MUJAWIMANA N'ABANDI v. BANKI YA KIGALI Ltd (B.K)

[Rwanda URUKIKO RW'IKIRENGA – RCOMAA0008/14/CS (Kayitesi Z. P.J., Kayitesi R. na Nyirandabaruta, J.) 22 Nyakanga 2016]

Ingwate – Umutungo utimukanwa – Agaciro k'amasezerano y'ingwate – Kwandikisha ingwate – Amasezerano y'ingwate agira agaciro hagati y'abayagiranye iyo yubahirije amategeko, n'iyo ingwate zatanzwe zitandikishijwe mu bitabo byabugenewe – Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 33 n'iya 34.

Ingwate – Gusesa amasezerano y'ingwate – Kuba mu masezerano y'umwenda utangwa hatanzwe ingwate hakaba nta na hamwe abafite uburenganzira kuruwo mutungo bemeye ko izo ngwate zitangwa, byerekana ko izo ngwate zatanzwe mu buryo bunyuranyije n'amategeko – Itegeko Ngenga N°08/2005 14/07/2005 rigena imikoreshereze n'imicungire y'ubutaka mu Rwanda, ingingo ya 35 – Itegeko Nº22/99 ryo kuwa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranwe, impano n'izungura, ingingo ya 21 n'iya 35.

Incamake y'ikibazo: Nyakwigendera Nyagatare Théogene yari yarahawe na Banki ya Kigali Ltd inguzanyo zitandukanye agatanga n'ingwate y'umitungo utimukanwa ariko aza gupfa atarangije kwishyura uwo myenda bituma banki ya Kigali irega abazungura be mu Rukiko Rukuru rw'Ubucuruzi isaba kwishyurwa, urukiko rubategeka kwishyura.

Abazungura ba nyakwigendera harimo n'umugore we nabo bahise batanga ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge basaba ko amasezerano y'inguzanyo yatangiweho izo ngwate yaseswa kuko batigeze bayamenya kandi ko atigeze ashyirwaho umukono n'umugore wa nyakwigendera. Urukiko rwemeza ko nta seswa ry'amasezerano y'ingwate ryabaho kuko atabayeho bitewe nuko izo ngwate zatanzwe zidafite agaciro kuko zitigeze zandikishwa mu bitabo by'umwanditsi Mukuru byagenewe kwandikwamo umutingo utimukanwa, bityo ko bagomba kwishyura Banki indishyi n'igihembo cy'avoka.

Bajuriye mu Rukiko Rukuru rw'Ubucuruzi bavuga ko urukiko rwirengagije ibyemezo byagiye bifatwa mu bibazo bisa nibi baregeye (jurisprudences). Urukiko rwemeza na none ko nta masezerano y'ingwate yabaye hagati ya nyakwigendera na banki, bityo ko bagomba kuyiha izindi ndishyi ziyongera kuzo baciwe mu rwego rwa mbere,

Abazungura ba Nyagatare bajuriye mu Rukiko rw'Ikirenga bavuga koUrukiko rwavuze ko nta masezerano y'ingwate yabayeho kuko atanditse mu gitabo cy'Umwanditsi Mukuru, nyamara yarabayeho Umwanditsi Mukuru atarabaho ndetse n'Itegeko ryo kwandikisha ingwate ritarajyaho. Bavuga kandi ko amategeko yateganyaga ko umutungo utangwaho ingwate ari uko abagize umuryango bose bawufiteho uburenganzira babyemeye ariko akaba atariko byagenze kuko Nyagatare Théogène yatanze ingwate zose yahaye Banki ya Kigali Ltd, umugore we n'abana be batabyemeye.

Uhagarariye banki we avuga ko nta masezerano y'ingwate yabaye hagati yayo na nyakwigendera kuko atayitanze, avuga ko umutungo ariwo wagombaga kuzaba ingwate.

Abazungura ba nyakwigendera kandi bavuze kobakwiye kugenerwa indishyi zo gushorwa mu manza. Uhagarariye Banki ya Kigali avuga ko nta ndishyi bakwiye guhabwa kuko ikirego cyabo nta shingiro gifite.

Incamake y'icyemezo: 1. Amasezerano y'ingwate agira agaciro hagati y'abayagiranye iyoyubahirije amategeko n'iyo ingwate zatanzwe zitandikishijwe mu bitabo byabugenewe. Bityo amasezerano y'ingwate yabaye hagati ya Nyagatare na Banki ya Kigali ntawushobora kuyahakana kandi inyandiko zayo zihari.

