

## **NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL**

[Rwanda SUPREME COURT – RADA0032/11/CS (Kanyange, P.J.,  
Mukandamage and Rugabirwa, J.) September 6, 2013]

*Administrative Law – Petition for cancellation of a public auction – The value of the claim requesting for the cancellation of the public auction due to the typographical error of the Court order number in the auction deed – The error on the number of the order is considered as an error that can be corrected – There is no ground of cancelling the public auction in case the plaintiff does not criticize the court order on which it was based.*

*Contracts or obligations law – Damages originating from the claim requesting for cancellation of the public auction – Procedural expenses and Counsel fees – The plaintiff cannot be awarded the damages requested in case the public auction was not cancelled but the respondents have rights on procedural and advocate fees.*

**Facts:** On 7<sup>th</sup> January, 1994 Ndagijimana Jean Pierre got a loan from BACAR which changed to be FINA BANK; his wife Murekatete and Nshimyumuremyi contracted as his sureties. Ndagijimana did not manage to pay the loan and BACAR filed a case in the Court of First Instance of Kigali which ordered Ndagijimana, Murekatete and Nshimyumuremyi to pay the loan and if not done accordingly, this would be taken from their properties forcibly. BACAR requested the President of the Court of first Instance of Kigali an order of the public auction of three houses including that of Nshimyumuremyi that was on plot n<sup>o</sup> 345 in Nyarugenge and the Court issued a court order n<sup>o</sup> 501/99 ordering the public auction of those three houses including that of Nshimyumuremyi abovementioned that was bought by Rubangura Vedaste.

Nshimyumuremyi filed a case against the State of Rwanda, Mutabazi Etienne (State Notary), FINA BANK, BCR and the heirs of Rubangura in

the High Court requesting for the cancellation of the public auction of his house carried out by the State notary on 6<sup>th</sup> February, 2000, so that he might either get back his house or its value, adding the rent fees and damages. He stated that the public auction was illegally carried out since the government notary carried it out basing on the order n<sup>o</sup> 478/99 mentioned in the auction deed which had never existed. The respondents argued that the public auction was legally carried out and that it cannot be cancelled. The Court ruled that the case of Nshimyumuremyi had no merit since the public auction was carried out basing on the court order n<sup>o</sup> 501/99 of the First Instance Court.

Nshimyumuremyi appealed to the Supreme Court alleging that the Commercial High Court ruled without motives that his house was auctioned pursuant to the court order n<sup>o</sup> 501/99 which is not true, rather it was pursuant to the court order n<sup>o</sup> 478/99 which never existed but appeared in auction deed which has never been contradicted by the person who drafted it.

**Held:** 1. In case the public auction was carried out basing on the court order n<sup>o</sup> 501/99 and the plaintiff does not criticize it while it has been realised that n<sup>o</sup> 478/99 is the one found in the auction deed, this is considered as an error which can be corrected by any interested party, especially that the content of that auction deed is what is provided in the order n<sup>o</sup> 501/99. Therefore, there is no reason of cancelling the public auction based on that order and that is why the auctioned house shall remain the property of the heirs of the person who bought it.

2. When the public auction is not cancelled, the damages requested by the plaintiff have no merit.

3. The respondents are entitled to procedural and advocate fees while the plaintiff is not because the public auction was not cancelled.

**Appeal has no merit.**

**Appellant ordered to pay to respondents the damages, procedural expenses and counsel fees.**

**With the costs to the appellant.**

**Statutes and statutory instruments referred to:**

Law n° 21/2012 of 14/06/2012 relating to Civil, Commercial, labour and administrative procedure, article 168.

Law of 30/07/1888 relating to contracts or obligations, article 276.

Law of 15/07/1964 of Civil and Commercial disputes procedure, articles 321, 322, 345, 346, 363, 369.

**No case referred to.**

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] Nshimyumuremyi Ephron filed a case in the High Court requesting for the annulment of the public auction of his house, which is on plot n° 345, located in commercial zone of Nyarugenge, which was carried out on 6<sup>th</sup> February, 2000 by the State notary, in the execution of the judgment RC 30039/99, on the request of FINA BANK and was bought by Rubangura Vedaste, which he claims that it was illegally carried out.

[2] In filing the case, Nshimyumuremyi's counsels argued that the court order n° 501/99 of the First Instance Court of Kigali ordering that the house be sold at public auction was adjudicated by the bench of three judges instead of the president of the Court, they added that the court order mentions that house while it was not mortgaged in favor of FINA BANK, and that even the notary sold it at public auction knowing that it was not a mortgage for the bank. They request that the State indemnifies him for the errors committed by its employees.

