TWAGIRAYEZU N'ABANDI v. BANKI Y'ABATURAGE Y'U RWANDA (BPR)

[Rwanda URUKIKO RW'IKIRENGA – RS/REV/INJUST/CIV0004/15/CS (Kayitesi Z., P.J., Hatangimbabazi, Gatete, Hitiyaremye na Ngagi, J.) 11 Nzeri 2015]

Amategeko agenga amasezerano – Ubugure – Igihe impande zagiranye amasezerano y'ubugure zimaze kumvikana ku kigurishwa n'ikiguzi cyacyo, ubugure buba buriho, kabone n'ubwo ikigurishwa cyaba kitaratangwa cyangwa se ikiguzi kitarishyurwa – Itegeko ryo kuwa 30/07/1888 rigenga amasezerano cyangwa imirimo nshinganwa, ingingo ya 264.

Amategeko agenga ingwate – Amasezerano y' ingwate ku mutungo utimukanwa – Amasezerano y'ingwate ku mutungo wagurishijwe ntagira agaciro kabone n'ubwo haba hatarakorwa ihererekanya mutungo kuko uwagurishije nta burenganzira abagifite bwo gutangaho ingwate umutungo utakiri uwe – Iteka ryo kuwa 15/05/1922 ryagengaga ubugwate ku mitungo itimukanwa, ingingo ya 12(1).

Incamake y'ikibazo: Twagirayezu yagiranye na Rushirabwoba amasezerano y'ubugure bw'ikibanza N^{o}400 kiri mu Kagali ka Gasave, Umurenge wa Gisozi, Akarere ka Gasabo, Umujyi wa Kigali, ku mafaranga 770.000 maze bumvikana ko aba amwishyuye amafaranga 720.000Frw andi 50.000Frw asigaye akazayamuha nyuma y'ukwezi amaze kumushyikiriza ibyangombwa by'ikibanza; hagati aho yahise anemererwa gutangira ibikorwa muri icyo kibanza.Gusa kwa kwezi kwarashize Rushirabwoba ntiyaha Twagirayezu ibyangombwa by'ikibanza nk'uko yari yabimwijeje.

Hashize igihe ayo masezerano abaye, Rushirabwoba yasabye inguzanyo muri Banki y' abaturage y' u Rwanda (BPR) ingana na miliyoni eshanu maze atanga ingwate ya cya kibanza yagurishije Twagirayezu ariko uyu n'umugore we batabizi. Rushirabwoba ntiyubahirije amasezerano y'inguzanyo yari yarahawe maze BPR ifatira wa mutungo ishaka kuwuteza cyamunara.

Twagirayezu n'umugore we Mukantabana babimenye batanze ikirego mu Rukiko Rwisumbuye rwa Gasabo basaba ko iyo cyamunara ihagarara kandi Banki y'Abaturage ishami rya Gikondo igategekwa kurekura ibyangombwa.Urwo Rukiko rwategetse ko habaho ihinduramutungo(mutation), ikibanza kikava kuri Rushirabwoba kikandikwa kuri Twagirayezu na Mukantabana kubera ko bagifatanyije.

Banki y'Abaturage yajuririye icyo cyemezo mu Rukiko Rukuru irega Twagirayezuna Mukantabana bonyine, urwo Rukiko rwemeza ko ubwo bujurire bufite ishingiro ko BPR itagomba guhatirwa kurekura ibyangombwa yahaweho ingwate mu gihe umwenda yahaye Rushirabwoba utarishyurwa.

Twagirayezu na Mukantabana bajuririye icyo cyemezo mu Rukiko rw'Ikirenga maze narwo rwemezako Banki y'Abaturage itagomba guhatirwa kurekura ibyangombwa kubera ko bigaragara ko yagihaweho ingwate na nyiri kibanza ikindi kandi kuba batarashishikariye guhabwa ibyangombwa hagashira imyaka 3 ndetse Rushirabwoba akageza aho atangaho ingwate uwo mutungo ari uburangare bagize n'icyizere gikabije bamugiriye.

Twagirayezu na Mukantabana bagejeje ikibazo cyabo ku Rwego rw'Umuvunyi basaba ko urubanza N° RCAA0149/11/CS rwasubirwamo ku mpamvu z'akarengane kubera ko rudashobora kurangizwa bitewe n'uko hari urundi rubanza N° RCA0111/08/TGI/GSBO baburanyemo ubutane rwemeje ko ikibanza N° 400 n'inzu icyubatsemo ari umutungo wabo

ugomba kuzagurishwa bakagabana ikiguzi kivuyemo, ngo Urukiko rw'Ikirenga rukaba ntacyo rwaruvuzeho igihe cyo guca urubanza N° RCAA 0149/11/CS.

Urwego rw'umuvunyi rwasabye ko urubanza N° RCAA0149/11/CS rwasubirwamo ku mpamvu z'akarengane ruvuga ko habayeho ibyemezo bibiri binyuranye ku mutungo umwe kandi byombi byabaye itegeko. Urwo rubanza rwemerewe gusubirishwano ku mpamvu z'akarengane.

Incamake y'icyemezo: 1. Igihe impande zagiranye amasezerano y'ubugure zimaze kumvikana ku kigurishwa n'ikiguzi cyacyo, ubugure buba buriho, kabone n'ubwo ikigurishwa cyaba kitaratangwa cyangwa se ikiguzi kitarishyurwa; kubw'ibyo Rushirabwoba nta burenganzira yari afite bwo gutangaho ingwate umutungo utari ukiri uwe.

