

## NISHIMWE v. MUGENGA ET.AL

[Rwanda Supreme Court – RCAA00031/2016/SC (Mugenzi P.J., Cyanzayire and Nyirinkwaya, J.) 09 November 2018]

*Civil procedure – Appeal – Suing someone who shares the same interests in the case – For a person to sue another on the appeal, he has to establish the interests he is pursuing, it is impossible to pursue interests against someone with whom you share the same case (whether you are both plaintiffs or respondents), while on the first instance they did not have a claim against each other.*

*Civil procedure – Litigants who share interests on the same subject matter – When many parties share interests in the subject matter, the appeal of one of them has consequences on all even though they were not summoned in the case.*

**Facts:** Mugenga had a sales contract of the house with Kabagema, which was annulled by the first instance Court of Kigali, on the ground that Kabagema sold another person's property because that house belonged to his brother Rwamanywa, thus he sold it unlawfully.

Mugenga after giving back the house he had bought, he filed a case at Nyarugenge Intermediate Court against Nishimwe and Mashami the heirs of Rwamanywa, stating that he gave the house back to them but he was not refunded the value he added on that house, he requested to be paid the profit he would have got from the money he spends on that house, the rent they got from that house and compensation for the loss due to inflation. That Court decided that there is value added to that house by Mugenga on that house, he even erected some buildings in that plot, thus, he should be refunded the value added determined in Court's discretion; it ordered the defendants to refund to Mugenga the court and procedural fees.

Mugenga and the heirs of Rwamanywa were not contented by that judgment, both appealed before the High Court, their appeals were combined and the Court ruled that the appeal of Mugenga as well as that one of the heirs of Rwamanywa has no merit, and thus sustained the appealed judgment.

Nishimwe appealed against that decision before the Supreme Court stating that she is suing Mugenga and Mashami. She explained that she appealed because there was a contradiction which led the Court to misinterpret the law, that the Court ordered to refund Mugenga the value he added on the house while he is the one who was at fault, and the evidence based on to determine the added value are uncertain.

The hearing was on 27/03/2018 and Mugenga raised an objection that Nishimwe, the appellant lost the case on same grounds at first and second instance, and the value of the subject matter is less than 50,000,000Frw, thus, the appeal should not be admissible because it is not in the jurisdiction of the Supreme Court. In the interlocutory judgment, the court overruled that objection.

Mugenga raised another objection, stating that Nishimwe changed the role of parties on appeal level because Mashami is now a respondent while she was on the side of Nishimwe on the first instance. In this case, on its motion, the Court examined whether the appeal of Nishimwe has no consequences to other heirs. Mugenga states that as Mashami was the claimant as Nishimwe in

the first instance, it is impossible that she becomes a respondent with him on appeal, thus, if Nishimwe changed the role of parties, her appeal is not admissible.

Nishimwe states that nothing prevents parties who were plaintiffs before to be respondents on appeal. And Mashami on appeal being a respondent doesn't matter, because she remains a party to the case as she was on the first instance. Mashami states that it doesn't matter to be respondent because she was a party to the case even on the first instance and she is an heir of Rwamanywa too.

As regards to whether the appeal of Nishimwe has no consequences to other heirs, which was raised by the Court, Nishimwe states that she appealed before the Supreme Court on her interests, but she appealed for the properties originating from Rwamanywa's inheritance. She states that the decision of the Court concerns all heirs.

Mashami states that at the time of filing the claim at first instance, the defendant was Rwamanywa inheritance, she emphasizes, that Nishimwe did not appeal representing the heirs, but appealed on her own. Mugenga states that before the intermediate Court the defendant was Rwamanywa heirs which also appealed, meaning that the decision was taken concerns the heirs, he states that before the Supreme Court Nishimwe appealed as a representative of the heirs, therefore she has to produce the power of attorney from the Rwamanywa's heirs, otherwise her appeal is not admissible.

**Held:** 1. For a person to sue another on the appeal, he has to establish the interests he is pursuing, it is impossible to pursue interests against someone with whom you share the same case (whether you are both plaintiffs or respondents), while on the first instance they did not have a claim against each other.

2. When many parties share interests in the subject matter, the appeal of one of them has consequences on all even though they were not summoned in the case.

**The objection of not changing the role of parties in appeal sustained.  
Summons Mashami in the case on the side of the appellant.**

**Statutes and statutory instrument referred to:**

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 9,147,153.

