

NYIRAKAMANA ET AL v. MUKASHARANGABO ET AL

[Rwanda SUPREME COURT – RS/REV/INJUST/CIV0007/15/CS (Kayitesi Z., P.J., Hatangimbabazi, Gatete, Hitiyaremye and Ngagi, J.) December 04, 2015]

Family law – Marriage contract – The validity of the second marriage contract while the first one is not annulled – No one may enter into a new marriage before the annulment or dissolution of the previous marriage – Constitution of the Republic of Rwanda of 24/11/1962, article 28 – Law N°42/1988 of 27/10/1988 instituting civil code book I, article 175.

Family law – Marriage contact – Sharing of property – In case spouses separate, they equally share the existing property at the time of their separation.

Family law – Cohabitation – Sharing property – The cohabitant only share equally the property they co-owned – Organic Law N°59/2008 of 10/09/2008 on prevention and punishment of gender- based violence, article 39.

Family law – Testament – Invalidation of the testament – The testament is invalid when it discriminates the children basing on gender and also when the de cujus tacitly changed testament before his death – Constitution of the Republic of Rwanda of 20/12/1978, article 16 and 93(2) – International Convention on the Elimination of all Forms of Discrimination against Women of 18 December 1979 signed at New York, article 5(a).

Family law – Donation – Invalidation of donation contract – The donation made without the consent of the co-owner and with the purpose to discriminate the children, is invalid.

Facts: Karimunda got civilly married to Mukasharangabo, who in 1965, abandoned her husband and went to cohabit with another man. After that period, Karimunda had a children with Mukandori but without cohabitation.

In 1970, he civilly got married to Nyirakamana with whom they concluded a contract of for the consolidation of their property to run a business together and they contributed to their family welfare.

In 1979, Karimunda filed a claim at the First Instance Court requesting to divorce Mukasharangabo, and the Court granted the divorce on the ground that wife abandoned the household.

The prosecution accused Karimunda and Nyirakamana of bigamy at the First Instance of Kigali alleging that they cohabited before he divorce Mukasharangabo, and it requested for annulment of the marriage contract which he entered into with Nyirakamana. The Court convicted them of bigamy but it did not annul the marriage contract on the ground that none will benefit from its cancellation because this would consist of a dissolution of the family which is well established, especially that the marriage contract between Karimunda and Mukasharangabo does no longer exist.

In 1991, Mukasharangabo applied for opposition against the divorce judgment because it was heard by her default. The court sustained the divorce on the ground that she willingly abandoned her husband Karimunda in 1965. Mukasharangabo appealed against the ruling but Karimunda died before its hearing.

Mukasharangabo filed a claim to the Primary Court praying for the cancellation of the marriage contract between Karimunda and Nyirakamana, and the Court ruled that her claim lacks merit.

Meanwhile, Nyirakamana and his son Karangwa instituted a third part opposition against the judgment in which Karimunda alleged that his children refused the descending partition. That case was joined to other cases which his wives and their children filed with the purpose of requesting the revocation of the testament he made as well as the case filed against Central Motors and Parts Sarl and Karangwa in single case RC0153/05/TP/KIG which was rendered by the Court of Kigali city.

That Court held that Mukasharangabo should be given $\frac{1}{2}$ of the property she co-owned with Karimunda as a legitimate wife, that all children of Karimunda should inherit $\frac{1}{2}$ of the whole estate of their father; that the house located on plot N^o05/524 at Karambo - Gikondo should be included into the estate of Karimunda, that Mukandoli should be allocated the land located at Kiziguro where she resides and that Nyirakamana Marciana remains with the shares she has in Central Motors and Parts Sarl.

Nyirakamana, Karangwa and Central motors appealed to the High Court and the appeal was joined to another appeal case lodged by Mukasharangabo before this Court. The court ruled that the marriage contract of Nyirakamana and Karimunda should not be annulled given that both were legitimate wives of Karimunda, therefore there is no basis to rely on and decide who between the two has the right on the estate of Karimunda. It declares in addition that the testament did not exist, therefore the property of Karimunda should equally be inherited by his children. It ordered also that the house on plot N^o15/525 which is registered on Central Motors and Parts Sarl shall be returned into the estate of Karimunda.

Nyirakamana, Karangwa and Central motors appealed to the Supreme Court which dismissed their appeal since it does not fall into its jurisdiction.

Appellants applied for review of the judgment due to injustice requesting that the testament made by Karimunda on 25 August 1981 be considered concerning the estate, and if not so, the marriage contract between Karimunda and Nyirakamana should be considered and Nyirakamana Marciana be given $\frac{1}{2}$ of the property that she is legally entitled to. They allege in addition that Mukasharangabo should not be given the right over the property Karimunda acquired together with Nyirakamana, and also that the property in Central Motors and Parts Sarl should not be included among the estate of Karimunda.

Held: 1. No one may enter into a new marriage before the annulment or dissolution of the previous marriage, therefore the fact that Karimunda got married to Nyirakamana before divorcing Mukasharangabo; their marriage should be nullified.

2. In case spouses separate, they equally share the existing property at the time of their separation, therefore Mukasharangabo should be given a half of the property she co-owned with Karimunda till the time she abandoned the household.

3. The cohabitant only share equally the property they co-owned, therefore Nyirakamana has the right to be given a half ($\frac{1}{2}$) of the property she acquired together with Karimunda from the day they started to cohabit.

4. The testament is invalid when it discriminates the children basing on gender and also when the de cujus tacitly changed testament before his death. Therefore, this implies that the testament which Karimunda made should not be referred to determine his succession, rather, it should be ab intestat, therefore all children of Karimunda have equal right to inherit the estate of Karimunda.

