

HABIMANA ET AL v. ASIIMWE ET AL

[Rwanda SUPREME COURT – RCOMAA 00031/2016/SC -RCOMAA 00036/16/CS
(Nyirinkwaya, P.J., Karimunda and Ngagi, J.) June 29, 2018]

Mortgage – Disputes arising from real property evaluation – In case of disagreement on the property evaluation at the request of the one who feels prejudiced another property evaluation is conducted.

Mortgage – When the receiver takes the obligations of the Registrar General without his authorisation is usurpation of duties.

Mortgage – The effect of nullifying the auction – When the auction is nullified, everything has to be in the status they were in before the auction.

Facts: Asiimwe Frank was given a secured loan by Bank of Kigali Ltd (BK), he mortgaged his house with a value of 121,000,000Frw, which was registered in RDB. The loan was not repaid as agreed, hence the mortgagor requested the Registrar General in RDB to appoint a receiver, thus appointed Advocate Habimana, who sold the mortgage in the auction.

Issues arose when the receiver hired a real property valuer to carry out a separate valuation from the one carried out when the loan was issued, that valuation valued the house at 65,197,200Frw, while the first valuation had valued it at 121,000,000Frw at the time when it was registered in RDB, this prompted the mortgagee to write to the Regulatory Council for Property Valuation requesting that another real property valuer be appointed to conduct another valuation because he disagrees with the value given to the house by the real property valuer appointed by the receiver, he gave a copy of that letter to both the Registrar General and the receiver, however that institute did not respond to his request until the auction was held and the mortgage sold at 55,000,000Frw.

This prompted the mortgagee to sue to the Commercial Court of Nyarugenge requesting to declare the auction null and void. That court declared the auction null and void on the ground that it did not comply with the Instructions of the Registrar General relating to modalities of the lease, sale, public auction, and mortgage acquisition, it ordered the Receiver, Bank of Kigali Ltd, the Regulatory Council for Property Valuation and the Registrar General in RDB, each to pay him procedural and counsel fees.

The receiver appealed to the Commercial High Court alleging that the court nullified the auction and awarded damages without any basis. The Bank of Kigali Ltd also appealed against the Court's decision to nullify the auction and that it also ordered it to pay damages without first establishing its fault, it states that it had no role in the auction process. The court found the appeal of the receiver without merit and that of the Bank of Kigali Ltd was founded on the ground that it is not liable for damages.

The receiver and Bank of Kigali Ltd were not contented with the outcome of the case and each appealed to the Supreme Court, while the mortgagee, the buyer of the house, and the Regulatory Council for Property Valuation each filed a cross-appeal.

In his appeal, the Receiver argued that the previous courts should not have invalidated the auction on the ground that the mortgage was sold at a lower price value, arguing that in case the mortgagee does not agree with the outcome of the valuation he requests for another valuation and the auction is suspended, if it is not done then its not the fault of the receiver because he is not the one who conducted the valuation and approve it and that when it is found that the value determined is less than the actual value, then the selling terms and conditions and the permit to sell the mortgage are the ones that are revoked.

The mortgagee argues that the auction cannot proceed after the receiver has seen that the owner of the property has requested the concerned organ for to first make another valuation and that in the courts the subject matter was the invalidation of the illegal auction because it had already been held, that he is also accused of conflict of interest because he acted as both a receiver and a court bailiff at the same time, he concludes that he did not deny that the mortgage is for Bank of Kigali Ltd, but it should be given its real value.

On the issue of whether the receiver notifying the selling terms and conditions instead of the Registrar General is ground to nullify the auction, the Receiver states that the Instructions of the Registrar General provide for the Registrar General to serve a copy instead of notifying them and that the Registrar General informs as he wishes, that the receiver doing it, is normal, he finds that the Court should have demonstrated the prejudice caused to him when the Registrar General did not personally hand to him the documents of instructions.

Whereas the mortgagee argues that the Instructions of the Registrar General in RDB stipulates that the Registrar General is the one who notifies the mortgagee and the mortgagor of the selling terms and conditions within 16 working hours from the time the document has been approved, therefore being notified by the receiver means that he has performed the duties of the Court Bailiff and also did not comply with the time limit set out in the Regulations as he was notified within five days instead of the 16 hours provided by the Instructions. He goes on to explain that the cancellation of the auction does not require to first establish the harm caused rather when the Instructions of the Registrar General are not complied with, the auction is nullified.

On that ground of appeal, the buyer of the auctioned house and the Bank of Kigali Ltd concurs with the receiver that the Receiver notifying the sell terms and conditions instead of the Registrar General is not a ground for the nullification of the auction because the purpose was to inform him of those terms and conditions and he was informed, thus the purpose was achieved.

The Bank of Kigali Ltd in its appeal, argues that the previous Court confused the responsibilities of the organs concerned with the auction with those of the mortgagee allowed to sell the mortgage, which led to the unjust ruling, it did not award it damages for vexatious suits while it had ruled that it committed no fault during the auction process and that declared the auction null and void but did not rule on its situation as a mortgagor.

The mortgagee argues that the bank claims are unfounded because it does not represent those organs, they had they, representatives, during the hearing and that he is not the one who led the Bank of Kigali Ltd into lawsuits rather it was due to the Receiver and that the court ruling on the situation after nullifying the auction was the claim to the court.

In his cross appeal, the mortgagee argues that based on the negative effects the illegal auction had on him, he requests that the receiver pays him various damages.

The Receiver argues that the damages claimed are unfounded because he defaulted on the loan, which resulted in the execution of the judgment by force, therefore he should bear the consequences.

In his cross appeal, the buyer of the house states that if the Court finds that the fault which led to the nullification of the auction was made by the receiver, then he should be ordered to pay counsel and procedural fees. He also states that if it finds that the auction was illegal, it should compel the Bank of Kigali Ltd to reimburse the money paid in the auction and also pay his procedural and counsel fees because his appeal is a result of the claim it filed.