2. Kuba mu masezerano y'umwenda utangwa hatanzwe ingwate nta na hamwe abafite uburenganzira kuri uwo mutungo bemeye ko izo ngwate zitangwa, byerekana ko izo ngwate zatanzwe mu buryo bunyuranyije n'amategeko. Bityo ayo masezerano y'ingwate yabaye hagati ya Banki ya Kigali na Nyagatare akaba agomba guseswa, kuko ntahagaragara umukono w'uwo bashakanye.

3. Kuba Tuyisenge Rachel na Ishimwe Leah Aliah baratakaje byinshi muri izi manza bishyura ba Avoka bakazikurikirana, ni ngombwa ko bahabwa indishyi, ariko kuko izo basaba ari nyinshi, bagomba bakazigenerwa mu bushishozi bw'Urukiko.

Ubujurire bufite ishingiro.
Amagarama y'urubanza aherereye ku warezwe.

Amategeko yashingiweho:

Itegeko Ngenga N°08/2005 ryo kuwa 14/07/2005 rigena imikoreshereze n'imicungire y'ubutaka mu Rwanda, ingingo ya 35 n'iya 38.

Itegeko Nº45/2011 ryo kuwa 25/11/2011 rigenga amasezerano, ingingo ya 64 n'iya 65.

Itegeko Nº22/99 ryo kuwa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranwe, impano n'izungura, ingingo ya 21 n'iya 35.

Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 33, iya 34 n'iya 258.

Imanza zifashishijwe:

Rwigema v. ECOBANK, RCOM0001/07/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 24/07/2008.

Ibitekerezo by'abahanga:

Gael Piette, Droit de sûreté, 9ème éd. Université momentos Ltd. Mouleno cedex.2015.,pp.142;147.

Francois T'S Kint, Sûretés et principes généraux du droit de poursuite des créanciers, Larcier, 2000, p.312.

Alain Bénabent, Droit des obligations, 14ème.éd. LGDJ, 2014, p.176.

Urubanza

I. IMITEREREY'URUBANZA

[1] Nyakwigendera Nyagatare Théogène akiriho yafashe umwenda muri Banki ya Kigali, atanga ingwate y'imitungo itimukanwa (inzu) apfa atarangije kwishyura umwenda wose, mu rubanza RCOM 0295/11/HCC rwaciwe kuwa 14 Nzeli 2012 n'Urukiko Rukuru rw'Ubucuruzi, abazungura be bategekwa kuwishyura. Umugore we Mujawimana Rose,Tuyisenge Rachel na Ishimwe Léah Aliah, abana be, bavuga ko ajya gufata umwenda batabimenye cyangwa ngo babyemere, bakaba batabazwa iby'uwo mwenda. Aho niho bahereye batanga ikirego kigamije gusaba ko amasezerano yatangiweho izo ngwate yaseswa.

[2] Urukiko rw'Ubucuruzi rwa Nyarugenge rwaciye urubanza RCOM 0722/13/TC/NYGE ku wa 17/01/2014, rwemeza ko ubugwate bw'imitungo itimukanwa ivugwa n'abarega nta gaciro bufite kuko butigeze bwandikwa mu gitabo cyandikwamo ingwate ku mutungo utimukanwa mu bitabo by'Umwanditsi Mukuru, ruvuga ko nta seswa ry'amasezerano y'ingwate atarabayeho ryashoboka, rutegeka abaregwa kwishyura Banki ya Kigali Ltd indishyi n'igihembo cya Avoka zingana na 600.000Frw.

[3] Mujawimana Rose, Tuyisenge Rachel na Ishimwe Leah Aliah bajuririye Urukiko Rukuru rw'Ubucuruzi bavuga ko Urukiko rwitiranyije ikorwa ry'amasezerano n'iyandikishwa ryayo, ndetse no mu bisobanuro by'Urukiko hakaba harabayeho ukwivuguruza gukomeye no kwirengagiza ibyemezo byagiye bifatwa mu bibazo bisa n'icyo baregeye (jurisprudences).

[4] Urukiko Rukuru rw'ubucuruzi rwaciye urubanza RCOMA0552/13/HCC kuwa 17/1/2014, rwemeza ko nta masezerano y'ubugwate yabaye hagati ya Banki ya Kigali Ltd na Nyagatare Théogène, rutegeka abarega guha Banki ya Kigali Ltd 400.000Frw y'igihembo cya Avoka yiyongera kuri 600.000Frw bari baciwe mu rwego rwa mbere n'indishyi zingana na 1.000.000Frw.

[5] Mujawimana Rose, Tuyisenge Rachel na Ishimwe Leah Aliah ntibishimiye imikirize y'urubanza bajurira mu Rukiko rw'Ikirenga, bavuga ko hirengagijwe ibimenyetso, amategeko, ndetse n'izindi manza zaciwe, ntirubahe n'indishyi basabye.

