CAPLAKI v. MUKANYIRINKWAYA

[Rwanda URUKIKO RW'IKIRENGA – RCOMAA0043/14/CS (Kayitesi Z, P.J., Kayitesi R. na Nyirandabaruta, J.) 27 Gicurasi 2016]

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Kugoboka ku bushake – Iyakirwa ry'ikirego cyo kugoboka ku bushake – Ikirego cyo kugoboka ku bushake kirakirwa, mu rwego rwa mbere cyangwa mu bujurire, keretse iyo ugobotse mu bujurire ashyikirije urukiko ikirego bwa mbere kitigeze gisuzumwa n'Inkiko zibanza – Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 113.

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Guhindura kamere y'urubanza – Kugoboka ku bushake kw'Umujyi wa Kigali ntibihindura kamere y'urubanza rwatangiye ari urw`ubucuruzi ngo ruhinduke urw'ubutegetsi kuko ikiregerwa ari inshingano zikomoka ku masezerano y'ubugure impande zombi zagiranye – Itegeko Ngenga N°02/2013 ryo kuwa 16/6/2013 rihindura kandi ryuzuza Itegeko Ngenga N°58/2009 ryo kuwa 09/09/2009 rigena imiterere, imikorere n'ububasha by'Inkiko ingingo ya 12.

Incamake y'ikibazo: Umujyi wa Kigali wagiranye na sosiyete SOGECO amasezerano y'ubukode burambye bw'ikibanza N°5810 uyiha n'ibyangombwa byo kucyubakamo, ariko nyuma yaho ayo masezerano aza guseswa n'umujyi wa Kigali ku mpamvu yuko wamenyeshejwe na Electrogaz ko icyo kibanza cyari kinyuzemo umuyoboro munini w'amazi washoboraga kubangamirwa no kwangizwa icyo kibanza kiramutse cyubatswemo inyubako zikomeye.

Nyuma yaho Umujyi wa Kigali waje gutiza icyo kibanza koperative yitwa CAPLAKI kugirango igicuruzemo ibihangano byayo ariko itemerewe ku cyubakamo, nyuma yahonayo iracyamburwa gihabwa bundi bushya Mukanyirinkwaya Adele, uyu agikodesha koperative CAPLAKI, nyuma yaho bumvikana kubugure bw'icyo kibanza ndetse bakorana amasezerano y'ubugure (promesse de vente), inamuha avansi kuri ubwo bugure.

Koperative CAPLAKI yaje kumenya ko Mukanyirinkwaya nta burenganzira yari afite bwo kugurisha icyo kibanza maze isesa amasezerano y'ubugure bakoranye, maze imurega mu Rukiko rw'Ubucuruzi rwa Nyarugenge isaba gusubizwa amafaranga y'ubukode bw'ikibanza hamwe na avansi yamuhaye, urukiko rwemeza ko ikirego gifite ishingiro, rutegeka Mukanyirinkwaya kwishyura amafaranga y'avansi yahawe na Koperative CAPLAKI hamwe indishyi z'ikurikiranarubanza n'iz'igihembo cy'avoka.

Ababuranyi bombi bajuririye mu Rukiko Rukuru rw'Ubucuruzi, uru rukiko rwemeza ko ubujurire bwa koperative CAPLAKI bufite ishingiro, naho ubwa Mukanyirikinkwaya bufite ishingiro kuri bimwe, rwemeza nanone ko habaho guhuza imyenda, maze rutegekakoperative CAPLAKI gusubiza Mukanyirinkwaya ikibanza yayikodesheje, ikamuha indishyi z'ikurikiranarubanza n'iz'igihembo cy'avoka.

Koperative CAPLAKI yongeye ijurira mu Rukiko rw'Ikirenga ivuga ko umucamanza wo mu rukiko rubanziriza uru yashingiye ku itegeko ritakiriho, ko kandi yagaragaje kwivuguruza gukabije mu rubanza rujuririrwa, ivuga kandi ko yirengagije ibimenyetso yatanze byerekana ko icyo kibanza ari umutungo wa Leta. Umujyi wa Kigali wagobotse ku bushake mu Rukiko rw'Ikirenga uvuga ko ufite inyungu muri uru rubanza kuko icyo kibanza amasezerano y'ubugure ashingiyeho ari umutungo wa Leta.

Mukanyirinkwaya yatanze inzitizi yo kutakira ukugoboka kubushake kw'umujyi wa Kigali avuga ko kwakozwe ubwa mbere mu Rukiko rw'Ikirenga, kandi ko uko kugoboka kuramutse kwemewe kwahindura kamere y'urubanza, urubanzarugahinduka urw'ubutegetsi aho kuba urw'ubucuruzi kandi ikiregerwa ari ugusubizwa amafaranga.