**No cases referred to.**

**Authors cited:**

Jacques ENGLEBERT, « Les pièges de la procédure civile », Editions Jeune Barreau, Bruxelles, 2005, pp. 7 à 68

Jean VINCENT et Serge GUINCHARD, Procédure civile, Précis Dalloz, 25ème édition, 1999, p. 140 937,

Hakim BOULARBAH, Olivier CAPRASSE, Georges de LEVAL, Frédéric GEORGES, Pierre MOREAU, Dominique MOUGENOT, Jacques Van COMPERNOLLE, Droit judiciaire, Manuel de procédure civile, T.2, 2015, P. 80

## **Judgment**

### **I. FACTS OF THE CASE**

[1] In 1994, Mugenga Joseph bought a house from Kabagema Ferdinand. The sells contact was nullified by the first instance Court of Kigali in a judgment RC36.294/01 rendered on 12/02/2003. In that case, the Court found that Kabagema Ferdinand sold someone else's property because the property belonged to his brother Rwamanywa Jérémie, for that reason the Court annulled the sells contract concluded between Kabagema Ferdinand and Mugenga Joseph.

[2] After Mugenga Joseph gave back the house, he filed a claim to Intermediate Court of Nyarugenge against the heirs of Rwamanywa Jérémie who are Nishimwe Claudine and Mashami Gisèle, stating that he gave back the house but he was not refunded the value added on that house, thus, he requests for the profit he would have got from the money he spent renovating that house, the rent received by Rwamanywa Jérémie's heirs from that house and the money he lost due to the inflation, all amounting to 137,056,112Frw.

[3] In the judgment rendered by the Intermediate Court, it ruled that Mugenga Joseph added value on that house, he even erected new buildings on that compound, thus it ordered the heirs of Rwamanywa Jérémie who are Nishimwe Claudine and Mashami Gisèle to refund 15,591,362Frw to Mugenga Joseph and also to pay 800,000Frw for counsel fee and 100,000Frw for procedural fee.

[4] Mugenga Joseph and the heirs of Rwamanywa Jérémie were not contented by the rulings and they both appealed before the High Court, their appeals were combined in case RCA0517/15/HC/KIG -0538/15/HC/KIG, which was decided on 22/04/2016. The Court decided that the appeal of Rwamanywa Jérémie's heirs and that of Mugenga Joseph have no merit, and therefore, sustained the appealed judgment.

[5] Nishimwe Claudine appealed again for that before the Supreme Court, her claim was registered on RCAA00031/2016/SC, she stated that her appeal is lodged against Mugenga Joseph and Mashami Gisèle. She explained that she appealed because there was contradiction which led the Court to misinterpret the law, that the Court ordered to refund Mugenga the value added on the house while he is the one who committed faults and even the evidence based on to determine the value added on the house are doubtful.

[6] The hearing of the case in public was on 27/03/2018, Nishimwe Claudine represented by Counsel Rwabukumba Moussa and Counsel Nsengiyumva Abel, Mashami Gisèle represented by Counsel Abasa Fazil, whereas Mugenga Joseph was assisted by Counsel Nzabahimana Augustin.

[7] At the opening of the hearing, Mugenga Joseph recalled the objection he raised related to the fact that the appellant, Nishimwe Claudine lost the case on first and second instance on the same grounds and also the value of the subject matter is less than 50,000,000Frw, thus, based on article 28 paragraph 2, *litera 7°* and in paragraph 5 of the Organic Law N°03/2012 of 13/06/2012 determining the organization, functioning, and jurisdiction of the Supreme Court, the appeal is inadmissible because it is not within the jurisdiction of the Supreme Court.

[8] In the interlocutory judgment of 20/04/2018, the Court overruled the objection raised by Mugenga Joseph, and the case was scheduled on 12/06/2018, on that date the hearing was postponed due to reforms in the judiciary and was heard on 09/10/2018, whereby Nishimwe Claudine was represented by Counsel Rwabukumba Moussa and Counsel Nsengiyumva Abel; Mugenga Joseph was assisted by Counsel Nzabahimana Augustin, while Mashami Gisèle was represented by Counsel Abasa Fazil.

[9] Mugenga Joseph raised again an objection stating that Nishimwe Claudine changed the parties at appeal level, because Mashami Gisèle is now a respondent while she was on the side of Nishimwe Claudine at first instances, this objection was the subject of hearing as well as the issue raised by the Court of whether the appeal of Nishimwe Claudine has no consequences to the other heirs.

