

# NIYIGENA v. NYIRISHEMA

[Rwanda SUPREME COURT – RS/INJUST/RC  
00010/2017/SC (Hatangimbabazi, P.J., Ngagi and Kanyange, J.)  
January 12, 2018]

*Land law – Immovable properties – Origin of immovable property – Contract of sale – The contract of sale alone cannot be a basis to prove the ownership of the land without proving whether the one you acquired that land from is the right owner.*

**Facts:** Niyigena took Nyirishema Hodari to Nyarugenge Intermediate Court for illegally occupying the house left to her by her father Ahishakiye Musafiri while Nyirishema Hodari claims that he bought that house from Maso Tharcisse. The court hold that the house belonged to Niyigena because she inherited it from her father Ahishakiye Musafiri, thus ordered Nyirishema to vacate the house and pay various damages.

Not satisfied with the decision, Niyigena appealed to the High Court, which found that Niyigena had not provided sufficient evidence to prove that the house belonged to her father, or that Nyirishema had illegally occupied it, thus reversed the judgment under appeal on all points and ordered Niyigena to pay damages and counsel fees.

Then, Niyigena applied to the Office of the Ombudsman to review this judgment on the grounds of being vitiated by injustice. After analysing the issue, the Office of the Ombudsman wrote a letter to the Chief Justice requesting him to review this judgment on the grounds of injustice. The judgment challenged on the grounds of injustice was reviewed before the

Supreme Court, with Niyigena alleging that the house belonged to Ahishakiye Musafiri, that Maso Tharcisse occupied it after 1994 and then ceded it to Nyirishema Hodari, that there are even writings from the administrative authorities which prove that Maso Tharcisse who had appropriated the house had indeed ceded it to Nyirishema Hodari.

Nyirishema claims that Niyigena Marlene did not suffer any injustice because she had not proved the origin of that house in dispute, thus claiming damages for this action which he finds reckless and vexatious.

In order to ascertain the truth of the case, the Supreme Court heard various witnesses, including those who had signed the contract of sale between Nyirishema Hodari and Maso Tharcisse, and others who had knowledge of the house in dispute: Uwimana Philippe, one of the witnesses, pointed out that it was he who had built this house in 1981, in the plot given to him as Nkundabagenzi Abdallah who thought he was his son, that he had stayed in this house until 1988 when he sold it to Ahishakiye Musafiri. Murari François added that the house was built by Uwimana Philippe in a plot of land that had been given to him by Nkundabagenzi Abdallah, and that he, in turn, sold it to Ahishakiye Musafiri, that Maso had only appropriated this house, that he had given it to Nyirishema Hodari, from the same locality as him, because he was forced to return to his native village following a serious illness. Mukanyindo Clotilde, another witness who married Ngaboyayezu Tharcisse (nicknamed Maso) in 1995, claims that they lived in the house in dispute and that her husband told her that it did not belong to them, that they would return the house as soon as the owner claimed it. She explained that the time came when her husband wanted to return to his home village and handed over the house

to his friend from his home village, which she must not have signed on the contract of sale of the said house as she already knew that it did not belong to them.

Witness Dusengimana Perijine, for his part, explained that Nyirishema Hodari told him one day that he had found a house to buy and asked her to accompany him to testify to the sales agreement, that everyone thought the house belonged to Maso Tharcisse because he was the one who occupied it. Uwamariya Immaculée, another witness, explained that after the genocide against the Tutsis, Ngaboyayezu Tharcisse (Maso) was staying with him, that an old man named Rubagumya Georges had shown him a house for sale, telling him that it had no further consequences and that Ngaboyezu Tharcisse then repainted the house, even married into it, but later he gave it to Nyirishema Hodari because he was forced to return to his home village after a great illness.

Niyigena Marlène was called upon to reply to the various testimonies and retorted that those from Uwimana Philippe, Murari François, Uwimana Immaculée and Mukanyindo Clotilde completed her claim that the house in dispute had been occupied by Maso Tharcisse without belonging to him and that he had sold it to Nyirishema Hodari without any title of sale. She asked the court to declare that the house belonged to her because it was only she who presented the evidence of its origin.