[3] Another ground considered as the basis of the counsels of Nshimyumuremyi for the request of annulment of the public auction, is that the court order n° 501/99 mentions Nshimyumuremyi Ephron instead of Ndagijimana Jean Pierre who had a loan for FINA BANK. They also plead that the bank requested for the house to be sold well knowing that it

was not its mortgage and even its owner has no loan for the bank, it even did not follow what is provided for by the provisions of the law relating to Civil and commercial disputes procedure which was in force at that time relating to the auction of the immovable property, therefore requesting that FINA BANK should pay him damages for that.

[4] In the case of Nshimyumuremyi, he also requested that the heirs of Rubangura Védaste who bought the house hands it back to him because he bought it unlawfully, and if impossible they compensate him with its value, and BCR pays him damages for having handed over the title deed of the house while it was mortgaged in its favour for another loan.

[5] During the hearing, the Counsels for Nshimyumuremyi pleaded that they no longer base on the errors in the court order n° 501/99 as a ground for the annulment of the public auction, rather on the ground that the State notary in conducting the public auction of that house relied on the court order n° 4 78/9 9 mentioned in the auction deed which did not exist (*imaginaire*).

[6] The High Court ruled that the claim of Nshimyumuremyi has no merit, because it found that the public auction was carried out pursuant to the court order n° 501/99 delivered by the First Instance Court of Kigali and he does not challenge it, especially because he did neither request it to be changed nor annulled, therefore it was not the court order n° 478/99 which was relied on because nothing demonstrates its existence.

[7] Regarding the procedure provided for by the law to be followed prior to the public auction, the Court ruled that it cannot be separated from the mentioned court order n° 501/99, and that for the court to order the public auction to be carried out, it had to first examine whether what is provided for by the law were complied with; held that he did not produce any evidence that it was not complied with, and he even did not sue to the court when the seizure of the house was carried out as it was recognized to him by article 363 of the law relating to civil and commercial disputes procedure, which was into force at the time in order to request the compliance with the law.

[8] The Court found that, he knew the house was not supposed to be sold as stated by the plaintiff, and held that the State notary did not have authority and duty to alter the court order to either change or remove anything, even if he did not commit any error, and no evidence was produced to prove that there was a collaboration against him between the notary and the judges who took the decision or even with FINA BANK.

[9] In its discretion, the court awarded 300,000Frw to each of the defendants for compensation, procedural cost and counsel fees.

[10] Nshimyumuremyi appealed to the Supreme Court asserting that the court adjudicated without motivation that his house was auctioned pursuant to the court order n<sup>o</sup> 501/99 which is false, yet it was done pursuant to the court order n<sup>o</sup> 478/99 which never existed found in the auction deed which was not disclaimed by its author, so therefore he could not have appealed against a decision which had never existed and that he had not seen. He argues, in addition, that the public auction which was carried out should be nullified and given back his house or compensated with its value, plus its rent because it was conducted illegally under fraudulent maneuver of FINA BANK, Notary and BCR, and all those defendants should indemnify him.

[11] Every defendant pleads that there was no error committed in carrying out the public auction of Nshimyumuremyi's house, to the extent that they should pay damages, and that the public auction was lawful, therefore should remain valid, he should not be awarded damages, instead he should pay them in return for dragging them in lawsuits without a due cause and the counsel fees.

[12] The case was heard in public on 9<sup>th</sup> April 2013 and 2<sup>nd</sup> July 2013, the Counsels, Munderere Léopold, Buhuru Pierre Celestin and Ntampuhwe Juvens representing Nshimyumuremyi, FINA BANK represented by the Counsel, Karangwa Vincent, BCR represented by the Counsel, Batware Jean Claude, the State represented by the Attorney Sezabungu Alphonse, Mutabazi Etienne represented by the Counsels,

Baragondoza Jean Damascène and Nzaramba Janvier while the heirs of Rubangura Védaste were represented by the Counsel Rwagatare Janvier.

## **II. ANALYSIS OF LEGAL ISSUES**

### **1. Whether the High Court erred in adjudicating that the house on plot n° 345, situated in the commercial zone of Nyarugenge, Kigali City, was sold in the public auction pursuant to the court order n° 501/99 of the First Instance Court of Kigali.**

[13] The counsels for Nshimyumuremyi argue that the High Court adjudicated that his house on plot n° 345 situated in the commercial zone of Nyarugenge in Kigali City was auctioned by the State Notary, Mutabazi Etienne based on the court order n° 501/99 while it is not true, because according to the auction deed drafted by the notary, proves that it was based on the court order n° 478/99 which had never existed. Therefore, they do not understand where the Court got the information that the notary was mistaken while he was not present during the court proceedings to contradict the authentic deed he made. They added that the fact for some of the parties to have stated that he was mistaken does not imply that there has been suing for forgery; therefore, it contravenes the provisions of article 13 paragraph 1 of the law relating to evidence and its production.