[6] Iburanisha mu ruhame ryabaye kuwa 07 Kamena 2016, Mujawimana Rose, Tuyishime Rachel na Ishimwe Lea Aliah bahagarariwe na Me Mutabazi Abayo Jean Claude, Banki ya Kigali Ltd ihagarariwe na Me Rusanganwa Jean Bosco.

II. IBIBAZO BIGOMBA GUSUZUMWA MU RUBANZA N'ISESENGURWA RYABYO.

Muri uru rubanza harasuzumwa niba hari amasezerano y'ingwate yabaye hagati ya Nyagatare Théogène na Banki ya Kigaki, nibigaragara ko yabayeho, hasuzumwe niba akwiriye guseswa, hanasuzumwe ibijyanye n'indishyi zasabwe.

1) Kumenya niba hari amasezerano y'ingwate yabaye hagati ya Banki ya Kigali Ltd na Nyagatare Théogène.

[7] Me Mutabazi Abayo Jean Claude avuga ko Urukiko rwavuze ko nta masezerano y'ingwate yabayeho kuko atanditse mu gitabo cy'Umwanditsi Mukuru, nyamara yarabayeho kuko n'uwo baburana ari we Banki ya Kigali Ltd ayemera uretse kuba iyanenga ko atanditse, ayo

masezerano akaba yarabayeho Umwanditsi Mukuru atarabaho ndetse n'Itegeko ryo kwandikisha ingwate ritarajyaho. Avuga ko ingwate zatanzwe zigaragara n'aho ziherereye hazwi, n'uko zatanzwe, ko amasezerano y'ingwate aba hagati y'impande ebyiri, akaba atagira agaciro kuko hagiyemo Umwanditsi Mukuru. Avuga ko ikigaragaza ko ayo masezerano yabayeho ari uko ibyangombwa by'inzu y'i Remera mu kibanza N°2685 n'iby'iyo mu Karere ka Rwamagana byose bifitwe na Banki ya Kigali kimwe n'undi mutungo Nyagatare yatanzeho ingwate, uri Kabare- Muhazi n'inzu iri mu kibanza N°1647, giherereye Kigabiro-Rwamagana, Banki ya Kigali ikaba ibifite kuko ari ingwate yayo, kandi ko imihango yashyizweho n'itegeko ijyanye no kwandikisha ingwate ikorwa iyo impande zombi zimaze kumvikana ku ngwate.

[8] Me Mutabazi Abayo Jean Claude akomeza avuga ko ku bw'itegeko ryagiyeho mu mwaka wa 2009 rikavugururwa mu mwaka wa 2010, inshingano yo kwandikisha ingwate ifitwe na Banki ya Kigali kuko ari nayo ifite ibyangombwa by'imitungo yatanzweho ingwate kugeza uyu munsi, ko niba itarandikishije ingwate kandi biri mu nshingano zayo itahindukira ngo ivuge ko amasezerano adafite gaciro.

[9] Me Mutabazi Abayo Jean Claude asobanura ingaruka zo kutandikisha ingwate avuga ko iyo uwahawe umwenda yatanze ingwate ntiyandikishwe atawishyuye, Banki ibanza kujya mu Rukiko, ingwate ikagurishwa mu buryo busanzwe binyuze ku Muhesha w'inkiko, mu gihe iyo atishyuye ariko ingwate yarandikishijwe Banki yandikira gusa RDB, igaha uburenganzira abo bita "receivers" bakagurisha ingwate Banki ikishyurwa itiriwe ibanza kuregera Inkiko. Avuga ko mbere y'uko Umwanditsi Mukuru ashyirwaho, iyo Banki yabaga ifite ingwate, hashingirwaga ku ngingo ya 53 y'itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, ingwate ikagurishwa muri "vente par voie parrée", ko ku byerekeye amasezerano yabaye hagati ya Banki ya Kigali na Nyagatare Théogène, uwari ufite ishingano zo kwandikisha ingwate ari Banki kuko mu masezerano bagiranye handitsemo ngo " *le client autorise expressement la Banque à requérir au près de Monsieur le conservateur des Titres Fonciers l'inscription hypothécaire de 1er rang sur les biens décrits ci-avant….*", bikaba bigaragara ko uburenganzira bwo kwandikisha ingwate Nyagatare Théogène yabutanze, kuba Banki itarandikishije iyo ngwate bikagira ingaruka y'uko idashobora kugurisha ngo yiyishyure, ahubwo igomba kuregera urukiko igategereza ko urubanza rurangira, kandi ko Banki itaza imbere y'Urukiko ngo ivuge ko hari ingwate ifite itarayandikishije.

