KAMUGWIZA v HASHIM

[Rwanda URUKIKO RW'IKIRENGA - RS/INJUST/RC 00008/2020/SC (Mukamulisa, P.J., Nyirinkwaya, Hitiyaremye, Muhumuza na Kalimunda, J.) 20 Gicurasi 2022]

Amategeko mbonezamubano - Ubutumwa bwo kwivanaho umutungo - Umuntu wahawe ubutumwa rusange afite gusa ububasha bwo gukora ibikorwa bisanzwe byo gucunga umutungo no kuwungura, naho igikorwa gikomeye nk'icyo kugurisha cyangwa kwivanaho umutungo mu buryo ubwo aribwo bwose, gisaba ubutumwa bweruye bugaragariza uwabuhawe nibura umwirondoro w'umutungo ugomba kugurishwa; ni ukuvuga ko bugomba kugaragaza uwo mutungo mu buryo bugaragara kandi budateye urujijo.

Incamake y'ikibazo: Uru rubanza rwatangiriye mu Rukiko rwisumbuye rwa Gasabo Hashim arega Mukuralinda ko yamugurishirje ikibanza mu buryo bunyuranije n'amategeko aho avuga ko yamuhaye ububasha bwo kujya amugurira ibibanza akanamwubakira amazu ariko nyuma Mukuralinda aza kuvuga ko indangamuntu ye yatakaye bityo ko hakwiye gukorwa indi nyandiko mpeshabubasha isimbura iya mbere, hanyuma iyo nyandiko iza gukorerwa imbere ya Noteri ariko hiyongeramo ijambo kugurisha bituma uwahawe ububasha agurisha ikibanza cya Hashim ntiyanamuha n'amafaranga akivuyemo. Urukiko rwisumbuye rwasanze Hashim atabasha gusobanura uko yatanze ububasha bwo kugurisha bituma atsindwa. Yaje kujurira mu Rukiko rw'Ubujurire, nyuma yo gusuzuma ubujurire bwe, rusanga bufite ishingiro ko amasezerano y'ubugure yakozwe ku wa 21/03/2015 ku butaka bubaruye kuri UPI 5/07/09/02/984, n'ibyangombwa by'ubukode burambye byanditswe kuri Kamugwiza byatanzwe ku wa 20/02/2015 no ku wa 13/07/2015 biteshejwe agaciro. Urwo rubanza nirwo Kamugwiza, uvuga ko yaguze ikibanza kiburanwa yajuririye mu Rukiko rw'Ubujurire ariko urwo rukiko rusanga ubujurire bwe nta shingiro bufite, noneho bituma atanga ikirego gisubirishamo urubanza ku mpamvu z'akarengane.

Mu iburanisha mu Rukiko rw'Ikirenga, Kamugwiza asobanura ko akarengane ke gashingiye ku kuba Urukiko rubanza rutarahaye agaciro inyandiko itanga ububasha burimo no kugurisha bigatuma rutesha agaciro amasezerano y'ubugure bw'ikibanza nyamara mu rwego rw'amategeko ntahagaragajwe inenge ayo masezerano y'ubugure afite kuko yakozwe n'abantu babifitiye ububasha. Hashim we avuga ko atigeze atanga ububasha bwo kugurisha ko icyabaye ari uko bamusomeye inyandiko, itanga ububasha bwo kugura no kumwubakira amazu gusa hanyuma bakamusinyisha ku nyandiko ebyiri bamubwira ko zombi zisa iya kabiri ikaba ariyo yari yongewemo ijambo kugurisha. Yasobanuye kandi ko yizeraga Mukuralinda kuko bakuranye hanyuma we akaza kugira ikibazo cyo kutabona neza bitewe n'uburwayi bituma amuha ububasha bwavuzwe hejuru.

Incamake y'icyemezo: 1. Umuntu wahawe ubutumwa (mandat) rusange afite gusa ububasha bwo gukora ibikorwa bisanzwe byo gucunga umutungo no kuwagura. Naho ibikorwa bikomeye nk'icyo kugurisha kivugwa muri uru rubanza, bisaba ubutumwa bweruye bugaragariza uwabuhawe nibura umwirondoro w'umutungo ugomba kugurishwa; kubwo ibyo kandi ubutumwa bwo kwivanaho

umutungo mu buryo ubwo aribwo bwose bugomba kuba butari rusange, bugomba kugaragaza uwo mutungo mu buryo bugaragara kandi budateye urujijo.