[14] They also argue that it is impossible that the court order n° 501/99 has been the basis for the auctioning of the house as held by the Court, because it stated that the public auction should have been carried out on 22<sup>nd</sup> January, 2000, at 11:00AM, but was carried out at 12:30PM on 6<sup>th</sup> February 2000. In addition to that, the announcement of public auction by the notary issued on 31<sup>st</sup> January 2000, did not rely on that order as held by the Court, because it mentions the house of Ndagijimana Jean Pierre, on plot n° 778 situated in Kimihurura, whereas it is not found in that order.

[15] The counsels for Nshimyumuremyi also plead that it was provided in the notary's announcement, on which the court based, a list detailing

how houses would be auctioned the house belonging to Ndagijimana, situated on plot n° 778 in Kimihurura and which had to be auctioned at a half past ten (10h30), the one for Nshimyumuremyi on plot n°118 situated in Kicukiro had to be auctioned at a half past eleven (11:30), and his other house on plot n° 345 situated in Nyarugenge had to be auctioned at 12:30. Therefore, the court did not explain, why that schedule was not followed and also explain the right that FINA BANK and the State notary had, for them to begin with the last house on the list, which was not even among the securities of the Bank.

[16] Karangwa Vincent, the Counsel for FINA BANK argues that Nshimyumuremyi is disregarding the series of activities presented by FINA BANK during the hearing in the High Court, where it exhibited that at first, there was a case RC 30039/99 in which FINA BANK sued Ndagijimana Jean Pierre and his sureties Murekatete Gloria and Nshimyumuremyi and lost the case for the loan of 55,949,630Frw, against which they did not appeal and therefore it became final and executed.

[17] He states that there is no irregularity in the court order no 501/99 issued by the First Instance Court of Kigali on 22<sup>nd</sup> October, 1999, on the request of FINA BANK for the judgment it won to be executed as those who were representing Nshimyumuremyi stated in the previous Court, when they said that they have nothing to criticize that decision, but instead their ground for requesting the annulment of the public auction is that the State notary auctioned the house pursuant to the court order n° 478/99 which never existed and exhibited. He finds that, if Nshimyumuremyi acknowledges the court order n° 501/99, and did not appeal against it or request for its annulment in the period provided for by the law he cannot alter and request the contrary to that acknowledgement. The fact that, the notary was mistaken in typing the number of the document is not a ground for annulment of the public auction which was in accordance with all the procedures provided for by the law. He finds therefore that the counsels for Nshimyumuremyi should present another judgment which the court order n° 478/99 intended to execute.

[18] The Counsel, Karangwa states again that the fact that Nshimyuremyi's counsels argue that the public auction did not follow the schedule which was provided in its advertisement, is considered as disregarding that what was projected for, is the disbursement to FINA BANK which had to be obtained from the assets of all those who lost the case. In case the notary had the judgment with enforcement order which had to be executed, all procedures being done in conformity with the law; nothing would prevent him from looking for the disbursement from the assets of those who lost the case, wherever they were.

[19] He also adduces that, alleging there are differing documents, because the house on plot n<sup>o</sup> 778 located in Kimihurura which is in the advertisement of the public auction but does not appear in the order n<sup>o</sup> 501/99; finds that there is no legal consequences as that house was not auctioned, and that order indicates the houses to be auctioned and not the program on how they will be auctioned, and so it was impossible to auction all of them at the same hour. He therefore finds that there was no deceit by FINA BANK as he does not provide any evidence over it.

[20] Mutabazi Etienne and his counsel adduce that the counsels for Nshimyuremyi acknowledge themselves that the court order n<sup>o</sup> 478/99 never existed nor came into sight. They explain that the public auction based on court order n<sup>o</sup> 501/99 as is evident in all documents thereon, but that in writing the deed of auction, a mistake was made and it was written "Order n<sup>o</sup> 478/99", however if they had requested for it earlier, when he was still working as a notary he would have corrected it.

[21] Concerning the date when the public auction was supposed to be carried out, they state that it should have been conducted on 22<sup>nd</sup> January, 2000, but did not get the bidders and postponed it in fifteen days, and was re-advertised, and took place on 6<sup>th</sup> February 2000.

[22] They also argue that the court order n<sup>o</sup> 501/99 for the public auction was not very clear, because it shows that all houses were supposed to be auctioned at the same time, 11:00 AM, which was impossible; the important thing being that the houses which were on it had to be auctioned.



[23] Concerning the faults alleged to have been committed by the notary who carried out the public auction because he knew well that the house was not supposed to be auctioned, Mutabazi and his counsels adduce that he had no authority to alter the decision as it is explained in the appealed judgment. What Nshimyumuremyi should have done first would be to use the procedure provided for by the law at the time the court order was made and file a third party opposition, an appeal or requests it to be rectified on the irregularities he argues it had which prejudiced him, but that if he alleges that the court order n<sup>o</sup> 501/99 did not prejudice him, he should not have sued it.