2. Amasezerano y'ingwate yakozwe hagati ya Banki na Rushirabwoba nta gaciro yahabwa n'ubwo rwose hatarakorwa ihererekanya mutungo kuko yakozwe n'umuntu utari nyiri umutungo bityo Banki y'Abaturage itegetswe kurekura ibyangombwa by'ikibanza Nº400 yahaweho ingwate na Rushirabwoba mu buryo bunyuranyije n'amategeko, bikandikwa mu mazina ya Twagirayezu na Mukantabana kuko aribo ba nyiracyo.

3. Indishyi z'ikurikiranarubanza n'igihembo cy'avoka zigenwa mu bushishozi bw'Urukiko iyo izisabwa ari nyinshi kandi iyo umuburanyi uzisaba ntacyo yatsindiye mu rubanza ntazihabwa.

Ikirego cyo gusubirishamo urubanza ku mpamvu z'akarengane gifite ishingiro;
Amagarama y'urubanza ahereye kuri Banki y'Abaturage agashami ka Gikondo.

Amategeko yashingiweho:
Itegeko ryo kuwa 30/07/1888 rigenga amasezerano cyangwa imirimo nshinganwa, ingingo ya 264.
Iteka ryo kuwa 15/05/1922 ryagengaga ubugwate ku mitungo itimukanwa, ingingo ya 12(1).

Imanza zifashishijwe:
Nteziryayo v. Rutabayiro, RCAA0003/13/CS, rwaciwe n'Urukiko rw'Ikirenga kuwa 31/01/2014.

Ibitekerezo by'abanga byifashishijwe:
FRANCOIS T'KINT, L'hypothèque de l'immeuble d'autrui est nulle, 3e édition, Larcier, Rue des Minimes 39, B-1000 Bruxelles, p.301.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rukomoka ku masezerano Twagirayezu Thadée, washakanye na Mukantabana Consolée, yagiranye n'uwitwa Rushirabwoba Aimable ku itariki ya 06/08/2004, uyu akemera kumugurisha ikibanza N° 400 kiri mu Kagali ka Gasave, Umurenge wa Gisozi, Akarere ka Gasabo, Umujyi wa Kigali, ku mafaranga ibihumbi magana arindwi na mirongo irindwi (770.000Frw).

[2] Amasezerano akimara gushyirwaho umukono, ako kanya hatanzwe amafaranga ibihumbi magana arindwi na makumyabiri (720.000Frw), hanyuma andi ibihumbi mirongo itanu (50.000Frw) akaba yaragombaga gutangwa ibyangombwa by'ikibanza bimaze gushyikirizwa Twagirayezu Thadée. Kugira ngo Twagirayezu Thadée agire icyizere, Rushirabwoba yamuhaye ingwate ya sheki yagombaga kumara ukwezi kumwe, y'agaciro kangana n'amafaranga 720.000Frw Twagirayezu Thadée yarishye, ndetse uyu yemererwa gutangira ibikorwa muri icyo kibanza.

[3] Uko kwezi gushize, Rushirabwoba Aimable ntiyahaye TwagirayezuThadée ibyangombwa by'ikibanza nk'uko yari yabimwijeje, Twagirayezu Thadéena we ntiyafata amafaranga ya sheki yahawe ngo yisubize ayo yatanze. Hagati aho Twagirayezu Thadée afatanyije n'umugore we MukantabanaConsolée, bubatse muri icyo kibanza inzu yari ihagaze ku gaciro kangana na 30.375.538Frw mu kwezi kwa cumi na kabiri 2011.

[4] Mu mwaka wa 2007, nyuma y'imyaka itatu (3) amasezerano abaye hagati ya Twagirayezu Thadée na Rushirabwoba Aimable, uyu yasabye inguzanyo muri Banki y'Abaturage (BPR) atanga ingwate ku kibanza cyavuzwe haruguru TwagirayezuThadée na Mukantabana Consolée batabizi. Muri ayo masezerano y'inguzanyo hari hateganyijwe ko mu gihe Rushirabwoba Aimable adatanze amafaranga ageze igihe cyo kwishyurwa, Banki izakurikirana ubwishyu ku ngwate nk'uko amategeko abiteganya, ko kandi ifite uburenganzira bwo gusaba ko ingwate zigurishwa bitagombye urubanza nk'uko amategeko abiteganya.

[5] Kubera kutubahiriza ayo masezerano y'inguzanyo, mu mwaka wa 2009, Banki yafatiriye umutungo yahaweho ingwate ishaka kuwuteza cyamunara, maze Twagirayezu Thadée na Mukantabana Consolée barabimenya basaba ko cyamunara ihagarikwa, imanza zitangira ubwo.

[6] Twagirayezu Thadée na Mukantabana Consolée baregeye Urukiko Rwisumbuye rwa Gasabo kuri N° RC006/10/TGI/GSBO, N° RC007/10/TGI/GSBO basaba guhinduza ikibanza n° 400 kikabandikwaho; Banki y'Abaturage ishami rya Gikondo nayo iraregwa kugira ngo itange ibyangombwa yari yarahawe na Rushirabwoba Aimable mu buryo bw'uburiganya. Ku wa 28/01/2011, urwo Rukiko rwaciye urubanza N° RC0006/10/TGI/GSBO//RC0007/TGI/GSBO rutegeka ko habaho guhindura (*mutation)*, ikibanza kikava kuri Rushirabwoba Aimable kikandikwa kuri Twagirayezu Thadée na Mukantabana Consolée kubera ko bagifatanyije.