[10] Me Rusanganwa avuga ko abarega batavuguruza ibyo umucamanza yashingiyeho bijyanye n'ingingo ya 4 y'Itegeko N°10/2009 ryo kuwa 14/05/2009 ryerekeye ubugwate ku mutungo utimukanwa nk'uko ryahinduwe kugeza ubu, iteganya ko "byitwa ko ubugwate bufite agaciro iyo bwanditse mu gitabo cyandikwamo ingwate ku mutungo utimukanwa mu biro by'Umwanditsi Mukuru", ko ntawasaba gutesha agaciro ikitagafite. Avuga ko nta bimenyetso abarega bagaragaza byirengagijwe, ko ashingiye ku masezerano yitwa "ouverture de crédit avec constitution d'hypothèque" bagaragaza bashaka gusaba ko amasezerano y'ingwate ateshwa agaciro, no ku mabaruwa menshi agaragaza amazu yatanzweho ingwate avugwa muri ayo masezerano, abona ntaho abazungura ba Nyagatare bahera bavuga ko ibyo yakoze batabyemera, cyane cyane ko Banki ya Kigali ivuga ko nta ingwate Nyagatare yatanze, ko icyabaye ari amasezerano y'umwenda n'ingwate yagombaga gutangwa (avec hypothèque à constituer), umutungo ukaba ariwo wagombaga kuzaba ingwate, kuko muri ayo masezerano ku rupapuro rwa 2 hagaragaramo icyo bise "*inscription de l'hypothèque*", aribyo kwandikisha ingwate, berekana uburyo bizagenda. Avuga ko atabona uburyo abazungura ba Nyagatare basaba ko aya

masezerano ateshwa agaciro ndetse bakongeraho ko ari amasezerano y’ubugwate, nyamara Nyagatare yarasinyiye gusa ko ingwate izatangwa.

[11] Me Rusanganwa Jean Bosco yabajijwe uburyo Banki ya Kigali Ltd itunzemo ibyangobwa by’inzu zavuzwe muri uru rubanza nyamara avuga ko nta masezerano y’ingwate (constitution d’hypothèque) yabayeho, asubiza ko Banki ya Kigali ifite ibyo byangombwa koko, kuko abazungura ba Nyagatare Théogène batigeze babyaka Banki ngo ibibime. Anavuga ko kuba Banki ibifite byerekana ko iby’itangwa ry’ingwate byatangiye ariko bikaba bitararangiye, ko Banki ya Kigali yahawe izo nyandiko na Nyagatare kugira ngo ingwate zitangwe kuko hari ibyo bari bumvikanyeho, ko ariko ibyakozwe ari intangiriro (processus) kuko mu masezerano bari bumvikanye ko ingwate izandikishwa ku Mubitsi w’Impapurompamo z’ubutaka.

UKO URUKIKO RUBIBONA

[12] Ingingo ya 33 y’Itegeko ryo kuwa 30/07/1888 rishyiraho Igitabo cya gatatu cy’Urwunge rw'amategeko y'imbonezamubano yakoreshwaga igihe Nyagatare Théogène na Banki ya Kigali Ltd bashyiraga umukono ku masezerano ya “ouverture de crédit avec constitution d’hypothèque” bagiranye kuwa 19/07/2005 n’ayakurikiyeho, iteganya ko amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayagiranye. Naho ingingo ya 34 y’iryo Tegeko ryavuzwe haruguru iteganya ko amasezerano adategeka icyemejwe ahubwo akubitiraho n'ingaruka ubutabera, imigenzereze cyangwa amategeko byageneye inshingano bikurikije kamere yayo[1].