[24] Regarding the reason why the house of Nshimyumuremyi was first sold at the public auction, Mutabazi explains that the law which was into force at the time of public auction provided that whenever there are many assets to be auctioned, the distrainer is the one who chooses the asset from which he can get full payment, so after making the advertisement, FINA BANK chose the house of Nshimyumuremyi to be auctioned.

[25] Sebazungu, the State attorney of Rwanda states also that the court order n<sup>o</sup> 501/99 was the one relied on by the notary in auctioning the house of Nshimyumuremyi, therefore, the fact that in the deed of auction it is mentioned the n<sup>o</sup> 478/99, was a mistake made in the registry. He also states that for the house on plot n<sup>o</sup> 778 Kimihurura which is not in the court order n<sup>o</sup> 501/99 but appears in the advertisement of the auction, there is no problem because it was not auctioned while concerning the date for auctioning which is in the court order but different from the one on which it was carried out, he explains that there was the postponement of the auction, and concerning the hours on which the houses were supposed to be auctioned, he states that they presumed that the auctioning should have been closed at 12:30 PM.

[26] Again, he finds that, regarding the procedures to be followed before delivering the court order for the public auction, it did not concern the notary but instead, FINA BANK. His duty was to execute what was included in the court order, and that is what he did, because the judgment he was requested to execute is the one he executed. On the problem concerning the procedures of the auction that Nshimyumuremyi claims

that they were not followed, he would have raised it in accordance with article 363 of the Law of 15<sup>th</sup> July, 1964 relating to the civil and commercial disputes procedure which was into force at the time, and file it to the court which delivered the order for public auction.

[27] Rwagatare, the counsel for the heirs of Rubangura states that he notices the auction has relied on the court order n<sup>o</sup> 501/99 and the counsels for Nshimyumuremyi assert that it does not prejudice him, so he finds no reason why he would have sued against the court order n<sup>o</sup> 478/99 which appear in the deed of auction because he realizes that it is a typographical error which was made.

[28] Mutabazi Etienne and his counsel adduce that the counsels for Nshimyumuremyi acknowledge themselves that the court order n<sup>o</sup> 478/99 never existed or seen. They explain that the public auction was based on the court order n<sup>o</sup> 501/99 as is evident in all documents concerning it. Nevertheless, in drafting the deed of auction, a mistake was made and “court order n<sup>o</sup> 478/99” was mentioned, but if they had requested for it earlier, when he was still working as a notary he would had corrected them.

[29] Concerning the date when the public auction was supposed to take place, they state that it should have been held on 22<sup>nd</sup> January, 2000, they did not get the buyers and postponed it in fifteen days, they re-advertised it, and it was conducted on 6<sup>th</sup> February 2000.

[30] They also argue that the court order n<sup>o</sup> 501/99 for the public auction was not very clear, because it shows that all houses were supposed to be auctioned at the same time, at 11:00 AM, which was impossible; the important thing being that the houses which were mentioned in that order had to be auctioned.

[31] Concerning the faults alleged to have been committed by the notary who carried out the public auction since he knew well that the house was not to be auctioned, Mutabazi and his counsels adduce that he had no authority to alter the decision of the court as it was explained in the appealed judgment. What Nshimyumuremyi should have done first would be to use the procedure provided for by the law at the time the

decision was made and file a third party opposition, appeal or request it to be corrected on the defects he argues they prejudiced him, but if he alleges that order n° 501/99 did not prejudice him, he should not have sued against it.

[32] Regarding the reason why the house of Nshimyumuremyi was the first to be auctioned, Mutabazi explains that the law which was into force at the time of public auction provided that wherever there are many properties to be auctioned, the distrainer is the one who chooses the asset from which he can get full payment, so after making the announcement it was FINA BANK which chose the house of Nshimyumuremyi to be auctioned.

[33] Sebazungu, the State attorney of Rwanda also states that the court order n° 501/99 was the one based on by the notary in auctioning the house of Nshimyumuremyi. The order n° 478/99 being mentioned in the deeds of auction was a mistake made in the registry. He also states that it is not an issue for the house on plot n° 501/99 not being in the court order n° 501/99 but in the advertisement of the auction, because it was not auctioned. Concerning the date for auctioning which is in the court order not being the same as the one on which it was carried out, he explains that there was postponement of the auction. Concerning the hours on which the houses were supposed to be auctioned, he states that they opted that the auctioning would be closed at 12:30 PM.

