

NYARUGENGE DISTRICT v. MUKANGEMANYI

[Rwanda SUPREME COURT – RS/RV/INJUST/AD0001/16/ CS – (Mukanyundo, P.J., Kayitesi and Rugabirwa, J.) June 30, 2017]

Civil procedure – Death of one of the spouse who is a party to a case – The responsibility of one of the spouses to continue the proceedings in case one of the spouse who was a party to the case have died – If one of the spouses who was a party in the case related to the property dies, the surviving spouse shall continue that proceedings, because according to the law he/she is entitled to the entire property – Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 129 – Law N°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, article 76.

Law determining the jurisdiction of courts – Jurisdiction of the Supreme Court – The effects for not exercising the remedies of appeal provided by the law before submitting a claim to the office of Ombudsman – The party entitled to ordinary and extraordinary remedies of appeal but who did not exercise this right within the time limit prescribed by law shall not be allowed to make an application of a review on the ground of injustice of the case he/she lost – Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 81.

Law determining the jurisdiction of courts – Jurisdiction of the Supreme Court – Application for the review of the final decision due to injustice – Decision of the President of the Court Supreme – The decision of the President of the Supreme Court ordering to record in the relevant registry the file from the office of Ombudsman does not prevent that during the hearing there shall be another debate concerning the jurisdiction of the Court and also about the admissibility of a claim; in addition to that the bench has the power to examine whether the claim was lawfully submitted to the Office of Ombudsman – Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 80.

Facts: Rwigara sued Nyarugenge District at the Intermediate Court of Nyarugenge, alleging that the expropriation for the public interest carried out on his property was not conducted in accordance with the expropriation laws, because he was not informed it. The Court held that the expropriation was unlawful because the District did not produce the elements of evidence which prove that the procedures for the expropriation in the public interest which are provided by the law were respected.

Nyarugenge District was not satisfied with the ruling and consequently wrote to the Office of Ombudsman requesting to review that judgment due to injustice, on the grounds that after the deliberation, it got documents which demonstrate that Rwigara was well aware of that expropriation, and also that the execution of that judgment was impossible. After examining the issue raised by Nyarugenge District, the Office of Ombudsman sent the file to the President of the Supreme Court requesting to review that judgment on the ground of injustice.

Meanwhile, Rwigara passed away, and consequently he was replaced in that lawsuit by Succession Rwigara Assinapol which prepared the defense submission, whereby it raised the objection for the inadmissibility of a claim of Nyarugenge district alleging that it applied for the review of the judgment due to injustice in violation of the Organic Law determining the

organization, functioning and jurisdiction of the Supreme Court because Nyarugenge District did not utilise the other remaining remedies of appeal.

Basing on on article 76 of the Law N°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, the Court found that since the lawsuit was initiated by Rwigara who later died should be replaced by his spouse Mukangemanyi instead of being replaced by Succession Rwigara represented by Mukangemanyi because Succession do not have a legal personality.

Firstly, the Court examined the objection for inadmissibility of the claim raised by the respondent, the District defends that the objection is groundless because the issue of determining whether the judgment should be reviewed or not because it was not appealed is examined by the Office of Ombudsman, that if it transfers the case to the Supreme Court and the President of the Supreme Court orders that it be recorded in the relevant registry of that Court, the issue of the jurisdiction is settled and can not be examined again. Therefore, this objection was belatedly raised because the claim has already been admitted. Thus, that issue should not be included among the grounds to be examined by the Supreme Court and if there were irregularities then they were rectified by those both institutions.

The respondent explains that Nyarugenge District had option to seek the other ordinary and extra ordinary remedies of appeal but it did not appeal or apply for the review of this judgment, since it alleges to have obtained the elements of evidence which it did not have during the hearing of that judgment. She further reminds that the Ombudsman is not a party to this case, also the fact that the President of the supreme Court decided the claim to be recorded in the relevant registry in order to be re-adjudicated, that decision is considered an administrative one but it does not mean that the parties would not pray for the laws to be abided with, especially those relating to the jurisdiction of the Court because they are of public order.

Held: 1. If one of the spouses who was a party in the case related to the property passed away, the surviving spouse shall continue that proceedings, because according to the law he/she is entitled to the entire property. Therefore, Rwigara Assinapol is replaced in this lawsuit by his spouse Mukangemanyi.

2. The decision of the President of the Supreme Court ordering to record in the relevant registry the file from the office of Ombudsman does not prevent that during the hearing there shall be another debate concerning the jurisdiction of the Court and also about the admissibility of a claim; in addition to that the bench has the power to examine whether the claim of Nyarugenge District was lawfully submitted to the office of Ombudsman.