In a cross-appeal from the Regulatory Council for Property Valuation, it states that the Court could consider whether, legally, it could have been sued for damages in a lawsuit if it was not an association, organization, or public agency because it had no assets, and had no legal representative. because it acts only as a Committee of People from all over the world but it is not a union of values because it has legal status. The other parties have not commented on this appeal

Held: 1. In case of disagreement on the property evaluation at the request of the one who feels prejudiced another property evaluation is conducted

, otherwise, the auction based on that challenged auction is nullified.

2. Its usurpation of duties, when the receiver performs the duties of the Registrar General without his/her authorisation.

3. When the auction is nullified, everything has to be in the status they were in before the auction, therefore, Bank of Kigali Ltd remains in possession of the mortgage furnished by the mortgagor and also reimburse the money paid for that mortgagor.

4. Moral damages are not awarded in case the claimant is the one who defaulted on his duties even if the case is ruled in his favour.

5. The receiver unlawfully auctioning the mortgage which led the buyer to be enjoined in the case is liable for counsel and procedural fees.

6. Since the mortgagor wrote to the Regulatory Council requesting it to appoint other Property Valuers to carry out another property valuation but did not respond, until the auction took place, while it is mandated by the Law to do so, that is a ground for it to be liable for damages.

The appeal of the Receiver is without merit;
The appeal of Bank of Kigali Ltd is without merit;
The cross appeal of the mortgagor has merit in parts;
The cross appeal of the buyer of the house has merit;
The cross appeal of the Regulatory Council for Property Valuation is without merit;
The auction is nullified;
The court fees deposit covers the expense incurred in this case.

Statutes and statutory instrument referred to:

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 10

Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 7
Law N° 15/2004 of 12/06/2004 relating to evidence and its production, article, article 3
Law N° 12/2013 of 22/03/2013 governing the bailiff function, article 38
Law N° 13/2010 of 07/05/2010 modifying and complementing Law N° 10/2009 of 14/05/2009 on mortgages, article 3
Article 36 of the law N° 17/2011 of 12/05/2010 establishing and organizing the real property valuation profession article 36
Instructions of the Registrar General N° 03/2010/org of 16/11/2010 on modalities of lease, sale, public auction and mortgage, article 9
Decree-Law of 30/07/1888 relating to contracts or obligations, article 258.

No case referred to.

Judgment

I. BACKGROUND OF THE CASE

Asiimwe Frank was granted a loan by Bank of Kigali Ltd, who also mortgaged his house worth 121,000,000Frw as indicated on the mortgage certificate issued by the Rwanda Development Board (RDB).

Asiimwe Frank failed to repay his debt, prompting the Bank of Kigali Ltd to request the Registrar General of the RDB to appoint a receiver to manage and sell the mortgage furnished to it by Asiimwe Frank, and the Registrar General appointed Me Habimana Vedaste, who sold the mortgage in the auction which took place on the 29/04/2015.

Asiimwe Frank filed a lawsuit in the Commercial Court of Nyarugenge requesting the court to declare the auction held on 29/04/2015 null and void, because Me. Habimana Vedaste, the receiver, engaged a new evaluator who carried out another evaluation which gave a different value from the one given at the time he was given the loan, he valued the house at 65,197,200Frw while the first one had valued it at 121,000,000Frw at the time of issuing the loan, this resulted in his house being sold at a very low price, because it was sold at 55,000,000Frw, and it was sold secretly, without being informed.

On 03/12/2015, the Commercial Court of Nyarugenge rendered a judgment RCOM 1321/15TC/NYGE and invalidated the auction on the ground that there was non compliance with article 9 of the instructions of the Registrar General N° 03/2010/org of 16/11/2010 on modalities of the lease, sale, public auction, and mortgage acquisition which provides that the Registrar general may approve of the selling terms and conditions and shall send notification of approval to both the mortgagee and the mortgagor within 24 working hours from the time the document has been approved but in this case, the provisions of this article were executed by Me Habimana Vedaste while it was not within his jurisdiction.

The Court also relied on the fact that Asiimwe Frank wrote to the Regulatory Council for Property Valuation requesting that other valuers be appointed to evaluate his house because he did not accept the valuation used by Me Habimana Vedaste, he copied the Registrar General and

also Me Habimana Vedaste himself, however, the auction proceeded based on article 19 of the law on mortgage which provides that the receiver shall be responsible for the selling of the mortgage at an appropriate market price after informing the two parties thereon, on the contrary, the provisions of that article do not give him the right to sell the mortgage at a lower price or devalue the mortgage claiming that it is the market value, because when you make another evaluation different from the first one, you have to indicate the materials on the mortgage which lost the value, not only just confirm a lower value of the mortgage without demonstrating how it lost value.

That Court ordered Me Habimana Vedaste, Bank of Kigali Ltd, the Regulatory Council for Property Valuation, and the Registrar General in RDB, each to pay Asiimwe Frank 1,000,000Frw for the moral damage and procedural fee.

Me Habimana Vedaste appealed to the Commercial High Court contesting that the Court:

1. nullified the auction because he as a Receiver notified the approval of the selling terms and conditions instead of the Registrar General and was", yet it was the duty of the Court Bailiff;
2. nullified the auction because the mortgage furnished by Asiimwe Frank was devalued but it was not the case because the court erred since it did not give the basis for its ruling that the mortgage was devalued;
3. held that Asiimwe Frank's right to call for another valuation was not respected, it based on article 36 of Law No. 17/2011 of 12/05/2010 establishing and organizing the real property valuation profession, nevertheless, it misapplied that provision because the issue, in this case, is the price offered at the auction, rather than the value got from the valuation.
4. **awarded damages to** Asiimwe Frank without basis.