Nyirishema, for its part, criticised the testimony of Mukanyindo, wife of Maso Tharcisse, accusing her of having been inclined to side with her opponent when she signed on to the contract for the sale of the house, which she intended to nullify the contract. Finally, he points out that Maso Tharcisse's wife wants to attribute to him the claim that he mentioned that the house did

not belong to him because he is no longer alive, that this cannot be true because he could not rehabilitate a house that did not belong to him, that the Court should not base its decision solely on the testimonies when he submitted written evidence based on a contract of sale.

**Held:** The contract of sale alone cannot be a basis to prove the ownership of the land without proving whether the one you acquired that land from is the right owner. Thus, the fact that Nyirishema Hodari was unable to prove that Ngaboyayezu whom he claims to have assigned the house to her by way of sale was also the owner of the house, this contract of sale is not valid because the seller would have sold her what did not belong to her, therefore, the house must be attributed to Niyigena because she managed to prove that she inherited it from her father.

### **Application for case review due to injustice allowed.**

#### **Statutes and statutory instruments referred to:**

Law N° 15/2004 relating to evidence and its production, article 3, paragraph 1 and 65.

Decree-law of 30/07/1888 relating to contract or conventional obligation (Repealed by law N° 020/2019 of 22/08/2019 repealing all legal instruments brought into force before the date of independence)

**No cases referred to.**

**Authors cited:**

## **Judgment**

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

[1] Niyigena Marlène filed a complaint in the Nyarugenge High Court accusing Mrs. Hodari of releasing her father's house, Ahishakiye Musafiri, in Ramiro Village, Karambo Cell, Gatenga Sector in Kigali City, claiming that she had bought it on the 15th. / 06/1997 in Maso Tharcisse.

[2] In judgment N° RC 0025/12/TGI/NYGE of 29/06/2012, the court declared that Niyigena Marlene inherited the house of her father Ahishakiye Musafiri, that Nyirishema Hodari should release her from it, and finally ordered her to pay damages, lawyers' fees and court costs equivalent to the sum of Frw 1,000,000.

[3] Not satisfied with this decision, Nyirishema Hodari appealed to the High Court of Kigali, which rendered judgment N° RCA 0433/12/HC on 24/01/2014, overruled the contested decision after finding that Niyigena Marlène had not produced sufficient evidence to prove that the house in dispute was owned by her father Ahishakiye Musafiri, hence it can't be claimed that Nyirishema Hodari had illegally occupied it. The Court declared that the house should be returned to Nyirishema Hodari, thus condemning Niyigena Marlene to pay 2,000,000Frw including damages and counsel fees.

[4] Niyigena Marlaine referred the matter to the Office of the Ombudsman requesting that judgment No RCA 0433/12/HC/KIG be reviewed on the grounds of injustice. After analyzing the file, the Office of the Ombudsman wrote to the President of the Supreme Court requesting to review the alleged injustice.

[5] The public hearing took place on 14/11/2017, Niyigena Marlene represented by Counsel Gahutu Joseph while Nyirishema Hodari was represented by Counsel Bimenyimana Emmanuel. The hearing was postponed to 13/12/2017 and on that the court heard the testimony of the witnesses as had been agreed in the previous hearing, the parties were represented as before.

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

### **1. Whether the litigated house is owned by Niyigena Marlene, who inherited it from her father Ahishakiye Musafiri**

[6] Counsel Gahutu Joseph claims that in holding that the house is owned by Niyigena Marlène, the Court based its decision on the testimony of Murari Francois who testified that it was owned by Ahishakiye Musafiri before 1994 and later occupied by Maso Tharcisse who fell ill and left the house in the hands of Nyirishema Hodari. He added that the Court also based on the documents issued by the administration demonstrating that the house was given to Nyirishema Hodari by Maso Tharcisse who had illegally occupied it.