Koperative CAPLAKI ivuga ko ukugoboka ku bushake kw'umujyi wa Kigali bidahindura kamere y'urubanza ku buryo ikirego gihinduka icy'ubutegetsi mu gihe ikiburanwa gishingiye ku mutungo ivuga ko ari uwa Leta.

Incamake y'icyemezo: 1. Ikirego cyo kugoboka ku bushake gishobora kwakirwa mu rwego rwa mbere cyangwa mu rwego rw'ubujurire, keretse iyo ugobotse mu bujurire ashyikirije Urukiko ikirego bwa mbere kitigeze gisuzumwa n'Inkiko zibanza. Bityo Umujyi wa Kigali ugomba kwemererwa kugoboka ku bushake mu Rukiko rw'Ikirenga kuko utabaye umuburanyi mu nkiko zibanza kandi ukaba wari ufite inyungu muri uru rubanza.

2. Kugoboka ku bushake kw'Umujyi wa Kigali ntibihindura kamere y'urubanza rwatangiye ari urw'ubucuruzi ngo ruhinduke urw'ubutegetsi kuko ikiregerwa ari inshingano zikomoka ku masezerano y'ubugure impande zombi zagiranye.

Inzitizi nta shingiro ifite.
Iburanisha mu mizi rizakomeza.
Amagarama y'urubanza abaye asubitswe.

Amategeko yashingiweho:

Itegeko Ngenga N°02/2013 ryo kuwa 16/6/2013 rihindura kandi ryuzuza Itegeko ngenga N°58/2009 ryo kuwa 09/09/2009 rigena imiterere, imikorere n'ububasha by'Inkiko, ingingo ya 12.

Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 112, 113 n'iya 114.

Nta manza zifashishijwe.

Ibitekerezo by'Abahanga:

Serge Guinchard "Droit et Pratique de la Procédure Civile",Edition Dalloz, Paris, 2006.
Jean Rivero na Jean Waline, "Droit Administratif", Edition Dalloz, 20ème Edition, 2004.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Kuwa 9/5/2000, Umujyi wa Kigali wahaye Sosiyeti yitwa "SOGECO" ikibanza N°5810 n'ibyangombwa byo kucyubaka, ariko kuwa 18/9/2002 Electrogaz yandikira Umujyi wa Kigali iwumenyesha ko muri icyo kibanza hanyuzemo umuyoboro w'amazi munini ugaburira igice kinini cya Kigali, ko haramutse hubatswe byakwangiza ibyo bikorwa maze Umujyi wa Kigali usesa amasezerano y'ubukode bw'icyo kibanza kuwa 31/12/2002.

[2] Kuwa 02/12/2003, Umujyi wa Kigali watije CAPLAKI ikibanza N°5810 kugira ngo igicururizemo ibihangano byayo, ariko kuwa 28/4/2009 ugiha na none Mukanyirinkwaya

Adèle maze nawe agikodesha CAPLAKI kuwa 14/5/2009 ndetse kuwa 09/06/2011 bakorana amasezerano y'ubugure, CAPLAKI yemera kuzagura icyo kibanza (Promesse de vente) iha Mukanyirinkwaya Adèle avansi ya 37.500.000Frw.

[3] Kuwa 27/3/2012, CAPLAKI yasheshe " Promesse de vente" nyuma yo kumenya y'uko Mukanyirinkwaya Adèle atari yemerewe kugurisha icyo kibanza, itanga ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge, isaba gusubizwa amafaranga y'ubukode na avansi yatanze n'indishyi zinyuranye, Urukiko ruca urubanza RCOM0279/14/TC/Nyge kuwa 30/5/2014, rwemeza ko ikirego cya CAPLAKI gifite ishingiro, rutegeka Mukanyirinkwaya Adèle kwishyura CAPLAKI 38.300.000Frw akubiyemo amafaranga y'avansi y'ikibanza, indishyi, ay'ikurikiranarubanza n'igihembo cy'Avoka.

