukiko rubifasheho icyemezo yabona uburyo bwo kumenya agaciro kayo, ibyo bikaba bijyanye by'umwihariko n'inzu iri i Roma hamwe n'ri mu Bubiligi bigoye kumenya agaciro kazo kuko ntawabasha kuzikorera *expertise* urubanza rutaracibwa ngo habeho *exequatur*.

[61] Kuri iki kibazo cy'imyenda, uburanira Ranghella Giuseppe avuga mu mwanzuro we wo kwiregura, ko Uwamwezi Joséphine agomba kugaragaza ikimenyetso cy'umwenda wa BRD wasigaye utishywe. Yongeraho ko urubanza rwo mu

Rukiko Rukuru rumaze kuvugwa haruguru rutaragaza icyo Uwamwezi Joséphine yaburanaga, akaba asanga nta cyo rwafasha Urukiko.

UKO URUKIKO RUBIBONA

[62] Ingingo ya 24 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura iteganya ko: "Ivangamutungo rusange cyangwa w'umuhahano rirangira ari uko habaye ugutana burundu kw'abashyingiranywe, kutabana by'agateganyo, uguhindura uburyo bw'icungamutungo. Iyo ivangamutungo rirangiye abashyingiranywe bagabana ku buryo bungana umutungo n'imyenda bahuriyeho".

[63] Ingingo ya 9 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu iteganya ko: "Urega agomba kugaragaza ibimenyetso by'ibyo aregera. Iyo abibuze, uwarezwe aratsinda [...].

[64] Hakurikijwe ibisobanuro by'impane zombi, byagaragajwe haruguru, Urukiko rurasanga Uwamwezi Joséphine na Ranghella Giuseppe bagomba kugabana imitungo yose basangiye, hakurikijwe ibiteganywa n'ingingo ya 24 y'Itegeko N° 22/99 ryo ku wa 12/11/1999 yibukijwe haruguru, ariko bakagabana iyo bagaragarije Urukiko ibimenyetso byayo nk'uko biteganywa n'ingingo ya 9 y'Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu nayo yibukijwe haruguru.

[65] Hashingiwe rero ku byasobanuwe haruguru, ikigaragarira Urukiko ni uko ku bijyanye n'imitungo itimukanwa, impande zombi zigaragaza ko nta mutungo utimukanwa ukibaho mu Rwanda kuko inzu yari ku Kacyiru mu kibanza n° 736 yashenywe n'umuhanda, Uwamwezi Joséphine agahabwa amafaranga ya *expropriation*, amazu ari mu bibanza n° 533 na n° 2270 agatezwa cyamunara kugirango hishyurwe umwenda wa BRD, *concession Mo Carlo* akaba koko atari umutungo wa Uwamwezi Joséphine na Ranghella Giuseppe nk'uko impande zombi zibyemeranyaho.

[66] Ikindi kigaragarira Urukiko, ni uko inzu iriho, kandi yahoze mu mutungo w'abashakanye nk'uko impande zombi zibyemeranyaho, ari iyubatse mu kibanza N° 2603 ku Kamonyi, ikaba yaravuye mu igurishwa ry'ikibanza n° 99 Nyarugenge Uwamwezi Joséphine na Ranghella Giuseppe bari basangiye nk'abashakanye, ndetse nk'uko uburanira Uwamwezi Joséphine yabyibukije haruguru, hakaba hari urubanza rukiburanwa mu Nkiko rujyanye n'ubugure bw'iyi nzu iri mu kibanza n° 99 Nyarugenge, cyaje guhinduka ikibanza n° 778 Nyarugenge.

[67] Urukiko rusanga ubwo hari urubanza rukiburanwa mu Nkiko rujyanye n'ubugure bw'inzu imaze kuvugwa, Ranghella Giuseppe na Uwamwezi Joséphine bagomba kuzagabana ku buryo bungana, agaciro mu mafaranga kazava muri urwo rubanza rujyanye n'iyi nzu, Uwamwezi Joséphine aramutse arutsinze.

[68] Ku bijyanye n'inzu iri Bruxelles mu Bubiligi, Urukiko rusanga impande zombi zirugaragariza ko n'ubundi zumvikanye kuyigabana, buri wese akagira 50% by'iyi nzu.

[69] Naho ku bijyanye n'inzu iri Roma mu Butaliyani, Urukiko rurasanga nta kimenyetso Uwamwezi Joséphine

agaragariza Urukiko ko iyo nzu ari iya Ranghella Giuseppe, mu gihe uburanira Ranghella Giuseppe avuga ko ikiri mu izungura, Uwamwezi Joséphine akaba atagaragaza ko hari umugabane wagenewe Ranghella Giuseppe kuri iyo nzu ku buryo washyirwa mu mutungo bagomba kugabana.

[70] Ku bijyanye n'imitungo yimukanwa, Urukiko rusanga impande zombi zirugaragariza ko zemera kugabana 65.926.589Frw yasigaye ku mazu yabo yari mu bibanza n° 533 na n° 2270 yatejwe cyamunara bishyura imyenda ya BRD, zikaba zinemera kugabana amafaranga yavuye muri “expropriation” y'inzu yabo iri mu kibanza n° 736 ku Kacyiru Uwamwezi Joséphine yahawe angana na 161.273.432Frw, yose hamwe akaba 227.200.021Frw, bityo rero nk'uko na Uwamwezi Joséphine wahawe ayo mafaranga yose yemera kuyagabana na Ranghella Giuseppe, buri wese akaba agomba gutwara icya kabiri cyayo kingana na 113.600.011Frw.

[71] Ku wundi mutungo wimukanwa ugizwe n'amafaranga Ranghella Giuseppe yaba afite mu mabanki yo mu Rwanda, cyangwa i Burayi nk'uko bivugwa na Uwamwezi Joséphine, Urukiko rurasanga uyu atarashoboye kurugaragariza ibimenyetso rwaheraho rubagabanya amafaranga na we ubwe atazi, mu gihe uburanira Ranghella Giuseppe avuga ko atashoboye kumenya amafaranga uwo uhagarariye afite. Ibi bikaba ari kimwe no ku modoka Sosiyete SOGIS Ltd yaba yari itunze, Uwamwezi Joséphine avuga ko itakigaragara, bikumvikanisha ko Urukiko ntaho rwahera rubagabanya ikintu kitagaragara.

[72] Ku bijyanye n'imyenda impande zombi zigomba kugabana, Urukiko rurasanga Uwamwezi Joséphine ari we uvuga « umwenda wa BRD ungana na 363.757.476 Frw » agaragara mu rubanza RCOM0161/09/HCC-RCOM0165/09/HCC, hamwe

n’umwenda ungana na 120.000.000 Frw yatsindiwe mu rubanza n’uwitwa Kayitesi Monique, ndetse ngo n’indi myenda igaragazwa n’imanza yatsindiwe mu Rukiko rw’Ikirenga.

[73] Urukiko rurasanga ariko nk’uko byavuzwe haruguru, umwenda wa BRD ungana na 363.757.476Frw » agaragara mu rubanza RCOM0161/09/HCC-RCOM0165/09/HCC, ujyanye n’ibibanza 533 na 2270 byatejwe cyamunara hishyurwa umwenda wa BRD, bikaba kandi byagaragajwe ko BRD yishyuwe, hagasigara ahubwo 65.926.589Frw impande zombi zigomba kugabana nk’uko byavuzwe haruguru, bikaba byumvikana ko ubwo ayo mazu bari bayafatanyije, agatezwa cyamunara, banafatanyije bombi kwishyura BRD umwenda uvugwa.

[74] Ku bijyanye n’umwenda wa 120.000.000 Frw Uwamwezi Joséphine avuga ko yatsindiwe mu rubanza n’uwitwa Kayitesi Monique, Urukiko rurasanga ibyo umuhagarariye avuga, by’uko hari amafaranga Kayitesi Monique yamutsindiye mu rubanza RC0070/07/TGI/NYGE-RC00754/07/TGI/NYGE nta kuri kurimo, kubera ko kopi y’urubanza RCA0040/09/HC/KIG-RC0047/09/HC/KIG rwaciwe n’Urukiko Rukuru, Uwamwezi Joséphine yerekanye mu iburanisha ryo ku wa 17/04/2018, igaragagaza ko abatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge mu rubanza rwavuzwe RC0070/07/TGI/NYGE-RC00754/07/TGI/NYGE, ari Nshimiyimana Callixte na Uwantege Jeannine, bakaba ari bo baregaga Kayitesi Monique basaba ko Urukiko rwategeka ko amasezerano bagiranye na Kayitesi Monique yo kugura imashini zo kumesa yakubahirizwa, muri urwo rubanza hakagobokamo undi muburanyi witwa Nyirandamira Valérie ku bushake bwe, naho Uwamwezi Joséphine agahatirwa kugobokamo, Kayitesi Monique na

Uwamwezi Joséphine bagatsindwa, bakajuririra Urukiko Rukuru.

[75] Kuba Uwamwezi Joséphine atarigeze ashaka gushyikiriza Urukiko kopi y'urwo rubanza RC0070/07/TGI/NYGE-RC00754/07/TGI/NYGE rumaze kuvugwa, kandi yarabisabwe mu iburanisha ryabaye ku wa 26/09/2017, yongera kubisabwa mu rubanza rubanziriza urundi rwasomwe tariki ya 16/03/2018, byose bigamije kumenya isano uwo mwenda ufitanye n'uru rubanza, Urukiko rurasanga ntaho rwahera rufata icyemezo kuri uwo mwenda.

[76] Ku bijyanye n'indi myenda Uwamwezi Joséphine avuga ko igaragazwa n'imanza yatsindiwe mu Rukiko rw'Ikirenga, Urukiko rurasanga nk'uko byari bimaze kuvugwa, atarigeze ashyikiriza Urukiko kopi y'izo manza uburanira Ranghella Giuseppe atigeze abona ngo zigibweho impaka, nyamara yari yarabisabwe mu iburanisha ryabaye ku wa 26/09/2017, ndetse no mu rubanza rubanziriza urundi rwasomwe tariki ya 16/03/2018, ngo anerekane umubare w'amafaranga impande zombi zigomba kugabana, n'aho izo manza zihuriye n'uru rubanza, rukaba rero ntaho rwahera rufata icyemezo kuri iyo myenda yindi idasobanutse ku bijyanye n'isano zifitanye n'uru rubanza.

[77] Hashingiwe ku bisobanuro byatanzwe haruguru no ku ngingo z'amategako yagaragajwe haruguru, Urukiko rurasanga imitungo Ranghella Giuseppe na Uwamwezi Joséphine bagomba kugabana ku buryo bungana hakurikijwe ingingo ya 24, y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuzwa Igitabo cya mbere cy'urwunge rw'amategako mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura iteye mu buryo bukurikira:

1. Imigabane ya Ranghella Giuseppe muri Sosiyete SOGIS Ltd ingana na 99, 03%: Uwamwezi Joséphine na Ranghella Giuseppe bagomba kuyigabana, buri wese akagira icya kabiri cyayo kingana na 49.50%;
2. Inzu iri Bruxelles mu Bubiligi, bagomba kuyigabana nk’uko bari babyumvikanye, buri wese akagira 50% by’iyo nzu.
3. Amafaranga 65.926.589 Frw yasigaye ku mazu yabo ari mu kibanza n° 533 na n° 2270 yatejwe cyamunara bishyura imyenda ya BRD, buri wese akaba agomba gutwara icya kabiri cyayo kingana na 33.790.794 Frw
4. Amafaranga yavuye muri “expropriation” y’inzu iri mu kibanza n° 736 cya Kacyiru angana na 161.273.43 Frw, buri wese akaba agomba gutwara icya kabiri cyayo kingana na 80.636.716Frw.

[78] Urukiko rurasanga kandi Ranghella Giuseppe na Uwamwezi Joséphine bagomba kuzagabana ku buryo bungana, agaciro kazava mu rubanza rujyanye n’inzu iri mu kibanza n° 99 Nyarugenge, cyaje guhinduka ikibanza n° 778 Nyarugenge, ikaza kugurishwa, amafaranga avuyemo akagurwa indi nzu ku Kamonyi, mu kibanza gifite n° 2603, Uwamwezi Joséphine aramutse arutsinze.

d. Amafaranga y’indishyi, ay’ikurikiranarubanza ay’igihembo cy’Avoka asabwa muri uru rubanza.

[79] Uburanira Uwamwezi Joséphine, avuga mu mwanzuro we, ko Ranghella Giuseppe akwiye gutegekwa kumuha 10.000.000Frw y’indishyi y’akababaro, 1.000.000 Frw y’ikurikiranarubanza na 5.000.000 Frw y’igihembo cy’Avoka

[80] Uburanira Ranghella Giuseppe mu kwiregura, avuga na we mu mwanzuro we, ko uyu ari we ahubwo ukwiye guhabwa na Uwamwezi Joséphine amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka angana na 1.000.000Frw.

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[81] Urukiko rurasanga amafaranga y'indishyi, ay'ikurikiranarubanza n'igihembo cy'Avoka asabwa n'ababuranyi muri uru rubanza adakwiye gutangwa, ahubwo mu rwego rwo kubahiriza ihame ryibukijwe haruguru ry'uko bagomba kugabana ku buryo bungana, buri wese akwiye guherezwaho ibyo yatakaje akurikiranye uru rubanza.

III. ICYEMEZO CY'URUKIKO

[82] Rwemeje ko inzitizi yatanzwe na Ranghella Giuseppe yo kutakira ikirego cya Uwamwezi Joséphine gisaba gusubirishamo urubanza RCA0127/12/TGI/GSBO ku mpamvu z'akarengane nta shingiro ifite;

[83] Rwemeje ko ikirego cya Uwamwezi Joséphine gisaba gusubirishamo urubanza RCA0127/12/TGI/GSBO ku mpamvu z'akarengane gifite ishingiro;

[84] Rwemeje ko Ranghella Giuseppe na Uwamwezi Joséphine bagomba kugabana imitungo yabo ku buryo bungana mu buryo bukurikira:

1. Imigabane ya Ranghella Giuseppe muri Sosiyete SOGIS Ltd ingana na 99, 03%: Uwamwezi Joséphine na Ranghella Giuseppe bayigabana, buri wese akagira icya kabiri cyayo kingana na 49.50%;
2. Inzu iri Bruxelles mu Bubirigi, bagomba kuyigabana nk’uko bari babyumvikanye, buri wese akagira 50% by’iyo nzu.
3. Amafaranga 65.926.589 Frw yasigaye ku mazu yabo ari mu bibanza n° 533 na n° 2270 yatejwe cyamunara bishyura imyenda ya BRD, buri wese akaba agomba gutwara icya kabiri cyayo kingana na 33.790.794Frw
4. Amafaranga yavuye muri “expropriation” y’inzu iri mu kibanza n° 736 cya Kacyiru angana na 161.273.432Frw, buri wese akaba agomba gutwara icya kabiri cyayo kingana na 80.636.716Frw.

[85] Rwemeje ko Ranghella Giuseppe na Uwamwezi Joséphine bagomba kuzagabana ku buryo bungana, agaciro kazava mu rubanza rujyanye n’inzu iri mu kibanza n° 99 Nyarugenge, cyaje guhinduka ikibanza n° 778 Nyarugenge, ikaza kugurishwa, amafaranga avuyemo akagurwa indi nzu ku Kamonyi, mu kibanza gifite n° 2603, Uwamwezi Joséphine aramutse arutsinze;

[86] Rutegetse Ranghella Giuseppe na Uwamwezi Joséphine gufatanya kwishyura amagarama y’uru rubanza angana na 100.000 Frw, buri wese agatanga icya kabiri cyayo kingana na 50.000Frw;

[87] Ruvuze ko imikirize y’urubanza RCA0180/08/TGI/GSBO rwaciwe n’Urukiko Rwisumbuye rwa

Gasabo ku wa 07/08/2009 n'urubanza RCA0127/12/TGI/GSBO rwaciwe n'Urukiko Rwisumbuye rwa Gasabo ku wa 27/01/2014 ihindutse ku bijyanye n'igabana ry'imitungo y'abashakanye mu buryo bw'ivangamutungo rusange.

IMANZA Z'UBUCURUZI

RADIANT INSURANCE COMPANY LTD v RWANDA AGRICULTURE BOARD (RAB)

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA
00026/2018/CA – (Karimunda, P.J, Munyangeri na Kanyange,
J.) 08 Gashyantare 2019]

Amategako agenga amasoko ya Leta – Amafaranga ahabwa uwatsindiye isoko rya Leta kugirango atangire imirimo (Avansi) – Isubizwa rya avansi ntirireberwa ku gaciro k'imirimo imaze gukorwa kuko Avansi ubwayo atari ubwishyu, Itegeko N° 12/2007 ryo ku wa 27/03/2007 rigenga amasoko ya Leta nk'uko ryahinduwe kandi rikuzuzwa n'Itegeko N° 05/2013 ryo ku wa 13/2/2013, ingingo ya 89.

Incamake y'ikibazo: Ikigo cy'Igihugu gishinzwe Ubuhinzi n'Ubworozi mu Rwanda (RAB) cyagiranye amasezerano na ETECO (Entreprise de Construction, Commerce, Mines et Carrières) yo kubaka laboratoire, maze RAB iha iyo sosiyete avansi yo gutangira imirimo. Radiant Insurance Company Ltd nayo yishingira iyo avansi. RAB yaje gusesa amasezerano y'isoko, avansi yatanze itararangira kwishyurwa hanyuma impande zombi zikora ihwanyamyenda hagati ya avansi yari isigaje kwishyurwa n'agaciro k'imirimo yakozwe ariko avansi yatanzwe ntiyashiramo, ibi byatumye RAB ivuga ko asigaye agomba kwishyurwa na Radiant Insurance Company Ltd ariko yo ikavuga ko imirimo ETECO yakoze ifite agaciro karuta avansi yatanzwe. Ibyo byatumye RAB irega Radiant Insurance Company mu Rukiko rw'Ubucuruzi rwa Nyarugenge isaba ko Radiant Insurance Company Ltd iyishyura amafaranga ETECO

iyigomba. Urwo Rukiko rwemeje ko ikirego cya RAB gitite ishingiro rutegeka Radiant Insurance Company kuyishyura amafaranga yasigaye kuri avansi yahawe ETECO ndetse n'indishyi zinyuranye.

Radiant Insurance Company ntiyishimiye imikirize y'urubanza maze ijuririra Urukiko Rukuru rw'Ubucuruza ivuga ko itagomba gutegekwa kwishyura avansi yo gutangira imirimo kuko yakoreshejwe imirimo yose yari yatangiwe. Urwo Rukiko rwemeje ko ubujurire bwa Radiant Insurance Company bufite ishingiro, ko ingwate yo gutangira imirimo yari yarahaye RAB yakoreshejwe yose ku mirimo ijyanye n'isoko yari yaratangiwe.

RAB yajuririye Urukiko rw'Ikirenga ariko ubwo bujurire bwimurirwa mu Rukiko rw'Ubujurire nyuma y'ivugururwa ry'amategeko. Mu bujurire bwayo, RAB ivuga ko amasezerano yabaye hagati yayo na Radiant yavugaga ko ingwate izasaza ari uko avansi yose yishyuwe, bityo ko icyari kigambiriwe ari uko uwatanze avansi ayigaruza yose, ikavuga rero ko isanga hatagomba kurebwa gusa ko avansi yakoreshejwe imirimo runaka, ahubwo hakwiye no kwitabwa ku kuba mu masezerano barumvikanye ko ubwishyu buzakatwa kuri buri facture, hitabwa ko ingwate izasaza avansi imaze kwishyurwa, hakanitabwa ko mu byo ingwate iba igamije harimo nuko avansi yose yishyurwa.

Radiant yo yiregura ivuga ko icyo yishingiye ari uko avansi yose yo gutangira imirimo ikoreshwa icyo yatangiwe, ntihagire ibindi ikoreshwa, ko ingwate ifatirwa gusa igihe yose cyangwa igice cyayo bikoreshejwe ibitajyanye n'isoko yatangiwe, ko rero nta handi RAB yashingira isaba kwishyurwa ingwate.

Incamake y’icyemezo: Isubizwa rya avansi ntirireberwa ku gaciro k’imirimo imaze gukorwa kuko Avansi ubwayo atari ubwishyu, bityo Radiant Insurance Company Ltd igomba kwishyura RAB avansi yari isigaje kwishyurwa.

**Ubujurire bufite ishingiro;
Ubujurire bwuririye ku bundi, nta shingiro bufite;
Urubanza rwaciwe n’Urukiko Rukuru rw’Ubucuruzi
ruhindutse mu ngingo zarwo zose;
Uregwa agomba gusubiza uwajuriye ingwate y’amagarama
yatanze ajurira.**

Amategeko yashingiweho:

Itegeko N° 12/2007 ryo ku wa 27/03/2007 rigenga amasoko ya Leta nk’uko ryahinduwe kandi rikuzuzwa n’Itegeko N° 05/2013 ryo ku wa 13/2/2013 (ryakoreshwaga icyo gihe), ingingo 89.

Imanza zifashishijwe:

Forest Company Volcanoes Gorillas (FCVG) Ltd v Ikigo cy’Imisoro n’Amahoro (RRA), RCOMAA
00055/2016/SC rwaciwe n’Urukiko rw’Ikirenga ku wa 29/9/2017

Urubanza

I. IMITERERE Y'URUBANZA

[1] Ikibazo kiri muri uru rubanza gishigiye kuri avansi yo gutangira imirimo Rwanda Agriculture Board (RAB) yahaye ETECO (*Entreprise de Construction, Commerce, Mines et Carrières*), ishingiye ku masezerano yo kubaka *laboratoire* yo ku wa 20/10/2014, Radiant Insurance Company Ltd yishingira iyo avansi nk'uko bigaragazwa n'inyandiko y'ingwate N° RD001RCOA140815/03695 yo ku wa 11/09/2014, ariko ayo masezerano y'isoko aseswa na RAB ku wa 22/12/2015, ETECO itararangiza kwishyura avansi yahawe bitewe nuko yayishyuraga kuri buri fagitire yakoraga hakatwa amafaranga angana na 20%, kuri fagitire eshatu (3) ETECO yari imaze gukora, RAB ikaba yari yiyishyuye avansi ingana na 60.239.971Frw, hasigara avansi ingana na 107.796.028Frw.

[2] Bitewe nuko nyuma ya fagitire ya gatatu ETECO yakoze imirimo ifite agaciro ka 53.878.560Frw, hakoze ihwanyamyenda hagati ya avansi yari isigaje kwishyura n'agaciro k'iyi mirimo (107.976.028Frw – 53.878.560Frw), hasigara 54.017.468Frw, RAB ivuga ko agomba kwishyurwa na Radiant Insurance Company Ltd kuko amasezerano yari ifitanye na ETECO yasheshwe itararangiza kwishyura avansi yahawe, naho Radiant Insurance Company Ltd ikavuga ko itakwishyura iyo avansi kuko yakoreshejwe mu mirimo y'isoko kandi iyo mirimo ikaba irenze avansi yatanzwe

[3] Nyuma yo kutumvikana ku iyishyurwa rya avansi ETECO yari itararangiza kwishyura, RAB yareze Radiant Insurance Company Ltd mu Rukiko rw'Ubucuruzi rwa

Nyarugenge, isaba ko yategekwa kwishyura 54.0170.468Frw ETECO iyigomba, n'indishyi zo gushorwa mu manza. Urwo Rukiko rwaciye urubanza RCOM 531/2017/TC/NYGE ku wa 27/7/2017, rwemeza ko ikirego cya RAB gifite ishingiro, rutegeka Radiant Insurance Company Ltd kwishyura 54.0170.468Frw yasigaye kuri avansi yahawe ETECO, ikanishyura 500.000Frw y'indishyi zo gushorwa mu manza, 500.000Frw y'igihembo cya Avoka, no gusubiza RAB 50.000Frw yatanzeho ingwate y'amagarama.

[4] Radiant Insurance Company Ltd yajuririye Urukiko Rukuru rw'Ubucuruzi, ivuga ko itagombaga gutegekwa kwishyura avansi yo gutangira imirimo kuko yakoreshejwe imirimo yose yari yatangiwe, mu rubanza RCOMA 0055/2017/CHC/HCC rwaciye ku wa 28/12/2017, urwo Rukiko rwemeza ko ubujurire bwa Radiant Insurance Company Ltd bufite ishingiro, ko ingwate yo gutangira imirimo yari yarahaye RAB yakoreshejwe yose ku mirimo ijyanye n'isoko yari yaratangiwe, ari nayo mpamvu y'ukubaho k'ubwishingizi, ko Radiant Insurance Company Ltd nta kindi igomba kwishyura RAB gikomoka kuri ubwo bwishingizi. Rwategetse RAB kwishyura Radiant Insurance Company Ltd indishyi z'ikurikiranarubanza n'igihembo cya Avoka ku rwego rubanza n'urw'ubujurire, zingana na 1.000.000Frw no kuyisubiza 75.000Frw yatanzeho ingwate y'amagarama ijurira, rutegeka kandi ko imikirirze y'urubanza RCOM 00531/2017/NYGE rwaciye ku wa 27/07/2017 ihindutse.

[5] RAB yajuririye mu Rukiko rw'Ikirenga, isaba Urukiko gusuzuma niba iyo avansi yo gutangira imirimo yakoreshejwe imirimo ijyanye n'isoko itagomba kwishyurwa yose, inasaba gusuzuma niba yaragombaga gucibwa indishyi kandi Radiant

Insurance Company Ltd ariyo yishe amasezerano. Radiant Insurance Company Ltd yo ivuga ko icyo yishingiye ari uko avansi yo gutangira imiromu ikoreshwa icyo yatangiwe, kandi ko byari ngombwa ko RAB icibwa indishyi kuko yayishoye mu rubanza bitari ngombwa.

[6] Nyuma y'ivugururwa ry'amategeko, ubujurire bwa RAB bwimuriwe mu Rukiko rw'Ubujurire hashingiwe ku biteganywa n'ingingo ya 105 y'Itegeko n° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'Inkiko, urubanza ruburanishwa mu ruhame ku wa 9/1/2019, Radiant Insurance Company Ltd ihagarariwe na Me Ruzindana Ignace na Me Twagiramungu Joseph, RAB ihagarariwe na Me Kayiranga Rukumbi Bernard, Me Kabibi Spéciose na Me Umwali Munyentwari Claire.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

- 1. Kumenya niba kuba avansi yo gutangira imirimo yarakoreshejwe mu mirimo y'isoko, bivanaho inshingano za Radiant Insurance Company Ltd zo kwishyura igice cya avansi ETECO itishyuye.**

[7] Mu mwanzuro wa RAB, ivuga ko Radiant Insurance Company Ltd yishingiye avansi yahawe ETECO, mu masezerano bakaba barateganyije uburyo iyo avansi yagombaga kugenda yishyurwa, ko hashingiwe ku ngingo ya 89 y'Itegeko rigenga amasoko ya Leta, RAB yagiye yiyishyura kuri fagitire ETECO yayihaga ariko ntiyarangiza kwishyura avansi yose bitewe nuko amasezerano yasheshwe imirimo itarangiye, ko ariyo mpamvu Radiant Insurance Company Ltd igomba kwishyura amafaranga

ya avansi yasigaye havuyemo ayo RAB igomba ETECO nkuko yagaragajwe muri raporo y'isozwa ry'imirimo.

[8] Ikomeza ivuga ko Urukiko Rukuru rw'Ubucuruzi rwagombaga kwita ku bikubiye mu nyandiko ya Radiant Insurance Company Ltd yo kwishingira avansi yo gutangira imirimo, ivuga ko *The maximum amount of this guarantee shall be progressively reduced by the amount of the advance payment repaid by the contractor as indicated in copies of interim statements or payment certificates which shall be presented to us. This guarantee shall expire after the complete reimbursement of the advance amount. Consequently, any demand for payment under this guarantee must be received by us at that time*, bivuze ko inshingano y'umwishingizi itagarukira gusa ku gukoresha avansi mu mirimo y'isoko ahubwo hari n'inshingano yo kugarurira avansi urwego rwayitanze, ko kandi uretse itegeko rigenga amasoko ya Leta, n'ingingo ya 64 y'itegeko rigenga amasezerano ivuga ko amasezerano akozwe mu buryo bukurikije amategeko aba itegeko ku bayagiranye.

[9] Ivuga kandi ko imyumvire yayo ihuye n'ibyemejwe mu rundi rubanza rwaciwe n'Urukiko Rukuru rw'Ubucuruzi (N° RCOMA 00254/2017/CHC/HCC) hagati y'Akarere ka Bugesera na Radiant Insurance Company Ltd, kandi Radiant ikaba itararujuriye.

[10] Mu bindi bisobanuro ababuranira RAB batanze, bavuga ko ibyo abahagarariye Radiant Insurance Company Ltd bavuga ko ntacyo igomba kwishyura kuko avansi yose yakoreshejwe imirimo y'isoko, ko ingwate ifatirwa iyo idakoreshejwe imirimo y'isoko, atari byo, ahubwo ko RAB yari kwishyurwa mu buryo buteganywa n'ingingo ya 89 y'Itegeko rigenga amasoko ya Leta

aho kuba iya 88, kuko ingwate igomba kugarukira urwego rwatanze isoko.

[11] Bavuga kandi ko mu masezerano yabaye hagati ya RAB na Radiant Insurance Company Ltd ahavugwa ko ingwate izasaza ari uko avansi yose yishyuwe, icyari kigambiriwe ari uko uwatanze avansi ayigaruka yose, kandi ko ayo masezerano ari hagati yabo bombi gusa, rwiyezamazirimo we akaba ntaho yasinye. Basanga hatagomba kurebwa gusa ko avansi yakoreshejwe imirimo runaka, ahubwo hakwiye no kwitabwa ku kuba mu masezerano barumvikanye ko ubwishyu buzakatwa kuri *facture*, ko ingwate izasaza avansi imaze kwishyurwa, hakanitabwa ko mu byo ingwate iba igamije, harimo n'uko avansi yose yishyurwa.

[12] Radiant Insurance Company Ltd yo ivuga ko icyo yishingiye, ari uko avansi yose yo gutangira imirimo ikoresheya icyo yatangiwe, ntihaire ibindi ikoresheya (ingingo ya 88 y'Itegeko rigenga amasoko ya Leta), ko ingwate ifatirwa gusa igihe yose cyangwa igice cyayo bikoreshejwe ibitajyanye n'isoko yatangiwe, ko rero nta handi RAB yashingira isaba kwishyurwa ingwate, yirengagije ibiteganywa n'iyi ngingo ya 88.

[13] Isobanura ko RAB yemera ko ETECO yakoze akazi karenze agaciro k'ingwate kuko yakoze imirimo ingana na 355.361.917 Frw, bivuze ko avansi yose yahawe yakoreshejwe icyo yatangiwe, ko ibivugwa na RAB by'uko isoko ryasheshwe ETECO itararangiza kwishyura avansi yahawe, itabishingiraho isaba Radiant Insurance Company Ltd kwishyurwa iyo avansi itarishyuwe kuko atari byo yishingiye, kuko avansi yose yagombaga kwishyurwa ari uko isoko ridasheshwe, rikarangira, ko ahubwo kuba isoko ryarasheshwe imirimo itarangiye, bivuze ko na rwiyezamazirimo atarangije kwishyura avansi, ariyo

mpamvu Radiant Insurance Company Ltd yishyujwe ingwate yo kurangiza neza imirimo ingana na 84.018.000Frw, ayo mafaranga akaba arenze kure ayo RAB yishyura angana na 54.017.468Frw, kandi iyo isoko ridaseswa, ingwate yo kurangiza imirimo ntiyari kwishyuzwa.

[14] Ikomeza ivuga ko ikibazo Rwanda Agriculture Board yibaza cyo kumenya niba iyo avansi yo gutangira imirimo yarakoreshejwe mu mirimo ijyanye n'isoko, itagomba kwishyurwa yose, kitareba umwishingizi, kuko icyo umwishingizi yishingira ari uko avansi yo gutangira imirimo ikoreshwa yose icyo yagenewe, bitaba ibyo igafatirwa n'urwego rwatanze isoko, ko kandi ingingo ya 89 y'Itegeko rigenga amasoko ya Leta ivuga uburyo ingwate yishyurwa na rwiyemezamirimo, ireba uwatanze isoko n'uwarihawe, ikaba itareba umwishingizi.

[15] Isobanura kandi ko kuba yarishingiye ko avansi yo gutangira imirimo izakoreshwa ibyo yagenewe, RAB yagombye kugaragaza ko avansi yakoreshejwe ibindi bitarebana n'isoko, akaba aribwo isaba Radiant Insurance Company Ltd kwishyura nk'uko biteganywa n'ingingo ya 88 y'Itegeko rigenga amasoko ya Leta.

UKO URUKIKO RUBIBONA

[16] Ikibazo kigomba gusuzumwa, ni icyo kumenya niba mu gihe avansi yo gutangira imirimo yakoreshejwe mu mirimo y'isoko, bivanaho inshingano z'uwayishingiye zo kwishyura avansi itarishyuwe n'uwatsindiye isoko.

[17] Ku birebana na avansi yo gutangira imirimo, ingingo ya 89 y'Itegeko n° 12/2007 ryo ku wa 27/03/2007 rigenga amasoko ya Leta nk'uko ryahinduwe kandi rikuzuzwa n'Itegeko N° 05/2013 ryo ku wa 13/2/2013, iteganya ko “Avansi yahawe uwegukanye isoko isubizwa hakoreshejwe ikatwa ry'umubare runaka w'amafaranga ku nyemezabuguzi zatanzwe kandi zemejwe. Igitabo cy'Amabwiriza agenga ipiganwa giteganya ijanisha ry'amafaranga azagenda akatwa kugeza igihe avansi yose yishyuriwe. Ingwate ya avansi isubizwa uwegukanye isoko mu minsi mirongo itatu (30) uhereye igihe avansi yose yatanzwe yishyuriwe”.

[18] Iyi ngingo ivuga ibyerekeye uburyo avansi yishyurwa nk'uko umutwe wayo ubigaragaza ‘iyishyurwa rya avansi’, yumvikanisha ko iyo rwiyezamirimo watsindiye isoko ahawe avansi, bidasobanura ko ari ubwishyu aba ahawe, ahubwo ko ari amafaranga aba agomba gusubiza urwego rwatanze isoko, agenda akatwa kuri fagitire zemejwe, yamara gusubizwa yose, akaba aribwo ingwate nayo isubizwa. Ibimaze kuvugwa ni nako byasobanuwe n'Urukiko rw'Ikirenga mu rubanza RCOMAA 0055/2016/SC rwaciwe ku wa 29/9/2017, aho rwavuze ko avansi yo gutangira imirimo ari amafaranga ahabwa uwatsindiye isoko kugira ngo abashe gutangira gushyira mu bikorwa isoko yatsindiye, ko nta gice cy'umurimo runaka aba yishyuriwe ku buryo yafatwa nk'ubwishyu, ahubwo uko uwatsindiye isoko agenda yishyura agaciro k'imirimo yakoze, agenda avanamo (déduction) ingano runaka ya avansi nk'uko byumvikanyweho n'impande zagiranye amasezerano, akazarangiza kwishyura imirimo yakoze yose, avansi yose isubijwe uwamuhaye isoko, ko rero kuba avansi isubizwa uwatanze isoko, itafatwa nk'ubwishyu kuri iryo soko.

[19] Inyandiko y'ingwate ya avansi yo gutangira imirimo “Advance payment guarantee RD 001RCOA 1408157/0395 ” Radiant Insurance Company Ltd yatanze ku wa 11/9/2014, ivuga ko yemeye kwishingira igiteranyo cy'amafaranga atarenga 168.035.999RWF, izishyura imaze kugaragarizwa ubusabe bwanditse buherekejwe n'inyandiko igaragaza ko rwiyezamezimirimo atubahirije inshingano ziri mu masezerano, akoresha avansi yahawe mu zindi nyungu zinyuranye n'imirimo yasezeranye gukora irebana n'isoko¹. Muri iyi nyandiko kandi, mu gika cya nyuma havugwamo ko amafaranga atangiwe ingwate azagenda agabanurwa n'ubwishyu bwa avansi buzajya bukorwa na rwiyezamezimirimo, kandi ko ingwate izareka kugira agaciro igihe avansi yose izaba imaze kwishyurwa².

[20] Urukiko rurasanga ibivugwa mu nyandiko y'ingwate, hari igice kimwe gihura n'ibiteganywa n'ingingo ya 88 y'Itegeko N° 12/2007 ryo ku wa 27/03/2007 ryavuzwe haruguru, ivuga ko iyo uwegukanye isoko akoresheje avansi yose cyangwa igice cyayo mu bikorwa bindi bidafite aho bihuriye n'isoko, iyo avansi ihita

¹ “At the request of the Contractor, we RADIANT INSURANCE COMPANY LTD, P.O.BOX 1861 KIGALI, hereby irrevocably undertake to pay you any sum or sums not exceeding in total amount of ONE HUNDRED SIXTY EIGHT MILLION THIRTY FIVE THOUSAND NINE HUNDRED NINETY NINE RWANDAN FRANCS (168,035,999 RWF) upon receipt by us of your demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligation under the Contract because the Contractor used the advance payment for purposes other than the costs of mobilization in respect of the works”.

² “The maximum amount of this guarantee shall be progressively reduced by the amount of the advance payment repaid by the Contractor as indicated in copies of interim statements or payment certificates which shall be presented to us. This guarantee shall expire after the complete reimbursement of the advance amount. Consequently, any demand for payment under this guarantee must be received by us at this office on or before that date”.

ifatwa nk'umwenda ugomba kwishyurwa hafatiriwe ingwate yose cyangwa igice, ikindi gice kikaba gihura n'ibivugwa mu ngingo ya 89 (in fine) yavuzwe haruguru, kuko nayo iteganya ko ingwate ya avansi isubizwa uwegukanye isoko mu minsi mirongo itatu (30) uhereye igihe avansi yose yatanzwe yishyuriwe”.

[21] Urukiko rurasanga kuba mu nyandiko y'ingwate, havugwamo ko inyandiko yishyura ingwate igomba kuba iherekejwe n'indi igaragaza ko rwiyezamirimo yakoresheje avansi mu yindi mirimo itajyanye n'isoko, bidakwiye gufatwa ko ariyo mpamvu yonyine yatuma urwego rwatanze isoko rusubizwa avansi, kuko ako ari agace kamwe mu tugize inyandiko y'ingwate, kakaba kadakwiye kurebwa konyine, kuko mu gace ka nyuma k'iyo nyandiko Radiant Insurance Company Ltd yanemeye ko ingwate izaba itagifite agaciro mu gihe avansi izaba yarangije kwishyurwa, bivuze ko mu gihe itarishyurwa rero, ingwate iba igifite agaciro, na avansi ikaba igomba kwishyurwa, nk'uko binateganywa mu ngingo ya 89 yavuzwe haruguru, kandi bikaba binahura n'ibisobanuro byatanzwe n'Urukiko rw'Ikirenga ku birebana na avansi yo gutangira imirimo nk'uko byagaragajwe.

[22] Ku bivugwa na Radiant Insurance Company Ltd by'uko imirimo ETECO yari imaze gukora ifite agaciro karenze avansi yatanzwe bityo ko ntacyo RAB igomba kwishyura, Urukiko rurasanga nta shingiro bifite, kuko nk'uko byasobanuwe haruguru, avansi si ubwishyu ku buryo isubizwa ryayo ryareberwa ku gaciro k'imirimo yari imaze gukorwa, ahubwo igomba gusubizwa urwego rwatanze isoko nk'uko ingingo ya 89 y'Itegeko ryavuzwe haruguru ibiteganya, bikaba byaranumvikanyweho mu gika cya nyuma cy'inyandiko y'ingwate yo gutangira imirimo. Byongeye kandi, ibivugwa na

Radiant Insurance Company Ltd ko imirimo ETECO yakoze ifite agaciro karenze avansi yahawe, ibivuga yirengagije ko ETECO itahawe avansi gusa ahubwo ko yanahawe amafaranga y'ubwishyu bw'imirimo yari imaze gukora.

[23] Urukiko rurasanga rero, Urukiko Rukuru rw'Ubucuruzi rutaragombaga gushingira ku mpamvu irebana no kuba avansi isubizwa gusa iyo itakoreshejwe imirimo itajyanye n'isoko, ngo ruyirutishe irebana no kuba ingwate izareka kugira agaciro igihe avansi yose izaba imaze kwishyurwa, kandi izo mpamvu zombi ziri mu nyandiko imwe Radiant Insurance yasinye, zikaba zinahura n'ibiteganywa n'Itegeko rigenga amasoko ya Leta.

[24] Urukiko rushingiye ku ngingo z'amategeko zagaragajwe haruguru no ku bisobanuro byatanzwe, rurasanga Radiant Insurance Company Ltd igomba kwishyura RAB avansi yari isigaje kwishyurwa ihwanye na 54.0170.468Frw.

2. Kumenya niba RAB yaragombaga gucibwa indishyi

[25] Ababuranira RAB bavuga ko Urukiko rwayitegetse kwishyura Radiant Insurance Company Ltd indishyi zingana na 1.000.000Frw yo gushorwa mu manza na 75.000 Frw y'amagarama yatanzwe, kandi ariyo itarubahirije amasezerano bakoranye, bigatuma ijya mu manza kugira ngo irenganurwe. Basanga ahubwo Radiant Insurance Company Ltd ariyo ikwiye kwishyura indishyi kuko kutubahiriza amasezerano bakoranye byatumye RAB ijya mu manza, ikaba isaba Urukiko rw'Ubujurire kubona ko nta ndishyi yari ikwiye gucibwa.

[26] Ababuranira Radiant Insurance Company Ltd bavuga ko byari ngombwa ko RAB icibwa indishyi kuko yayishoye mu rubanza rutari ngombwa, ko yo yari yishingiye ko avansi yahawe

ETECO ikoreshwa icyo yayihereye kandi ko yabikoze kuko RAB igaragaza ko yakoze imirimo ihwanye na 355.361.917Frw, bivuga ko yakoze imirimo ikubye inshuro zirenga ebyiri agaciro k'ingwate yatanze, ko rero ntacyo RAB yagombaga gusaba gusubizwa kuko ibyo yari yishingiye byakozwe.

UKO URUKIKO RUBIBONA

[27] Urukiko rurasanga nk'uko byasobanuwe haruguru, Radiant Insurance Company Ltd yaragombaga gusubiza RAB avansi yatanze, kuko isoko ryasheshwe itararangiza kwishyurwa, kandi Radiant Insurance Company Ltd ikaba ariyo yari yarishingiye avansi yose yahawe ETECO, bivuze ko indishyi RAB yaciwe n'Urukiko Rukuru rw'Ubucuruzi nta shingiro zifite, bityo izo yaciwe zingana na 1000.000Frw yo gushorwa mu manza na 75.000 Frw y'amagarama ikaba itagomba kuzitanga.

