Re. GLIHD

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00002/2019/SC – (Rugege, P.J., Nyirinkwaya, Cyanzayire, Rukundakuvuga and Hitiyaremye, J.) October 4, 2019]

Constitution – Property right – Property right for those cohabitating as concubines – The rationale for sharing the property between those who have been cohabitating as concubines is because they acquired and owned it together – Those cohabitating as concubines when they separate, they share among themselves immovable and movable property they acquired together.

Court practice and procedures – The doctrine of precedent (stare decisis) – The Supreme Court as the highest court with its unique nature which makes it have jurisdiction on all types of cases that are heard by all courts so that it can set precedents for other courts to follow – The doctrine of precedent (stare decisis) requires each court to follow the precedent it set or set by a superior court when making a ruling on a case with similar facts.

Facts: GLIHD, petitioned the Supreme Court seeking to declare paragraph 2 of article 39 of Law N° 59/2008 of 10/09/2008 2008 on prevention and punishment of gender-based violence be inconsistent with articles 15,16 and 34 of the Constitution of the Republic of Rwanda of 2003 as amended in 2015.

In its submission, GLIHD explains that paragraph 2 of article 39 of the law mentioned above provides that it sharing of the properties of those who have been cohabiting as a husband and wife takes place only if one of them is going to get married to another person; thus those who are cohabiting are not treated equally because there is no other ground or reason which was provided. It also argues that in case one of them want to have his or her share can't get it without first proving that the reason for their separation is to get married to another person, thus he/she cannot enjoy that property he/she acquired with the other partner they separated with.

The State Attorney argues that the claims of the are groundless because when paragraph 2 of Article 39 of the aforementioned law is repealed those who have been cohabiting as a husband and wife would be completely deprived of the right to property they acquired and that the clause itself would be meanless because all 4 paragraphs are complementary. She further stated that instead, it would be better if paragraph 2 of that article is amended, so that the sharing of the property takes place in case one of the partners is getting married, or if there is another reason why they should stop living together.

The Faculty of Law of the University of Rwanda, which intervened as Amicus Curiae states that paragraph 2 of the article mentioned above is not unconstitutional because there is no category which this law prevented from having their right on the property even the precedents set by the Supreme Court protects those who have been cohabitating as a husband and wife equally when they separate regardless of the reason for their separation.

As to whether that issue was settled by the precedents set by the Supreme Court in the cases it decided, the applicant argues that the issue was not settled by those precedents because there is no case in which that issue was examined in that specific manner and that the current law, there is no mandate that the precedents of the Supreme Court bind the lower courts, which causes worry that the lower courts may prejudice those who separate for other reasons other than marrying another person in case its petition is found without merit.

The State of Rwanda, as well as the University of Rwanda (the amicus curiae), find that those cases settled the issue because they decided that those who live as husband and wife, when they separate, they are entitled to the property they acquired together and those case laws do not discriminate those who separate for other reasons other than getting married.

Held: 1. The issue concerning the property of those who cease cohabitating as a husband and wife for other reasons other than getting married was settled by the Supreme Court in its various case laws.

2. The basis for the sharing of the property of those who have been living as husband and wife is that they jointly own that property or they acquired it together.

3. Those living as a wife and husband, even if they are not legally married, they share the property, whether immovable or movable, they acquired together when they separate.

4. The Supreme Court as the highest court with its unique nature which makes it have jurisdiction on all types of cases that are heard by all courts so that it can set precedents for other courts to follow.

5. The doctrine of precedent (stare decisis) requires each court to follow the precedent it set or set by a superior court when making a ruling on a case with similar facts.

Petition without merit.

Paragraph 2 of article 39 of the Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence is not inconsistent with articles 15, 16, and 34 of the Constitution of the Republic of Rwanda.

Statutes and statutory instruments referred to:

The Constitution of the Republic of Rwanda of 2003 as amended in 2015, article 15,16 and 34

Law Nº 22/2018 of 29 / 04/2018 relating to the civil, commercial, labour and administrative procedure, article 9

Law N°30/2018 of 02/06/2018 determining the jurisdiction of Courts, article 65, 73

Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, article 39.

Cases referred to:

Uwiragiye Charles v Uwamahoro Jeanine, RCAA 00043/2016/CS rendered by the Supreme Court on 15/09/2019.

Gatera Johnson v Kabalisa Teddy RS/INCONST/Pén.0003/10/CS rendered by the Supreme Court on 07/01/2011.