5. The donation made without the consent of the co-owner and with the purpose to discriminate the children, is invalid. Consequently, the donation which was given to Central

Motors and Parts Sarl is invalid, and must be included into the estate of Karimunda and Nyirakamana.

6. The claim is inadmissible when the party to the case has no interest in the case.

7. When each party to the case lost some of his/her claims, the damages are not awarded.

**The claim has merit in part.
The court fees to all parties in the case.**

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of 24/11/1962, article 28.

Constitution of the Republic of Rwanda of 20/12/1978, articles 16 and 93(2).

Organic Law N°59/2008 of 10/09/2008 on Prevention and Punishment of Gender- based violence, article 39.

International Convention on the Elimination of all Forms of Discrimination against Women of 18 December 1979 signed at New York, article 5(a).

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 2.

Law N°22/99 of 12/11/1999 supplement book one of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, articles 56 and 58.

Law N°42/1988 of 27/10/1988 instituting the preliminary title and civil code book I, article 175.

No case referred to.

Authors cited:

Christian Jubaut, Droit Civil, les successions. Les Libéralités, DALLOZ, 2005, pp.444-445, N°751.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Karimunda Gérard cohabited with three women namely Mukasharangabo Eugénie, Mukandoli Epiphane and Nyirakamana Marcianna. In 1965 Mukasharangabo Eugénie abandoned her husband and went to cohabit with another man called Muvunyi Aaron. Meanwhile, Karimunda Gérard had a relationship with Mukandoli Epiphane without permanent cohabitation, but they gave birth to three children.

[2] After Karimunda Gérard realised that Mukasharangabo Eugénie had abandoned him, he got civilly married to another wife called Nyirakamana Marcianna on 26 November 1970. They concluded a contract for the consolidation of their property to run a business together whereby Karimunda Gérard contributed 51,000Frw whereas Nyirakamana Marcianna contributed 80,000Frw. In 1975 they bought a plot N°517 in Kigali City and built on a house. They gave birth to three children namely Karangwa Denis, Karigirwa Edinace and Kantamaga Jacqueline. Their relationship ended by the death of Karimunda Gérard in 1994.

[3] Meanwhile, in 1979, Karimunda Gérard had instituted a divorce claim at the first instance Court of Kabaya against Mukasharangabo Eugénie. On 21 November 1979 the judgment RC 224/79 was rendered in default of Mukasharangabo Eugénie, whereby a Court granted the divorce on the ground that she had abandoned the household.

[4] Due to the fact that Nyirakamana Marciana and Karimunda Gérard were married on 26 November 1970 before the former got divorced, the prosecution accused them of bigamy in the First Instance Court of Kigali, and prayed for the annulment of the marriage contract. That Court found them guilty of that offence but did not annul that marriage. The prosecution appealed against the decision to the Court of appeal of Kigali, which held in the judgment RPA2826/KIG on 19/11/1981 that they are guilty but did not annul the marriage contract on the ground that none will be benefit from its cancellation because this would consist of a dissolution of the family which is well established, and this is likely to result in disturbance of public order, especially that the marriage was dissolved.

[5] Mukasharangabo Eugénie applied for opposition against the divorce judgment which was rendered by her default by the First Instance Court of Gisenyi, located at Kabaya, which in the judgment RC5195/R11/KY rendered on 21 September 1991 upheld the divorce on the ground that since 1965 Mukasharangabo Eugénie separated with her husband Karimunda Gérard. Mukasharangabo Eugénie appealed to the Court of appeal of Ruhengeri and the case was recorded on RCA6302/R14/RUH, but Karimunda Gérard passed away while the case was still pending, therefore that Court declared the extinction of divorce proceedings by the death of Karimunda Gérard.

[6] Later on, Mukasharangabo Eugénie filed a claim to the Primary Court of Nyarugenge requesting for cancellation of the marriage contract between Karimunda Gérard and Nyirakamana Marciana. The Court rendered the judgment RC0379/08/TB/NYG on 31 October 2008 and held that the claim has no merit.

[7] Mukasharangabo Eugénie appealed against it to the High Court whereby the case was recorded on RC5195 but her claim was joined to other cases initiated by Nyirakamana Marciana and Karangwa Denis who applied for opposition against judgment RC5091/R11/KYA rendered on 23 May 1990 by the First Instance Court of Gisenyi located at Kabaya, the Court to which Karimunda Gérard once filed a petition alleging that his children rejected the descending partition which he bestowed to them.

[8] Nyirakamana Marciana and Karangwa Denis lodged a third party opposition against judgment RC5091/R11/KYA, their case was joined with the case of Mukasharangabo Eugénie praying for the annulment of the marriage between Nyirakamana Marciana and Karimunda Gérard. Those judgments were also joined with other cases filed by other wives and children of Karimunda Gérard requesting for the revocation of a testament made by Karimunda Gérard so that the properties left by the de jure be inherited in accordance with the law and requesting for the descending partition. Furthermore, those cases were joined with the others in which Central Motors and Parts Sarl and Karangwa Denis were sued and all they recorded on RC0153/05/TP/KIG which was adjudicated by Court of Kigali on 13 June 2005.

[9] Among its decisions, the Court of Kigali decided that as the legitimate wife, Mukasharangabo be given ½ of the properties which she co-owned with Karimunda Gérard and children of Karimunda Gérard inherit ½ of the property; that the house on plot N°05/524 located in Karambo-Gikondo be included in the property of Karimunda Gérard to be

inherited; and Mukandoli was allocated the land located at Kiziguro on which she resided; it further decided that Nyirakamana Marciana remains with the shares she has in Central Motors and Parts Sarl.