3. Ibirebana n'indishyi Radiant Insurance Company Ltd isaba

[28] Mu bujurire bwuririye ku bundi, Radiant Insurance Company Ltd ivuga ko RAB ikomeje kuyikurura mu manza zitari ngombwa, ikaba isaba ko yacibwa indishyi zingana na 2.000.000Frw hamwe na 800.000Frw y'ikurikiranarubanza n'igihembo cya Avoka kuri uru rwego.

[29] Ababuranira RAB bavuga ko izo ndishyi nta shingiro zifite kuko ifite uburenganzira bwo kwiambaza inzira y'ubujurire, usibye ko n'indishyi zisabwa ari umurengera kandi Radiant Insurance Company Ltd ikaba itagaragaza akababaro yagize

UKO URUKIKO RUBIBONA

[30] Urukiko rurasanga indishyi Radiant Insurance Company Ltd isaba idakwiye kuzihabwa, kuko, nk’uko byasobanuwe haruguru, ariyo yagombaga kwishyura avansi yo gutangira imirimo RAB yahaye ETECO nk’uko yabyiyemeje, ariko ikaba itarayishyuye bigatuma RAB yiyambaza inkiko, kuba itsindwa n’uru rubanza, byumvikana ko n’indishyi isaba nta shingiro zifite.

III. ICYEMEZO CY’URUKIKO

[31] Rwemeje ko ubujurire bwa Rwanda Agriculture Board (RAB) bufite ishingiro;

[32] Rwemeje ko ubujurire bwuririye ku bundi bwatanzwe na Radiant Insurance Company Ltd, nta shingiro bufite;

[33] Rutegetse Radiant Insurance Company Ltd kwishyura Rwanda Agriculture Board (RAB) 54.017.468 Frw yasigaye kuri avansi yahawe ETECO;

[34] Rwemeje ko indishyi Rwanda Agriculture Board (RAB) yaciwe n’Urukiko Rukuru rw’Ubucuruzi zivanyweho;

[35] Ruvuze ko urubanza RCOMA 00553/2017/CHC/HCC rwaciwe n’Urukiko Rukuru rw’Ubucuruzi ku wa 28/12/2017 ruhindutse mu ngingo zarwo zose.

[36] Rutegetse Radiant Insurance Company Ltd gusubiza Rwanda Agriculture Board 100.000 Frw y’ingwate y’amagarama yatanze ijurira.

RWAGASANA v BANKI YA KIGALI (BK LTD)

[Rwanda URUKIKO RW'IKIRENGA – RCOMAA
0056/15/SC-RCOMAA 00025/2017/SC-RCOM 0003/17/CS-
RCOM 00004/2017/SC (Mutashya, P.J., Rugabirwa na
Nyirinkwaya, J.) 26 Mutarama 2018]

Amategeko agenga amasezerano – Amasezerano y'inguzanyo – Inshingano zo kwishyura inyungu zikomoka ku masezerano yo kurangiza neza imirimo z'amafaranga yishyuwe na banki mu mwanya w'uwahawe umwenda – Nta kosa banki iba ikoze iyo yishyuje inyungu ku mafaranga yishyuriye rwiyezeza mirimo nk'ingwate yo kurangiza neza imirimo (performance guaranty) ku rwego rwatanze isoko iyo uwaritsindiye atarangije imirimo neza – Itegeko N°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, ingingo ya 64.

Amategeko agenga amasezerano – Amasezerano y'inguzanyo – Kudahakana umwenda umwishingizi yasinyiye – Umwishingizi washakanye n'uwahawe umwenda na banki ntiyahakana umwenda wafashwe n'uwo bashakanye yitwaza ko atawusinginye kandi basangiye uwo mutungo mu gihe bigaragaye ko imyenda yose yafashwe n'uwo bashakanye yayishyizeho umukono.

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Igihembo cy'avoka – Amafaranga y'ikurikiranarubanza, n'igihembo cya avoka agenwa mu bushishozi bw'urukiko n'ubwo impande zombi zaba zarabyumvikanyeho mu masezerano iyo bigaragaye ko ari ukwihesha indonke ikabije kandi n'uyasaba ntagaragaze ikimenyetso cy'uburyo yayakoresheje.

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Igihembo cy'umuhanga – Iyo igihembo cy'umuhanga cyishyurwa na banki mu mwanya w'umukiliya wayo, ategukwa kucyishyura mu gihe atsinze urubanza.

Incamake y'ikibazo: Rwagasana yahawe inguzanyo zitandukanye na Banki ya Kigali (BK LTD) Ltd, azihabwa mu bihe bitandukanye. Muri izo nguzanyo hiyongereyeho iy'ingwate yo kurangiza neza imirimo y'isoko (Bank Guarantee), hamwe n'aya *ligne de credit*, n'ayo banki yaguriye Rwagasana inguzanyo yari afite muri ECOBANK (rachat credit).

Impande zombi zikorana amasezerano y'inguzanyo, ay'ubwishingizi n'ay'ingwate, bumvikana ko natishyura nkuko bikwiye baziyamabaza inkiko. Mu masezerano bumvikanye kandi ko igipimo cy'inyungu umwenda uzabarirwaho ari 17.25 % ku kwezi, ariko ko azayishyura 2 % y'inyungu z'ubukererwe ziyongera kuri 17.25 % zikaba iza 19,25 % mu gihe atishyuye inguzanyo y'ingwate yo kurangiza neza imirimo.

Rwagasana yananiwe kwishyura bituma banki isesa amasezerano, inamushyira mu cyicyiro cya 5 cy'abatishyura neza inguzanyo bahawe (classe 5).

Ibi byatumye Rwagasana arega BK mu Rukiko rw'Ubucuruzi rwa Nyarugenge umugore we nawe Mukakimenyi Marie Rose arugobokamo basaba ko inzu ze yatanzeho ingwate zitatezwa cyamunara, basaba kutishyura amafaranga atandukanye ajyanye n'inguzanyo yahawe, basaba kandi banki kudakomeza kubara inyungu z'ubukererwe nyuma y'iseswa ry'amasezerano y'inguzanyo, asaba n'indishyi zinyuranye.

Urukiko rwemeje ko ikirego cyabo gifite ishingiro kuri bimwe, kandi ko ingwate y'inzu itatezwa cyamunara, banki igahabwa

indishyi z'igihombo yagize, urukiko rwemeza kandi ko inyungu zari zazamuwe nyuma y'iseswa ry'amasezerano zigomba gusubizwa ku gipimo zumvikanyweho n'impande zombi mu masezerano bagiranye.

BK Ltd na Rwagasana na Mukakimenyi bajuririye mu Rukiko Rukuru rw'Ubucuruzi, rwemeza ko ubujurire bwa BK bufite ishingiro, naho ubujurire bwa Rwagasana nta shingiro bufite, ko imikirize y'urubanza rwajuririwe ihindutse mu ngingo zayo zose.

Rwagasana yajuririye mu Rukiko rw'Ikirenga avuga ko inkiko zibanza zemeje ko agomba kwishyura ingwate yo kurangiza neza imirimo y'isoko BK Ltd yamwishyuriye hamwe n'inyungu zayo zisanzwe n'iz'ubukererwe kandi BK itagaragaje aho yishyuriye.

Yavuze kandi ko raporo y'umuhanga itahabwa agaciro kuko itagaragaza imyenda yose aregwa na BK Ltd, uburyo yayifashe n'uburyo bwo kuyishyura bari barumvikanyeho mu masezerano bagiranye.

Yarongeye avuga kandi ko yishyuzwa amafaranga y'umurenge y'igihembo cya Avocat n'amafaranga y'ikurikirana rubanza kuko arimo urwunguko rwinshi kandi na BK itagaragaza uburyo yayakoresheje.

Mukakimemyi nawe yajuririye avuga ko hari umwenda atemera kuko atigeze awusinyira kandi ari umugore wa Rwagasana Thomas ufite 50% by'imitungo bashakanye.

BK Ltd yireguye ivuga ko yaguriye Rwagasana inguzanyo zitandukanye, ivuga ukuntu iyo myenda yagiye yiyongera ku yindi myenda yagiye imuha kuko atayishyuraga nk'uko bikwiye, ivuga kandi ko izo nguzanyo zose zigomba kwishyurwa hamwe n'inyungu zisanzwe n'iz'ubukererwe ku gipimo cyumvikanywe mu masezerano y'inguzanyo.

Yavuze kandi ko raporo y'umuhanga yahabwa agaciro kuko igaragaza uburyo imyenda yose yafashwe na Rwagasana Thomas n'ubwo idahura n'igiteranyo cy'amafaranga yaregeye. Kubijyanye n'amafaranga y'igihembo cya Avocat n'ay'ikurikirana rubanza, BK yavuze ko bayishyura kuko ateganyijwe mu masezerano y'ingwate bagiranye.

Ku ngingo ya Mukakimenyi yo guhakana ko atakwishyura umwenda yitwaje ko hari uwo atasinyiye, BK yireguye ivuga ko nta shingiro byahabwa kuko imyenda yose yahaye Rwagasana Thomas bayisinyiye bose imbere ya noteri.

Incamake y'icyemezo: 1. Nta kosa banki iba ikoze iyo yishyuje inyungu ku mafaranga yishyuriye rwiyezeza mirimo nk'ingwate yo kurangiza neza imirimo (performance guaranty) ku rwego rwatanze isoko iyo uwaritsindiye atarangije imirimo.

2. Amafaranga y'ikurikiranarubanza, n'igihembo cya avoka agenwa mu bushishozi bw'urukiko kabone nubwo hari ikigero cyayo (pourcentage) cyateganyijwe mu masezerano y'inguzanyo iyo ari umurenge kandi nuyasabye ntagaragaze uko yayakoresheje.

3. Uwashakanye n'uwahawe umwenda na banki ntiyahakana umwenda wafashwe n'uwo bashakanye yitwaza ko atawusinginye kandi basangiye uwo mutungo mu gihe bigaragaye ko imyenda yose yafashwe n'uwo bashakanye yayishyizeho umukono.

4. Amafaranga ya raporo y'umuhanga yishyurwa n'uwatsinzwe urubanza.

**Ubujurire nta shingiro bufite.
Ubujurire bwuririye ku bundi bufite kuri bimwe.**

**Ikirego cya Bank ya Kigali gifite bufite ishingiro kuri
bimwe;
Nta gihindutse ku rubanza rwaciwe n'Urukiko Rukuru
rw'Ubucuruzi;
Abareze bagomba gufatanya kwishyura umwenda remezo
n'inzungu z'ubukererwe;
Amagarama y'urubanza ahwanye n'ibyakozwe mu
rubanza.**

Amategeko yashingiweho:

Itegeko Ngenga N°08/2005 ryo ku wa 14/07/2005 rigena imikoreshereze n'imicungire y'ubutaka mu Rwanda (ryakoreshwaga icyo gihe), ingingo ya 34 na 35.

Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi (ryakoreshwaga icyo gihe), ingingo ya 9.

Itegeko N°45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, ingingo ya 64.

Itegeko N°15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 76.

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

Itegeko-Teka ryo ku wa 30/07/1888, rigenga amasezerano cyangwa imirimo nshinganwa (ryakoreshwaga icyo gihe), ingingo ya 258.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko rw'Ubucuruzi rwa Nyarugenge, Rwagasana Thomas arega BK Ltd asaba ko inzu ze ziri mu kibanza N° 322/324 kiri mu Karere ka Nyagatare zitategurwa cyamunara kuko amasezerano bagiranye ateganya ko mu gihe ananiwe kwishyura inguzanyo yamuhaye haziyambazwa inkiko, ko atakwishyura 9% ya frais judiciaires, mise à exécutions, commissions et frais non privilégiés kuko ari clauses abusives, kandi ko igipimo cy'inyungu (taux d'intérêt) kitagomba kuva kuri 17, 25% ngo kube 19,5% bitewe n'uko Rwagasana Thomas yashyizwe mu cyicyiro cya 5 (classe 5) cy'abatishyura neza inguzanyo bahawe, ndetse ko BK Ltd itakomeza kubara inyungu z'ubukererwe nyuma y'iseswa ry'amasezerano y'inguzanyo ryabaye ku wa 06/12/2012, anasaba ko yamuha indishyi zinyuranye. Mukakimenyi Marie Rosine, umugore wa Rwagasana Thomas, yagobotsemo ku bushake muri urwo rubanza.

[2] Mu miburanire ye, Rwagasana Thomas yasabye kandi ko atakwishyura BK Ltd umwenda w'ikirenga imwishyura ungana na 879.296.362Frw ubazwe kugeza ku wa 09/08/2013 kuko igipimo cy'inyungu cya 19,5%, uwo mwenda wabariweho, kidateganyijwe mu masezerano bagiranye, kandi ko izo nyungu zitagomba gukomeza kubarwa nyuma y'iseswa ry'amasezerano y'inguzanyo. Naho uburanira BK Ltd avuga ko itishyura Rwagasana Thomas umwenda w'ikirenga, ko ahubwo akwiye kuyishyura amafaranga yose ayibereyemo arimo 879.296.362Frw y'umwenda na 261.864.547Frw y'ingwate yo kurangiza neza imirimo y'isoko (Bank Guarantee), ariko ko

inyungu zawo z'ubukererwe zigomba gukomeza kubarwa kugeza igihe azayishyurira umwenda wose.

[3] Urwo rukiko rwaciye urubanza RCOM 0774/13/TC/Nyge ku wa 28/11/2013, rwemeza ko ikirego cya Rwagasana Thomas n'icya Mukakimenyi Marie Rosine bifite ishingiro kuri bimwe, rwemeza ko inzu iri mu kibanza N°322/324 kiri mu Karere ka Nyagatare itagurishwa muri cyamunara binyuze ku Mwanditsi Mukuru wa RDB, rwemeza ko 9% abariwe ku mwenda-remezo ya frais judiciaires, mise à exécution, commissions et frais non privilégiés atahabwa agaciro kuko ari «clauses abusives», rutegeka ko BK Ltd ihabwa indishyi nyakuri zijyanye n'igihombo yagize.

[4] Urwo Rukiko rwemeje kandi ko 261.864.547Frw ya Bank Guarantee (y'ingwate yo kurangiza imirimo) agomba kuvanwa mu mwenda Rwagasana Thomas yishyuzwa na BK Ltd kuko atigeze atangwa, kandi ko inyungu zazamuwe nyuma y'iseswa ry'amasezerano zikaba 19,5% zigomba gusubizwa kuri 17,25% kuko arizo zumvikanyweho n'impande zombi mu masezerano bagiranye.

[5] Urwo Rukiko rwasobanuye na none ko Rwagasana Thomas atakwishyura BK Ltd 91.016.449Frw kuko nta kimenyetso yatanze kigaragaza ko imwishyuza ayo mafaranga, ariko ko 665.248.503Frw atavanwa mu myenda imwishyuza kuko itayamugeretseho nk'uko Rwagasana Thomas ashaka kubyumvikanisha, kubera ko igihe BK Ltd yamwandikiraga ibaruwa yo ku wa 07/09/2012 yamwihanangirizaga bwa nyuma yiswe Last warning, konti ye N° 040-0293075-71, yari iriho umwenda ungana na 717.157.248Frw, kandi ko Rwagasana Thomas atigeze awuhakana mbere hose.

[6] BK Ltd, Rwagasana Thomas na Mukakimenyi Marie Rosine bajuririye urwo rubanza mu Rukiko Rukuru rw'Ubucuruzi, ruca urubanza RCOMA 0591/13/HCC-RCOMA 0007/14/HCC ku wa 03/07/2014, rwemeza ko ubujurire bwa BK Ltd bufite ishingiro, ko ubujurire bwa Rwagasana Thomas na Mukakimenyi Marie Rosine nta shingiro bufite, ko imikirize y'urubanza rwajuririwe ihindutse mu ngingo zayo zose, rutegeka Rwagasana Thomas gufatanya na Mukakimenyi Marie Rosine guha BK Ltd 500.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka na 500.000Frw y'indishyi zo gukomeza kuyishora mu rubanza, rutegeka Rwagasana Thomas guha Habineza Emmanuel, 350.000Frw y'igihembo cy'umuhanga washinzwe n'urukiko kugira ngo akore igenzura mu ibaruramari n'ibindi byose byafasha kwerekana uko imyenda Rwagasana Thomas yahawe ingana.

[7] Urwo Rukiko rwasobanuye ko 9% y'ikurikiranarubanza, ay'igihembo cy'Avoka, ayo guhamba umuhesha w'inkiko n'ay'irangizarubanza (frais judiciaires, mise à exécution, commissions et frais non privilégiés), atari clauses abusives kuko mu masezerano y'inguzanyo impande zombi zagiranye, hateganyijwe ko mu gihe Rwagasana Thomas atishyuye BK Ltd umwenda ayibereyemo, azayishyura 2% y'inyungu z'ubukererwe ziziyongera kuri 17.25% y'igipimo cy'inyungu zisanzwe, zikaba 19.25%.

[8] Urwo Rukiko rwasobanuye kandi ko 240.994.500Frw ya Bank Guarantee agomba gushyirwa mu mwenda Rwagasana Thomas yishyuzwa na BK Ltd kuko yayamwishyuriye muri Minisiteri y'Ubuzima. Ikindi n'uko ko nta kimenyetso Rwagasana Thomas yatanze kigaragaza ko hari amafaranga BK Ltd yamugeretseho nk'uko ashaka kubyumvikanisha, ariko ko

kugira ngo hamenyekane ingano y’umwenda nyakuri ayibereyemo, hagomba gushyirwaho umuhanga mu by’ibaruramari nk’uko Rwagasana Thomas yabisabye ku rwego rwa mbere no mu bujurire, nyamara kubera ko Rwagasana Thomas yanze kumwishyura kugira ngo akore iyo raporo, akwiye gucibwa 350.000Frw y’igihembo cy’umuhanga washyizweho n’urukiko gihwanye n’imirimo y’ibanze yakoze, maze urubanza rwe rugacibwa hashingiwe ku myanzuro yatanze, aho gushingira ku buhamya bw’umuhanga.

[9] Rwagasana Thomas yajuririye urubanza RCOMA 0591/13/HCC-RCOMA 0007/14/HCC mu Rukiko rw’Ikirenga, ubujurire bwe bwandikwa kuri RCOMAA 0056/15/SC – RCOMAA 00025/2017/SC.

[10] BK Ltd imaze kubona ko amafaranga yavuye muri cyamunara y’inzu za Rwagasana Thomas atarangije umwenda wose yari ayifitiye, byatumye itanga ikirego mu Rukiko Rukuru rw’Ubucuruzi isaba ko Rwagasana Thomas na Mukakimenyi Marie Rosine bayishyura umwenda wasigaye uhwanye na 2.174.151.697 agizwe na 888.923.978 Frw “en principal” + 1.285.719 Frw “pour les agios” abazwe kugeza ku wa 17/08/2001, ariko ko icyo kirego kitaburanishijwe ahubwo cyoherejwe muri uru rukiko, aho cyanditswe kuri RCOM 0003/17/CS - RCOM 00004/2017/SC kinahuzwa n’ubujurire bwa Rwagasana Thomas bwanditswe RCOMAA 0056/15/SC – RCOMAA 00025/2017/SC kubera ko izo manza zombi zifitanye isano, n’ababuranyi ari bamwe.

[11] Urubanza rwaburanishijwe mu ruhamwe ku wa 25/07/2017, Rwagasana Thomas yunganiwe na Me Mutabazi Abayo Claude, Mukakimenyi Marie Rosine yunganiwe na Me

Rwinikiza Félix, naho BK Ltd ihagarariwe na Me Rusanganwa Jean Bosco.

[12] Iburanisha ry'urubanza ritangiye, uburanira BK Ltd yavuze ko aretse inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga yari yaratanze mu nama ntegurarubanza yo ku wa 25/01/2017, aho yavugaga ko agaciro k'ikiburanwa katageze kuri 50.000.000Frw, maze urubanza ruburanishwa mu mizi.

[13] Ku wa 26/07/2017, uru rukiko rwashyizeho Ayinkamiye Spéciose nk'umuhanga muri uru rubanza kugira ngo agaragaze by'umwihariko ingano y'umwenda-remezo n'inyungu ziwukomokaho, Rwagasana Thomas agomba kwishyura BK Ltd.

[14] Ku wa 30/10/2017, Ayinkamiye Spéciose yatanze raporo ikubiyemo ibisubizo by'ibibazo binyuranye yari yarabajijwe n'urukiko, n'ababuranyi batanga indi myanzuro y'inyongera bagira icyo bayivugaho. Iburanisha ry'urubanza ryasubukuwe ku wa 13/12/2017, maze Ayinkamiye Spéciose asobanura iyo raporo ye n'abandi baburanyi bagira icyo bayivugaho.

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO

1.Kumenya ingano y'umwenda-remezo n'inyungu ziwukomokaho Rwagasana Thomas agomba kwishyura BK Ltd

[15] Rwagasana Thomas n'umwunganira bavuga ko BK Ltd yamuhaye inguzanyo zitandukanye no mu bihe bitandukanye kugira ngo yubake amazu y'ubucuruzi, amashuri, ibitaro n'ibindi bikorwa nk'uko bigaragazwa n'amasezerano bagiranye, ariko ko

BK Ltd yamwishyuye 668.248.503Frw nk'uko bigaragazwa na historique bancaire mu buryo bukurikira: 100.000.000Frw yo ku wa 23/08/2010, 189.452.100 Frw yo ku wa 02/07/2010, 119.740.499Frw yo ku wa 04/12/2012, 256.055.904Frw yo ku wa 27/08/2010, na 409.192.599 Frw, kandi ko BK Ltd yakomeje kuyabarira inyungu z'ubukererwe nyuma y'iseswa ry'amasezerano, kandi nta masezerano yanditse bagiranye agaragaza ko yamuhaye iyo myenda.

[16] Bavuga kandi ko Urukiko Rukuru rw'Ubucuruzi rwemeje ko agomba kwishyura BK Ltd 240.994.500Frw y'ingwate yo kurangiza neza imirimo y'isoko (Bank Guarantee) hiyongereyeho n'inyungu zayo, kandi ko ayo mafaranga agomba kwiyongera ku zindi nguzanyo ayifitiye, rwirengagije ko ayo mafaranga atari inguzanyo kubera ko nta masezerano yihariye bagiranye ayigenga. Bavuga ko indi mpamvu ituma Rwagasana Thomas atakwishyura BK Ltd ayo mafaranga, ari uko nta kimenyetso yatanze kigaragaza ko yamwishyuriye uwo mwenda muri MINISANTE, ko ariko iramutse itanze icyo kimenyetso, yayishyura 240.994.500Frw yumvikanyweho n'impande zombi, atabariyemo inyungu kuko zitumvikanyweho n'impande zombi.

[17] Bakomeza basobanura ko guhera ku wa 07/09/2012, igihe BK Ltd yandikiraga Rwagasana Thomas imwishyura umwenda ayibereyemo, kugeza ku wa 11/03/2015, yayishyuye uwo mwenda mu buryo bukurikira: ku wa 15/01/2013 yayishyuye 46.572.417Frw na 32.072.857Frw, ku wa 20/06/2013 ayishyura 879.083.831Frw, ku wa 14/01/2014 ayishyura 89.730.282Frw, ku wa 14/03/2014 ayishyura 126.728.540Frw, naho ku wa 11/03/2015 ayishyura 40.000.000Frw, yose hamwe akaba 1.214.187.927Frw, ko kuba ku wa 07/09/2012, BK Ltd yarandikiye Rwagasana Thomas imwishyura 1.164.321.782Frw,

kandi yarayishyuye 1.214.187.927Frw, basanga ahubwo ariyo igomba kumusubiza 49.866.145Frw y'ikinyuranyo cy'ayo mafaranga. Basaba ko Urukiko rw'Ikirenga rwakwemeza ko Rwagasana Thomas yishyuye BK Ltd imyenda yose yamuhaye ku buryo igomba kumusubiza 1.000.000.000Frw irenga yayishyuye bitari ngombwa.

[18] Ku bijyanye n'agaciro ka raporo y'umuhanga, Me Mutabazi Abayo Claude wunganira Rwagasana Thomas avuga ko iyo raporo itahabwa agaciro kuko itagaragaza imyenda yose Rwagasana Thomas aregwa na BK Ltd, uburyo yayifashe n'uburyo bwo kuyishyura bari barumvikanyeho mu masezerano bagiranye, kandi ko umuhanga atagaragaje umubare w'amafaranga Rwagasana Thomas yayishyuye mbere na nyuma ya cyamunara y'inzu ye kuko atagaragaje uburyo 40.000.000Frw yavuye muri iyo cyamunara yagabanyije umwenda we.

[19] Avuga kandi ko umuhanga yagaragaje ko Rwagasana Thomas asigaje kwishyura BK Ltd 1.668.645.757Frw abariyemo inyungu zingana na 786.948.623Frw zabariwe ku gipimo cy'inyungu kingana na 19.25 %, ariko ko batamenye aho yakuye iryo janisha ry'inyungu kuko ritigeze ryumvikanwaho n'impande zombi mu masezerano bagiranye, ko ahubwo igipimo cy'inyungu yagombaga gukoresha mu kubara inyungu ari 17.25 % kuko aricyo cyumvikanyweho n'impande zombi mu masezerano bagiranye yasinyiwe imbere ya Noteri.

[20] Avuga na none ko umuhanga atagaragaje niba 786.948.623Frw ari inyungu zisanzwe cyangwa z'ubukererwe kuko inyungu zisanzwe zagombaga guhagarara guhera ku itariki y'iseswa ry'amasezerano cyangwa ry'isibwa ry'umwenda mu bitabo bya BK Ltd, uretse ko inyungu z'ubukererwe zo zagombaga gukomeza kubarwa kugeza urubanza ruciwe nk'uko

byemejwe mu mwiherero w'Abacamanza wabereye mu Karere ka Rubavu, ariko ko bitumvikana ukuntu izo nyungu zajya kungana n'umwenda yishyuzwa ungana na 881.697.134Frw.

[21] Ku byerekeranye n'agaciro ka raporo y'umuhanga, Mukakimenyi Marie Rosine n'umwunganira bavuga ko iyo raporo itahabwa agaciro kubera ko itagaragaza imyenda agomba gufatanya n'umugabo we n'iyo batagomba gufatanya bitewe n'uko hari amasezerano y'inguzanyo n'ay'ingwate Mukakimenyi Marie Rosine atasinye. Ikindi n'uko bitumvikana ukuntu umwenda wishyuzwa ungana na 881.697.134Frw ujya kungana n'inyungu zawo zingana na 786.948.623 Frw zibariwe ku ijjanisha rya 19.25 % ritumvikanyweho n'impande zombi mu masezerano bagiranye.

[22] Me Rusanganwa Jean Bosco avuga ko BK Ltd yaguriye Rwagasana Thomas inguzanyo zitandukanye mu bihe bitandukanye kuva mu mwaka wa 2010 kugeza 2012 nk'uko bigaragazwa n'amasezerano bagiranye kuko ku wa 02/03/2010, yamuguriye 294.775.152Frw arimo 94.775.152 Frw yakoresheje mu kumugurira umwenda yari afitiye ECOBANK inamuha ligne de crédit ya 200.000.000Frw, kandi ko iyo myenda yagiye yiyongera ku yindi myenda yagiye imuha kuko atayishyuraga nk'uko bikwiye ku buryo ku wa 31/01/2012, iyo myenda yose yanganaga na 1.048.187.160Frw nk'uko bigaragazwa n'amasezerano yo ku wa 31/01/2012.

[23] Avuga kandi ko ku wa 11/06/2012, BK Ltd yandikiye Rwagasana Thomas imusaba kuyishyura byibuze 1.055.701.542Frw akomoka ku mwenda wanganaga na 1.118.645.689Frw habariwemo na 63.244.147Frw ya mortgage loan, ariko ko atabikoze, bituma ku wa 07/09/2012, imuha integuza (last warning letter) imusaba kuyishyura

1.164.321.782Frw, bigeze ku wa 06/12/2012, ihagarika amasezerano bagiranye inamusaba kuyishyura 1.211.614.537Frw y'umwenda yari ayibereyemo.

[24] Asobanura ko historique ya konti isanzwe (compte courant) N° 00293075-71 ya Rwagasana Thomas igaragaza ko yashyizweho amafaranga yavuye muri cyamunara y'inzu ye, maze agabanya umwenda we ku buryo wavuye kuri 927.581.853Frw ukaba 887.581.853Frw ku wa 11/03/2015 habariwemo 240.994.500Frw y'ingwate yo kurangiza neza imirimo y'isoko, BK Ltd yamwishyuriye muri MINISANTE ku wa 10/06/2014 hashingiwe ku masezerano y'ubwishingire bagiranye, ariko ko uwo mwenda utabariwemo inyungu z'ubukererwe (agios) zabazwe kuwa ku wa 01/01/2013 nk'uko bigaragazwa na historique ya konti yazo ifite N° 09860175-36, ko kubera ko amafaranga yavuye muri cyamuna atarangije umwenda wose wa Rwagasana Thomas, ariyo mpamvu yatumye imurega mu rukiko imusaba kuyishyura 888.923.978Frw y'umwenda-remezo hiyongereyeho 1.285.227.719Frw y'inyungu z'ubukererwe (agios)zibazwe kugeza ku wa 17/08/2016, yose hamwe akaba 2.174.151.697Frw, ariko ko inyungu z'ubukererwe zikwiye kubarwa kugeza umwenda wose wishyuwe.

[25] Akomeza asobanura ko igipimo cy'inyungu cyumvikanyweho mu masezerano ari 17.25 % ku kwezi n'ubwo umuhanga yabariye izo nyungu ku mwaka, ariko ko icyo gipimo cyazo cyabaye 19,25 % kubera ko muri ayo masezerano, no muri Règlement des Ouvertures de Crédit yahawe na BK Ltd, Rwagasana Thomas yemeye anasinyira ko azayishyura 2% y'inyungu z'ubukererwe ziyongera kuri 17.25 % mu gihe atishyuye inguzanyo yahawe.

[26] Ku byerekeye 240.994.500Frw y'ingwate yo kurangiza neza imirimo y'isoko (Bank Guarantee), avuga ko hashingiwe ku ngingo ya 64 y'Itegeko rigenga amasezerano, Rwagasana Thomas akwiye kuyishyura ayo mafaranga hiyongereyeho n'inyungu zayo kubera ko bayumvikanyeho mu masezerano y'ubwishingire bagiranye ku wa 31/01/2012, kandi ko BK Ltd yamwishyuriye 240.994.500Frw muri Minisitari y'Ubuzima ku wa 10/06/2014, inyanyujije kuri konti yayo iri muri BNR bitewe n'uko Rwagasana Thomas atarangije isoko BK Ltd yari yishingiye, maze ayo mafaranga yiyongera ku myenda yamuhaye, kandi ko agomba kubyara inyungu kuko BK Ltd ikora akazi ko gucuruza amafaranga.

[27] Ku byerekeranye n'agaciro ka raporo y'umuhanga, Me Rusanganwa Jean Bosco, avuga ko iyo raporo ikwiye guhabwa agaciro kuko umuhanga yemeje ko Rwagasana Thomas agomba kwishyura BK Ltd 881.697.134Frw y'umwenda-remezo na 786.948.623Frw y'inyungu z'ubukererwe (agios), yose hamwe akaba 1.668.645.757Frw n'ubwo aya mafaranga adahuye n'ayo BK Ltd yari yararegeye mbere angana na 2.174.151.697 abazwe kugeza ku wa 17/08/2001.

[28] Umuhanga asobanura ko igipimo cy'inyungu zisanze kigaragara mu masezerano ari 17.25%, ariko ko cyiyongereyeho 2% y'inyungu z'ubukererwe, gihinduka 19.25% nk'uko kigaragarira mu ibaruwa yo ku wa 06/12/2012, BK Ltd yandikiye Rwagasana Thomas imumenyesha ko igipimo cy'inyungu cyahindutse kikaba 19.25% bitewe n'uko yananiwe kuyishyura imyenda ayibereyemo, kandi ko uyu yabonye iyo baruwa arayisinye ku wa 27/03/2013, nyamara ntiyagira icyo ayivugaho, bivuze ko yemeye ibiyikubiyemo, kandi ko igipimo cy'inyungu cya 19.25%, aricyo kimufitiye akamaro kuko iyo atabona iyo

baruwa, yari kubarira inyungu zisanzwe n'iz'ubukererwe ku gipimo cy'inyungu cya 41% ku mwaka.

[29] Avuga kandi ko amafaranga yose y'ubwishyu yaciye kuri konti ya Rwagasana Thomas arimo ayavuye muri za cyamunara y'inzu ze yagabanyije imyenda ye nk'uko yabisobanuye muri raporo ye. Yongeraho ko Mukakimenyi Marie Rosine yasinye amasezerano yose Rwagasana Thomas yagiranye na BK Ltd.

UKO URUKIKO RUBIBONA

[30] Ku byerekeranye n'agaciro ka raporo y'umuhanga, ingingo ya 76 y'Itegeko N°15/2004 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", naho ingingo ya 98 y'iryo Tegeko, igateganya ko "Urukiko ntirukurikiza byanze bikunze ibitekerezo by'abahanga mu gihe binyuranye n'imyumvire y'abacamanza".

[31] Hashingiwe kuri iyo ngingo, Urukiko rurasanga iyo raporo ikwiye gushingirwaho mu guca uru rubanza kuko yakozwe n'umuhanga mu mbibi z'inshingano yari yarasabwe n'urukiko, kandi rubona ibiyikubiyemo bihuje n'ukuri.

[32] Ku birebana n'umwenda-remezo, 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 bayagiranye. Ashobora guseswa ari uko

babyumvikanyeho cyangwa ku mpamvu zemewe n'amategeko. Agomba kubahirizwa nta buriganya”.

[33] Naho ku byerekeranye n'inyungu z'ubukererwe, ingingo ya 7, igika cya 2, y'Amabwiriza rusange N°02/2011 ku ishyirwa mu byiciro by'imyenda no guteganya ingoboka, iteganya ko “Inyungu zose ku myenda itishyurwa neza zabariwe mbere mu mutungo ariko ntizakirwe zigomba guhindurwa kandi zikandikwa kuri konti y'inyungu zahagaze kugeza igihe zishyuriwe n'uwafashe umwenda”.

[34] Ku birebana n'uru rubanza, inyandiko ziri muri dosiye na raporo yakozwe n'umuhanga washyizweho n'uru rukiko yo ku wa 30/10/2017, bigaragaza ko ku wa 09/04/2009, Rwagasana Thomas yandikiye BK Ltd asaba ko yamuha découvert ya 700.000.000Frw izamufasha kurangiza ku gihe imirimo yo kubaka ishuri rya Fawe Girl's School riri i Kayonza, kandi ko azishyura ayo mafaranga mu gihe cy'amezi atatu (3). Ku wa 14/04/2009, BK Ltd, Rwagasana Thomas na Mukakimenyi Marie Rosine basinye amasezerano yiswe Ouverture de crédit avec constitution d'hypothèque bari imbere ya Noteri. Ayo masezerano agaragaza ko BK Ltd yemereye Rwagasana Thomas inguzanyo ya 700.000.000Frw yayisabye, kandi ko azayishyura mu gihe cy'imyaka 3 ku gipimo cy'inyungu kingana na 17.25 % ku mwaka, ko agaciro k'ingwate atanze kangana na 120.000.000Frw na 10.800.000Frw ya frais judiciaires, et de mise à exécution, commissions et frais privilégiés, ko aya mafaranga angana na 130.800.000Frw. Rwagasana Thomas na Mukakimenyi Marie Rosine batanze ingwate y'iyo nguzanyo igizwe n'inzu yabo iri mu kibanza gifite N°322/324 kiri i Nyagatare, mu Ntara y'Iburasirazuba.

[35] Ku wa 20/04/2009, BK Ltd yandikiye Rwagasana Thomas ibaruwa imumenyesha ko imuguriye (mise en place du crédit) 700.000.000Frw yo kubaka ishuri rya FAWE GIRL'S SCHOOL riri i Kayonza, izishyurwa mu gihe cy'amezi 3 ku gipimo cy'inyungu cya 17.25 % ku mwaka, kandi ko ingwate y'iyo nguzanyo ari inzu yavuzwe haruguru.

[36] Ku wa 01/09/2009, Rwagasana Thomas yandikiye BK Ltd ayisaba découvert ya 100.000.000Frw yo kubaka ikigega cy'amazi gifite 100 m3 n'imishahara yo guhamba abakozi bubakaga ishuri rya FAWE GIRL SCHOOL ryavuzwe haruguru.

[37] Ku wa 02/12/2009, Rwagasana Thomas yandikiye BK asaba ko yamwongerera igihe cy'amezi 3 kugeza muri Gashyantare 2010 kugira ngo azayishyure iyo nguzanyo kuko nyir'ibikorwa ataramwishyura amafaranga amusigayemo.

[38] Ku wa 08/12/2009, Rwagasana Thomas yandikiye BK Ltd ayisaba ko yamuguriza 79.902.927 Frw y'ingwate yo kurangiza neza imirimo y'isoko (Caution de Bonne Fin) ahwanye na 10 % y'isoko yatsindiye rya 799.029.271Frw ryo kubaka umuhanda w'itaka: Nyamata – Musenyi - Shyara, uri mu Karere ka Bugesera, ufite uburebure bw'ibilometero 27.

[39] Ku wa 02/12/2009, Rwagasana Thomas yandikiye na none BK Ltd ayisaba ko yamuguriza 298.260.45Euros ahwanye na 240.994.500Frw y'ingwate yo kurangiza neza imirimo y'isoko ry'ibitaro bya Bushenge biri mu Karere ka Nyamasheke, mu Ntara y'Iburengerazuba.

[40] Ku wa 25/01/2010, Rwagasana Thomas yandikiye BK Ltd ayisaba inguzanyo yo mu bwoko bwa découvert ya

200.000.000Frw yo kugura ibikoresho byo kubaka ibitaro bya Bushenge byavuzwe haruguru n'imishahara y'abakozi.

[41] Ku wa 25/01/2010, Rwagasana Thomas yandikiye BK Ltd ayisaba ko yamugurira umwenda afitiye ECOBANK ungana na 94.779.152Frw, BK Ltd ikanahabwa ingwate z'uwo mwenda zose kugira ngo imyenda ye yose iherere muri BK Ltd.

[42] Ku wa 02/03/2010, BK Ltd yandikiye Rwagasana Thomas ibaruwa imumenyesha ko imuguriye 94.775.152Frw azishyurwa mu gihe cy'imyaka itanu (5), ibazwe guhera ku wa 31/03/2010, ku gipimo cy'inyungu kingana na 17.25 % ku mwaka.

[43] Ku wa 29/06/2010, BK Ltd yakoranye na Rwagasana Thomas amasezerano y'inguzanyo n'ingwate (Loan agreement with creation of a mortgage), agaragaza ko imuguriye 933.590.963 Frw, ko agaciro k'igwate atanze kangana na 400.000.000Frw, kandi ko azayishyura 36.000.000 Frw ya frais judiciaires, et de mise à exécution, commissions et frais privilégiés aya mafaranga akaba 436.000.000Frw. Ayo masezerano yasinyiwe imbere ya Noteri w'Akarere ka Gasabo na BK Ltd, Rwagasana Thomas na Mukakimenyi Marie Rosine.

[44] Ku wa 16/09/2011, BK Ltd yandikiye Rwagasana Thomas imumenyesha ko imwemereye facility ya 69.000.000Frw yo guhamba abakozi (The Bank has agreed to extend an overdraft facility of Rwf 69.000.000 has been granted fo cater for employees's salary)

[45] Ku wa 13/12/2011, Rwagasana Thomas yongeye kwandikira BK Ltd ayisaba kumwongerera igihe cy'amezi 3 kugira ngo azayishyure inguzanyo (découvert) ya 200.000.000

Frw yo kurangiza imirimo isigaye yo kubaka ibitaro bya Bushenge byavuzwe haruguru (The expression need of money is 200 million which is equivalent to the cost of remaining works for reconstruction of Bushenge Hospital).

[46] Ku wa 21/12/2011, BK Ltd yandikiye Rwagasana Thomas imumenyesha ko imwemereye découvert ya 100.000.000Frw (The Bank has agreed to grant an overdraft facility of Rwf 100.000.000 has been granted fo facilitate your daily operations expense), inamwibutsa indi myenda ayibereyemo ibazwe kugeza ku wa 21/12/2011.

[47] Ku wa 22/12/2011, BK Ltd yagiranye na Rwagasana Thomas amasezerano y'ingwate (Loan agreement with creation of a mortgage) ya 1.050.929.051Frw (The Bank offers tot he Client, who accepts, a loan of Rwf 1.050.929.051 to be drawn on Bank of Kigali. Muri ayo masezerano yasinyiwe imbere ya Noteri w'Akarere ka Gasabo na BK Ltd, Rwagasana Thomas na Mukakimenyi Marie Rosine, hateganyijwe ko BK Ltd ihawe ingwate igizwe n'inzu iri mu kibanza gifite N°1584/KIC/MAS kiri Masaka, mu Karere ka Kicukiro, ifite agaciro ka 13.000.000Frw, kandi ko azayishyura 1.170.000Frw ya frais judiciaires, mise à exécution, commissions et frais non privilégiés, yose hamwe akaba 14. 170.000Frw.

[48] Ku wa 05/01/2012, BK Ltd yagiranye na Rwagasana Thomas amasezerano y'ingwate (Constitution of mortgage) N°15329 igizwe n'inzu iri mu kibanza N°319 kiri Nyarutarama, mu Karere ka Gasabo ifite agaciro kangana na 250.000.000Frw, kandi ko azayishyura 22.500.000Frw ya frais judiciaires, mise à exécution, commissions et frais non privilégiés, yose hamwe akaba 272.500.000Frw. Ayo masezerano yasinyiwe imbere ya

Noteri w'Akarere ka Gasabo na BK Ltd, Rwagasana Thomas na Mukakimenyi Marie Rosine.

[49] Ku wa 26/01/2012, Rwagasana Thomas yandikiye BK Ltd ayisaba kumwongerera igihe cy'amezi 3 kugira ngo azayishyure inguzanyo zose yamuhaye zigaragara mu bitabo byayo, cyane cyane *découvert* yamuhaye yakoresheje mu kubaka ibitaro bya Bushenge mu gihe agitegereje ko MINISANTE itanga uburenganzira bwo kumwishyura.

[50] Ku wa 31/01/2012, BK Ltd yandikiye Rwagasana Thomas imumenyesha ko imwemereye *découvert* ya 404.293.881 Frw agomba kuzishyura mu mezi 3 mu gihe agitegereje kwishyurwa. (The Bank has agreed to grant an overdraft limit for the debit balance on your account of Rwf 404.293.881 for a period of 3 months awaiting payments).