3. The party entitled to ordinary and extraordinary remedies of appeal but who did not exercise this right within the time limit prescribed by law shall not be allowed to make an application of a review on the ground of injustice of the case he/she lost. The fact that the appellant already obtained the new evidence, he/she deprived himself the remedies of appeal for getting justice, therefore, he /she is not allowed to apply a review of a final decision due to injustice.

4. Any act of man which causes damage to another obliges the person by whose fault it happened to repair it. Therefore, the fact that the appellant filed unlawfully a claim which led the respondent to hire a lawyer and following up of the judgment into this Court, he/she must be awarded into the discretion of the Court the counsel and procedure fees.

The objection has merit.

Statutes and statutory instruments referred to:

Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, articles 79, 80 and 81.

Law N°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, article 76.

Law N° 21/2012 of 14/06/2012 Law relating to the civil, commercial, labour and administrative procedure, articles 129, 162, 184 and 186(3).

Decree-Law 30/07/1888 relating to Contracts or obligations, article 258.

No case referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] This case originates from the suit initiated by Rwigara Assinapol in the Intermediate Court of Nyarugenge requesting for “eviction de la parcelle 5860 Rugenge pour projet non révélé” on the ground that the expropriation for public interest was not conducted in accordance with the expropriation laws, because he was not informed of that expropriation and requested for damages. In its defence, the District of Nyarugenge stated that the claim is groundless because Rwigara was informed of that expropriation because he was in the residents meeting in which that expropriation was mentioned and even after being informed of the value awarded to his property; he contested the compensation given for his property.

[2] On 28/02/2013, the Intermediate Court of Nyarugenge rendered a judgment RAD0010/12/TGI/NYGE, whereby it held that the District of Nyarugenge expropriated Rwigara Assinapol illegally because it did not produce any evidence proving that procedures for the expropriation in the public interest as provided by the law were respected.

[3] The District of Nyarugenge wrote to the Office of Ombudsman requesting that the judgment RAD0010/12/TGI/NYGE be reviewed due to injustice because after the rendering of the judgment, it obtained the documents demonstrating that Rwigara Assinapol knew it even though he pleaded that he was not aware of that expropriation; it also explains that even its execution would be impossible that is the reason why it requests for the application of review due to injustice so that the rulings be reversed.

[4] After examining the issue of Nyarugenge District, the Office of the Ombudsman wrote to the President of the Supreme Court requesting that the judgment RAD0010/12/TGI/NYGE be reviewed due to injustice because the rulings of the Intermediate Court of Nyarugenge that the District of Nyarugenge should expropriate Rwigara Assinapol in accordance to the laws governing expropriation in the public interest, the implementation of that decision is time barred because one of the procedures provided by the law of consulting with the residents who own properties at the place where that expropriation will take place is done before the expropriation,

that consultation cannot be conducted after the expropriation. In addition even the procedure of compiling the list of the assets to be expropriated and announcing cannot be conducted because the expropriation was already carried out. That procedure would be useless on either the part of Rwigara Assinapol or the Nyarugenge District as explained above, thus, it would be unlawful.

[5] Basing on the first paragraph, *litera* 3 of article 79 which provides that a final judgment can be reviewed when the judgment cannot be executed due to its rulings, the Office of Ombudsman requested that judgment RAD0010/12/TGI/NYGE be reviewed because its evident that it cannot be executed.

[6] In the defence submission; the counsel for Succession Rwigara Assinapol raised an objection for the inadmissibility of the claim of Nyarugenge District arguing that it applied for review due to injustice contrary to Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court.

[7] The hearing was held in public on March 21, 2017, Nyarugenge District represented by Rubango Epimaque, the State attorney, whereas Succession Rwigara Assinapol assisted by Counsel Rwagatare Janvier. On that day the hearing was postponed to 23/05/2017 because Counsel Rwagatare Janvier appeared and declared that he is representing Succession Rwigara Assinapol which is also being represented by Mukangemanyi Adéline; but the Court basing on article 76 of the Law N°27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, it found that since the lawsuit was initiated by Rwigara Assinapol and later died, the latter should be replaced by his spouse Mukangemanyi Adéline instead of Succession Rwigara Assinapol being represented by Mukangemanyi Adeline because Succession do not have a legal personality. However, the Court found that Mukangemanyi Adeline cannot be summoned in this case before proving that she was legally married with the *de cuius*. Therefore, the Court postponed the hearing for the Counsel Rwagatare Janvier to submit to the court the marriage certificate.