[10] Nyirakamana Marciana, Karangwa Denis and Central Motors and Parts appealed against that judgment to the High Court and it was joined with another case in which Mukasharangabo appealed against the judgment N°RC5195 mentioned above which sustained the marriage contract between Karimunda Gérard and Nyirakamana. The cases were recorded on a single N°RCA0221/05/HC/KIG, RCA0221/09/HC/KIG which was adjudicated on 02 April 2010, whereby the High Court ruled that the marriage contract could not be annulled; therefore, the fact that Mukasharangabo Eugénie and Nyirakamana Marciana were both legitimate wives of Karimunda Gérard, there is no basis on which the Court would rely on to indicate the wife who is entitled to properties left by Karimunda Gérard.

[11] Concerning the testament, the High Court held that it did not exist, therefore it ordered the equal inheritance of the property of Karimunda Gérard by his children. It ordered in addition that the house on plot N°15/525 registered on Central Motors and Parts Sarl be included among the estate of Karimunda Gérard.

[12] Nyirakamana Marciana, Karangwa Denis and Central Motors and Parts Sarl appealed to the Supreme Court, the preliminary judge dismissed their appeal because it does not fulfil the legal requirements to fall into the jurisdiction of the Supreme Court. They appealed against the order on 16 March 2012, and the Court rendered the judgment RCAA0038/10/CS holding that their appeal lacks merit. Consequently, it sustained the rulings of the judgment RCA0221/05/HC/KIG, RCA0221/09/HC/KIG rendered on 02 April 2010.

[13] Nyirakamana Marciana, Karangwa Denis and Central Motors and Parts Sarl applied for the review of the judgment RCA0221/05/HC/KIG, RCA0221/09/HC/KIG due to injustice, whereby they requested the consideration of the testament made by Karimunda Gérard on 25 August 1981 regarding the partition of the estate, and if decided otherwise, the marriage contract between Karimunda Gérard and Nyirakamana Marciana should be considered as valid, and consequently the latter be allocated ½ of the property she is entitled by the law. They allege in addition that Mukasharangabo should not be given the portion on the property jointly acquired by Karimunda Gérard and Nyirakamana Marciana, and that the shares in Central Motors and Parts Sarl should not be included into the estate of Karimunda Gérard.

[14] The respondents and some of forced interveners raised an objection of inadmissibility the claim, but the Supreme Court decided through interlocutory judgment rendered on 30 June 2015, that the objections raised lack merit and the hearing on merit should be resumed.

[15] The hearing was held on 07 October 2015, in the presence of all parties, whereby Nyirakamana Marciana and Central Motors and Parts Sarl and Karangwa Denis were represented by Counsel Gashagaza Philbert, Mukasharangabo Eugénie by Counsel Twayigize Jean Claude, successors of Bitwayiki Martin, successors of Ntahobari Nasson, successors of Mukanoheli, successors of Mukandekezi Alphonsine by Counsel Jean Baptiste and Ndereyimana Sylvestre; Mukandori Epiphane, Nyirashema Marie, and Karimunda Hakizimana Alphonse represented by Counsel Nsabimana Jean Baptiste and GT Bank Ltd, the former FINA Bank by Counsel Nkurunziza François Xavier.

II. ANALYSIS OF LEGAL ISSUES

To indicate who has the right on estate of Karimunda Gérard between Nyirakamana Marciana and Mukasharangabo Eugénie.

[16] The Counsel of Nyirakamana Marciana states that the injustice she suffers can be resolved by respecting the testament made by Karimunda Gérard on 25 September 1981 which allocated her the house located at Gikondo on plot N°05/224, but if the Supreme Court finds it otherwise, it should rule that she is legitimate wife of Karimunda Gérard, for her to be allocated ½ of estate of Karimunda Gérard, while Mukasharangabo Eugénie would not have the right to the estate, because Karimunda Gérard jointly acquired it with Nyirakamana Marciana, when Mukasharangabo Eugénie had abandoned him.

[17] The counsel for Nyirakamana Marciana explains that she is a legitimate wife because after Mukasharangabo Eugénie abandoned the household, Karimunda Gérard filed divorce claim, and in the judgment RC224/79 the Court held that the divorce status of Mukasharangabo Eugénie should be registered in civil status registry; and after, Mukasharangabo Eugénie applied for an opposition against the judgment, the ruling sustained the divorce. She appealed against it but Karimunda Gérard died before delivery of the judgment, therefore the Counsel finds that the remedy requested by Mukasharangabo Eugénie was not granted; rather, it was sustained the divorce judgment, therefore Nyirakamana Marciana is a legitimate wife.

[18] The Counsel alleges in addition that even in the criminal judgment RPA2826/KIG of 19 November 1981 which convicted Nyirakamana Marciana and Karimunda Gérard of bigamy, the Court declared that it can not cancel their marriage contract because no one will benefit from it; rather, it will cause the disturbance of public order if the established family is dissolved, therefore Counsel finds that Courts admitted her to be a legitimate wife.

[19] The Counsel for Mukasharangabo Eugénie states that Karimunda Gérard married Nyirakamana Marciana while the marriage with Mukasharangabo Eugénie was still valid, but that he supports the rulings of the High Court that there is no basis to determine the legitimate spouse between the two, and this issue does not constitute the subject matter in this case because the dispute relates to whether testament Karimunda made was lawful.