[7] He also argues that this testimony is corroborated by the testimony of Uwimana Philippe, the first owner of that house

and sold it to Ahishakiye Musafiri and that of Mukanyindo Clotilde, the wife to Maso Tharcisse, who testified that they lived in that house aware that it was not theirs. He adds that the documents from by the local administration, especially the one dated 01/12/2009, Nyirishema Hodari had promised to hand over the house with all its documents on 30/12/2009, which proves that he acknowledged that he did not own it.

[8] Regarding his opponent's arguments that the property that Niyigena had requested to inherit is the one located in Rugunga, he rebuts that it cannot stop his client from claiming the house located in Gatenga because she has the right to inherit her father's entire estate wherever its located. He requests the Court to declare that the house belongs to Niyigena because she has a proved the origin of the house, that she acquired through inheritance of her father Ahishakiye Musafiri's estate who also acquired it through sale, he brought it from Uwimana Philippe who built it on a plot of land given to him by Nkundabagenzi Abdallah, therefore, based on the provisions of article 276 of the Civil Code, Book III, the contract of sale on which Nyirishema Hodari bases to claim the ownership of the house is null and void because it was concluded by someone who is not the owner of the property.

[9] The counsel for Nyirishema Hodari argues that Niyigena Marlene did not suffer any injustice because she did not the origin of the house in dispute, that contrary to her claims, the evidence presented to the court proves that Ahishakiye Musafiri never owned a house in Karambo cell.

[10] He further claims that even if they do not intend to invoke the statute of limitations, however, they wonder why Niyigena Marlene's mother, who never left the country, would

have initiated lawsuits to claim the houses located Rugunga leaving the one in Gatenga, that it was 16 years after the first lawsuit that she felt entitled to do so, even if there were legitimate grounds not to follow up on that house, but Ahishakiye Musafiri's sister called Ahishakiye M. Rose from doing so especially that she was a witness in the judgment No RC 0224/08/TB/NYMBO, whereby she testified that Niyigena Marlene is her brother's daughter, this proves that Ahishakiye Musafiri's properties are located in Biryogo where he lived with the mother of Niyigena Marlene, especially that even in the case she initiated requesting that Niyigena Marlene inherit the estate of her deceased father, she stated that those properties are located in Biryogo but never mentioned the house located at Gatenga.

[11] He goes further to argue that Mukanyindo Clotilde, wife of Maso Tharcisse, who also signed on the sales contract of 15/06/1997, now claims that the house did not belong to them purposely to nullify that contract, for her to repossess it through others she alleges that they are the owners.

[12] Concerning the arguments that the house was built by Uwimana Philippe who then sold it to Ahishakiye Musafiri, Counsel Bimenyimana responded that no one in the vicinity of Karambo knows Ahishakiye Musafiri, that also even the testimony of Murari François which was based on by the Intermediate Court of Nyarugenge as a person who resided there before 1994 is contradicted by the evidence they submitted (on cote 15) which proves that he moved there after 1994 from Bugesera. Besides, he testified that the house was built by Ahishakiye Musafiri while Uwimana Philippe stated that he is



the one who sold the house to him, this creates doubt on who built it.

[13] On the argument that Nyirishema Hodari agreed to hand over the house and its documents on 01/12/2009, the Counsel argues that his learned fellow is misinterpreting that document, rather he stated that he could hand over the house or the documents of the house, including the sales contract and the title which bestows to him the ownership of the house which he bought from Maso Tharcisse who was occupying it, who was considered as the owner because the buyer found him occupying it, and therefore the argument that Maso Tharcisse left the house to Nyirishema in the category of renting it to him should not be considered since there is no tenancy agreement produced.

[14] As explained above, in order to determine the owner of the house, the Court heard various witnesses, including those who signed the sale agreement between Nyirishema Hodari and Maso Tharcisse, and those who had the information about the house in litigation.

[15] Uwimana Philippe testified that he built that house in 1981 on a plot of land given to him by Nkundabagenzi Abdallah who treated him as his son, that he lived in that house until 1988 when he sold it to Ahishakiye Musafiri.