[51] Ku wa 20/04/2012, Rwagasana Thomas yandikiye BK Ltd ayisaba ko yamuguriza 68.000.000Frw yo guhamba abakozi bubakaga ibitaro bya Bushenge.

[52] Ku wa 11/06/2012, BK Ltd yandikiye Rwagasana Thomas imusaba ko yayishyura 1.118.645.689Frw y'umwenda ayibereyemo ubazwe kugeza ku wa 11/06/2012, ariko ko agomba kuyishyura nibura 1.055.701.542Frw bitarenze ku wa 11/06/2012.

[53] Ku wa 07/09/2012, BK Ltd yandikiye Rwagasana Thomas imuha integuza (Last warning letter) imusaba ko yayishyura 1.164.321.782Frw, kandi ko natabikora mu gihe cy'iminsi 30 y'akazi, BK Ltd izatangira imihango yo kugurisha amazu ye yayihayeho ingwate, ndetse ko izamushyirisha mu

bakiriya batajya bishyura inguzanyo zabo neza, Rwagasana Thomas yabonye iyo baruwa ku wa 18/09/2012, arabisinyira.

[54] Ku wa 25/09/2012, Rwagasana Thomas yandikiye BK Ltd ayitakambira asaba ko yamwongerera igihe cyo kuyishyura inguzanyo yamuhaye kugeza igihe Minisiteri y'Ubuzima izamwishyurira amafaranga imusigayemo.

[55] Ku wa 06/12/2012, BK Ltd yandikiye Rwagasana Thomas imumenyesha ko isheshe amasezerano bagiranye (Termination of your repayment program), imusaba ko yayishyura 1.211.614.537Frw akubiyemo umwenda-remezo, inyungu, commission n'andi mafaranga ayibereyemo (charges), ariko ko inyungu z'ubukererwe zizakomeza kubarirwa ku gipimo cy'inyungu kingana na 19.25 % kugeza igihe azayishyurira imyenda yose ayifitiye, maze zigashyirwa kuri konti itandukanye n'amakonti asanganwe. Rwagasana Thomas yabonye iyo baruwa ku wa 27/03/2012, aranabisinyira.

[56] Raporo yo ku wa 22/12/2013 n'iyiyo ku wa 28/02/2014 zakozwe na Me Kanyana Bibiane na Me Habimana Védaste, bari bashinzwe kugurisha ingwate, zigaragaza ko nyuma yo kugurisha amazu ari mu bibanza N°1/02/13/02/319 na N°1/02/13/02/619 biri Nyarutarama, mu Karere ka Gasabo, ya Rwagasana Thomas na Mukakimenyi Marie Rosine bari baratanzeho ingwate muri BK Ltd, hari amafaranga yakoreshejwe muri izo cyamunara ku buryo hasigaye 85.480.282 Frw ku nzu imwe, hanasigara 118.456.988Frw ku yindi nzu, yashyizwe kuri konti N°00040-0293075-71 ya Rwagasana Thomas, maze agabanya découvert yari ayifitiye nk'uko bivugwa muri raporo y'umuhanga wavuzwe haruguru.

[57] Avis de crédit yo ku wa 10/06/2014 iri muri dosiye, igaragaza ko BK Ltd yishyuriye Rwagasana Thomas 240.994.500Frw y'ingwate yo kurangiza neza imirimo y'isoko yo kubaka ibitaro bya Bushenge muri Minisiteri y'Ubuzima iyanyujije kuri konti yayo N°1201176 iri muri BNR nk'uko bari barabyumvikanyeho mu masezerano y'ubwishingire N°98469 (Performance Guarantee N° 98469) yo mwaka wa 2009, noneho BK Ltd irangije kumwishyurira ayo mafaranga, yayongereye ku myenda Rwagasana Thomas yari ayibereyemo kuko ku wa 10/06/2014, BK Ltd yashyize konte ye N° 040-0293075-71 muri solde négatif nk'uko bigaragazwa n'inyandiko iri muri dosiye kuri cote ya 207 na Accusé de reception d'ordre de virement immédiat N° 345023 iri kuri cote ya 208.

[58] Ku bijyanye n'imyenda BK Ltd yaguriye Rwagasana Thomas, umuhanga washyizweho n'uru rukiko yasesenguye amasezerano y'inguzanyo yavuzwe haruguru, atanga raporo yo ku wa 30/10/2017, igaragaza ko BK Ltd yaguriye Rwagasana Thomas imyenda ikurikira: 700.000.000Frw ku wa 20/04/2009, 240.994.500 Frw ku wa 02/12/2009, 94.775.152 Frw ku wa 02/03/2010, 200.000.000 Frw ku wa 02/03/2010, 110.000.000 Frw ku wa 02/03/2010 na 933.590.963 Frw ku wa 29/06/2010.

[59] Iyo raporo y'umuhanga igaragaza kandi ko muri iyo myenda-remezo, Rwagasana Thomas yarangije kwishyura BK Ltd 700.000.000Frw gusa mu mpera z'ukwezi kwa munani 2009, kandi ko kuri mortgage loan facility ingana na 94.775.152Frw, yayishyuye gusa 56.940.552Frw na 2.719.204 y'inyungu zayo z'ubukererwe, hasigara 73.341.651Frw yiyongereye ku zindi za découverts yamuhaye, ko nyuma yo guteza cyamunara amazu ye abiri ari mu bibanza N° 1/02/13/02/319 na N° 1/02/13/02/619 biri Nyarutarama byavuzwe haruguru, amafaranga avuyemo

(85.480.282 Frw + 118.456.988 Frw) yashyizwe kuri konti ye N° 00040-0293075-71 iri muri BK Ltd agabanya imyenda ye, ariko ko iyo myenda yongeye kwiyongeraho 240.994.500Frw y'ingwate yo kurangiza neza imirimo y'isoko yamwishyuriye muri MINISANTE nk'uko byasobanuwe haruguru.

[60] Amasezerano y'inguzanyo na raporo y'umuhanga byavuzwe haruguru biri muri dosiye, bigaragaza ko imyenda Rwagasana Thomas yagurijwe na BK Ltd yavuzwe haruguru izishyurwa hiyongereyeho inyungu zayo zisanzwe zibariwe ku gipimo cy'inyungu kingana na 17.25 %, uretse Bank Guarantee iziyongeraho inyungu zibariwe ku gipimo cy'inyungu kingana na 3.5 %, ariko ko mu gihe atayishyuye umwenda ayibereyemo, azawishyura hiyongereyeho inyungu zawo z'ubukererwe zizabarirwa ku gipimo cy'inyungu kingana na 19.25 % nk'uko bivugwa mu ibaruwa BK Ltd yamwandikiye ku wa 06/12/2012, igihe yasesaga amasezerano bagiranye (Termination of your repayment program).

[61] Hashingiwe ku bisobanuro bimaze kuvugwa haruguru, Urukiko rurasanga imvugo y'uburanira Rwagasana Thomas y'uko inyungu z'ubukererwe zitagombaga kubarirwa ku gipimo cya 19.25 %, nyuma y'iseswa ry'amasezerano y'inguzanyo nta shingiro ifite, kubera ko BK Ltd yamwandikiye ibaruwa yo ku wa 06/12/2012 yavuzwe haruguru, imumenyesha ko azayishyura inyungu z'ubukererwe zibariwe ku gipimo cya 19.25 %, kandi Rwagasana Thomas yabonye iyo baruwa ku wa 27/03/2012, arabisinyira, ariko ntiyagira icyo ayivugaho icyo gihe, bigaragara ko yemeye icyo gipimo cy'inyungu.

[62] Urukiko rurasanga ikindi kimenyetso kigaragaza ko inyungu z'ubukererwe zikwiye kubarirwa ku gipimo kingana na 19.25 %, ari uko BK Ltd yagiye yandikira Rwagasana Thomas

amabaruwa atandukanye yo ku wa 21/12/2011, ku wa 31/01/2012, 11/06/2012 no ku wa 07/09/2012, imumenyesha ko natayishyura ibirarane ayibereyemo bikurikira: 7.235.903Frw; 12.256.453Frw; 4.869.120Frw na 12.340.276Frw, azabyishyurira inyungu z’ubukererwe zibariwe ku gipimo cya 19.25 %, ariko ko Rwagasana Thomas atagize icyo akinenga icyo gihe cyose, bivuze rero ko nta kosa umuhanga yakoze ubwo yabariraga inyungu z’ubukererwe ku gipimo cya 19.25 %.

[63] Ku birebana na 240.994.500Frw y’ingwate yo kurangiza neza imirimo y’isoko, Urukiko rurasanga, kuba BK Ltd yarishyuriye Rwagasana Thomas ayo mafaranga muri MINISANTE ku wa 10/06/2014 nk’uko bigaragazwa n’ibimenyetso birimo na Avis de crédit yo ku wa 10/06/2014 biri muri dosiye byavuzwe haruguru, nta kosa Urukiko Rukuru rw’Ubucuruzi rwakoze ubwo rwemezaga ko ayo mafaranga agomba kwiyongera ku zindi nguzanyo yamuhaye akanayishyurira inyungu zingana na 3.5% ku mwaka nk’uko byanemejwe n’umuhanga washyizweho n’uru rukiko kubera ko BK Ltd ari ikigo cy’imari gishinzwe gucuruza amafaranga.

[64] Urukiko rurasanga imvugo y’uburanira Rwagasana Thomas y’uko atakwishyura BK Ltd 668.248.503Frw (ariko mu by’ukuri ni 665.248.503 Frw) agizwe na 100.000.000Frw + 189.452.100 Frw + 119.740.499 Frw + 256.055.904 Frw agaragarira kuri historique bancaire ya BK Ltd ngo kuko yayageretsweho na BK Ltd nta shingiro ifite, kuko nta kimenyetso yatanze kigaragaza ukuri kw’ibyo aburana nk’uko biteganywa n’ingingo ya 9 y’Itegeko N° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y’imanza z’imbenezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi, iteganya ko “Urega agomba kugaragaza ibimenyetso by’ibyo

aregera. Iyo abibuze, uwarezwe aratsinda, kubera ko BK Ltd yagiye imwandikira amabaruwa atandukanye yavuzwe haruguru imumenyesha ingano y'imyenda ayibereyemo, ariko ntagire icyo ayinenga, ahubwo agakomeza kuyisaba izindi nguzanyo nk'uko byasobanuwe haruguru.

[65] Hashingiwe ku ngingo ya 64 y'Itegeko ryavuzwe no kuri raporo y'umuhanga byavuzwe haruguru, Urukiko rurasanga Rwagasana Thomas agomba kwishyura BK Ltd 881.697.134Frw y'umwenda-remezo na 786.948.623Frw y'inyungu z'ubukererwe, yose hamwe akaba 1.668.645.757Frw kuko Rwagasana Thomas na Mukakimenyi Marie Rosine n'ababunganira nta bimenyetso batanze bivuguriza ibyashingiweho n'umuhanga byavuzwe haruguru.

2. Kumenya niba hari amasezerano Mukakimenyi Marie Rosine atasinye ku buryo atafatanya na Rwagasana Thomas kwishyura BK Ltd imyenda yamuhaye atayishyuye

[66] Mukakimenyi Marie Rosine n'umwunganira bavuga ko atafatanya na Rwagasana Thomas kwishyura BK Ltd imyenda yose yamuguriye kuko atasinye amasezerano y'inguzanyo n'ay'ingwate umugabo we yagiranye na BK Ltd.

[67] Basobanura ko muri ayo masezerano harimo amasezerano y'inguzanyo yo ku wa 31/01/2012 ya 404.293.881Frw akwiye guteshwa agaciro kuko iyo nguzanyo yatanzweho ingwate y'imitungo yose y'umuryango, ariko ko Mukakimenyi Marie Rosine atayasinye kandi nawe afite uburenganzira bungana na 50 % kuri iyo mitungo y'umuryango nkuko biteganywa n'ingingo ya 34 na 35 z'Itegeko Ngenga N°08/2005 ryo ku wa 14/07/2005 rigena imikoreshereze n'imicungire y'ubutaka mu Rwanda , hamwe n'ingingo ya 21

y'Itegeko N° 22/99 ryo ku wa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, iteganya ko "Uko imicungire y'umutungo n'uburyo bawucunga byaba biri kose, ubwumvikane bw'abashyingiranywe ni ngombwa mu gutanga ikitimukanwa bwite n'umutungo bahuriyeho no kubitangaho ubundi burenganzira bwose"

[68] Me Rusanganwa Jean Bosco, uburanira BK Ltd, avuga ko Mukakimenyi Marie Rosine akwiye gufatanya na Rwagasana Thomas kwishyura imyenda yose uyu yahawe na BK Ltd kuko yasiye ku masezerano yose y'inguzanyo n'ay'ingwate bagiranye.

UKO URUKIKO RUBIBONA

[69] Ingingo ya 9 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko "Urega agomba kugaragaza ibimenyetso by'ibyo aregera. Iyo abibuze, uwarezwe aratsinda".

[70] Dosiye y'urubanza igaragaza ko Mukakimenyi Marie Rosine yasinyiye imbere ya Noteri w'Akarere ka Gasabo amasezerano y'inguzanyo n'ay'ingwate yo ku wa 14/04/2009, ku wa 29/06/2010, no ku wa 22/12/2011, ndetse n'amasezerano y'ingwate (Constitution of mortgage) yo ku wa 05/01/2012 yavuzwe haruguru.

[71] Urukiko rurasanga, nk'uko n'umuhanga yabisobanuye muri raporo ye yavuzwe haruguru, nta masezerano y'inguzanyo cyangwa y'ingwate Rwagasana Thomas yagiranye na BK Ltd,

Mukakimenyi Marie Rosine atasinye, bityo uyu akaba agomba kubitsindirwa nk'uko biteganywa n'ingingo ya 9 y'Itegeko ryavuzwe haruguru, bivuze rero ko Mukakimenyi Marie Rosine agomba gufatanya na Rwagasana Thomas kwishyura BK Ltd umwenda-remezo n'inyungu z'ubukererwe nk'uko byasobanuwe haruguru.

3. Kumenya niba amasezerano y'inguzanyo Rwagasana Thomas yagiranye na BK Ltd arimo clauses abusives ku birebana na frais judiciaires, mise à exécution, commissions et frais non privilégiés

[72] Rwagasana Thomas n'umwunganira bavuga ko atakwishyura BK Ltd 9% y'umwenda-remezo wose imwishyura urenga miriyari y'ikurikiranarubanza, ay'igihembo cya Avoka, yo kwishyura amatangazo ya cyamunara, yo guhamba umuhesha w'inkiko n'ay'irangizarubanza (frais judiciaires, mise à exécution, commissions et frais non privilégiés) kubera ko ingingo zose z'amasezerano bagiranye ari muri position de faiblesse zimutegeka kuyishyura ayo mafaranga, ari clauses abusives kuko ziteganyiriza BK Ltd urwunguko rwinshi cyane kuko 9% y'amafaranga arenga miriyari yishyuzwa ashobora kugera kuri 160.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka, kandi ko nta kimenyetso BK Ltd yatanze kigaragaza ko yakoresheje ayo mafaranga mu gukurikirana no kuburana uru rubanza.

[73] Bavuga ko ahubwo Rwagasana Thomas yarangije kwishyura amafaranga ya frais judiciaires, mise à exécution, commissions et frais non privilégiés, igihe inzu ze zatezwaga cyamunara kuko abaziteje cyamunara bishyuye amafaranga y'amatangazo ya cyamunara, ay'igihembo cy'umuhesha w'inkiko n'andi yose yasabwaga, barangije, bayamubaraho,

ariko ko iyo umuhanga agaragaza amafaranga yose Rwagasana Thomas yishyuye icyo gihe, yari gusanga hasigaye amafaranga y'igihembo cya Avoka gusa.

[74] Me Rusanganwa Jean Bosco, uburanira BK Ltd, avuga ko 9% ya frais judiciaires, mise à exécution, commissions et frais non privilégiés, agaragarira mu masezerano y'ingwate, atari clauses abusives, kuko adashingiye ku mwenda-remezo wose yishyuzwa, kandi ko ayo mafaranga atagombye kumutera impungenge mu gihe BK Ltd imwishyuza gusa 10.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka na 50.000Frw y'ingwate y'igarama yatanze.

UKO URUKIKO RUBIBONA

[75] Amasezerano y'inguzanyo n'ay'ingwate yo ku wa 14/04/2009, ayo ku wa 29/06/2010, ayo ku wa 22/12/2011 n'ayo ku wa 05/01/2012 yavuzwe haruguru, agaragaza ko mu gihe Rwagasana Thomas atishyuye inguzanyo yamuhaye, azishyura 10.800.000Frw, 36.000.000Frw, 1.170.000Frw na 22.500.000 Frw ya frais judiciaires, et de mise à exécution, commissions et frais privilégiés.

[76] Ku birebana n'amafaranga ya frais judiciaires, et de mise à exécution, commissions et frais privilégiés, Urukiko rurasanga rukwiye kuyagera BK Ltd mu bushishozi bwawo, aho gushingira ku gipimo cya 9% cy'imyenda yahawe kivugwa muri ayo masezerano kuko kwaba ari kuyihesha indonke ikabije (enrichissement sans cause) kandi bitemewe n'amategeko, kuko nta kimenyetso BK Ltd yatanze kigaragaza ingano y'amafaranga yakoresheje ikurikirana uru rubanza, cyane cyane ko

n'uyiburanira muri uru rubanza yiyemereye ko icyo gipimo kitashingirwaho mu kuyigenera ayo mafaranga.

4. Kumenya niba Rwagasana Thomas atakwishyura 350.000Frw y'igihembo cy'umuhanga wo ku rwego rwa mbere

[77] Rwagasana Thomas n'umwunganira bavuga ko Urukiko Rukuru rw'Ubucuruzi rutagombaga kumutegeka kwishyura Habineza Emmanuel 350.000Frw nk'igihembo cy'umuhanga, kandi nta raporo ya expertise yakoze.

[78] Me Rusanganwa Jean Bosco, uburanira BK Ltd, avuga ko Rwagasana Thomas akwiye kwishyura ayo mafaranga kubera ko uwo muhanga yashyizweho n'Urukiko Rukuru rw'Ubucuruzi ariwe ubisabye nk'uko bigaragarira mu gika cya 17 cy'urubanza rujuririrwa, kandi ko uwo muhanga yakoze imirimo y'ibanze kugeza ubwo yatanze fagitire, ariko ko atakoze raporo bitewe n'uko Rwagasana Thomas yanze kumuha avance yari gutuma ayikora.

UKO URUKIKO RUBIBONA

[79] Urukiko rurasanga nk'uko n'Urukiko Rukuru rw'Ubucuruzi rwabisobanuye mu gika cya 18 cy'urubanza rwajuririwe muri uru rukiko, kuba Rwagasana Thomas yaremeye ko hashyirwaho umuhanga mu by'ibaruramari kugira ngo atange raporo igaragaza ingano nyakuri y'umwenda abereyemo BK Ltd, kandi umuhanga washyizweho n'urwo rukiko akaba yarakoze imirimo y'ibanze ijyanye no gusuzuma uburemere bw'imirimo yari yahawe kugeza ubwo yatangaga inyemezabwishyu facture igaragaza ingano y'amafaranga azishyurwa, ariko iyo raporo ikaba itarakozwe bitewe n'uko Rwagasana Thomas

atamwishyuye ayo mafaranga, nta kosa Urukiko Rukuru rw'Ubucuruzi rwakoze ubwo rwamutegekaga kwishyura uwo muhanga 350.000Frw ahwanye n'imirimo y'ibanze yari amaze gukora, bityo ubujurire bwe kuri iyi ngingo nta shingiro bufite.

5. Kumenya niba Rwagasana Thomas yahabwa indishyi asaba no kumenya niba ubujurire bwuririye ku bundi bwatanzwe na BK Ltd bufite ishingiro

[80] Rwagasana Thomas n'umwunganira bavuga ko BK Ltd ikwiye kumuha 20.000.000Frw y'indishyi z'akababaro z'uko itubahirije amasezerano bagiranye, 500.000Frw y'ikurikiranarubanza na 10.000.000Frw y'igihembo cy'Avoka, ariko ko ataha BK Ltd indishyi isaba kubera ayo makosa yamukoreye.

[81] Me Rusanganwa Jean Bosco, uburanira BK Ltd, avuga ko itaha Rwagasana Thomas indishyi asaba kuko atubahirije amasezerano y'inguzanyo bagiranye, ko ahubwo atanze ubujurire bwuririye ku bundi, asaba ko Rwagasana Thomas na Mukakimenyi Marie Rosine bafatanya kuyiha 2.000.000Frw y'indishyi zo gushorwa mu manza nta mpamvu, 10.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka.

[82] Me Rwinikiza Félix, uburanira Mukakimenyi Marie Rosine, avuga ko ataha BK Ltd indishyi isaba kubera ko atasinye amasezerano yose y'inguzanyo n'ay'ingwate BK Ltd yakoranye na Rusanganwa Jean Bosco, kandi nawe yari afite uruhare ku mutungo w'umuryango wabo.

UKO URUKIKO RUBIBONA

[83] Ingingo ya 258 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano, iteganya ko "Igikorwa cyose cy'umuntu cyangirije undi gitegeka nyirugukora ikosa rigikomokaho kuriha ibyangiritse".

[84] Hashingiwe kuri iyo ngingo, Urukiko rurasanga Rwagasana Thomas atahabwa indishyi z'akababaro, amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka kubera ko atsinzwe.

[85] Ku birebana n'amafaranga BK Ltd isaba mu bujuriye bwuririye ku bundi, Urukiko rurasanga itahabwa indishyi z'akababaro zo gushorwa mu manza nta mpamvu kuko nta kigaragaza ko Rwagasana Thomas yayireze nkana agamije kuyangiriza, ariko agomba kuyiha 1.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka yo kuri uru rwego agenewe n'urukiko mu bushishozi bwawo kuko ayo isaba ari menshi.

6. Kumenya ugomba kwishyura igihembo cy'umuhanga wo kuri uru rwego

[86] Inyemezabwishyu (reçu) yo ku wa 04/01/2017 iri muri dosiye, igaragaza ko Rwagasana Thomas yishyuye Ayinkamiye Spéciose, umuhanga washyizweho n'uru rukiko, 2.000.000Frw y'igihembo kugira ngo ategure raporo igaragaza ingano y'umwenda abereyemo BK Ltd. Na none bordereau de versement yo ku wa 01/12/2017 iri muri dosiye, igaragaza ko BK Ltd yishyuye uwo muhanga igihembo kingana na 2.000.000Frw kugira ngo abashe gukora iyo raporo.

[87] Urukiko rurasanga Rwagasana Thomas akwiye gusubiza BK Ltd 2.000.000Frw y'igihembo cy'umuhanga wakoze raporo igaragaza ingano y'umwenda ayibereyemo kubera ko atsinzwe urubanza.

[88] Hakurikijwe ibisobanuro byavuzwe haruguru, Urukiko rurasanga rero igiteranyo cy'amafaranga Rwagasana Thomas na Mukakimenyi Marie Rosine bagomba kwishyura BK Ltd ari: 881.697.134Frw y'umwenda-remezo + 786.948.623Frw y'inyungu z'ubukererwe + 1.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka yo kuri uru rwego, yose hamwe akaba 1.669.645.757Frw, bakanayisubiza 2.000.000Frw y'igihembo cy'umuhanga wakoze raporo igaragaza ingano y'umwenda ayibereyemo, ayo mafaranga akaba agomba kwiyongera kuyo yaciwe mbere.

III. ICYEMEZO CY'URUKIKO

[89] Rwemeje ko ubujurire bwa Rwagasana Thomas nta shingiro bufite;

[90] Rwemeje ko ubujurire bwuririye ku bundi bwatanzwe na BK Ltd bufite ishingiro kuri bimwe;

[91] Rwemeje ko ikirego cyatanzwe na BK Ltd gifite ishingiro kuri bimwe;

[92] Rwemeje ko nta gihindutse ku mikirize y'urubanza RCOMA 0591/13/HCC-RCOMA 0007/14/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 03/07/2014;

[93] Rutegetse Rwagasana Thomas na Mukakimenyi Marie Rosine gufatanya guha BK Ltd 881.697.134 Frw y'umwenda-remezo na 786.948.623 Frw y'inyungu z'ubukererwe, yose hamwe akaba 1.668.645.757Frw;

[94] Rutegetse Rwagasana Thomas na Mukakimenyi Marie Rosine gufatanya guha BK Ltd 1.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka yo kuri uru rwego;

[95] Rutegetse Rwagasana Thomas na Mukakimenyi Marie Rosine gufatanya guha BK Ltd 2.000.000Frw y'igihembo cy'umuhanga wakoze raporo igaragaza ingano y'umwenda bayibereyemo;

[96] Rutegetse ko ingwate y'amagarama yatanzwe na Rwagasana Thomas ajurira ingana na 100.000 Frw ihwanye n'ibyakoze muri uru rubanza.

**RWANDA LAW
REPORTS**

ENGLISH VERSION

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TEAM OF EDITORS

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KAVUTSE M. Claude

KUBWIMANA Jean Claude

MUJABI K. Naphtal

UWINKINDI Angelique

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YANKURIJE Dorothée : President of the Primary Court

PREFACE

Dear Readers,

We are pleased to present to you the Law Reports Volume 3 [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 seven (7) cases, which includes; six (6) cases in merit; one (1) administrative case, three (3) civil cases, two (2) commercial cases and one (1) procedural case.

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.

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The Reports in this volume are cited as:
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**CASE RELATING TO THE
PROCEDURE FOR REVIEW OF A
JUDGMENT DUE TO INJUSTICE**

NDITIRIBAMBE v GATERA ET AL

[Rwanda SUPREME COURT – RS/ INJUST/RC
00007/2018/SC (Mukamulisa, P.J, Nyirinkwaya, Cyanzayire,
Rukundakuvuga and Hitiyaremye, J.) 13 March 2020]

Review of a judgment due to injustice – Scope of the subject matter of the case under review due to injustice – The rulings of a final judgment cannot be reversed through the review due to injustice of another judgment of which they are not in the same sequence.

Review of a judgment due to injustice – Scope of the subject matter of the case review due to injustice – New claims which were not litigated upon at the first instance or issues which were not raised in the case which is being reviewed due to injustice.

Contracts – Sale agreement – Obligations of the seller – The seller guarantees the buyer peaceful possession (garantie contre l'éviction).

Facts: This case started before Gasabo Intermediate Court, whereby Nditiribambe sued Gatera requesting damages for his house located in the plot he sold to him, which was destroyed as a result of the execution of the judgment of Gatera against Nyamaswa, who sued him for selling his plot and won the case. In that case, opposing Nditiribambe to Gatera, the court ordered the latter to pay Nditiribambe the compensation for the demolished house as well as the loss of expected rent. Gatera applied for the opposition before this same court since the case was tried in his default, which court relied its decision on the ruling of the case between Gatera and Nyamaswa against which

Nditiribambe applied for third-party opposition but lost it on the ground that he indicated in his court briefs that he was aware of disputes over that plot at the time of its acquisition; therefore the court did not hold Gatera liable for damages incurred as a result of enforcement of the judgment he lost against Nyamaswa on the ground that he did not sell the said plot to him with full knowledge that he did not own it.

Nditiribambe was not contented with the judgment and appealed to the High Court stating that the Intermediate Court disregarded that he bought the plot from Gatera without bad faith and that he immediately used the proceeds of sale to pay back the loan Gatera owed to the bank since the house was mortgaged to secure its payment; therefore, he believed the plot was registered on no any other person since Gatera could not have mortgaged it as long as he did not own it.

The defendant elaborates on the injustice he suffered and states that the court disregarded the elements of evidence he produced constituted by the amicable settlement agreement concluded between Gatera and Nyamaswa clearly indicating that he lawfully bought the plot; therefore, he should be restored in its ownership and be awarded compensation for his destroyed houses by them.

In his rebuttal against this allegation, Gatera argues that the courts erred where they held that a sale agreement had been concluded between him and Nyamaswa whereas the latter did not present a written agreement or indicate the agreed price of sale as well as the size of the plot, the reason why he also finds that the judgment RCA0086/09/HC/KIG which attributed it to him has to be reviewed due to injustice, and he finds no injustice in the judgment RCA0379/12/HC/KIG under review due to injustice, because the court could not instruct him to retransfer the plot

which was no longer in his ownership, but that if the court finds necessary to review all judgments, the retrial of the judgment RCA0086/09/HC/KIG that opposed him to Nyamaswa and which awarded him the plot should be carried out. Concerning damages, he finds that he could not be held liable for them, rather Nyamwasa should be the one to be held liable for having been dishonestly attributed that plot, and for this reason, houses were destroyed.

Furthermore, the defendant states that he deserves to be awarded damages for his house destroyed during the execution of the judgment RCA0086/09/HC/KIG, for he acquired that plot with good faith.

As far as this allegation is concerned, Gatera rebuts that he should not be ordered to pay damages, because they should instead be paid by Nyamaswa for having been party to deceitful litigation in which he won the property not belonging to him. Nyamaswa states also that he should not be held liable for them since he has never been a party to that case under review; therefore, the person responsible to pay those damages is the one who executed the judgment in contravention of the law. The applicant concludes by requesting to be compensated for costs incurred for court proceedings.

Held: 1. The rulings of a final judgment cannot be reversed through the review due to injustice of another judgment of which they are not in the same sequence, therefore, the ruling of the final judgment between Gatera and Nyamaswa should neither be retried nor modified through the trial of the case for which Nditiribambe applied for review due to injustice.

2. New claims which were not litigated upon at the first instance or issues which were not raised in the case which is being

reviewed due to injustice, therefore Nditiribambe cannot request for the damages which he did request before.

3. The seller guarantees the buyer peaceful possession (garantie contre l'éviction).

**Application for review of the judgment due to injustice has merit;
The ruling of the judgment under review is reversed.**

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, articles 9 and 63;

Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 81;

Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 11 and 81

No cases referred to.

Authors cited:

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Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 10/10/2004 Nditiribambe Samuel bought a plot for 850,000 Frw from Gatera Jason. Later on, Nditiribambe Samuel was dispossessed from that plot and the house he had built as a result of lawsuits between Gatera Jason and Nyamaswa Faustin. on 15/06/2006 Gasabo Intermediate Court rendered the judgment RCA0096/06/TGI/GSBO and declared that the plot in which a house was build belonged to Nyamaswa Faustin; the judgment against which Nditiribambe Samuel applied for third-party opposition but that he lost in the final judgment RCA0086/09/HC/KIG rendered by the High Court on 21/10/2009.

[2] The judgment RCA0086/09/HC/KIG was executed, and Nditiribambe Samuel was ordered to remove the buildings off the plot awarded to Nyamaswa Faustin, and consequently, he sued Gatera Jason before Gasabo Intermediate Court requesting damages for his house removed off the plot Gatera sold to him.

[3] On 17/12/2010, that court rendered the judgment RC0389/10/TGI/GSBO and found with merit the claim of Nditiribambe Samuel because Gatera Jason sold to him a house and a plot without informing him that the plot on which the house was built had already been the subject of sale to Nyamaswa Faustin, and ordered Gatera Jason to pay him damages he requested amounting to 9,450,000 Frw, consisting of 8,000,000 Frw equivalent to the value of his destroyed house, 1,200,000 Frw of loss of expected rent and 250,000 Frw for counsel fee.

[4] Gatera Jason applied for opposition to the judgment rendered in his absence, and the Intermediate Court of Gasabo, in the judgment RC0069/11/TGI/GSBO rendered on 24/05/2012, declared the claim of Nditiribambe Samuel without merit because, in the judgment RC0026/08/TGI/GSBO in which he lodged a third party opposition against the decision of the judgment RCA0096/06/TGI/GSBO, he submitted in his court briefs and statements that he relied his decision to buy from Gatera Jason on the agreement of 03/10/2004, where Gatera Jason agreed to refund the price of sale to Nyamaswa Faustin, which indicates that there no longer existed any concern between Gatera Jason and Nyamaswa Faustin. He also relied on the land titles Gatera Jason submitted to him, implying that he was informed about the background of the plot at the time of acquisition, and for these reasons, Gatera Jason did not sell to him very well aware that the land was no longer in his ownership; therefore, he cannot be held liable for the demolition done as a result of the execution of the ruling of the case he lost against Nyamaswa Faustin.

[5] Nditiribambe Samuel appealed before the High Court arguing that the Intermediate Court of Gasabo disregarded the fact that he acquired the plot from Gatera Jason without bad faith and that both Gatera Jason's father and spouse, as well as the Executive Committee of Ruhura II, countersigned it. In addition to that, he used the total amount to pay back the bank because the house was mortgaged to secure the loan Gatera Jason owed it. Therefore, he believed that the plot would not be registered to someone else because it could not have been mortgaged to the bank unless he owns it, and for this reason, he should pay him compensation for the loss incurred for his enrichment by selling that plot to two persons.

[6] That court rendered the judgment RCA 0379/12/HC/KIG on 19/07/2013 and declared his appeal without merit for the following grounds:

- The contract concluded on 03/10/2004, where Gatera Jason agrees to refund the price of sale of the plot to Nyamaswa Faustin, does not replace the one they had concluded before at the time of acquisition by Nyamaswa Faustin and in that contract nowhere is mentioned that the latter agreed to revoke the contract of sale of the plot concluded before;
- Those interviewed confirmed that Nditiribambe Samuel was aware of the disputes about the plot when he bought it because it had been acquired by Nyamaswa Faustin;
- Nditiribambe Samuel built in that plot on the basis of the titles he received from Gatera Jason before while they were invalidated by the Mediation Committee (Abunzi) in the case between Nyamaswa Faustin and Gatera Jason.

[7] After he applied for the review of that judgment (judgment RCA 0494/13/HC/KIG rendered on 16/05/2015), which was rejected, Nditiribambe Samuel wrote to the Office of the Ombudsman applying for the review of that judgment for the grounds of being vitiated by injustice.

[8] After the assessment of that application, the Office of the Ombudsman found out that it is the judgment RCA0379/12/HC/KIG which should be reviewed due to injustice because this is the case which was the subject of hearing in merit at the final stage, and on 03/02/2018, the Office wrote to the President of the Supreme Court, requesting him that the

concerned judgment be reviewed for the grounds of being vitiated by injustice.

[9] After examining the report from the General Inspection of Courts on that judgment, the President of the Supreme Court instructed its registration in registers for the revision.

[10] The hearing was scheduled on 26/02/2019, and it was not conducted because the parties to the case requested the court to order Nyamaswa Faustin to intervene, which the court admitted and ordered the parties to share with him court briefs, and the hearing was postponed to 14/05/2019.

[11] On that day, the parties to the case appeared, but Nyamaswa Faustin appeared without legal counsel. Another person named Uwimana Coloneria also appeared and requested to voluntarily intervene in the case because she had interests relating to the plot she was granted by Gatera Jason where she built a house which was later destroyed as a result of the execution of the judgment RCA 0086/09/HC/KIG. After hearing the replies of the parties to the case on that request, the court admitted her request and adjourned the hearing for allowing her and Nyamaswa Faustin to seek legal counsel and submit their court briefs.

[12] Subsequently, the hearing has been adjourned due to reasons from parties to the case and it was heard in public on November 07, 2019, whereby Nditiribambe Samuel was represented by his wife Nyirahabimana Rehema who is also assisted by Counsel Nzabamwita Jean Claude, Gatera Jason assisted by Counsel Katushabe Mary, Nyamaswa Faustin assisted by Counsel Mulingande Jean Claude and Uwimana Coloneria assisted by Counsel Murekatete Marigarita.

[13] After hearing the pleadings from all parties, the Court found that it needed more clarifications about the description of the plot and houses built at it which were destroyed during the execution of the judgment RCA0086/09/HC/KIG rendered by the High Court on October 21, 2009 and on January 13, 2020 visited the subject matter, whereby it heard the witnesses and designed a blueprint of subject matter which parties agreed on. On February 06, 2020, the parties to the case were again convened before the court to submit their additional briefs if any, and they all appeared represented or assisted as before, except Uwimana Coloneria who withdrew herself from the case.

[14] In his pleadings, Nditiribambe Samuel explained that the injustice he suffered in the judgment RCA0379/12/HC/KIG lied on the fact that he was refused to be awarded the damages for his house which was destroyed and 13 cases he litigated. He prays for justice to be done and for this reason, be awarded those damages and given back his plot illegally allocated to Nyamaswa Faustin by the judgment n° RCA 0086/09/HC/KIG.

[15] Gatera Jason explains that Nyamaswa Faustin's disputes were baseless, despite the courts allocated him the property which does not belong to him, the reason why he finds that the judgment which handed him that plot should be reviewed due to injustice since the ruling is in contravention with the law, therefore Nditiribambe Samuel should be handed over his plot.

[16] As far as he is concerned, Nyamaswa Faustin supported that Nditiribambe Samuel should not sue him because he concluded a land acquisition agreement with Gatera Jason with full knowledge that it was no longer in his ownership. He also prayed that Nditiribambe Samuel should be instructed to restore the landmark stones he uprooted, and be ordered to give back the

part of that plot measuring 3m/20m he retained during the execution of the judgment RCA0086/09/HC/KIG.

[17] Legal issues analyzed in this case are the following:

- Whether Nditiribambe Samuel should be awarded the plot by which Nyamaswa Faustin was allocated in the judgment n° RCA0086/09/HC/KIG;
- Whether Nditiribambe Samuel should be awarded damages he requested related to his destroyed house;
- Whether Nditiribambe Samuel should be awarded damages he requested related to lawsuits which he got involved in against Gatera Jason and Nyamaswa Faustin;
- Whether Nyamaswa Faustin should be awarded what he is requesting.

II. ANALYSIS OF LEGAL ISSUES

A. Whether Nditiribambe Samuel should be awarded the plot by which Nyamaswa Faustin was allocated in the judgment n° RCA0086/09/HC/KIG

[18] Counsel Nzabamwita Jean Claude who assists Nyirahabimana Rehema representing Nditiribambe Samuel states that the amicable settlement agreement signed on October 3, 2004 between Gatera Jason and Nyamaswa Faustin clearly shows that he bought the plot in accordance with the law, therefore he should get handed it back.

[19] Gatera Jason argues that the courts erred because they held that there had been a sale agreement between him and Nyamaswa Faustin while the latter did not produce a written sale agreement they concluded or indicate the price they agreed on and the size of the plot, the reason why he finds that the judgment which allocated it to him has to be reviewed on the grounds of being vitiated by injustice since their ruling contravenes the law.

[20] He explains that Nyamaswa Faustin lent him money, and at the time of reimbursement, the balance of 50,000 Frw remained unpaid. They agreed that after getting the land titles, they will conclude a sale of the plot where Nyamwasa will pay him additional amount of money, but they did not agree on the size and the price of the plot to be sold; therefore, that there is no way Nyamaswa Faustin can pretend to have made a purchase.

[21] He continued stating that after they failed to agree on the subject of sale and the price, they concluded a settlement on 3/10/2004 where they agreed that he will pay Nyamaswa Faustin 50,000Frw he owed him and 67,272 Frw not later than 30/1/2015 for late payment. After this settlement, he sold a plot to Nditiribambe Samuel in order to pay back the total amount of money he owed Nyamaswa Faustin, but the latter refused, and he rather sued before the court.

[22] He states that even though the courts erred, Nditiribambe Samuel should not claim for the entire plot sold measuring 20m/30m because he knows that there is a part of it he still possesses. He explains that the plot Nyamaswa Faustin owned comprises of two parts of which an unsold part measuring 15 meters out of 10 meters and a part belonging to Nditiribambe Samuel which measures 15 meters out of 20 meters. He concludes by stating that in the interests of delivering due justice,

Nyamaswa Faustin should hand the part of the plot he took from them back to everyone.

[23] Counsel Katushabe Mary who assists him argues that the settlement document of 3/10/2004 between Gatera Jason and Nyamaswa Faustin indicates that the latter did not buy the plot which is the subject matter in this case, and finds that the judgment RCA 0379/12/HC/KIG is not vitiated with injustice since the Court could not order Gatera Jason to give back the plot which was not in his possession. However, she states that if the Court finds it necessary to review all the judgments, an analysis should be carried out on the judgment RCA 0086/09/HC/KIG which allocated it to Nyamaswa Faustin.

[24] Nyamaswa Faustin states that in 2003, Gatera Jason told him that he owns a plot of land for sale. After visiting it they agreed on 50,000Frw and he paid him, but when he asked him to sign a written agreement of sale, Gatera Jason intentionally kept on buying time, and after he discovered that he was deceiving him, he called on the neighbours who asked Gatera Jason if there is money he still owes him, and he replied that there wasn't, and when they asked him whether he gave it to him as a loan, he said that they were planning a sale of the plot. They asked him why he refuses to sign a written agreement with him and he replied that he wishes to pay back only the amount he received and its interests. They concluded a settlement on 03/10/2004 where Gatera Jason agreed to refund 50,000Frw plus 67,272 Frw of interests not later than January 30, 2005.

[25] He continues stating that Nditiribambe Samuel should not sue him because he concluded an agreement of sale with Gatera Jason on October 10, 2004 with full knowledge that on that date Gatera Jason had not yet cleared the issue between them because

the issue was meant to be resolved on January 30, 2005 after paying the amount of money he agreed on in the amicable settlement agreement; therefore, the land was still in his possession the time he made a sale with Gatera Jason.

[26] Counsel Muligande Jean Claude assisting him states that Nyamaswa Faustin admitted without choice the statements of the document of October 03, 2004, because after failing to get ownership of the plot he bought, he agreed to be refunded the money.

DETERMINATION OF THE COURT

[27] In the judgment RCA0379/12/HC/KIG under review due to injustice, Nditiribambe Samuel was suing Gatera Jason requesting damages related to his house destroyed during the execution of the judgment RCA0086/09/HC/KIG which held that the plot at which a house is built belongs to Nyamaswa Faustin because he bought it from Gatera Jason.

[28] However, based on the explanations of Nditiribambe Samuel about the injustice found in the judgment RCA0379/12/HC/KIG under review, and the rectifications or modifications requested as well as the rebuttals of Gatera Jason; it is clear that they both readdress the holdings of the judgment RCA0086/09/HC/KIG they lost because they pray this Court to declare that there has not been a sale between Gatera Jason and Nyamaswa Faustin, rather that there has been a borrowing of money.

[29] The issue that has to be analyzed is to know whether the ruling of another final judgment can be subject to reversion

through the review due to injustice of the judgment which is not in the same court proceedings basing on the sole fact that they are connected.

[30] Article 11 of Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that a case that was definitively decided and of which the possibility to be reviewed due to a decision tainted with injustice is exhausted cannot be summoned again for the same facts and between the same parties pleading the same subject matter.

[31] With regarding the review of the case due to injustice, article 81 of Organic Law N° 03/2012/OL of 13/06/2012 Organic Law determining the organization, functioning and jurisdiction of the Supreme Court provided that a party to the case which does not contend with the final judgment can apply for its review due to injustice¹.