## II. ANALYSIS OF LEGAL ISSUES

### A. Whether Nishimwe Claudine can file a claim in an appeal against Mashami Gisèle who was on her side at first instance.

[10] Mugenga Joseph states that Mashami Gisèle, as well as Nishimwe Claudine, were the plaintiffs at the first instance, hence it is impossible that she becomes a respondent as him on the appeal level, thus, if Nishimwe Claudine changed the parties, her claim would be inadmissible. He continues stating that Mashami Gisèle refused to pay court fees, and that has legal consequences in case the heirs of Rwamanywa Jérémie lose the case and ordered to pay costs, he requests that Nishimwe Claudine remains the plaintiff while Mashami Gisèle is removed from the case.

[11] Counsel Nzabahimana Augustin assisting Mugenga Joseph states that based on article 169 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure<sup>1</sup> the status of parties does not change on appeal.

[12] Counsel Rwabukumba Moussa representing Nishimwe Claudine states that the plaintiffs on the first instance can be respondents on the appeal level. He states that Nishimwe Claudine and Mashami Gisèle at first instance were plaintiffs and defendants, Mashami Gisèle became the respondent was because she gave unsatisfactory testimony to Nishimwe Claudine which led her to lose the case and be ordered to pay.

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<sup>1</sup> An appeal shall have the effect of returning to the situation a case as it was before, but only as to issues that are the subject matter of appeal.

[13] Counsel Nsengiyumva Abel assisting also Nishimwe Claudine states that summoning Mashami Gisèle on appeal as a respondent has no legal consequences because she remains a party to the case as it was in first instance Courts.

[14] Counsel Abasa Fazil assisting Mashami Gisèle states that there is no problem if his client was summoned as a respondent because she was a party to the case in the first instance and she is also part of Rwamanywa Jérémie's heirs. He also states that she is in this case as a respondent because she did not pay court fees and she is ready to defend herself on an allegation made against her whatever they claim to her is ready to answer it. He added that it is before the Supreme Court, he has heard that she was sued because of the testimony she gave before the High Court, and what he was prepared to respond to, is the rights of Mashami Gisèle as the heir of Rwamanywa Jérémie, but it does not prevent her from replying to this claim.

## VIEW OF THE COURT

[15] The Court finds that there is no provision in the law that stipulates whether it is possible or not to sue in appeal someone who was on your side in the first instance (someone with whom you sue or you are sued together). Article 147 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure in its paragraph one, only provides that "a person who was a party to the proceedings in the first instance may appeal the judgment if that person has an interest therein, except when the law provides otherwise.

[16] Article 9 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure in its paragraph one, provides that "a judge adjudicates a case on the basis of relevant rules of law. In the absence of such rules, the judge adjudicates according to the rules that he/she would establish if he/she had to act as legislator, relying on precedents, customs, general principles of law and doctrine."

[17] A legal scholar called Jacques Englebert, explains that, the requirements for someone to appeal include:

Being a party to the appealed judgment case;

His accused in appeal has been party to the appealed judgment;

The subject matter in first instance has an instance link between him and whom he accuses in appeal<sup>2</sup>

He states also that, for someone to be accused in appeal, there should be an instance link with the appellant in appealed judgment<sup>3</sup>

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<sup>2</sup> « Pour pouvoir interjeter appel principal, il faut :

-avoir été partie au procès en première instance ;

-diriger son appel contre une partie qui était elle-même à la cause [.....]

-avoir eu un "lien d'instance", devant le premier juge, entre la partie qui interjette appel et la partie contre laquelle l'appel est interjeté »; Jacques ENGLEBERT, « Les pièges de la procédure civile », in Les pièges de la procédure, Editions Jeune Barreau, Bruxelles, 2005, pp. 7 à 68

<sup>3</sup> « Pour être valablement intimé, il faut avoir eu avec l'appellant au principal un lien d'instance dans le cadre de la procédure ayant donné lieu au jugement dont appel » ; Ibidem

[18] This legal scholar also states that, the principle is that, the appeal concerns your opponent in first instance, he explains also that the opponents in first instance, means that there is an accusation from one to another or has some facts to rebuttal on<sup>4</sup>. Based on the judgment rendered by the Court of Cassation of Belgium on 10/10/2002, he states that it is enough that one of the parties has sued another in first instance for one or more grounds of the claim.<sup>5</sup>

[19] The statement of this legal scholar is emphasized by the fact that, if one person wants to sue another in appeal, he has to indicate the interest he pursues, as it is provided by article 147 of the Law N°22/2018 of 29/04/2018 mentioned above, it is impossible to persue interests to some one with whom you have the same case (whether you sue or you are sued together), while during their pleadings in first instance, there was no litigation among them.

