

## FINA BANK v. MUTEMBO

[Rwanda URUKIKO RW'IKIRENGA – 2014 SC – RCOMA 0147/11/CS (Kayitesi, P.J., Mukandamage na Rugabirwa, J.) 24 Mutarama 2014]

*Amategako agenga imitungo – Guhererekanya umutungo utimukanwa – Indishyi zituruka kugutanga impapuro z'inzu yaguzwe mu gihe habayeho ubukererwe mu kuzitanga – Kudahabwa ibyangombwa by'umutungo utimukanwa nyuma y'ubugure ubwabyo ni impamvu yo kuryozwa indishyi ku wabitindanye kabone n'ubwo yaba yarashyikirije uwo mutungo uwawuguze –Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 258.*

*Amategako agenga amasezerano cyangwa imirimo nshinganwa– Inyungu zituruka ku kutabasha gukoresha mu buryo busesuye icyaguzwe – Uwaguze inzu akayihabwa ariko ntahabwe ibyangombwa byayo ntiyagenerwa inyungu zibariwe ku gaciro k'inzu yitwaje ko atahawe ibyangombwa byayo kandi nyamara ayituyemo.*

**Incamake y'ikibazo:** Kuwa 27/09/2007, FINA BANK yagurishije mu cyamunara Mutembo inzu iri mu kibanza n° 91 iherereye i Musanze mu Ntara y'Amajyaruguru. Mukumuha ibyemezo by'inzu, yamuhaye “Certificat d'enregistrement”y'inzu iri mu kibanza n° 25; Mutembo aza kumenya ko yahawe ibyangombwa bitari iby'inzu yaguze mu cyamunara ari uko asabye “mutation” kugira ngo ahabwe “certificat d'enregistrement” nshya yanditse mu mazina ye. Mutembo yabimenyesheje FINA BANK yemera ikosa imwizeza ko izabikosora ariko kuyibona bikomeza gutinda.

Mutembo nyuma yo kwandikira no kwihanangiriza FINA BANK yatanze ikirego mu Rukiko Rukuru rw'Ubucuruzi avuga ko yahabwa indishyi z'igihe kinini FINA BANK yamaze itamuha ibyangombwa by'inzu yamugurishije, naho FINA BANK yo ikavuga ko nta ruhare yagize mu kuba Mutembo yaramaze igihe kinini adahawe ibyangombwa by'inzu yaguze. Urukiko Rukuru rw'Ubucuruzi rwemeza ko ikirego cya Mutembo gifite ishingiro kuko FINA BANK yabaye nyirabayazana mu kumutinda kubona “certificat d'enregistrement” y'inzu yaguze ruyitegeka no kubitangira indishyi.

FINA BANK yajuririye Urukiko rw'Ikirenga ivuga ko Urukiko Rukuru rw'Ubucuruzi rwayiciye indishyi rwirengagije ibisobanuro yaruhaye bigaragaza ko nta ruhare yagize mu gutuma Mutembo atinda guhabwa icyangombwa cy'inzu yaguze; naho Mutembo we akavuga ko ubujurire bwa FINA BANK ntashingiro bwahabwa kuko banki yakomeje kumutinda kubona ibyangombwa kandi ibizi neza ko ibyo yamuhaye ataribyoye.

Muri urwo rubanza kandi Mutembo yasabye inyungu z'uko atabashije kubyaza umusaruro inzu yaguze akazibara ashingira ku gaciro kayo nyamara kandi arahise ayijyamo akimara kuyigura; naho FINA BANK ikavuga ko itatanga kuko ikirego cy'inyungu yatanze kitashyikirijwe ubwanditsi bw'Urukiko ndetse ko n'inzu yahise ayihabwa, ko rero ibyo asaba byaba ari icyo bita “enrichissement sans cause”.

**Incamake y'icyemezo:** 1.Kuba uregwa yaramaze imyaka hafi itanu atarahabwa impapuro z'inzu yaguze yavukijwe uburenganzira bwo kuyikoresha mu buryo bwisanzuye nko kuyitangaho ingwate cyangwa kuyigurisha n'ibindi..., akaba rero agomba kubiharerwa indishyi zingana na 5.000.000frw kubera ko uwajuriye yatinze kumuha icyangombwa cy'inzu bituma atayikoresha mu buryo bwuzuye.