Bank of Kigali Ltd also appealed contesting the ruling of the Court that:

1. the auction which was held on 29/04/2015, be canceled because the person who communicated the approval of the selling terms and conditions could not do so, but the provisions of that article were complied with, as it does not provide that serving a copy to Asiimwe Frank have to be done by the Registrar General in RDB, it would be done by anyone.
2. the auction is canceled when the mortgage was sold at a low price, but that is not the case because the price of the mortgage on which it will be sold on the auction is not regulated by the valuation as provided for in article 3 amending article 19 of the Law on mortgage.
3. Bank of Kigali Ltd must pay 1,000,000 Frw in damages without giving the fault for which is being charged those damages, as it was not involved in the auction process.

On 31/03/2016, the Commercial High Court rendered judgments (RCOMA 0011/16 / HCC - RCOMA 0035/16 / HCC) whereby it found the appeal of Me Habimana Vedaste without merit, the appeal of Bank of Kigali Ltd with merit in parts, that the judgment RCOM 1321/15 / TC / NYGE has only changed in the sense that Bank of Kigali should not be charged damages. It ordered Me Habimana Vedaste to pay Asiimwe Frank 1,500,000Frw for the procedural and

counsel fees on the first instance and 1,000,000Frw for the procedural and counsel fees on appeal level.

Habimana Vedaste appealed to the Supreme Court, requesting to examine the following issues which are whether:

- 1.** the auction which was conducted in the execution of various administrative decisions and approved by the certificate of the Registrar General in the RDB can be declared null and void without first suing requesting to declare null and void the certificate of the Registrar General which approved the auction;
- 2.** the disputes on the property valuation or challenging the procedures of the auction is a ground for invalidating the auction
- 3.** whether the receiver is held liable when the valuation made by an expert and approved by the Registrar General and rejected by the mortgagor;
- 4.** the mortgagor requesting the competent authority to appoint other evaluators to make another evaluation suspends the auction;
- 5.** analysis of the Court interpretation of article 19 of the law on mortgage and article 36 of the Law N ° 17/2010 of 12/05/2010 establishing and organising the real property valuation profession;
- 6.** the effects of non compliance with the regulations N°03/2010/ORG, and the one who is liable for it;
- 7.** The court did not contradict itself;
- 8.** is not entitled to procedural and counsel fees and attorney's fees and other court costs.

Bank of Kigali Ltd also appealed arguing that the Court:

- 1.** did not award it damages whilst it ruled that it committed no error during the auction, therefore it was dragged into a frivolous lawsuit;
- 2.** confused the responsibilities of the auctioneer and the receiver, leading to an erroneous decision;
- 3.** ruled null and void the auction held on 29/04/2015, but did not clarify the fate of Bank of Kigali which was furnished with the mortgage.

The case was heard in public on 27/02/2018, Me Habimana Vedaste represented by Me Nkurunziza François-Xavier, Bank of Kigali Ltd represented by Me Rutembesa Phocas, Asimwe Frank assisted by Me Rwigema Vincent, Me Kayihura Didas and Me Munyentwari Charles, Regulatory Council for Property Valuation represented by Me Ntarugira Nicolas, Musinguzi Hannington represented by Me Nsengiyumva Niyondora, while the Registrar General in RDB did not appear although signed on the hearing date.

After hearing both parties on the issue of the absence of the Registrar General, the Court, after reviewing the provisions of article 59 of Law N° 21/2012 of 14/06/2012 on relating to the civil, commercial, labour and administrative procedure, it ruled that the case should proceed in absentia of the Registrar General and that it will consider the Registrar General's court submissions in deliberation, it first examined the objection of lack of jurisdiction of this Court raised by Asiimwe Frank, but it was overruled, the case in merit was heard on 29/05/2018, again the Registrar General did not appear, although was legally summoned, the Bank of Kigali Ltd represented by Me Buzayire Angèle, the other parties represented as before.

II. ANALYSIS OF LEGAL ISSUES

A. The appeal of Me Habimana Vedaste

In his appeal, Me Habimana Vedaste submitted eight grounds of appeal, but which may be categorised in two which are; whether the auction held on 29/04/2015 had to be null and void and its effects, all the grounds of appeal contained therein as they were submitted by Me Nkurunziza François-Xavier to be examined, the other is to determine whether damages should be awarded in this case.

1. Whether the auction held on 29/04/2015 had to be nullified and its effects

a. Whether the Commercial High Court should not have relied on the ground that the mortgage was sold at a low price to nullify the auction

Me Nkurunziza François-Xavier, the counsel for Me Habimana Vedaste, argues that what they challenge in the judgment of RCOMA 0011/16 / HCC & RCOMA 035/16 / HCC rendered on 31/03/2016 by the High Court, is that it nullified the auction on the ground that the mortgage was sold at a lower price based on the real property valuation carried out at the time of granting the loan.

He further contends that the Commercial High Court not have nullified the auction held on 19/04/2015 on the ground that the mortgage was sold at a lower value because if the mortgagor is not contented with the real property valuation he requests for another property valuation and the auction is suspended, that when he does not do that then it's not the fault of the receiver (Habimana Vedaste) because he is not the one who carried out that real property valuation and approved it.

He concludes that the disputes over property valuations are settled in accordance with the provisions of article 36 of Law No. 17/2010 of 12/05/2010 establishing and organising the real property valuation profession, that when the decision is taken by that organ or if it demonstrates that the prescribed value is less than the actual value, then the document approving the terms and conditions of sell and the Registrar's certificate approving the auction are nullified.