[34] Furthermore, he notes that regarding the procedure which had to be followed before making a court for the public auction does not concern the notary but FINA BANK, his duty was to execute what was included in the court order, and that's what he did, because the judgment he was requested to execute is the one he executed. On the problem concerning the procedure of the auction Nshimyumuremyi claims that they were not followed, he would have raised it in accordance to article 363 of the Law of 15/07/1964 regarding the procedure of civil and commercial disputes procedure which was in force at the time, and file it to the court which rendered the decision for public auction.

[35] Rwagatare the counsel for the heirs of Rubangura adduces that as he notices that the auction relied on the court order n<sup>o</sup> 501/99 and the counsels for Nshimyumuremyi assert that it is not inconveniencing him, so he finds no reason why he sued against the court order n<sup>o</sup> 478/99 which appear on the deeds of auction because its typographical error which was made.

## **THE VIEW OF THE COURT**

[36] The documents in the case file show that on 7<sup>th</sup> January 1994 Ndagijimana Jean Pierre got a loan of 25,000,000Frw from BACAR now known as FINA BANK Ltd has as guarantors his wife Murekatete Gloria and his father Nshimyumuremyi Ephron.

[37] After realizing that the loan was not reimbursed BACAR sued the borrower and his guarantors in the First Instance Court of Kigali. Consequently, in the judgment RC 30039/99 rendered on 11/06/1999, the court ordered Ndagijimana, Murekatete and Nshimyumuremyi to pay to BACAR the amount of 55,949,630Frw of the principal loan, its interests and late payment interest, as soon as the judgment has been delivered and failure to do so that amount be deducted from their properties by the coercive of the state. That case was rendered in the default of all respondent.

[38] In its letter dated 6<sup>th</sup> October, 1999, BACAR requested the president of the First Instance Court of Kigali for the order to sell at public auction the houses on the following plots: n<sup>o</sup> 778 at Kimihurura III of Ndagijimana Jean Pierre, n<sup>o</sup> 118 at Kicukiro and n<sup>o</sup> 345 at Nyarugenge of Nshimyumuremyi Ephron so that the said judgment can be executed, it also states that it sent the whole document to be examined.

[39] In response to that letter, the Court made an order n<sup>o</sup> 501/99 for the auctioning of the houses n<sup>o</sup>118 at Kicukiro and n<sup>o</sup> 345 at Nyarugenge of Nshimyumuremyi Ephron, and it was affixed on the entrance of the First Instance Court of Kigali, at the procecuton of Kigali, at Kicukiro Commune, at Nyarugenge Commune, at Kigali City and at the appellate Court of Kigali. After its advertisement of 31<sup>st</sup>January, 2000, the public

auction did not take place on 22<sup>nd</sup> January, 2000 at 11:30 AM as expected but on 6<sup>th</sup> February, 2000, as seen in the statement of the auction drafted by the notary, hence the house on plot no 345 at Nyarugenge was brought by Rubangura at the price of 95,100,000Frw.

[40] The Court is of the view that, as decided by the High Court, the notary relied on the decision n<sup>o</sup> 501/99 to auction the house in the plot no 345 of Nshimyumuremyi, which is referred in it. Again the statement of the auction made by the Notary in the presence of the witnesses, the secretary and the representative of FINA bank and attached to the deeds of auction it shows that is the house which was auctioned, thus, on the deeds of auction indicating that in auctioning the house it was the decision n<sup>o</sup> 478/88 of the Primary Instance Court which was relied on is a typographical error, which could be corrected on the request of any interested person, further more others referred to in it, were coincide with the decision no 501/99.

[41] Again, the Court finds that as Nshimyumuremyi has nothing to criticize on the court order n<sup>o</sup> 501/99 as asserted by his counsel, there is no reason for the annulment of the auction which was based on that order.

[42] Regarding other irregularities, that Nshimyumuremyi claims to have been committed by the notary who carried out the public auction, the Court is of the view that their purpose also was to demonstrate that the public auction was not based on the court order n<sup>o</sup> 501/99, rather on the order which did not exist, but those are groundless because considering a sequence of activities in the public auction, it is obvious that all were based on the court order n<sup>o</sup> 501/99 delivered by the Court for the execution of the judgment RC 30039/99 mentioned above.

## **2. Whether FINA BANK may have fraudulently sold the house which does not belong to it.**

[43] The counsels for Nshimyumuremyi argue that in the appealed judgment they demonstrated that selling another person's property is null according to article 276 of the law of 30/07/1888 relating to contracts or obligations, but the Court did not explain if there is a link between FINA

BANK and the house of Nshimyumuremyi on plot no 345 at Nyarugenge. He explains that on 7<sup>th</sup> January, 1994 when they signed the loan contract and its mortgage, FINA BANK accepted only the houses which were given as a mortgage, implying that it sold the house in litigation fraudulently (in bad faith) for it misled the Court requesting for its public auction well knowing that it was not its mortgage. He added that what is astonishing is that the Court did not make any remark on it, and the judgment illustrates that there was mistaking real security for personal security.