Mpangare Hope, RS/INCONST/Pén.0001/11/CS rendered by the Supreme Court on 29/04/2011.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Based on article 72 of Law N°30/2018 of 02/06/2018 determining the jurisdiction of Courts[1] GLIHD petitioned the Supreme Court requesting that paragraph 2 of article 39 of the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence be repealed for the rights of those who are entertaining unlawful marriages be equally respected in accordance with the principle enshrined in the Constitution of the Republic of Rwanda and other international human rights conventions ratified by Rwanda.

[2] GLIHD adduces the following principles :

a. Equality before the law ;

b. Equal protection of the law ;

c. Non-discrimination ;

d. Right to property.

[3] It is in this context that he petitioned the Supreme Court requesting that the second paragraph of article 39[2] of Law N ° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence be repealed.

[4] The petition was registered on RS / INCONST / SPEC 00002/2019 / SC, the State was summoned and the University of Rwanda requested to intervene as amicus curie. The hearing was scheduled for 08/11/2019, on that day both parties were present, GLIHD represented by Umulisa Vestine (its Deputy Chairperson) represented by Counsel Sezirahiga Yves and Counsel Gumisiriza Hillary, the State represented by Gahongayire Miriam while the University of 'Rwanda was represented by Lecturer Shenge Laurent and Uwineza Odette.

[5] On elaborating on their petition, GLIDH Deputy Chairperson Umulisa Vestine, Counsel Sezirahiga Yves, and Counsel Gumisiriza Hillary state that paragraph 2 of Article 39 of the GBV Law was written was contrary to the provisions of 'Articles 15, 16 and 34 of the Constitution, as follows :

a. Whether it infringes on article 15 of the Constitution of the Republic of Rwanda.

[6] This article states that all people are equal before the law. The law protects them in the same way. GLIHD argues that when this article is read together with the provisions of paragraph 2 of article 39 of the Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence mentioned above, the sharing of the commonly owned belongings for those entertaining unlawful marriages is only provided when one of them decides to marry someone other than the one they are already living with; the legislator did not give equal opportunity or equal protection to those who have been entertaining unlawful marriages but decides to separate for a different reason

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[1] That article provides that the Supreme Court is petitioned by any person or company and associations with legal personality over petitions seeking to declare unconstitutional a law if they have any interest.

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

other than one of them getting married because for them sharing of the property which they co-own was not provided for.

b. Whether it infringes on article 16 of the Constitution of the Republic of Rwanda.

[7] GLIHD argues that article 16 of the Constitution of the Republic of Rwanda provides that all Rwandans are born equal and continue to enjoy equal rights and freedoms. It also provides that discrimination of any kind or its propaganda based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by law.

[8] GLIHD argues that when that article is read together with paragraph 2 of article 39 of Law N ° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, that paragraph discriminates against some of those who live in unlawful marriages because it puts them in two (2) different categories: some have the right to share the property they owned or that they accumulated together, others do not have that right while all of them are in the same conditions: living as husband and wife. Therefore, it finds that this infringes on the principle enshrined in this article of the Constitution which provides that all persons are equal before the law. They are entitled to equal protection of the law and it also infringes on the principle that prohibits any discrimination or its propaganda based on.

c. Whether it infringes on article 34 of the Constitution of the Republic of Rwanda.

[9] Article 34 of the Constitution of the Republic of Rwanda provides that "Everyone has the right to private property, whether individually or collectively owned. Private property, whether owned individually or collectively, is inviolable. The right to property shall not be encroached upon except in public interest and accordance with the provisions of the law".

[10] GLIHD argues that when this article is read together with the provisions of paragraph 2 of article 39 of Law N ° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, the impugned in paragraph prevents and deprives some category of those who were consummating unlawful marriage the right to property when the reason for their separation is not that one of them is going to be lawfully married to another person because in case one of them seeks to be given his or her share of that property, for any other reason cannot get it without first proving that the reason for the separation was to marry another person. Thus, he/she is deprived of the right to the property s/he acquired with the former partner.

[11] The State attorney argues that the grounds for the petition seeking the Supreme Court to declare paragraph 2 of article 39 of Law Nº 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence invalid because it is unconstitutional without merit, because if that paragraph is repealed even those who were allowed the right to share the property when one decides to get married to another person will completely lose it, and that article will have no meaning because all the four (4) paragraphs complement each other. If one paragraph is repealed the whole article would be worthless since it would not be protecting anyone.