2. Inyandiko mpeshabubasha yanditswe mu buryo rusange ikwiye gufatwa nk'igamije gucunga umutungo mu rwego rwo kurengera uwayitanze kuko bitashoboka ko umuntu ukiriho, ufite ubushobozi n'ububasha atanga uburenganzira bw'uko imitungo yose afite n'iyo azagira igurishwa n'undi.

Ikirego cyatanzwe cyo gusubirishamo urubanza Nº RCAA 00001/2019/CA ku mpamvu z'akarengane nta shingiro gifite;

Amategeko yifashishijwe

Itegeko Nº 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 9, 11

Amategeko yifshishijwe atagikoreshwa

Itegeko ryo ku wa 30 Nyakanga 1888 rishyiraho Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano, ingingo ya 530.

Imanza zifashishijwe

Cass. Civ. 1ère, 21 décembre 1976, Bull.Civ. I, N° 421.

The Church of Christ Charitable Trust & Educational Charitable Society v. M/s Ponniamman Educational Trust, rwaciwe n'Urukiko rw'Ikirenga rw'Ubuhinde, ku wa 03/07/2012

Mrs. Umadevi Nambiar v. Thamarasseri Roman Catholic Diocese Rep by Its Procurator Devssia's Son Rev. Father Joseph Kappil, rwaciwe n'Urukiko rw'Ikirenga rw'Ubuhinde, ku wa 01/04/2022, para 09, 17-18.

Inyandiko z'abahanga

Authority given to the agent by explicit agreement, either orally or in writing. B.A. Garner, Black's law dictionary, ST. PAUL, MINN., WEST PUBLISHING CO., 2019, 11th ed., p.128.

Philippe Malaurie, Laurent Aynès na Pierre Yves Gautier, Droit des contrats spéciaux, Paris, L.G.D.J., 2018, pp.345-346.

Francois Collart Dutilleul et Philippe Delebecque, Contrats civils et commerciaux, Paris, Dalloz, 2019, p.548.

Jacques Raynard et Jean-Baptiste Seube, Droit des contrats spéciaux, Lexis-Nexis, Paris, 2019, p.397, 398.

Urubanza

I. INCAMAKE Y’URUBANZA

1. Uru rubanza rwatangijwe na Sakina HASHIM mu Rukiko Rwisumbuye rwa Gasabo avuga ko Mukuralinda Alain Bernard yamugurishirije ikibanza mu buryo bunyuranyije n’amategeko. Yasobanuye ko ku wa 15/01/2009 yamuhaye procuration kugira ngo ajye amugurira ibibanza anamwubakire amazu, bigeze mu mwaka wa 2014, Mukuralinda Alain Bernard amubwira ko irangamuntu yari yanditswe muri iyo procuration yatakaye, akaba akeneye indi procuration igaragaza irangamuntu nshya. Avuga ko bajyanye kwa Noteri ku wa 09/05/2014, bamusomera procuration isa n’iya mbere ariko bamutega indi irimo ijambo “kugurisha”, ayisinya atabizi, iyo bamuteze aba ariyo ishingirwaho hagurishwa ikibanza cye, n’amafaranga yavuyemo ntiyayahabwa.

2. Urwo Rukiko rwasanze Sakina Hashim atavuga ko atahaye MukuralindA Alain Bernard ububasha bwo kumugurishiriza ikibanza kandi barajyanye kwa noteri ari muzima, nta n’agahato yashyizweho akamusinyira procuration yo ku wa 09/05/2014. Ibi byatumye Sakina Hashim ajuririra Urukiko Rukuru, nyuma yo gusuzuma ubujurire bwe, rusanga bufite ishingiro. Urwo rubanza nirwo Kamugwiza Phoebe, uvuga ko yaguze ikibanza kiburanwa yajuririye mu Rukiko rw’Ubujurire ariko urwo Rukiko rusanga ubujurire nta shingiro bufite, noneho bituma atanga ikirego gisubirishamo urubanza ku mpamvu z’akarengane.