[13] Dosiye igaragaza ko Nyagatare Théogène yasabye gukomerezwa umwenda kuwa 2 Gashyantare 2009, maze Banki ya Kigali Ltd imusubiza kuwa 5 Werurwe 2009 imumenyesha ko umwenda we ugeze kuri 124.000.000Frw, abarirwamo 24.000.000Frw agomba kuba yarangije kwishyura kuwa 31Gicurasi 2009 kandi agakomeza kwishyura umwenda ungana 15.472.369Frw yahawe agura inzu yo mu kibanza N^{o}2685 iri Remera-Kimironko. Yibutswa kugura ubwishingizi bw’ingwate (garantie) Banki yari ifite arizo: “hypthèque” ifite agaciro ka 50.000.000Frw yagombaga kwandikwa ku rwego rwa mbere ku kibanza Nº2685 kiri i Remera-Gasabo, mu Mujyi wa Kigali, Hypothéque ifite agaciro ka 21.000.000Frw yagombaga kwandikwa ku rwego rwa 1 ku kibanza Nº1647 kiri i Kigabiro-Rwamagana, ikaba yari yahawe n’ibyemezo by’umutungo utimukanwa birimo icyemezo cy’umutungo w’inzu iri Kabare-Muhazi ho mu Burasirazuba n’ibyemezo by’imitungo itimukanwa iherereye Kigabiro-Rwamagana (izindi nzu 2) akaba ataragombaga kuwugurisha, kuwutangira ubuntu cyangwa kuwutangaho ingwate Banki itabanje kubimwemerera, Banki ikaba yaranahaweho ingwate ku rwego rwa mbere, umutungo wimukanwa ufite agaciro ka 50.000.000Frw.

[14] Dosiye igaragaza na none ko kuwa 17 Kamena 2009 Nyagatare yongeye kwaka inguzanyo y’igihe gito, maze kuwa 27 Nyakanga 2009, Banki ya Kigali Ltd imwandikira imumenyesha ko umwennda we ugeze kuri 148.000.000Frw, na none yibutswa ko ingwate (garanties) Banki ifite ari imitungo yose yavuzwe mu gika kibanziriza iki. Izo ngwate Banki ya Kigali Ltd ikaba ariyo yagombaga kuzandikisha nk’uko biteganyijwe mu masezerano y’umwenda utangwa hatanzwe ingwate (ouverture de crédit avec constitution d’hypothèque) yo kuwa 19 Nyakanga 2005 yavuzwe haruguru (ku rupapuro rwa kabiri/deuxième Feuillet) nk’uko

[1]Ibivugwa muri izo ngingo zombi tubisanga no mu ngingo za 64 na 65 z’Itegeko N^{o}45/2011 ryo kuwa 25/11/2011 rigenga amasezerano.

kandi byagiye byibutswa mu nyandiko yose imwemerera inguzanyo inagaragaza ingwate Banki ihawe.

[15] Urukiko rw'Ikirenga rurasanga bigaragara ko Banki ya Kigali na Nyagatare Théogène bagiranye amasezerano atandukanye y'umwenda, yose akaba yaragiye ahabwa umwenda ari uko atanze ingwate, Banki ya Kigali Ltd ikaba ariyo ifite ishingano yo kwandikisha izo ngwate. Muri ayo masezerano harimo ayo kuwa 19 Nyakanga 2005, yabayeho hakorwa ivugururwa rya mbere ry'amasezerano (avenant Nº001) ku masezerano y'umwenda utangwa hatanzwe ingwate (ouverture de crédit avec constitution d'hypothèque), yashyiriweho umukono imbere ya noteri wa Leta Norbert Kamugisha. Muri ayo masezerano Nyagatare Théogène yahaye Banki ya Kigali Ltd ingwate ho inzu zubatse n'izizubakwa mu kibanza Nº1647 kiri Kigabiro-Rwamagana, ayiha n'amasezerano Nº L139/rwa/2005 y'ubukode bw'icyo kibanza. Hari kandi inyandiko yo kuwa 27/07/2009, Banki ya Kigali Ltd yandikiye Nyagatare Théogène imumenyesha ingano y'umwenda ayifitiye, inamwibutsa ko ingwate Banki ifite z'iyo myenda yose ari inzu iri mu kibanza Nº2685 i Remera-Kimironko, inzu iri mu kibanza Nº1647 Kigabiro-Rwamagana (izo ngwate zombi zagombaga kwandikishwa kuri "hypotheque de 1er rang"), inzu 2 ziri Kigabiro–Rwamagana, n'ingwate y'imitungo yimukanwa (gaje de fonds de commerce) ifite agaciro ka 50.000.000Frw, ibyangombwa by'iyo mitungo yose itimukanwa Nyagatare Théogène akaba yarabihaye Banki ya Kigali Ltd, ayiha n'uburenganzira bwo kwandikisha ingwate.

[16] Ku bijyanye no kwandikisha ingwate, abahanga mu mategeko babivuga ko bikorwa mu rwego rwo kugira ngo uwahawe ingwate agire icyizere cyo kwishyurwa mbere y'abandi bantu umubereyemo umwenda yaba afitiye indi myenda, bigakorwa kugira ngo abo bandi bamenye ko uwo mwenda uriho kandi nyirawo afite uburenganzira bwo kwishyurwa mbere, kuko mu gihe ingwate itandikishijwe nta burenganzira uwayihawe aba arusha abandi bafitiwe imyenda, ariko kutayandikisha bikaba bitavanaho ko amasezerano yabayeho kuko iryo yandikishwa riba rigamije gusa kumenyesha abandi ko uwo mutungo utimukanwa watanzweho ingwate[2].