[44] Karangwa, the counsel for FINA BANK argues that the counsel for Nshimyumuremyi are disregarding that the loan contract was annulled by the judgment RC 30039/99 in which three persons who are Ndagijimana, Nshimyumuremyi and Murekatete lost the case equally. Therefore, that enforcement order is the only link for the judgment which should be executed in order for FINA BANK which won the case to be paid from the assets of the losers.

## **THE VIEW OF THE COURT**

[45] The Court finds that the sold house of Nshimyumuremyi on plot n<sup>o</sup> 345 at Nyarugenge which is in litigation in this case was auctioned pursuant to the court order as explained above, under the application by the FINA BANK in order to get paid from the enforce the judgment RC 30039/99 and he does not criticize it. Therefore it is not FINA BANK which decided to sell the house for it to be sued for having sold another person's property, while it was sold under the court order. Therefore, his counsels who claimed that the sold house was not its mortgage, should have filed a case against it to the Court that delivered the court order n<sup>o</sup> 501/99 which ordered to auction it, as provided for by article 363 of the Law of 15/07/1964 relating to civil and commercial disputes procedure which was in force at the time that court order was delivered<sup>1</sup>, requesting that the house be removed among those houses that were to be sold. For

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<sup>1</sup> This article provides that "All the litigations relating to the laws of securities are settled by the judge's order, if they are not necessarily settled by the judgment".

as much as they did not do it, they cannot request for it in this case, because that court order was not attacked.

**3. Regarding the procedures for the seizure of the house that Nshimyumuremyi alleges they were not in compliance with the law.**

[46] The counsels for Nshimyumuremyi argue that it was explained to the previous Court that articles 321,322, 345 and 346 of the law of 15/07/1964 relating to civil and commercial disputes procedure which was in force at the time the public auction was conducted were not complied with, because in the file of the public auction there is no single document relating to it, then in response to that issue the Court asserted that before the court order n° 501/99 was delivered, the First Instance Court examined first all the documents contained in the case file, which is not true, because the notary who sold the house, states in the auction deed that he sold it relying on the court order n° 478/99 which did not exist (*imaginaire*), and that if the Court had really examined the file it would have noticed that in the judgment RC 30039/99 of which FINA BANK was requesting to be executed, the house n° 345 located at Nyarugenge did not appear, because it was not its mortgage.

[47] They argue also that the Court held that it was Nshimyumuremyi who was supposed to submit evidence that there was no order to pay when he raised that issue, and that he was informed by BCR that his house was sold when he inquired about his loan. They find that it is FINA BANK which should submit evidences for it requested the auction.

[48] Karangwa, the counsel for FINA BANK states that all the procedures which are required by the law for the auctioning of Nshimyumuremyi's house were complied with.

[49] Baragondoza, the counsel for Mutabazi states that articles of laws invoked by the counsels for Nshimyumuremyi in their pleadings is a waste of time because they should have invoked them when the public auction procedures were performed as they were provided for in articles

of 363 and 369 of the law of 15/07/1964 relating to civil and commercial disputes procedure which was into force at that time for them to file a claim to the court or to the authority who ordered the seizure the house.

[50] Sebazungu, the State attorney argues that the First Instance Court of Kigali ordered the auction after examining that the file was complete, and also that what was requested to be invalidated is not that court order, and that even the absence of the owner of the property which was auctioned cannot itself invalidate the public auction.

## **THE VIEW OF THE COURT**

[51] The court finds that articles of 321 and 322 of the law of 15/07/1964 relating to Civil and Commercial disputes Procedure which was into force in regard to the seizure of the movable property, on which the counsels for Nshimyumuremyi rely cannot be considered in this case.

[52] Regarding the order and its content ordering Nshimyumuremyi to pay or notified at his residence or where he elected to be his home (commandement à *personne*) as provided for by articles 345 and 346 of the law of 15/07/1964 mentioned; his counsel state that it does not appear in the file of the public auction, and it was FINA BANK which was supposed to exhibit it; the Court finds that such a document is made by the Court bailiff, before the Court delivers a court order to carry out the public auction. In as so much as the counsels for Nshimyumuremyi state that he does not criticize the court order n°501/99 on which the auctioning of the house relied, and did not file a case to the Court which delivered for its annulment for not complying with the procedures provided for by the above mentioned articles, there is no way he can request for the annulment of the public auction which relied on it in this case.