[16] In his testimony, Murari François also stated that the house was built by Uwimana Philippe in the plot given to him by Nkundabagenzi Abdallah, that he then sold it to Ahishakiye Musafiri, that Maso Tharcisse illegally occupied but later due to his illness he went back to his village and left the house to Nyirishema Hodari, his friend and village mate. He also explained that he lived in Karambo since 1981 renting a house

of Nkundabagenzi Abdallah, those who argue that he never lived in Karambo may have not moved there yet.

[17] Mukanyindu Clotilde told the Court that she married Ngabonziza Tharcisse nicknamed Maso in 1995, that even though they occupied that house, her husband had told her that it was not his, that at any time the owner may come and repossess it. She stated that time came when her husband wanted to return to the village, that he first wanted to leave the house to his brothers who were soldiers so that they hand over the house once the owner came, but that they refused because of the nature of their job, that it when he left it with Nyirishema Hodari, who was his friend and village mate, that he requested him to give him 150. 000Frw to facilitated him to go back to his home village, but he only gave him 60,000Frw. Furthermore, she states that within a short period her husband died, that later, she went to Nyirishema Hodari and requested him to give her some money on the remaining balance, the latter gave her 10,000Frw, when she went back to him she chased her and told her that she should not claim anything because the house did not belong to them either. She adds that she does not remember signing the sales agreement because she could not dare sign it because the house was not theirs, especially that the agreement only mentions her first name Clotilde (Korotirida) and she wonders why Mukanyindo is not mentioned and that the signature on it is not hers.

[18] Dusengimana Perijine also testified before the Court and explained that he worked together with Nyirishema Hodari as taxi men, one day he told her that he had found a house to buy and asked her to accompany him to be a witness on the sales

agreement, that they thought that the house belonged to Maso Tharcisse because he was the one who was occupying it.

[19] The court also heard from Uwamariya Immaculate, who testified that she has been living in Karambo since 1991, that after the Genocide against the Tutsis in 1994, Ngaboyayezu Tharcisse (Maso) lived at her place because he was her husband's brother. She went on to explain that an elderly man named Rubagumya Georges showed him the house in litigation which was by then occupied by carpenters and told him that it has no one to follow up on it soon, Ngaboyayezu Tharcisse rehabilitated it and even brought a wife but later fell sick and decided to return to his home village. She states that he told her that he requested to leave the house to his brothers but they refused and that he will leave it with Nyirishema Hodari and that she asked him what they agreed on the value he added on the house, he told her that he will give him 120,000Frw or 150,000Frw (that she does not precisely remember the figure), but later told her that he gave him only 60,000Frw.

[20] She further added that later Ngaboyayezu Tharcisse died, his wife went to request Nyirishema Hodari to give her some money from the remaining balance, she told her that he only gave her 10,000 Frw and when she returned to claim for the balance, he chased her and told her that the house was not theirs.

[21] Another person who made a statement to the Court but was not considered as a witness because is a wife to Nyirishema Hodari is Umutesi Chantal, she stated that her husband brought the house from Maso Tharcisse in the presence of the authorities, that the house was his because he was the one living in it and also took care of its maintenance.

[22] Mujiyambere Schadrack also explained to the Court that he was witness to the sales agreement between Maso Tharcisse and Nyirishema Hodari and that they thought the house belonged to Maso because he was the occupant.

[23] Concerning these testimonies, Niyigena's counsel states that the testimonies of Uwimana Philippe, Murari François, Uwimana Immaculée and Mukanyindo Clotilde support the argument that Maso Tharcisse illegally occupied the house and left it with Nyirishema Hodari, who was his friend, this implies that he also knew that the house was not owned by Maso, and also this is substantiated by the testimony<sup>1</sup> of Mutambuka Evariste, who testified that Nyirishema Hodari wanted to erect a fence around the house, but was refused by the chief of the cell (Responsible ) called Gitenge to erect it on the land which is not his.