3. Nyuma yo gusanga MukuralindA Alain Bernard yarashingiye ku butumwa rusange agurisha umutungo wa Sakina Hashim, Uru Rukiko rusanga:

i. Umuntu wahawe ubutumwa (mandat) rusange afite gusa ububasha bwo gukora ibikorwa bisanzwe byo gucunga umutungo no kuwagura; naho ibikorwa bikomeye nk’icyo kugurisha kivugwa muri uru rubanza, bisaba ubutumwa bweruye bugaragariza uwabuhawe nibura umwirondoro w’umutungo ugomba kugurishwa;

ii. Procuration yanditswe mu buryo rusange ikwiye gufatwa nk’igamije gucunga umutungo mu rwego rwo kurengera uwayitanze kuko bitashoboka ko umuntu ukiriho, ufite ubushobozi n’ububasha atanga uburenganzira bw’uko imitungo yose afite n’iyo azagira igurishwa n’undi;

iii. Ubutumwa bwo kwivanaho umutungo mu buryo ubwo aribwo bwose bugomba kuba butari rusange, bugomba kugaragaza uwo mutungo mu buryo bugaragara kandi budateye urujijo.

Nyuma y’ibyo bisobanuro, Urukiko rwanzuye ko, harebwe imiterere ya procuration yashingiweho, Mukuralinda Alain Bernard nta bubasha bwo kugurisha imitungo ya Sakina Hashim yari afite.

II. IMITERERE Y’URUBANZA.

[1] Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Gasabo, Sakina Hashim arega Kamugwiza Phoebe kuba yaragiranye amasezerano y’ubugure ya baringa na Mukuralinda Alain Bernard, uyu akagurisha ikibanza cye kibaruye kuri UPI 5/07/09/02/984, giherereye mu Karere ka Bugesera, Umurenge wa Ntarama, Akagali ka Kanzenze, Umudugudu wa Kabeza yitwaje ko atumwe na Sakina Hashim kukimugurishiriza, nyamara nta burenganzira bwo kugurisha, kwakira amafaranga cyangwa ubwo guhinduza ibyangombwa mu izina rye yatanze, asaba Urukiko kwemeza ko ibyakozwe na Mukuralinda Alain Bernard byo kugurisha mu izina rye icyo kibanza nta kuri kurimo, bityo ko nta n’amasezerano y’ubugure yabayeho.

[2] Kamugwiza Phoebe yireguye avuga ko amasezerano y’ubugure yabayeho, ko icyo kibanza yakiguze 45.000.000 Frw, yishyura Mukuralinda Alain Bernard wari uhagarariye Sakina Hashim

kuko uyu yari yaramuhaye procuration, asaba Urukiko kudaha ishingiro ikirego cya Sakina Hashim ahubwo rukemeza ko amasezerano y'ubugure yakozwe mu buryo bukurikije amategeko kuko ntawigeze ayatesha agaciro cyangwa ngo ayatambamire.

[3] Mu nama ntegurarubanza, ababuranyi basabye ko Famida Hashim na MukuralindA Alain Bernard bagobokeshwa mu rubanza. Mu gihe cy'iburanisha, Urukiko rwasanze nta kigaragaza ko Mukuralinda Alain Bernard yamenyeshejwe iby'uko afite urubanza ndetse n'ibyavugwaga na Me Nizeyimana Boniface by'uko amuhagarariye, atabyemererwa kuko ari we uburanira Kamugwiza Phoebe wasabye ko Mukuralinda Alain Bernard agobokeshwa, ruvuga ko Mukuralinda Alain Bernard adakwiye gufatwa nk'umuburanyi mu rubanza.

[4] Ku bijyanye n'imizi y'ikirego, urubanza no RC 00303/2016/TGI/GSBO rwaciwe ku wa 29/06/2017, Urukiko rusanga inyandiko y'impeshabubasha (procuration) Mukuralinda Alain Bernard yahawe na Sakina Hashim nta nenge ifite kuko yakorewe imbere ya Noteri, Sakina Hashim ayisinyaho, akuze, ari muzima kandi nta gahato yashyizweho, byumvikanisha ko Mukuralinda Alain Bernard yari afite ububasha bwo kugurisha imitungo ya Sakina Hashim mu gihe abona ari ngombwa, rwanzura ko amasezerano y'ubugure atagomba guteshwa agaciro. Naho ku bijyanye n'indishyi zasabwaga n'abaregwa, Urukiko rwasanze zifite ishingiro, rutegeka Sakina Hashim guha Kamugwiza Phoebe na Famida Hashim, kuri buri wese, indishyi zingana na 1.300.000 Frw y'igihembo cya Avoka n'amafaranga y'ikurikiranarubanza.