[7] Banki y'Abaturage yajuririye icyo cyemezo mu Rukiko Rukuru kuri N° RCA0062/11/HC/KIG, irega Twagirayezu Thadée na Mukantabana Consolée bonyine, maze ku itariki ya 25/11/2011, urwo Rukiko rwemeza ko ubwo bujurire bufite ishingiro, ko imikirize y'urubanza rwaciwe n'Urukiko Rwisumbuye rwa Gasabo ihindutse kuri byose, ko BPR itagomba guhatirwa kurekura ibyangombwa yahaweho ingwate mu gihe umwenda yahaye Rushirabwoba Aimable utarishyurwa. Mu gufata icyo cyemezo, urwo Rukiko rwashingiye ku mpamvu z'uko Twagirayezu Thadée atahawe ibyangombwa by'ikibanza byuzuye, ntanihatire kugira ngo Rushirabwoba Aimable abimushyikirize, bigatuma nawe abitanga muri Banki ngo abone inguzanyo.

[8] Twagirayezu Thadée na Mukantabana Consolée bajuriye mu Rukiko rw'Ikirenga kuri RCAA0149/11/CS, bavuga ko ihame ry'uko "ntawe uburanira undi atabimuhereye uburenganzira", n'iry'uko urubanza ruba rureba ba nyirarwo rukaba aribo rugiraho inyungu cyangwa ingaruka, bakavuga ko ayo mahame yombi atubahirijwe mu rubanza rwajuririwe.

Ikindi bavuze ni uko Umucamanza yahinduye icyaburanwaga avanaho icyemezo cyategekaga *mutation* kandi abo bireba bakoranye amasezerano y'ubugure batarabijuririye.

[9] Ku itariki ya 16/11/2012, mu rubanza N° RCAA0149/11/CS, Urukiko rw'Ikirenga narwo rwemeje ko BPR itagomba guhatirwa kurekura ibyangombwa by'ikibanza yahaweho ingwate mu gihe umwenda yahaye Rushirabwoba Aimable wari nyiri ikibanza utarishyurwa.

[10] Twagirayezu Thadée na Mukantabana Consolée bagejeje ikibazo cyabo ku Rwego rw'Umuvunyi basaba ko urubanza N° RCAA0149/11/CS rwasubirwamo ku mpamvu z'akarengane kubera ko rudashobora kurangizwa bitewe ni uko hari urundi rubanza N° RCA0111/08/TGI/GSBO baburanyemo ubutane rwemeje ko ikibanza N° 400 n'inzu icyubatsemo ari umutungo wabo ugomba kuzagurishwa bakagabana ikiguzi kivuyemo, ngo Urukiko rw'Ikirenga rukaba ntacyo rwaruvuzeho igihe cyo guca urubanza N° RCAA0149/11/CS.

[11] Kuwa 16/07/2014 Urwego rw'Umuvunyi rwandikiye Perezida w'Urukiko rw'Ikirenga rusaba ko urubanza N° RCAA0149/11/CS rwasubirwamo ku mpamvu z'akarengane ruvuga ko habayeho ibyemezo bibiri binyuranye ku mutungo umwe kandi byombi byabaye itegeko.

[12] Nyuma yo gusuzuma raporo yakozwe n'Ubugenzuzi Bukuru bw'Inkiko, ku itariki ya 31/3/2015 Perezida w'Urukiko rw'Ikirenga yafashe icyemezo Nº 11/2015 gitegeka ko uru rubanza rwoherezwa mu Bwanditsi bw'Urukiko rw'Ikirenga kugira ngo rwandikwe mu bitabo byarwo ruzongere ruburanishwe, maze ruhabwa Nº RS/REV/INJUST/CIV0004/15/CS.

[13] Mu myanzuro batanze, Twagirayezu Thadée na Mukantabana Consolée bavuga ko Urukiko rwabarenganyije kuko rwaciye urubanza rutitaye ku mvugo ya Rushirabwoba Aimable na we ubwe wiyemereye ko ikibanza yatanzeho ingwate kitari icye, kuko yari yarakibagurishije, ko kandi hari urubanza N° RCA0111/08/TGI/GSBO rwaciwe n'Urukiko Rwisumbuye rwa Gasabo rwabaye itegeko, rukemeza ko ikibanza N° 400 kirimo inzu ari umutungo wa Twagirayezu Thadée na Mukantabana Consolée.

[14] Urubanza rwaburanishijwe mu ruhame ku itariki ya 30/06/2015, Mukantabana Consolée yunganiwe na Me Mukamazimpaka Hilarie afatanyije na Me Kaboyi Benoît, aba bakaba ari nabo baburanira Twagirayezu Thadée, naho Banki y'Abaturage y'u Rwanda, ishami rya Gikondo (muri uru rubanza ikaba iri bwitwe Banki y'Abaturage mu magambo magufi) ihagarariwe na Me Mubangizi Frank.

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO

Kumenya niba ikibanza N° 400 kiri ku Gisozi n'inzu ikirimo ari umutungo wa Twagirayezu Thadée na Mukantabana Consolée ugomba kubandikwaho.