[32] That Organic Law provided also the modalities and time for the review due to injustice of the cases definitively decided on, and in its transitional and final provisions, it provided the modalities of that review for the cases definitively decided on before its publication. Article 86 of that law provided that final decisions alleged to be unjust made after the establishment of the

¹The review of a final decision due to injustice shall only be applied for on any of the following grounds:

1° when there is unquestionable evidence of corruption, favoritism or nepotism that were relied upon in the judgment and that were unknown to the losing party during the proceedings;

2° when there are provisions and irrefutable evidence that the judge ignored in rendering the judgment; 3° when the judgment cannot be executed due to the drafting of its content.

Office of the Ombudsman in 2003, whether executed or not which shall be referred to the Office of the Ombudsman within one (1) year as of the publication of this Organic Law in the Official Gazette of the Republic of Rwanda. This means that after the publication of this Organic Law, a party to the case whose judgment became final before the publication of this Organic Law but finds it unjust has also gotten the remedy to apply for its review.

[33] The court finds therefore that since that remedy was available but not exercised by Nditiribambe Samuel or Gatera Jason to apply for the review of the judgment RCA0086/09/HC/KIG which allocated the plot to Nyamaswa Faustin, the decisions on the subject matters of that case between them became definitive. This means that that plot was conclusively allocated to Nyamaswa Faustin, and Nditiribambe Samuel has no longer any right over it because failure to apply for a review of that judgment resulted in the impossibility to re-adjudicate it as provided by article 11 of the aforementioned Law n° 21/2012 of 14/06/2012.

B. Whether Gatera Jason and Nyamaswa Faustin should be ordered to award Nditiribambe Samuel the damages related to his house destroyed during the execution of the judgment RCA0086/09/HC/KIG

[34] Counsel Nzabamwita Jean Claude states that the High Court held that Nditiribambe Samuel should not be awarded the damages for his house destroyed during the execution of the judgment RCA0086/09/HC/KIG since he bought the plot at which a house was built with the knowledge that it had been already sold to Nyamaswa Faustin by disregarding that the amicable settlement agreement signed between Gatera Jason and

Nyamaswa Faustin clearly indicates that he bought that plot without bad faith and in accordance with the law.

[35] Gatera Jason retorts that he should not be ordered to pay any damages; rather, they should be awarded by Nyamaswa Faustin who defended fallacious claims and to whom the Court allocated the property which does not belong to him, since he did not contribute to injustice Nditiribambe Samuel suffered because he did the best he could to demonstrate to the court that the subject matter belongs to him but they both lost the case.

[36] Counsel Katushabe Mary assisting him states that Nditiribambe Samuel should not have sued Gatera Jason because he himself admits that no sale had been concluded between him and Nyamaswa Faustin, and therefore he did not contribute to the loss of the judgment RCA0086/09/HC/KIG or its execution, especially that everything relied on the courts' decisions, and not on the action or instructions of Gatera Jason.

[37] Counsel Muligande Jean Claude assisting Nyamaswa Faustin states that the latter has never been a party to the case under review, therefore that the requested damages should be paid by the person who may have wrongly executed the judgments and that his client should not be held liable for anything since he did not contribute in any way to the destruction of the house of Nditiribambe Samuel.

DETERMINATION OF THE COURT

[38] As held above, the decisions of the judgment RCA0086/09/HC/KIG that the concerned plot belongs to Nyamaswa Faustin, became final. This implies that he cannot be

held liable for the damages resulting from the execution of that judgment since he did not individually contribute to it. This denotes also that Gatera Jason sold to Nditiribambe Samuel the plot which did no longer belong to him because holding otherwise could amount to the contradiction of the final court decision. Thus, the court shall examine in the subsequent issues whether Gatera Jason should be ordered to pay damages for that.

[39] No legal provision in Rwanda law provides for the remedy in case a person purchased something from the person who is not the owner, and later be asked to hand it back to its owner. However, article 9 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that in the absence of relevant 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 legal scholars' opinions (*principes généraux du droit*)².

[40] In this context, the Court finds that there exists a general principle of the law that can help to settle this case. That principle states that “*The vendor guarantees the purchaser proper and peaceful possession against de facto and de jure disturbances (garantie contre l’éviction)*”. In other words, when the purchaser is deprived of his right to proper and peaceful possession against de facto and de jure disturbances, he may request the vendor to refund him/her the price of acquisition, the output product he/she was ordered to refund, judicial damages, damages (*dommages et*

² That article provides that A judge adjudicates a case based on relevant rules of law. In the absence of such rules, the judge adjudicates according to the rules that he/she would establish if he/she had to act as legislator, relying on precedents, customs, general principles of law and doctrine.

intérêts), as well as the expenses incurred for the conclusion of the agreement. However, it is understandable that the vendor would not be ordered to do it as long as the purchaser had known that he/she would be dispossessed of the thing he/she bought at the time of the purchase. Law scholars explain that that principle is inspired by the duty of mutual respect and loyalty in the conclusion of the contract (*obligation de loyauté*)³.

[41] As far as this case is concerned, the court finds that Gatera Jason, the seller of the plot to Nditiribambe Samuel and for which he is requested to pay damages, admits himself that Nditiribambe Samuel purchased a plot which was a subject of disputes in the judgment RCA0086/09/HC/KIG believing that he was buying it from the right owner, and this is itself an indication that he did it with good faith, unaware that he could be dispossessed of it. Consequently, the fact that he was dispossessed of it by the person who became its owner by the decision of the court, entitles him the right to request compensation from the vendor basing on the stated principle that the vendor guarantees the purchaser proper and peaceful possession against de facto and de jure disturbances, and the issue is the determination of the amount of damages, and this is going to be analysed in the subsequent part of the judgment.

C. Determination of the amount of compensation in relation to the destroyed house of Nditiribambe Samuel that Gatera Jason should be ordered to pay

[42] Counsel Nzabamwita Jean Claude prays that based on the injustice Nditiribambe Samuel suffered, he deserves to be

³François Collart Dutilleul na Philippe Delebecque, *Contrats civils et commerciaux*, Dalloz, 7ème éd., 2004, n° 246 p.230

awarded the compensation for his destroyed houses equivalent to 3,867,000 Frw as indicated by the valuation report he uploaded in IECMS, and 1,200,000 Frw of expected rent from those houses which had five rooms among which three were rented for 25,000 Frw per month each, and two rooms rented for 15,000 Frw per month each.

[43] By the time the court arrived at the location of the subject matter, it asked the parties to the case about the characteristics of destroyed houses and agreed that the first house had three doors, and the second with two doors and a toilet, built with adobe bricks where one house was roofed with one line of metal sheet and another with two lines of metal sheets.

[44] Regarding the value of destroyed houses of Nditiribambe Samuel, Gatera Jason stated that the value of the houses can be estimated to 3,000,000 Frw but that an estimate of 500,000 Frw of the value of the remains he managed to recuperate after the destruction should be deducted from this amount.

[45] Counsel Katushabe Mary who assists him stated that 3,867,000 Frw Nditiribambe Samuel is requesting as the value of the destroyed houses includes the materials he managed to recuperate during the execution of the judgment, which includes roofing sheets, doors, and a window as indicated in the valuation report, therefore that he should not claim for their compensation. By contrast, the request should concern the plot of land and labor expenses (*main d'oeuvre*).

[46] Nyamaswa Faustin stated that by estimation he finds that the destroyed houses of Nditiribambe Samuel now have the value of 3,000,000 Frw but an amount of 300,000 Frw of the value of the non-destroyed material has to be deducted.

[47] A witness named Ngarambe Félix, who is also the Executive Secretary of Ruhuha Cell and executed the judgment RCA 0086/09/HC/KIG stated that by estimation, he finds that those houses can be valued to 4,500,000 Frw and an amount of 500,00 Frw has to be deducted from that value as the value of the non-destroyed materials.

[48] A witness named Gasana Athanase, who was also a tax collector from rents paid in relation to those houses, stated that he knew those houses which have been destroyed, and for him, they can be estimated to 5,000,000 Frw.

[49] With regard to the materials which were not affected by the demolition of the houses, Nditiribambe Samuel alleged that when someone's house is destroyed, the remains are worthless.

[50] Concerning the money from the rent Nditiribambe Samuel is requesting, Gatera Jason stated that he should produce a rent contract he concluded with at least one person so that it would be relied on for the analysis of the requested damages.

[51] He also stated that he found that the amount of rent can be estimated to 7,000 Frw per month per room for the three doors, and 4,000Frw per month for each room for the remaining two doors, but that by the time those houses were destroyed, those rooms were no longer rented due to lack of lessees, that if all rooms were still occupied Nditiribambe Samuel could not have requested the amount of rent for only one year because the judgment was executed in 2010 while he sued in 2013; therefore, he should have considered all those years.

[52] Nyamaswa Faustin stated that the amount of money Nditiribambe Samuel is requesting is excessive and that he heard

people saying that he was paid 10,000 Frw for one room per month and he noticed that only one room was sometimes occupied while others were not.

DETERMINATION OF THE COURT

[53] The parties to the case agree on the features of destroyed houses, their size, and the number of rooms. The only issue consists of the current value of those houses, the amount of the rent for their rooms and if they were rented.

[54] Concerning the value of the destroyed houses, given that no valuation report was established before their destruction, the court finds that in its discretion, basing on the consensus of the parties on their features and number of rooms, basing also on their location (in a business center), it can be held that they are worth 3,500,000 Frw.

[55] With regard to the materials that may have not been damaged by the destruction of the houses, the Court finds that apart from that Nditiribambe Samuel is rejecting it, all those interviewed, either party to the case or witnesses, confirm that they were there, thus, their value should be determined to be deducted from the value of destroyed houses.

[56] Given that there exists no other evidence the court can base on in determining their value, it should be considered the price provided by the parties to the case and witnesses and with the consideration that the materials undergo depreciation once they are removed from the house, the Court finds, upon its discretion, that the materials which remained after the destruction have to be valued at 150,000 Frw.

[57] Consideration made of the motivations stated in the previous paragraphs, the Court finds that Gatera Jason has to pay Nditiribambe Samuel 3,350,000 Frw of the value of his destroyed houses (3,500,000 Frw - 150,000 Frw).

[58] Concerning damages relating to expected rents, Nditiribambe Samuel used to receive from his houses which have been destroyed, the Court finds that the fact that they were for business purposes and located in a business center implies that he suffered a loss from the lack of money he used to collect from their rental.

[59] The Court finds also that even though Nditiribambe Samuel has not produced a rental contract to be relied on in determining the amount of the rent for each room, upon its discretion, based on their characteristics and their location in a business center, it can be held that each room was rented for 8,000Frw per month, therefore the loss of the rent he suffered in one year due to the destruction of his houses is equal to 480,000 Frw (8,000 Frw x 5 x12 months), and this amount has to be paid to him by Gatera Jason.

[60] In general, the Court finds that Gatera Jason has to pay to Nditiribambe Samuel 3,830,000 Frw (3,350,000 Frw + 480,000Frw).

D. Concerning judicial damages requested by Nditiribambe Samuel for the lawsuits in which he participated

[61] Nzabamwita Jean Claude prays that based on the injustice inflicted to Nditiribambe Samuel he should be paid 402,000 Frw he paid Gatera Jason for the execution of the judgment

RC0196/13/TB/RHHA⁴, 235,000 Frw he paid him for the execution of the judgment RCA0084/14/TGI/GSBO⁵ as indicated by the statement of the execution of those judgments, and 73,200 Frw he paid for the execution of the judgment RCA0086/09/HC/KIG whereby he was instructed to willingly remove the buildings not later than February 03, 2010 on his expenses, 6,000,000 Frw of counsel fees he paid for 13 cases against Gatera Jason and Nyamaswa Faustin, 1,000,000 Frw for counsel fee he paid for the review due to injustice of this case as well as 1,000,000 Frw for judicial damages.

[62] Gatera Jason argues that the payment of all amounts of money by Nditiribambe Samuel was done under the courts' instructions for the execution of the judgments he lost; therefore, he should not be ordered to award him any damages.

[63] Counsel Katushabe Mary assisting him states that not all judgments alleged by Nditiribambe Samuel to have participated in should be the subject of his request for damages because it is not all of them which were mentioned in the application to examine injustice.

⁴ It is a case of 31/10/2013, in which Gatera Jason sued Nditiribambe Samuel requesting damages for dragging him in unnecessary lawsuits, and the Court held that Nditiribambe Samuel had to award him 400,000 Frw for judicial damages.

⁵ It is a case of 29/07/2015 originating from the claim Gatera Jason filed against Nditiribambe Samuel requesting damages related to the judgment n° RCA0494/13/HC/KIG which reviewed for new grounds the judgment n° RCA0379/12/HC/KIG, and the court held that Nditiribambe Samuel had to pay him 235,000 Frw for counsel and judicial damages.

DETERMINATION OF THE COURT

[64] In this case, the issue being analysed is to know whether the judgment RCA0379/12/HC/KIG in which Nditiribambe Samuel is requesting damages for his destroyed houses, the loss related to rent and counsel fee, is vitiated by injustice. However, in analysing the prayer of Nditiribambe Samuel, the Court finds that it includes what he did not request in the judgment under review due to injustice. Among that, include the money he paid to Gatera Jason during the execution of the aforementioned judgments, the money he paid for the execution of the judgment RCA0086/09/HC/KIG, as well as the counsel fees paid for his cases against Gatera Jason and Nyamaswa Faustin which were not in the same proceedings with this one under review due to injustice.

[65] An issue to be clarified is to determine whether the provisions of the Article 63 of Law n°30/2018 of 02/06/2018 determining the jurisdiction of the courts that when the Court receives an application for review of a judgment due to injustice, it re-examines the merits of the case, which entitles the party to the case to file new claims which have not been the subject of adjudication in the judgment under review.

[66] The court finds that the fact that a party to the case who finds injustice in the judgment in which he/she was a party has been entitled to apply for its review as it was provided by the article 81 of Organic Law n° 03/2012/OL of 13/06/2012 determining the organisation, functioning and jurisdiction of the Supreme Court, does not entail he/she can use this remedy to bring new claims which are not in line with the initial claim at the first instance or raise issues which were not analysed in the case

under review because this is considered as going beyond the scope of the said judgment.

[67] The Court finds therefore that, based on the explanations provided in the previous paragraph, the amount of money Nditiribambe Samuel paid to Gatera Jason:

- a. 402,000 Frw for the execution of judgment n° RC0196/13/TB/RHHA;
- b. 235,000 Frw he paid him in the course of execution of the judgment n° RCA0084/14/TGI/GSBO;
- c. 73,200 Frw he paid for the execution of the judgment n° RCA 0086/09/HC;
- d. The counsel fee he paid for the cases which are not in line with this case under review due to injustice; should not be considered in this case because it does not fall within its scope.

[68] Concerning the judicial damages and counsel fee amounting to 2,000,000 Frw Nditiribambe Samuel is requesting basing on this case under review due to injustice, the Court finds that he deserves to be awarded them because there are some expenses he incurred for this case follow up, of which he wins, and it finds that they are in range considering the three instances it went through.

E. Concerning the requests of Nyamaswa Faustin

[69] Nyamaswa Faustin prays that Nditiribambe Samuel be instructed to restore the boundary stones of the plot (*bornes*) he uprooted at the beginning of the case, and be ordered also to concede the part of the plot he remained with measuring 3 meters

out of 20 meters because he did not hand it during the execution of the judgment RCA0086/09/HC.

[70] He also prays that he be paid all expenses incurred on cases, including 200,000 Frw for transportation fee, 100,000 Frw for catering services, 200,000 Frw for the loss he suffered, 500,000 Frw for being dragged in unnecessary lawsuits, 1,000,000 Frw for moral damages and 500,000 Frw for counsel fee, and the total being 2,500,000 Frw.

[71] Other parties to the case did not react to the request of Nyamaswa Faustin, be it on the boundaries of the plot, damages, despite being mentioned in his additional court brief he uploaded in the IECMS.

DETERMINATION OF THE COURT

[72] The Court finds that the restoration of the boundaries of the plot does not fall within the scope of the subject matter of this case reviewing the judgment RCA 0379/12/HC/KIG due to injustice; thus, it should not be examined.

[73] However, the Court finds that Nyamaswa Faustin should be awarded counsel and judicial damages because it has been necessary for him to pay counsel fee and he incurred some expenses for the follow-up of the in which he was forced to intervene, and in its discretion, it awards him 800,000 Frw which includes 500,000 Frw for counsel fee and 300,000 Frw for judicial damages to be paid by both Nditiribambe Samuel and Gatera Jason because they are the ones who requested for his intervention.

[74] With regard to 200,000 Frw of the loss, 500,000 Frw for dragging him in unnecessary lawsuits and 1,000,000 Frw for moral damages, the court finds that he should not be awarded those amounts because he did not provide arguments about them.

III. DECISION OF THE COURT

[75] Finds the claim filed by Nditiribambe Samuel for the review due to injustice of the judgment RCA0379/12/HC/KIG rendered by the High Court on July 19, 2013 with merit in part;

[76] Quashes in whole the judgment RCA0379/12/HC/KIG rendered by the High Court on July 19, 2013;

[77] Orders Gatera Jason to pay Nditiribambe Samuel 5,830,000 Frw, which includes:

- 3,350,000 Frw for the value of his destroyed houses;
- 480,000 Frw for expected rents of his destroyed houses;
- 2,000,000 Frw for counsel fees and judicial damages;

[78] Orders Gatera Jason and Nditiribambe Samuel to pay Nyamaswa Faustin 800,000 Frw, which includes 500,000 Frw for counsel fee and 300,000 Frw for judicial damages, where each one should pay him 400,000 Frw.

CASES IN MERITS

ADMINISTRATIVE CASE

SALIMINI v GOVERNMENT OF RWANDA (MINISANTE)

[Rwanda SUPREME COURT – RADA 0002/16/CS –
(Nyirinkwaya, P.J., Mukandamage and Rugabirwa, J.) February
23, 2018]

Administrative law – Sanctions against a public servant – Disciplinary faults – When a public servant commits a fault which is not sanctioned by the disciplinary sanctions provided for by the statute governing public servants the head of his/her institution, upon recommendation of internal disciplinary committee, shall determine the sanction in relation to the gravity of the fault committed – The Presidential Order N° 65/01 of 04/03/2014 determines modalities of imposing disciplinary sanctions to public servants, article 15.

Administrative law – Disciplinary sanctions – Closing a criminal case – A decision on the criminal charges against a public servant doesn't prevent him/her from being sanctioned on the disciplinary level because those sanctions can be levied against him/her even when he/her was not found guilty.

Fact: Salimini who was a technician incharge of maintenance at Byumba Hospital sued the government of Rwanda (Ministry of Health) to alleging that it unlawfully dismissed him. He requested to be reinstated in his post, to be paid the salary arrears which he was not remunerated before his dismissal and to pay him various damages including that related to the fact that he was not issued a work certificate.

In its defence, the Government of Rwanda stated that it lawfully dismissed Salimini due to the gross misconduct he committed in that hospital, which includes the changing of a brand new engine and the shock absorbers of the motorcycle he used in his work and the fact that he acted with negligence which led the generator that provided the electricity to that hospital to switch off while it could badly affect the service delivery and the patients who are hospitalised in that hospital including infants who were in incubators.

The High Court, after ruling that Salimini had to be dismissed from work, also held that the claim of Salimini Saidi has merit in part since he was not issued the work certificate, and it ordered the Government of Rwanda to pay him judicial damages and counsel fees.

Salimini appealed before the Supreme Court stating that the High Court declared that he must be dismissed from work, disregarding that his dismissal was unlawful since he did not commit the faults he was accused of and did not exercise the right to defence, and that he was given an unlawful sanction while his case had been closed by the judicial police.

The Government of Rwanda rebutted that the fact for the High Court to have held that the plaintiff should not be reinstated was due to the fact that it found he committed the faults he was sued for which could harmfully affect service delivery of the hospital as well as the patients who were hospitalised.

Concerning the issue of the right to defence, the Government of Rwanda replied that the appellant was not unlawfully dismissed because he was given the right to defend himself on the aforementioned serious faults.

With regards to the ground relating to unlawful dismissal and disciplinary sanctions, the Government of Rwanda retorted that the High Court found that the appellant deserved to be dismissed due to the gravity of the faults he committed which relate to the mismanagement of the government equipment he has to take care of, and those faults could cause the bad impact to the extent that they should not only be assessed on the value of the damaged equipment.

The Government of Rwanda filed a cross-appeal praying for judicial damages of 5,000,000 Frw. Salimini defended himself arguing that he cannot award those damages because the Government did not appeal for what it lost in the case at the previous instance.

Held: 1. The public servant who breaches his/her work obligation by committing acts that are not listed among statutory disciplinary faults, the sanction imposed to him/her should correspond to the gravity of the fault determined by the head of his/her institution, upon recommendation of an internal disciplinary committee. Therefore, Salimini committed gross faults he was sued for which related to mismanagement of government equipment under his responsibility.

2. The fact for the prosecution to have closed the criminal case against an employee does not preclude him from facing disciplinary procedure sanctions. Thus, Salimini was lawfully dismissed due to the serious faults he committed, even if he was not found guilty in prosecution.

Appeal lacks merit.

Cross appeal has merit.

court fees deposit covers expenses incurred in this case.

Statutes and statutory instruments referred to:

Law N° 86/2013 ryo ku wa 11/09/2013 establishing the general statute governing public servants, articles 76, 77 and 79.

Law of 30/07/1888 relating to contract or obligations, article 258.

Presidential Order N° 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants, articles 5 and 15.

Authors cited:

Jean Rivero, Droit Administratif, Dalloz, 2011, p. 374.

I. BRIEF BACKGROUND OF THE CASE

[1] This case started before the High Court, Salimini Saidi who was a technician of maintenance at Byumba Hospital suing the Government of Rwanda (Ministry of Health). He requested to be reinstated on his post because it unlawfully dismissed him, to be paid the salary arrears which he was not remunerated before his dismissal and to be awarded various damages.

[2] In his defence, the counsel for Government of Rwanda (Ministry of Health) state that it did not dismiss Salimini Saidi unlawfully, rather it dismissed him due to the serious fault he committed in that hospital, including the fact that the new engine of Motorcycle Yamaha AG 100 (GPM) 319 B which he used to ride in his work was exchanged with an old one and its shock absorbers were changed. In addition, he acted negligently which led the generator that provided the electricity to that hospital to switch off while it could affect negatively the patients who were

hospitalised in that hospital including infants who were in incubators.

[3] On 30/11/2015, that court rendered the judgment RAD0003/15/HC/KIG and held that the claim of Salimini Saidi has merit in part on matters related to the fact he was not given the work certificate, the judicial damages, and counsel fees. It ordered the Government of Rwanda (Ministry of Health) to give him 460,000Frw (but it motivated that he must be given 462,000Frw) in damages for not to have been given the work certificate and 500,000Frw for judicial damages and counsel fees.

[4] Salimini Saidi appealed against that judgment to the Supreme Court stating that the High Court confirmed his dismissal from work while disregarding that it was imposed unlawfully because he did not commit the faults he was sued for and did not exercise his right to defense, and indeed that even when this court would deem that he committed them, the imposed sanction remains unlawful.

[5] The hearing was conducted in public on 16/01/2018, where Salimini Saidi was assisted by counsel Nsengiyumva Enos, while the Government of Rwanda (Ministry of Health) was represented by counsel Rubango Epimague.

II. ANALYSIS OF THE LEGAL ISSUES

- **A. Determining whether Salimini Saidi was unlawfully dismissed from work**
- **1. Whether Salimini Saidi was unlawfully dismissed from work because he did not commit the faults related to work**

[6] Salimini Saidi and his counsel state that he was unlawfully dismissed from work because he did not commit the fault he was sued for, consisting of damaging the motorcycle Yamaha AG 100 (GPM 319 B) he used in his work because it was damaged by Biraguma when he gave it to him for making its maintenance. They further state that he did not damage the generator of Byumba Hospital, rather, it is possible that an employee of “Garage Tropical” may have introduced a code in one of the generators of that hospital in order to be given the repair fees since the evidence proving that he did not commit those faults, is that he was found not guilty by the judicial police station of Byumba because it closed his file.

[7] They further state that the High Court held that Salimini Saidi must be dismissed because the gross faults he committed affected the hospitalised patients in Byumba hospital and the infants who were in incubators while disregarding that nothing proves that those effects really happened. They request the Government of Rwanda (Ministry of Health) to be instructed to reinstate him on work, and if impossible due to unavailability of his position, it should give him 12,000,000Frw in damages for unlawful dismissal.

[8] The State attorney (Ministry of Health) argues that Salimini Saidi was not unlawfully dismissed because the High Court found that he committed the serious fault consisting of changing engine and shock absorbers of the motorcycle which he had to take care of, and the fact that he acted with negligence to the extent that the generator providing electricity to the hospital of Byumba switched off, which was likely to affect patients who were in that hospital including those who were undergoing surgery operations and those who were on ventilators as well as the infants who were in incubators; therefore, he should not be reinstated on his post or be given the damages he requests for.

DETERMINATION OF THE COURT

[9] Article 77 of the Law n°86/2013 of 11/09/2013 establishing the general statutes for public service provides that “If a public servant breaches or fails to comply with the obligations assigned to him/her, this shall constitute a disciplinary fault punishable by one of sanctions provided for in article 76 of this Law in consideration of its seriousness”. In addition, article 15 of the Presidential order n°65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants provides that “when a public servant commits an act or behaves in way that breaches his/her work obligation while such act or conduct is not among disciplinary faults provided for by this Order, the head of his/her institution, upon recommendation of internal disciplinary committee, shall determine the gravity of acts or behaviour taken as disciplinary fault and its corresponding sanction, among sanctions provided for by this Order”.

[10] The case file demonstrates that the Director General of Byumba hospital wrote to Salimini Saidi, a technician of maintenance of that hospital, the letter n°20/02.1/OPH BY/2009 of 27/12/2013 requesting him to provide the explanation about the faults he committed concerning the fact that the new engine and shock absorbers of the motorcycle GPM 319 B he used to fulfil his duties were exchanged with old ones. On 08/01/2014, Salimini Saidi responded in writing that he is not the person who changed that engine and shock absorbers of that motorcycle as it was done by Biraguma when he gave it to him for its maintenance because Kevin who used to do its maintenance was not there. Concerning the generator, he states that he is not the person who introduced the code that prevented it from switching on, rather, he thinks it may have been introduced on by an employee of *Garaje Tropical* who did its maintenance in order to get paid for repair fees.

[11] As it was indicated by the report of *Garaje Tropical* on 17/02/2014, the automatic charger of the first generator of Byumba hospital known as SDM was stolen and its Solenoid valves and starter were damaged, while the second named PRAMAC 65 KVA was coded to prevent it from switching on and providing electricity, and in addition to this, its automatic charger died while Salimini Saidi is the person who held the key of the room where they were stored.

[12] The case file also indicates that the Director General of Byumba Hospital, based on the report of 17/02/2014 mentioned above and on the various letters which were written to Salimini Saidi informing him his different faults he committed, but refused to change, he temporarily suspended him on work from 17/02/2014 due to the faults he committed that led to the theft of

the engine and other spare parts of the motorcycle and two generators of that hospital. This act taffected the service delivery of that hospital to the client as stated in the letter n°20/87/OPH BY/2014 of 17/02/2014.

[13] The report of 02/05/2014 prepared by the team of staff members of the Ministry of Health and Ministry of Public Service and Labour indicates that Salimini Saidi should be held liable for the serious fault he committed of damaging the equipment of Byumba hospital which he had to take care of, because the engine of motorcycle Yamaha AG 100 (GPM 319 B) was changed as it is demonstrated by the chassis number, while he was the person in charge of that motorcycle. In addition, the generator of the hospital failed to provide the electricity automatically and its solenoid valves were changed, while Salimini Saidi was in charge of keeping its keys, therefore, that team requested disciplinary sanctions of suspension for a period not exceeding three (3) months without pay against him as a consequence of breach to fulfill his duties and to misuse government equipment.

[14] In the case file there is a report of 17/06/2014 that was submitted by the members of disciplinary committee of Byumba Hospital which emphasised also that Salimini Saidi should be dismissed from work because of the serious faults he committed relating to the intentional damage on the motorcycle Yamaha AG 100 (GPM 319 B) and the generators providing electricity in Byumba Hospital as it is indicated by the report of *Garage Tropical* technicians mentioned above. Those faults were likely to threaten the life of patients like those who were on set for surgery operation, those who were in incubators, those who were on oxygene, and all these would compromise the reputation of Byumba Hospital. In addition, Salimini Saidi received various

letters showing him his faults consisting of misbehaviour in his work, but showed no sign of change.

[15] Basing on different letters and reports mentioned above, on 03/07/2014, the Minister of Health notified Salimini Saidi that he was dismissed from work due to the above-stated serious faults he committed.

[16] The Court finds that the letters and reports which are mentioned above indicate that Salimini Saidi has committed the serious faults he was accused of relating to the mismanagement of the government equipments in his attributions because the engine and shock absorbers of the motorcycle Yamaha AG 100 (GPM 319 B) of Byumba Hospital were stolen ; and that the automatic battery charger the first generator of that hospital was also stolen and its Solenoid valves and starters were damaged while the second was coded to the extent that it could not switch on and provide electricity to that hospital despite the fact that he was the person in charge of those equipments for he used that motorcycle in his daily work and kept the key of the place of installaton of those generators as evidenced by the report of 17/02/2014 submitted by the technicians of *Garage Tropical*.

[17] Concerning the statements of Salimini Saidi that he cannot be held liable for the disciplinary faults while he was found not guilty for the offence of damaging the motorcycle and generator because the case file was closed by the judicial police of police station of Byumba; article 78 of the Law N° 86/2013 of 11/09/2013 establishing the general statutes for public service provides that the disciplinary sanction of a public servant shall be independent from criminal liability and punishment as provided by the criminal code to the extent that the same fault may trigger both disciplinary and criminal procedures..

[18] Indeed, the law scholar, Jean Rivero, in his book titled “Droit Administratif” explains that the same fact may trigger both disciplinary and criminal procedures and that the decision on the criminal action does not affect the disciplinary decision, the exception made of the facts of which the penal judge decided to have occurred or not in a final decision, otherwise the employee may be held liable for disciplinary faults for which he was declared innocent by a criminal verdict.¹

[19] Basing on the provisions of article 78 of the aforementioned law and on the explanations of the above-stated law scholar, the court finds that nothing was likely to prevent Salimini Saidi from facing disciplinary procedure and be sanctioned despite the absence of criminal action against him as he alleges. Accordingly, the grounds of Salimini Saidi that he was unlawfully dismissed because he did not commit the faults lack merit.

- Whether Salimini Saidi was unlawfully dismissed on work because he did not exercise his right to defense

[20] Salimini Saidi and his counsel state that the High Court held that he should be dismissed, disregarding that he was

¹ "(...) lorsqu'un même fait constitue, à la fois, une faute disciplinaire et une faute pénale, les deux formes de répression peuvent s'exercer parallèlement; si la décision pénale intervient la première, elle est sans conséquence sur la décision disciplinaire, sous une seule réserve: les constatations de fait du pénal juge, en vertu de l'autorité de la chose jugée, lient l'autorité disciplinaire; mais elle peut déclarer disciplinairement punissables les faits qui, au pénal, ont entraîné l'acquittement, et inversement. C'est ce que l'on exprime en parlant de l'autonomie de la répression disciplinaire", par Jean Rivero, "Droit Administratif", Dalloz, 2011, p.374.

unlawfully dismissed because he did not defend himself on faults he was accused of beforehand concerning damaging motorcycle and generators of Byumba hospital.

[21] The state attorney states that Salimini Saidi was not unlawfully dismissed because he defended himself on gross faults mentioned above he committed. Uburanira Leta y'u Rwanda (Minisiteri y'Ubuzima) avuga ko Salimini Saidi atirukanwe ku kazi mu buryo bunyuranyije n'amategeko kubera ko yisobanuye ku makosa akomeye yakoze yavuzwe haruguru.

DETERMINATION OF THE COURT

[22] Article 79 of the law establishing the general statutes for public service provides that no public servant shall be sanctioned unless he/she has been given an opportunity to submit in writing his/her defence.

[23] As it was explained above, after the letter n° 20/116/HOPBYABA 2014 of 27/12/2013 that the Director General of Byumba Hospital wrote to Salimini Saidi requesting him to explain on the above-stated serious faults he committed relating to the fact that the engine and shock absorbers of the motorcycle AG 100 (GPM 319 B) of that hospital was changed while he was the person in charge of it, Salimini Saidi replied to that letter on 08/01/2014 informing him that he did not commit those faults; rather, it was committed by Biraguma when he gave him that motorcycle in order to do maintenance, since Kevin who used to do it was not around.

[24] After receiving that letter, the Director General of Byumba Hospital wrote a letter to Salimini Saidi on 17/02/2014,

informing him that he temporarily suspends him due to the faults he committed as mentioned above. This led Salimini Saidi to write to the Chairperson of the Board Of Directors of Byumba Hospital a letter of 24/02/2014, requesting him to do justice and he explained to him that his superior could have not suspended him temporarily on work, while he did not damage the engine and shock absorbers of motorcycle Yamaha AG 100 (GPM 319 B) because they were changed by Biraguma, and he did not damage generators of that hospital because on 12/02/2014, he did not hold the key of the room where they were and it is his colleague Serge who had it instead.

[25] The case file demonstrates that afterwards, the team of staff members of the Ministry of Health and Ministry of Public Service and Labour submitted the report of 17/06/2014, whereby they explained that they were not satisfied by the explanations of Salimini Saidi because he exculpates himself from the faults he was accused of related to generators and motorcycle of which their spare parts were changed while he was responsible of taking care of them as he rather inculpates his colleagues including the in charge of transport services and Serge. For these reasons, on 03/07/2014, the Minister of Health based on the different reports that are mentioned above notified Salimini Saidi that he was dismissed from 17/02/2014, the time he was temporarily suspended due to serious faults he committed of damaging that government equipment which he should take care of, as well as other faults of misbehaviour he was informed but failed to change.

[26] The court finds that the letters and reports above stated indicate that before the dismissal of Salimini Saidi by the Minister of Health on 03/07/2014, he had exercised his right to

defense beforehand on faults he was accused of before his superior and Chairperson of the Board of Directors of Byumba Hospital as well as the team of staff members of Ministry of Health and Ministry of Public Service and Labour as indicated and explained above. Therefore, his argument that he was unlawfully dismissed because he did not defend himself on the faults he was accused of lack merit.

- Whether Salimini Saidi was unlawfully dismissed on work because he was imposed unlawful disciplinary sanctions

[27] Salimini Saidi and his counsel state that he was unlawfully dismissed because he was imposed the disciplinary sanction which does not correspond to the gravity of the faults he was accused of, because if the High Court was furnished with the elements of evidence supporting that he damaged the motorcycle whose value is superior to 1,000,000Frw but not exceeding 1,500,000Frw, he should have been sanctioned with delay in promotion provided by article 12 of presidential order no 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants or he would have been suspended for a period not exceeding three (3) months without pay as provided by article 13 of that presidential order, instead of being imposed the sanction of dismissal because it is not proportional to the gravity of the faults alleged to have committed as mentioned above.

[28] The State attorney (Ministry of Health) states that Salimini Saidi was not unlawfully dismissed because the High Court relied on article 5 of the presidential order mentioned above, which provides for the determination the gravity of a fault, and found that he should be dismissed of work because of the

gravity of the faults he committed that are related to mismanagement of the government equipment which he must take care of, and those faults could result in negative effects which cannot be determined in consideration of only the value of the damaged equipment as the High Court held it in paragraph 8 of the judgment against which the appeal was lodged to this court.

DETERMINATION OF THE COURT

[29] Article 5 presidential order n° 65/01 of 04/03/2014 determining modalities of imposing disciplinary sanctions to public servants, provides that the gravity of a disciplinary fault shall be determined by taking into account the circumstances in which it was committed and the related consequences. In addition, article 15 of that presidential order provides that when a public servant commits an act or behaves in way that breaches his/her work obligation while such act or conduct is not among disciplinary faults provided for by this Order, the head of his/her institution, upon recommendation of internal disciplinary committee, shall determine the gravity of acts or behaviour taken as disciplinary fault and its corresponding sanction, among sanctions provided for by this Order.

[30] Concerning the disciplinary sanction that Salimini Saidi should be imposed, basing on article 5 and 15 of the aforementioned presidential order, the court finds that the fact for Salimini Saidi to have committed the fault of mismanagement of the government equipments as it was explained above, which fault resulted in deterioration of two generators because their parts were stolen and were coded which disabled them from switching on and producing electricity to that hospital, to the extent that this could cause severe effect including deaths of

patients who were undergoing surgery operations and those who were on ventilators as well as infants who were in incubators. It finds in addition that those faults have affected the reputation of that hospital because it was unable to provide the good service to its clients as it is indicated in the previously stated report of disciplinary committee of 04/06/2014, it is obvious that his statement of being unlawfully dismissed because he was imposed an illegal sanction of dismissal has no merit. Therefore, he should not be reinstated in work and be given the moral damages he requested for, and it is not necessary to examine about the arrears of salary he was not remunerated for the period he was temporarily suspended, as well as 16 months of his dismissal and the terminal benefits.

- **Whether Salimini Saidi should be awarded damages equivalent to his 6 months' salary because he was not given the work certificate**

[31] Salimini Saidi and his counsel state that the Government of Rwanda (Ministry of Health) should pay him damages for not be given the work certificate which are equal to his 6 months' salary, amounting to $154,000 \times 6\text{months} = 924,000\text{Frw}$; instead of being three months of his salary of 462,000Frw that he has been awarded by the High Court.

[32] The State attorney states that Salimini Saidi should not be given 924,000Frw which is equivalent to his six months' salary because he does not raise any deprecation against the judgment rendered by the High Court that awarded him the damages of 462,000Frw equivalent to his 3 months of salary for not be given the work certificate.

DETERMINATION OF THE COURT

[33] The Copy of the judgment RAD0003/15/HC/KIG that was subject to appeal before this court indicates that the High Court awarded Salimini Saidi a discretionary amount of 460,000Frw in damages (but it explained that he must be given 462,000Frw = 154,000frw x3) equivalent to his 3 months of salary because the Government of Rwanda (Ministry of Health) did not issue him the work certificate at the time of his dismissal.

[34] The court finds that those damages awarded to Salimini Saidi by the High Court for not being given the work certificate are in proper range, therefore he should not be given the damages that are equal to six months' salary because he does not substantiate the with legal basis.

**- Whether Salimini Saidi should be awarded the
counsel and judicial damages**

[35] Salimini Saidi and his counsel state that the Government of Rwanda (Ministry of Health) should pay him 800,000Frw of judicial damages from the first instance up to this court and 1,500,000Frw of the counsel fees he incurred in all instances he pleaded in, totalling 2,300,000Frw.

[36] The State attorney states that the Government should not pay Salimini Saidi that money because he committed serious faults as stated above and then dragged himself into unnecessary lawsuits.

DETERMINATION OF THE COURT

[37] The court finds that Salimini Saidi should not be awarded the counsel and judicial damages because his appeal has no merit.

- Whether the cross appeal of the Government of Rwanda (Ministry of Health) has merit

[38] The State attorney states that he raises a cross-appeal requesting Salimini Saidi to pay to it 5,000,000 Frw for judicial damages.

[39] Salimini Saidi and his counsel state that he should not pay the Government of Rwanda those damages because it did not appeal against the ruling on the claims it lost in the first instance.

DETERMINATION OF THE COURT

[40] Article 258 of Civil Code Book Three, provides that any act of a person, which causes damage to another obliges the person by whose fault it happened to be held liable.

[41] Basing on that article, the court finds that Salimini Saidi should pay the Government of Rwanda (Ministry of Health) 800,000Frw for judicial damages awarded in the discretion of the court ; because it incurred unnecessary expenses in following up this appeal while it was clear that his appeal was groundless.

[42] With regards to the compensation, according to the motivation provided above, the court finds that the Government of Rwanda (Ministry of Health) should pay Salimini Saidi 462,000Frw of the damages for not handing to him the work

certificate and 500,000Frw of the counsel fees and judicial damages which he was awarded on the first instance, totaling 962,000 while Salimini Saidi. Should pay the Government 800,000 Frw for judicial damages. Through the compensation of both debts, the court finds that the Government of Rwanda (Ministry of Health) should pay Salimini Saidi the balance of $962,000 - 800,000 = 162,000\text{Frw}$.

III. DECISION OF THE COURT

[43] Declares without merit the appeal of Salimini Saidi ;

[44] Declares with merit the cross-appeal of Government of Rwanda (Ministry of Health)

[45] Orders the Government of Rwanda (Ministry of Health) to pay Salimini Saidi 162,000Frw as a result of compensation of debts as it was explained above.

[46] Rules that 100,000 Frw of the court fees deposit by Salimini Saidi for his appeal covers the expenses incurred in this case.

CIVIL CASE

MUKANKUBITO v NABIMANA

[Rwanda SUPREME COURT – RS/INJUST/RC
00009/2019/SC Ntezilyayo, P.J, Nyirinkwaya, Cyanzayire,
Mukamulisa, and Hitiyaremye, J.) 03 March 2020]

Evidence law – Civil marriage – A marriage certificate is the conclusive evidence for proving that the couples are married – In case of its loss or unavailability of the registers of marriage, it relies on testimony evidence – The fact that one of the partner is written on her or his cohabitants identity card as a wife or husband, does not consist of reliable evidence to prove that they are legally married.

Facts: The case started before Nyarugenge Primary Court whereby Mukankubito requested a suppletive judgment for her marriage with Nabimana. The Court dismissed her case on the ground that she did not produce convincing evidence proving the civil marriage between her and Nabimana.

Mukankubito appealed before Nyarugenge Intermediate Court indicating that the previous Court disregarded the evidence she produced proving that she is legally married to Nabimana. The Intermediate Court sustained her claim and decided that civil marriage was concluded between her and Nabimana. The court, therefore, reversed in whole the appealed judgment and decided to award to Mukankubito the suppletive judgment of marriage. The motivation of the court lied on the fact that nothing would prevent Mukankubito to be awarded a suppletive judgment of marriage while she produced reliable elements of evidence of her marriage with Nabimana including photographs of the ceremony, marriage certificates issued by the Kacyiru sector, church

certificate indicating that they were religiously married. It pursued that people could not get married religiously without civil marriage celebration before Commune and that it was quite impossible to register her name in the ancient identification card of her husband as his wife unless they were married.