2. Kubyerekeye inyungu zasabwe n'warezwe mu bujurire ashingiye kuba atarahawe ibyangombwa by'inzu nk'utarayihawe, urukiko rwasanze atazihabwa kuko iyo nzu yayishyikirijwe akayituramo.

**Ubujurire nta shingiro bufite.  
Ubujurire bwuririye ku bundi nta shingiro bufite.  
Amagarama aherereye ku wajuriye.**

**Amategeko yashingiweho:**

Itegeko ryo kuwa 30/07/1888 ryerekeye imirimo nshinganwa cyangwa amasezerano, ingingo ya 258.

**Nta manza zifashishijwe.**

## Urubanza

### I. IMITERERE Y'URUBANZA

[1] Kuwa 27/09/2006 Mutembo Senyana Kavos yaguze na FINA BANK muri cyamunara inzu iri mu kibanza n° 91 i Musanze mu Ntara y'Amajyaruguru y'uwitwa Zigiranyirazo Protais wari uyibereyemo umwenda. Igiye kumuha ibyemezo by'inzu yamuhaye "certificat d'enregistrement" y'inzu iri mu kibanza no 25 [nayo ya Zigiranyirazo Protais] aho kumuha iy'inzu yaguze iri mu kibanza no 91, bimenyekana ari uko Mutembo asabye "mutation" kugira ngo ahabwe "certificat d'enregistrement" nshya yanditse ku mazina ye. Mutembo yaje kumenya ko ibyangombwa by'inzu ye byari bifitwe na BRD yari yarabihaweho ingwate na Zigiranyirazo Protais igihe yishingiraga umwenda wafashwe na SOBOLIRWA, abimenyesha FINA BNK yemera ikosa imwizeza ko izarikosora, agashobora kubona "certificat d'enregistrement" y'inzu ye imwanditseho, ariko kuyibona bikomeza gutinda.

[2] Nyuma yo kwandikira FINA BANK no kuyihanangiriza, Mutembo Senyana Kavos yaregeye Urukiko Rukuru rw'Ubucuruzi asaba ibikubiye mu kirego nk'uko byasobanuwe hejuru, FINA BANK yo ikavuga ko ntacyo yari gukurikiranwaho kuko nta ruhare yagize mu kuba Mutembo yaramaze igihe kinini adahawe ibyangombwa by'inzu yaguze. Urukiko rwemeje ko ikirego cye gifite ishingiro kuri bimwe, rutegeka FINA BANK kumwishyura 5.000.000 Frw y'indishyi z'uko yabaye nyirabayazana wo kumutinda kubona "certificat d'enregistrement" y'inzu yaguze, kumuha indishyi zingana na 1.000.000 Frw y'ikurikiranarubanza n'igihembo cya avoka, yose hamwe akaba 6.000.000 Frw no kwishyura 9.700 Frw y' amagarama y'urubanza.

[3] FINA BANK yajuririye Urukiko rw'Ikirenga ivuga ko Urukiko Rukuru rwayemeje ikosa ryo kuba yarahaye Mutembo Senyana Kavos "certificat d'enregistrement"<sup>1</sup> itari iy'inzu yaguze yo mu kibanza n° 91 i Musanze aribyo byabaye intandaro yo kuba "mutation de propriété" yarafashe igihe kinini, no kuyitegeka kubitangira indishyi zigeze kuri 6.000.000 Frw, rwirengagije ibisobanuro yaruhaye bigaragaza ko nta ruhare yagize mu gutuma Mutembo atinda guhabwa icyangombwa cy'inzu yaguze. Dosiye yakorewe ibanzirizasuzuma, umucamanza wabishinze yemeza ko ubujurire bwakiriwe, urubanza ruburanishwa kuwa

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<sup>1</sup>"Certificat d'enregistrement" y'inzu iri mu kibanza n° 25 i Musanze mu Ntara y'Amajyaruguru.

24/12/2013, FINA BANK iburanirwa na Me Rusanganwa Jean Bosco, naho Mutembo Senyana aburanirwa na Me Toy Nzamwita.