[8] Pursuant to article 76 of the Law N°27/2016 of 08/07/2016, mentioned above which provides that “succession of spouses married under the community of property regime is done as follows: 1° if one of the spouses dies, the surviving spouse is entitled to the entire property and fulfils the duty to take care of their children and that of the legitimate children of the *de cuius*” the Court found that the married certificate submitted by Mukangemanyi Adéline indicates that Rwigara Assinapol was legally married with Mukangemanyi Adéline and they were under the community of property regime. Therefore pursuant to article 129 of the Law N°21/2012 of 14/06/2012 Law relating to the civil, commercial, labour and administrative procedure, it declared that Rwigara Assinapol has been replaced by his spouse Mukangemanyi Adéline in this case.

[9] Counsel Rwagatare Janvier representing Mukangemanyi Adéline raised an objection for inadmissibility of the claim of Nyarugenge District on the ground of irregularity of procedures.

II. ANALYSIS OF LEGAL ISSUES

1. Whether there are remedies of appeal which were not exercised by Nyarugenge District and may lead to the inadmissibility of its claim relating to the review of the judgment due to injustice.

[10] Counsel Rwagatare Janvier explains that article 81 paragraph 2 of the Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, provides that “ the party entitled to other ordinary and extraordinary procedures to appeal who did not exercise this right within the time limit prescribed by law shall not be entitled to invoke the provisions of this section to apply for review of a decision of the case he/she lost” the section mentioned in this article is that for the review of a final decision due to injustice. Thus, the Nyarugenge District never appealed nor reviewed the judgment RAD0010/12/TGI/NYGE, especially that its representative states that it possesses new evidences which it did not have at the time of the hearing of that case.

[11] He goes on to explain that the District had accepted the rulings of the judgment because it had begun to execute the judgment, hence, it is the reason they find that Nyarugenge District was not allowed to exercise this extra ordinary remedy. He argues that the Ombudsman is not a party to this case and also the arguments of Nyarugenge District that the President of the Supreme Court decided that the claim be recorded to the relevant registry in order to be re-adjudicated; his decision is considered as an administrative one but does not imply that the parties could not pray for the laws to be respected, especially those concerned with the jurisdiction of the Court because it is a public order.

[12] Counsel Rwagatare Janvier was asked how his client would be paid the damages and compensation resulting from the expropriation in public interest, if this Court sustains the objection he raised; he replied that they do not request to be awarded the houses which are on that plot because she is not the one who constructed them, he further argues that orders against the district contained in that judgment are clear therefore, they must be executed. In addition to this there is a case recorded on RAD0041/14/TGI/NYGE requesting that Nyarugenge District forcefully execute the judgment RAD0010/12/TGI/NYGE which is applied to be the review due to injustice. Regarding the fact that the counsel for Nyarugenge District alleges that it was equity, he argues that if Nyarugenge district realised that the execution of this judgment was impossible, it would have applied equity by applying for the review of the case, but equity does not replace the jurisdiction of the Supreme Court.

[13] The representative of Nyarugenge district, Rubango Epimaque during the preliminary hearing of 13/02/2017 argued that the objection lacks merit since the issue of determining whether the case will be reviewed or not because it was not appealed, is examined by the Office of Ombudsman, that if it is transferred to the Supreme Court and its president orders that the judgment be recorded in the relevant registry of that Court, the issue of the jurisdiction ceases to be examined, this implies that the objection raised by his opponents when the claim was already admitted is time barred. Therefore, that issue should not be among those to be examined by Supreme Court

[14] He further explains that the matter submitted to this Court is of a special procedures in the Supreme Court, that the judgment requested to be reviewed due to injustice was rendered on 11/01/2014, and that the law provides that in order to be admitted it must have been transferred

by the Office of Ombudsman and examined by the President of the Supreme Court, which were conducted. Therefore, he finds that if there was an error, it can be rectified by those organs. He states in addition that there is also an issue of equity because if the judgment could not be executed, there is no other remedy for the party to the case, other than reviewing that judgment due to injustice.

[15] He goes on stating that the rulings of the judgment RAD0010/12/TGI/NYGE rendered by the Intermediate Court of Nyarugenge which is requested to be reviewed due to injustice its execution is impossible, this concurs with the provision of article 81 *litera* 3, because the court held that Rwigara should be lawfully expropriated whilst the plot in litigation, RSSB (former RAMA and Social security fund) has already constructed a house on it, according to ruling of the judgment determining the value of the plot, the inventory will include properties which do not belong to him, therefore, they pray to this Court that it declares that it has competence, it should also hold that Rwigara Assinapol be paid the amount he was awarded at that time which is equivalent to assets which were on that plot.