[4] CAPLAKI na Mukanyirinkwaya bajuririye urwo rubanza mu Rukiko Rukuru rw'Ubucuruzi, ubujurire bwa Mukanyirinkwaya buhabwa RCOMA0353/14/HCC naho ubwa CAPLAKI buhabwa RCOMA0390/14/HCC, izo manza zirahuzwa, Urukiko ruca urubanza kuwa 19/09/2014, rwemeza ko ubujurire bwa Mukanyirinkwaya Adèle bufite ishingiro naho ubwa CAPLAKI bufite ishingiro kuri bimwe, rwemeza ko imikirize y'urubanza rwajuririwe ihindutse mu ngingo zayo zose, rukiza ko habaho guhuza imyenda, rutegeka CAPLAKI gusubiza Mukanyirinkwaya Adèle ikibanza yayikodesheje, itabikora urubanza rukimara gusomwa ikishyura Mukanyirinkwaya 34.948.000Frw y'ubukode imubereyemo, 1.000.000Frw y'indishyi zo kumushora mu manza, 1.500.000 Frw y'igihembo cy'Avoka na 500.000Frw y'ikurikiranarubanza.

[5] CAPLAKI ihagarariwe na Me Nsengiyumva Niyondora yajuririye na none urwo rubanza mu Rukiko rw'Ikirenga kuwa 14/10/2014, avuga ko Umucamanza yashingiye ku Itegeko ritakiriho, ko kandi yagaragaje kwivuguruza gukabije mu rubanza rujuririrwa no kuba yarirengagije ibimenyetso byerekana ko ikibanza CAPLAKI ikoreramo ari umutungo wa Leta, naho <u>Umujyi wa Kigali ugoboka ku bushake</u> muri uru rubanza.

[6] Urubanza rwaburanishijwe mu ruhame kuwa 26/04/2016, CAPLAKI yitabye ihagarariwe na Me Nsengiyumva Niyondora, Mukanyirinkwaya Adèle ahagarariwe na Me Mwanayire Florentine na Me Semadwinga Claude naho Umujyi wa Kigali uhagarariwe na Me Rubango Epimaque.

[7] Me Mwanayire Florentine na Me Semadwinga Claude batanze inzitizi yo kutakira ukugoboka ku bushake kw'Umujyi wa Kigali.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

Kumenya niba ukugoboka ku bushake kwakozwe n'Umujyi wa Kigali kugomba kwemerwa kandi niba gutuma kamere y'urubanza ihinduka.

[8] Me Rubango Epimaque avuga ko Umujyi wa Kigali wagobotse ku bushake ushingiye ku ngingo ya 112 na 113 y'Itegeko Nº21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi kuko ufite inyungu muri uru rubanza.

[9] Asobanura ko mu mwaka wa 2000, Umujyi wa Kigali watije SOGECO ikibanza Nº5810, basinyana n'amasezerano y'ubukode ariko kuwa 31/10/2002 urayasesa kuko wasanze icyo kibanza kinyuramo umuyoboro w'amazi munini ugaburira igice kinini cya

Kigali, ko guhera icyo gihe, icyo kibanza nta muntu ugifiteho uburenganzira, ko ibyo binashimangirwa no kuba Umujyi wa Kigali waragitije CAPLAKI kugira ngo icururizemo ibihangano byayo, ariko itemerewe kubakamo inyubako zikomeye no gukora ibikorwa bibangamira ibikorwa bya Electrogaz byari muri icyo kibanza.

[10] Avuga ko kandi kuba Mukanyirinkwaya yaragiranye na CAPLAKI amasezerano y'ubugure (Promesse de vente) bw'uwo mutungo kandi utari uwe, ntibanagobokeshe Umujyi wa Kigali kugira ngo hasobanuke nyir'umutungo, bigaragaza umugambi wo gushaka gutwara umutungo utari uwabo, asaba Urukiko kwakira ukugoboka kw'Umujyi wa Kigali.

[11] Me Mwanayire Florentine avuga ko kugoboka ku bushake kw'Umujyi wa Kigali kutagomba kwakirwa kuko kwakozwe bwa mbere mu Rukiko rw'Ikirenga kandi wari usanzwe uzi ikibazo, ko Umujyi wa Kigali uvuze ko ikibanza kiburanwa ari icyawo, ikirego kigomba kuba icy'ubutegetsi, ukakiregera mu Rukiko ruburanisha imanza z'ubutegetsi, akomeza avuga ko Umujyi wa Kigali nta nyungu ufite muri uru rubanza kuko ikiregerwa ari ugusubizwa amafaranga.

[12] Me Semadwinga Claude avuga ko kugoboka ku bushake kw'Umujyi wa Kigali kutagomba kwakirwa kuko ikirego CAPLAKI iburana na Mukanyirinkwaya gishingiye ku masezerano y'ubukode n'ay'ubugure bw'ikibanza N°5810, kikaba ari ikirego cy'Ubucuruzi, ashingira ku ihame mu mategeko rya (Continuité de pouvoir) avuga ko icyemezo cy'Ubuyobozi cyakozwe n'Ubuyobozi bwari bubifitiye ububasha icyo gihe, Umujyi wa Kigali ukagitesha agaciro bihindura urubanza urw'ubutegetsi, ko rero ikirego cy'Umujyi wa Kigali kidashobora kubangikana n'icy'ubucuruzi.