## **II. ISESENGURA RY'IBIBAZO BIGIZE URU RUBANZA**

### **1. Kumenya niba hari uruhare FINA BANK yagize mu gutinda gutanga ibyangombwa by'inzu yaguzwe muri cyamunara na Mutembo Senyana Kavos.**

[4] Uburanira FINA BANK avuga ko Urukiko rubanza rwarenze ku bisobanuro batanze bagaragaza ko nta kosa cyangwa uburangare FINA BANK yagize cyangwa kwica amasezerano mu gutuma Mutembo adahabwa impapuro mpamo z'inzu baguze iri mu kibanza n° 91. Asobanura ko icyo FINA BANK yemera ari uko yabanje guha Mutembo Senyana Kavos "certificat d'enregistrement" itari iy'inzu yaguze no kuba iyo nzu yari yaratanzweho ingwate muri BRD na Zigiranyirazo igihe yishingiraga umwenda wa SOBOLIRWA, ariko ko ibyo byombi FINA BANK yabimenye nyuma ya cyamunara ubwo Mutembo yayigaragarizaga ko yibeshye ikamuha "certificat d'enregistrement" y'indi nzu iri mu kibanza n°25, akayisaba iy'inzu ye iri mu kibanza n° 91. Uburanira FINA BANK avugako rero asanga nta kosa ryayibarwaho.

[5] Avuga ko ahubwo ikosa ryabaye ryatewe n'imyitwarire ya Mutembo Senyana Kavos wamaze kubona inzu (transfert matériel de propriété) akicecekerera, muri 2010 nyuma y'imyaka itatu akaba aribwo yatangiye gusaba ibyangombwa byayo, ko iyo yihutira kubisaba cyamunara ikimara kuba muri 2006, ikibazo kiba cyaramenyekanye kigakemurwa hakiri kare, ariko ko aho FINA BANK ibimenyeye yihutiye gukemura ikibazo kugira ngo "mutation" ishobore gukorwa.

[6] Akomeza avuga ko ndetse iryo kosa rikomoka no ku myitwarire y'izindi nzego zabigizemo uruhare, ko Umubitsi w'impapuro mpamo z'ubutaka yavuze ko ryari ryarabaye igihe hatangwaga ibyangombwa by'icyo kibanza cyagiye gihabwa numero zitandukanye, 25, 92, na 91 kandi ibyo nta ruhare FINA BANK yabigizemo, ko atariyo yaryozwa amakosa yabaye kuko inzu yatejwe cyamunara ari iyo yahawe mu bugwate kandi ikaba ariyo yagurishijwe, ko na none icyo gihe "Notaire" ariwe wakoze "acte d'adjudication publique" kuwa 27/09/2006 yagaragayemo amakosa, iyo nzu iri mu kibanza no 91 igurishwa, yitwa ko iri mu kibanza n° 25.

[7] Uburanira Mutembo avuga ko ubujurire bwa FINA BANK nta shingiro ryabwo, kuko no mu Rukiko rubanza yemeye ikosa ryo kuba yaratanze "certificat d'enregistrement" idahuye n'inzu yagurishije, ko yajyaga ibandikira yisegura, bigaragara ko hari amakosa yemeraga, ariko inzira zo kubikosora ziza kuruhanya, ko kuba yikuraho iryo kosa ikarishyira ku zindi nzego zishinzwe gutanga ibyangombwa by'amazu atari byo, kuko icyabaye ari ubushishozi buke bwatumye haba kudahuza amazu n'ibyemezo biyaranga, FINA BANK ikaba yaragombaga kugira imikorere myiza yo kugenzura inzu yarigiye guteza cyamunara n'ibyemezo by'ubutaka biyaranga.

[8] Avuga kandi ko kuvuga ko ikosa ryatewe na Mutembo watinze gusaba icyemezo cy'inzu ye, nyuma y'imyaka itatu muri 2010 atari ukuri, kuko yagisabye cyamunara ikimara kuba kuwa 27/9/2006 agahabwa ikitaricyo, aribwo umugore wa Mutembo yatangiye kwandikirana na FINA BANK muri 2008 ayisaba icyemezo nyakuri cy'inzu baguze, ko kuva n'icyo gihe bitewe n'imikorere mibi yayo, byafashe imyaka 6 imwizeza buri gihe ko igiye gukemura ikibazo, Mutembo Senyana Kavos aza kugihabwa muri 2012 urubanza rwaratangiye, ko ibyo byose bigaragazwa n'inyandiko zisanzwe n'iz'ubutumwa bugufi

(Emails) yashyikirije Urukiko. Uburanira Mutembo Senyana Kavos yanzura avuga ko ubujurire bwa FINA BANK nta shingiro ifite kuko ikibazo yateje ari ugatanga ibyangombwa by'inzu bitari byo, ko ubusanzwe ntawe uteza cyamunara inzu adafitiye ibyangombwa biyiranga.