[20] The Counsel for Mukandori Epiphanie, her children and the children of Mukasharangabo Eugénie argues that Nyirakamana Marciana could not be considered as a legitimate wife, given that even Mukasharangabo Eugénie is legitimate, therefore for the counsel, Karimunda was not allowed by the Constitution to get married to two wives, hence, even the judgment which ruled as such erred in law.

THE OPINION OF THE COURT

[21] Article 28 of the constitution of Republic of Rwanda of 24 November 1962 which was into force at the time Karimunda Gérard got married to Nyirakamana Marciana on 25 November 1970, provides that only monogamous marriage is recognized in the forms and conditions laid down by the law¹.

¹ Article 28: “Only monogamous marriage is recognized in the forms and conditions laid down by the Law”.

[22] Article 101 of the civil code book I which was into force² at time Karimunda Gérard got married to Nyirakamana Marciana on 25 November 1970 stipulates that “no one may enter into a new marriage before the annulment or dissolution of the previous marriage”.

[23] The documents in the case file prove that Mukasharangabo Eugénie was married to Karimunda Gérard in 1952 before civil status officer Rwamuningi in the former district of Ngororero as it is indicated by the certificate issued by the civil status officer of Kageyo district on 11 June 2001 (judgment of the High Court, paragraph 44). The document in the case file includes also the civil status certificate issued at Runda on 22 March 2002 indicating that Karimunda Gérard was married to Nyirakamana Marciana on 25 November 1970.

[24] As motivated at the beginning of this case, Karimunda Gérard filed a claim to divorce Mukasharangabo Eugénie in 1979, and it was granted in the judgment RC224/79 rendered on 21 November 1979, because the wife abandoned the household.

[25] The Supreme Court is of view that Karimunda Gérard got married to Nyirakamana Marciana on 25 November 1970 before instituting a divorce claim to the Court against his first wife Mukasharangabo Eugénie. This implies that the marriage which they concluded was unlawful, the reason why it should be considered invalid.

[26] The Court finds in addition that as motivated, Karimunda died prior to the delivery of divorce judgment between him and Mukasharangabo Eugénie, therefore this means that the divorce was not granted, thus Mukasharangabo Eugénie remains a legitimate wife of Karimunda Gérard.

[27] The Court finds that even if Mukasharangabo Eugénie was a legitimate wife, the documents in the case file prove that she separated with her husband Karimunda since 1965 when she went to cohabit with another man, and after they were involved in divorce case which was interrupted by the death of Karimunda in 1994, implying that there was no final decision, thus the property which she jointly owned with Karimunda consists of the one they co-owned till 1965, and she is only entitled to ½ of it.

[28] Concerning Nyirakamana Marciana, the Court finds that even if she did not become a legitimate wife as motivated above, it is obvious that she cohabited with Karimunda from 25 November 1970 till he died in 1994. In that period they jointly carried out commercial activities according to the contract they concluded on 05 January 1968 available in the case file (page 23 Dos.CS), whereby Nyirakamana Marciana contributed 70,000Frw and a sewing machine with the value of 10,000Frw, whereas Karimunda contributed 20,000Frw and the shop room located at Vunga that was evaluated at 31,000Frw, the contribution of Karimunda amounting to 51,000Frw, which means that he got from the property he jointly owned with his legitimate wife Mukasharangabo Eugénie.

[29] Concerning cohabitation, article 39 of Organic Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, it orders husband or wife who lives with many husbands or wives, to legally marry one husband or wife, but it also orders in that time that he/she shall first of all share the commonly owned belongings or acquired together before he/she gets married. That article stipulates also that the sharing of the property shall not entrench on the children’s legally recognized rights.³

² That article 101 became 175 of the Law N°42/1988 of 27/10/1988 instituting the civil code book I.

³ Article 39 provides the following:

[30] Basing on article 39 of the Law N°59/2008 mentioned above, the Court finds that even if Nyirakamana Marciana is not a legitimate wife because she begun to cohabit with Karimunda Gérard before the divorce with his legitimate wife, she has the right to be given ½ of the property jointly owned or belongings acquired together with Karimunda Gérard from the time they started to cohabit on 27 November 1970, another ½ remaining the estate of Karimunda Gérard.

[31] Basing also on the provision of the last paragraph of article 39 of the aforementioned Law N°59/2008 which stipulates that the property distribution shall not entrench on the children's legally recognized rights, the Court finds that the children of Karimunda Gérard and Mukasharangabo Eugénie are entitled to the property of their both parents, especially, the rights they bestowed by the succession law which was in force at the time Karimunda Gérard died in 1994. Other children of Karimunda Gérard with Mukasharangabo, Nyirakamana Marciana and Mukandoli have the right to inherit him according to the succession law which was in force at time he died in 1994 as well.

[32] The Court finds that for the fair succession, either in favor of Mukasharangabo or Nyirakamana Marciana, with regards to their respective share as mentioned above, as well as in favor of all children of Karimunda Gérard, all heirs will have to produce the whole estate which Mukasharangabo co-owned with Karimunda till the time she abandoned the household, as well as the one Nyirakamana Marciana acquired together with Karimunda Gérard from 25 November 1970 till his death in due time, regardless whether those properties are registered on them or not, are movable or immovable, the money in bank or shares in companies, etc...

Whether the testament made by Karimunda Gérard on 25 August 1981 should be considered.