[5] Sakina Hashim yajuririye Urukiko Rukuru avuga ko Kamugwiza Phoebe atari kugura ikibanza ku wa 21/03/2015 kandi bigaragara ko yari yaragiherewe icyangombwa cy'ubukode burambye ku wa 20/02/2015, ndetse ko na nyuma yaho, ku wa 13/07/2015 yongeye guhabwa ikindi cyangombwa kuri uwo mutungo, bikaba bitumvikana uburyo yari guhabwa ibyangombwa bibiri ku mutungo umwe. Yavuze kandi ko nawe yari yarahawe icyangombwa cy'ubukode burambye kuri uwo mutungo ku wa 20/02/2015, bivuze ko kuri iyo tariki hatanzwe ibyangombwa bibiri, bihabwa abantu batandukanye ku mutungo umwe, ibyo bikaba bitera urujijo, asaba kurenganurwa agasubizwa ikibanza cye Mukuralinda Alain Bernard yagurishije atabimuhereye uburenganzira.

[6] Mu iburanisha ryabaye ku wa 19/04/2018, ababuranyi basabye ko Mukuralinda Alain Bernard agobokeshwa mu bujurire ariko ntagire ibyo acibwa. Urukiko rwasanze ubwo busabe bufite ishingiro, rutegeka ko Mukuralinda Alain Bernard agobokeshwa, akaba umuburanyi mu rubanza.

[7] Mu rubanza no RCA 00265/2017/HC/KIG rwaciwe ku wa 09/11/2018, Urukiko rwanzuye ko ubujurire bwa Sakina Hashim bufite ishingiro, ko amasezerano y'ubugure yakozwe ku wa 21/03/2015 ku butaka bubaruye kuri UPI 5/07/09/02/984, n'ibyangombwa by'ubukode burambye byanditswe kuri Kamugwiza Phoebe byatanzwe ku wa 20/02/2015 no ku wa 13/07/2015 biteshejwe agaciro. Mu gufata icyemezo, Urukiko rwasanze:

i. Ikigo gishinzwe imicungire y'ubutaka mu Rwanda kivuga ko ku bijyanye n'ikibanza kibaruye kuri UPI 5/07/09/02/984, nta byangombwa bibiri byatanzwe ku wa 20/02/2015 kuko hatanzwe icya Sakina Hashim gusa, rusanga nubwo Kamugwiza Phoebe afite amasezerano y'ubukode burambye yo ku wa 20/02/2015 n'ayo ku wa 13/07/2015, atabasha kugaragaza ibyangombwa yahawe n'uwamugurishije n'igihe yakorewe ihererekanyamutungo;

ii. Sakina Hashim atari kuba yagurishije Kamugwiza Phoebe uwo mutungo ngo agumane icyangombwa cyawo cy'umwimerere;
iii. Bitumvikana uburyo Mukuralinda Alain Bernard yari kwishyurwa 45.000.000 Frw, yajya kuyaha nyirayo akayatanga mu ntoki.

[8] Nyuma yo gukoresha igenagaciro ry'umutungo uburanwa ryagaragaje ko ufite agaciro ka 182.165.000 Frw, Kamugwiza Phoebe yajuririye Urukiko rw'Ubujurire avuga ko Urukiko Rukuru rutagombaga gutesha agaciro amasezerano y'ubugure yo ku wa 21/03/2015, kuko yakozwe mu buryo bwemewe n'amategeko, kubera ko mu burenganzira Sakina Hashim yari yarahaye Mukuralinda Alain Bernard harimo n'ubwo kugurisha imitungo ye.

[9] Sakina Hashim yatanze inzitizi y'iburabubasha, avuga ko agaciro k'ikiburanwa katageze kuri 75.000.000 Frw ziteganywa n'Itegeko N° 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko kuko haburanwa gutesha agaciro amasezerano y'ubugure bw'ubutaka bwaguzwe 45.000.000 Frw, agaciro ka 182.165.000 Frw kavugwa muri raporo y'igenagaciro yatanzwe n'uwajuriye kakaba katashingirwaho kuko ntaho kagaragara mu masezerano y'ubugure kandi kakaba kataragiweho impaka kuva urubanza rugitangira.