[15] Mukantabana Consolée avuga ko, nk'uko babigaragaje mu myanzuro bashyikirije urukiko, nta ngwate Bankiy'Abaturage ifite ku nzu iri mu kibanza N° 400, kubera ko uwo mutungo wanditse kuri Twagirayezu Thadée na Mukantabana Consolée, ko ikindi kigaragaza ko uwo mutungo utari mu bugwate, ari uko nta hantu banki yigeze iwandikisha nk'ingwate nk'uko amategeko abiteganya.

[16] Avuga kandi ko Banki y'Abaturage yareze mu bujurire Twagirayezu Thadée na Mukantabana Consolée kandi nta masezerano y'umwenda bagiranye, uwo bayagiranye ari Rushirabwoba Aimable, ko kandi mu Rukiko Rwisumbuye rwa Gasabo ubwo haburanwaga ibirebana no guhinduza umutungo *(mutation)* yiyemereye ko umutungo yahayeho Banki y'Abaturage ingwate yari yarawubagurishije, ko kuba rero banki itarajuririye izo mvugo za Rushirabwoba Aimable bivuze ko yazemeye.

[17] Me Kaboyi Benoit wunganira Mukantabana Consolée akaba anaburanira Twagirayezu Thadée, avuga ko Urukiko rw'Ikirenga rwashimangiye icyemezo cy'Urukiko Rukuru kandi umucamanza wagifashe atarasobanuye impamvu yakuyeho icyemezo cyari cyarafashwe n'Urukiko Rwisumbuye kandi cyari gishingiye ku mategeko, mu gihe we yafashe icyemezo kidafite itegeko na rimwe gishingiyeho.

[18] Asobanura ko Urukiko rw'Ikirenga rwivuguruje ku bijyanye n'ingingo ya 264 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano (CCLIII) rwashingiyeho, ruvuga ko hagumyeho icyemezo cy'Urukiko Rukuru, ko amasezerano Rushirabwoba Aimable yari yaragiranye na Twagirayezu Thadée atari yuzuye kugira ngo uyu afatwe nka nyiri ikibanza cyagurishwaga mu gihe yari atarahabwa ibyangombwa, nyamara iyo ngingo ivuga neza ko igurisha riba ryuzuye hagati y'abagiranye amasezerano kandi umugurisha akegurira burundu umuguzi icyagurishijwe mu gihe bumvikanye ku kintu no ku giciro cyacyo n'ubwo ikigurishwa kitari cyatangwa.

[19] Avuga ko ku kibazo nk'iki hari urubanza rufite N° RCAA0003/13/CS rwaciwe n'Urukiko rw'Ikirenga ku itariki ya 31/1/2014 aho Rutabayiru Eric yagiranye amasezerano y'ubugure bw'ikibanza na Nteziryayo Eric, uwagurishije agashaka kwanga gutanga ibyangombwa by'ikibanza, Urukiko rw'Ikirenga rukaba rwaranzuye rutegeka Nteziryayo Eric gukorera RutabayiruEric ihinduzamutungo kuko bari barumvikanye ku mazu yagurishwaga no ku giciro cyayo.

[20] Asobanura ko amasezerano y'iguriza ya miliyoni eshanu (5.000.000Frw) yakozwe hagati ya Rushirabwoba Aimable na Bankiy'Abaturage nta gaciro afite, kubera ko mu ngingo yayo ya kabiri bavuze ko ugurizwa ahaye Banki ikibanza kiri ku Gisozi nk'ingwate y'uwo mwenda, ariko ntibagaragaza numero yacyo mu rwego rwo kwerekana icyo kibanza icyo aricyo kuko ku Gisozi hari ibibanza byinshi, ko rero ibyo binyuranye n'ibiteganywa n'ingingo ya 8, agace ka gatatu, y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano, ivuga ko kugira ngo amasezerano agire agaciro hagomba ikintu kidashidikanywa ari na cyo remezo ry'isezerano.

[21] Me Kaboyi Benoit avuga ko byongeye kandi asanga nta n'ubugwate bwabayeho kubera ko ntaho bigaragara ko Banki y'Abaturage yigeze yandikisha iyo ngwate y'ikibanza gifite N°400 nk'uko yanabyiyemereye mu Rukiko rw'Ikirenga, ko kandi bitajyaga no gushoboka kuko icyo kibanza cyanditse kuri Twagirayezu Thadée naMukantabana Consolée. Akavuga ko ibyo binyuranye n'ibiteganywa n'ingingo ya 19 y'Itegeko ryo ku wa 15/05/1922 rigena ubugwate ku kintu kitimukanwa ivuga ko nta bugwate ku kintu kitimukanwa bubaho butanditswe mu gitabo cy'inyandiko z'ubutaka.

[22] Me Mukamazimpaka Hilarie na we wunganira Mukantabana Consolée, avuga ko urubanza basaba ko rusubirishwamo ku mpamvu z'akarengane rwabarenganyije kuko rutitaye ku mvugo za Rushirabwoba Aimable imbere y'Urukiko Rwisumbuye, icyo gihe na Banki y'Abaturage ikaba yari ihagarariwe, aho yemeye ko habaye kwibeshya ubwo yatangaga ikibanza kiburanwa ho ingwate kandi yari yaramaze kukigurisha, akaba

yaremeraga ko habaho ihererekanyamutungo (*mutation).* Avuga ko kuba izo mvugo Banki itarazijuririye mu Rukiko Rukuru, no kuba kandi itaratambamiye urubanza N° RCA0111/08/TGI/GSBO rwaciwe ku itariki ya 30/1/2009 rwategetse ko inzu iburanwa igabanywa hagati ya Mukantabana Consolée na Twagirayezu Thadée kandi yararumenyeshejwe, bivuze ko yemeye ibyavuzwe na Rushirabwoba Aimable.