[33] The counsel for Nyirakamana Marciana, Karangwa Denis and Central Motors and Parts Sarl states that they suffered injustice during the adjudication of the judgment RCA0221/05/HC/KIG rendered on 02 April 2010, based on the fact that the testament made on 25 August 1981 by Karimunda Gérard was not invalidated by the High Court, while it held that it did not exist considering the judgment rendered on 23 May 1990 by the First Instance Court of Kabaya whereby Karimunda Gérard compeled his children to receive the descending partition and declared that if that testament has ever existed, Karimunda Gérard would not have seized the Court requesting that they accept it; therefore the High Court did not analyse that testament in order to indicate that it is contrary to the Law which was in force at the time of its establishment on 28 August 1981.

[34] Therefore, the Counsel argues that the testament of 25 August 1981 which was made in presence of notary must be executed, especially that Karimunda Gérard did not modify it as it is stated by the counsel for respondents, pretending that there is a letter which Karimunda Gérard wrote to the Minister of energy and public service whereby he allocates the house located at Gikondo to Central Motors and Parts Sarl, because if he modified it he would have returned to the notary.

Those people entertaining unlawful marriages shall be married in accordance with the monogamous principle. If a person concerned with the provision of previous paragraph of this article was living with many husbands/wives, he shall first of all share the commonly owned belongings with those husbands/wives equally. The property distribution referred to in paragraph 2 of this article shall not entrench on the children's legally recognized rights.

[35] The Counsel for Nyirakamana Marciana adds that the High Court confused the testament with the descending partition, because article 42 of the Law N°22/99 of 12/11/1999 regulating matrimonial regimes, liberalities and successions provides that “the ascending partition is an act accomplished by parents while they are still alive, by which they share their patrimony between their children or their descendants who acquire, each for the portion devolved to him or her, full ownership. This partition shall be regarded as the accomplishment of parents duties to educate their children and to provide them with a personal patrimony”, whereas article 56 of that law provides for that “a testament is an act by which a person decides on the destination of his/her patrimony after his/her death and fixes provisions of his/her last will”.

[36] The Counsel for Nyirakamana Marciana states that High Court misinterpreted the Law by relying its decision on aforementioned article 56, while the testament under probate was made in 1981 before the promulgation of the Law, since at that time the Rwandan custom was applied whereby only male child was allowed to inherit, the reason why in that testament females were not included. with regard to a polygamous, the custom dictated that children inherited the estate in custody of their mothers.

[37] The Counsel for Nyirakamana Marciana states that the provision was misinterpreted because it defines the testament, and that Law came into force to supplement the Rwandan custom, and emphasizes that the testament lawfully made must remain valid in order to respect the last will of the *de cuius*.

[38] The Counsel for Nyirakamana Marciana continues to state that the testament should not have been invalidated while it was an authentic deed in conformity with article 13 of the Law N°15/2004 of 12 /06/2004 relating to evidence and its production, which provides that an authentic deed established by a competent authority is trustworthy. Therefore that testament must be considered for it expresses the last will of de cuius Karimunda Gérard.

[39] The counsel for the respondents argues that the allegations of Nyirakamana Marciana, Karangwa Denis and Central Motors and Parts Sarl and that of ombudsman office injustice at the High Court was due to the disregard of the testament, is groundless because it obvious at page eleven (11), paragraphs 47 and 48 of the judgment that the High Court did not disregard it, rather, examined it and found that it must not be considered.

[40] The counsel adduces that even the provision of article 56 of the Law mentioned above was not misinterpreted, especially that the counsel for Nyirakamana Marciana, Karangwa Denis and Central Motors and Parts Sarl prays to the Supreme Court to apply it with regard to the testament it mentions. The counsel adds however that the testament has the defect which led the judge of High Court to dismiss it, the defects being:

- a. The fact that it was not actually established in presence of notary as it is mentioned by the counsel for Nyirakamana Marciana, Karangwa Denis and Central Motors and Parts Sarl since the name of notary is not indicated.
- b. The fact that no original copy of the testament is available, the photocopy should not be considered.
- c. The fact that Karimunda Gérard made it on 25 August 1981 after the delivery of the judgment RC500/R11/KYA by the First Instance Court of Kabaya that prevented him to donate some of his properties again.

d. The fact that the testament discriminated the children because those of Mukasharangabo Eugénie were allocated the farm of 50m to 70m and Nyirakamana Marciana's, the storey house in Kigali city.

e. The fact that he allocated the house twice, for the first time to Nyirakamana Marciana, and the second time, to Central Motors and Parts Sarl.

THE OPINION OF THE COURT

[41] The Rwandan laws which were in force at the time Karimunda Gérard made the testament of 25 August 1981, was silent with regard to the testament or succession. Article 1 of the preliminary title of the Civil Code book I provided that when the Law is silent with regard to a given matter, the competent courts shall refer to customs, general principles of law and equity in case disputes arise.⁴

[42] Concerning the general principles of law, article 16 of the Constitution of Rwanda 20/12/1978 which was in force at the time Karimunda Gérard made the testament of 25 August 1981⁵, provides that "all human beings are equal before the law. They shall enjoy, without any discrimination like sex, equal protection of the law...."⁶.

[43] With regard to the custom, article 93, paragraph 2 of Constitution previously mentioned provides that "the custom of a Country remains applicable as long as it has not been replaced by written laws, is not inconsistent with the Constitution, Laws and regulations, and does not violate human rights, prejudice public order or offend public decency and morals.