[17] Urukiko rurasanga rero nk'uko rumaze kubigaragaza, amasezerano y'ingwate hagati ya Nyagatare Théogène na Banki ya Kigali Ltd yarabayeho, akaba afite agaciro hagati y'abayagiranye kuko yubahirije ingingo ya 33 yavuzwe haruguru, akaba nk'uko byasobanuwe, adashobora kuvanwaho cyangwa ngo ateshwe agaciro n'uko ingwate zatanzwe zitandikishijwe, akaba nta n'ushobora kuyahakana kandi inyandiko zayo zihari.

2) Kumenya niba amasezerano y'ingwate Banki ya Kigali yagiranye na Nyagatare Théogène agomba guseswa.

[18] Me Mutabazi Abayo Jean Claude avuga ko itegeko ry'ubutaka ryo mu mwaka wa 2005 ryateganyaga mu ngingo yaryo ya 35 ko kugira ngo uhagarariye umuryango ashobore gutanga

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[2] 1. Gael Piette, Droit de sûreté, 9ème éd. Université momentos Ltd. Mouleno cedex.2015.p.142;147. (Les conditions de fond de l'hypothèque concernent le constituant, la créance garantie et l'assiètte de la sûreté. le respect d'une condition de forme est généralement nécessaire : la rédaction d'un acte notarié… l'inscription va permettre d'assurer la publicité d'hypothèque, donc de rendre la sûreté opposable aux tiers. A défaut de publicité, l'hypothèque est inopposable aux tiers, qu'ils soient de bonne ou de mauvaise foi. L'inscription est donc une condition d'opposabilité et non une condition de validité. Une hypothèque non publiée est valable entre les partes).
2. Francois T'S kint, Sûretés et principes généraux du droit de poursuite des créanciers, Larcier, 200.p.312. (L'inscription de l'hypothèque en assure la publicité. Elle ne crée aucun droit. L'inscription ne fait que réveller, aux yeux des tiers, le droit d'hypothèque).

uburenganzira ku mutungo utimukanwa, bigomba kubanza kwemerwa n'abagize umuryango bose bawufiteho uburenganzira (umugore, abana bafite imyaka y'ubukure, abatayifite bagahagararirwa n'ababyeyi babo), ko umutungo utangwaho ingwate ari uko bose babyemeye ariko akaba atariko byagenze Nyagatare Théogène atanga ingwate zose yahaye Banki ya Kigali Ltd, ko yatanze imitungo ho ingwate umugore we n'abana be batabyemeye. Avuga kandi ko mu gutanga no kwakira izo ngwate na none hirengagijwe ingingo ya 21 y'Itegeko N°22/99 ryo ku wa 12/11/1999 ryuzuza Igitabo cya mbere cy'Urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyigiranywe, iteganya ko, *uko imicungire y'umutungo n'uburyo bawucunga byaba biri kose, ubwumvikane bw'abashyingiranywe ari ngombwa mu gutanga ikitimukanwa bwite n'umutungo bahuriyeho no kubitangaho ubundi burenganzira bwose*.

[19] Me Mutabazi Abayo Jean Claude asoza avuga ko mu mitungo Nyagatare Théogène yatanzeho ingwate harimo igice cy'umutungo Mujawimana Rose afiteho uburenganzira, ko Urukiko ruramutse rwemeje ko amasezerano yabayeho, ingaruka zaba ko igice cya Nyagatare ari cyo yaba yaratanzeho ingwate gusa, amasezerano yaramuka asheshwe Mujawimana Rose akagira uburenganzira ku mutungo wose.

[20] Me Rusanganwa avuga ko amasezerano abo baburana basaba ko ateshwa agaciro ari amasezerano y'inguzanyo kuko nta masezerano y'ingwate yabayeho, ko icyabayeho ari amasezerano y'umwenda, kandi ko Banki ya Kigali Ltd itazagurisha ishingiye kuri ayo masezerano ahubwo izashingira ku rubanza kuko amasezerano yabaye mbere ya 2009, ku rupapuro rwayo rwa 4 bumvikanye ko mu kugurisha ingwate hakorwa, "*vente par voie parreé*", ariko ko bitashoboka kuko iyo ngwate itanditse, ko kandi ingaruka y'ingwate ari uko iyo umwenda utishyuwe ingwate igurishwa, hakaba amahirwe yo kwishyurwa mbere aribyo byitwa "rang privilégié", ariko ko byose bitashoboka ingwate itanditse, avuga ko urukiko ruramutse rwemeje ko amasezerano y'ingwate avuyeho byaba bivuze ko n'ay'umwenda yaba akuweho kuko ari mu nyandiko imwe. Avuga ko igihe cyose Banki idafite "titre" itavuga ko ifite ingwate, ko rero abazungura ba Nyagatare batavuga ko Banki ifite uburenganzira ku mutungo wa Nyagatare.