Nabimana came to learn about the decision of that judgment and lodged a third party opposition alleging that he cohabited with Mukankubito as spouses since 1978, because Mukankubito had not yet attained the majority age as she was only 17 years old and for this reason, they could not legally get married, thus, they concluded religious marriage in 1983. The Court found Nabimana's claim with merit and reversed the judgment in whole due to the lack of reliable evidence proving the celebration of civil marriage between Mukankubito and Nabimana. Mukankubito applied for review whereby she relied on a certificate issued by National Identification Agency (NIDA), but the Intermediate Court rejected her claim and upheld the decision of the judgment for which revision was formed. This Court motivated that the document issued by NIDA is not a new evidence discovered after the hearing, because its content is similar to that in the other document she produced before.

Mukankubito submitted her application for case review due to injustice to the ombudsman office, which after its examination prayed to the President of the Supreme Court to entertain the application. After the scrutiny, the President instructed the revision of the case by the Supreme Court.

Mukankubito indicated before the Supreme Court, that the Intermediate Court disregarded some provisions of laws that were applicable at that period because by the time they celebrated religious marriage in 1983, the Constitution and other laws into force recognised religious marriage as valid civil marriage. She

continued stating that, there are various elements of evidence disregarded including Nabimana's ID card in which it is registered that they were legally married as well as their children and that the content of ID is copied from civil status registers, and this constitutes the substantive evidence of their civil marriage.

Nabimana argues instead that the main claim filed before the Primary Court by Mukankubito consisted of praying the Court to render a suppletive judgment to the certificate of marriage celebrated in 1978, but that at the moment, they are indicating that the legal marriage to be declared valid is the one celebrated religiously in 1983, which they considered as the modification of the claim, which is not allowed, and the Constitution they referred to, does not provide so since the decree they relied on did not provide for that and was already repealed. Nabimana states in addition that, the Identification card is not reliable evidence on which to base the decision that someone is married to another and concludes his briefs by declaring that no provisions of the law were disregarded.

Held: 1. Conclusive evidence for civil marriage is a marriage certificate. In case of its loss or unavailability of the registers of marriage, it relied on testimony. For this reason, other documents issued in Belgium produced by Mukankubito indicating that she is married are not reliable in deciding that civil marriage was celebrated.

2. The fact that one of the partners in cohabitation is registered in the identification card of another does not consist of any evidence proving that they are legally married, thus the fact for Mukankubito to indicate that she was registered in Nabimana's Identification card is not evidence that they are married according to the Law.

**The case review due to injustice has no merit.
The ruling of the case for which the application for review
due to injustice was filed is upheld.**

Statutes and statutory instruments referred to:

Constitution of 20/12/1978, articles 25 and 98

Constitution of 24/11/1962, article 28.

Law N°15/2004 of 12/05/2004 relating to evidence and its
production, Article 11.

Decree-Law N° 01/81 of 16 January 1981 relating to
population's survey, Identification card, articles 5,6 and
7

Decree of 04/05/1985 instituting title one of civil code, book
one, articles 18, 20 and 117

No cases referred to.

Author cited:

Ntampaka, Charles, Droit des personnes et de la famille,
Manuel de droit rwandais, 1993, p. 108.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case originates from Mukankubito Daphrose's claim before Nyarugenge Primary Court, praying for a suppletive judgment of marriage certificate she celebrated with Nabimana Pierre whereby she argued that they were legally married on

18/08/1978 in former Nyarugenge Commune, but that when she occurred to Nyarugenge sector to request for a marriage certificate, the registers for marriages celebrated during that period were missing.

[2] On 02/04/2015, Nyarugenge Primary Court rendered the judgment RC 0088/15/TB/NYGE and held that there is no evidence produced by Mukankubito Daphrose indicating without a doubt that she married Nabimana Pierre on 18/08/1978. The Court elucidated that the marriage certificate of Nabimana Pierre and Mukankubito Daphrose issued by Kacyiru commune on 12/03/2003 is not likely to constitute persuasive evidence because it was issued in the past and the plaintiff failed to produce the original copy and the administration awarded it without relevant information thereto since she states that their marriage was celebrated before Nyarugenge Sector, whereas the marriage certificate (To Whom It May Concern) which was awarded by the administration of Nyarugenge sector indicates that the registry of marriage to prove that Mukankubito Daphrose and Nabimana Pierre are legally married is inexistent. The court also declared that the picture of their religious wedding could not also be sustained as reliable evidence because it does not indicate whether they were shot before a civil status registration officer holding national flag in accordance with the Law, and in addition, land titles cannot be relied on because spouses may co-own land without being legally married. For these reasons, it found unreliable the documents indicating their religious marriage including pictures and titles issued by the Land center because the Law does not consider partners married religiously as legally married.

[3] Mukankubito Daphrose was not contented with that decision, then appealed before Nyarugenge Intermediate Court, arguing that the Court disregarded various evidence she produced before it to prove that she is legally married to Nahimana Pierre, which include his identification card where she is mentioned as her wife, a certificate issued by Kacyiru Commune on 12/03/2003 indicating that they are married, a parish card witnessing that Mukankubito Daphrose got married to Nabimana Pierre in Nyamirambo Parish, pictures of marriage as well as other documents supporting that they are considered married at their residence in Belgium. On 30/04/2015, that Court held in judgment RC 0076/15/TGI/NYGE, that Mukankubito Daphrose's appeal has merit, that the appealed judgment is reversed in whole, and ordered that Mukankubito Daphrose be issued suppletive judgment to a marriage certificate and the said decision be transferred to Nyarugenge sector.

[4] The Court motivated its decision by explaining that there is no reason to prevent Mukankubito Daphrose from being awarded the judgment substituting marriage certificate because she produced to the Court convincing elements of evidence that she is legally married to Nahimana Pierre, which include the pictures indicating how Mukankubito Daphrose and Nahimana Pierre were married, certificates issued by Kacyiru sector and religious wedding certificate issued by Nyamirambo parish. It held that people could not celebrate a religious wedding without going through civil marriage and that it was impossible to be registered in her husband's old identification document in the capacity of a spouse without them being legally married.

[5] Nahimana Pierre lodged a third party opposition against that case, arguing that he never legally married Mukankubito

Daphrose, rather, they cohabited since 1978, especially that she was only 17 and minor, the reason why they could not get married in accordance with the law, therefore, they religiously tied the knot 1983 without getting civilly married. Nyarugenge Intermediate Court rendered the judgment RCA0076/15/TGI/NYGE on 18/05/2015, and found Nahimana Pierre's claim with merit by holding that there exists no convincing evidence indicating that Mukankubito Daphrose and Nahimana Pierre celebrated civil marriage.

[6] The Court explained that elements of evidence relied upon in the case which is the subject of third party opposition consist of the documents Mukankubito Daphrose admit to having got in 1983 while celebrating the religious wedding. However, they do not prove that she got married in 1978 before the civil registration officer, rather, they prove that she concluded a religious wedding and she does not indicate any legislation entitling her the married status by the mere fact of being religiously married in 1983 ; thus, the evidence produced to the Court is not sufficient to hold that they were legally married.

[7] The Court found also that, based on article 13 of the Law N°15/2004 relating to evidence and its production, the Court decided that the certificate of marriage of 12/03/2003 is an authentic document enforceable against everybody (*erga omnes*), whereas it was not issued in respect of required conditions by the competent civil servant. It motivated that Mukankubito Daphrose alleged they were legally married before the Nyarugenge sector, whereas the marriage certificate, which is not even original, was issued by the former Kacyiru commune, thus, the issuer had no basis to testify the civil marriage between Mukankubito Daphrose and Nahimana Pierre.

[8] The Court heard some witnesses who were their neighbors testifying that they have never legally been married, rather what they know is that they got religiously married, and they could not celebrate civil marriage without their knowledge. It found also that Mukankubito Daphrose does not present a witness who could testify her statement or indicate the civil registration officer who officiated their marriage.

[9] Mukankubito Daphrose applied for a review of the judgment RCA 0106/15/TGI/NYGE arguing that, there is new evidence made of a document issued by NIDA on 05/10/2015. Nyarugenge Intermediate Court rendered the judgment RCA0222/15/TGI/NYGE on 15/12/2015, whereby it rejected her application and upheld the judgment RCA0106/15/TGI/NYGE rendered by Nyarugenge Intermediate Court. It, therefore, ordered Mukankubito Daphrose to pay 2,000,000 Frw to Nabimana Pierre in damages encompassing procedural and counsel fees.

[10] The Court noted that the document issued by NIDA on 05/10/2015 is not a new evidence discovered after the closure of the hearing, because its content is similar to that of 21/05/2015, and were both requested by Mukankubito Daphrose, which implies that in the course of the hearings, Mukankubito Daphrose knew about their content but did not rely on them and indicate unforeseeable event which prevented her from producing that evidence. For these reasons, it held that the document issued on 05/10/2015 does not constitute a piece of new evidence.

[11] Mukankubito Daphrose requested in writing to Office of Ombudsman for review of the judgment RCA 0106/15/TGI/NYGE due to injustice; which, after scrutiny of the request, prayed to the President of the Supreme Court to review

that judgment due to injustice. The President of the Supreme Court, after examination, instructed that the judgment RCA 0106/15/TGI/NYGE be registered in the court registry for review and the claim was assigned the docket number RS/INJUST/RC 00009/2019/SC.

[12] Counsel Mugeni Anita states that Mukankubito Daphrose applied for review of the judgment RCA 0106/15/TGI/NYGE due to injustice because the Court disregarded the provisions of the laws and evidence indicating undoubtedly that she legally married Nabimana Pierre, which resulted in injustice.

[13] The hearing of the case occurred in public on 05/02/2020 whereby Nabimana Pierre was assisted by Counsel Niyomugabo Christophe and Counsel Ndagijimana Emmanuel, whereas Mukankubito Daphrose was represented by Counsel Mugeni Anita. Before the analysis of legal issues of the case, the Court first examined the issue relating to the effects likely to arise between the judgment RCA 0034/03/2017/HC/KIG pending before the High Court, where Mukankubito Daphrose filed a claim praying this Court to order for the partition of matrimonial assets she co-own with Nabimana Pierre as spouses and the present case before the Supreme Court.

[14] Concerning this issue, Counsel Mugeni Anita started explaining how that case aiming at sharing co-owned properties between Mukankubito Daphrose and Nabimana as spouses. She argues that the initiation of that case is the result of the fact that Mukankubito Daphrose noticed she had no other choice left, after realizing that Nabimana Pierre has started to deregister her name from the co-owned property. She states that this injustice-related case would have no effects on the pending case before the High Court because, after the release of the Ombudsman's decision,

they requested the Court to stay that case until the Supreme Court's decision.

[15] On the side of the counsel for Nabimana Pierre, they declare that they have raised that issue where they were wondering how Mukankubito Daphrose prays the Court to affirm that she is legally married to Nahimana Pierre on one side and the partition of co-owned property on the other side since this scenario implies that she acknowledges they are not legally married. They allege in contrast that it should be considered as judicial confession, admissible against the author, therefore, they find that the case of injustice should not have been admitted besides that case.

[16] After hearing both sides on this issue, the Court withdrew for deliberation after finding that there exists a case RCA0034/03/2017/HC/KIG pending before the High Court whose subject matter is the sharing of the properties, it decided the stay of that case till the Supreme Court ruling in the interest of justice and avoidance of conflicting judgments.

[17] Again, before the analysis of legal issues of the case, the Court examined the objection raised by the counsel for Nabimana Pierre, alleging that, if Counsel Mugeni Anita for Mukankubito Daphrose wishes to keep relying on the document issued by Nyamirambo Parish as evidence in the course of her pleading, they intend to challenge the document for forgery.

[18] Counsel Mugeni Anita replied that, since the procedure to challenge the document as forgery delays, while she has explained that the concerned evidence is not so crucial, rather a piece of supporting evidence, she renounces to use that document

issued by Nyamirambo Parish, and as a result, the hearing proceeded.

[19] For the adjudication of the application for review of the judgment RCA0106/15/TGI/NYGE due to injustice, the Court finds that the following issues which are also raised by parties should be analyzed.

- i. Whether the judgment RCA0106/15/TGI/NYGE disregarded the applicable law at the time of the celebration of marriage between Mukankubito Daphrose and Nabimana Pierre ;
- ii. Whether the case RCA0106/15/TGI/NYGE disregarded elements of evidence produced by Mukankubito Daphrose which proves her marriage with Nabimana Pierre ;
- iii. Whether damages requested by parties to the case can be awarded.

II. ANALYSIS OF LEGAL ISSUES

- **Whether the case RCA0106/15/TGI/NYGE disregarded the applicable law at the time of celebration of marriage between Mukankubito Daphrose and Nabimana Pierre.**

[20] Based on pleadings and court briefs of Counsel Mugeni Anita for Mukankubito Daphrose, the analysis of this issue should focus on determining whether the wedding celebrated between Mukankubito Daphrose and Nabimana Pierre before the church on 17/12/1983 was recognized by the Constitution of 20/12/1978 as civil marriage.

[21] Counsel Mugeni Anita declares that Mukankubito Daphrose and Nahimana Pierre admit that, they have cohabited since 1978 after celebrating civil marriage because their firstborn arrived in 1979. She also states that it was after Nahimana Pierre concealed their administrative documents proving the celebration of their marriage that Mukankubito Daphrose started collecting further evidence from the church where they got religiously married in 1983 as admitted by Nabimana Pierre who, at the same time alleges it was unlawful.

[22] He explains that, in the case under review, the Judge disregarded the applicable legislation at that time providing that, religious wedding before Roman Catholic Church was legal. She states that article 28 of the constitution of the Republic of Rwanda of 24/11/1962 provided that marriage between one man and one woman celebrated before a civil registration officer or before the church is legally recognized by the Constitution and this Constitution was repealed by another one of 20/12/1978 of which its article 25 provides that: “Marriage of one man and one woman celebrated before a civil registration officer is the only recognized legal marriage”, and it was this provision which was current while Mukankubito Daphrose and Nahimana Pierre tied the knot religiously in 1983.

[23] She continues stating that, in general, among the laws governing marriage during that time, includes the decree of 04/05/1895 instituting civil code, book one. It was provided in its article 17 that Catholic missionaries were invested by colonial administration with the power to officiate marriage for the indigenous population, and that marriage was recognized legally by the administration, thus, the marriage of Mukankubito Daphrose and Nahimana Pierre before the Catholic Church

occurred on 17/12/1983 is legal. She argues that the Court should have based on that and hold that they are married according to the law, especially that the article 26 of that decree and articles 476, 458 of the Law of 1988 (which repealed the Law of 1948 that repealed the 1895 decree too), saved pre-existing marriages, thus for these reasons, Mukankubito Daphrose prays the Supreme Court to award her a judgment in substitution of the marriage certificate.

[24] She explains that, with regard to the judgment RC00258/2017/TGI/NYGE, for which Mukankubito Daphrose claimed the partition of the matrimonial assets she co-own with Nabimana Pierre, the Court should not consider it as evidence of an admission by her client of the absence of civil marriage celebration between her and Nabimana Pierre, since she filed that claim after she lost previous cases and the delay of her reply to application to the Office of Ombudsman delayed, whereas Nabimana Pierre had started deregistering her from their co-owned properties, and consequently, she opted to file it as her last resort.

[25] Counsel Niyomugabo Christophe, for Nabimana Pierre, states that the origin of this case is the claim filed by Mukankubito Daphrose before Nyarugenge Primary Court requesting for the judgment substituting marriage certificate of 18/8/1978 pretending to have legally married Nabimana Pierre on this date, the claim which was recorded on RC0088/15/TB/NYGE. However, Mukankubito Daphrose does not indicate in the case RCA0106/15/TGI/NYGE that the Court disregarded the evidence supporting she married Nabimana Pierre in 1978; rather she produced the evidence of religious wedding in 1983, the act that he finds consists of the modification

of the subject matter of the claim barred at this instance level by article 6 of Law n° 21/2018 relating to the civil, commercial, labor and the administrative procedure.

[26] He continues stating that, concerning the statements of the counsel for Mukankubito Daphrose that article 25 of the Constitution of 1978 and article 17 of the aforementioned Decree Law of 04/05/1895 considered a religious wedding as a civil marriage ; Counsel Mugeni Anita mentions the provision of this 17 in part because it provides that catholic missionaries were given by colonial administration the power to officiate the marriage of indigenous population and be considered as civil marriage. He also states that this article explains clearly the procedure following which catholic missionaries would officiate religious and civil marriage subsequently under the authorization of the Gouverneur General to be recognized as civil marriage.¹ In addition, not all missionaries had the power to officiate a marriage considered as official because there were requirements provided by article 17 and among others, the concerned missionary had to apply for authorization with terms and time

¹ In each jurisdiction, he may also delegate to agents of the colony or private individuals, to draw up these acts within the territory and time limit and under the conditions, he shall determine. They shall perform these functions under the direction of the competent officer, who shall oversee that the deeds are regularly drawn up, note any irregularities and report them to the Governor General. The delegation referred to in the preceding paragraph will be granted on their request to Catholic missionaries with the power for them to officiate the civil marriage of indigenous whose religious union they have celebrated. Private individuals and Catholic missionaries will only be competent to receive delegation for the purpose of drawing up acts relating to indigenous (of the Congo or the bordering colonies).

limits and officiate marriage for only people who got religiously married before. He adds that, after the wedding, he had to establish immediately the marriage certificate to be reported to the civil registration officer for transcription to official registers.

[27] The counsels for Nabimana Pierre state also that, the provisions of article 17 of the aforementioned decree, was repealed by the Constitution of 1962 because article 28 provides clearly that "the marriage exists between one man and one woman religiously or before civil registration officer" implying that ministers of all recognized religious entities could officiate marriage and be valid without applying for permission or following solemnities prescribed by the positive law as it was provided by article 17 of 04/05/1895's decree.

[28] Furthermore, they explain that the Constitution of 1962 repealed by the Constitution of 1978, which was into force in 1983 when Mukankubito Daphrose religiously married Nabimana Pierre, read in article 25 that "marriage between one man and one woman concluded according to positive law, is the one considered legal", and that its article 93 provided that "all legal instruments into force, which are inconsistent to it, and not repealed or modified, will remain applicable"; therefore all provisions of 04/05/1895's decree contrary to that Constitution were repealed including aforementioned article 17. They state also that, since 28/12/1978, the Law governing communes vested only bourgoumestres with the civil registration officers' power to officiate legal marriage according to positive law, and the religious ministers could only officiate religious weddings.

[29] They add that, there exists also a legal position set by the Supreme Court in the judgment RS/INCONST.PEN 0003/10/CS of Gatera Johnson and Kabarisa Teddy rendered on 07/01/2011,

where this honorable Court decided that the monogamous marriage concluded before the civil registration officer is the one recognised ; a position taken based on article 26 of the Constitution of the Republic of Rwanda as revised to date. They pursue that article 25 of the Constitution of 1978 is clear when interpreted *mutatis mutandis* with regard to this article 26 of the current constitution given that both provisions are similar.

[30] Also, the counsels for Nabimana Pierre states that the marriage of Mukankubito Daphrose and Nabimana could not be considered legal based on the form issued by Nyamirambo Parish. They explain again that whenever a Catholic missionary was permitted to officiate a marriage, he had to act in the capacity of a civil registration officer (*Officier de l'état civil*) and issue a marriage certificate. They argue that as long as Mukankubito Daphrose cannot produce a marriage certificate (*acte de mariage*) issued by the missionary which was signed by two witnesses and herself in compliance with article 20² and article 24³ of 04/05/1895's decree; her statements she relies on the form issued by Nyamirambo Parish that she is legally married are groundless.

[31] Basing on all their court briefs, the counsel for Nabimana Pierre declares that the Court did not disregard the Law by holding in the judgment RCA0106/15/TGI/NYGE that the religious wedding celebrated in 1983 between Mukankubito Daphrose and Nabimana Pierre does not imply that they were

² The certificates of the civil registration are received in the presence of two witnesses.

³ The certificates are signed by the civil registrar, by the participants and the witnesses, or mention is made of the cause which prevents the participants and the witnesses from signing.

legally married according to the Law which was into force during that period.

[32] With regard to the case in which Mukankubito Daphrose filed a claim before the Court praying it to order for the sharing of all their properties due to their cohabitation, the counsel for Nabimana Pierre states that this supports that Mukankubito Daphrose admitted before the Court that they were not married, (*aveu judiciaire*), thus, she could not have desisted it and file this claim.

[33] Concerning the above arguments by counsel for Nabimana Pierre; Counsel Mugeni Anita replies that the aforementioned decree of 04/05/1895 was not repealed by the Constitution of 1962, rather by the Law N° 42/1988 instituting part one of the book one of civil code. She argues in addition that about the religious wedding of 1983, the priests replaced missionaries in all their powers.

[34] Regarding the argument that they modified their claim before the Supreme Court, she argues that it is groundless because, since the initial step of the trial, they were and maintained praying to be issued the judgment substituting the marriage certificate. Therefore, the judge shall examine whether they celebrated the marriage according to the Law.

DETERMINATION OF THE COURT

[35] Article 25 of the Constitution of 20/12/1978 which was in force in 1983 when Nabimana Pierre and Mukankubito Daphrose celebrated their religious marriage, was providing that “marriage between one man and one woman concluded according to the

Law and the procedure provided by it, is the one recognised” whereas article 98 provides that, this Law repealed the Constitution of 24/11/1962 as it was modified.

[36] The interpretation of the Constitution of 24/11/1962, especially aforementioned article 28, indicates that the legal marriage was the one concluded between one man and one woman before the public administration or before the religious congregation. This being confronted with the issue under determination, it implies that whenever a representative of a recognized religious organization in Rwanda officiated a marriage according to religious rites, that marriage was acknowledged legal. The aforementioned article 28 was not taken back in the Constitution of 20/12/1978, because its article 25 did not refer to religious marriage; rather, it only provided that only the marriage between one man and one woman concluded in accordance with the Law and the procedure provided is recognised.

[37] Regarding the provisions of the Law governing the marriage in 1983 when Mukankubito Daphrose and Nahimana Pierre celebrated a religious wedding, Counsel Mugeni Anita states that the law which was into force is the decree of 04/05/1895 stated above, especially its article 17. In the hearing of the case held on February 5, 2020, she was requested to reconcile the provisions of article 17 and those of article 16 providing for the procedure to go through by the missionary to recognize the marriage by him officiated after obtaining the permission, and the religious wedding celebrated in 1983. The issue here consists of knowing whether the provisions of that article could also apply in 1983 for that religious marriage to be recognized by the Law, notably that the existing institution of the

“Gouverneur Général” who was competent to permit the missionary to officiate the marriage in accordance with the law during the colonial period, was no longer present in 1983. Counsel Mugeni Anita did not even indicate whether someone else replaced him and acted as provided by aforementioned articles 16 and 17. In respect of this issue, the Counsel for Nabimana Pierre retorts that since 20/12/1978, the religious wedding was no longer considered civil marriage, because since then, only the bourgoumestre had the power to officiate the civil marriage basing on the Law governing communes of 1963.

[38] The Law of 23/12/1963 governing communes, as modified by the decree of 26/09/1977 provides in article 58 that bourgoumestre was in charge of safeguarding civil status and census registry. In this context, he was in charge of gathering and transcription of all information relating to the population residing in his commune. That attribution belongs usually to the civil status officer. Regarding officiating marriage in particular, there is a Law scholar who states that in Butare, which was one of the country's prefectures, its governor instructed all bourgoumestres to officiate all marriage in compliance with the provisions of the civil law. It was by the same occasion published an order instituting formalities to be followed. That practice spread to the whole country. He continues stating that the Law no 42/1988 of 27 October 1988 instituting preliminary title and book one of the civil code, in its article 87, confirmed bourgoumestres in that duty of being a civil registration office, whereas article 456 of that Law provided that all acts performed by the administration of prefectures and communes before the publication of that Law

remain valid, despite the inexistence of a particular law vesting them with the capacity of the civil registration officer.⁴

[39] The Court, basing on the holdings in previous paragraphs, finds that the arguments of Mukankubito Daphrose that the religious marriage with Nabimana Pierre celebrated in 1983 in Nyamirambo Parish should be considered legal, have no merit.

- **Whether the elements of evidence produced by Mukankubito Daphrose in the judgment RCA0106/15/TGI/NYGE, proving her marriage with Nabimana Pierre were disregarded.**

a. The identity card of Nahimana Pierre

[40] Counsel Mugeni Anita for Mukankubito Daphrose declares that in the case under review due to injustice, the Court disregarded the evidence including the identification document (I.D) of Nabimana Pierre indicating that they are legally married because it used to be filled in by the civil registration officer; thus, Mukankubito Daphrose being mentioned as his spouse including their both children constitute reliable evidence.

[41] Counsel Niyomugabo Christophe states that among the pieces of evidence pointed out by the Office of Ombudsman to have been disregarded include the identification card indicating the marriage between Mukankubito Daphrose and Nabimana Pierre, but that they find it is not a piece of evidence to prove that a person is married to another, which even the judge clarified it

⁴ NTAMPAKA, Charles, *Droit des personnes et de la famille*, Manuels de droit rwandais, 1993, pages 17, 66 et 67

in paragraph 18 of the case under review. He also states that the article 86 CCB.I. provides that the civil status of persons is proven and indicated by the documents issued according to this title, therefore that no other evidence apart from the marriage certificate “acte de mariage” or judgment substituting marriage certificate “jugement supplétif d’acte de mariage” is likely to be admitted to substantiate marriage.

[42] In the course of the hearing of 05/02/2020, Nabimana Pierre was given the floor and argued that the identification card he had been using before 1994 was confiscated during the genocide against the Tutsis in 1994, thus, the one produced by Mukankubito Daphrose is a forged document for traveling abroad, as it is not the only document she forged and in addition, she lied about her completion of secondary education at Karubanda, where she pretended to have been awarded a diploma no T-568/79 of 25/7/1979, whereas she completed only primary school. She also forged a traveling document (titre de voyage) stating that she is Congolese and changed her name to Caroline. His counsel also argues that in the case under review, the Court did not disregard the said identification card, rather as it is clear on page 9 paragraph 18 of the judgment RCA0106/15/TGI/NYGE, it clarified that it could not constitute lawful evidence of civil status, because the legal evidence is the marriage certificate or suppletive judgment. Furthermore, she declares that their marriage took place in Nyarugenge whereas that identification card was issued in Kacyiru.

DETERMINATION OF THE COURT

[43] Article 117 of 04/05/1895 of the aforementioned Decree provided that the evidence of marriage is produced according to

the title relating to civil status' certificates, whereas article 109 of that Decree provided about marriage officiating formality, where they stated that, after vowing to become spouses, the civil registration officer had to draw the marriage certificate. The content of these articles corroborates with the opinion of a Law scholar named Ntampaka Charles, who indicates that, in general, the indubitable evidence of marriage is a marriage certificate, unless it is lost or the registry of marriage is unavailable and in this case, they base on testimonial evidence.⁵

[44] Basing on the reasons in the previous paragraph, the Court finds that the fact for Mukankubito Daphrose to be mentioned in Nabimana Pierre's identification card as his spouse could not be considered as evidence for proving they got civilly married because the marriage is evidenced solely by the marriage certificate.

[45] Concerning the argument of counsel Mugeni Anita that, for a wife to be registered in her husband's identification card they had to be married; the Court finds it without merit because the Decree-Law N° 01/81 of 16 January 1981 relating to population's census, the identification card, the residence and the domicile of a person, particularly in articles 5, 6 and 7, provided for the requirements for a person to be awarded the identification card which includes being aged 16, possession of 2 passport photos of which one should be put on the identification card and the other

⁵ NTAMPAKA, Charles, *Droit des personnes et de la famille*, Manuel de droit rwandais, 1993, pge 108 : « En général la prevue du mariage est faite à suffisance par un extrait de l'acte de mariage. La prevue sera faite par témoins en cas de perte ou d'inexistence de registres de mariage (In general, the proof of marriage is made by an extract of the marriage certificate. The proof of marriage will be made by witnesses in case of loss or non-existence of marriage registers)».

on the census form. Among the requirements, nowhere is provided that the applicant should first indicate that she is legally married to her husband. Rather, it is the annex of that decree which contains the information to be filled in identification card such as names of the spouse and children. The Court finds also that the identification card produced by Mukankubito Daphrose is a copy of which, she failed to produce the original from which she made the copy, and indeed, Nabimana Pierre does not admit it by declaring he lost it during the genocide.

[46] The court is of the view that basing on the reasons provided in previous paragraphs and as decided by Nyarugenge Intermediate Court in the judgment for which Mukankubito Daphrose applied for review due to injustice; her argument that she was registered in Nabimana Pierre's identification card does not constitute a piece of conclusive evidence to decide that they are civilly married.

b. Marriage certificate

[47] Counsel Mugeni Anita states also that another disregarded evidence is the marriage certificate issued in 1983 when Nabimana Pierre requested to be recorded as legally married to Mukankubito Daphrose in order to get Belgium documents. She states in addition that after acquiring Belgium nationality, the administration of Belgium communes issued various documents indicating that Nabimana Pierre is legally married to Mukankubito Daphrose but the Court disregarded them.

[48] Counsel Niyomugabo Christophe states that primarily, the certificate of marriage issued on 12/3/2003 by Kacyiru commune should not be examined because the Office of

Ombudsman did not consider it as disregarded evidence, however, if the Court finds it worthy to be examined, it should not be considered reliable to prove that Mukankubito Daphrose married Nabimana Pierre because it is not original, and does not comply with the provisions of article 11 of Law 15/2004 of 12/05/2004 relating to evidence and its production. He further states that this corroborates the view of the judge in paragraph 11 of the judgment RCA0106/15/TGI/NYGE, where he held that the concerned document should not be considered as an authentic document basing on the fact that it is not original, and does not comply with the provisions of the aforementioned article 11, because Mukankubito Daphrose alleges that their marriage was officiated in Nyarugenge whereas she applied for that marriage certificate in commune Kacyiru, implying that the issuer had no basis to affirm that Mukankubito Daphrose married Nabimana Pierre. He states also that, the concerned certificate should not be produced as evidence because it is very old as it was issued in 2003 with over 12 years.

[49] During the hearing of 05/02/2020, Nabimana Pierre stated that he learned the concerned marriage certificate for the first time in Court when it was produced by Mukankubito Daphrose.

DETERMINATION OF THE COURT

[50] Article 18 of the aforementioned Decree Law of 04/05/1985 read that in every office of civil registration, civil status acts are registered in civil status registries, whereas article 20 of the same decree provides that the civil status certificates should be issued in presence of two witnesses.

[51] After the analysis of article 18 mentioned in the previous paragraph, the Court finds that the legislator provided for the registration of civil status certificates in the registry to allow the civil registration officers to have reference and basis to issue duplicate certificates in case of loss or any dispute relating to marriage, and information contained in them be consulted to resolve those disputes.

[52] The case file contains the marriage certificate issued by Kacyiru Commune on 12/03/2003 testifying that Nabimana Pierre and Mukankubito Daphrose concluded civil marriage before the Nyarugenge commune on 18/8/1978 and religious marriage on 17/12/1983.

[53] The Court finds that, on the basis of Mukankubito Daphrose's statements, where she argues that she got married to Nabimana Pierre on 18/8/1978 before Nyarugenge Commune but that he concealed that certificate -the reason she filed a claim before the Court to be awarded a suppletive judgment of a marriage certificate - She did not indicate at least any witness of that marriage who would have accompanied them to receive that certificate in compliance with article 20 of the aforementioned decree, and in addition to that, in the Nyarugenge sector (which replaced the former Nyarugenge commune), which she alleged to have officiated their marriage, they indicated that the civil status registers of that period were lost, implying that the said administration issued the marriage certificate without basing on reliable information.

[54] Basing on previous holdings, The Court finds that Nyarugenge Intermediate Court admitted the marriage certificate issued by Kacyiru commune on 12/03/2003 indicating that Nabimana Pierre and Mukankubito Daphrose concluded a civil

marriage before Nyarugenge commune on 18/8/1978 but disqualified it because it was issued in contravention of the Law.

c. Various documents were issued by the administration of Belgium communes.

[55] Counsel Mugeni Anita argues that another evidence lies in the fact that Mukankubito Daphrose traveled to Belgium in 1999 with all children, and that in order to benefit from family reunion (regroupement familial) Nabimana Pierre needed to prove that he is married to Mukankubito Daphrose, which he did and they are considered legally married in Belgium, and if he refutes this, it is up to him to demonstrate by which other means he acquired the Belgium nationality.

[56] Counsel Niyomugabo Christophe argues that, primarily, this evidence should not have been examined because the Office of Ombudsman did not consider it as disregarded evidence, but if the Court finds it otherwise, the argument that Nabimana Pierre acquired Belgium nationality basing on the fact they were married, is not the right scenario, and in addition, it should wonder that given that Mukankubito Daphrose argues that they were married in Belgium, why didn't she apply for marriage certificate "acte de mariage" there. He adds that their contents are just mere statements of Mukankubito Daphrose (Simples déclarations).

[57] In the course of the hearing of 05/02/2020, Nabimana Pierre argued that, with regard to family reunion (regroupement familial), he prays the Court to instruct Mukankubito Daphrose to indicate the document proving where she requested it (regroupement familial) for him, and he explains that he used to travel in European countries to the extent that including him in

family reunion (regroupement familial for him) schedule was not necessary and being mentioned on a household member document (composition de ménage) does not imply being a Belgium resident. He gives an example of Counsel Mugeni Anita who lives in Rwanda but appears on that (composition de ménage); therefore, he was also considered as residing in Belgium, which is not the case, and the family reunion (regroupement familial) never happened.

DETERMINATION OF THE COURT

[58] The casefile includes various documents issued by Molenbeek commune in Belgium, on which it is written that Mukankubito Daphrose is married to Nahimana Pierre, those documents are the *Certificat de résidence historique, légalisation, Composition de ménage, Avertissement-extrait de rôle Impôt des personnes physiques et taxes additionnelles*.

[59] The Court, pursuant to article 117 of the aforementioned 04/05/1895's decree and noting reasons of rejection of the marriage certificate to prove legal marriage between Mukankubito Daphrose and Nabimana Pierre as expressed in previous paragraphs, finds that the fact for them to appear on various documents issued in Belgium as married, does not substantiate that they are civilly married; thus, the Nyarugenge Intermediate Court did not err in dismissing them.

d. Documents from National Identification Agency (NIDA) and Directorate General of immigration and emigration

[60] Counsel Mugeni Anita states that another dismissed evidence consists of the document issued by NIDA attesting that they concluded a civil marriage. She states also that, the Office of Ombudsman carried out an investigation to Immigration Office, where it found that among the documents filled in by Nabimana Pierre, he mentioned that he is married to Mukankubito Daphrose.

[61] Concerning the documents issued by NIDA, the Counsel for Nabimana Pierre argues that they also cannot be relied on as evidence for reviewing the case due to injustice because their content that Nabimana Pierre is married to Mukankubito Daphrose, has been rectified in NIDA's database, where it is now clear that Nabimana Pierre is single as indicated by the certificate of celibacy (*attestation de célibat*) issued to him on 20/4/2016 as well as the new one of 31/10/2019. With regard to documents in the custody of the immigration administration where Nabimana Pierre mentioned that he married Mukankubito Daphrose; they reply that he filled those documents in consideration of their religious marriage, but that apart from that he does not admit they concluded a civil marriage.

DETERMINATION OF THE COURT

[62] The court notes that Mukankubito Daphrose requested in writing to National Identification Agency (NIDA) information concerning Nabimana Pierre's civil status which, based on National ID Data, replied to her that he is married to

Mukankubito Daphrose. Furthermore, on 18/12/2019, the Director-General of the National Identification Agency (NIDA) issued a “To Whom It May Concern” informing that Mukankubito Daphrose is married to Nabimana Pierre. In addition, on 28/12/2019, that Office addressed a note to the Executive Secretary of Kimihurura sector replying to his information inquiry about Nabimana Pierre that the latter is married to Mukankubito Daphrose. The Court considers these documents unreliable evidence to prove their civil marriage since they don’t replace the marriage credential which was provided for by article 117 of the aforementioned decree Law of 04/05/1985. For this reason, the arguments of counsel Mugeni Anita, that the Intermediate Court disregarded those elements of evidence is groundless.

- **With respect to damages requested in this case**
- **Analysis of damages requested by Mukankubito Daphrose and Nabimana Pierre**

[63] Mukankubito Daphrose argues that, since she suffered injustice in the case under review due to injustice, she prays the Court to order Nabimana Pierre to pay her judicial damages amounting to 15,000,000 Frw (for air tickets and accommodation) for each instance undertaken (Primary Court, High Court, Office of Ombudsman, the Supreme Court), and the Counsel fee equivalent to 1,500,000 Frw at each instance and the total of 13,500,000Frw for almost 9 trial instances it underwent.

[64] Nabimana Pierre states that he prays the Court to order Mukankubito to pay him damages for dragging him in lawsuits equivalent to 10,000,000 Frw and judicial damages equivalent to

2,000,000Frw, as well as Counsel fees equivalent to 10,000,000 Frw.

DETERMINATION OF THE COURT

- Concerning damages for being dragged in an unnecessary lawsuit

[65] The Court finds that damages requested by Nabimana Pierre for being dragged in unnecessary lawsuits should not be awarded given that Mukankubito Daphrose has the right to file her claim for the court to examine whether the injustice she pretends to have suffered from Nabimana Pierre's actions has merit.

- Concerning procedural and counsel fees

[66] The Court finds that Mukankubito Daphrose should not be awarded procedural and counsel fees because there was no injustice as a result of either the misinterpretation of the Law or disregarding the evidence presented in the judgment under review due to injustice.

[67] The Court finds that Nabimana Pierre deserves to get paid for judicial damages and counsel fees, because it was incumbent to follow up the court claim filed by Mukankubito Daphrose against him, and hired legal counsel services to assist him. However, the Court finds that he should not be awarded 2,000,000 Frw he requests because he did not provide substantive evidence and finds it excessive, therefore, the Court awards him a discretionary amount of 300,000 Frw for judicial damages and regarding counsel fee, the Court finds that it could not award him

10,000,000Frw he requested because it is excessive and he failed to produce supporting evidence, and for this reason, he is awarded a discretionary amount of 500,000 Frw.

III. DECISION OF THE COURT

[68] Decides that the application for review of the judgment RCA0106/15/TGI/NYGE rendered on 18/05/2015 by Nyarugenge Intermediate Court due to injustice, filed by Mukankubito Daphrose lacks merit;

[69] Upholds the ruling of the judgment RCA0106/15/TGI/NYGE rendered by Nyarugenge Intermediate Court on 18/05/2015

[70] Decides that the damages requested by Mukankubito Daphrose are without merit;

[71] Orders that Nahimana Pierre should not be awarded damages for being dragged in unnecessary damages.

[72] Orders Mukankubito Daphrose to pay 300,000Frw for procedural fees and 500,000Frw for counsel fees, the total being 800,000Frw.

RIZIKI v. MUBIRIGI

[Rwanda SUPREME COURT – RS/INJUST/RC00001/2019/SC
(Kayitesi Z, P.J, Nyirinkwaya, Cyanzayire, Rukundakuvuga and
Hitiyaremye, J.) 29 November 2019]

Family law – Divorce – Sharing spouse’s property due to divorce – If spouses married under community property regime divorce, the principle is that, they have to share equally the property whereby they either sell their property and then share the proceed of sale, or share the property in its state or again one of the spouse can pay the other the equivalent of property’s value in money in order to keep it without sharing. In case the spouses fail to reach a agreement on any means of sharing, it is up to the judge to establish the fair sharing procedure for the couple.

Facts: This case was initiated before Nyarugunga Primary Court where Riziki Filed a divorce claim on ground of excesses, abuses and seriously insults to her by her husband Mubirigi. He adds that their cohabitation deteriorated, consequently, she prayed the Court to grant divorce and given that they are married under community property regime, it should be ordered the sharing of their properties. The Court granted the divorce and awarded legal custody of children to Riziki whereas Mubirigi remains entitled with the right of visit. With regard to their property, the Court ordered the sharing of the proceeds of sale. The plaintiff was not contented with that decision and appealed before Nyarugenge Intermediate Court alleging that all grounds she raised were not examined, that some evidence were disregarded, that the Court did not take into account the children’s interests while sharing their properties and it did not order the respondent to pay for

alimony. The Court found her appeal with merit in part and ordered him to pay monthly alimony and to jointly share the cost of their children's education.

The plaintiff lodged a second appeal to the High Court but her appeal was not admitted. Then she wrote to the President of High Court requesting to review the case rendered by the Intermediate Court due to injustice. The president of the High Court wrote to the president of Supreme Court requesting its review indicating that it is vitiated with injustice, which the President admitted.

. The applicant of review requested to be given the house instead of being sold for the sake of children accommodation because its sale is likely to deprive children of a shelter. She states that, being the one who has custody of the children, she would keep the family house, while Mubiligi will keep other properties whose value is higher than that of the concerned house.

Mubirigi argues that, the fact for the Court to have ordered the sharing of the proceeds of sale of their properties does not amount to injustice, because as long as everyone obtained his/her share, she could acquire her own house and that, those children on whom she relies have become mature, and that if other joint properties she stated are more valued than the house, she may keep them all instead and let him with the house only so that he may get a shelter during his retirement period which is close.

Held: If spouses married under community property regime divorce, the principle is that, they have to share equally the property whereby they either sell their property and then share the proceed of sale, or share the property in its state or again one of the spouse can pay the other the equivalent of property's value in money in order to keep it without sharing. In case the spouses don't reach an agreement on any means of sharing, it is up to the

judge to establish the fair sharing procedure for the couple. Thus, as it is clear that Riziki and Mubirigi failed to reach an agreement on how to share their properties, the Court should decide and therefore their properties should be sold in order for them to share equally the proceeds of sale.

The claim for review of the judgment due to injustice lacks merit.

Statutes and statutory instrument referred to:

Law N° 32/2016 of 28/08/2016 governing persons and family as modified and complemented to date, articles 8 and 242.

Cases referred to

Murayire v Sindikubwabo, RS/REV/INJUST/CIV 0029/16/CS rendered by the Supreme Court on 01/06/2018

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Riziki Nicole legally married Mubirigi Rwamfizi Jean Paul on 03/07/1999 in former Rubavu commune (current Gisenyi sector). they gave birth to 3 children namely Mugisha Daniel, Singiza Prisca and Ntwari Arnold Peace. They share the following properties:

- a. the plot N° UPI1/03/05/04/596 containing a house and its boy's quarters located in Rubirizi cell, Kanombe sector, Kicukiro district.
- b. the plot N° UPI 1/03/05/03/4108 located in Karama cell, Kanombe sector in Kicukiro district;
- c. The plot No UPI 1/02/10/04/3037 located Murama cell, Kanyinya sector in Gasabo district;
- d. Movable property construed of a Toyota Corolla RAA 864 N car, and household equipment.

[2] Riziki Nicole states that their cohabitation became worse, to the extent that Mubirigi Rwamfizi Jean Paul used to mistreat, abuse and seriously insult her, which led her to institute a divorce claim before Nyarugunga Primary Court and was registered on RC 0296/16/TB/NYRGA. The judgment was rendered on 06/07/2017.