Asiimwe Frank argues that, apart from Me Habimana Vedaste's interest in proceeding with the auction when he knew that the mortgagor had requested for another valuation to first be carried out, there would be no other reason for the auction to proceed while that was the gist of the action, that the issue which was being litigated was to declare null and void the auction which

was illegally held, thus he finds that Me Habimana Vedaste wanted to litigate on the matters he already litigated and lost on the first and second level. He further argues that Me Habimana Vedaste's allegations that he did not carry out a counter valuation are misleading because there is no way he would have carried out when he had already written to the concerned organs. He further states that in one and a half years the property had devalued from 140,500.00Frw to 65,197,200Frw, this happened because the Valuer hired by Me Habimana Vedaste who valued it using fake materials which were not used in its construction alleging that are the ones used purposely to devalue it as held in the judgment RCOM 1321/15/TC/NYGE, he further argues that among the claims against Me. Habimana Vedaste is a conflict of interest because he acted both as a receiver and a Court bailiff at the same time. He concludes by saying that he does not dispute that the mortgage was furnished to Bank of Kigali Ltd, but he wants the mortgage to be given its real value.

Me Kayihura Didace, the counsel for Asiimwe Frank, explains that the motive for article 7 of the Regulations of the Registrar General is that the one who uses the valuation (expertise) should compare it with its value at the time of its registration, that if there is a significant difference, he also puts it under consideration and do not sale the mortgage. He says that if the provisions of the Regulations were followed, Asiimwe Frank's property would not have been devalued and sold at a very low price.

Me Munyentwari Charles, the counsel for Asiimwe Frank, argues that what they are requesting from the Court is to confirm that the previous courts were correct to hold that the auction was null and void.

Me Rwigema Vincent, also assisting Asiimwe Frank, argues that the Law authorizes the receiver to sell the mortgage at a reasonable price considering the price fluctuations.

Me Ntarugira Nicolas, the counsel for the Regulatory Council for Property Valuation, argues that the claim filed with the court is not about property valuation rather its about nullification of the auction.

Me Niyondora Nsengiyumva, the counsel for Musinguzi Hannington, argues that his client also became a party to this case because as someone who brought the house in the auction, this case has effects on him.

Me Buzayire Angèle, the counsel for Bank of Kigali Ltd, argues that nullifying the auction because the mortgage was sold at a low price does not change the fact that the mortgage belongs to Bank of Kigali Ltd.

The Registrar General in RDB did not submit on this issue as his court submissions are not available nor did he attend the pre-trial conference although he was duly notified.

DETERMINATION OF THE COURT

Article 3 of the Law N°13/2010 of 07/05/2010 modifying and complementing Law N°10/2009 of 14/05/2009 on mortgages provides that "the receiver shall be responsible for selling the mortgage at the market price after informing the two parties thereon". Paragraph two of that article

provides that "the market price shall be determined based on prevailing market conditions. Any proposed sale shall be conducted in accordance with auction procedures".

Article 36 of the law N° 17/2011 of 12/05/2010 establishing and organizing the real property valuation profession provides that "Where a party does not agree with a real property valuation, he/she shall refer the matter to the Council. In such a case, the Council shall select other certified valuers who shall decide other valuation methods to be used. In case the dispute is not settled, it shall be submitted to a competent court of Law".

Article 11 of the Instructions of the Registrar General N° 03/2010/org of 16/11/2010 on modalities of lease, sale, public auction and mortgage provides that "the receiver of the mortgage has the responsibility to sell the mortgage with a reasonable price according to the changes on the market and its value state in the selling terms and conditions document".

The case file indicates that on 02/03/2015, the Registrar General in RDB signed a document entitled "Permit to sale the mortgaged property", Me Habimana Vedaste, Bank of Kigali Ltd and Asiimwe Frank were given a copy. That document indicates that the value of the mortgage at the time of its registration was 121,000,000Frw, the debt owed to the Bank of Kigali Ltd was 70,850,000Frw, it also indicated the time when the auction will begin and end.

The case file demonstrates that when the mortgage was about to be sold, Me. Habimana Vedaste employed real property valuer to carry out property valuation, which was conducted on 07/03/2015, its outcome indicated that the mortgage had a value at 65,197,200Frw. The case file also indicates that Asiimwe Frank challenged that valuation, on 16/03/2015, he wrote to the Regulatory Council for Property Valuation requesting that other property valuers be appointed to carry out another property valuation (counter- expertise) like the one which was done on behalf of Me Habimana Vedaste, Asiimwe Frank also copied that letter to the Registrar General in the RDB, Me Habimana Vedaste and the Bank of Kigali, nonetheless the requested valuation (counter-expertise) was not conducted because Asiimwe Frank did not get a response, instead, the auction proceeded and the mortgage was sold at for 55,000,000Frw.

The Court finds that, since Asiimwe Frank had challenged the outcome of the property valuation requested by Me Habimana Vedaste, who was the receiver and consequently wrote to the Regulatory Council for Property Valuation requesting that another real property valuation on the mortgage he had furnished to the Bank of Kigali Ltd, he also gave a copy of that letter to the Registrar General in RDB, Me Habimana Vedaste and Bank of Kigali Ltd, unfortunately, Me Habimana Vedaste, who was knowledgeable that article 36 of Law N° 17/2011 of 12/05/2010 establishes and regulates the professional functioning of the valuation of the immovable property provides for the redress in case there is no agreement on the results of the real property valuation, this regarded it sold the house at 55,000,000Frw, implies that the auction was illegally conducted.