OPINION OF THE COURT

[16] Article 79, paragraph 4 of the Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, provides that “when the Office of the Ombudsman finds that the decision handed down is unjust, it shall send to the President of the Supreme Court a letter accompanied by a report on the issue and evidence of such injustice and request to re-adjudicate the case”. The last paragraph of that article provides that “application for review of a final decision due to injustice shall not be subject to screening”.

[17] Article 80 of the Organic Law N°03/2012/OL of 13/06/2012 provides that “after considering the report of the General Inspectorate of Courts, the President of the Supreme Court shall decide that the case be re - adjudicated, he/she shall send the file to the Chief Registrar of the Supreme Court for recording it in the relevant registry, and he/she shall set the date of hearing and determine the bench. He/she shall also designate from among the members of the bench a judge rapporteur...”.

[18] Whereas article 81, paragraph 1, *litera* 3 of Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, provides that “the review of a final decision due to injustice shall only be applied for on any of the following grounds: when the judgment cannot be executed due to its rulings”, whereas paragraph 2 provides that “however, the party entitled to other ordinary and extraordinary procedures to appeal who did not exercise this right within the time limit prescribed by law shall not be entitled to invoke the provisions of this section to apply for review of a decision of the case he/she lost”.

[19] Determining whether the decision of the President of the Supreme Court excludes other debate about the jurisdiction of the court or the admissibility of the claim relating to the judgment transferred by the Office of Ombudsman in order to be reviewed due to injustice, the Court finds that according to the provision of article 80 of the Organic Law N°03/2012/OL mentioned above, the decision taken by the President of the Supreme Court ordering to record in the relevant registry a claim from the Office of Ombudsman, it should not be used as pretext by the parties to allege that the issue of jurisdiction or admissibility of claim was already decided

on, because that decision is not about the admissibility of a claim, rather it is about recording it in relevant registry. Thus during the hearing any interested party has the right to raise an objection of lack of jurisdiction or that of inadmissibility of a claim basing on article 81 or other articles of the Organic Law N°03/2012/OL mentioned above, especially that the decision was made without the participation of another party.

[20] Therefore, the Court finds that the decision of the President of the Supreme Court ordering to record in the relevant registry the file from the Office of Ombudsman does not prevent that during the hearing there are other debate on the jurisdiction of the Court and even on the admissibility of the claim. Consequently, the bench has the competence to examine whether the claim of Nyarugenge District was lawfully submitted to the Office of Ombudsman.

[21] In the rendering of the judgment RAD0010/12/TGI/NYGE, the Intermediate Court of Nyarugenge held that for the expropriation in the public interest to be lawful, all procedures provided by the law must be respected, otherwise it will be considered unlawfully conducted. It decided that Rwigara Assinapol was unlawfully expropriated because Nyurugenge District failed to produce the elements of evidence proving that the provided procedures were respected ,such as consultative meeting with those to be expropriated on how it will be conducted and also nothing proving that Rwigara Assinapol was just not satisfied with the compesation he was given by the District, as it alleges.

[22] As elaborated in the letter submitted to the Office of Ombudsman, whereby Nyarugenge District stated that its record officer was the one in better position to know the whereabouts of the documents demonstrating that Rwigara Assinapol was informed about the expropriation, eventhough he pleaded demostrating that he was not aware of it because he had gone to study abroad.¹

[23] The Court finds that after getting those documents, the District lodged a claim to the Office of Ombudsman basing on article 79 of the Organic Law N°03/2012/OL of 13/06/2012 alleging that the judgment RAD0010/12/TGI/NYGE contains injustice because considering its rulings, its execution is impossible; it requested that the Supreme Court may re- adjudicate it and compare the pleadings of Rwigara Assinapol in that case whereby he argued that he was not aware of the expropriation and the obtained documents which cleary demonstrate that he was aware of it so that the ruling of judgment be reversed basing on those elements of evidence.

¹ Those elements of evidences clearly demonstrate that Rwigara was well aware and even followed up the issues concerning the expropriation of his property, especially the report of the land commission of 17 July 2010; that of 23 August 2010; the letter of 17 July 2010 informing him the value of 6,284,243Frw which was attached to his property and also informing him that if he was not satisfied with that value, he may conduct a counter expertise as it is provided for by article 26 of the law relating to expropriation in the public interest together with his letter of 02 August 2010 replaying it on what concerning the valuation carried to his property.