## UKO URUKIKO RUBIBONA

[9] Ingingo ya 258 CC LIII ivuga ko “igikorwa cyose cy’umuntu cyangirije undi gisaba nyiri ukugikora kubitangira indishyi”.

[10] Inyandiko ziri muri dosiye zigaragaza ko inzu FINA BANK yarifiteho ingwate yari iy’uwitwa Zigiranyirazo Protais iri mu kibanza n° 91, ko kandi yari yaranatanzweho ingwate muri BRD, ari nayo yari ifite ibyangombwa byayo igihe yatezwaga cyamunara kuwa 27/09/2006, ikagurwa na Mutembo Senyana Kavos, ariko aza guhabwa “certificat d’enregistrement” itariyo, kuko yahawe iy’inzu iri mu kibanza n° 25 i Musanze nayo ya Zigiranyirazo Protais. Bigaragara kandi kuri 13, ko iyi nzu<sup>2</sup> nayo yatejwe cyamunara, igurwa n’uwitwa Mbanda Laurent na Madamu we Chantal Mbanda kuwa 04/08/2009 mu kurangiza urubanza n° 81 rwaciwe n’Urukiko Gacaca rwa Rwiri kuwa 14/02/2008. Bigaragara na none muri dosiye ko Umubitsi w’inyandiko mpamo z’ubutaka yamenye iki kibazo igihe Mutembo Senyana Kavos yamusabaga ko hakorwa “mutation” kugira ngo ahabwe “certificat d’enregistrement” nshya.

[11] Urukiko rusanga rero FINA BANK yaragize uburangare n’imicungiremibi y’ingwate z’amazu yahawe bituma yitiranya ibyemezo byayo igiheyabihaga abayaguze, hashingiwe kubigaragara mu ibaruwa y’Umubitsi Wungirije w’Impapuro mpamo z’Ubutaka yandikiye Umuyobozi Mukuru wa FINA BANK S.A amusaba gukosoza icyemezo cya cyamunara (acte d’adjudication) yakozwe kuwa 27/05/2009 na Noteri wa Leta, amusaba kandi ko nibirangira, azamugezaho umwimerere w’Impapuro mpamo z’ubutaka numero R.XII Folio 182 zose zanditse kuri Zigiranyirazo Protais’icyemezo cya RDB gihanagura imyenda kuri ibyo bibanza kugirango bashyire mu bikorwa icyifuzo cya buri muntu.

[12] Urukiko rusanga na none nkuko amabaruwa asanzwe n’ubutumwa bugufi biri muri dosiye abigaragaza Mutembo Senyana Kavos ataratinze gusaba icyangombwa cy’inzu kuko yatangiye kwandikirana na FINA BANK mu kwezi kwa mbere kwa 2008, cyamunara yarabaye kuwa 27/09/2006, ni ukuvuga nyuma y’imyaka 2. Kuba rero FINA BANK ivuga ko ikosa ryo kuba Mutembo Senyana Kavos yaratinye gukorerwa “mutation” ariwe ryaryozwa bikaba atari byo, kuko icyabaye ikosa ari uko FINA BANK yamuhaye icyangombwa cy’inzu kitari cyo kubera ubushishozi buke bwayo, kuko mu busanzwe yagombye kuba yaragenzuye inzu igurishwa muri cyamunara, aho iherereye n’ibyangombwa byayo.