[23] Avuga ko mu kugirana amasezerano y'iguriza na Rushirabwoba Aimable mu 2007, Banki y'Abaturage yagize uburangare ntiyajya kureba aho umutungo yari ihaweho ingwate uherereye ngo irebe n'isura yawo, ko iyo ijya kubikora yari kubona ko icyo yari ihaweho ingwate atari ikibanza ahubwo yari inzu ifite ba nyirayo batari Rushirabwoba Aimable wayibeshyaga.

[24] Me Mukamazimpaka Hilarie na we agaruka ku ngingo ya 264 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano n'iya 33 y'icyo gitabo, avuga ko kuba Rushirabwoba Aimable yari yaragiranye amasezerano y'ubugure bw'ikibanza na Twagirayezu Thadée icyo kibanza cyari cyarangije kuba icy'uwaguze, kabone n'ubwo yari atarahabwa ibyangombwa byacyo, ko rero atagombaga guhindukira ngo agitangeho ingwate muri banki. Avuga ko icyo kibazo Urukiko rw'Ikirenga rwagifasheho icyemezo mu rubanza N° RCAA0003/13/CS.

[25] Me Mubangizi Frank uburanira Banki y'Abaturage avuga ko impamvu zitangwa n'abarega nta shingiro zifite kuko Banki y'Abaturage yahaweho ingwate ibyangombwa by'ikibanza kiri ku Gisozi byagaragaraga ko ari we nyiracyo, akaba nta zindi mpungenge yagombaga kugira. Ku birebana no kuba ku Gisozi hari ibibanza byinshi nk'uko bivugwa n'uburanira abarega, avuga ko nta shingiro bikwiye guhabwa kubera ko ibyo bibanza byose bidafite N° 400 igaragara mu byangombwa Banki y'Abaturage yahawe, ko rero ingingo ya 8, agace ka gatatu, y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano yubahirijwe.

[26] Ku birebana no kuba ingwate yahawe itarandikishijwe hakurikijwe ibikubiye mu ngingo ya 19 y'Itegeko ryo ku wa 15/05/1922 rigena ubugwate ku kintu kitimukanwa, Me Mubangizi Frank avuga ko ibyo bitari ngombwa kubera ko iyo ngingo yarebaga ubugwate ku mutungo ufite *"titre de propriété"*. Yongeraho ko kuba uwatanze ingwate nta kibazo afite, abarega bataza kubaza ibirebana n'iyo ngwate kubera ko ntaho bahuriye na yo.

[27] Me Mubangizi Frank avuga ko mu gace ka 17 ka kopi y'urubanza, Urukiko rwasobanuye ko amasezerano hagati ya Twagirayezu Thadée na Rushirabwoba Aimable atari yuzuye kugira ngo Twagirayezu Thadée afatwe mu rwego rw'amategeko ko ari we nyiri ikibanza kuko atigeze ahabwa ibyangombwa byacyo. Avuga kandi ko mu gace ka 18 k'urubanza, Urukiko rwavuze ko mu rwego rw'amategeko, ufatwa nka nyiri ikibanza ari ubigaragariza ibyemezo bidashidikanywaho, akavuga ko ntaho abarega bahera bavuga ko Urukiko rwivuguruje ku bijyanye n'ingingo ya 264 CCLIII kuko rwayitanzeho ibisobanuro birambuye.

[28] Ku birebana n'urubanza (*jurisprudence*) rwatanzwe na Me Kaboyi Benoît, Me Mubangizi Frank avuga ko ntaho ruhuriye n'uru rubanza baburana, kubera ko icyo Banki y'Abaturage iburana na Twagirayezu Thadée hamwe na Mukantabana Consolée kidashingiye ku masezerano y'ubugure nk'uko bimeze muri urwo rubanza.

UKO URUKIKO RUBIBONA

[29] Mu nyandikozigize urubanzaharimo amasezerano y'ubugure bw'ikibanza yakozwe ku wa 06/08/2004 aho Rushirabwoba Aimable yemeye ko agurishije Twagirayezu Thadée ikibanza gifite Nº400 kiri mu Kagari ka Gasave, Umurenge wa Gisozi, Akarere ka Gasabo, ku mafaranga ibihumbi magana arindwi na mirongo irindwi (770.000Frw), aya masezerano kandi agaragaza ko abayagiranye bumvikanye ko uguze yishyuye amafaranga ibihumbi magana arindwi na makumyabiri (720.000Frw), andi ibihumbi mirongo itanu (50.000Frw) asigaye akazatangwa nyuma y'uko ibyangombwa byerekana nyiri ikibanza bihawe uwaguze (Twagirayezu Thadée). Ikindi abagiranye amasezerano y'ubugure bumvikanye, ni uko Twagirayezu Thadée waguze yemerewe guhita atangira gukorera ibikorwa bye muri icyo kibanza amasezerano akimara gusinywa.