[3] The Court decided that Mubirigi Rwamfizi Jean Paul and Riziki Nicole are divorced and awarded the custody of the children to Riziki Nicole while their father maintains the right of visit. It ordered that:

- a. Their immovable property as aforementioned will be sold and the proceeds of sale be shared equally between Riziki Nicole and Mubirigi Rwamfizi Jean Paul;
- b. The movable property comprising a vehicle and household equipment will be sold and the proceeds of sale be shared equally between them.

[4] Riziki Nicole lodged an appeal against that judgment before Nyarugenge Intermediate Court, basing on the following grounds:

- a. All issues indicated in a divorce claim were not examined;
- b. The Court based on false and contradictory grounds;
- c. The Court disregarded the evidence indicated in judgment RC00447/16/TB/NYRGA which ordered the husband to leave the spouse's house;
- d. The Court neither did hear the testimonies of the children nor it did take into account children's interests in properties sharing;
- e. The Court granted the divorce basing on both parties' faults, and it did not order Mubirigi Rwamfizi Jean Paul to pay any alimony.

[5] The case in appeal was recorded on RCA00110/2017/TGI/NYGE and the judgment rendered on 31/05/2018 whereby the Court found Riziki Nicole' appeal with merit in part and ordered Mubirigi Rwamfizi Jean Paul to keep paying children's monthly alimony amounting to one hundred and twenty thousand (120,000 Frw) and jointly share with Riziki Nicole the responsibility to pay for children's tuition fees.

[6] Riziki Nicole made a second appeal before the High Court but the Court rejected it and on 13/02/2019 she wrote to the president of the High Court requesting him to examine the injustice suffered in the judgment RCA00110/2017/TGI/NYGE. After assessment of Riziki Nicole's request, The President of the

High Court wrote to the President of Supreme Court requesting him to review the case due injustice.

[7] President of the High Court explained that the injustice resides on:

a. The fact that in the course of the adjudication of the judgment RCA00110/2017/TGI/NYGE, the Court remained silent on the amount of 5,000,000Frw of which Riziki Nicole alleges to be deposited on bank account while it was the subject of debate as part of sharing properties as indicated in hearing minutes dated 01/03/2018;

b. The fact that the Court did not indicate the amount of tuition fees for children to be paid by each spouse basing on his/her means, which may result in failure of execution of the judgment if parties don't reach an agreement thereto.

[8] On 07/05/2019, the President of Supreme Court took an order number 096/CJ/2019 whereby he instructed to review the case RCA00110/2017/TGI/NYGE which was rendered at last instance by Nyarugenge intermediate Court due to injustice. He ordered to register the case on the cause list and was numbered RS/INJUST/RC 00001/2019/SC. The hearing of the case was scheduled on 11/09/2019.

[9] On 11/09/2019, the hearing was held in public, Riziki Nicole assisted by Counsel Mukandera Clothilde whereas Mubirigi Rwamfizi Jean Paul was assisted by Counsel Subukonoke Emmanuel. Litigants held debates on the issue regarding the sharing of the house built at the plot n° UPI1/03/05/04/596 located in Rubirizi cell, Kanombe sector,

Kicukiro district. Riziki Nicole indicated to the Court that she wishes to keep the concerned house for the sake of the children and in order to be raised in this house. Mubirigi Rwamfizi Jean Paul argues that he should be the one to keep the concerned house so that he gets a shelter during his retirement period which is close. Another main issue debated is the retirement pension allocated to military personnel going into retirement. Riziki Nicole states that the concerned amount of money was not included among the property destined for sharing whereas Mubirigi Rwamfizi Jean-Paul argues that, this was not part of the claim before the previous Courts.

[10] The hearing of the case was closed and the parties were notified about the date of pronouncement which is 18/10/2019. The Court found during the withdraw for deliberation that, before the pronouncement of the judgment it must be informed from Zigama CSS about the deposit on account n° 0049633 as savings allocated to military personnel who retires, especially the amount of money deposited on that account since 13/07/2016, date of filing the divorce claim, till 10/05/2019.

[11] Zigama CSS provided with the Court the bank statement indicating that on 26/07/2016 the deposit on account n° 0049633 was 5,021,920Frw, while on 25/04/2019 the deposit was 6,741,856Frw. The hearing resumed on 11/11/2019 for the parties to argue on the information provided by Zigama CSS. During the hearing, Riziki Nicole motion to the Court that she dismisses that claim in relation to that amount of money and leaves it for Mubirigi Rwamfizi Jean Paul, consequently, this issue should not be analysed.

[12] The main issue consists of determining whether during the sharing of the properties, the house built at plot n° UPI

1/03/05/04/596 can remain in the custody of Riziki Nicole in order to accommodate the children and in their interests.

II. ANALYSIS OF THE LEGAL ISSUE.

- **Whether during the sharing of the properties, the house built at plot n° UPI 1/03/05/04/596 can remain in the custody of Riziki Nicole in order to accommodate the children and in their interests.**

[13] With regard to this issue, Riziki Nicole explains the injustice she suffers in the following terms:

- a. The Primary Court had ordered that the common property of Riziki Nicole and Mubirigi Rwamfizi Jean Paul has to be sold while disregarding that all children are still young and need a shelter to live in with a parent in charge of raising them.
- b. The Intermediate Court should have rectified that error and allocate the house to her; thus, it disregarded the provisions of article 3 of the Convention on the Rights of the Child which states that in all actions concerning children, whether undertaken by various institutions or courts of law, the best interests of the child shall be a primary consideration;
- c. The aforementioned article corroborates with article 4 of African Charter On the Rights and Welfare of the Child stating also that in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration. The decision taken by both Courts is also contrary to the

provisions of article 227 of the Law N° 32/2016 of 28/08/2016 governing persons and family.¹

d. the fact for the Court to have ordered the sale of properties entails that it will be done through auction. This consists of obstruction to the wellbeing of the children, especially that one of them is already traumatised and is followed by Ndera Hospital. Another one got a heart attack and was operated in Europe for those reasons the Intermediate Court should have reversed the decision of the Primary Court and decide that the house built at plot n°UPII/03/05/04/596, whose value is 36,500,000Frw is allocated to Riziki Nicole's side while Mubirigi Rwamfizi Jean Paul is awarded plots valued at more than 50,000,000Frw and pay the balance;

e. In her cohabitation with Mubirigi Rwamfizi Jean Paul, she was the victim of severe household violence which led her to file for divorce, but she did not get justice because the Court granted the divorce basing on reciprocal faults and as a result, she was not allocated the house.

f. The allocation of the house to her is not contrary to the Law because she has the custody of the children who are still young. She states that, though Singiza Prisca is 20 years old but she has got heart illness, the second is aged 17 but has trauma and the one who completed secondary education is still living at home. Thus, if the house they live in is auctioned, the children will become homeless,

¹Where the court orders separate residence, except in case where spouses are married under the regime of separation of property, movable and immovable assets are provisionally shared, after the inventory signed by both parties, in consideration of interest of children and the profession of spouses.

and this will cause them more trauma than that they suffered after her divorce with Mubirigi Rwamfizi Jean Paul.

g. She concludes by stating that, another ground of injustice is that the Court disregarded the evidence of property valuation report indicating that the value of the house built at plot UPI:1/03/05/04/596 amounts to 36,523,640Frw, while that of the plot UPI: 1/03/05/03/4108 is 46,426,000Frw and another plot whose UPI: 1/10/04/3037 is valued at 5,096,000Frw; thus, if the interests of the children are taken into consideration, Mubirigi Rwamfizi Jean Paul should have been given those plots valued at 51,522,000Frw which is much higher than the value of the house, then she would remain with the house within which she will raise the children.

[14] Counsel Mukandera Clothilde who assist her states that article 245 of the Law governing persons and family in Rwanda was disregarded and that if the spouse's house is sold, the children will remain without shelter and their interests ignored. She argues that based on that article, she finds that Riziki Nicole being the one who looks after the children, she should keep that household house while Mubirigi Rwamfizi Jean Paul would keep other properties whose value is higher than that of the house which Riziki Nicole requests to be allocated.

[15] Mubirigi Rwamfizi Jean Paul states in his rebuttal to Riziki Nicole's grounds that:

a. The fact for the Court to have ordered the sale of their co-owned properties does not constitute an injustice, because it is in compliance with the provision of article 8

of the Law n° 27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions², as well as the writings of Law scholars, indicate that the entire properties to be shared in case of divorce consists of the assets existing on the day of the divorce and liabilities towards other persons (*...La masse à partager se compose des biens existants au jour du divorce, sur base de l' inventaire, tout en déterminant le passif commun*; Alain Duelz, *Le droit du divorce*, 3 éd., Bruxelles, De Boeck & Larcier, 2002).

b. Children have already grown, because Singiza Prisca is 21 years old, Ntwari Peace Arnold is 18 and both completed secondary education and are waiting to register at University. The third one Mugisha Daniel is 15 years old and is about to complete O level “Tronc commun”, thus he finds that the decision taken by both Courts (Nyarugunga Primary Court and Nyarugenge Intermediate Court) of selling out community properties and sharing the proceed of sale equally complies with the law. He states that in case of sharing, each will get his/her part and may buy a house, and children will live wherever they choose to be especially that they have grown;

c. The properties he shares with Riziki Nicole are not only immovable properties (a house and two plots of land) but they share also movable properties (household equipment and a vehicle) as mentioned in the decision of Nyarugunga Primary Court, he does not thus understand

² Where dissolution of community of property regime occurs following divorce or change in the type of matrimonial regime, those whose marriage was under the community of property regime, share equally or according to any other agreed-upon method the assets and liabilities of the community.

why Riziki Nicole emphasizes only on immovable property, mostly the house;

d. If Riziki Nicole finds the two shared plots have more value than the house, he prays the Supreme Court to order Riziki Nicole to keep those plots, as well as the vehicle and the house equipment while he will be allocated the house so that none of them may lose. He states that he is aged 47, and remain only with 3 years to retire, he needs thus a shelter;

e. The statement of Riziki Nicole that she is victim of domestic violence is not true rather she intends to instigate emotions because she seeks the house, if he behaved so, he would have been punished by Gasabo intermediate Court as it was prosecuted. He explains that he is the one who bought the house under litigation from the loan granted by Zigama CSS, but that loan has been reimbursed as he got a chance to go for a mission abroad.

f. The argument that if the house is sold it will traumatize the children, is false because children are healthy as even Singizwa who went through heart operation is fine to date, though Riziki Nicole sent him in Canada without informing him;

g. Though he does not agree with the property valuation report made by Riziki Nicole, for reaching a compromise, he will give her 50% of the value of the house, all house equipment and the vehicle, and then share the remaining plots, and he will also raise the children because he is capable of doing it especially that they are mature. He states that he does not understand why she refuses to sell and share the proceed of sale, whereas if they sell out,

they can get much money, enough for her to buy another house better than what they own.

[16] Counsel Sebukonoke Emmanuel who assists Mubirigi Rwamfizi Jean Paul states that the case under review does not entail injustice, because it relied on the Law. He argues that if spouses divorce, they share equally the community properties and have the obligation to raise their children depending on their means, and that the Law did not provide that children will prevail over property sharing.

DETERMINATION OF THE COURT

[17] Article 242 of the Law N° 32/2016 of 28/08/2016 governing persons and family provides that the divorce entails the dissolution of marriage and matrimonial regime of spouses. The property is shared according to the law governing matrimonial regimes. In addition, article 8 paragraph one of the Law N° 27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions provides that “Where dissolution of community of property regime occurs following divorce or change in the type of matrimonial regime, those whose marriage was under the community of property regime, share equally or according to any other agreed-upon method the assets and liabilities of the community. However, the court may order that the value of damages caused by either spouse be deducted from his/her share”.

[18] The interpretation of these provisions suggests that if spouses married under community property divorce, the principle is that, they have to share equally the property. The Law did not provide for the procedure of sharing, whether they have to sell

their property and then share the proceed of sale, or share the property in its state without any sale or again one of the spouses can pay the other the equivalence of the property in money and keep it without sharing. If the spouses don't reach an agreement, the judge in his/her discretion establishes the fair and equitable sharing between spouses.

[19] As far as this this case is concerned, the Court finds that parties had in community properties the following:

- a. A house which has a boy's quarter built at plot n° UPI:1/03/05/04/596, located in Kanombe sector, Kicukiro district;
- b. A plot n° UPI:1/03/05/03/4108 located in Kanombe sector, Kicukiro District;
- c. A plot n° UPI:1/02/10/04/3037 located in Kinyinya district, Gasabo district;
- d. Various movable property and Toyota Corolla RAA864 car.

[20] Riziki Nicole states that she is willing to give up other plots, and remain with the plot within which a house is built in which she will raise the children, whereas Mubirigi Rwamfizi Jean Paul argues that, he is not willing to give up that house especially that he needs it the most, and that he is ready to raise the children because they are mature. The Court finds therefore that since the spouses failed to reach an agreement, it has to decide discretionally.

[21] The Court finds, as ruled by Primary and Intermediate Courts, the fair and indisputable decision likely to put an end to recurrent court proceedings consists of selling the community

property of Riziki Nicole and Mubirigi Rwamfizi Jean Paul and share equally the proceeds of the sale, while each of them fulfilling parental obligations towards their children.

[22] The Court finds without merit the arguments of Riziki Nicole that, if the house is auctioned it will instigate traumatism consequences on children because they consist of hypothetical thoughtsf, the Court finds also that, nothing prevents the spouse to buy another house after the sharing of the proceeds of sale and the children cannot be deprived of a shelter.

[23] The Court finds also that, the sale of the spouses' property and sharing of the proceeds of sale corroborates the decision in the case RS/REV/INJUST/CIV 0029/16/CS rendered by the Supreme Court on 01/06/2018 where parties were Murayire Marie vs. Sindikubwabo Louis.

[24] The Court finds then consequently that, basing on motivations above, and on article 242 of the Law n° 32/2016 of 28/08/2016 governing persons and family and article 8 paragraph 1 of the Law n° 27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, the community property of Riziki Nicole and Mubirigi Rwamfizi Jean Paul have to be sold and share equally the proceeds of sale, as it was decided by previous Courts.

III. DECISION OF THE COURT

[25] Admits Riziki Nicole's claim for review due to injustice of the judgment RCA00110/2017/TGI/NYGE rendered by Nyarugenge Intermediate Court on 31/05/2018;

[26] Finds the judgment RCA00110/2017/TGI/NYGE rendered by Nyarugenge Intermediate Court on 31/05/2018 without injustice;

[27] Upholds the ruling of the judgment RCA 00110/2017/TGI/NYGE rendered by Nyarugenge Intermediate on 31/05/2018;

[28] Decides that the plot UPI:1/03/05/04/596 within which a house and a boys' quarter are built, have to be sold too, whereby Riziki Nicole and Mubiligi Rwamfizi Jean Paul have to share equally the proceeds of sale.

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UWAMWEZI v RANGHELLA

[Rwanda SUPREME COURT–
RS/REV/INJUST/CIV.0012/16/SC (Kayitesi, P.J, Nyirinkwaya,
Hatangimbabazi and Kanyange, J.) 1 june 2018]

Family law – Divorce – Community of property – A consent agreement of sharing properties made between spouses married under community property regime, is void if it's purpose is not to modify matrimonial regime between the spouses, because they are still under community property regime as long as they are not yet divorced.

Facts: This case started before Kacyiru Primary Court Ranghella suing Uwamwezi for divorce due to excess, abuse and serious insults, he requested also the Court to sustain the sharing contract they both made. The Court rendered the judgment and the divorce was not granted because it lacked evidence that Uwamwezi does excess, abuses and seriously insults Ranghella, the Court decided also that, the sharing contract is void.

Ranghella was not contented with that judgment and appealed before Gasabo Intermediate Court which decided that that appeal has merit in part, it decided that the divorce is not granted, but it sustained the sharing contract (*contrat de partage*).

After two years, Ranghella filed a new divorce claim before Primary Court for the grounds that he has separated from his wife Uwamwezi for a period of three years, the Court granted the divorce and decided also that with regarding the properties, the sharing contract (*contrat de partage*) confirmed by the

Intermediate Court in previous case which acquired res judicata principle is sustained.

Uwamwezi did not get contended with that decision and appealed before Gasabo Intermediate Court stating that the sharing contract was illegal because the Court would not be basing on sharing contract (*contrat de partage*) whereas they are married under community property regime, thus it should have based on the law. The Court found without merit her appeal, it found baseless the statement that the contract does not prevail over the Law because it is a contract made between parties, and was never declared void.

Uwamwezi was not contended with the ruling of that judgment, then she wrote to the Ombudsman stating that the concerned judgment is vitiated with injustice, thus, she requests for its review, the Ombudsman after assessment submitted the issue to the Supreme Court which admitted to review the case due to injustice. During the hearing, the counsel for the claimant indicated that the case under review is vitiated with injustice with regarding the sharing of the properties where the Court based on the sharing contract which they don't even recognize because she signed it ignoring its content, that the concerned contract could not be based on because it could not prevail over the matrimonial regime under which they are married and which has never been modified thus, they should share their properties basing on the principle that divorced couple must share their properties in case they are married under community property regime.

The counsel for Ranghella argues that the statement of Uwamwezi about the case which she pretends is vitiated with injustice whereas the latter did not infringe the Law by deciding that the issue of properties sharing was resolved by the judgment which acquired res judicata principle, he finds then that the issue

of property sharing could not be adjudicated again before Courts, because it was adjudicated earlier in previous judgments. The counsel for Ranghella argues that the statement of Uwamwezi is without merit that she does not recognize the sharing contract (*contrat de partage*) because she signed it ignoring its content and does not indicate where that contract caused her injustice or where it infringed the Law.

Held: 1. A consent agreement of sharing properties made between spouses married under community property regime, is void if it was not concluded aiming at modifying matrimonial regime between the spouses, because community property regime is still valid as long as they are not divorced, thus the sharing contract of properties between Ranghella and Uwamwezi is void regarding the sharing of properties basing on the matrimonial regime they chosen during their marriage.

**Review of the case due to injustice has merit;
The decision of the case under review is reversed with
regarding the properties sharing.**

Statutes and statutory instruments referred to:

Organic Law N° 03/2012/OL of 13/06/2012 determining the organisation, functioning and jurisdiction of the Supreme Court, articles 33, 78, 79, 80 and 81;

Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 9 and 11;

Law N° 22/99 of 12/11/1999 completing Book One of Civil Code and instituting part five regarding matrimonial regimes, liberalities and successions, articles 19 and 24.

No cases referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] In the case RC 0377/08/TB/KCY rendered by the Primary Court of Kacyiru, Ranghella Giuseppe, who married Uwamwezi Joséphine, sued his wife for divorce for excess, abuse and serious insults from her towards him; and prayed the Court to sustain the sharing contract they made on 06/07/2007, (see paragraph 7, 26, 28 and 31 of that case RC 0377/08/TB/KCY).

[2] In her defence regarding divorce, Uwamwezi Joséphine argued that she does not consent to the divorce whereas, regarding the sharing contract, she states that, she does not recognize it, as her lawyer led her signing the contract whereas she ignores its content because she does not master French in which it is drafted and does not include their properties located in Europe, and that she bore alone all family loans and she is selling houses referred to in that sharing contract in ignorance of her husband (see paragraph 9, 27, 29 and 30 of that case RC 0377/08/TB/KCY).

[3] The Primary Court of Kacyiru rendered the the judgment RC 0377/08/TB/KCY on 28/11/2008, and decided that the divorce is not granted because there is no evidence that Uwamwezi Joséphine does excess, abuses and seriously insults Ranghella Giuseppe, it decided also void, the sharing contract of 06/07/2007.

[4] Ranghella Giuseppe was not contended by the ruling of that judgment and appealed before the Intermediate Court of Gasabo, the case was registered on RCA 0180/08/TGI/GSBO, in that appeal, Ranghella Giuseppe continues requesting for divorce, whereas regarding the sharing contract, he argues that the judge couldn't declare it void while he did not grant the divorce and Uwamwezi Joséphine did not even request that, (*ultra petita*). He argued also that, the statement of Uwamwezi Joséphine that she does not recognize that contract because as it is drafted in french which she does not master is false as all her correspondences are in french, and it was not compulsory for children to sign, because they are heirs regardless the sharing of the property (see article 4, 5 of the judgment RCA 0180/08/TGI/GSBO)

[5] In her defence in appeal, the representative of Uwamwezi Joséphine argues that, the statement of Ranghella Giuseppe that, the judge ruled "*ultra petita*" is false, because, it is Ranghella Giuseppe who brought that sharing contract before the Court, was then part of litigation, they couldn't ignore it any way. He added that sharing of properties for spouses, has to be approved by the Court in case of divorce by mutual consent, which is not the case for the judgment in hand, reason why the sharing contract is void (*nul et de nul effet*).

[6] After assessment of both sides' submissions, the Intermediate Court of Gasabo, rendered the judgment RCA 0180/08/TGI/GSBO on 07/08/2009, and held that the appeal of Ranghella Giuseppe has merit in part, it decided that the divorce is not granted, that the "the sharing contract" is sustained.¹ That judgment was not subjected to appeal.

1. Gasabo Intermediate Court stated in paragraph 33 of the judgment RCA 0180/08/TGI/GSBO that "article 24 of the Law n°22/99 of 12/11/1999 [...]"

[7] Ranghella Giuseppe, after loosing the case for divorce in the aforementioned case, he filed a new case before Kacyiru Primary Court which numbered RC 0422/10/TN/KCY and was requesting again divorce, for the grounds that his wife and him are separated since three years.

[8] Kacyiru Primary Court, rendered the judgment on 13/02/2012, and decided that Ranghella Giuseppe is divorced to Uwamwezi Joséphine, it decided also that the issue of properties has been answered in case RCA 0180/08/TGI/GSBO because it decided that the sharing contract made on 07/06/2007 is sustained and that judgment has acquired *res judicata* principle, thus each one should keep the properties acquired that time and their related interests.

[9] Uwamwezi Joséphine appealed before the Intermediate Court of Gasabo, then by the judgment RCA 0127/12/TGI/GSBO rendered on 27/01/2014, that Court decided that the divorce is granted, and with regarding the properties, the sharing contract of 07/06/2007 should apply because it is a contract made by both parties and it has never been declared void, it motivated that the statement of Uwamwezi Joséphine that the sharing contract does not prevail over the community property regime under which they are married, has no merit because it is a contract made

completing book one of civil code and instituting part five relating to matrimonial regime, liberalities and succession provides that The regime of community of property and that of limited community of acquests shall be dissolved by: divorce; legal separation; modification of the marital regime. Thus as long as Uwamwezi and Langhela have not apply before the civil status officer for modification of their marital regime, though they have signed a contract which indicates how they shared their properties, community property agreed upon during marriage, remain valid”

between both parties and has never been declared void, as it was motivated in the judgment RC 0180/08/TGI/GSBO.

[10] Gasabo intermediate Court found with no merit the statement of Uwamwezi Joséphine that the sharing of the properties was based on the contract of 06/07/2007 which disresarded the Law, because she has no legal reference, it found without merit the argument that the sharing contract does not prevail over the community property regime under which they are married, because it is a contract made between both parties and has never been declared void as it was explained by the representatives of the claimant.

[11] Uwamwezi Joséphine was not contented by the decision of that case and wrote to the Ombudsman office arguing that the judgment RCA 0127/12/TGI/GSBO is vitiated with injustice. She explained to the Office of the Ombudsman that injustice she suffered is based on the the decision of Gasabo Intermediate Court which decided with merit about the divorce but it did not decide about the sharing of the spouses' properties basing on the community property regime, this is contrary to the provision of the Law No 22/99 of 12/11/1999 completing Book One of civil code and instituting part five regarding matrimonial regimes, liberalities and successions.

[12] The office of Ombudsman after assessment of the claim it received, it found that the judgment RCA 0127/12/TGI/GSBO aforementioned is vitiated with injustice because Ranghella Giussepe and Uwamwezi Joséphine were married under the community property regime, at time of deciding about divorce, the Court did not share neither their properties nor their loans as it is provided by article 24 of the Law N° 22/99 of 12/11/1999 aforementioned, whereas they did not reverse their matrimonial

regime, it stated also that the Court decided the case basing on the sharing contract whereas it does not replace the community regime under which they are married, it requested the President of the Supreme Court to review the case due to injustice, the latter decided to review the case too, so that the Court can analyse the injustice which vitiates it.

[13] The hearing of the case happened in public on 26/09/2017, Uwamwezi Joséphine represented by Counsel Ndagijimana Emmanuel, whereas Ranghella Giuseppe is represented by Counsel Nkurunziza François Xavier, the latter raised the objection of inadmissibility of the claim because there is a case RC 0180/08/TGI/GSBO which acquired *res judicata* principle and which sustained the sharing contract between Uwamwezi Joséphine and Ranghella made on 06/07/2007 (*contrat de partage*), he states that in sharing the properties of the spouses none Law was disregarded, thus Uwamwezi Joséphine who filed a claim for injustice does not have interests in the case.

[14] The Court decided that the objection will be analysed together with the case in merit, basing on the provision of article 78 paragraph 4 of the Law N° 21/2012 of 14/06/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.

[15] The Court continued with the hearing, but in the middle, it found necessary to look for further evidence and explanations before closing the hearing, it requested Counsel Ndagijimana Emmanuel to look for figures which indicate that there is balance which remained from the house sold for reimbursement of the loan taken by Uwamwezi Joséphine in Banque Rwandaise de développement (BRD), and he should also indicate personal accounts either of Uwamwezi Joséphine or for La Comète

company, since the commencement of the case till now, whereas Counsel Nkurinziza François Xavier was ordered to indicate how the plot no 99 was registered on Ranghella Giuseppe's company namely SOGIS and the amount of money it costed.; to produce the deed of the houses located in Belgium and in Roma and their property valuer report « expertises » he should also indicate the accounts statement either of Ranghella Giuseppe or of SOGIS since two years from the adjudication of the case which is vitiated by injustice. The Court ordered also both parties to the case to insert in the case file all copies of the judgment they referred to, and all relevant evidence which they find useful to the Court.

[16] All these reasons led the Court to postpone the hearing of the case for the first time on 05/12/2017, then for the second time on 06/02/2018, that day parties appeared before the Court represented as before, the case was adjudicated and closed, its pronouncement was scheduled on 16/03/2018.

[17] In its deliberation to decide upon the case, the Court found it necessary to look for further explanations about the movable and immovable properties of parties to the case, it ordered consequently parties to the case the following :

1. Ranghella Giuseppe has to produce before the Court, in written, SOGIS Ltd's house located in plot n°2603 in Kamonyi, which was acquired from selling price of the plot n° 99/Nyarugenge which became afterwards n° 778/Nyarugenge, and should also produce before the Court all documents related either to latter plot since its acquisition, or related to property transfer on it;
2. Ranghella Giuseppe has to produce before the Court the value for money for the shares he has in SOGIS Ltd

company, movable and immovable properties of SOGIS Ltd company and their value for money.

3. Ranghella Giuseppe and Uwamwezi Joséphine have to produce before the Court, respectively, the value for money of the shares they have or they had in la Comète Company, movable and immovable properties of La Comète Company and its value, and they should indicate its bank accounts number and the available money on them.

4. Uwamwezi Joséphine must produce before the Court the case she stated that she lost against Kayitesi Monique which value is 120,000,000 Frw and the relationship between that case and the current case;

5. Uwamwezi Joséphine must produce before the Court the value of the loan which she stated that, it is evidenced by the Court cases she lost before the Supreme Court, and its relationship with this case;

6. Ranghella Giuseppe and Uwamwezi Joséphine have to produce before the Court the amount of the money they have in Rwandan banks and abroad, they should also indicate accounts number and money deposited on them;

7. Ranghella Giuseppe and Uwamwezi Joséphine have to produce before the Court, respectively how the Concession Carlo Mo mentioned in this case (Giti cy'inyoni) is managed.

[18] On 09/04/2018 counsel Nkurunziza François Xavier who represents Ranghella Giuseppe produced a document containing explanations about properties, then on 12/04/2018, Counsel Ndagijimana Emmanuel who represents Uwamwezi Joséphine

also provided explanations regarding those properties, and had a say about explanations provided by Counsel Nkurunziza François Xavier who represents Ranghella Giuseppe.

[19] The hearing resumed again on 17/04/ 2018 as it was scheduled in interlocutory judgment on 16/03/2018, that day Counsel Ndagijimana Emmanuel who represents Uwamwezi Josephine appeared before the Court, Counsel Nkurunziza François Xavier who represents Ranghella Giuseppe appeared as well, the case was adjudicated and closed, the pronouncement was scheduled on 01/06/2018.

II. ANALYSIS OF LEGAL ISSUES

a. Whether the objection raised by Ranghella Giuseppe of inadmissibility of Uwamwezi Joséphine's claim to review the case RCA 0127/12/TGI/GSBO due to injustice has merit

[20] The counsel for Ranghella Giuseppe states that the claim of injustice filed by Uwamwezi Joséphine is inadmissible because she cannot indicate where the Court erred in Law in judgment RCA 0127/12/TGI/GSBO for which she applied for review due to injustice. He explains that the issue of property sharing couldn't be submitted to Court again, because it was analysed in cases RCA 0180/08/TGI/GSBO, RC 0422/10/TB/KCY and RCA 0127/12/TGI/GSBO, and sustained the sharing contract made on 06/07/2007 (contrat de partage), he finds that Uwamwezi Joséphine cannot refer to this as injustice because the case RCA 0180/08/TGI/GSBO rendered by Gasabo Intermediate Court decided at last instance that the sharing contract (contrat de partage) must be enforced, and acquired res

judicata principle because there is no another case law which reversed it.

[21] The Counsel for Ranghella Giuseppe argues that the statement of Uwamwezi Joséphine is without merit that she does not recognize the sharing contract (contrat de partage) pretending that she signed it ignoring its content as she does not master French, because she does not indicate where that contract infringed her or where it contradicted the Law, furthermore, that contract provides in article 5 that any disputes should be resolved through arbitration, thus, this arbitration procedure has never been applied to declare void that contract.

[22] The Counsel for Ranghella Giuseppe states that he admits that a case rendered at last instance can be reviewed, however he finds that there was no Law disregarded, because as he aforementioned, other Courts decided upon the issue of Ranguella Giuseppe and Uwamwezi Joséphine's properties definitively, he finds then that there is no injustice in case Law applied for review, whereas upon the sharing issue, there is a decision taken and which acquired res judicata principle.

[23] The Counsel for Uwamwezi Joséphine for his rebuttal about the objection, he states that the judgment rendered for the last instance, which is subject for review due to injustice is the judgment RCA 0127/12/TGI/GSBO, which decided upon divorce as well between Ranguella Giuseppe and his wife Uwamwezi Joséphine, it found that the issue of sharing the properties was resolved in judgment RCA 0180/08/TGI/GSBO which acquired res judicata principle as stated by the counsel for Ranghella Giuseppe, it was decided in the latter judgment to sustain the sharing contract (contrat de partage) of 07/06/2007, however this is the source of injustice for Uwamwezi Joséphine,

that injustice was found by the Office of the Ombudsman because that case did not divide the spouses' properties equally either movable or immovable and even loans they have, whereas they are married under community property regime, this is contrary to article 24 of the Law N° of 12/11/1999 completing Book One of Civil Code and instituting Part Five relating to matrimonial regime, liberalities and successions and article 3 of the same Law, which provides that the regime of community of property is a contract by which the spouses opt for a marriage settlement based on joint ownership of all their property-movable as well as immovable and their present and future charges. Even the article 4 of the same Law which provides that in the event the regime of community of property is altered in accordance with article 19 of the Law afore-mentioned, the spouses shall equally share the assets and liabilities of the common property.

[24] The counsel for Uwamwezi Joséphine concludes by stating that there is no grounds to reject Uwamwezi Joséphine's claim for injustice whereas the injustice has been identified by the Office of Ombudsman, thus, the objection raised by the counsel for Ranghella Giuseppe must be rejected, mostly because he mentions the case RCA 0180/08/TGI/GSBO which acquired *res judicata* principle, but that case did not decide upon divorce, it decided even that the management of matrimonial regime of the spouses should remain community property.

DETERMINATION OF THE COURT

[25] Article 33, of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court provides that "The Supreme Court may undertake a review due to injustice on final

judgements rendered by the Supreme Court itself or other courts, basing on the provisions of this Organic Law”.

[26] Article 78 of the Organic Law N° 03/2012/OL aforementioned provides that:” the Supreme Court shall have exclusive jurisdiction over applications for review of final decisions due to injustice upon approval of the President of the Supreme Court.”

[27] Article 79 of the Law N° 03/2012/OL aforementioned provides that “The Office of the Ombudsman shall be the competent organ to petition the Supreme Court over application for review of a final decision due to injustice. When the Office of the Ombudsman finds that the decision handed down is unjust, it shall send to the President of the Supreme Court a letter accompanied by a report on the issue and evidence of such injustice and request to re-adjudicate the case. Application for review of a final decision due to injustice shall not be subject to screening”.

[28] Article 80 of the Organic Law N° 03/2012/OL aforementioned provides that “After considering the report of the General Inspectorate of Courts, the President of the Supreme Court shall decide that the case be re-adjudicated, he/she shall send the file to the Chief Registrar of the Supreme Court for recording it in the relevant registry, and he/she shall set the date of hearing and determine the bench. He/she shall also designate from among the members of the bench a judge rapporteur”.

[29] Article 81 of the same Organic Law N° 03/2012/OL of 13/06/2012 provides in the paragraph 2 that “However, the party entitled to other ordinary and extraordinary procedures to appeal who did not exercise this right within the time limit prescribed by

law shall not be entitled to invoke the provisions of this Section to apply for review of a decision of the case he/she lost”.

[30] As regarding to grounds for inadmissibility of the claim, article 77, paragraph 4, of the Law N° 21/2012 of 14/06/2012 relating to the the civil, commercial, labour and administrative procedure provides that “The reason for the inadmissibility of a claim is any argument requesting for inadmissibility of a claim without being considered on merit such as not having the status, capacity, and interest to file a claim, prescription of the claim, expiry of the prescribed period to file a claim, a decided case or non payment of court fees”.

[31] As regarding to the case which acquired *res judicata* principle, article 11 of the Law No21/2012 of 14/06/2012 afore mentioned provides that “A case that was definitively decided and of which the possibility to be reviewed due to a decision tainted with injustice is exhausted cannot be summoned again for the same facts and between the same parties pleading the same subject matter”.

[32] As aforementioned, the case file indicates that after the Intermediate Court of Gasabo by the case RCA 0127/12/TGI/GSBO rendered on 27/01/2014, it decided that Uwamwezi Joséphine is divorced to her husband Ranguella Giuseppe, whereas the sharing contract concluded on 07/06/2007 shall apply regarding properties, because it is a contract made between both parties and was never declared void, as the case RC 0180/08/TGI/GSBO motivated, Uwamwezi Joséphine filed a claim to office of Ombudsman stating that she suffered injustice in case RCA 0127/12/TGI/GSBO, because it did not divide her and her husband properties equally, the office of Ombudsman found that the case RCA 0127/12/TGI/GSBO is vitiated by

injustice, then it requested the President of the Supreme Court to review that case, the President of the Supreme Court also ordered to hear the case review to analyse the injustice it contains.

[33] Though it is clear that, the case RC 0180/08/TGI/GSBO rendered on 07/08/2009 by Gasabo Intermediate Court at last instance, because neither Uwamwezi Joséphine nor Ranguella Giuseppe did not apply any appeal procedure either ordinary or extra ordinary, to reverse the decision in that case Law as provided by article 81, paragraph 2 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, the Court basing on the provisions of article 78, 79, 80, and 81 of that Law aforementioned, the Office of the Ombudsman found injustice in the case RCA 0127/12/TGI/GSBO, thus, if there is case RC 0180/08/TGI/GSBO rendered on 07/08/2009 by Gasabo Intermediate Court, which the counsel for Ranguella Giuseppe referred to as acquired *res judicata* principle because none appealed for it, is groundless to declare the claim against the case RCA 0127/12/TGI/GSBO inadmissible, rather it must be considered as a defence argument of Ranguella Giuseppe with regarding to injustice which Uwamwezi Joséphine pretended to suffer from.

[34] Basing on motivations above provided, the Court finds the objection of inadmissibility of Uwamwezi Joséphine's claim for review the case RCA 0127/12/TGI/GSBO due to injustice raised by Ranguella Giuseppe lacks merit.

b. Whether Ranghella Giuseppe and Uwamwezi Joséphine have to share equally their properties regardless their sharing contract (*contrat de partage*)

[35] The counsel for Uwamwezi Joséphine states that the injustice suffered by his client from the judgment RCA 0127/12/TGI/GSBO which is under review due to injustice resides in the fact that the Court decided upon the divorce between Ranghella Giuseppe and Uwamwezi Joséphine, however, it decided that the issue of sharing the properties was answered by the judgment RCA 0180/08/TGI/GSBO which acquired res judicata principle, it decided also to sustain the sharing contract of 07/06/2007, instead of sharing their movable and immovable properties equally including their loans whereas they are married under community property regime, this contrary to the Law N° 22/99 of 12/11/1999 completing Book One of Civil Code and instituting part five relating to matrimonial regime, liberalities and successions.

[36] The counsel for Uwamwezi Joséphine continue stating that the decision of the judge in judgment RCA 0127/12/TGI/GSBO under review due to injustice is erroneous that there is another judgment RCA 0180/08/TGI/GSBO which acquired res judicata principle about the sharing of the properties, because that judgment is not the one which decides upon divorce, also it did not decide that the management of the spouses' properties remain the community property regime².

² It was stated in paragraph 33 of the judgment RCA0180/08/TGI/GSBO, which is stated that: "article 24 of the Law n°22/99 of 12/11/1999 [...] completing book one of civil code and instituting part five relating to matrimonial regime, liberalities and succession provides that "The regime of

[37] In his rebuttal, the counsel for Ranghella Giuseppe, sates that the judgment RCA 0127/12/TGI/GSBO which Uwamwezi Joséphine states that it contains injustice, it did not contradict the Law anyway by deciding that the property issue between spouses was resolved in judgment RCA 0180/08/TGI/GSBO which acquired *res judicata* principle, he finds that the issue of property sharing would not be brought afresh in Court, because it was analysed in all previous judgments to the judgment RCA 0127/12/TGI/GSBO, the last judgment is RCA 0180/08/TGI/GSBO, the latter sustained the contract of 06/07/2007 of sharing properties (*contrat de partage*), he finds then that, the statement of Uwamwezi Joséphine that she suffered injustice in judgment RCA 0127/12/TGI/GSBO is without merit, as long as there is no judgment which quashed the judgment RCA 0180/08/TGI/GSBO.

[38] The counsel for Ranghella Giuseppe continues stating that, is without merit the statement of Uwamwezi Joséphine that she does not recognize the sharing contract (*contrat de partage*) because she signed it ignoring its content as she does not know French, because she does not indicate where that contract caused her injustice or where it contradicts the Law, furthermore, article 5 of that contract provides that any dispute will be resolved through arbitration, the latter procedure has never been applied so that it could had declared that contract void.

community of property and that of limited community of acquests shall be dissolved by: divorce; legal separation; modification of the marital regime. Thus as long as Uwamwezi and Langhela have not apply before the civil status officer for modification of their marital regime, though they have signed a contract which indicates how they shared their properties, community property agreed upon during marriage remain valid”.

[39] The counsel for Ranghella Giuseppe concludes by stating that he agrees that a judgment rendered at last instance can be reviewed, however he finds that there was no Law disregarded, because as he stated above, there are Courts which resolved definitively the issue of properties under adjudication between Ranguella Giuseppe and Uwamwezi Joséphine.

DETERMINATION OF THE COURT

[40] Article 19 of the Law N° 22/99 of 12/11/1999 completing Book One of Civil Code and instituting part five relating to matrimonial regime, liberalities and succession provides that: “On application by the spouses or by one spouse during the marriage, the matrimonial regime may be modified. The applicant has to prove that modification is required in the interest of the household or by a significant change that has occurred in the situation of the spouses or of one spouse. The request shall be submitted under summary procedure before the Court of First Instance of the place of residence of the spouses. In case the request is dismissed by a final decision, no other such request may be made, but only two years after this decision, and basing on new evidence”.

[41] Article 24 of the Law N° 22/99 of 12/11/1999 aforementioned states that : “The regime of community of property and that of limited community of acquests shall be dissolved by divorce ; legal separation ; modification of the marital regime. In case of dissolution of the community, spouses shall share common assets and liabilities”.

[42] The case file indicates that before Ranguella Giuseppe and Uwamwezi Joséphine were given divorce in judgment RC

0422/10/TN/KCY rendered by Kacyiru Primary Court on 13/02/2012, that divorce was confirmed by Gasabo Intermediate Court in judgment RCA 0127/12/TGI/GSBO rendered on 27/01/2014, they had a contract titled sharing contract (contrat de partage) concluded on 07/06/2007 drafted in French, whose content is as follows :

Article 1 : Les soussignés se conviennent d'une façon de partager les biens en commun de la manière suivante:

a. Les biens suivants reviennent à Mme Uwamwezi Joséphie :

Maison d'habitation parcelle no 736 Kacyiru ;

1. Immeuble ex Eden Garden parcelle no 533 à Nyarugenge ;

2. Parcelle (marché) no 2270 à Nyarugenge ;

3. Société la COMETE S.A.R.L;

4. Gestion Concession Carlo Mo (Giti cy'inyoni) à 90% ;

5. Maison de Bruxelles sise 22, Rue de la Sympathie (Anderleckt) à 50% ;

b. Les biens suivants reviennent à Monsieur Ranguella Giuseppe :

7. Immeuble sis dans la parcelle n° 99 à Nyarugenge ;

8. La Société SOGIS S.A.R.L;

9. Gestion Concession Carlo Mo (Giti cy'inyoni) à 10% ;

10. Maison de Bruxelles sise 22, Rue de la Sympathie (Anderleckt) à 50% ;

Article 2 :

Concernant le crédit de la BRD sur Mme Uwamwezi Joséphine, la partie Ranguella Giuseppe accepte de payer les intérêts encourus jusqu'à concurrence de 30.000.000 Frw par chèque de Fina Bank dont le présent contrat constitue bonne et valable quittance.

Article 3 :

Mme Uwamwezi Joséphine reconnaît par la présente convention de partage qu'elle reste seule responsable des engagements pris à la BRD en relation avec l'immeuble sis dans la parcelle no 533, étant donné qu'elle est unique propriétaire.

Article 4 :

Les parties s'engagent d'informer la BRD du retrait de la caution solidaire de Monsieur Ranguella Giuseppe sur le crédit octroyé à Mme Uwamwezi Joséphine, étant donné qu'elle était donnée en sa qualité de co-propriétaire des biens donnés en garantie avant la convention.