[44] Article 5(a) of the Convention for the Elimination of all Forms of Discrimination Against Women of 18/12/1979 which Rwanda ratified on 10/11/1980⁷ provides that "... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."⁸

[45] As it is mentioned above, when Karimunda Gérard made the testament on 25 August 1981, the Rwandan law was silent about the definition of testament. However, the law scholars explains that "a testament is an act by which a person decides on the destination of his/her patrimony after his/her death and fixes provisions of his/her last will"⁹, whereas on

⁴ Ordonnance de l'Administrateur Général au Congo relatif aux principes à suivre dans les décisions judiciaires, approuvée par le Décret du 12 novembre 19986, rendu exécutoire au Rwanda par l'O.R.U. N°11/82 du 21/06/1949 : "Quand la matière n'est pas prévue par un Décret, un arrêté ou une ordonnance déjà promulguée, les contestations qui sont de la compétence des tribunaux....seront jugées d'après les coutumes locales, les principes généraux du droit et l'équité".

⁵ That law was abrogated by that of 24/11/1962.

⁶Article 16: Tous les citoyens sont égaux devant la loi, sans discrimination aucune, notamment de race, de couleur, d'origine, d'ethnie, de clan, de sexe, d'opinion, de religion, ou de position sociale.

⁷ Ratification date is 10/11/1980 as it is indicated in presidential decree of 10/11/1980.

⁸ See the presidential decree N°431/16 of 10/11/1980.

⁹droit-finances-net, in : <http://droit-finances.commentcamarche.net/contents/1012-testament-comment-le-rediger>

what concerns with an authentic testament, state that it is an act passed before the notary and two witnesses.¹⁰

[46] These explanations are similar to the provision of article 56 of 22/99 of 12/11/1999 supplement book one of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions provides that a testament is an act by which a person decides on the destination of his/her patrimony after his/her death and fixes provisions of his/her last will. The property which the de cujus has not disposed of by testament shall be devolved in accordance with the provisions of intestate succession.¹¹ Whereas article 58 provides that “an authentic testament is the one established by the testator/testatrix before either the notary or the registrar of his/her domicile or residence[.....]”.

[47] Concerning the testament which Karimunda Gérard made on 25 August 1981, the documents in the case file (page 64) indicate that it is made up of twelve articles, whereby article one stipulates that the land located at Kiziguro, Satinsyi District, Gisenyi Province between two hills Kanyinya and Karunyambo is apportioned to his children and that the land located at Kanyinya is reserved for the descending partition among them, whereas the land located at Karunyambo from the limit of Kagabo to the limit of Kagenza at Kankomati river is reserved for inheritance.

[48] It is in article 2 that Karimunda Gérard allocated the estate mostly comprised of land to his sons descending from Mukasharangabo Eugénie, namely Bitwayiki Martin, Habimana Ildephonse, Ntahobari Naasson, and Hakizimana Alphonse as follow: 1. Bitwayiki Martin, a half of the forest located at Karunyambo; the farm contiguous between that forest and Kagabo limit and two houses located at Kiziguro, 2. Habimana Ildephonse, the remained part of the aforementioned forest to share with Bitwayiki Martin as well as the land which is adjacent to that forest, 3. Ntahobari Naasson, the middle part of land near to that forest, 4. Hakizimana Alphonse, the part sharing the limit with that of Kagenza at Kankomati and the forest planted on it. In contrast, from article 5 to 9 Karimunda Gérard allocated to Nyirakamana Marciana and her children the following inheritance:

- a. The house located at Gikondo, plot N°05/524 to Nyirakamana Marciana;
- b. The house located at Kigali on plot N°517, “Quartier commercial” to the son of Nyirakamana Marciana named Karangwa Denis;
- c. Cars, money which Karimunda Gérard possessed on bank accounts and in companies to the son of Nyirakamana Marciana. Karangwa Denis was ordered to pay the debts of Karimunda Gérard.

[49] The analysis of the testament which Karimunda Gérard made, and according to the content of the documents of the case file, the Court finds that Karimunda Gérard has other children descending from three wives namely Mukasharangabo Eugénie, Nyirakamana Marciana and Mukandori Epiphanie, while no any female child was mentioned apart from stating that if she becomes miserable, she would seek help from his brother. Those female children are Kantamage Jacqueline and Karimunda Kaligirwa Edinace of Nyirakamana

¹⁰droit-finances-net, in: <http://droit-finances.commentcamarche.net/contents/1012-testament-comment-le-rediger>: “(Le testament authentique est un acte passé devant deux notaires ou devant un notaire et deux témoins”.

¹¹Le testament est l'acte par lequel une personne détermine la destination de son patrimoine après sa mort et fixe ses dispositions de dernière volonté. Les biens dont le de cujus n'a pas disposé par testament sont dévolus conformément aux dispositions sur la succession ab intestat.

Marciana; Mukashema Madeleine and Nyirashema Marie of Mukandori Epiphanie; Mukandekezi Alphonsine and Mukandori Mariane of Mukasharangabo Eugénie.

[50] Although the Counsel for Nyirakamana Marciana, Karangwa Denis and Central Motors and Parts Sarl argues that the testament is fair because it was in accordance with custom which dictated that only male children have the right to inherit, and that it was made in presence of notary, the Court finds that the testament was inconsistent with the public order provided for by article 1 of preliminary title of the Civil Code book 1 mentioned above, one of those principles relating to prohibition of any form of discrimination especially based on gender, provided for by article 16 of the Constitution of Rwanda of 20/12/1978 which was into force at the time Karimunda Gérard made the testament of 25 August 1981 and article 5(a) of the Convention on Elimination of all Form of Discrimination Against Women of 18/12/1979 ratified by Rwanda on 10/11/1980.

[51] The Court finds that such discrimination is the serious defect which relates to a public order; therefore it renders testament of 25 August 1981 to be not considered because it discriminates some of children.