### **4. Whether Nshimyumuremyi should get back the house or its pecuniary value and be paid its rent.**

[53] The counsel for Nshimyumuremyi argue that he should get back his house which was sold at the public auction from the heirs of



Rubangura who bought it, because the State notary auctioned it contrary to the law while it was not the subject matter of the judgment RC 300039/99 which was being executed because it was not among the mortgages of FINA BANK, if not possible he be given 600,000,000Frw of its pecuniary value or be evaluated by the expert if necessary.

[54] Rwagatare, the Counsel for the heirs of Rubangura states that they should not give back the house bought by Rubangura at the public auction which was carried out in conformity with the law, and also he did no fault which makes them reliable to pay damages.

[55] The Court finds as demonstrated above, that there is no reason for annulment of the public auction at which Nshimyumuremyi's house, was bought by Rubangura. Therefore that house should remain the property of his heirs.

#### **5. The grounds for damages requested by Nshimyumuremyi. Damages demanded from FINA BANK.**

[56] The counsels for Nshimyumuremyi request that FINA BANK hand him back the money got from the rent of his house which was auctioned, computed from the day of the auction which is 6<sup>th</sup> February 2000 up to the day of the judgment, delivery amounting to 234,680,000Frw which is mentioned in the submissions in addition with that they got paid after the submissions, because it's the one which did everything possible fraudulently so that the house can be auctioned, while it was not its mortgage instead of auctioning those it was given as mortgages, and it did it in order to disposes him of his house.

[57] Karangwa, the Counsel for FINA BANK argued that it should not be charged of any little damages because it did not commit any fault, for it executed the judgment to get paid the loan it granted, and that, it cannot pay the rent it got until then because it does not exploit it.

[58] The Court finds that FINA BANK should not pay the damages for the house rent, because it requested for the court order to auction the

house of Nshimyumuremyi in execution of the judgment it had won which involved the loan that had to be paid and was given it, and as it was repeatedly said, that court is not the one attacked.

### **Damages claimed from the heirs of Rubangura.**

[59] The Counsels for Nshimyumuremyi argue in addition that the heirs of Rubangura Védaste have to give him moral damages amounting to 25,000,000Frw because Rubangura bought the house and after, he paid the loan in BCR for the company owned by Nshimyumuremyi which is known as SOCOFAG, in order to get its documents while it is not a mortgage of FINA BANK, therefore he owns it fraudulently.

[60] Rwagatare, the Counsel for the heirs of Rubangura states that Rubangura is not the one who paid the loan to BCR for Nshimyumuremyi in order to get the document of the house, instead it is BCR which requested the seizure of 1,823,961Frw from the Court which Nshimyumuremyi owed it, and requested to be deducted from the proceeds of the public auction as it is clear in the court order n° 292/ND.E./2000 of 28/07/2000 for provisional seizure issued by the president of the First Instance Court of Kigali. And he adds that, there exists legal modalities which provide how a buyer in the public auction gets the title, therefore it was given to him by the Registrar of Land Titles in the letter he wrote to him on 17<sup>th</sup> July, 2003. Therefore, he did not get it from BCR as the counsels for Nshimyumuremyi alleges.

[61] The court finds that there is no evidence submitted by Nshimyumuremyi contradicting the one submitted by the heirs of Rubangura as mentioned above, which proves indeed that it is Rubangula who paid the loan owed to BCR by Nshimyumuremyi's company known as SOCOFAG it, with the intention of getting fraudulently the land title for the house.

### **Damages claimed from BCR**

[62] The counsels for Nshimyumuremyi are also requesting BCR to pay 25,000,000Frw for damages because it gave out the title of the house it had without first analyzing while it was the one which had that house as a mortgagee.

[63] Batware, the counsel for BCR states that it came to know about the auctioning of the house when the public auction was over, therefore it did not commit any fault, what happened was that BCR had to be paid first because it had the preferential right over the mortgage, and Rubangura demonstrated that he was the successful bidder and requested to be given its title. He states in addition that, the damages claimed by Nshimyumuremyi from BCR constitute a new claim on which it cannot submit its defence for the first time in appeal.

[64] The court finds that it is not the first time BCR was requested to pay damages because they were the subject matter of the claim filed in the previous Court, but they have not been awarded because the case of Nshimyumuremyi was without merit. The Court is however of the view that there is no reason why BCR should deny handing over the title of the house (title deed) which was auctioned while it was paid its debt, therefore it should not pay related damages.

### **The damages claimed from the State of Rwanda and Mutabazi Etienne**

[65] The counsels for Nshimyumuremyi request in addition that the state of Rwanda, the employer of Notary Mutabazi and himself jointly pay 25,000,000Frw of damages because he breached his obligations and sold a house which was not a mortgage of FINA BANK relying on an inexistent court order he forged.