The special meeting of the land commission and the residents of 17 July 2010 which was aimed at informing them of the resolutions of the land commission of the previous meetings with the purpose of demonstrating the outcome of the property evaluation and receive their complaints whereas that of 23 August 2010 shows clearly that the land commission examined the issue of alternative value submitted by Rwigara; it decided that it will first seek advice about the houses it demolished after paying the owners, also the law relating to expropriation in public interest provides that if you are going to determine the value the property, you must compute the land and property thereon; but during that time of valuation there was nothing on the land.

[24] Article 184 of the Law N°21/2012 of 14/06/2012 provides that “an application for review seeks to have a final judgment quashed and redecided on the facts and the law”. Whereas article 186, litera 3 of the Law N°21/2012 of 14/06/2012 also provides that “since the time of rendering the judgment, it was evident that there was injustice due to the judgement for which the review is sought, whether an element of evidence was in the file but was not noticed by the court or was revealed later.”

[25] The fact that Nyarugenge District had already obtained the elements of evidence which are contained in the file it submitted to the Office of Ombudsman stating that they clearly demonstrate that Rwigara Assinapol was aware of the expropriation and also followed it up ,those elements includes the report of the meeting of the land commission of 17/07/2010, that of 23/08/2010, the latter of 17/07/2010 informing him that his property was valued at 6,284,243Frw , whereby it also informed him that if he was not contented with that value, he mayconduct a counter expertise as provided for by article 26 of the law relating to expropriation in the public interest, the letter of Rwigara Assinapol of 02/08/2010 replying the one mentioned above explaining the issue concerning the valuation of his property, all this therefore implies that the District should have applied for the review of the Judgment RAD0010/12/TGI/NYGE in accordance to the provision of article 184 and 186 of the law mentioned above.

[26] Therefore, the Court finds that even if the enforcement of the Judgment RAD0010/12/TGI/NYGE rendered by the Intermediate Court of Nyarugenge would have been impossible due to its rulings as argued by the Counsel for the District which was also confirmed by the Office of Ombudsman basing on article 81 paragraph 1, *litera* 3 of the Organic Law N°03/2012/OL of 13/06/2012, this is not a ground for the admissibility of Nyarugenge district’s the claim requesting for the review of that judgment due to injustice in the Supreme Court, because as motivated above, Nyarugenge district should have used the remedy of appeal provided for by article 162 of the Law N°21/2012 of 14/06/2012 mentioned above or applying for the review which is also provided by article 184 and 186 of the mentioned law, however it did not not exercise those remedies. Therefore, the fact that it neglected and deprived itself the remedies of appeal which would have have served it justice, sinceit had got the elements of evidence which it alleges that they are new; it is not allowed to apply for the review of the judgment due to injustice basing on article 81 paragraph 2 of the Organic Law N°03/2012/OL of 13/06/2012 mentioned above.

2. Whether Mukangemanyi Adéline should be given the dameges she claims for

[27] Counsel Rwagatare Janvier argues that the fact that Nyarugenge district took the judgment to the Office of Ombudsman, it is an abuse of the process because it should have appealed or filean application for review of a judgment rendered by the Intermediate Court of Nyarugenge; therefore, on behalf of his client, he requests that Mukangemanyi Adéline be awarded 2,000,000Frw for the Counsel fees and 1,000,000Frw for the procedure fees.

[28] Counsel Rubango Epimaque argues that Nyarugenge district did not appeal in this Court, the claim was reffered to this Court by the Office of Ombudsman and which procedure is provided by the law; therefore, the damages they request for are groundless.

OPINION OF THE COURT

[29] Article 258 of the civil code book III provides that “any act of man which causes damage to another obliges the person by whose fault it happened to repair it”.

[30] The Court finds that due to the fact that Nyarugenge district have lost the case on the ground that it filed a claim through unlawful procedure, which led Mukangemanyi Adéline to hire the service of an advocate and also following up the case in this Court. This Court relying on article 258 mentioned above, award her 1,000,000Frw of counsel and procedure fees in the discretion of the Court because the 2,000,000Frw for the counsel fees and 1,000,000Frw for the procedure fees which Counsel Rwagatare Janvier requests on her behalf does not produce evidence for it.

III. DECISION OF THE COURT

[31] Decides that the objection raised by Mukangemanyi Adéline is sustained;

[32] Rejects the claim of Nyarugenge district for reviewing the Judgment due to injustice, the judgment RAD0010/12/TGI/NYGE rendered on 28 February 2013 by the Intermediate Court of Nyarugenge;

[33] Holds that the counter claim of Mukangemanyi Adéline claiming for the procedure and counsel fees has merit;

[34] Orders Nyarugenge district to pay to Mukangemanyi Adéline 1,000,000Frw for the Counsel and procedure fees;

[35] Orders Nyarugenge district to pay the Court fees amounting to 100,000Frw.