[13] Me Niyondora Nsengiyumva avuga ko nta cyabuza Umujyi wa Kigali kugoboka ku bushake aho urubanza rwaba rugeze hose no ku rwego rw'ubujurire mu gihe ugaragaza ko ufite inyungu muri uru rubanza kuko nk'uko biteganywa n'ingingo za 113, 114 na 115 z'Itegeko N°21/2012 ryavuzwe haruguru ariwo watije CAPLAKI ikibanza N°5810, ko kandi kuba Umujyi wa Kigali waragobotse mu rubanza ku bushake bidahindura kamere y'urubanza ku buryo ikirego gihinduka icy'ubutegetsi mu gihe ikiburanwa gishingiye ku mutungo uvuga ko ari uwawo.

UKO URUKIKO RUBIBONA

[14] Ingingo ya 112 y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko "Umuntu wese afite uburenganzira bwo kugoboka mu rubanza ataregeye cyangwa atarezwemo, mu nkiko zose n'igihe cyose, iyo urwo rubanza rushobora kugira icyo rumurenganyaho".

[15] Naho ingingo ya 113 y'iryo tegeko ikavuga ko "Kugoboka ku bushake ari igihe umuntu ku bushake bwe, yinjiye mu rubanza atareze cyangwa atarezwemo, kugira ngo yemeze ko ikiburanwa ari icye cyangwa kugira ngo yizere ko uburenganzira bwe budahungabanywa n'icyemezo cy'Urukiko" ndetse n'ingingo ya 114 y'iryo tegeko ikavuga ko "kugira ngo ikirego cye cyakirwe, ugoboka agomba kugaragaza inyungu yemewe n'amategeko, itaziguye kandi ye bwite, yaba ishingiye ku mutungo we cyangwa ku mutimanama".

[16] Izi ngingo zirebewe hamwe zumvikanisha ko umuntu wese yemerewe kugoboka mu rubanza ataregeye cyangwa atarezwemo, ku rwego rwose urubanza rwaba rugezeho iyo urwo rubanza rushobora kugira icyo rumurenganyaho, apfa gusa kugaragaza ko hari inyungu yemewe n`amategeko itaziguye kandi ye bwite yaba ishingiye ku mutungo we cyangwa umutimanama. Ibi kandi ni nabyo bishimangirwa n'ibivugwa n'Umuhanga mu mategeko witwa Serge Guinchard mu gitabo cye "Droit et Pratique de la Procédure Civile", agira ati "Ikirego cyo kugoboka ku bushake kirakirwa, yaba ku rwego rwa mbere cyangwa mu rwego rw'ubujurire, keretse iyo ugobotse mu bujurire ashyikirije Urukiko ikirego bwa mbere kitigeze gisuzumwa n'Inkiko zibanza"[1].

[17] Ku birebana n`igoboka ku bushake ry'Umujyi wa Kigali bwa mbere kuri uru rwego, hashingiwe ku bisobanuro by'amategeko bitanzwe haruguru, Urukiko rurasanga Umujyi wa Kigali ugomba kwemererwa kugoboka ku bushake mu Rukiko rw'Ikirenga kuko utabaye umuburanyi yaba mu rubanza RCOM0279/14/TC/Nyge rwaciwe n'Urukiko rw'Ubucuruzi rwa Nyarugenge, yaba mu manza RCOMA0353/14/HCC - RCOMA0390/14/HCC zijuririrwa, byongeye kandi Umujyi wa Kigali ufite inyungu muri uru rubanza kubera ko n'ubwo bwose ikiburanwa ari ugusubiza CAPLAKI amafaranga 60.572.000Frw n'indishyi zinyuranye, ariko ayo mafaranga akomoka ku bukode n'ubugure bw'ikibanza Nº5810 Umujyi wa Kigali uvuga ko ari icyawo.

[18] Ku birebana n'ibirego birebana n`imanza z'ubutegetsi,Itegeko Ngenga Nº02/2013 ryo ku wa 16/6/2013 rihindura kandi ryuzuza Itegeko ngenga Nº58/2009 ryo kuwa 09/09/2009 rigena imiterere, imikorere n'ububasha by'Inkikomu ngingo yaryo ya 12 riha Ingereko zihariye ziburanisha imanza z'ubutegetsi ububasha bwo kuburanisha ku rwego rwa mbere ibirego birebana n'ibyemezo by'ubutegetsi bifatwa ku rwego rwa nyuma n`abayobozi, ikanagaragaza urutonde rw'ibyo birego bigeze ku icumi (10), naho iya 15 igaha Urukiko Rukuru ububasha bwo kuburanisha ibirego bijyanye n'imanza z'ubutegetsi byerekeranye no gukuraho ibyemezo by'ubutegetsi byafashwe ku rwego rwa nyuma na Perezida wa Repubulika n'abayobozi bakuru b'igihugu, ikanerekana urutonde rw'ibyo birego bigarukiye kuri bitatu (3).