[12] The State also argues that in the Judgment nº RS / INCONST / Pén 0003/10 / CS[3], the Supreme Court found that article 39 was not unconstitutional rather the legislator wanted to

[3] In this case, Gatera Johnson and Kabarisa Teddy were requesting the Supreme Court to declare invalid the provision of article 39 of the Law Nº 59/2008 of 10/09/2008 on prevention and

eliminate the injustice carried out on the property commonly owned by those who have been living in unlawful marriage and one of them chooses to get lawfully married.

[13] The State argues that it would be better if paragraph 2 of the impugned article 39, be amended, and the sharing of the property takes place in case one of the partners is going to be married, or for any other reason they have separated. It recommends that it would be more clear if the following paragraph is added after paragraph 2 that "the **common property is shared whenever there is any other ground for the separation of those who have been living in unlawful marriage".**

[14] The Faculty of Law of the University of Rwanda which intervened as an amicus curie objects to the petition of GLIHD, which seeks to declare paragraph 2 of article 39 mentioned above unconstitutional because as held in the in cases decided by the Supreme Court, there is no category of spouses prejudiced by this law because the legal precedent set in those cases protects those who separated while living as a wife and husband illegally in the same regardless of the reason for their separation.

[15] The University of Rwanda cited the following case laws:

a. Judgment RCAA 00043/2016 / CS, Uwiragiye Charles and Uwamahoro Jeanine rendered on 15/09/2019 by the Supreme Court ;

b. Judgment RS / INCONST / Pén.0003 / 10 / CS, Gatera Johnson v Kabalisa Teddy rendered on 07/01/2011 by the Supreme Court ;

c. Judgment RS / INCONST / Pén.0001 / 11 / CS, of Mpangare Hope rendered by the Supreme Court

[16] The University of Rwanda explains that in all these cases, the parties cohabited and separated without the intention of marrying again. However, the Supreme Court, regardless of the reason for their separation, and pursuant to article 39 of the aforementioned Law, held that they should equally share the property they acquired together.

[17] After hearing the amicus brief, the State of Rwanda also concurs that the concerns of the GLIHD were indeed resolved, however, GLIHD insisted that article 39 of the above mentioned Law in its paragraph two is unconstitutional and that the aforementioned case laws did not solve that issue as it was not examined in its specificity.

[18] The Supreme Court, therefore finds that the issues to be examined are the following :

- To determine whether the second paragraph of Article 39 of Law N ° 59/2008 of 10/09/2008 infringes on the right to property of those who have been cohabitating as husband and wife when they separated without the intention of marrying another person ;
- Whether the precedents set by the Supreme Court in its various rulings on the issue regarding those who were cohabitating as a husband and wife did not solve the question

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punishment of gender-based violence because it was inconsistent with article 26 of the Constitution of the Republic of Rwanda which provides that A civil monogamous marriage between a man and a woman is the only recognized marital union (…). The state that the other marital union or unlawful marriages cannot have the same effects as those for lawful marriage.

of GLIDH regarding the infringement of the rights of those who separate without the intention of marrying another person.

II. ANALYSIS OF THE LEGAL ISSUES

A. To determine whether the second paragraph of Article 39 of Law N ° 59/2008 of 10/09/2008 infringes on the right to property of those who have been cohabitating as husband and wife when they separated without the intention of marrying another person;

[19] GLIHD states that article 39 of Law N ° 59/2008 of 10/09/2008 prevents and punishes any form of sexual violence that does not protect equally those cohabitating as a husband and wife because paragraph 2 of that article defines the right they have on the property when they decide to separate and marry someone else, but that article does not apply to those whose purpose of separation is not to get married to another person. As explained in paragraphs 6-10, GLIHD finds it discriminatory against those in the latter category because it deprives them of their right on the property they acquired as a husband and wife, and this is a violation of the fundamental rights enshrined in the Constitution of the Republic of Rwanda and other International Human Rights treaties ratified by Rwanda

[20] Before supporting the Amicus curiae briefs demonstrating that issue was settled by the cases decided by the Supreme Court, even though the State does not concur with GLIHD that article 39, paragraph two is unconstitutional, it had also requested that it should be amended and written clearly, and another paragraph be added preceding paragraph 2 as follows “the property is also shared whenever those cohabitating as a wife and husband cease to live together ".

DETERMINATION OF THE COURT

[21] In its entirety, article 39 of the Law N ° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, reads as follows : Those people entertaining unlawful marriages shall be married in accordance with the monogamous principle. If a person concerned with the provision of the previous paragraph of this Article was living with many husbands/wives, he shall, first of all, share the commonly owned belongings with those husbands/wives equally. The property distribution referred to in paragraph 2 of this Article shall not entrench on the children’s legally recognized rights.