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[21] Ingingo ya 35 y'Itegeko Ngenga N°08/2005 14/07/2005 rigena imikoreshereze n'imicungire y'ubutaka mu Rwanda iteganya ko gutanga burundu uburenganzira ku butaka, nko kubugurisha, kubutangira ubuntu cyangwa kubugurana, bikozwe n'uhagarariye umuryango bigomba kubanza kwemerwa n'abagize umuryango bose basangiye ubwo burenganzira naho ingingo ya 38 igateganya ko kwemerwa kuvugwa mu ngingo ya 35 y'iri Tegeko Ngenga ari ngombwa no mu gihe hagomba gutangwa ingwate ku butaka, ubukode ku butaka, ukwatisha kw'igihe kirekire cyangwa se mu gihe habayeho ubwumvikane ku burenganzira bwo gukoresha ubutaka bw'undi bitewe n'imiterere yabwo.

[22] Ingingo ya 21 y'Itegeko Nº22/99 ryo kuwa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranwe, impano n'izungura iteganya ko imicungire y'umutungo n'uburyo bawucunga byaba biri kose, ubwumvikanwe bw'abashyingiranywe ari

ngombwa mu gutanga ikitimukanwa bwite n'umutungo bahuriyeho no kubitangaho ubundi burenganzira.

[23] Urukiko rurasanga mu masezerano y'umwenda utangwa hatanzwe ingwate (contrat d'ouverture de crédit avec constitution d'hypothèque) Nyagatare Théogène yagiranye na Banki ya Kigali Ltd kuwa 19 Nyakanga 2005 no mu yandi masezerano yose yakurikiyeho kugeza kuyo kuwa 27 Nyakanga 2009, aho Banki ya Kigali Ltd yamwemereye inguzanyo nawe akayiha ho ingwate inzu iri mu kibanza N°2685 kiri I Remera-Kimironko akayiha n'icyangombwa cyayo (titre de propriété), n'inzu iri mu kibanza N°1647 Kigabiro–Rwamagana n'icyangombwa cyayo, nta na hamwe bigaragara ko umugore we Mujawimana Rose yemeye ko izo ngwate zitangwa kuko ari nta na hamwe hagaragara umukono we, byerekana ko izo ngwate Nyagatare Théogène yahaye Banki ya Kigali Ltd ikaba itunze ibyangombwa byazo nk'uko n'uyihagarariye yabyemereye Urukiko ndetse akavuga ko impamvu Banki ikibitunze ari uko abazungura ba Nyagatare batabisabye, zatanzwe mu buryo bunyuranyije n'amategeko kuko zitubahirijwe ibiteganywa mu ngingo ya 35 n'iya 21 zavuzwe haruguru, bityo ayo masezerano y'ingwate akaba agomba guseswa, ibyangombwa by'iyo mitungo itimukanwa yavuzwe haruguru bifitwe na Banki ya Kigali Ltd ikabisubiza Mujawimana Rose,umugore wa Nyagatare Théogène.

[24] Urukiko rurasanga ariko kubera ko nta masezerano yihariye y'ingwate Nyagatare Théogène yagiranye na Banki ya Kigali ahubwo ibyerekeye ingwate bivugwa mu masezerano y'umwenda utangwa hatanzwe ingwate (ouverture de crédit avec constitution d'hypothèque) yo kuwa 19 Nyakanga 2005, ayo kuwa 05 Werurwe 2009 n'ayo kuwa 27 Nyakanga 2009, bigomba kumvikana neza ko, iseswa ry'aya masezerano y'ingwate ritareba amasezerano yose y'umwenda yavuzwe haruguru, ahubwo rireba gusa ingingo zayo zivuga ibirebana n'ingwate yatanzwe ku nzu iri mu kibanza N°2685 kiri i Remera-Kimironko n'iyatanzwe ku nzu iri mu kibanza N°1647 Kigabiro–Rwamagana, cyane cyane ko abajuriye muri uru rubanza bari mu bazungura ba Nyagatare Théogène batsindiwe umwenda yagombaga kwishyura Banki ya Kigali Ltd, mu rubanza RCOMA0154/12/CS rwaciwe n'uru Rukiko kuwa 05 Gashyantare 2016, rukaba rwarabaye itegeko. Ibi bihuye n'ibyo bamwe mu bahanga mu mategeko bavuga ko amasezerano ashobora guseswa igice kimwe ikindi kikagumaho nk'igihe umucamanza asanga ibyo bice byombi bishobora gutandukanywa, nko mu masezerano "synallagmatiques" cyangwa "a titre gratuit[3]. Iby'uko ingwate yatanzwe binyuranyije n'amategeko igomba guseswa bihuye kandi n'ibyemejwe n'uru Rukiko mu rubanza RCOM 0001/07/CS rwaciwe kuwa 24/07/2008 haburana Rwigema Chantal na ECOBANK, aho rwemeje ko Mme Rwigema Chantal nta ruhare yagize mu masezerano yabaye hagati ya Mazimpaka na BCDI yatanzwemo ingwate inzu y'umuryango, kuko atigeze ayamenyeshwa ngo ayemere".