[66] Sebazungu, the State attorney argues that the state should not pay damages because the public auction was in accordance with the law and that the court order n<sup>o</sup> 501/99 was issued on the request of FINA BANK, and the notary relied upon it to auction the house, therefore the State cannot be accountable for the mistake made while drafting auction deed.

[67] Baragondoza, the counsel, asserts that the damages claimed from Mutabazi are groundless because the public auctioned out in accordance with the law.

[68] The Court finds that the notary carried out the public auction relying on the court order and as it was explained by the previous Court, he did not have the authority to modify it. he did what he was requested which was to execute the judgment Nshimyumuremi lost in favor of BACAR in relation to the credit he guaranteed in accordance with the ruling of the court order, therefore he should not pay him any damages, the same to the State which was his employer.

## **6. The damages requested by respondents.**

[69] Rwagatare, the counsel for the heirs of Rubangura request that the amount of 300,000Frw for the procedural expenses and Counsel fees charged to Nshimyumuremyi should be increased by 2,000,000Frw more, and pays in addition 15,000,000Frw because he filed a case preventing Rubangura from fully enjoying their house and 15,000,000Frw for defamation.

[70] Karangwa, the counsel for FINA BANK states that Nshimyumuremyi should pay it 30,000,000Frw for dragging it in lawsuits, the Counsel's fees inclusive.

[71] Batware, the counsel for BCR also requests that Nshimyumuremyi pays it 500,000Frw for dragging it in appeal, for case preparation and its pleading in addition to 3,00,000Frw which was awarded in the previous Court, altogether amounting to 8,000,000Frw.

[72] Sebazungu, the State attorney considers that 300,000Frw for damages previously charged to Nshimyumuremyi to be paid to the state of Rwanda should be sustained.

[73] Baragondoza argues that Nshimyumuremyi should pay Mutabazi Etienne the damages equivalent to 500,000Frw of the Counsel fees and the procedural expenses because he was dragged in lawsuits.

[74] In response to the damages requested by the respondents, the counsels for Nshimyumuremyi argue that he should not pay them damages because of the mistakes everyone did for him, which led his house to be auctioned, but instead, he requests that they should jointly pay him damages for procedural expenses and Counsel fees equivalent to 10% of all the requested damages.

## **THE VIEW OF THE COURT**

[75] The Court finds 30,000,000Frw of damages requested by the heirs of Rubangura cannot be awarded to them since they were requested for the first time in the appeal, as it is prohibited by article 168 of CCLAP stipulating that no new claim may be lodged at the appeal level. Regarding the procedural expenses and the Counsel fees, the Court in its discretion, finds that they should be awarded 300,000Frw, in addition to the 300,000Frw they were awarded in the previous Court because what they are requesting for is excessive, all of them totalling 600,000Frw on both level.

[76] Regarding the damages of 30,000,000Frw claimed by FINA BANK from Nshimyumuremyi due to the fact that he dragged it in lawsuits and the Counsel fees, the Court finds that there is no evidence that he sued FINA BANK with the intention of dragging it in lawsuits, since he did not understand the way his house was auctioned, thus he should not pay damages for it; instead, he should pay it the Counsel fees for it hired the Counsel, therefore the Court in its discretion, awards 300,000Frw in addition to 300,000Frw awarded by the previous Court, the total being 600,000Frw.

[77] Regarding the damages claimed by BCR from Nshimyumuremyi equivalent to 500,000Frw for dragging it in the lawsuit for no reason, case preparation and its pleadings, the court finds that it was his right to appeal when he is not contented with the judgment, but because BCR also hired a counsel to plead for it, in its analysis it is awarded 300,000Frw of the Counsel fees in addition to 300,000Frw which was awarded in the previous Court, the total being 600,000Frw.

[78] Regarding what the state of Rwanda is requesting to sustain the procedural expense of 300,000Frw awarded in the previous Court, the Court finds that they should be respected, and the ones requested by Mutabazi Etienne should not be awarded to him because he was not dragged in the lawsuit by Nshimyumuremyi, but he was forced to intervene on the request of the State of Rwanda.

[79] Regarding the request of Nshimyumuremyi to order the respondents to bear procedural expenses, the Court finds that they should not be awarded to him because his appeal is without merit.

### **III. THE DECISION OF THE COURT.**

[80] Decides that Nshimyumuremyi Ephron's appeal is without merit;

[81] Orders him to pay FINA BANK, BCR and the heirs of Rubangura Védaste 600.000Frw to each one of them, for procedural expenses and Counsel fees and to pay 300,000Frw to the State of Rwanda for procedural expenses and counsel fees as they were awarded by the High Court, all amounting to 2,000,000Frw;

[82] Orders Nshimyumuremyi Ephron to pay the court fees of 82,900Frw, and once not paid within 8 days, they shall be deducted from his property on government coercion.