The Court also finds that the fact that Asiimwe Frank wrote a letter requesting for another property valuation to be carried on his house but none reacted to it be the recipient of the letter nor those who were given a copy of that letter until the house was sold for a half (1/2) of the value it was valued, at the time the mortgage was registered in RDB Ltd., that was two years before, this means that Me Habimana Vedaste cannot refute that he did not devalue the

mortgage, because when he disregarded the request of conducting another valuation as requested by the mortgagor, so that the market price can be determined and unfortunately the mortgage was sold at a very lower price, it implies that Me Habimimana Vedaste did not comply with the provisions of article 3 of Law N°13/2010 of 07/05/2010 modifying and complementing Law N°10/2009 of 14/05/2009 on mortgages, in its first paragraph, and Article 11 of the Instructions of the Registrar General N° 03/2010/org of 16/11/2010 on modalities of lease, sale, public auction and mortgage stipulates that “the receiver has the responsibility to sell the mortgage at a reasonable price according to the changes on the market, having notified both parties”.

As also held by the previous courts, this Court finds that since Asiimwe Frank had challenged the property valuation determined by the Property Valuer chosen by Me Habimana Vedaste, another valuation had to be carried out because that is what the law provides for in that situation, therefore the auction held on 29/04/2015 is null and void.

b. Whether Me Habimana Vedaste sending the notification of the selling terms and conditions instead of being sent by the Registrar General is a ground to declare the auction null and void.

Counsel Nkurunziza François-Xavier, representing Advocate Habimana Vedaste states that he was appointed as a receiver by the Registrar General in RDB, gave him instructions and a certificate confirming that he conducted his duties in conformity with the law, this implies that the mortgagor cannot sue requesting for nullification of the auction alleging that he challenges the property valuation conducted on his house or the sale procedures, without first requesting for the nullification of various decisions made by the authorities.

Counsel Nkurunziza François Xavier, assisting Advocate Habimana Vedaste argues that the Instructions of the Registrar General provide for the Registrar General to serve a copy instead of notifying them and that the Registrar General informs as he wishes, that being done by the Receiver is normal, he finds that the Court should have demonstrated the prejudice of Asiimwe Frank when the Registrar General did not personally hand to him the documents of instructions, besides that on page 9, section 26, the Court contradicted itself whereby it stated that serving a copy of instructions is in the responsibility of the Registrar General and he is liable when the notification is not conducted lawfully, while on page 14, section 53, it stated that Habimana Vedaste did not use discernment, caution and refraining from bias, therefore his faults prejudiced Asiimwe Frank.

Asiimwe Frank argues that article 9 of the Instructions of the Registrar General in RDB stipulates that the Registrar General is the one who notifies the mortgagee and the mortgagor of the selling terms and conditions within 16 working hours from the time the document has been approved. He adds that Advocate Habimana Vedaste as a Receiver performed the duties of Court Bailiff and again did not comply with the time limit prescribed by the Instructions of the Registrar General in RDB because the selling terms and conditions made on 25/03/2015 were notified on 30/03/2015, that is five days later instead of 16 hours prescribed by law.

Counsel Kayihura Didace, Counsel Munyentwari Charles and Counsel Rwigema Vincent, all assisting Asiimwe Frank argue that article 9 of the Instructions of the Registrar General in RDB stipulates that once the Registrar General approves of the selling terms and conditions, shall send notification of approval to both the mortgagee and the mortgagor, they argue that their client was

not notified of the selling terms and conditions by the Registrar General and those provisions of the Instructions were meant to eliminate the disorder in the auction, that the cancellation of the auction does not require a person to prove the damage suffered but if the Instructions of the Registrar General are not complied with, the auction must be canceled, the fact that the procedures (*procedures*) are not complied with is a ground to invalidate the auction because those procedures are public order.

Counsel Niyondora Nsengiyumva, states that concerning the provisions of article 9 of the Instructions of the Registrar General, this article states that once the Registrar General has approved the selling terms and conditions, shall send notification of approval to both the mortgagee and the mortgagor within 16 working hours, that thus the courts holding that non compliance of it is a ground for the cancellation of the auction, he finds that the Instructions is silent on it and if the intention was for Asiimwe Frank to be notified the intention was achieved. As to whether the procedures set out in the Instructions of the Registrar General in RDB are of public order, he states that they are not of *ordre public* because they are not related to judicial process.

Counsel Buzayire Angèle, representing Bank of Kigali Ltd, argues that Asiimwe Frank not being notified of the selling terms and conditions is not a ground for the nullification of the auction. He further argues that the procedures provided for in the Instructions are not of *d'ordre public* so some of the procedures were not followed does not mean that there the auction should be nullified.

The representative of the Regulatory Council for Property Valuation and the Registrar General did not debate on this issue.

DETERMINATION OF THE COURT

Article 9 of the Instructions of the Registrar General provides that “the Registrar general may approve of the selling terms and conditions and shall send notification of approval to both the mortgagee and the mortgagor within 16 working hours from the time the document has been approved ”.

The case file demonstrates that on 10/03/2015, Advocate Habimana Vedaste sent the selling terms and conditions of the mortgage furnished by Asiimwe Frank to the Registrar General in RDB requesting him to approve it, he gave a copy to the CEO of Bank of Kigali Ltd and Asiimwe Frank, but the latter received it on 15/03/2015. The case file also indicates that on 25/03/2015, the Registrar General in RDB wrote to Advocate Habimana Vedaste informing him that he had approved the selling terms and conditions of the mortgage furnished by Asiimwe Frank, made a copy for both Bank of Kigali Ltd and Asiimwe Frank. On 30/03/2015, Advocate Habimana Vedaste delivered a copy of the selling terms and conditions to Asiimwe Frank, he left it with his employee called Jesika.

The Court finds that article 9 of the Instructions of the Registrar General provides only the Registrar General to issue a copy of the selling terms and conditions to both the mortgagee and the mortgagor within 16 working hours from the time the document has been approved. It is apparent that the Registrar General designated a copy to Asiimwe Frank, but it was served to him

by Advocate Habimana Vedaste on 30/03/2015. The interpretation of this article is that it only provides the designation of the copy but does not state how the copy is delivered to the intended recipient, nor does it state that the Registrar General is the one who delivers it to the mortgagor. Eventhough this article does not indicate that the Registrar General is the one who serves the document, it is clear that he is responsible for determining and planning how the document will be delivered to the intended recipient within the hours provided for in the Instructions of the Registrar General.