3. Ibyerekeye indishyi zasabwe muri uru rubanza.

[25] Me Mutabazi Abayo Jean Claude avuga ko Urukiko Rukuru rw'Ubucuruzi rwanze kugenera indishyi abo ahagarariye rushingiye ku mpamvu y'uko ikirego cyabo kidafite ishingiro bitewe n'uko batashoboye kugaragaza ko amasezerano y'ingwate yabayeho, ko rero nyuma yo kubigaragaza muri uru Rukiko, rwabikosora, abo ahagarariye bakagenerwa indishyi hitawe ku kuba bararuhijwe bikomeye bagashorwa mu manza guhera mu Rukiko rw'Ubucuruzi kugeza mu

[3] Alain Bénabent, Droit des obligations, 14ème .éd. LGDJ, 2014,P 176

Rukiko rw'Ikirenga, bagahabwa indishyi z'amafaranga y'ikurikiranarubanza angana na 1000.000 Frw na 6.000.000Frw y'igihembo cya Avoka.

[26] Me Rusanganwa avuga ko asanga nta ndishyi zikwiye gutangwa kuko ikirego cy'abo baburana nta shingiro gifite, ko abazungura ba Nyagatare bari mu rubanza mu mwanya we, nta kindi cyatuma bataza mu rubanza kuko badashobora kwanga ibyo Nyagatare Théogène yakoze, ko ahubwo uwo ahagarariye yahabwa indishyi z'ikurikiranarubanza zingana na 2.000.000Frw na 2.000.000Frw y'igihembo cya Avoka. Me Mutabazi Abayo Jean Claude yasabye Urukiko kuzasuzuma iby'uhagarariye Banki ya Kigali Ltd yaka mu bushishozi bwarwo.

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[27] Urukiko rusanga Mujawamariya Rose, Tuyisenge Rachel na Ishimwe Leah Aliah baratakaje byinshi muri izi manza bishyura ba Avoka bakazikurikirana, akaba ari ngombwa ko bahabwa indishyi hashingiwe ku biteganywa n'ingingo ya 258 CCLIII, ariko kuko indishyi basaba ari nyinshi, mu bushishozi bw'Urukiko Banki ya Kigali Ltd ikaba igomba kubaha 1.800.000Frw akubiyemo ay'ikurikiranarubanza n'ay'igihembo cya Avoka.

[28] Urukiko rurasanga indishyi Banki ya Kigali, Ltd isaba itazihabwa kuko itsindwa n'urubanza.

III. ICYEMEZO CY'URUKIKO

[29] Rwemeje ko ubujurire bwa Mujawimana Rose, Tuyisenge Rachel na Ishimwe Leah Aliah bufite ishingiro.

[30] Rwemeje ko urubanza RCOMA 0552/13/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ruhindutse kuri byose.

[31] Rutegetse ko amasezerano y'ingwate Nyagatare Théogène yahaye Banki ya Kigali Ltd ku mitungo itimukanwa ikurikira: inzu iri mu kibanza N°2685 i Remera-Kimironko, n'inzu iri mu kibanza N°1647 Kigabiro–Rwamagana yose asheshwe.

[32] Rutegetse Banki ya Kigali Ltd guha Mujawimana Rose ibyangombwa byose by'iyo mitungo itimukanwa ivuzwe haruguru.

[33] Ruyitegetse guha Mujawimana Rose, Tuyisenge Rachel na Ishimwe Leah bose hamwe indishyi z'ikurikiranarubanza n''igihembo cya Avoka bingana na 1.800.000Frw.

[34] Rutegetse Banki ya Kigali Ltd kwishyura amagarama y'urubanza.