[20] Legal scholars headed by Georges de Leval, explain that, the interests mean the outcome expected from the judgment at time of filing a claim<sup>6</sup> Law schoolers Jean Vincent and Serge Guinchard<sup>7</sup>, as well as another Law schooler Méline Douchy-Oudot<sup>8</sup>, they explain also that, the accuser has to indicate that he/she will gain something from her/his the claim he/she filed.

[21] In this case Nishimwe Claudine and Mashami Gisèle had same claim in first instance and had same interests as the heirs of Rwamanywa Jérémie, there was no claim between them. Basing on motivations provided, Nishimwe Claudine can not sue Mashami Gisèle in appeal mostly because document instituting proceedings in appeal before the Supreme Court even in her submissions does not indicate for what she sues her. It is in the hearing of the case of 09/10/2018 where Counsel Nsengiyunva Abel assisting Nishimwe Claudine indicated to the Court that his client sued Mashami Gisèle because she gave out unsatisfactory testimony to her while she did not sue her for that same ground in the first instance.

[22] Based on the motivations provided, the Court finds that Nishimwe Claudine's claim in an appeal concerning Mashami Gisèle is inadmissible.

**B. Determining the consequences of Nishimwe Claudine's appeal on the other heirs sued together with her in the first instance and with whom they share interests on the subject matter.**

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<sup>4</sup> « On enseigne traditionnellement que le recours ne peut, en principe, être dirigé que contre une partie dont on est l'adversaire en première instance, et en la qualité en laquelle elle avait été mise à la cause » . « Avoir été adversaires en première instance, c'est avoir conclu l'un contre l'autre ou encore avoir développé des prétentions à l'encontre d'une partie défenderesse ou avoir opposé des défenses à l'égard d'une partie demanderesse » ; Ibidem

<sup>5</sup>il suffit [...] que ces parties aient pris des conclusions l'une contre l'autre en première instance et aient été, ainsi, l'adversaire l'une de l'autre à propos d'un ou de plusieurs points litigieux. L'existence d'un lien d'instance est rencontrée par l'existence, au premier degré de juridiction, d'une contestation sous-jacente entre les parties concernées qui a été exprimée dans les conclusions"; Ibidem

<sup>6</sup> L'intérêt consiste en tout avantage matériel ou moral - effectif mais non théorique- que le demandeur peut retirer de la demande au moment où il la forme » ; Hakim BOULARBAH, Olivier CAPRASSE, Georges de LEVAL, Frédéric GEORGES, Pierre MOREAU, Dominique MOUGENOT, Jacques Van COMPERNOLLE, Droit judiciaire, Manuel de procédure civile, T.2, 2015, P. 80

<sup>7</sup> « Celui qui agit doit justifier que l'action qu'il exerce est susceptible de lui procurer un avantage » ; Jean VINCENT et Serge GUINCHARD, Procédure Civile, Précis Dalloz, 25ème édition, 1999, p. 140.

<sup>8</sup> « La personne doit justifier que la saisine de la juridiction est faite en vue de l'obtention d'un avantage » ; Méline DOUCHY-LOUDOT, Procédure Civile, l'action en justice, le procès, les voies de recours, 2 ème édition, 2007, P. 104.

[23] Counsel Rwabukumba Moussa representing Nishimwe Claudine states that his client appealed before the Supreme Court on her behalf, but she appealed for the properties originating from Rwamanywa Jérémie's inheritance. He states that the outcome of the case will be upon the whole inheritance. He added that, at the intermediate Court, the judge made a decision over the whole inheritance while each of its heirs sued on her behalf, he believes that it is a mistake because everyone would have been ordered to pay on her behalf though the subject matter is shared by all Rwamanywa Jérémie's heirs.

[24] Counsel Abasa Fazil assisting Mashami Gisèle states that at the time of filing a claim in the first instance, the heirs of Rwamanywa Jérémie were the defendants. He states that, the appellant before the Supreme Court was Nishimwe Claudine alone, as part of the inheritance and who has interested in it. He emphasizes that Nishimwe Claudine did not appeal on behalf of the inheritance but appealed on her behalf.