The Court finds that the case file does not indicate that Advocate Habimana Vedaste was given the duty of the Registrar General to serve a copy of the selling terms and conditions to Asiimwe Frank. It finds that, as also held by the Commercial High Court that for Advocate Habimana Vedaste to delegate to himself the responsibility of the Registrar General without being delegated by the one provided for by the Instructions, is a usurpation of duties because even though he was a professional court bailiff, he would have first concluded a written contract with the client as provided by article 38 of Law N° 12/2013 of 22/03/2013 governing the bailiff function, which states that before executing any judgment, decisions or other enforcement orders, the professional bailiff shall conclude a written contract with the client. The court finds that since there is no proof that the Registrar General in RDB hired Advocate Habimana Vedaste to carry out the duties of the Court Bailiff, this implies that whatever he did was done without the authorization from the competent authority, which means that he did not comply with the provisions of the law, therefore they are invalid.

The Court finds that the statements of the counsels for Habimana Vedaste, Bank of Kigali Ltd and Musinguzi Hannington that Asiimwe Frank being notified of the selling terms and conditions by Advocate Habimana Vedaste did not cause any harm to him and thus it should not be a ground to nullify auction, especially that the procedures for the auction are not of *ordre public*, is unfounded because generally those instructions were put in place to ensure that the rights of each party to the auction are respected and that its conducted in an orderly manner, thus non compliance with those instructions is a ground for Asiimwe Frank to request that the auction be conducted in compliance with those Instructions without proving the harm caused. The court also finds that the purpose is not to determine whether the proceedings provided for in those Instructions are of *ordre public* or not for the auction to be nullified, because nullifying the auction which did not comply with the law does not necessarily require that those laws be of *ordre public* be civil, as long as the one whom the laws are intended to protect exercises his rights and requests that the auction which was illegally conducted and prejudicial to him be nullified.

The Court finds that even if Advocate Habimana Vedaste was legally permitted to serve a copy of the selling terms and conditions to Asiimwe Frank, the 16 hours provided for in the Instructions would not have been complied with, because as mentioned above, the document was made on 25/05/2015 and delivered to Asiimwe Frank on 30/03/2015, which is also a ground to nullify the auction.

Based on the legal provisions, Instructions of the Registrar General and the motivations given above, the Court finds that as held by previous courts, the auction held on 29/04/2015 selling the mortgage furnished by Asiimwe Frank to Bank of Kigali Ltd is nullified because it was conducted illegally, therefore things have to be in the state as they were before the auction.

B. APPEAL OF BANK OF KIGALI Ltd

Whether the Commercial High Court confused the responsibilities of the organs in charge of the auction with those of the mortgagee allowed to sell the mortgage

In his court submissions, Counsel Rutembesa Phocas argues that the Commercial High Court confused the responsibilities of the organs concerned with the auction with those of the mortgagee allowed to sell the mortgage, which led to the unjust ruling.

Asimwe Frank argues that the fact that the Bank of Kigali Ltd does not prove that it represents those organs for which it's defending in this case, renders his claims groundless because it does not represent them especially that they were also represented in the hearing.

Counsel Niyondora Nsengiyumva assisting Musinguzi Hannington, argues that this ground of appeal does not apply to Musinguzi Hannington because for him, he only participated in the auction and the observance of the procedures preceding the auction are in the responsibilities of the Registrar General and the Receiver.

DETERMINATION OF THE COURT

[1] Article 3 of Law N° 15/2004 of 12/06/2004 on Evidence in Trial and its Evidence provides that: "Each party must prove the facts of the case.

[2] On this ground of appeal, apart from Bank of Kigali Ltd merely alleging that the Commercial High Court confused the responsibilities of the organs that are concerned with the auction with those of the mortgagee allowed to sell the mortgage, which leads to the unjust ruling, the Court finds that it does not demonstrate how the Court may have confused these responsibilities, and does not even demonstrate the unjust ruling made by the Court and how it caused it harm, because it clearly explained the responsibilities of each organ and demonstrated that Advocate Habimana Vedaste performed the duties without the delegation of the Registrar General, therefore this ground of appeal is unfounded

Whether the Bank of Kigali Ltd should have been awarded damages for vexatious suit

[3] In his court submissions, Counsel Rutembesa Phocas representing the Bank of Kigali Ltd argues that the Commercial High Court did not award damages to his client while it ruled that it had no faults in the auction conducted, thus it was dragged into vexatious lawsuits.

[4] Asimwe Frank argues that this ground of appeal is unfounded, because the Commercial High Court demonstrated that he is not the one who led the Bank of Kigali Ltd in lawsuits, but rather it was caused by Advocate Habimana Vedaste, as explained in paragraph 58, on page 15, of the appealed judgment, hence the Bank of Kigali Ltd is seeking damages from a wrong party, therefore it should not be awarded.

DETERMINATION OF THE COURT

[5] The Court finds that for the Commercial High Court holding that Bank of Kigali Ltd should not have been charged damages because it is not the one which made faults which caused the auction to be invalidated does not imply that Asiimwe Frank should pay it damages. It finds, however, that as it turned out that Asiimwe Frank won the case because the mortgage he furnished was illegally auctioned, which led to the auction being invalidated, it indicates that he was not the one to pay damages to the Bank of Kigali Ltd because he was not the one who led the Bank of Kigali Ltd into lawsuits, rather it was caused by Advocate Habimana Vedaste, who illegally sold the mortgage furnished by Asiimwe Frank, the Bank of Kigali Ltd should have claimed those damages from him, therefore since it did not do so it has to bear the consequences, therefore as held by the Commercial High Court the Bank of Kigali did not deserve those damages.