[30] Mu nyandiko zigize urubanza, harimo kandi amasezerano y'iguriza Nº007/2007 yabaye ku itariki ya 22/05/2007 hagati ya Banki y'Abaturage na Rushirabwoba Aimable, muri ayo masezerano Rushirabwoba akaba yaragurijwe na Banki y'Abaturage amafaranga miliyoni eshanu (5.000.000Frw) yagombaga kwishyurwa mu myaka itatu (36mois), mu ngingo ya 2 y'ayo masezerano nyiri ukugurizwa akaba yaratanzeho ingwate z'uwo mwenda ikibanza cye kiri ku Gisozi.

[31] Urukiko rurasanga mu rubanza Nº RC0006/10/TGI/GSBO//RC0007/10/TGI/GSBO Mukantabana Consolée na Twagirayezu Thadée barareze Rushirabwoba Aimable na Banki y'Abaturage basaba guhindurirwa ibyangombwa by'ikibanza baguze kikabandikwaho (*mutation*), Urukiko rugategeka ko ikibanza kigomba kwandikwa kuri Mukantabana Consolée na Twagirayezu Thadée, ko kandi Banki y'Abaturage igomba gusubiza ibyangombwa by'icyo kibanza kuko yabihaweho ingwate mu buryo butemewe n'amategeko.

[32] Urukiko rurasanga kandi mu bujurire bw'urwo rubanza rumaze kuvugwa, Urukiko Rukuru rwaremeje ko Banki y'Abaturage itagomba guhatirwa kurekura ibyangombwa by'ikibanza Nº400 kiburanwa yahaweho ingwate na Ruzirabwoba Aimable mu gihe umwenda yamuhaye utarishyurwa, ibi bikaba ari nabyo Urukiko rw'Ikirenga rwemeje mu rubanza N° RCAA0149/11/CSrushingiye ku ngingo ya 264 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano, no ku ngingo ya 282 y'iryo tegeko.

[33] Ingingo ya 264 y'Igitabo cy'urwunge rw'amategeko y'imbonezamubano iteganya ko "igurisha riba ryuzuye hagati y'abagiranye amasezerano kandi umugurisha akegurira burundu umuguzi icyagurishijwe mu gihe bumvikanye ku kintu no ku giciro cyacyo nubwo ikigurishwa kitari cyatangwa n'ikiguzi cyacyo kikaba kitari cyishyurwa", naho ingingo ya 282 y'icyo gitabo yo "igateganya ko inshingano yo gushyikiriza ibitimukanwa iba yuzuye ku ruhande rw'umugurisha iyo atanze imfunguzo, niba ari inyubako cyangwa impapuro zigaragaza nyiri ikintu".

[34] Mu rubanza NºRCAA0149/11/CS rusabirwa gusubirwamo ku mpamvu z'akarengane, Urukiko rw'Ikirenga rwasobanuye ko amasezerano yo kuwa 06/08/2004 Rushirabwoba Aimable yagiranye na Twagirayezu Thadée mu rwego rw'amategeko atari yuzuye kugira ngo Twagirayezu Thadée afatwe ko ari we nyiri ikibanza kuko atigeze ahabwa ibyangomwa byacyo, ko imbere ya rubanda ndetse no mu rwego rw'amategeko Rushirabwoba ari we wakomeje kuba nyiri ikibanza kuko ari we wari ufite ibyangombwa biteganywa n'amategeko.

[35] Urukiko rw'Ikirenga rurasanga harabayeho kudakoresha neza ingingo z'itegeko zavuzwe haruguru, aho urubanza rusabirwa gusubirwamo ku mpamvu z'akarengane, mu gika cyarwo cya 17, rwavuze ko Twagirayezu Thadée atagombaga gufatwa nka nyiri ikibanza yaguze kuko Atari yagahabwa ibyangombwa byacyo, ibyo rukaba rwarabishingiraga ku

ngingo ya 282 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano yibukijwe haruguru, nyamara iyo ngingo igaragaza igihe uwagurishije aba yujuje inshingano ye mu rwego rwo gushyira mu bikorwa amasezerano y'ubugure, iyo nshingano akaba ari ugushyikiriza imfunguzo, niba icyaguzwe ari inyubako, cyangwa impapuro zigaragaza nyiri ikintu. Kuba rero uwagurishije yarenga ku nshingano ye bikaba bitagomba ubwabyo gutesha agaciro amasezerano y'ubugure nk'uko bisobanurwa mu ngingo ya 264 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano na yo yavuzwe haruguru.

[36] Urukiko rwaciye urubanza rusabirwa gusubirwamo ku mpamvu z'akarengane, rwasobanuye kandi ko Twagirayezu Thadée yemera ko mu myaka itatu (3) yose nyuma y'ubugure,atahawe ibyo byangombwa ntanashishikarire kubihabwa kugeza aho Rushirabwoba Aimable abitangaho ingwate ku nguzanyo, no kugeza igihe ikibanza n'ibirimo byenda gutezwa cyamunara na Banki y'Abaturage kubera ko Rushirabwoba Aimable atishyuye inguzanyo yahawe, ari uburangare yagize n'icyizere gikabije yamugiriye.