[22] From the analysis of that article, it was aimed for the following three purposes:

a. Providing the procedure on how those who have been cohabitating as a husband and wife can get legally married but also reminding them that whenever they do so they should keep in mind that it is done through the monogamous principle. This is contained in the first paragraph of this article and it is clear that the legislator wanted to indicate to those cohabitating, that even if a man/woman has more than one wife/husband and loves them equally, it is not allowed to marry all of them.

b. Demonstrate the rights of those who have been living as husband and wife (who did not get the chance to be chosen as a husband/wife) on the property they shared when one of them has decided to get legally married. This is what is provided for in the second paragraph of this article. Apparently, in complying with the provisions of the first paragraph only, issues regarding the rights of the remaining women/men on the property

could have arisen, when the husband/wife chooses, as required by law, to marry only one of them or another one who they have not been cohabitating with.

c. Demonstrate the rights of the child in the event one of them marries in the procedure provided for in this article (this is provided in paragraph three).

[23] In general, as explained in the preceding paragraph, this article deals with the specific issue of couples cohabitating as husband and wife who wish to get legally married with one of the spouses they were cohabitating with, in case he/she has been cohabitating with more that one. This article is not intended to deprive the right to property of those who separated for other reasons, nor is it intended to give special rights or discriminate against anyone in such a way that it is construed as being inconsistent with the mentioned provisions of the Constitution (articles 15, 16 and 34), rather it is purpose is to guide those who have been cohabitating as a wife and husband who wish to get legally married. For the other categories which were not mentioned, that is, those who cohabitated and separated without the intention of getting legally married were not the intended target. So instead of being treated as if it discriminated against those categories, it should be construed as being silent.

[24] The Supreme Court, therefore, finds that in the event an issue arises and the law is silent, it does not imply that those concerned were deprived of certain rights granted to them by the Constitution, or that there is a law that deprives them of that right which must be repealed. Instead, such an issue is settled through the ordinary analysis of the courts as provided for in article 9 of Law N°·22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure. That article provides that: "…. . 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."

[25] The Supreme Court finds that the provisions cited in the preceding paragraph were applied in the various cases regarding the issue of the right of those who have been cohabitating as a husband and a wife whose reason for separation is not getting legally married, therefore the petition filed by GLIHD on the ground that they were deprived of their constitutional rights and they rely on it to request that the second paragraph of article 39 of the above-mentioned article be declared invalid, is without merit.

B. Whether the cases decided by the Supreme Court did not settle the issue regarding the rights of those who have been cohabitating as a husband and wife and separates because of other reasons apart from getting married

[26] GLIHD argues that the cases decided by the Supreme Court regarding those who have been cohabitating but separate for different reasons other than getting legally married did not settle the issue that paragraph two of article 39 of the above-mentioned law deprive them of their constitutional rights because there is no specific case where that issue was examined in that perspective. GLIHD also adds that in the current law the judgments of the Supreme Court no longer bind lower courts, which is also another cause of concern that those courts can be unjust to those who separate because of other reasons other than that of getting married to another man/woman in case this Court finds its petition without merit.

[27] The State as well as the Amicus curiae, the University of Rwanda are of the view that GLIHD should not worry because the rights enshrined under articles 15, 16, and 34 of the Constitution which it seeks to be accessible to those who cohabited as a husband and a wife and they separate because of other reasons other than getting married is not trampled upon, because as

explained in the cases cited in paragraph 15, the Court held that they had this right because those in those cases it was held that those who cohabited as husband and wife, when they separate, each is entitled to the property they acquired together and they do not discriminate those who separate for different reasons other than getting married.

DETERMINATION OF THE COURT

[28] The Court finds that the legal precedent set by the Supreme Court in the previous cases should have cleared the doubt of GLIDH on the issue regarding those it alleges that were deprived of their rights on the property rights as demonstrated in the following paragraphs.