[13] Urukiko rusanga na none, naho ikibazo cy’inyandiko n’ibyemezo by’amazu kigaragariye, ntabwo FINA BANK yakoranye ubuhanga n’umwete kugira ngo ibyangombaga gukosorwa bikorwe mu gihe gito gishoboka kubera ko nkuko inzandiko ziri muri dosiye (correspondance) yandikiranye na Mutembo Senyana Kavos ndetse n’Umubitsi w’Impapuro mpamo z’Ubutaka zibigaragaza, imishyikirano ku mugaragaro yatangiye mu kwa mbere 2008, guhera icyo gihe byafashe imyaka ine (4) kugira ngo Mutembo Senyana

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<sup>2</sup>Ibaruwa N° 1882 16.03/NLC/0214Umubitsi Wungirije w’Impapuro mpamo z’ubutaka yandikiye Umuyobozi Mukuru wa FINA BANK yerekeye gusaba icyemezo cya Cyamunara, ivugwamo ikibanza n° 25 cyaguzwe na Bwana Mbanda Laurent.

Kavos abone “Certificat d’enregistrement” ku mazinaye muri 2012, urubanza rwaratangiye nyuma yo kwihanangirizwa (mise endemeure) birenze inshuro imwe.

[14] Hashingiwe ku bimaze kuvugwa, Urukiko rurasanga FINA BANK yaragize uruhare mu gutuma Mutembo Senyana Kavos atinda guhabwa ibyangombwa by’inzu yaguze bituma atayikoresha mu buryo bwisanzuye, bityo ikaba rero igomba kubiryoza hakurikijwe ibiteganywa n’ingingo ya 258 CC LIII yavuzwe haruguru.

## **2. Ku byerekeye n’indishyi zisabwa**

[15] Uburanira Mutembo Senyana Kavos avuga ko kuba yarimwe uburenganzira ku nzu ye mu gihe kirenga imyaka itanu (5) ngo abe yarayitanzeho ingwate kugira ngo ahabwe inguzanyo, byamuteje akababaro, akaba asanga uru Rukiko rukwiye kwemeza indishyi zose hamwe yagenewe n’urukiko rubanza zingana na 6.000.000 Frw yahawe. Avuga kandi ko FINA BANK yategekwa kwishyura Mutembo Senyana Kavos amafaranga y’igihembo angana na 10% y’amafaranga yose igomba kumwishyura.

[16] Avuga kandi ko yuririye ku bujuriye bwatanzwe na FINA BANK, asaba na none inyungu za 18% ku kiguzi cy’inzu cya 31.410.000 Frw kubera inyungu we n’umugore we bavukijwe kuko bashoye imari yabo mu kugura inzu itigeze ibungukira mu gihe cy’imyaka itanu, ko izo nyungu zabarwa ku kiguzi cy’inzu guhera kuwa 13/11/2006, umunsi FINA BANK yemeje ko yakiriye ayo mafaranga kugeza ku munsi w’icibwa ry’urubanza zibazwe mu buryo bukurikira:  $31.410.000 \text{ Frw} \times 18\% \times 65 \text{ (mois)} = 30.624.750 \text{ Frw}$ .

[17] Uburanira FINA BANK avuga ko ikirego cya Mutembo Senyana Kavos cyuririye ku bujuriye bwatanzwe na FINA BANK kigamije gusaba inyungu kubera igihombo yatejwe no kutabyaza inzu ye inyungu kitashyikirijwe Ubwanditsi bw’Urukiko, ko ariko kandi nta gihombo Mutembo Senyana Kavos yagize kuko inzu yahise ayihabwa, ko rero ibyo asaba byaba ari icyo bita “enrichissement sans cause”. Asanga ko nta ndishyi FINA BANK yari gucibwa, ko ahubwo igomba guhabwa indishyi zingana na 1.000.000 Frw y’ikurikiranarubanza n’igihembo cya avoka.

[18] Ku byerekeye indishyi zingana na 1.000.000 Frw y’ikurikiranarubanza n’igihembo cya avoka zisabwa na FINA BANK, uburanira Mutembo Senyana Kavos avuga ko ntaho zashingira mu gihe bigaragara ko ariyo iri mu makosa.

## **UKO URUKIKO RUBIBONA**

[19] Ku byerekeye indishyi zisabwa, Urukiko rusanga nkuko byasobanuwe haruguru, kuba Mutembo Senyana Kavos yaramaze igihe kinini atarahabwa ibyangombwa by’inzu, byaratewe n’amakosa ya FINA BANK yagize imikorere mibi, ibura ubushishozi bituma itanga icyemezo cy’inzu kitaricyo, n’igihe ibimenyeye, ntiyagaragaza ubushake n’umwete wo kubikosora mu buryo bwihuse ngo Mutembo Senyana Kavos ahabwe icyemezo cy’inzu ye.