[25] Mugenga Joseph states that in the first instance before the intermediate Court the defendants was Rwamanywa Jérémie's inheritance and it is the one which appealed, meaning that, the decision was taken on the whole inheritance, he states that Nishimwe Claudine appealed before the Supreme Court on behalf of the inheritance, thus has to produce the power of attorney given to her by other heirs of Rwamanywa Jérémie, otherwise her appeal would be inadmissible.

## **VIEW OF THE COURT**

[26] Article 153 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that, "if some of the parties appealed the judgment and others have not done so, it does not prevent the court to summon all of them in appeal. In that case, those who have not appealed can take part in proceedings to protect their interests. They can also make an incidental appeal to make some claims, as well they may lose those to which they are entitled to the first judgment".

[27] The subject matter in this case and which was also appealed before the Supreme Court is related to the house left by Rwamanywa Jérémie, which was sold by Kabagema Ferdinand, which is shared by Nishimwe Claudine and Mashami Gisèle as heirs of Rwamanywa Jérémie.

[28] At first instance at the Intermediate Court, the heirs of Rwamanywa Jeremie, were the defendants, these are Mashami Gisèle and Nishimwe Claudine. The decisions of that court concerned those heirs. In High Court, each of the heirs of Rwamanywa Jeremie, appealed on her own. Their appeal was found with no merit, thus the decision of the Intermediate Court was sustained.

[29] Before the Supreme Court, as it is clear in the case file uploaded on the integrated electronic case management system ([www.iecms.gov.rw](http://www.iecms.gov.rw)), Nishimwe Claudine appealed on her behalf, without representing the heirs of Rwamanywa Jeremie, but she states that she shares with other heirs the properties she is suing for. The Court finds that the decisions taken basing on the subject matter do not concern only Nishimwe Claudine who appealed but have consequences to all heirs who share with her interests on the subject matter.

[30] Legal scholars Jean Vincent and Serge Guinchard, explain that, if many parties share interests in the subject matter, the appeal of one of them has consequences to others, though they don't appear in the hearing.<sup>9</sup>they base this, on the the provision of the French Civil Code (article 553).

[31] In the writings of Christophe L hermitte of 19/04/2016, basing on the motivations of Court of Cassation in France<sup>10</sup> he explains that sharing interests in the subject matter (indivisibility) is when it is quite impossible to execute the judgment in different ways to each of the parties<sup>11</sup>

[32] These explanations of Legal scholars, emphasize the provision of article 153 of the Law N°22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure cited above, because this article provides the procedure in general when there are many parties, whereby some appeal and others don't, it demonstrates that it can not prevent summoning others the hearing although it is not a rule. The explanations of Legal scholars as it was recalled above, indicate in particular that when parties share interests, the decision taken regarding one has consequences on all who share the interests. In that case, the provisions of article 153 would not be a choice, rather is mandatory to summon all parties who share interests in the case, so that the Court decision can be executed.

[33] Based on the provisions of article 153 of the Law N°22/2018 of 29/04/2018 mentioned above, together with the explanations of the legal scholars indicated in previous paragraphs, also basing on the fact that Nishimwe Claudine and Mashami Gisèle share interests in the subject matter as heirs of Rwamanywa Jérémie, and put into consideration that any decision will have consequences on both of them, the Court finds that Mashami Gisèle has to be summoned in the case even though she did not appeal.

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

[34] Decides that the appeal of Nishimwe Claudine regarding Mashami Gisèle is inadmissible,

[35] Decides that Mashami Gisèle as a respondent is removed from the case;

[36] Orders to summon Mashami Gisele in this case on side of Nishimwe Claudine who appealed.

[37] Orders that the hearing of this case will be resumed on 08/01/2019;

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<sup>9</sup>« En cas d'indivisibilité entre plusieurs parties, l'appel de l'une produit effet à l'égard des autres, même si celles-ci ne se sont pas jointes à l'instance » ; Jean VINCENT et Serge GUINCHARD, Procédure civile, 25ème édition, 1999, p. 937.

<sup>10</sup> Cass. civ.2e, 7 avril 2016, N°15-10126

<sup>11</sup> « L'indivisibilité se caractérise par l'impossibilité d'exécuter séparément les dispositions du jugement concernant chacune des parties » ; posté par Christophe LHERMITTE, Blog du Cabinet Gauthier & Lhermitte, le 19 Avril 2016



[38] Orders to suspend the Court fees.