[29] In Case Nº. RS / INCONST / Pén 0003/10 / CS between Gatera and Kabalisa rendered on 07/01/2011, the Court examined the issue of "whether article 39 of the Law on the on prevention and punishment of gender-based violence regarding the sharing of the property of those who were cohabiting as a husband and wife is unconstitutional because it would be treating those who were cohabitating without being legally married as those who are legally married. The court, after motivating that those who have been cohabitating as a husband and wife have the right on the property they acquired together and also demonstrating that that right differs from that of those who are legally married, held that "….in order for the separated couples who have been cohabitating as a husband and a wife to share the property, they should be jointly owning it and they acquired it together[4] . " **It also clearly explained that the property right is not only based on the fact that they cohabitated as a husband and a wife, but it should be evident that they jointly own or acquired it.[5]**

[30] As it can be demonstrated in this case, although the Court did not specifically examine the issue of the rights on the property of those who separate for other reasons other than getting married, be the case it was not the subject matter, it did explain that the **basis for the sharing of that property between those who were cohabitating is that they jointly own that property or they acquired it together**. This should have shown GLIHD that even those who separate for other reasons other than getting married to another person, this judgment gave them the right to that property as long as they can prove that they jointly own it or acquired it together.

[31] Also, the right to property of those who cease cohabitating as a husband and wife for other reasons other than getting married was further directly emphasized in case Nº. RCAA 00043/2016 / SC between Uwiragiye Charles and Uwamahoro Jeanine. In this case, the parties were litigating "the sharing of the property they acquired while they cohabited as a husband and wife which consists of a house located on parcel n° 367, a parcel of land nº 0139, and two vehicles", the Supreme Court ruled that "... **those living as a wife and husband, even if they are not legally married, they share the property, whether immovable or movable, they acquired together when they separate**[6] ". It should be recalled that in this case, the reason for the separation of Uwiragiye and Uwamahoro was not to get married to another person as indicated in cases nº RCA 00239/2016 / HC / KIG and nº RC 0281/15 / TGI / GSBO, nevertheless, it did not prevent the Supreme Court from dividing amongst them the property they owned before separating.

[4] See paragraph 14 of that judgment
[5] Idem
[6] See paragraph 16 of that Judgment.

[32] For the arguments of GLIHD that since article 47 of the Organic Law Nº 03/2012 / OL of 13/06/2012 determining the structure, functioning and jurisdiction of the Supreme Court[7] was repealed the precedents of the Supreme Court judgments are no longer binding on other courts are baseless because the use of precedents has been reinforced in the new law on the jurisdiction of Courts.[8] That law gave special competence of hearing cases which make precedents and give guidance to other courts. This is emphasized in the second paragraph of the explanatory note of the Organic Law instituting the Court of Appeal, whereby it explains that the special nature of the Supreme Court is to be a separate Court, which oversees other courts and to reconcile the judgments of the cases with similar issues, and provide a legal position or precedents for lower courts[9]. This position was reinforced by article 65 of the Law N° 30/2018 of 02/06/2018 determining the jurisdiction of the courts whereby it is mandatory to comply with the existing precedents in settling a similar issue because to overturn that precedent it requires to petition the Supreme Court and the Supreme Court also to overturn it has to first demonstrate the issue with the existing precedent before setting a new one as demonstrated in the last paragraph of article 73 of that Law.

[33] The jurisdictions which follow the doctrine of precedent (stare decisis), each court is obligated to follow the precedent it set or set by a superior court when making a ruling on a case with similar facts ***(The basis of the system of precedent is the principle of stare decisis and this requires a later court to use the same reasoning as an earlier court where the two cases raise the same legal issues)***[10], therefore ***the higher up a court is in the hierarchy, the more authoritative its decisions: decisions of the higher courts will bind lower courts to apply the same decided principle***[11]. In particular, the Supreme Court as the highest court, it is obvious that it is also the main source of precedents which are followed by other courts, which is the reason for its unique nature as explained in the preceding paragraph, its nature makes it have jurisdiction on all types of cases which are filed to courts so that it can set precedent others courts to follow.

III. DECISION OF THE COURT

[34] Admits the petition lodged by GLIHDbut upon its examination, it finds it without merit ;

[35] Decides that paragraph two of article 39 of the Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence do not infringe on the provisions of articles 15, 16, and 34 of the Constitution of the Republic of Rwanda.

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[7] Par. 6 of that article provides that: " Judgements and decisions of the Supreme Court are binding on all courts in the country."

[8] Article n°30/2018 of 02/06/2018 determining the jurisdiction of Courts.

[9] See the Senate's report (The Committee on Political and Good Governance) of 21 March 2017.

[10] The Open University, OpenLearn, Judges and the law, available at https://www.open.edu/openlearn/society-politics-law/judges-and-the-law/content-section-3.4

[11] Idem. There are two exceptions to this principle : Overruling (the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a previous case) and distinguishing (the possibility that a court may regard the facts of the case before it as significantly different from the facts of a cited precedent, so it will not find itself bound to follow that precedent).