[37] Urukiko rurasanga iyi myumvire inyuranye n'ibiteganywa n'ingingo ya 264 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano, iteganya ko kuva igihe impande zagiranye amasezerano y'ubugure zimaze kumvikana ku kigurishwa n'ikiguzi cyacyo, ubugure buba buriho,kabone n'ubwo ikigurishwa cyaba kitaratangwa cyangwa se ikiguzi kitarishyurwa.

[38] Urukiko rurasanga kandi ibisobanuro by'iyi ngingo ari nabyo byagarutsweho mu rubanza NºRCAA0003/13/CS aho Urukiko rw'Ikirenga rushingiye ku bisobanuro byatanzwe n'umuhanga <u>*Laurent Collon*</u>, mu gitabo cye cyitwa *Vente d'immeuble* rwemeje ko igura riba ryuzuye mu gihe abagiranye amasezerano y'ubugure bumvikanye ku kigurishwa n'igiciro cyacyo kabone n'ubwo bo ubwabo bashobora kwiyongereramo izindi shingano[1].

[39] Urukiko rurasanga ibivugwa mu ngingo ya 282 yo mu gitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano,byo gushyikiriza uwaguze ibyangombwa by'icyo yaguze, ari inshingano abagiranye amasezerano bagira nyuma yo kugura atari impamvu zituma amasezerano y'ubugure ateshwa agaciro (*formalités substantielles à peine de nullité*), gusa umwe mu bagiranye amasezerano akaba ashobora kuririra kuri izo nshingano iyo zitubahirijwe, asaba ko amasezerano y'ubugure ateshwa agaciro, nyamara muri uru rubanza hakaba nta n'umwe mu bagiranye amasezerano wigeze asaba ko aseswa kubera ko hari inshingano runaka zitubahirijwe, ikibazo kikaba cyaravutse ahubwo kubera ko Twagirayezu Thadée yasabye gukorerwa ihererekanyamutungo *(mutation)* agasanga ikibanza yaguze cyaratanzweho ingwate muri Banki.

[40] Urukiko rurasanga amasezerano yo ku wa 06/08/2004 yabaye hagati ya Rushirabwoba Aimable na Twagirayezu Thadée yaragize Twagirayezu Thadée nyiri ikibanza, ku buryo Rushirabwoba Aimablenta burenganzira yari agifite bwo kuba yagira icyo agikoraho yitwaje ko ataramuha ibyangombwa cyangwa se ko atarishyurwa amafaranga yose (kugitanga, kukigurisha cyangwa kugitangaho ingwate).

[41] Urukiko rurasanga kandi, kuba impande zombi zarateganyijje ko amafaranga ibihumbi mirongo itanu (50.000Frw) asigaye azatangwa ari uko Twagirayezu Thadée amaze gushyikirizwa ibyangombwa, nabyo atari inkomyi, ahubwo ari ubugure bwuzuye, indi mihango ibuherekeza ikazakorwa ari uko igiciro cyose cyuzuye. Iki akaba ari na cyo

[1]Reba urubanza NºRCAA0003/13/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 31/01/2014 hagati ya Nteziryayo Eric na Rutabayiro Eric.

gitekerezo kiri mu rubanza rufite N° RCAA0003/13/CS rwaciwe n'Urukiko rw'Ikirenga ku itariki ya 31/1/2014, aho Rutabayiru Eric yagiranye amasezerano y'ubugure bw'amazu na Nteziryayo Eric, uwagurishije agashaka kwanga gutanga ibyangombwa by'ikibanza, Urukiko rw'Ikirenga rukaba rwaranzuye ko amasezerano y'ubugure Nteziryayo Eric yagiranye na Rutabayiru Eric afite agaciro kuko bumvikanye ku mazu agurishwa no ku giciro cyayo, maze rutegeka Nteziryayo Eric gukorera Rutabayiru Eric ihererekanyamutungo.

[42] Urukiko rurasanga rero, nk'uko bimaze gusobanurwa haruguru, Rushirabwoba Aimable nta burenganzira yari afite bwo gutangaho ingwate umutungo utari ukiri uwe kuko wari wararangije kugera mu maboko ya Twagirayezu Thadée na Mukantabana Consolée, bityo amasezerano y'ingwate yakozwe hagati ya Banki na Rushirabwoba Aimable akaba adashobora kugira agaciro nk'uko biteganywa n'ingingo ya 12, agace kayo ka mbere, y'Iteka ryo kuwa 15/05/1922 ryagengaga ubugwate ku mitungo itimukanwa[2] ryakoreshwaga ubwo ikibanza Nº400 cyatangwagaho ingwate na Rushirabwoba, ibivugwa n'iyi ngingo bikaba ari nabyo byemezwa n'umuhanga mu mategeko François T'Kint mu gitabo cye cyitwa *Sûretés et principes généraux du droit de poursuites des créances*[3].

[43] Hashingiwe ku bisobanuro byatanzwe haruguru, Urukiko rw'Ikirenga rurasanga ikibanza Nº 400 kiri mu Kagari ka Gasave, Umurenge wa Gisozi, Akarere ka Gasabo, ari icya Twagirayezu Thadée na Mukantabana Consolée kuko bakiguze mu buryo bukurikije amategeko, hashingiwe ku ngingo ya 264 y'Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano yibukijwe haruguru, bityo urubanza NºRCA0062/11/HC/KIG rwaciwe n'Urukiko Rukuru, n'urubanza NºRCAA0149/11/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 16/12/2012 zikaba zihindutse muri byose, Banki y'Abaturage ikaba itegetswe kurekura ibyangombwa by'ikibanza nº400 yahaweho ingwate na Rushirabwoba Aimable mu buryo bunyuranyije n'amategeko, bikandikwa mu mazina ya Twagirayezu Thadée na Mukantabana Consolée kuko aribo ba nyiracyo.