[52] The Court finds in addition that the fact that the testament of Karimunda bequeathed the countryside farms to some children while valuable properties including the house located at Kigali on plot N°517 at *Quartier Commercial*, cars, the money deposited on bank accounts and shares in companies were bequeathed to Karangwa Denis, son of Nyirakamana Marciana. This demonstrates that the testament discriminates against some children which is prohibited by article 16 of the Constitution of Rwanda mentioned above. Therefore the testament should not be considered.

[53] The Court finds in addition that apart from the fact that the testament which Karimunda Gérard made on 25 August 1981 should not be considered as previously motivated, Karimunda Gérard demonstrated tacitly that he revoked that testament which is indicated by the fact that he manifested in his will the wish to allocate the house located at Gikondo on plot N°05/524 to Nyirakamana Marciana while the documents in the case file include the donation contract made on 24 November 1992 whereby Karimunda Gérard donated again that plot to Central Motors and Parts Sarl. This is emphasized also by the fact that he intended to bequeath the ascending partition on the land located at Kiziguro, Kanyinya to his sons, while the documents in the case file indicate that Karimunda Gérard changed it through the document titled “ascending partition to the children of Karimunda Gérard” as it is clear on page two of the judgment RC5091/R11/KYA rendered on 23 May 1990 by the First Instance Court of Kabaya, whereby he demonstrated for this time that he bequeathed the land located at Kanyinya to Mukanoheli Mariana, Habimana Ildephonse, Mukashema Madeleine and Nyirashema.

[54] The law scholars explain that the revocation of testament may be express or tacit. Concerning the tacit revocation, they state that the revocation results from the incompatibility or the contrary nature of the new instrument with the previous act (*la révocation procède de l'incompatibilité ou du caractère contraire de l'acte nouveau avec l'acte précédent*).¹²

[55] The Court finds that the fact that there are actions of Karimunda Gérard which demonstrate that he tacitly changed his testament, implies that the will made on 25 August 1981 should not be followed for his succession as Nyirakamana Marciana and her children

¹² Christian Jubaut, *Droit Civil, les successions. Les Libéralités*, DALLOZ, 2005, pp.444-445, N°751.

allege, rather, the succession ab intestat should be followed, Therefore all children of Karimunda Gérard have equal right to succeed the whole estate without discrimination.

Whether the house located at Gikondo on plot N°05/524 should be included among the estate of Karimunda Gérard.

[56] The counsel for Nyirakamana Marciana, Karangwa Denis and Central Motors and Parts Sarl states that the injustice which is in the judgment RCA0221/05/HC/KIG rendered on 02 April 2010 is due to the fact that the High Court disregarded the elements of evidence of the property of Central Motors and Parts Sarl, whereby it included its plot N°05/524 among Karimunda Gérard's estate while that property was transferred to Central Motors and Parts Sarl that possesses its title since 1986; especially that Karimunda was not even a shareholder of that company.

[57] Counsel Twayigize Jean Claude and Nsabimana Jean Baptiste assisting the respondents state that this ground lacks merit because the First Instance Court of Kabaya forbade Karimunda Gérard to transfer again his property from the family to Nyirakamana Marciana. The counsel continues to argue that the properties registered on Central Motors and Parts Sarl belonged to Karimunda Gérard. With regard to the concerned plot, Karimunda Gérard transferred it twice, since he allocated it to Nyirakamana Marciana in the testament he made on 25 August 1981, and then in 1990 to Central Motors and Parts Sarl as it is indicated by the letter he wrote to the Minister of energy and public service requesting him/her to register it on Central Motors and Parts Sarl, whereby he states that Central Motors and Parts Sarl owned it from 17 November 1986, therefore the Counsel realises that he deprived himself from his property in favor of Nyirakamana Marciana and her children with bad faith.

[58] Karigirwa Edinace states that the concerned plot was a set of two plots, while Karimunda Hakizimana Alphonse argues that the statement of his sister Karigirwa Edinace the daughter of Nyirakamana Marciana is not true, rather, there was one plot except that it was recorded on two numbers, because they wanted to change it and was recorded on N°50108 while its former number was N°05/524, as it is indicated in the letter which Karimunda Gérard wrote to MINITRAPE.

THE OPINION OF THE COURT

[59] Concerning the determination of whether the house located at Gikondo on plot N°05/524 can be included among the estate of Karimunda Gérard and ceased to belong to Central Motors and Parts Sarl, the documents in the case file demonstrate that on 25 August 1981 the time he made the testament, Karimunda Gérard indicated that the house belongs to him, whereby he bequeathed it to his wife Nyirakamana Marciana.

[60] Furthermore, as it is mentioned above, the case file contains the letter N°012/09/90/KG/RE of 12 September 1990 which Karimunda Gérard wrote to the Minister of public service, energy and water requesting the registration of that plot on Central Motors and Parts Sarl as well as the donation contract which was made on 24 November 1992 whereby Karimunda Gérard transferred that plot to Central Motors and Parts Sarl.

[61] Concerning the shareholders of Central Motors and Parts Sarl, its articles of association of 14 March 1991 indicates that they are Nyirakamana Marciana and her children Karangwa Denis, Karigirwa Edinace, and Kantamage Jacqueline (pages 117-120).

[62] The analysis of all documents, demonstrate that the concerned plot and the house on it were part of the property of Karimunda because if not so, he could have not bequeathed it to his wife Nyirakamana Marciana, and changed it and transferred to Central Motors and Parts Sarl later.