Whether the commercial High Court had the responsibility to give direction on how the issue will be handled on the part of the Bank of Kigali Ltd, the mortgagee after it nullified the auction.

[6] The counsels for Bank of Kigali Ltd argue that the Commercial High Court declared the auction held on 29/04/2015 null and void, but did not specify on the situation of the Bank of Kigali Ltd, which was the mortgagee.

[7] Asiimwe Frank argues that this ground of appeal is unfounded because ruling on how the matter should be handled after nullifying the auction was not the plaint and no one requested the court to rule upon it, therefore the court would not have ruled beyond the request because it would have been contrary to the provisions of article 7 of Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, which provides: “ the judge shall rule only and on all that which is referred to the court ”.

[8] Counsel Niyondora Nsengiyumva argues that on this ground, whether the Court states it directly or indirectly, it is obvious that when the auction is invalidated, things remain as they were before that auction. He further states that the house remains a mortgage for Bank of Kigali Ltd until the loan is paid off voluntarily or an auction is held in accordance with the law.

DETERMINATION OF THE COURT

[9] Article 10 of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, which provides “ a judge may not decide more than he/she has been asked to”.

[10] The case file demonstrates that in the Commercial High Court, the Bank of Kigali Ltd appealed against the Court's decision that the auction held on 29/04/2015 be annulled because the person who notified the selling terms and conditions had no capacity to do so, the mortgage was sold at a low price and ordered Bank of Kigali Ltd to pay 1,000,000Frw in damages but it did not demonstrate the fault it committed.

[11] The Court finds that, after the Commercial High Court had ruled that the auction of 29/04/2015 had been invalidated, it was not necessary to rule on what should happen next to the Bank of Kigali, because, as stated by the counsel for Musunguzi Hannington, the Court either

states it directly or indirectly, it is obvious that when the auction is invalidated, things remain as they were before that auction.

C. CROSS APPEAL

C.1. CROSS APPEAL OF ASIIMWE Frank

Whether Asiimwe Frank should be awarded damages

[12] Asiimwe Frank argues that based on the fact that his house was illegally auctioned on 29/04/2015, as a consequence he couldn't feed family, couldn't live in the part of the house that was not rented, and he could no longer work from the room designated as office where used to work from, and since then the house is in the hands of the buyer and the auction has been invalidated and some of the participants in the sale have accepted the outcome of the case, but the house is still being used for commercial activities and its making profits in various ways, he requests that Advocate Habimana Vedaste who sold his house illegally, causing him losses, causing his family misery, to be charged moral damages of 55,802,800Frw, which is the difference between the value of the house registered in RDB of 121,000,000Frw and the value given to the house of 65,197,200Frw, procedural fees of 2,000,000Frw and counsel fees of 5,000,000Frw for continuing to drag him into lawsuits aware that his second appeal was unlawful with the purpose of protecting the one who brought the house illegally, Musinguzi Hannington so that he continues to get revenue from it, he requests that in accordance with article 258 of Code Civil Book III and the regulations on scale of fees for Advocates.

[13] Counsel Nkurunziza François Xavier argues that the damages claimed by Asiimwe Frank are unfounded because he failed to pay the debt owed to the Bank of Kigali Ltd resulting in the execution of the judgment by force, therefore he should bear the consequences. As for the counsel fees, he states that he leaves it to the discretion of the court, let it be awarded to the one who wins the case.

[14] Counsel Buzayire Angèle, representing the Bank of Kigali Ltd, argues that the damages claimed by Asiimwe Frank should not be awarded because he is the one at fault, because the Bank of Kigali Ltd does not rent the house to Musinguzi Hannington rather it sold it to him to reduce the amount of debt Asiimwe Frank owes it. He argues that instead, Asiimwe Frank is the one who should reimburse the money which the Bank of Kigali Ltd spent on the advocates.

[15] On this ground of cross appeal, the counsel for Musinguzi Hannington and the representative of the Regulatory Council for Property Valuation responded that it does not concern them.

DETERMINATION OF THE COURT

[16] The Court finds that the moral damages requested by Asiimwe Frank should not be awarded because even though the auction was nullified due to non compliance with some of the procedures, he cannot also disregard that he is the cause of the auction because he failed to voluntarily fulfill his obligations, paving way for the auction to take place. However the Court

finds that Advocate Habimana Vedaste should pay counsel and procedural fees to Asiimwe Frank because his failure to comply with the law led Asiimwe to sue in the courts of law, therefore, in the discretion of the court, he is awarded 1,000,000Frw for counsel fees and 300,000Frw for procedural fees, because he does not prove that the 2,000,000Frw he claims is what he spent on this case.

C.2. CROSS APPEAL OF MUSINGUZI Hannington

Whether Musinguzi Hannington can be reimbursed the 55,000,000Frw he offered to buy Asiimwe Frank's house and if he can be awarded damages

[17] Musinguzi Hannington states that he has been enjoined in the case on three instances and moreover he has no fault; that in case the Court finds that the fault was committed by Advocate Habimana Vedaste, which led the auction to be invalidated, then Advocate Habimana Vedaste should be ordered to pay procedural and counsel fees of 2,000,000Frw.

[18] He argues that he was enjoined in the case before the Commercial High Court and the Supreme Court, while the Bank of Kigali Ltd has no claim against him because it did not make any fault, that if the Court finds that the auction was not in accordance with the law, they request that it orders the Bank of Kigali Ltd to reimburse the 55,000,000Frw he paid in the auction because there is no reason to retain it, while the auction has been invalidated. He also requests the Court to order Bank of Kigali Ltd to pay him 2,000,000Frw for the procedural and counsel fees because his appeal to the Supreme Court is based on the claim filed by Bank of Kigali Ltd.