En cas de refus du retrait de cette caution par la Banque, les parties trouveront une solution d'apurement de ce crédit par la réalisation des biens donnés en garantie.

Article 5 :

En cas de litige ... ».

[43] The case file indicates that the concerned contract intitled sharing contract (contrat de partage) of 07/06/2007 confirmed by the judgments (RC 0422/10/TN/KCY and RC 0127/12/TGI/GSBO) should be applied between Ranguella Giuseppe and Uwamwezi Joséphine with regarding to the sharing of community properties because it was concluded between the

concerned parties and the sharing contract (*contrat de partage*) has never been declared void as motivated by the judgment RC 0180/08/TGI/GSBO.

[44] The analyse of the judgment RC 0180/08/TGI/GSBO aforementioned, which referred to by the counsel for Ranghela as acquired *res judicata* principle withregarding to the sharing contract (*contrat de partage*) of 07/06/2007, it indicates that, though the Intermediate Court of Gasabo decided in paragraph 37 to sustain the sharing contract of 07/06/2007, but in paragraph 33 of that judgment (RCA 0180/08/TGI/GSBO), it motivated that “as long as Uwamwezi Joséphine and Ranghela did not apply before the Civil Registartion Officer to change their matrimonial regime, their community regime prevails”, this is based on article 24 of the Law in case of divorce of the spouses N°22/99 of 12/11/1999 [...] instituting part five relating to matriomonial regime, liberalties and succession provides that “The regime of community of property and that of limited community of acquests shall be dissolved by: divorce; legal separation; modification of the marital regime”, this suggests that the Court had sustained the application of that decision, in case of divorce of the spouses, this suggests then that, its decision to sustain the sharin contract (*contrat de partage*) of 07/06/2007, is contrary to its findings which is also provided by article 24 of the Law N°22/99 of 12/11/1999 on which the Court based.

[45] The Court finds then that, in the judgment RCA 0127/12/TGI/GSBO for which Uwamwezi Joséphine applied for review due to injustice, Gasabo Intermediate Court decided that the issue of sharing contract (*contrat de partage*) of 07/06/2007 was definitely resolved in judgment RCA 0180/08/TGI/GSBO which acquired *res judicata* principle, as Counsel Nkurunziza

François Xavier who represents Ranghella Giuseppe argues, it is not true because as aforementioned, the Court indicated in paragraph 33 of the concerned judgment RCA 0180/08/TGI/GSBO, that the community property regime remains applicable between spouses as long as they are not yet divorced, this suggests that basing on article 24 of the law N°22/99 of 12/11/1999 aforementioned, if community property regime ends due to divorce, in that case the spouses have to share equally common loans and properties, thus, the sharing of the properties as provided in sharing contract (contrat de partage) of 07/06/2007, is without merit because it is contrary to Law, mostly because that sharing contract was not aimed at modifying the matrimonial regime into force between Uwamwezi Joséphine and Ranghella Giuseppe: community property, because that is done by reference to article 19 of the Law N° 22/99 of 12/11/1999 aforementioned.

[46] Basing on legal provisions and motivations above, for the judgment RCA 0127/12/TGI/GSBO rendered by Gasabo Intermediate Court rejected the equal sharing of the common properties and loans between Ranghella Giuseppe and Uwamwezi, rather it sustained the sharing contract (contrat de partage) of 07/06/2007, the Court finds that judgment caused injustice obviously every party to the case, Uwamwezi Joséphine who filed a claim against it, because the issue of sharing contract (contrat de partage) did not acquireres judicata principle (autorité de la chose jugée) as aforemotivated.

[47] The Court finds then that, in order to remove the injustice contained in judgment RC 0127/12/TGI/GSBO, the decision taken in that judgment with regarding the the sharing of the properties of the spouses (community property), has to be

reversed, and decide that the divorce between spouses married under the latter regime, have to share equally all their properties, including loans assets and liabilities (actif et passif), as provided by article 24 of the Law N°22/99 of 12/11/1999 aforementioned.

**c. to know which properties to be shared
between Ranghella Giuseppe and Uwamwezi
Joséphine**

[48] Counsel Ndagijimana Emmanuel, who represents Uwamwezi Joséphine, in his submissions, even in his letter of 29/01/2018 submitted to the Court with the evidence it requested during the hearing of 08/02/2018, together with the explanations he provided during the same hearing and that one of 17/04/2018, he states that community properties and loans Ranghella Giuseppe and Uwamwezi Joséphine had as spouses married under community property regime which they have to share is composed of immovable, movable property and debts.

[49] With regarding the immovable property, Counsel Ndagijimana Emmanuel states that is composed of:

A. Immovable property

1. The house located in plot No533 Nyarugenge (whose value is 395,000,000 Frw) sold in public auction for 301,000,000 Frw, to pay BRD's loan, it was bought by Nduwumwami Victor ;
2. The plot n° 2270 Nyarugenge within which a market is constructed, also sold in public auction to pay BRD's loan ;

Counsel Ndagijimana Emmanuel explains that in his letter dated 29/01/2018 aforementioned that, the houses located in both plots of Ranghella Giussepe and Uwamwezi Joséphine were sold on 22/11/2012 for 610,622,000 Frw to pay BRD's loan, and after payment, Uwamwezi Joséphine was refunded 65,926,589Frw, which she admits to share with Ranghella Giussepe, each should take a half of it equivalent to 33,790,794Frw.

3. The house located in plot n° 99 Nyarugenge, which became plot n° 778 Nyarugenge, and was sold where by the product of sale, was used to buy another house at Kamonyi, located in plot n° 2603;

Counsel Ndagijimana Emmanuel explains in his letter dated 29/01/2018 aforementioned, that the concerned house is valued at 571,262,000 Frw based on the property valuer report submitted to Court, however, that house was registered on Ranghella Giussepe, the latter transferred the ownership to SOGIS Ltd Company, then he sold it to Rugenera Marc in 2014, the product of the sale, Ranghella Giussepe used it to buy another house in Kamonyi located in plot n° 2603, which he kept on registering it on SOGIS Ltd Company, legally represented by Ranghella Giussepe and his daughter, Ranghella Giussepe has 99, 03% shares whereas his daughter has 0,07%, he finds also that the selling contract of the house n° 778 Nyarugenge which Ranghella Giussepe indicates that it was sold to Rugenera Marc for 120,000,000frw is forgery, because it does not reflect its real value of

571,262,000Frw aforementioned basing on the the property valuer report submitted to Court.

Counsel Ndagijimana Emmanuel requests that the concerned house was unlawfully registered on SOGIS Ltd Company, because it was done basing on the unlawful sharing contract (*contrat de partage*), it should be sold and share both the selling price, basing on Ranghella Giuseppe's shares of 99,03% in that company. He adds that they don't recognize the buying contract of Rugenera Marc, reason why there is a Court case undergoing before the court.

4. a house located at Kacyiru in plot n° 736; destroyed for the construction of the road;

Counsel Ndagijimana Emmanuel explains that Uwamwezi Joséphine was paid for that house 161,273,432 Frw, and is willing to share it with Ranghella Giuseppe, where by each will get a half equivalent to 80,636,716 Frw.

5. houses composed of 3 ware houses (*dépôts*) benefited from the management of Carlo Mo Concession (*Gestion Concession Carlo Mo*) (Giti cy'inanyi);

Counsel Ndagijimana Emmanuel explains that, though in the document submitted to Court, he stated that those houses belong to Uwamwezi Joséphine, he finds that, they should not be included in immovable properties to share, because they belong to another person (Carlo Mo), he apologizes for the mistake available in the document just mentioned.

6. house located in Bruxelles in Belgium on street Sympothesie, n°.22, Anderlecht;
7. house located in Roma in Italy Via Casali du Vallera n°18 Roma.

[50] Regarding this issue of immovable property, the counsel for Ranghella Giuseppe argues that in his rebuttal submission, he stated that Uwamwezi Joséphine and Ranghella Giuseppe have no longer immovable properties, because the house located at Kacyiru in plot n° 533 was destroyed by the construction of the road where by Uwamwezi Joséphine was paid money for expropriation, houses located in plot n° 2270 and 533 was auctioned to pay BRD's loan, Carlo Mo concession are not Uwamwezi Joséphine and Ranghella Giuseppe's properties, rather they are in charge of management, the house located in plot n° 2603 at Kamonyi, (it was bought with the money received after the selling of the plot n° 99 Nyarugenge which became plot n° 778 Nyarugenge) and is owned by SOGIS Ltd Company.

[51] The counsel for Ranghella Giuseppe states that, the house located in Bruxelles, both parties agreed to share it for 50%, whereas the house located in Roma cannot be divided because the succession is not yet opened, he finds then that, as long as the issue of succession stands, there are challenges to share it.

B. Movable property

[52] With regarding movable property, Counsel Ndagijimana Emmanuel who represents Uwamwezi Joséphine states that it is composed with the following:

1. Money deposited on bank accounts in bank of Kigali and in Europe, but it is unknown to Uwamwezi Joséphine

because it is deposited on her husband's account, the Court should order to produce the bank statements particularly those of I&M Bank.

2. The balance of 65,926,589Frw, remained on houses sold to pay loans, as aforementioned, Uwamwezi Joséphine agrees to share with Ranghella Giuseppe;

3. Money equivalent to 161,273,432Frw, received by Uwamwezi Joséphine from the house located in plot n° 736 in Kacyiru which she agrees to share with Ranghella Giuseppe as well, where by each will get a half equivalent to 80,636,716 Frw.

4. A vehicle owned by SOGIS Ltd Company, which is no longer available.

[53] During the hearing of 17/04/2018, Counsel Ndagijimana Emmanuel who represents Uwamwezi Joséphine adds that his client gave him a bank statement (*extrait bancaire*) of bank of Kigali which indicates that on 29/01/2018, Uwamwezi Joséphine had on her account 182,000,000Frw composed of the balance she was refunded and money from expropriation. Whereas Uwamwezi Joséphine states that after withdrawing some money, she remains with 253,000,000Frw.

[54] With regarding La Comete Company, Counsel Ndagijimana Emmanuel the counsel for Uwamwezi Joséphine states that, the concerned company, which does no longer exist, is insolvent, Uwamwezi Joséphine was audited (*constat de stock mort*), even the house in which it was operating was auctioned as indicated by the statement of auction submitted to Court, money equivalent to 14,000,000Frw which that company had on account was taken by Rwanda Revenue Authority.

[55] With regarding this issue of movable property, the counsel for Ranghella Giuseppe states that in his rebuttal submission, he indicated that he cannot know the money which was on bank accounts of Kigali and Europe as Ranghella is hospitalized in Italy, however Uwamwezi Joséphine who mentions it, has no evidence for it, as she has no access to Ranghella Giuseppe's accounts.

[56] The counsel for Ranghella Giuseppe continues stating that Ranghella Giuseppe should be sharing his shares in SOGIS Company with Uwamwezi Joséphine, because the company itself cannot be divided, this also applies for shares in La Comete Company as well as it cannot be divided too, Uwamwezi Joséphine has to be ordered by the Court to indicate her shares in La Comete Company. During the hearing of 17 /04/2018, he added that if the Court decides that Uwamwezi Joséphine has to share with her husband Ranghella Giuseppe, in that case, he does not agree with the statement of Uwamwezi Joséphine's counsel that La Comete Company is insolvent and has no property, because if it was true, it could not have been listed among the properties available in sharing contract (*contrat de partage*), furthermore it has never written off in books of commerce, even auctioning the house does not mean that La Comete Company does not have other properties, if they cannot indicate the location of merchandise and other equipment.

[57] He states also that, he does not agree with the statement of Uwamwezi Joséphine that she has 253,000,000 Frw, because that amount is what is available on Bank of Kigali account, whereas she is hiding money on other accounts.

C. Debts

[58] With regarding Ranghella Giuseppe and Uwamwezi Joséphine's debts which they have to share,

1. The loan of BRD equivalent 363,757,476Frw indicated in judgment RCOM 0161/09/HCC- RCOM 0165/09/HCC;
2. A loan equivalent to 120,000,000Frw consequent to the case she lost against Kayitesi Monique;
3. Other debts indicated in cases she lost before the Supreme Court.

[59] Counsel Ndagijimana Emmanuel who represents Uwamwezi Joséphine, explains that the loan of 120,000,000Frw is a family loan, this is indicated by the fact that the person who bought the equipment did it while the spouses were still living together, it was thus the common business between both. during the hearing of 17/04/2018, he stated that, though he asked his client to bring all copies of judgments regarding those loans, he has never received them, except the copy of judgment of the High court case where Uwamwezi Joséphine was ordered to pay 120,000,000Frw.

[60] With regarding to know the exact claim of Uwamwezi Joséphine whereby she is requesting to share the community properties she has with her husband, whereas she argues that she does not know the value of their common property, her Counsel Ndagijimana Emmanuel, states that, there are properties possessed by her husband but are unknown to her, however, if the Court decides upon that, their value can be revealed, this concern particularly the houses located in Roma and in Belgium, because

none can conduct an expertise before this judgment is rendered and conduct Exequatur.

[61] With regarding this issue of debts, the counsel for Ranghella Giuseppe argues that in Uwamwezi Joséphine's rebuttal submission, she has to indicate the evidence of BRD's loan which remains unpaid. He adds that the judgment of High Court aforementioned does not indicate Uwamwezi Joséphine's claim, he finds then that, it can not help the Court at all.

DETERMINATION OF THE COURT

[62] Article 24 of the Law N° 22/99 of the Law 12/11/1999 completing Book One of Civil Code and instituting part five relating to matriomonal regime, liberalties and succession provides that: "The regime of community of property and that of limited community of acquests shall be dissolved by: divorce; legal separation; modification of the marital regime. In case of dissolution of the community, spouses shall share common assets and liabilities".

[63] Article 9 of the Law N° 21/2012 of 14/06/2012 2012 relating to the the civil, commercial, labour and administrative procedure provides that "Every plaintiff must prove a claim".

[64] Basing on arguments of both parties, aforementioned, the Court finds that Uwamwezi Joséphine and Ranghella Giuseppe, have to share all common properties, basing on the provision of article 24 of the Law N° 22/99 of 12/11/1999 aforementioned, however they should share the properties indicated and evidenced before the Court as provided by article 9 of the Law N° 21/2012

of 14/06/2012 relating to the civil, commercial, labour and administrative procedure afore mentioned.

[65] Basing thus on motivations above, it is clear to Court that there is no longer immovable property available in Rwanda, because the house which was located at Kacyiru in plot 736 was destroyed by the construction of the road, Uwamwezi Joséphine was paid expropriation fee, houses located in plots n° 533 and n° 2270 were auctioned to pay BRD loan, “Mo Carlo concession” is not really Uwamwezi Joséphine and Ranghella Giuseppe’s property as they both agree.

[66] What is clear to Court again is that they remain with the house located in Kamonyi built in plot n° 2603, which was accounted among community property and was acquired from the sale’s product of plot n° 99 Nyarugenge which was a common property between Uwamwezi Joséphine and Ranghella Giuseppe as spouses, even as the counsel for Uwamwezi Joséphine recalled above, there is a Court case undergoing regarding the sale of that house located in plot n° 99 which became n° 778 Nyarugenge.

[67] The Court finds that, as long as there is a Court case undergoing before the Court regarding the sale agreement of the house just mentioned, Ranghella Giuseppe and Uwamwezi Joséphine have to share equally, the value of money which will come out from the Court case of that house, if Uwamwezi Joséphine wins it.

[68] With regarding the house located in Bruxelles in Belgium, the Court finds that both parties agreed to share it, each will get 50% of it.

[69] Withr egarding the house located in Roma in Italy, the Court finds that Uwamwezi Joséphine does not produce evidence before the Court which poves that Ranghella Giuseppe is the owner whereas the counsel for Ranghella Giuseppe states that it is still under succession.

[70] With regarding movable property, the Court finds that both parties agree before the Court that, they agree to share 65,926,589 Frw which is the balance from their houses located in plots n° 533 and n° 2270 auctioned to pay BRD's loan, both parties agree also to share money from expropriation of their house located in plots n° 736 in Kacyiru received by Uwamwezi Joséphine equivalent to 161,273.432 Frw, thus, all is amounting 227,200,021Frw, thus as Uwamwezi Joséphine who received all that money agrees to share it with Ranghella Giuseppe, each will received a half of it equivalent to 113,600,011Frw.

[71] With regarding other movable property composed of the money that Ranghella Giuseppe may own, deposited on bank accounts in Rwanda or Europe as stated by Uwamwezi Joséphine, the Court finds that the latter, could not produce evidence that it can base on to divide the money which she even ignores, whereas the counsel for Ranghella Giuseppe states that he could not know the amount of money kept by his client.

[72] With regarding debts to be shared between both parties, the Court finds that Uwamwezi Joséphine is the one who mentions the BRD loan equivalent to 363,757,476 Frw available in judgment RCOM 0161/09/HCC-RCOM 0165/09/HCC, and the loan equivalent to 120,000,000 Frw from the Court case she lost against Kayitesi Monique, and even further loans indicated in cases she lost before the Supreme Court.

[73] The Court finds rather that as aforementioned, BRD' s loan equivalent to 363,757,476 Frw indicated in judgment RCOM 0161/09/HCC-N° RCOM 0165/09/HCC, in relation to plots 533 and 2270 auctioned to pay BRD loan, and it was evidenced that BRD has been reimbursed, where by the balance after reimbursement equal to 65,926,589 Frw which both parties should share as aforementioned, this suggests that if they owned both those houses which were then auctioned, they both paid BRD loan referred to in this case.

[74] With regarding the loan of 120,000,000Frw stated by Uwamwezi Joséphine that is consequent to the Court case she lost against Kayitesi Monique, the Court finds without truth, the statement of her counsel that there is money won by Kayitesi Monique in judgment 0070/07/TGI/NYGE-RC 00754/07/TGI/NYGE, because the copy of judgment RCA 0040/09/HC/KIG-RCA 0047/09/HC/KIG rendered by the High Court, produced before the Court during the hearing of 17/04/2018, indicates that the claimants before Nyarugenge Intermediate Court in the judgment RC 0070/07/TGI/NYGE-RC 00754/07/TGI/NYGE aforementioned, are Nshimiyimana Callixte and Uwantege Jeannine, they are the ones who were accusing Kayitesi Monique, they prayed the court to order for the enforcement of the selling contract of washing machine they had with Kayitesi Monique, someone else intervened voluntarily in that judgment namely Nyirandamira Valérie, whereas Uwamwezi Joséphine was forced to intervene, Kayitesi Monique and Uwamwezi Joséphine lost the case and appealed before the High Court.

[75] Uwamwezi Joséphine being reluctant to submit the copy of judgment of the judgment RC 0070/07/TGI/NYGE-RC

00754/07/TGI/NYGE aforementioned, whereas she was asked to, during the hearing the of 26/09/2017, and even during the interlocutory judgment pronounced on 16/03/2018, all these aimed to know the relation between that loan and the current judgment, the Court finds baseless to decide on that loan.

[76] With regarding to other loans, Uwamwezi Joséphine states that they are evidenced by the judgments she lost before the Supreme Court, the Court finds as aforementioned, she did not produce before it a copy of judgment, it was thus unavailable to counsel for Ranghella Giuseppe to pleads on it, whereas she was asked to, during the hearing of wa 26/09/2017, even during the interlocutory judgment pronounced on 16/03/2018, and indicate the value of money which both parties have to share, and indicate the relation between those judgments and the current case, thus, the Court finds baseless to decide upon those other debts which are not clear about their link to this case.

[77] Basing on motivations provided above and on legal provisions aforementioned, the Court finds Ranghella Giuseppe and Uwamwezi Joséphine's properties have to share equally basing on article 24 of the Law completing Book One of Civil Code and instituting part five relating to matriomonial regime, liberalties and succession the properties as follows:

1. shares of Ranghella Giuseppe in SOGIS Ltd Company equivalent to 99, 03%: Uwamwezi Joséphine and Ranghella Giuseppe have to share them, where by each will take the half of them equivalent to 49.50%;
- 2.a house located in Bruxelles in Belgium, they have to share it as they have agreed, each will get 50% of it.

3. Money equivalent to 65,926,589Frw which remained after the auction of their house located in plots n° 533 and n° 2270 for the reimbursement of BRD loan, each will take the half of it equivalent to 33,790,794 Frw

4. Money from expropriation of the house located in plot n° 736 in Kacyiru equivalent to 161,273,432 Frw, each will take the half of it equivalent to 80,636,716Frw.

[78] The Court finds also that Ranghella Giussepe and Uwamwezi Joséphine have to share equally, the value of money which will get out from the judgment related to the house located in plot n° 99 Nyarugenge, which became n° 778 Nyarugenge, which was sold and the product of sale was used to buy another house located in Kamonyi, in plot n° 2603, in event Uwamwezi Joséphine wins the case.

d. Damages, procedural and Counsel fee requested in this case

[79] The counsel for Uwamwezi Joséphine, states in his submission that, Ranghella Giuseppe has to be ordered to give him 10,000,000 Frw of moral damages, 1,000,000 Frw of procedural fee and 5,000,000 Frw of counsel fee.

[80] Counsel for Ranghella Giuseppe in his rebuttal, states that, in his submission he requested rather that his client should be given by Uwamwezi Joséphine procedural fee and counsel fee equivalent to 1,000,000Frw.

DETERMINATION OF THE COURT

[81] The Court finds without merit to award to parties' money for moral damages, for procedural and counsel fee they request in this case, rather in the spirit of recalling the principle of sharing equally aforementioned, each has to bear the procedural fee for this case.

III. DECISION OF THE COURT

[82] Decides to reject the objection of inadmissibility of Uwamwezi Joséphine's claim aiming at review the case RCA 0127/12/TGI/GSBO due to injustice raised by Ranghella Giuseppe;

[83] Decides with merit Uwamwezi Joséphine's claim of review the case RCA 0127/12/TGI/GSBO due to injustice;

[84] Decides that Ranghella Giuseppe and Uwamwezi Joséphine have to share their properties equally as follows:

1. Shares of Ranghella Giuseppe in SOGIS Ltd company equal to 99, 03% ; Uwamwezi Joséphine and Ranghella Giuseppe have to share them, where by each will take the half of them equivalent to 49.50%;
2. A house located in Bruxelles in Belgium, they have to share it as they have agreed, each will get 50% of it ;
3. Money equivalent to 65,926,589Frw which remained after the auction of their house located in plots n° 533 and n° 2270 for the reimbursement of BRD loan, each will take the half of it equivalent to 33,790,794 Frw ;

4. Money from expropriation of the house located in plot n° 736 in Kacyiru equivalent to 161,273,432 Frw, each will take the half of it equivalent to 80,636,716Frw.

[85] Decides that Ranghella Giuseppe and Uwamwezi Joséphine have to share equally, the value of money which will get out from the judgment related to the house located in plot n° 99 Nyarugenge, which became n° 778 Nyarugenge, which was sold and the product of sale was used to buy another house located in Kamonyi, in plot n° 2603, in event Uwamwezi Joséphine wins the case;

[86] Orders Ranghella Giuseppe and Uwamwezi Joséphine to pay together Court fees related to this case equal to 100,000Frw, each of them will pay a half of it equivalent to 50,000Frw;

[87] Decides that the decision of the judgment RCA 0180/08/TGI/GSBO rendered by Gasabo Intermediate Court on 07/08/2009 and that of the judgment RCA 0127/12/TGI/GSBO rendered by Gasabo Intermediate Court on 27/01/2014 are reversed with regarding the sharing of the spouses' properties married under community property regime.

COMMERCIAL CASES

RADIANT INSURANCE COMPANY LTD v RWANDA AGRICULTURE BOARD

[Rwanda COURT OF APPEAL – RCOMAA 00026/2018/CA –
(Karimunda, P.J., Munyangeri and Kanyange, J.) 08 February
2019]

Public procurement – The advance received by the successful bidder – In case the tender is cancelled before the procuring entity deducted the entire amount of the advance it paid, the fact that the work which was done is equivalent or more than the advance paid is not a ground for the guarantee to refuse to pay the remaining amount of the advance which was not deducted because that advance is not the price of the work or service rendered.

Insurance law – Advance payment – Obligations of the insurer in case the latter is asked to pay the party who offered the tender – The security for the advance payment for the start of work remains valid until that advance is entirely refunded, it is not invalidated by the fact that the completed works are worth or exceed the advance paid, as it is not the payment.

Facts: Rwanda Agricultural Board (RAB) signed a contract with ETECO (*Entreprise de Construction, Commerce, Mines et Carrières*) for the construction of a laboratory and Radiant Insurance Company Ltd agreed to insure that advance payment. Meanwhile, RAB terminated the contract before the advance payment was fully used and consequently, it wrote to Radiant

Insurance Company Ltd requesting the latter to refund the unused amount from the advance paid. Radiant Insurance Company Ltd refused to refund that money arguing that it should not be liable for it since the work completed by ETECO exceeds in value the advance paid.

RAB filed a claim before the Commercial Court stating that Radiant Insurance Company Ltd has to pay since the latter agreed to secure the advance payment until it is fully refunded, and not the completed work worth that advance payment. The Court ruled that the claim of RAB has merit and ordered Radiant Insurance Company Ltd to refund the advance payment.

Radiant Insurance Company Ltd appealed before the Commercial High Court stating that it should not be held liable for the advance since the works executed extremely exceeds in value the secured advance payment, and the Commercial High Court found this appeal with merit.

RAB appealed before the Supreme Court, but due to the law reforms, the case was tried by the Court of Appeal, and RAB was criticizing the decision of the Commercial High Court, arguing that it should have examined whether the advance paid was used in the activities related to the tender; and if this is the case, to order Radiant Insurance Company Ltd to refund the balance in accordance with the agreement they concluded.

Held:1. In case the tender is cancelled before the procuring entity deducted the entire amount of the advance it paid, the fact that the work which was done is equivalent or more than the advance paid is not a ground for the guarantee to refuse to pay the remaining amount of the advance which was not deducted because that advance is not the price of the work or service rendered.

2. The security for the advance payment for the start of work remains valid until that advance is entirely refunded, it is not invalidated by the fact that the completed works are worth or exceed the advance paid, as it is not the payment

Appeal has merit.

Cross appeal lacks merit.

The judgment rendered by the Commercial High Court is reversed in whole.

The defendant has to refund to the appellant the court fee paid for the appeal.

Statutes and statutory instruments referred to:

Law N° 12/2007 of 27/03/2007 governing public procurement as modified and complemented by the Law N° 05/2013 of 13/2/2013, Article 89.

Cases referred to :

Forest Company Volcanoes Gorillas (FCVG) Ltd v Rwanda Revenue Authority (RRA) RCOMAA 00055/2016/SC rendered by the Supreme Court on 29/9/2017.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The subject matter in this case is based on the advance payment for the commencement of works which Rwanda

Agriculture Board (RAB) offered to ETECO (*Entreprise de Construction, Commerce, Mines et Carrières*), basing on the concluded contract of 20/10/2014 for construction of a laboratory, and Radiant Insurance Company Ltd agreed to insure that advance as evidenced by the security document N° RD001RCOA140815/03695 of 11/09/2014, but the tender contract was later terminated by RAB on 22/12/2015 before ETECO finished to refund the advance paid, since it used to pay it on every invoice by deducting 20% of the total amount. For three (3) invoices ETECO had submitted so far, RAB has withheld the advance worth 60,239,971 Frw and the balance which remained due amounting to 107,796,028 Frw.

[2] Due to the fact that after the third invoice ETECO completed the works worth 53,878,560 Frw, the compensation between the balance of advance to be refunded and the completed works was effected (107,976,028 Frw – 53,878,560 Frw), and the balance was 54,017,468 Frw, which RAB stated that it should be paid by Radiant Insurance Company Ltd, because the contract it concluded with ETECO was terminated before the latter finishes to refund the advance received. Radiant Insurance Company Ltd states that it should not pay that advance because it has been used in the activities relating to tender and the completed works exceed in value the advance paid.

[3] After failing to reach an agreement on the refund of the remaining advance by ETECO, RAB sued Radiant Insurance Company Ltd before Nyarugenge Commercial Court praying that the latter be instructed to pay 54,017,468 Frw that ETECO owes it, and the damages for being dragged in unnecessary law suits. That Court rendered the judgment n° RCOM 531/2017/TC/NYGE on 27/7/2017 where it found the claim of

RAB with merit, and ordered Radiant Insurance Company Ltd to pay the balance of 54,0170,468 Frw from the advance paid to ETECO, 500,000 Frw in damages for being dragged in unnecessary law suits, 500,000 Frw for Counsel fee, and reimburse 50,000 Frw to RAB for the court fee.

[4] Radiant Insurance Company Ltd appealed before the Commercial High Court arguing that it should not be ordered to pay the advance for the commencement of works because it was fully spent on activities it was paid for, in the judgment n° RCOMA 0055/2017/CHC/HCC rendered on 28/12/2017. This Court found the appeal of Radiant Insurance Company Ltd with merit, therefore that the security for the commencement of works offered to RAB was fully spent on the targeted tender-related activities, which is the purpose of the security. Consequently, Radiant Insurance Company Ltd owes RAB nothing else in relation to that security. The Court ordered RAB to pay Radiant Insurance Company Ltd the damages amounting to 1,000,000 Frw for judicial damages and the counsel fee for the first appeal and to refund the amount of 75,000 Frw for the court fees paid for lodging an appeal, and reversed the judgment n° RCOM 00531/2017/NYGE rendered on 27/07/2017.

[5] RAB appealed before the Supreme Court, requesting the Court to examine whether when the advance payment is spent on the works related to the tender should not be paid in total. It also prayed to examine whether it should be held liable for the damages while it is Radiant Insurance Company Ltd which failed to respect the terms of the contract. Radiant Insurance Company Ltd states that what it insured was the use of the advance complied with its purpose, and it was necessary to order RAB to pay the damages since it dragged it in unnecessary law suits.

[6] After the law reforms, the appeal of RAB was transferred to the Court of Appeal in accordance with the provisions of the article 105 of the Law n° 30/2018 of 02/06/2018 determining the jurisdiction of courts, and the case was tried in public on 9/1/2019, whereby Radiant Insurance Company Ltd was represented by Counsel Ruzindana Ignace and Counsel Twagiramungu Joseph, while RAB was represented by State Attorneys Kayiranga Rukumbi Bernard, Kabibi Spéciose and Umwali Munyentwari Claire.

II. ANALYSIS OF LEGAL ISSUES

1. Whether the fact for the advance payment for the commencement of works was spent on tender-related activities, discharges Radiant Insurance Company Ltd from the obligations of to pay the balance from the advance ETECO did not refund.

[7] In the RAB court submissions, it states that Radiant Insurance Company Ltd insured the advance paid to ETECO, and the contract they concluded provides for the payment modalities of the advance, and with reference to the article 89 of the Law governing Public Procurement, RAB used to withhold the payment from every invoice submitted by ETECO but the latter failed to complete the payment because the contract was terminated before the completion of the works, and for this reason Radiant Insurance Company Ltd should pay the balance deducted of the money RAB owes ETECO, as it was stated in work completion report.

[8] RAB states furthermore that the Commercial High Court should have considered the content of the security document issued by Radiant Insurance Company Ltd for the advance payment for the commencement of works, which states that “The maximum amount of this guarantee shall be progressively reduced by the amount of the advance payment repaid by the contractor as indicated in copies of interim statements or payment certificates which shall be presented to us. This guarantee shall expire after the complete reimbursement of the advance amount. Consequently, any demand for payment under this guarantee must be received by us at that time”, which entails that the insurer’s obligation is not only limited to the use of the advance for the tender work, but extends also to recovery of the advance to the concerned institution, and apart from the law governing public procurement, even the article 64 of the law governing contracts provides that contracts made in accordance with the law shall be binding between parties.

[9] It also states that its interpretation corroborates the decisions of another judgment rendered by the Commercial High Court (N° RCOMA 00254/2017/CHC/HCC) between Bugesera District and Radiant Insurance Company Ltd, against which Radiant didn’t appeal.

[10] Among other explanations given by the counsel for RAB, it is stated that the statements of the representatives of Radiant Insurance Company Ltd that it owes nothing because the advance payment was entirely spent on the tender-related activities, and that the security is seized when it is not used for that purpose, are unsubstantiated; rather, RAB should have been paid in accordance with the provisions of the article 89 of the Law

governing Public Procurement and not the article 88, because the security has to be recovered by the procuring entity.

[11] They further state that the intention behind the stipulations in the contract concluded between RAB and Radiant Insurance Company Ltd that the expiry of security shall occur when the advance is totally recovered, was to ensure the party recovers the total advance he paid, and the contract exclusively binds those two parties, especially that the contractor didn't sign anywhere. They believe that it should not only be considered that the advance was spent on the given works, rather a consideration should be made on the fact that in the contract they agreed that the payment will be deducted from the invoice, that the security will expire when the advance is totally recovered which consists of its purpose.

[12] Radiant Insurance Company Ltd states that the subject of insurance consisted of ensuring the use of the advance payment for the commencement of works complied with its purpose and not spent on something else (article 88 of the Law governing public procurement); that the security is only seized when the total or a part of it is not used for the tender purposes it was paid for, and that RAB has no any other ground for its request for the security payment while disregarding the provisions of this article 88.

[13] It explains that RAB admits that ETECO completed the work which exceeds in value the security, because the completed work is worth 355,361,917 Frw, entailing that the total advance payment it received was used for its purpose, therefore that the statements of RAB according to which the tender was terminated before ETECO finishes to refund the advance it received, should not be based on to request Radiant Insurance Company Ltd to pay

that unrecovered advance because it is not the subject of insurance given that the advance should have been entirely recovered if the tender was not terminated and completed, and it's this act that ensued the contractor to fail to refund the advance, the reason why Radiant Insurance Company Ltd was required to pay the performance security worth 84,018,000 Frw, the amount which exceeds in value the one requested by RAB worth 54,017,468 Frw, and had the tender not been terminated, a request to refund the performance security should have not been made.

[14] It continues stating that the concern of Rwanda Agriculture Board of whether the fact that the advance payment for the commencement of works should not to be totally recovered, doesn't concern the insurer, because the subject of insurance consists of the guaranty of its use according to its purpose, otherwise, the security is seized by the procuring entity, and that the article 89 of the Law governing Public Procurement providing for the payment modalities for security by the contractor, binds the procuring entity and the successful bidder, and not the insurer.

[15] It further states that the fact that it insured for the use of the advance payment for the commencement of the works for its purposes, RAB should prove that the advance was used for something else in order to be able to require Radiant Insurance Company Ltd to refund as provided by the article 88 of the Law governing Public Procurement.

DETERMINATION OF THE COURT

[16] The issue to be analyzed, is to know whether when the advance payment for the commencement of works is spent on activities related to the tender, discharges the insurer from the obligations to refund the advance payment unpaid by the successful bidder.

[17] With regards to the advance payment for the commencement of works, the article 89 of the Law n° 12/2007 of 27/03/2007 governing Public Procurement as modified and complemented by the Law N° 05/2013 of 13/2/2013 provides that “The advance received by the successful bidder shall be refunded by deducting a certain amount from submitted and approved invoices. The bidding document shall determine the percentage to be deducted until the whole amount of the advance is refunded. The advance security shall be returned to the successful bidder within thirty (30) days following the payment of the entire advance received”.

[18] This article stating how the advance is paid, as its heading reads “Refund of the advance paid”, clearly infers that when the successful bidder receives an advance, it doesn’t entail he/she is paid, but rather it consists of the money he/she has to refund to the procuring entity, through deductions from the approved invoices, and the security is reimbursed until the entire money is refunded. The aforementioned statements corroborate the holding of the Supreme Court in the judgment RCOMAA0055/2016/SC rendered on 29/9/2017, where it stated that the advance payment for the commencement of works is the amount of money awarded to the successful bidder in order to help him/her to get started with the execution of the tender he/she won; therefore, it does not

correspond to any certain part of executed work to be considered as payment. Rather, the successful bidder deducts a certain amount for the reimbursement of the advance as agreed by both parties to the contract from the progressive payments of the executed works, and the completion of the entire work becomes concurrent with the reimbursement of the entire advance to the procuring entity. Accordingly, since the advance is paid back to the procuring entity, it cannot be considered as payment for the same tender.

[19] The advance payment guarantee RD 001RCOA 1408157/0395 that Radiant Insurance Company Ltd issued on 11/9/2014, states that it is committed to insure the total amount of money not exceeding 168,035,999 RWF, that it will pay upon presentation of the request accompanied by the document stating that the contractor failed to fulfill his/her obligations provided in the contract, and used the advance for purposes other than the activities in respect of the tender as agreed in the contract¹. In the last paragraph of the same document, it is stated that the insured amount of money shall be progressively reduced by the amount of the advance payment repaid by the Contractor, and that the

¹ 'At the request of the Contractor, we RADIANT INSURANCE COMPANY LTD, P.O.BOX 1861 KIGALI, hereby irrevocably undertake to pay you any sum or sums not exceeding in total amount of ONE HUNDRED SIXTY EIGHT MILLION THIRTY FIVE THOUSAND NINE HUNDRED NINETY NINE RWANDAN FRANCS (168,035,999 RWF) upon receipt by us of your demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligation under the Contract because the Contractor used the advance payment for purposes other than the costs of mobilization in respect of the works”.

security shall expire after the complete reimbursement of the advance amount².

[20] The court finds that one part of the clauses of the guarantee document, corroborates the provision of the article 88 of the Law N° 12/2007 of 27/03/2007 mentioned above providing that “if the successful bidder uses the entire advance or part of it in other activities that are unrelated to the tender, the advance shall immediately be considered as a debt which shall be paid by seizing the entire security or part of it”, and another part of that document corroborates the provisions of the article 89 (in fine) mentioned above, which provides that “The advance security shall be returned to the successful bidder within thirty (30) days following the payment of the entire advance received.”

[21] The court finds that the fact that it is mentioned in the security document that the request of payment should be accompanied by another document proving that the contractor used the advance payment in other activities unrelated to the tender, should not be as the sole reason of the refund of advance payment to the procuring entity, because this is one of the elements the security document, and it should not be considered in isolation, since in the last part of that document, Radiant Insurance Company Ltd also admitted that the security expire by the time the entire advance is refunded, implying that before that time, the security remains valid, and the advance has to be

² “The maximum amount of this guarantee shall be progressively reduced by the amount of the advance payment repaid by the Contractor as indicated in copies of interim statements or payment certificates which shall be presented to us. This guarantee shall expire after the complete reimbursement of the advance amount. Consequently, any demand for payment under this guarantee must be received by us at this office on or before that date”.

refunded as provided in the article 89 above-stated. This reasoning corroborates the stated position of the Supreme Court regarding the advance payment for the commencement of works.

[22] With regards to the statements of Radiant Insurance Company Ltd that the works already completed by ETECO exceeds in value the paid advance and therefore RAB should n request for payment, the Court finds it without merit, because as explained above, an advance does not consist of the payment to the extent that its refund be envisaged in terms of the value of the completed works, rather it has to be refunded to the procuring entity as provided by the article 89 of the aforementioned law and as agreed on in the last paragraph of the security performance document. In addition, the statements of Radiant Insurance Company Ltd that the works completed by ETECO exceed in value the advance the latter received, are raised while disregarding that ETECO did not only receive the advance but also received the payment for the completed works.

[23] The court finds thus that, the Commercial High Court should not have assigned much importance to the ground that an advance is only refunded when it was not used for activities in respect of the tender while leaving aside the ground that the security shall expire after the entire advance is refunded. Those both grounds are stated in the same document Radiant Insurance signed and comply with the provisions of the Law governing Public Procurement.

[24] Basing on the aforementioned legal provisions and the explanations provided, the Court finds that Radiant Insurance Company Ltd has to refund RAB the remaining advance payment worth 54,0170,468 Frw.

2. Whether RAB should pay damages

[25] The counsel for RAB argues that the Court ordered the latter to pay Radiant Insurance Company Ltd the damages amounting to 1,000,000 Frw for dragging it in unnecessary lawsuits and 75,000 Frw for the court fees deposit, while it is the one which failed to respect the agreement they concluded, which drove it to sue before the court seeking justice. They find rather that Radiant Insurance Company Ltd is the one that should pay damages for its failure to respect the terms of the agreement which is the reason of RAB complaint, therefore it is praying the Court of Appeal to deem that it should not pay any damage.

[26] The counsel of Radiant Insurance Company Ltd argues that it was necessary that RAB be held liable for the damages because it dragged it in an unnecessary lawsuit, because it insured the use of the advance payment given to ETECO for its purpose, which it did since RAB states that it completed the work worth 355,361,917Frw, meaning that it executed the works which exceed the double of the value of the security given; therefore, RAB should not have requested nothing as a refund given that the subject of security was executed.

DETERMINATION OF THE COURT

[27] The court finds that as explained above, Radiant Insurance Company Ltd should refund RAB the advance paid because the tender was terminated before the refund was completed, and that Radiant Insurance Company Ltd had insured the entire advance payment given to ETECO ; therefore, the damages worth 1000,000 Frw for unnecessary lawsuits and

75,000 Frw for court fees the Commercial High Court ordered RAB to pay are without merit and should not be paid.

3. Regarding the damages requested by Radiant Insurance Company Ltd

[28] In the cross-appeal, Radiant Insurance Company Ltd states that RAB continues to drag it in unnecessary lawsuits, and prays that it be held liable for the damages worth 2,000,000 Frw and 800,000 Frw for judicial damages and counsel fees.

[29] The counsel for RAB argues that those damages are ungrounded because it has the right to exercise the appeal, and in addition to that, the requested damages are excessive, and Radiant Insurance Company Ltd fails to prove the grief it experienced.

DETERMINATION OF THE COURT

[30] The Court finds that Radiant Insurance Company Ltd should not be awarded the damages it is requesting, because, as explained above, it is the one with contractual obligation to refund the advance for the commencement of works RAB paid to ETECO, which it failed to do. Consequently, RAB seized the Court and the fact it lost this case, the damages it is requesting are without merit.

III. DECISION OF THE COURT

[31] Finds the appeal of Rwanda Agriculture Board (RAB) with merit ;

[32] Finds the cross-appeal filed by Radiant Insurance Company Ltd without merit ;

[33] Orders Radiant Insurance Company Ltd to pay Rwanda Agriculture Board (RAB) the balance of 54,017,468 Frw from the advance paid to ETECO ;

[34] Quashes the damages Rwanda Agriculture Board was instructed to pay by the Commercial High Court ;

[35] Reverses in whole the judgment RCOMA00553/2017/CHC/HCC rendered by the Commercial High Court on 28/12/2017 ;

[36] Orders Radiant Insurance Company Ltd to refund Rwanda Agriculture Board 100,000 Frw of court fees it paid on the appeal.