[20] Urukiko rusanga rero Mutembo Senyana Kavos yarahise ahabwa inzuye akimara kwishyura kuwa 13/11/2006, kuba yaramaze imyaka hafi itanu atarahabwa Impapuro mpamo zayo, yabujijwe uburenganzirabwokuyikoreshamu buryo bwisanzuye nko kuyitangaho ingwate cyangwa kuyigurisha n’ibindi..., akaba rero agombaga kubiharerwa indishyi nkuko Urukiko rubanza rwabyemeje.

[21] Ku birebana n'ingano y'indishyi Mutembo Senyana Kavos akwiye guhabwa, Urukiko rurasanga 5.000.000 Frw yahawe kubera ko FINA BANK yatinze kumuha icyangombwa cy'inzu bituma atayikoresha mu buryo bwuzuye, ari mu kigero gikwiye akaba ariyo agomba kugumaho.

[22] Ku byerekeranye n'inyungu zingana 30.624.750 Frw Mutembo Senyana Kavos asaba kubera ko atashoboye kubyaza inyungu inzu ye, rusanga atazihabwa kuko inzu yaguze yayihawe, akaba rero atagomba kubarira inyungu ku giciro yishyuye.

[23] Ku byerekeye amafaranga y'igihembo cya avoka, Urukiko rusanga Mutembo Senyana Kavos adakwiye gushingira ayo mafaranga ku gaciro k'ikiburanwa kuko binyuranyije n'ibiteganywa n'ingingo<sup>3</sup>ya 62 n'ya 63 z'Itegeko N° 83/2013 ryo kuwa 11/09/2013 rishyiraho Urugaga rw'Abavoka mu Rwanda, rikanagena imitunganyirize n'imikorere byarwo, ariko kandi indishyi za 1.000.000 Frw y'ikirikiranarubanza n'igihembo cya avoka yagenwe n'Urukiko rubanza ziri mu rugero rukwiye ku nzego zombi yaburaniyemo.

[24] Ku birebana n'indishyi z'ikirikiranarubanza n'igihembo cy'avoka FINA BANK isaba, Urukiko rurasanga itazihabwa kubera ko ntacyo itsindiye muri uru rubanza.

### **III. ICYEMEZO CY'URUKIKO**

[25] Rwemeje ko ubujurire bwatanzwe na FINA BANK nta shingiro bufite;

[26] Rwemeje ko ubujurire bwatanzwe na Mutembo Senyana Kavos bwuririye ku bwa FINA BANK nta shingiro bufite;

[27] Rwemeje ko imikirize y'urubanza N° R.COM 0109/11/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi kuwa 02/02/2012 idahindutse;

[28] Rutegetse FINA BANK gutanga amagarama y'urubanza angana na 24.300 Frw, itayatanga mu gihe cy'iminsi 8, akazakurwa mu byayo ku ngufu za Leta.

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<sup>3</sup> Ingingo ya 62 : Igena n'itangazwa ry'ibihembo mbonera by'Abavoka Inama y'Urugaga igena ibihembo mbonera by'Abavoka mu bushishozi bukwiye uwo mwuga.

Birabujijwe gushyiraho ibihembo ushingira ku buryo urubanza ruzakizwa kuko Umwavoka ashinzwe gukoresha ubushishozi bwe. Umwavoka ntashobora kubirengaho nta ruhushya rw'Umukuru w'Urugaga. Ibihembo mbonera by'Abavoka bitangazwa mu Igazeti ya Leta ya Repubulika y'u Rwanda n'Umukuru w'Urugaga.

Ingingo ya 63: Kwishyura igihembo cy'Umwavoka cyishyurwa hakurikijwe igihembo cyumvikanyweho n'Avoka n'uwo aburanira hitawe ku biteganywa n'ibihembo mbonera by'Abavoka.

Impaka zijyanye n'ubwishyu zimenyeshwa Umukuru w'Urugaga kugira ngo yumvikanishe impande zombi.