[19] Asiimwe Frank argues that the claims of Musinguzi Hannington have no merit because they contradict the statements he made in his court submissions.

DETERMINATION OF THE COURT

[20] Article 258 of Civil Code Book III provides that any action which causes harm to another entitles the one who did it to pay damages”

[21] The Court finds that since Advocate Habimana Vedaste auctioned the mortgage illegally which led Asiimwe Frank to initiate lawsuits seeking to declare the auction null and void and the courts invalidated it, and it's also the view of this Court, this led to Musinguzi Hannington, who brought the house in the auction to be summoned in the courts because of the faults done by Advocate Habimana Vedaste, which led him to hire the services of the legal counsel and had also to follow up the case, and therefore he deserves the damages he claims for, but because he does not prove that the amount he requests for is the one he spent on the case, in the discretion of the court, he is awarded 500,000Frw for counsel fees and 300,000Frw for the procedural fees, altogether amounting to 800,000Frw.

[22] The Court finds that, as reminded above, that since the auction is invalidated, things had to remain as they were before the auction took place, the Bank of Kigali Ltd repossess the mortgage and reimburse 55,000,000Frw to Hannington which he bought the house at the auction. The court however finds that the 2,000,000Frw for the procedural and counsel fees claimed by

Musinguzi Hannington from Bank of Kigali Ltd should not be awarded because the Bank of Kigali Ltd did not commit any mistake against him.

C.3. CROSS APPEAL OF REGULATORY COUNCIL FOR PROPERTY VALUATION

[23] The Regulatory Council for Property Valuation states that the Court should examine whether legally it is liable for damages in a lawsuit when it is not an association, organization or public institution; that it finds it inappropriate then the damages of 1,000,000Frw which it was imposed should be set aside, because the Regulatory Council has no assets, no legal representative and that decision cannot be implemented because it only functions as a committee of people from various places but it is not the Institute of the Real Property Valuers because for it it has legal personality.

[24] Other parties did not debate on this cross appeal filed by *Regulatory Council for Property Valuation*.

DETERMINATION OF THE COURT

[25] Article 3, paragraph 3, of Law N° 17/2010 of 12/05/2010 establishing and organising the real property valuation profession in Rwanda provides that The Institute has legal personality and autonomy. Article 9 of that Law provides for the establishment of the A council of regulation of the real property valuation profession in Rwanda and it also stipulates that The Council shall commence its activities within ninety (90) days from the publication of this Law in the Official Gazette of the Republic of Rwanda.

[26] The case file demonstrates that on 16/03/2015, Asiimwe Frank wrote to the Regulatory Council for Property Valuation requesting it to appoint other property valuers to carry out another property valuation as provided for in article 36 of the Law in the preceding paragraph, the organ did not respond to that letter, thus the house was auctioned.

[27] The Court finds that since Asiimwe Frank wrote to the Regulatory Council requesting it to appoint other Property Valuers to carry out another property valuation, but did not respond, until the auction took place, while it is mandated by the Law to do so, that is a ground for it to be liable for damages. The Court finds that the Institute was given 90 days after the publication of the Law in the Official Gazette of the Republic of Rwanda to be operational, for it to have been instituted in 2010 and Asiimwe Frank wrote to it in 2015, five years later, the allegation of the counsel for Regulatory Council for Valuation Property that it couldn't execute the request of Asiimwe Frank because it has no property and legal representative is unfounded because article 3, paragraph 3, of the aforementioned Law, provides that the Institute has legal personality and autonomy., so if it is not operational its not Asiimwe Frank's fault, therefore the damages of 1,000,000Frw, it was charged by Commercial High Court is sustained.

D. WHETHER THE DAMAGES CLAIMED BY ADVOCATE HABIMANA VEDASTE FROM ASIIMWE FRANK HAVE MERIT

Counsel Nkurunziza François-Xavier representing Advocate Habimana Vedaste requests the Court to order Asiimwe Frank to pay him damages he claimed at the first and second instance, in addition to 3,000,000Frw on this appeal level and to reimburse all the court fees he paid.

[79] Asiimwe Frank argues that the damages requested cannot be awarded because apart from not proving them, the claimant is the one who voluntarily got involved in the lawsuits.d.

DETERMINATION OF THE COURT

[28] The Court finds that Advocate Habimana Vedaste was the one who sold the mortgage in the auction, and as held by the previous courts it was illegally conducted and thus invalidated it and that is also the view of this court, therefore the damages he claims should not be awarded because he losses the case.

III. DECISION OF THE COURT

[29] Holds that the appeal of Habimana Vedaste lacks merit;

Holds that the appeal of Bank of Kigali Ltd lacks merit;

[30] Holds that the cross appeal of Asiimwe Frank has merit in parts;

[31] Holds that the cross appeal of Musinguzi Hannington has merit;

[32] Holds that the cross appeal of Regulatory Council for Property Valuation has no merit;

[33] Holds that the rulings of the judgment RCOMA 0011/16/2016 HCC & RCOMA 0035/16/HCC rendered by the Commercial High Court on 31/03/2016 is upheld, apart from the damages awarded on this instance and that the Bank of Kigali Ltd must reimburse 55.000.000Frw to Musinguzi Hannington;

[34] Orders Advocate Habimana Vedaste to pay to Asiimwe Frank, 1.000.000Frw for the counsel fees and 300.000Frw for procedural fees, all amounting to 1.300.000Frw on this instance;

Declares the auction conducted on 29/04/2015 null and void;

[35] Orders Bank of Kigali Ltd to reimburse to Musinguzi Hannington the 55,000,000Frw which he bought the house in the auction and it also retains the mortgage which was furnished by Asiimwe Frank;

[36] Declares that the cost of this case is equivalent to the court fees deposit.