[10] Ku wa 08/11/2019, Urukiko rwafashe icyemezo ku nzitizi y'iburabubasha mu rubanza N° RCAA 00001/2019/CA, rusanga uregwa ataranyomoje igenagaciro ryatanzwe na Kamugwiza Phoebe, bityo ko nta cyarubuza kwemeza ko agaciro k'ikiburanwa ari akatanzwe n'uwajuriye, rwanzura ko inzitizi nta shingiro ifite.

[11] Naho ku wa 06/05/2020, Urukiko rwaciye urubanza mu mizi ku kibazo cyo kumenya niba amasezerano y'ubugure hagati ya Kamugwiza Phoebe na Mukuralinda Alain Bernard akwiye guteshwa agaciro, rusanga Urukiko Rukuru rwari rufite ukuri ubwo rwemezaga ko ayo masezerano ateshwa agaciro. Urukiko rw'Ubujurire rwageze kuri uwo mwanzuro rushingiye ku mpamvu zikurikira:

i. Kuba ubutaka bubaruye kuri UPI 5/07/09/02/984 bwaranditswe kuri KamugwizA Phoebe ku wa 20/02/2015, ariko amasezerano y'ubugure na Sakina Hashim akandikwa ko yakozwe ku wa 21/03/2015, bikaba bidashoboka ko yagura ubutaka busanzwe bumwanditsweho;

ii. Kuba hari ibaruwa Mukuralinda Alain Bernard yandikiye Umuyobozi w'Akarere ka Bugesera ku wa 24/06/2015 asaba ko Kamugwiza Phoebe yandikwaho ikibanza yaguze na Sakina Hashim kibaruye kuri UPI 5/07/09/02/984, iyo baruwa ikaba yaranditswe Kamugwiza Phoebe yaramaze kwiyandikishaho ubwo butaka ku wa 20/2/2015;
iii. Kuba procurations Mukuralinda Alain Bernard ashingiraho avuga ko zamuhaga ububasha bwo kugurisha uwo mutungo mu izina rya Sakina Hashim zigaragaza ko zitandukanye, iyo ku wa 15/01/2009 ikaba imuha ububasha bwo kugurira Sakina Hashim ubutaka no kumwubakira inzu, naho iyo ku wa 09/05/2014 ikamuha uburenganzira busesuye harimo n'ubwo kugurisha, kuba izo procurations zombi zarakorewe imbere ya Noteri umunsi umwe wo ku wa 09/05/2014 bikaba bigaragaza ko zakozwe mu buriganya;

iv. Kuba nta hererekanya ry'ubutaka ryabayeho hagati ya Kamugwiza Phoebe na Sakina Hashim kuko uyu agifite icyangombwa cy'ubwo butaka, nyamara mu ngingo ya 4 n'iya 5 z'amasezerano y'ubugure yo ku wa 21/03/2015, Mukuralinda Alain Bernard wari uhagarariye Sakina Hashim akaba yaravuze ko ahaye Kamugwiza Phoebe ibyangombwa by'ubutaka aguze, ko kuba inyandiko z'umwimerere zari zikibitswe na Sakina Hashim ari ikimenyetso cy'uko uyu atigeze abugurisha.

[12] Kamugwiza Phoebe yandikiye Perezida w'Urukiko rw'Ikirenga asaba ko urubanza no RCAA 00001/2019/CA rwaciwe n'Urukiko rw'Ubujurire ku wa 06/05/2020, rusubirishwamo ku mpamvu z'akarengane. Mu cyemezo Nº 057/CJ/2020 cyo ku wa 16/11/2020, Perezida w'Urukiko rw'Ikirenga amaze gusuzuma ubwo busabe, yemeje ko rwoherezwa mu Bwanditsi bw'Urukiko rw'Ikirenga kugira ngo ruzongere ruburanishwe.