[24] The counsel for Nyirishema Hodari argues that the testimony of Mukanyindo Clotilde demonstrates the hatred she harbours towards his client, that is the reason she wants to have the sales contract nullified and that alleging that Maso Tharcisse himself said that the house is not his, are only words attributed to him because he died, that he could not repair a house which is not his. He requests the Court not to rely on testimony when there is a written agreement of sale.

## **DETERMINATION OF THE COURT**

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<sup>1</sup> In the village meeting convened on 07/09/2015 by the Executive Secretary of Gatenga Sector.

[25] Article 3, paragraph 1 of the law N° 15/2004 of 12/06/2004 on evidence stipulates that " Each party has the burden of proving the facts it alleges. Article 65 of that Law provides the following "Only the court can assess the relevance, pertinence and admissibility or rejection of testimonial evidence. It shall not be influenced by the number of witnesses. It shall mainly consider their knowledge of facts and the objectivity and sincerity of their testimonies.

[26] As can be seen from the pleadings of both parties, the major evidence that Nyirishema Hodari presented to the court is the contract of sale that he allegedly entered into with Maso Tharcisse dated 15/06/1997, while Niyigena Marlène alleges that the house originally belonged to her father Ahishakiye Musafiri, that Maso Tharcisse only occupied it in his absence, and that he gave it to Nyirishema Hodari when he was forced to return to his native village.

[27] The Court finds that even if Nyirishema Hodari proves that he bought this house from Maso Tharcisse ( Ngabonziza), this is not sufficient as a title deed to this house, because it is also necessary to prove the origin of this house as stated by the legal scholars, such as that of François Terré and Philippe Simler, that legal acts of acquisition, such as sales contract, are not sufficient to prove the right owner of the movable property, but must also prove that the person he acquired it from was also the rightful owner<sup>2</sup> .

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<sup>2</sup> Lorsque le demandeur est en mesure de faire état de titre de propriété, c'est-à-dire d'actes juridiques d'acquisition (achat, échange, donation, testament...), ceux-ci ne sont pas invoqués en tant que conventions translatives du droit. Ils ne permettent pas, en effet, d'établir avec une absolue certitude la régularité du transfert. En prouvant par un titre que l'on a

[28] As regards the origin of the house in dispute, the witnesses Murari François, Mukanyindo Clotilde and Uwamariya Immaculée, all concur that the house in dispute did not belong to Ngaboyezu Tharcisse (Maso) rather he had illegally occupied it after the Genocide perpetrated against the Tutsis in 1994, there is no ground to reject their testimonies because the witnesses demonstrate that they knew much about the house, especially Murari Francois, who was in charge of the area where that house is located, Uwamariya Immaculate also have enough information about it because she resides in that area and knew Ngaboyayezu Tharcisse (Maso), and Mukanyindo Clotilde's testimony is also based on the fact that she stayed in that house with her husband Ngaboyayezu Tharcisse (Maso) as a tenant.

[29] Apart from what has been confirmed by the witnesses mentioned above that the house had been illegally occupied by Ngaboyayezu Tharcisse (Maso), there is also the testimony of Uwimana Philippe stating that he is the one who built that house in the plot that Nkundabagenzi Abdallah, which was confirmed by Murari François. He also retaliated that he is the one who built the house in the villager's meeting convened by the Executive Secretary of Gatenga sector on 07/09/2015, he was not challenged rather his testimony was emphasised by the residents who had attended that meeting, including Simbayobewe Elisé, who stated that he had stayed in the

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acquis tel immeuble, on ne prouve pas irréfutablement que l'on en est devenu propriétaire. On n'a pu le devenir que si le cédant ou disposant avait lui-même cette qualité. Et il ne suffit pas de fournir le titre en vertu duquel ce dernier est devenu propriétaire, car il faudra démontrer que son propre auteur l'était déjà, et ainsi de suite: François Terré et Philippe Simler, Droit civil, Les Biens, Dalloz, 7e édition, P.418

locality since 1975 and he knew Uwimana Philippe as the one who built that house in the plot given to him by Abdallah, and subsequently sold it to Ahishakiye Musafiri.