[63] Even if nothing prevents a person to make a donation, according to general provisions concerning donations which provide that it consists essentially of the gratuitous disposition by the disposer of all or part of his property or rights for the benefit of another person (inter vivos) gratuitously;¹³ it is obvious that the mentioned house located at Gikondo on plot N°05/524 does not really belong to Karimunda alone, rather, as mentioned above he co-owned it with Nyirakamana Marciana who has the right over a half of it in accordance with article 39 of Organic Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence referred to above. Therefore it is unconceivable for Karimunda Gérard to have donated that property to Central Motors and Parts Sarl without the consent of Nyirakamana Marciana whom they co-owned it; especially that the Court disregarded the will in which he had transferred that house to Nyirakamana Marciana.

[64] The Court is also of the view that the donation was concluded with the purpose of unfair distinction among children of Karimunda Gérard as it is demonstrated by the memorandum and articles of association of Central Motors and Parts Sarl that shareholders are Nyirakamana Marciana and her children. Therefore the Court finds that the allocation of that house to the company deprives other children of Karimunda Gérard of the right to inherit the part of their father to that house.

[65] Considering the motivations mentioned above, the Court finds that the donation of the house located at Gikondo on plot N°05/524 to Central Motors and Parts Sarl as aforementioned, was unjustly done, the reason why it should not be considered. Therefore, it should remain into the estate of Karimunda Gérard and Nyirakamana Marciana.

Concerning the prayers of GT Bank Ltd to be reimbursed the loan owed by Karimunda Gérard.

[66] Counsel Nkurunziza François Xavier for GT Bank Ltd claims that the family of Karimunda Gérard should be ordered to reimburse the loan worth to 47,416,566Frw it owes GT Bank Ltd pursuant to the judgment RCOM321/10/HCC rendered by the Commercial High Court whereby it held that the successors of Karimunda Gérard are liable for that loan because Karimunda Gérard died before paying it.

[67] Counsel Twayigize argues that concerning the issue of succession, the property of Karimunda Gérard was never revealed because even in the the testament he stated that he was still working, and his death was known in 2007. The one who would have declared that asset is Karambizi Canisius who was appointed as a a liquidator, but was suspended by the Supreme Court. Therefore he prays to the Court to refer to him for a assistance to reveal the property of Karimunda Gérard because only, the loan from GT Bank Ltd, the house which is pretended to belong to Central Motors and Parts Sarl and the storey house located at Kigali city are known.

¹³La donation consiste essentiellement dans l'aliénation gratuite que le disposant fait de tout ou partie de ses biens ou droits au profit d'une autre personne. Lire commentaires de l'article 894, du Code Civil français, DALLOZ, Edition 2009.

THE OPINION OF THE COURT

[68] Article 2 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides that a claim cannot be accepted in Court unless the plaintiff has the status, interest and capacity to bring the suit, article 77 of the same Law confers the judge the right to reject the claim without hearing the case on merit, due to the lack of the status, capacity and interest to file a claim, whereas article 78 allows the judge to raise an objection at any stage of proceedings, whereby it stipulates that the judge can raise an incident at his/her own motion at any stage of proceedings before the pronouncement of the judgment.

[69] As stated by the counsel for GT Bank Ltd, the documents in the case file demonstrate that there exists a final judgment RCOM321/10/HCC rendered by Commercial High Court whereby the successors of Karimunda Gérard were ordered to pay back 47,416,566Frw to GT Bank Ltd which Karimunda Gérard owed before his death.

[70] The Court finds that consideration made of the ruling of the mentioned judgment RCOM321/10/HCC, GT Bank Ltd has no interest in the judgment RCA0221/05/HC/KIG rendered on 02 April 2010 which is subject to review due to injustice, because his request was granted in that judgment, therefore basing on articles of the Law N°21/2012 mentioned above, the request of GT Bank Ltd is not admitted.

Concerning the requested damages.

[71] The Counsel of Nyirakamana Marciana states that she was dragged into vexatious litigation; therefore praying to the Court to award her the procedural damages worth to 2,000,000Frw and the counsel fees of 6,000,000Frw, whereas the Counsel of the respondents argues that the requested damages are groundless because none dragged them into lawsuits, rather, they must be given 5,000,000Frw in damages because of being dragged into vexatious litigation and 2,000,000Frw of the counsel fees.

[72] The Court finds that the requested damages by each party in this case should not be awarded to them, because everyone lost on some grounds in this case.

III. DECISION OF THE COURT

[73] Admits the claim of review due to injustice submitted by Nyirakamana Marciana, her children and Central Motors and Parts Sarl, but finds it with merit in part;

[74] It holds that Mukasharangabo Eugénie has the right to ½ of the property of Karimunda Gérard which they co-owned till the time she abandoned household in 1965;

[75] It holds that Nyirakamana Marciana has also the right on ½ of the property of Karimunda Gérard which they co-owned from their cohabitation on 26 November 1970 till now;

[76] It rules that the testament made on 25 August 1981 by Karimunda Gérard is not considered, therefore his succession will be ab intestat;

[77] It rules that the donation of the house located at Gikondo on plot N^o05/524 is invalid, therefore that house should be included in the estate of Karimunda Gérard and Nyirakamana Marciana;

[78] It rules that all children of Karimunda Gérard have the equal right to inherit his estate, exclusive of the property of Nyirakamana Marciana and that of Mukasharangabo Eugénie mentioned above;

[79] It orders that Nyirakamana Marciana and her children and Mukasharangabo Eugénie and her children jointly pay the court fees of 100,000Frw, whereby each part should pay its half i.e 50,000Frw;

[80] It changes the judgment RCA0221/05/HC/KIG, RCA0221/09/HC/KIG rendered on 02 April 2010 by the High Court in part.