Ku birebana n'indishyi zisabwa na buri ruhande muri uru rubanza.

[44] Me Kaboyi avuga ko Twagirayezu Thadée na Mukantabana Consolée bakwiye guhabwa indishyi zingana n'amafaranga miliyoni umunani (8.000.000Frw) zijyanye n'ibyangiritse ku nzu yubatse mu kibanza N° 400 cya Twagirayezu Thadée na Mukantabana Consolée, miliyoni imwe (1.000.000Frw) y'ikurikiranarubanza kuva uru rubanza rwatangira, miliyoni imwe (1.000.000Frw) y'indishyi z'akababaro ko kuba bararezwe na Banki y'Abaturage nta nguzanyo yabahaye, hamwe na miliyoni ebyiri (2.000.000Frw) y'igihembo cya Avoka kuva imanza zitangira kugeza ubu.

[45] Me Mubangizi Frank uburanira Bankiy'Abaturage, mu myanzuro ye avuga ko nta ndishyi abarega bakwiye guhabwa kubera ko atari Banki yabareze, ko ahubwo ari bo bareze, ko kuba Banki yaratsinzwe urubanza ikarujuririra ari uburenganzira yemererwa n'amategeko. Akomeza avuga ko hari indishyi bakeneye atari Banki y'Abaturage bazisaba, ko ahubwo bazisaba uwababeshye ko abagurishije.

[46] Ashingiye ku ngingo ya 106 y'Itegeko N°21/2012 ryo ku wa 14/6/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, no

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[2] Il n'ya contrat d'hypothèque valable que: Si celui qui s'engage à la constituer est actuellement propriétaire de l'immeuble ou titulaire du droit à gréver ou s'il a un droit actuel à le devenir, et s'il a capacité d'aliéner [….]»

[3] Le constituant de l'hypothèque doit être propriétaire de l'immeuble qu'il grève ou, plus exactement, titulaire d'un droit réel sur l'immeuble. L'hypothèque de l'immeuble d'autrui est nulle, FRANCOIS T'KINT., 3^{e} édition, Larcier, Rue des Minimes 39, B-1000 Bruxelles, 2000, p.301.

ku ngingo ya 258 y'Igitabo cya gatatu cy'urwunge rw'amategeko y'imbonezamubano, Me Mubangizi Frank arasabira Banki y'Abaturage indishyi zingana na miliyoni enye (4.000.000Frw) zo gushorwa mu manza ku maherere, hamwe na miliyoni imwe y'amafaranga y'u Rwanda (1.000.000Frw) y'igihembo cya Avoka.

[47] Me Kaboyi Benoît avuga ko izo ndishyi Banki y'Abaturage ntazo igomba guhabwa kubera ko ari yo yarenganyije Twagirayezu Thadée na Mukantabana Consolée yanga kurega uwo yagombaga kurega ikabashora mu manza.

[48] Urukiko rw'Ikirenga rurasanga ku bijyanye n'indishyi Me Kaboyi Bénoit asaba zingana na miliyoni imwe y'amafaranga y'u Rwanda (1.000.000Frw) ntazo akwiye guhabwa kubera ko atazitangira ibisobanuro. Naho ku bijyanye n'indishyi z'ikurikiranarubanza n'igihembo cya Avoka asabira abo aburanira, bakaba bakwiye guhabwa miliyoni imwe (1.000.000Frw) agenwe mu bushishozi bw'Urukiko kubera ko miliyoni ebyiri n'ibihumbi magana atanu (2.500.000Frw) asaba ari umurengera.

[49] Ku birebana n'indishyi zisabwa na Banki y'Abaturagemu bujurire bwuririye ku bundi, Urukiko rw'Ikirenga rurasanga itazihabwa kubera ko ntacyo yatsindiye muri uru rubanza.

III. ICYEMEZO CY'URUKIKO

[50] Rwemeje ko ikirego cya Mukantabana Consolée na Twagirayezu Thadée gisaba ko urubanza N° RCAA0149/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 16/11/2012rwasubirwamo ku mpamvu z'akarengane gifite ishingiro;

[51] Rwemeje ko urubanza N°RCAA0149/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 16/11/2012 n'urubanza N° RCA0062/11/HC/KIG rwaciwe n'Urukiko Rukuru ku itariki ya 25/11/2011 zihindutse muri byose;

[52] Rutegetse Banki y'Abaturage, agashami ka Gikondo, kurekura ibyangombwa by'ikibanza Nº400 kiri i Gasave, mu Murenge wa Gisozi, Akarere ka Gasabo, Umujyi wa Kigali, bigashyikirizwa Twagirayezu Thadée na Mukantabana Consolée bikabandikwaho.

[53] Rutegetse Banki y'Abaturage, agashami ka Gikondo, guha Twagirayezu Thadée na Mukantabana Consolée miliyoni imwe y'amafaranga y'u Rwanda (1.000.000Frw) y'igihembo cya avoka;

[54] Rutegetse Banki y'Abaturage, agashami ka Gikondo, kwishyura amagarama y'urubanza angana na 100.000.