RWAGASANA v BANK OF KIGALI (BK) LTD

[Rwanda SUPREME COURT – RCOMAA0056/15/SC-
RCOMAA00025/2017SC-RCOM 0003/17/CS-
RCOM00004/2017/SC (Mutashya, P.J., Rugabirwa and
Nyirinkwaya J.) 26 January 2018]

Contract law – Loan agreement – Borrower’s obligations of paying interests stipulated in the performance contract – A bank does not err if it claims interests from payment done as performance guaranty on behalf of a borrower when the latter fails to perform the tender – Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 9, Law N°45/2011 of 25/11/2011 governing contracts, article 64.

Contract law – Loan agreement – Non-repudiation of the loan the insurer agreed to secure – An insurer married to the bank’s borrower cannot repudiate the loan offered to his/her spouse on the grounds that he/she did not sign for it while they share that property in case it is proven that he/she signed for all loans taken by his/her spouse – Law N°45/2011 of 25/11/2011, article 64.

Commercial procedure law – Counsel fees – Procedural fees and counsel fees are awarded in Court discretion though their percentage was stipulated in contract when it is found that it is an act of appropriation of excess illegal benefit and the applicant fails to prove its use.

Commercial procedure law –Expert fees – When an expert fee is paid by the bank instead of its client, the latter is obliged to refund it in case he/she loses the case.

Facts: Rwagasana was granted by Bank of Kigali Ltd (BK Ltd) different loans for various occasions, on the existing loans, he was also given facility for performance Guarantee, line of credit and those spent for repurchase of the loan ((rachat credit) he had in ECOBANK.

All parties concluded loan agreements, suretyship and security, they agreed that in case the borrower fails to comply with terms of payment, the bank would sue to the court, in their contract, they agreed that the interests rate shall be 17.25% per month but they also agreed for late fines of 2% in addition to 17.25%, all amounting to 19.25% when he fails to pay the loan he was granted. Rwagasana did not respect the contract and consequently, the bank placed him in class 5 of the borrowers who do not pay.

The above reasons provoked Rwagasana to sue before Nyarugenge Commercial Court, his wife also intervened in the case, claiming to suspend the auction of their houses offered as securities, he also claimed for stopping payment of different loans, he further claims that the bank should not keep computing late fines after termination of loan agreements, he also claims for various damages.

The court found their claim with merit in part, and decided that the auction for their house be suspended, and the bank be awarded the damages related to the loss it endured, the court also decided that the interests rate raised after the revocation of the contract be reset to the agreed rate by both parties in the contract they concluded.

BK Ltd, Rwagasana and Mukakimenyi appealed before the Commercial High Court, the Court found BK Ltd's appeal with

merit whilst it found Rwagasana's appeal without, and it quashed the rulings of the judgment.

Rwagasana appealed to the Supreme Court stating that the previous courts decided that he has to pay for performance guarantee for which BK Ltd paid on his behalf and related regular interests and late fines whilst BK did not prove that payment.

Before the Supreme Court, Rwagasana argues that the expertise report should not be considered because it does not reveal all debts claimed by BK Ltd, he adds that the report does not indicate how the loans were granted and terms of payment expressed in their agreement.

He also states that the counsel fee and procedural fee he is asked to pay are excessive because they include excess interest rate and BK is not even proving its use.

Mukakimenyi appealed stating that there is a loan she does not recognize because she did not sign for it and that she is married to Rwagasana Thomas who owns 50% of their common property.

Before this Court, in its defense, BK Ltd states that it granted different loans to Rwagasana, it explained how those loans were added to other existing loans because he was not complying with terms of payment, BK Ltd further states that all those loans should be paid together with related regular interests and late fines on the rate agreed upon in loan contracts.

It stated that the expert report has to be considered because it indicates how all loans were granted to Rwagasana Thomas though it is not matching with the total amount it sued for. As regards to counsel and procedural fees, BK stated that they have to pay them for they are provided in the security contract they concluded.

With regarding the statement of Mukakimenyi of refusing to pay back the loan with the ground that she did not sign, in its defence, BK states that it is baseless because she signed on all loan agreements granted to Rwagasana before a lawyer (notary).

Held: 1. A bank does not err if it claims interests from payment done as performance guaranty on behalf of a borrower when the latter fails to perform the tender.

2. Procedural fees and counsel fees are awarded in Court discretion regardless the claim against its percentage stipulated in contract in case it is excessive and the party requesting it is unable to prove its uses.

3. The spouse of the bank's borrower cannot repudiate the loan offered to his/her spouse on the grounds that he/she did not sign for it while they share that property in case it is proven that he/she signed for all loans taken by his/her spouse.

4. When an expert fee is paid by the bank instead of its client, the latter is obliged to refund it in case he/she loses the case.

Appeal has no merit;

Cross appeal has no merit in part;

The claim filed by BK has merit in part;

The judgment rendered by the Commercial High Court is sustained;

The appellants have to pay principal loan and late fines.

Court fees cover expenses of the case.

Statutes referred to:

Organic law N° 08/2005 of 14th July 2005 Determining the Use and Management of Land in Rwanda, article 34 and 35;
Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 9;
Law N°45/2011 of 25/11/2011 governing contracts, article 64;
Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article 76;
Law N° 22/99 of 12/11/1999 supplementing Book I of the Civil Code and instituting Part Five regarding matrimonial regime, liberalities and successions, article 21;
Law N° 30/07/1888 relating to contract or obligation, article 258.

No case referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] This case started before the Commercial Court of Nyarugenge whereby RwagasanaThomas sued BK Ltd, praying to stay the auction of his houses located on plot N° 322/324 situated in Nyagatare District because the agreement concluded between parties stipulates that in case the loan is not paid, the matter shall be sent to courts, that he should not pay 9% for court fees, fees for execution, commissions and no privileged fees because it's an abusing clause and that interests rate should not increase from 17,25% to 19,5% basing on the fact that Rwagasana was placed in class 5 of those who do not pay appropriately, in addition, BK Ltd should not continue computing

default interests after termination of the contract which was done on 06/12/2012, Rwagasana also claims for various damages. Mukakimenyi Marie Rosine, Rwagasana Thomas's wife, voluntarily intervened in that case.

[2] In his pleadings, Rwagasana Thomas argues that he should not pay to BK Ltd, excessive loan worth 879,296,362 Frw calculated up to 09/08/2013 because interests rate of 19,5%, which was applied on that loan, that rate is not stipulated in the contract concluded between parties and those interests should not be computed after cancellation of the contract. While counsel for BK Ltd argues that it does not claim excessive loan from Rwagasana Thomas, rather, he has to pay the loan all amounting to 879,296,362Frw and 261,864,547Frw for the performance guaranty, they add, default interests have to be computed until the loan is entirely paid.

[3] That Court rendered the judgment RCOM 0774/13/TC/Nyge on 28/11/2013, holding that Rwagasana Thomas's claim and that of Mukakimenyi Marie Rosine have merit in part, the Court held that the house located in plot N° 322/324 situated in Nyagatare District cannot be auctioned through Registrar General in RDB, It decided that 9% of the court fees, fees for execution, commissions and no privileged fees should not be considered because it would be an abusive clause, the Court ordered that BK Ltd be awarded real damages equivalent to the loss occurred.

[4] That Court also held that the performance guaranty of 261,864,547Frw should be deducted from the loan claimed by BK Ltd because that money was not offered, and that the interests which were increased after cancellation of the contract up to

19,5% must be returned to 17,25%, the rate agreed on by both parties of the contract.

[5] That Court also motivated that Rwagasana Thomas should not pay 91,016,449Frw to BK Ltd because the latter did not produce any element of evidence that it claims from him that amount of money, but 665,248.503Frw should remain in debt claimed because Rwagasana Thomas owes that money to BK Ltd contrary to what he pretends to convince, because when BK Ltd wrote to him in the letter dated 07/09/2012, It gave him last warning, his account N° 040-0293075-71 had a debt worth 717,157.248Frw and also, Rwagasana Thomas did not deny that debt since the beginning.

[6] BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine appealed to the Commercial High Court, that Court rendered the judgment RCOMA 0591/13/HCC-RCOMA0007/14/HCC on 03/07/2014, finding BK Ltd's appeal with merit, that Rwagasana Thomas and Mukakimenyi Marie Rosine's appeal lacks merit, that the rulings of the appealed judgment are quashed, the Court ordered Rwagasana Thomas and Mukakimenyi Marie Rosine to give BK Ltd, 500,000Frw for procedural fees and counsel fees, 500,000Frw for being dragged into unnecessary lawsuits, It ordered Rwagasana Thomas to give Habineza Emmanuel 350.000 Frw for the fees of the expert appointed by the Court for auditing with intention to reveal the status of the loan offered to Rwagasana Thomas.

[7] That Court motivated that 9% for procedural fees, council fees, court bailiff fees and fees of execution of the judgment, commissions and no privileged fees are not abusing clauses because in loan agreement concluded between both parties, it is stipulated that in case Rwagasana Thomas defaults to pay BK

Ltd, 2% for default interests shall apply in addition to 17.25 % which is regular interests, all amounting to 19.25%.

[8] That Court also motivated that 240,994,500Frw for performance guaranty should be added to loan for which Rwagasana Thomas owes to BK Ltd because the latter paid for him in Ministry of Health. And also, Rwagasana Thomas did not produce any element of evidence to prove that BK Ltd claims more than it deserves as he pretends to convince, but in order to clarify the amount of the total loan, there is a need of appointing the expert in accounting as Rwagasana Thomas requested so on first instance as well as at appellate level, but due to the fact that Rwagasana Thomas refused to pay the expert for him to prepare a report, Rwagasana has to be ordered to pay 350,000Frw as fees for the expert appointed by the Court, fees which are equivalent to preliminary works, and the case is to be adjudicated using his submissions instead of basing on the testimony of the expert.

[9] Rwagasana Thomas appealed to the Supreme Court against the judgment RCOMA 0591/13/HCC-RCOMA 0007/14/HCC, his appeal was registered on N° RCOMAA 0056/15/SC – RCOMAA 00025/2017/SC.

[10] After realising that the outcome of the auction of Rwagasana Thomas's houses did not cover the debt he owes to BK Ltd, the latter filed a claim before the Commercial High Court praying that RWAGASANA Thomas and Mukakimenyi Marie Rosine pay the remaining loan equivalent to 2,174,151,697Frw which comprises of 888,923,978Frw for principal loan+ 1,285,719Frw for interests(les agios) calculated up to 17/08/2001 but that claim was not heard but it was transferred to this court and the claim was recorded on RCOM0003/17/CS - RCOM 00004/2017/SC and combined with Rwagasana Thomas's appeal

which was recorded on RCOMAA0056/15/SC – RCOMAA00025/2017/SC because the cases are related and parties are the same.

[11] The public hearing was conducted on 25/07/2017, Rwagasana Thomas was assisted by Counsel Mutabazi Abayo Claude, Mukakimenyi Marie Rosine was assisted by Rwinikiza Félix whereas BK Ltd was represented by Counsel Rusanganwa Jean Bosco.

[12] At the beginning of the hearing, counsel for BK Ltd stated that they withdraw the objection of lack of jurisdiction of the Supreme Court which was raised in pre-trial meeting of 25/01/2017 whereby he mentioned that the value of the subject matter is under 50,000,000Frw, and then, the case was heard in merit.

[13] On 26/07/2017, this Court appointed Ayinkamiye Spéciose as an expert so that she can demonstrate the amount of the principal loan and related interests which Rwagasana Thomas owes to BK Ltd.

[14] On 30/10/2017, AYINKAMIYE Spéciose submitted the report which contains responses of the issues requested by the Court to be analysed, the parties submitted additional submissions reacting on the report. The hearing of the case was resumed on 13/12/2017, on that day ; Ayinkamiye Spéciose explained her report and parties reacted on that.

II. ANALYSIS OF LEGAL ISSUES

1. To know the amount of the principal loan and related interests which Rwagasana Thomas owes to BK Ltd

[15] Rwagasana Thomas and his counsel state that BK Ltd offered him different loans for various occasions, for him to build commercial houses, schools, hospitals and other activities as stipulated in the agreement concluded between them, but BK Ltd claimed 668,248,503Frw as per bank statement in the following manner: 100,000,000Frw of 23/08/2010, 189,452,100Frw of 02/07/2010, 119,740,499Frw of 04/12/2012, 256,055,904Frw of 27/08/2010, and 409,192,599Frw, and that BK Ltd kept computing default interests after cancellation of the contract while there is no written agreement to prove all those loans.

[16] They further state that the Commercial High Court held that he has to pay to BK Ltd 240,994,500Frw for performance guaranty and its interests, that those amount should be added to other loans he owes the bank, they argue that the Court disregarded that those are not loans because there was no contract that governs them. They add that another ground for which Rwagasana Thomas should not pay that money to BK Ltd is that the latter did not produce any element of evidence to prove that it paid that loan to MINISANTE on his behalf, that in case the bank proves it, Rwagasana Thomas would pay 240,994,500Frw agreed upon by both parties without interests because they didn't agree on them.

[17] They kept explaining that since 07/09/2012, when BK Ltd wrote to Rwagasana Thomas claiming its debt, up to 11/03/2015

he paid the debt as follows: on 15/01/2013 he paid 46,572,417Frw and 32,072,857Frw, on 20/06/2013 he paid 879,083,831Frw, on 14/01/2014 he paid 89,730,282Frw, on 14/03/2014 he paid 126,728,540Frw, while on 11/03/2015 he paid 40,000,000Frw, all amounting to 1,214,187,927Frw, that the fact that on 07/09/2012 BK Ltd wrote to Rwagasana Thomas claiming from him to pay 1,164,321,782 Frw while he had already paid 1,214,187,927 Frw, rather they find that BK Ltd should reimburse him 49.866.145Frw as surplus of that amount. They pray to the Court to hold that Rwagasana Thomas has fully paid all loans offered to him, that BK Ltd should reimburse him 1,000,000,000Frw which he paid with no reason.

[18] With regard to the value of the expert's report, Counsel Mutabazi Abayo Claude assisting Rwagasana Thomas, argues that the report should not be considered because it does not enumerate all loans for which BK Ltd claims, how loans were granted and terms of payment agreed upon between parties and that, the expert didn't demonstrate amount of payment paid before and after auction of Rwagasana Thomas's house because the expert failed to mention how 40,000,000Frw earned from auction reduced the debt.

[19] He also states that the expert showed that Rwagasana Thomas has outstanding debt of 1,668,645,757Frw, this amount includes interests of 786,948,623Frw calculated on the interest rate of 19.25 %, but they cannot know where she found that rate because parties didn't agree on that in contract concluded, rather, she should have used interest rate of 17.25 % as one stipulated in the contract concluded between parties before Notary.

[20] He adds, the expert didn't demonstrate whether 786,948,623Frw are regular interests or default interests because

regular interests would not be computed any more from the day of cancellation of the contract or from the day of a write off debt in BK Ltd's records, but defaults interests had to be computed till the moment of rendering the judgment as decided so in judges retreat that took place at Rubavu District, he adds that it's not reasonable how those interests be almost equivalent to the debt being claimed worth 881,697,134Frw.

[21] Concerning the value of the expert's report, Mukakimenyi Marie Rosine and her counsel argue that the report should not be considered because it does not demonstrate loans which she jointly has with her husband and those which are separate loans due to the fact that there were loan agreement and guaranty agreement which she didn't sign. They further state that it's not understandable how a loan worth 881,697,134Frw is almost equivalent to its interests equal to 786,948,623Frw calculated on the rate of 19.25 % not agreed upon in agreement concluded between parties.

[22] Counsel Rusanganwa Jean Bosco states that BK Ltd granted to Rwagasana Thomas, different loans for various occasions from 2010 to 2012 as indicated in agreement concluded because on 02/03/2010 it offered him 294,775,152Frw composed of 94,775,152Frw for the repurchase of the debt he owed to ECOBANK and credit lign of 200,000,000Frw, and that these loans came as addition to other loans granted to him because he was not complying with the payment, that on 31/01/2012, all loans were 1,048,187,160Frw as stipulated in agreement dated 31/01/2012.

[23] He states that on 11/06/2012, BK Ltd wrote to Rwagasana Thomas claiming from him for a payment of 1,055,701,542Frw at least, amount which originates from the loan worth

1,118,645,689Frw that includes 63,244,147Frw for mortgage loan, that he failed to comply with it, and consequently, on 07/09/2012 BK Ltd gave him last warning and asked him to pay 1,164,321,782Frw, on 06/12/2012, it cancelled the contract and requested him to pay the debt equivalent to 1,211,614,537Frw.

[24] He explains that the bank statement of Rwagasana Thomas's current account N° 00293075-71 demonstrates that there was a deposit of the money from his house's auction, thus on 11/03/2015, it reduced his debt from 927,581,853Frw to 887,581,853Frw, this amount is composed of 240,994,500Frw for performance guaranty that BK Ltd paid for him in MINISANTE on 10/06/2014 basing on suretyship agreement concluded between them but that loan does not include default interests which were computed from 01/01/2013 as proven by bank statement of the account N° 09860175-36, that due to the fact that money obtained in auction did not cover Rwagasana Thomas's debt, that is the ground of suing him before the Court claiming a payment of 888,923,978Frw for principal loan and defaults interests (agios) worth 1,285,227,719Frw computed till 17/08/2016, all amounting to 2,174,151,697Frw, he adds, defaults interests should be computed until the debt is fully paid.

[25] He further states that the interests rate agreed upon in the contract is 17.25 % per month though the expert calculated those interests on the basis of a year, that the rate was increased to 19,25% because as stipulated by that contract as well as rules of credit (*Règlement des Ouvertures de Crédit*) issued by BK Ltd, Rwagasana Thomas voluntarily agreed and signed for paying 2 % as additional defaults interests to 17.25 % in case he fails to pay the loan.

[26] With regard to 240,994,500Frw for performance guaranty, Counsel Rusanganwa states that pursuant to article 64 of the Law governing the contract, Rwagasana Thomas should pay the loan and related interests as parties agreed on in suretyship agreement concluded on 31/01/2012, in addition, on 10/06/2014, BK Ltd paid 240,994,500Frw for him in Ministry of Health using its account in National Bank of Rwanda, that amount of money was added to other loans because Rwagasana Thomas failed to perform the tender for which BK Ltd guaranteed since it carries out money related business.

[27] Concerning the value of the expert's report, Counsel Rusanganwa Jean Bosco states that the report should be considered since the expert affirmed that Rwagasana Thomas owes BK Ltd 881,697,134Frw for principal loan and 786,948,623Frw for default interests (agios), all amounting to 1,668,645,757Frw though that amount is not equivalent to that claimed by BK Ltd at the beginning which worth 2,174,151,697Frw computed till 17/08/2001.

[28] The expert explains that regular interests rate of 17.25 %, is one stipulated in the contract, but that rate was increased with 2 % for default interests, consequently the rate became 19.25 % as indicated in the letter dated 06/12/2012 which BK Ltd wrote to Rwagasana Thomas informing him a change of interests rate to 19.25 % because he failed to pay debts, she adds that Rwagasana received that letter and acknowledged to receive it on 27/03/2013 but he did not react on it which implies that he agreed, and also 19.25 % as interests rate is the one which favours him because if he did not receive the letter, regular and defaults interests would have been calculated on the rate of 41 % per year.

[29] She further states that all payments through Rwagasana Thomas's account include those from his houses' auction which decreased loans as indicated in the report. She adds, Mukakimenyi Marie Rosine signed all agreements concluded between Rwagasana Thomas and BK Ltd.

DETERMINATION OF THE COURT

[30] With regard to the report of the expert, article 76 of the law N° 15/2004 of 12/06/2004 relating to evidence and its production 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", while article 98 of the same law provides that "a court is not bound to follow the opinion of experts if it is contrary to the conviction of judges."

[31] Basing on that article, the Court finds that the report should be considered in adjudicating the case because it was prepared by an expert in compliance with request of the Court, thus the Court finds that the content of the report is real.

[32] Concerning the principal loan, article 64 of the Law N°45/2011 of 25/11/2011 governing contracts provides that "contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They have to be honestly respected."

[33] Whilst concening late fines, article 7 paragraph 2 of the Regulation N°02/2011on credit classification and provisioning

provides that” all interest on non-performing credit facilities previously accrued into income but uncollected shall be reversed and credited into interest in suspense account until paid by the borrower.”

[34] Regarding this case, the documents of the case file as well as the report of the expert appointed by the Court on 30/10/2017, demonstrate that on 09/04/2009 Rwagasana Thomas wrote to BK Ltd praying for overdraft(*découvert*) equal to 700,000,000Frw to enable him to execute construction of Fawe Girl's School located at Kayonza and it was to be paid within three (3) months. On 14/04/2009, BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine concluded an agreement titled “*Ouverture de crédit avec constitution d’hypothèque*” before Notary whereby BK Ltd agreed to offer him 700,000,000Frw that will be paid in three years on the interests’ rate of 17.25 %, that the value of the guaranty that Rwagasana offers, equals to 120,000,000Frw and 10,800,000Frw for judicial fees and execution, commissions and no privileged fees, all equals to 130,800,000Frw. Rwagasana Thomas and Mukakimenyi Marie Rosine gave in guaranty their house located in plot N° 322/324 situated at Nyagatare in Eastern province.

[35] On 20/04/2009, BK Ltd wrote to Rwagasana Thomas informing him a credit offer of 700,000,000Frw for construction of Fawe Girl's School located at Kayonza which was to be paid within three (3) months with interests’ rate of 17.25% per year and a guaranty was a house mentioned above.

[36] On 01/09/2009, Rwagasana Thomas wrote to BK Ltd requesting for overdraft (*découvert*) of 100,000,000Frw for constructing 100m³ tank and for paying wages of those who worked in building of Fawe Girl's School stated above.

[37] On 02/12/2009 wrote Rwagasana Thomas to BK Ltd asking extension of three (3) months up to February 2010 so that he pays under pretext that the beneficiary (FAWE GIRL'S SCHOOL) of works does not yet pay the remaining amount.

[38] On 08/12/2009, Rwagasana Thomas wrote to BK Ltd applying for the credit worth 79,902,927Frw for performance guaranty equal to 10% for the tender of 799,029,271Frw for constructing non-paved road of 27KM Nyamata – Musenyi – Shyara, in Bugesera District.

[39] On 02/12/2009, Rwagasana Thomas again wrote to BK Ltd applying for the credit equal to 298,260.45 Euros equivalent to 240,994,500Frw to finish up the tender of Bushenge hospital located in Nyamasheke District in western province.

[40] On 25/01/2010, Rwagasana Thomas wrote to BK Ltd applying for the credit of the type of overdraft(découvert) worth 200,000,000Frw for the purchase of different items of constructing Bushenge hospital mentioned above and wages of workers.

[41] On 25/01/2010, Rwagasana Thomas wrote to BK Ltd applying for the repurchase of the debt he owed to ECOBANK equal to 94,779,152Frw, BK Ltd should be given all securities of that credit with intention to gather all loans in BK Ltd.

[42] On 02/03/2010, BK Ltd wrote to Rwagasana Thomas informing him the offer of 94,775,152Frw to be paid within five (5) years, the loan calculated from 31/03/2010 on the interests' rate of 17.25 % per year.

[43] On 29/06/2010, BK Ltd concluded with Rwagasana Thomas a loan agreement with creation of a mortgage, with offer of 933,590,963Frw, the agreement indicates that the value of the mortgage is 400,000,000Frw, that he agrees to pay BK Ltd, 36,000,000 Frw for judicial fees, fees of execution, commission fee and no privileged fees, all amounting to 436,000,000Frw. That contract was signed between BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine before the Notary of Gasabo District.

[44] On 16/09/2011, BK Ltd wrote to Rwagasana Thomas informing him that the Bank has agreed to extend an overdraft facility of Rwf 69,000,000, that amount has been granted to cater for employees's salary.

[45] On 13/12/2011, Rwagasana Thomas again wrote to BK Ltd requesting the extension of three (3) months to enable him to pay an overdraft (découvert) of 200,000,000Frw which is equivalent to the cost of remaining works for reconstruction of Bushenge Hospital stated above.

[46] On 21/12/2011, BK Ltd wrote to Rwagasana Thomas informing him that the Bank has agreed to grant him an overdraft facility of 100,000,000Frw which has been granted to facilitate his daily operations expense, it also reminds him other loans computed up to 21/12/2011.

[47] On 22/12/2011, BK Ltd concluded with Rwagasana Thomas a Loan agreement with creation of a mortgage of 1,050,929,051Frw, that the latter accepts a loan of that amount to be drawn on Bank of Kigali. In this contract concluded between BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine which was signed before the Notary of Gasabo District, it is

stipulated that BK Ltd is given a mortgage of a house located in plot N° 1584/KIC/MAS situated at Masaka in Kicukiro District which has value equal to 13,000,000Frw, and that he agrees to pay 1,170,000Frw for judicial fees, commission fee and non privileged fees, all amounting to 14, 170,000Frw.

[48] On 05/01/2012, BK Ltd concluded with Rwagasana Thomas an agreement on mortgage N° 15329 which constitutes a house of a value worth 250,000,000Frw located in plot N° 319 situated at Nyarutarama, in Gasabo District, Rwagasana has also agreed to pay 22,500,000Frw for judicial fees, commission fee and non privileged fees, all amounting to 272,500,000Frw, the contract was concluded between BK Ltd, Rwagasana Thomas and Mukakimenyi Marie Rosine before the Notary of Gasabo District.

[49] On 26/01/2012, Rwagasana Thomas wrote to BK Ltd requesting for the extension of three (3) months to enable him to pay all loans recorded in its books especially that of overdraft(découvert) offered to construct Bushenge hospital while waiting for MINISANTE's approval for payment.

[50] On 31/01/2012, BK Ltd wrote to Rwagasana Thomas informing him that the Bank has agreed to grant him an overdraft limit for the debit balance on his account of 404,293,881Frw for a period of 3 months awaiting payments.

[51] On 20/04/2012, Rwagasana Thomas wrote to BK Ltd praying for the credit equal to 68,000,000Frw for paying wages of those worked in construction of Bushenge Hospital.

[52] On 11/06/2012, BK Ltd wrote to Rwagasana Thomas claiming for a payment of 1,118,645,689Frw of the debt he owes

to Bank, computed up to 11/06/2012, the Bank added that he should at least pay 1,055,701,542Frw not later than 11/06/2012.

[53] On 07/09/2012, BK Ltd gave Rwagasana Thomas last warning letter claiming a payment worth 1,164,321,782Frw, it warned him that if he fails to pay within 30 days, BK Ltd will begin procedures of auctioning houses offered as securities and the Bank will make him be registered on the list of those defaulting on loans. Rwagasana Thomas received that letter on 18/09/2012 and he acknowledged to receive it.

[54] On 25/09/2012, Rwagasana Thomas wrote a letter of mercy to BK Ltd praying for the extension of payment period till when the Ministry of Health pays him the rest of his money.

[55] On 06/12/2012, BK Ltd wrote to Rwagasana Thomas informing him termination of repayment program and asked him to pay 1,211,614,537Frw which constitutes principal loan, interests, commission and other charges but late fines shall still be computed on the interest rate of 19.25 % till he fully pays all loans owes to the Bank, and those late fines will be deposited on account different from accounts he had. Rwagasana Thomas received that letter on 27/03/2012 and he acknowledged to receive it.

[56] The report of 22/12/2013 and the one of 28/02/2014 prepared by court bailiffs Kanyana Bibiane and Habimana Védaste who were in charge of selling loan securities, the reports demonstrate that after selling houses located in plots N° 1/02/13/02/319 na N° 1/02/13/02/619 situated at Nyarutarama in Gasabo District which given as securities to BK Ltd by Rwagasana Thomas and Mukakimenyi Marie Rosine, there was expense in that auction, that the remaining amount was

85,480,282Frw at one house and 118,456,988Frw on another, and were deposited on Rwagasana Thomas's account N° 00040-0293075-71, consequently he reduced debt of overdraft(découvert) as indicated in the report of expert mentioned above.

[57] Notification of the loan done on 10/06/2014 which is in the case file, demonstrates that BK Ltd paid 240,994,500Frw for Rwagasana Thomas as performance guaranty for the construction of Bushenge Hospital in the Ministry of Health using its account N° 1201176 open in National Bank of Rwanda as agreed in the contract of Performance Guarantee N° 98469 in 2009, after paing on his behalf, that amount of money was added to other loans which Rwagasana Thomas owed to BK Ltd, because on 10/06/2014, BK Ltd put his account N° 040-0293075-71 in negative balance(solde negative) as proven by a document which is in the case file on identification mark 207 and *Accusé de reception d'ordre de virement immédiat* N° 345023 which is on identification mark 208.

[58] With regard to loans for which BK Ltd offered Rwagasana Thomas, the expert appointed by the Court analysed the loan contracts stated above, she issued her report of 30/10/2017 which demonstrates that BK Ltd offered RWAGASANA Thomas the following loans : 700,000,000Frw on 20/04/2009, 240,994,500Frw on 02/12/2009, 94,775,152Frw on 02/03/2010, 200,000,000Frw on 02/03/2010, 110,000,000Frw on 02/03/2010 and 933,590,963Frw on 29/06/2010.

[59] The expert report also shows that among those principal loans, RWAGASANA Thomas has only paid 700,000,000Frw at the end of August 2009 and that on mortgage loan facility worth

94,775,152Frw, he has only paid 56,940,552Frw and 2,719,204Frw for their late fines, the remaining amount was 73,341,651Frw which is added to other overdrafts(découverts) offered to him, that after auction of his 2 houses located in plots N° 1/02/13/02/319 and N° 1/02/13/02/619 situated at Nyarutarama stated above, outcome of the auction (85,480,282Frw + 118,456,988 Frw) were deposited in BK Ltd to his account N° 00040-0293075-71, thus he reduced his debts, but his debts were increased by 240,994,500Frw for performance guaranty of the tender paid on his behalf in MINISANTE as explained above.

[60] Loan agreement and the expert report mentioned above which are in the case file, demonstrate that the loan which was offered by BK Ltd to Rwagasana Thomas has to be paid with its regular interests calculated on interest rate of 17.25 %, except Bank Guarantee which has to paid with interest calculated on the rate of 3.5 %, that in case he fails to pay, the payment shall be done with late fines, thus, interests shall be calculated on the rate of 19.25 % as indicated in BK Ltd's letter addressed to him on 06/12/2012 when it terminated his repayment program.

[61] Pursuant to the motivations above, the Court finds with no merit, the statement of the Counsel for Rwagasana Thomas, that the late fines should not be calculated on the rate of 19.25% after termination of the loan agreement, because BK Ltd wrote to him on 06/12/2012 informing him that he will pay late fines calculated on the rate of 19.25%, and Rwagasana Thomas received that letter on 27/03/2012 and he acknowledged to receive it, but he did not react which implies that he has accepted that interests rate.

[62] The Court also finds, another ground for which late fines should be calculated on the rate of 19.25 %, is that, BK Ltd wrote to Rwagasana Thomas for various occasions, a letter dated 21/12/2011, 31/01/2012, 11/06/2012 and one of 07/09/2012, warning him that if he does not pay arrears as follow: 7,235,903Frw; 12,256,453Frw; 4,869,120Frw and 12,340,276Frw, he should pay late fines calculated on 19.25 %, but Rwagasana Thomas did not react on it, this proves that the expert did not err in calculating late fines on the rate of 19.25 %

[63] With regard to 240,994,500Frw of performance guarantee of thye tender, the Court finds, the fact that on 10/06/2014 BK Ltd paid that amount of money for Rwagasana Thomas in Ministry of health as proven by elements of evidence that include *Avis de credit* issued on 10/06/2014 which are found in the case file, the Commercial High Court did not err when deciding that amount to be added on other loans and related interests of 3.5% per year as also affirmed by the expert appointed by the Court since BK Ltd is an institution that carries out money related business.

[64] The Court finds without merit, the statement of RWAGASANA Thomas's Counsel, that he should not pay BK Ltd 668,248,503Frw (but real amount is 665,248,503Frw) composed of 100,000,000Frw + 189,452,100Frw + 119,740,499Frw + 256,055,904Frw indicated on BK Ltd's bank statement under pretext that BK Ltd falsely claim from him, because he did not produce any element of evidence to prove what he alleges as provided by article 9 of the Law N° 21/2012 ryo ku wa 14/06/2012 relating to the civil, commercial, labour and administrative procedure that provides that the claimant must prove a claim, failing which the respondent wins the case, due to

the fact that BK Ltd kept to write informing him the amount of the debt and he failed to react but he continued requesting for other loans as explained above.

[65] Basing on article 64 of the Law as well as on the report of the expert mentioned above, the Court finds, Rwagasana Thomas has to pay 881,697,134Frw for principal loan and 786,948,623Frw for late fines all amounting to 1,668,645,757Frw because Rwagasana Thomas and Mukakimenyi Marie Rosine did not produce elements of evidence to prove wrong those mentioned above based on by the expert.

2. Whether there are agreements for which Mukakimenyi Marie Rosine did not sign, so that she should not pay jointly with Rwagasana Thomas loans granted to the latter by BK Ltd

[66] Mukakimenyi Marie Rosine and her counsel argue that she should not pay jointly with Rwagasana Thomas to BK Ltd for all loans granted to him because she did not sign on loan and performance guarantee agreements concluded between her husband and BK Ltd.

[67] They defend that among those agreements include one of 31/01/2012 for 404,293,881Frw which they claim that it should be annulled because on that loan, all family properties were offered as guaranty and Mukakimenyi Marie Rosine did not sign while she has rights equivalent to 50% of the properties as provided by articles 34 and 35 of the Organic law N° 08/2005 of 14th July 2005 determining the Use and Management of Land in

Rwanda¹ and article 21 of the Law N° 22/99 of 12/11/1999 to Supplement Book I of the Civil Code and to institute Part Five Regarding Matrimonial Regimes, Liberalities and Successions which provide that whatever be the matrimonial regime chosen and the management modalities of the patrimony of spouses, the agreement of both spouses shall be required for final transfer of personal immovable property and a property in the community, as well as granting any right attached to those properties.

[68] Counsel Rusanganwa Jean Bosco representing BK Ltd states that Mukakimenyi Marie Rosine and Rwagasana Thomas should jointly pay all loans granted to the latter by BK Ltd because she signed all loans agreements and performance guaranty.

DETERMINATION OF THE COURT

[69] Article 9 of the Law N° 21/2012 ryo ku wa 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that the claimant must prove a claim, failing which the respondent wins the case.

[70] The case file demonstrates that Mukakimenyi Marie Rosine signed loan agreement and that of guaranty as follow, on

¹ Article 34 of that law provides that Rights based on Land may be transferred through different individuals or it may be guaranteed through succession; it may be guaranteed gratuitously, leased or sale; it may be mortgaged according to requirements and procedures provided for by ordinary civil law without prejudice to specific provisions of this organic law, whilst article 35 of that law provides that final transfer of rights on land like sale, donation or exchange by a representative of the family requires the prior consent of all other members of the family who are joint owners of such rights.

14/04/2009, on 29/06/2010, and on 22/12/2011, she also signed on 05/01/2012, agreement for constitution of mortgage mentioned above.

[71] The Court finds, as the expert stated it in her report, there is no loan agreement or guaranty contract concluded between Rwagasana Thomas and BK Ltd for which Mukakimenyi Marie Rosine did not sign, thus, she loses as provided by article 9 of the law mentioned above, consequently, Mukakimenyi Marie Rosine and Rwagasana Thomas should jointly pay BK Ltd, principal loan and late fines as motivated above.

3. Whether loan agreements concluded between Rwagasana Thomas and BK Ltd contain abusing clauses with regard to judicial fees, fees of execution, commissions and no privileged fees

[72] Rwagasana Thomas and his counsel state that he cannot pay BK Ltd 9% of principal loan which exceeds one billion for procedural fees, counsel fees fees of advertising, fees of court bailiff and execution because the contract was concluded when he was in weak position because clauses of the contract are abusive since they stipulate excessive profit to BK Ltd considering that 9% of more than a billion being claimed, may be equivalent to 160,000,000Frw for procedural and counsel fees, and that, BK Ltd did not produce any element of evidence to prove that it has incurred that expense in procedure and pleading the case.

[73] They argue that he has completely paid judicial fees, fees of execution, commissions and no privileged fees when his houses were auctioned because those involved in auction had

paid fees of advertising, fees of court bailiff, etc, but they still claim all those fees from him, but if the expert revealed all payments Rwagasana Thomas did, the expert would have found that counsel fees only were remained unpaid.

[74] Counsel Rusanganwa Jean Bosco, representing BK Ltd states that 9% for judicial fees, fees of execution, commissions and no privileged fees stipulated in the contract of guaranty, that do not constitute abusing clauses because they are not relied on principal loan being claimed, and he should not worry while BK Ltd claims from 10,000,000Frw for procedural and counsel fees and 50,000Frw for court fees.

DETERMINATION OF THE COURT

[75] Loan agreements and that of guaranty concluded respectively on 14/04/2009, on 29/06/2010, on 22/12/2011 and the one concluded on 05/01/2012 mentioned above, stipulate that in case Rwagasana Thomas fails to pay loans granted to him, he will pay 10,800,000Frw, 36,000,000Frw, 1,170,000Frw and 22,500,000Frw for judicial fees, fees of execution, commissions and no privileged fees.

[76] Concerning judicial fees, fees of execution, commissions and no privileged fees, the Court finds, they have to be awarded to BK Ltd in discretion of the Court instead of basing on the rate of 9% of the loans he was granted, the rate stipulated in contract because it would be illicit enrichment which is not allowed by the law because BK Ltd did not produce an element of evidence to prove the amount of money it spent in following up the case, especially that its advocate had admitted that this rate should not be based on in awarding that money.

4. Whether Rwagasana Thomas should pay 350,000Frw as fees of the expert on first instance

[77] Rwagasana Thomas and counsel argue that the Commercial High Court should not have ordered him to pay Habineza Emmanuel, 350,000Frw as fees of the expert while he did not prepare an expertise report.

[78] Counsel Rusanganwa Jean Bosco representing BK Ltd states that Rwagasana Thomas has to pay that money because the expert was appointed by the Commercial High Court upon his request as indicated in paragraph 17 of the appealed judgment and the expert conducted preliminary works to the extent of issuing an invoice but he did not issue a report due to the fact that Rwagasana Thomas refused to pay him an advance.

DETERMINATION OF THE COURT

[79] The Court finds, as the Commercial High Court motivated it in paragraph 18 of the appealed judgment, the fact that Rwagasana Thomas agreed for appointing an expert in accounting so that he demonstrates in a report, the amount of the debts for which Rwagasana owes to BK Ltd and the expert appointed by that Court, did preliminary works concerning examination of duties to the extent of issuing an invoice indicating the amount of fees he was supposed to be paid but the report was not prepared because Rwagasana Thomas didn't pay that money, the Commercial High Court did not err when ordering him to pay the expert 350,000Frw equivalent to preliminary works he already did, therefore, his appeal on this ground lacks merit.

5. Whether Rwagasana Thomas should be awarded damages and to know if BK Ltd's cross appeal has merit

[80] Rwagasana Thomas and his counsel state BK Ltd should give him 20,000,000Frw as moral damages for having failed to honour the contract, 500,000Frw for procedural fees and 10,000,000Frw for counsel fees, that he cannot compensate BK Ltd because of those errors against him.

[81] Counsel Rusanganwa Jean Bosco representing BK Ltd supports that it cannot compensate Rwagasana Thomas because he breached loan agreement between them, Counsel Rusanganwa states he lodges a cross appeal claiming that Rwagasana Thomas and Mukakimenyi Marie Rosine give in solidum BK Ltd 2,000,000Frw for having dragged it into unnecessary lawsuits, 10,000,000Frw for procedural and counsel fees.

[82] Counsel Rwinikiza Félix assisting Mukakimenyi Marie Rosine states that she cannot compensate because she didn't sign all loans and guaranty agreements concluded between BK Ltd and Rwagasana Thomas while she has rights over their family property.

DETERMINATION OF THE COURT

[83] Article 258 of the civil code book III provides that any act or omission by man that causes another injury, requires that the former, due to the wrong act committed, to repair it.

[84] Pursuant to the above article, the Court finds, the Court finds, Rwagasana Thomas should not be awarded moral damages, procedural fees and counsel fees because he loses the case.

[85] With regard to damages for which BK Ltd claims in cross appeal, the Court finds, it should not be awarded moral damages for being dragged into unnecessary lawsuits because nothing proves that Rwagasana Thomas sued it with bad faith but he has to give BK Ltd 1,000,000Frw for procedural and counsel fees on this instance, fees which are awarded in the discretion of the Court because what BK Ltd claims are excessive.

6. To know who shall be responsible for paying expertise fees on this instance

[86] The receipt of 04/01/2017 which is in the case file demonstrates that Rwagasana Thomas paid 2,000,000Frw to Ayinkamiye Spéciose, the expert appointed by this Court, so that the latter does an audit with intention of demonstrating the debt he owes BK Ltd. And also deposit slip of 01/12/2017 which is found in the case file, indicates that BK Ltd paid 2,000,000Frw to the expert to enable her preparing a report.

[87] The Court finds, Rwagasana Thomas should pay BK Ltd, 2,000,000Frw as expertise fees of that who prepared a report indicating the amount of the debt because he loses the case.

[88] In light of the above motivations, the Court finds, the total amount for which Rwagasana Thomas and Mukakimenyi Marie Rosine have to pay BK Ltd is as follows: 881,697,134Frw for principal loan + 786,948,623Frw for late fines + 1,000,000Frw for procedural and counsel fees on this instance, all amounting to 1,669,645,757Frw, they have also to give BK Ltd 2,000,000Frw as expertise fees of that who prepared a report indicating the amount of the debt, in addition to money he was ordered to pay on previous instance.

III. DECISION OF THE COURT

[89] Decides that Rwagasana Thomas's appeal lacks appeal ;

[90] Declares BK Ltd's cross appeal with merit in part ;

[91] Declares BK Ltd's claim with merit in part ;

[92] Sustains the rulings of the judgment RCOMA 0591/13/HCC-RCOMA 0007/14/HCC rendered on 03/07/2014 by the Commercial High Court 03/07/2014 ;

[93] Orders Rwagasana Thomas and Mukakimenyi Marie Rosine to pay BK Ltd 881,697,134Frw for principal loan and 786,948,623Frw for late fines all amounting to 1,668,645,757 Frw ;

[94] Orders Rwagasana Thomas and Mukakimenyi Marie Rosine to give BK Ltd 1,000,000Frw for procedural and counsel fees on this instance ;

[95] Orders Rwagasana Thomas and Mukakimenyi Marie Rosine to pay BK Ltd 2,000,000Frw for expertise fees ;

[96] Decides that court fees paid by Rwagasana Thomas when lodging his appeal, cover expenses of the case.

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Tel : (+250) 788 887 218 / 789 332 730
E-mail:imagedesigningcenter@gmail.com