[19] Ku bijyanye nuko "kugoboka ku bushake kw'Umujyi wa Kigali" byatuma ikirego cy'ubucuruzi gihinduka icy'ubutegetsi, n'ubwo Umushingamategeko atatanze igisobanuro mu buryo butaziguye "icyo ikirego cy`ubutegetsi aricyo" (définition), Urukiko rusanga harebewe hamwe ibyo ingingo zivuzwe haruguru ziteganya, ibirego by`ubutegetsi ari ibirego bishingiye ku byemezo byafashwe ku rwego rwa nyuma n'abayobozi mu nzego z'ubutegetsi bwa Leta. Ibi kandi bihura na none n`ibivugwa n' Abahanga mu mategeko Jean Rivero na JeanWaline, mu gitabo cyabo "Droit Administratif", aho bagira bati: " … iyo Ubuyobozi butubahirije amategeko, umucamanza uburanisha imanza z'ubutegetsi niwe utegeka ko yubahirizwa, utishimiye icyemezo cy'ubuyobozi yemerewe kuregera Urukiko asaba kuvanaho icyemezo cyafashwe hadakurikijwe amategeko cyangwa asaba indishyi zikomoka kuri icyo cyemezo anenga, ko ibyo birego by'ubutegetsi byerekanwa na kamere y'ikibazo cyashyikirijwe Umucamanza"[2].

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[1]Droit et Pratique de la Procédure Civile, Edition Dalloz, Paris, 2006 C'est que l'intervention volontaire est receivable tant en première instance qu'en appel, sauf dans ce dernier cas l'interdiction de soumettre à la Cour un litige nouveau en la saisissant de prétentions qui n'ont pas subi le premier degré de juridiction. A chacun de ces degrés, l'intervention volontaire est possible en tout état de cause, même après l'ordonnance de clôture dans les procédures écrites devant les Tribunaux de première Instance et devant la Cour d'Appel.

[2]: "…..Au fond, on considère que si l'administration manque au droit, c'est au Juge administrative qu'il revient de la sanctionner. Pour cela les administrés disposent d'un recours pour excès de pouvoir, le plein

[20] Nk'uko bigaragazwa n'inyandiko itanga ikirego, bigaragara ko ikiburanwa muri uru rubanza ari ugusubizwa amafaranga 60.572.000 n'indishyi zinyuranye, ayo mafaranga akaba akomoka ku masezerano yabaye hagati ya CAPLAKI na Mukanyirinkwaya Adèle (Promesse de vente) y'ubugure bw'ikibanza Nº5810.

[21] Hashingiwe ku bisobanuro by`amategeko n'ibivugwa n'abahanga mu mategeko bigaragajwe haruguru, Urukiko rurasanga kuba Umujyi wa Kigali waragobotse ku bushake muri uru rubanza, ugamije kugaragaza ko ikibanza Mukanyirinkwaya yashatse kugurisha ari icya Leta, bidahindura kamere y'urubanza rwatangiye ari urubanza rw'ubucuruzi, kuko bidakuraho inshingano zikomoka kuri ayo masezerano y`ubugure impande zombi zagiranye, bityo kugoboka ku bushake bw'Umujyi wa Kigali muri uru rubanza rw'ubucuruzi bikaba bidashobora gutuma kamere yarwo ihinduka iy'ubutegetsi.

III. ICYEMEZO CY'URUKIKO.

[22] Rwemeje ko inzitizi yatanzwe na Mukanyirinkwaya Adèle nta shingiro ifite;

[23] Rwemeje ko Umujyi wa Kigali wemerewe kugoboka ku bushake mu rubanza rwajuririwe RCOMAA0043/14/CS muri uru Rukiko;

[24] Rutegetse ko iburanisha ry'urubanza RCOMAA0043/14/CS mu mizi rizakomeza kuwa 12/7/2016;

[25] Rutegetse ko amagarama y'uru rubanza abaye asubitswe.

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contentieux………La classification moderne des recours repose sur la nature de la question posée au Juge par le requérant. Droit Administratif", Edition Dalloz, 20ème Edition, 2004, page 27, paragr.44.