[30] In the same meeting, Minani Emmanuel also testified that he carried out carpentry activities in that house in 1995, but later Ngarambe who was «Responsible» gave it to Ngaboyayezu Tharcisse this was also supported by Nyirababirigi Annonciata, who was also in the meeting.

[31] The Court finds that for Nyirishema Hodari basing the origin of this house on the agreement of sale he had with Ngaboyayezu Tharcisse (Maso), but failed to prove that the seller was indeed the owner, whereas, on the other hand, the testimony given by various people mentioned above demonstrate that Ngaboyayezu Tharcisse was not the owner of that house rather it was temporary given to him, the Court finds that those testimonies should be given value especially that they concur on many issues in their statements, even Nyirishema Hodari has not been able to put forward strong arguments why these testimonies should not be given value, except on Mukanyindo Clotilde whereby he states that she harbours much hatred for him but without specifying the reason for that hatred when her testimony corroborates with that of others.

[32] In addition, the Court finds that the testimonies of Mujyambere Schadrack and Dusengimana Perijine cannot be taken into account because they do not know the origin of the house in dispute, to merely allege that the house belonged to Maso Tharcisse because they saw him in that house or because he resided there, that only does not confer on him the ownership as motivated above.

[33] Therefore, the Court finds that the sales agreement which Nyirishema Hodari bases on to claim ownership of the house is invalid, because Ngaboyayezu Tharcisse (Maso) knowingly sold someone else's property, as was proved by the witnesses including Uwamariya Immaculate and Mukanyindo Clotilde who stated that Maso only left the house to him as a friend, and even Uwimana Philippe who testified that he is the one who built that house and sold it to Ahishakiye Musafiri, and this had been supported by other testimonies.

[34] Pursuant to the motivations provided above and on the provisions of article 276 of the Civil Code, Book Three, which provides that "the sale of someone's property is null and void and it can entail damages if the buyer was not aware that the seller is not the owner", therefore the Court finds that the sale between Nyirishema Hodari and Ngaboyayezu Tharcisse (Maso) was null and void and thus the owner of the house in litigation is Niyigena Marlène because she has proved that she acquired it from her father Ahishakiye Musafiri.

## **2. Whether the damages claimed by each of the two parties have merit.**

[35] The court submissions of Niyigena Marlene's counsel, he explains that Nyirishema Hodari refused to hand over the house, well knowing that it originates from his father, dragged her into unnecessary lawsuits instead of making that house profitable, for that reason Niyigena should be awarded 5,000,000 Frw which includes moral damages, vexatious lawsuits damages, procedural fees and also 1,000,000Frw for counsel fees.



[36] The counsel for Nyirishema Hodari argues that the damages claimed by Niyigena Marlène are unfounded, rather she should be compelled to pay his client 5,000,000Frw in damages for vexatious lawsuits.

## **DETERMINATION OF THE COURT**

[37] The Court finds that the damages of 5,000,000Frw which Niyigena Marlène claims include moral damages and procedural fees should only be awarded in the court's discretion 300,000Frw for procedural fees as it's obvious that she incurred expenses to follow up the on the lawsuits. Whereas those for moral damages and vexatious lawsuits damages are not awarded because they are not justified. The court also finds that she hired a legal counsel on all instances up to the Supreme Court, thus, the court awards her on all instances 1,000,000 Frwfor counsel fees, all totaling to 1,300,000 Frw.

[38] Concerning the damages claimed by Nyirishema Hodari, the Court finds that they should not be awarded because he lost the case as motivated above.

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

[39] The Court finds the application for review due to injustice filed by Niyigena Marlène with merit;

[40] Holds that judgment N° RCA 0433/12/HC/KIG rendered by the High Court on 24/01/2014 is reversed;

[41] Holds that the house located in Ramiro village, Karambo cell, Gatenga Sector belongs to Niyigena Marlène;

[42] Orders Nyirishema Hodari to vacate that house;

[43] The Court orders Nyirishema Hodari to give to 1,300,000 Frw to Niyigena Marlene for procedural and counsel fees;

[44] The Court orders Nyirishema Hodari to pay court fees.