[13] Urubanza rwaburanishijwe mu ruhame ku wa 12/10/2021, Kamugwiza Phoebe ahagarariwe na Me Nizeyimana Boniface, Sakina Hashim ahagarariwe na Me Nsabimana Jean-Baptiste, Mukuralinda Alain Bernard ahagarariwe na Me Niyitegeka Eraste naho Famida Hashim ahagarariwe na Me Nsabayezu Evariste, haherwa ku kibazo cyazamuwe na Me Nsabimana Jean-Baptiste wasabye ko hasuzumwa niba Urukiko rw'Ubujurire rwari rufite ububasha bwo kuburanisha ubujurire bwa kabiri bwa Kamugwiza Phoebe. Ku wa 29/10/2021, Urukiko rwaciye urubanza rubanziriza urundi, rusanga umuburanyi utarasabye ko urubanza rusubirishwamo ku mpamvu z'akarengane, atakwuririra ku kirego cyatanzwe n'uwo baburana, ngo nawe asabe Urukiko gusuzuma ibyo atishimiye muri urwo rubanza, rwanzura ko inzitizi y'iburabubasha bw'Urukiko rw'Ubujurire yatanzwe muri urwo rukiko itakongera gusuzumwa muri uru rubanza.

[14] Iburanisha ry'urubanza mu mizi ryabaye ku wa 11/01/2022, ababuranyi bahagarariwe nka mbere, bajya impaka ku kibazo cyo kumenya niba Mukuralinda Alain Bernard yari yarahawe na Sakina Hashim ububasha bwo kugurisha ikibanza kibaruye kuri UPI 5/07/09/02/984 n'icy'indishyi zisabwa na buri ruhande, urubanza rurapfundikirwa, ababuranyi bamenyeshwa ko ruzasomwa ku wa 18/02/2022.

[15] Mu gihe ariko Urukiko rwari rwiherereye ngo ruce urubanza, rwasanze ari ngombwa guhamagaza bamwe mu baburanyi kugira ngo rubone amakuru ahagije ku bimenyetso biri muri dosiye bitavugwaho rumwe. Rushingiye ku biteganywa n'ingingo ya 60 y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko Urukiko rushobora gutegeka ko ababuranyi barwitaba ubwabo, Urukiko rwemeje ko Sakina Hashim, Mukuralinda Alain Bernard na Famida Hashim barwitaba ubwabo.

[16] Iburanisha ryongeye gupfundurwa ku wa 13/04/2022, Kamugwiza Phoebe ahagarariwe na Me Nizeyimana Boniface, Sakina Hashim yunganiwe na Me Nsabimana Jean-Baptiste, Mukuralinda Alain Bernard yunganiwe na Me Niyitegeka Eraste naho Famida Hashim yunganiwe na Me Nsabayezu Evariste.

[17] Iburanisha rigitangira, Me NsabimanA Jean-Baptiste, uburanira Sakina Hashim, yasabye ko iburanisha rihagarara mu nyungu rusange z'ubutabera kugira ngo uru urubanza rutegereze urubanza Nº RPA 00360/2020/HC/KIG – RPA 00419/2020/HC/KIG ruri mu Rukiko Rukuru. Yavuze ko ibyo abishingira ku ihame rya le pénal tient le civil en état. Asobanura ko muri urwo

rubanza rw'inshinjabyaha, Sakina Hashim aregwa icyaha cyo guhimba cyangwa guhindura amasezerano y'ubukode burambye ari muri dosiye iri muri uru Rukiko. Me Nsabayezu Evariste yashyigikiye ko uru rubanza ruhagarara ashingiye ku kuba imanza zasubirishijwemo ku mpamvu z'akarengane zitajuririrwa.

[18] Me Nzeyimana Boniface we yavuze ko nta busobekerane buri hagati y'izo manza, ko Urukiko rw'Ikirenga atari rwo rwategereza urubanza ruri mu Rukiko Rukuru, ndetse ko icyo kibazo cyazamuwe mu nkiko zabanje kigafatwaho icyemezo kitajuririwe cyangwa ngo gitangwe nk'impamvu y'akarengane, akaba asanga Sakina Hashim ashaka gusa gutinza urubanza.

[19] Nyuma y'izo mpaka, Urukiko rwafatiye icyemezo mu ntebe, rusanga ubusabe bwa Me Nsabimana Jean-Baptiste bwaraje impitagihe kuko uru rubanza rwari rwarapfundikiwe, rupfundurwa mu bushishozi bw'Urukiko kuko hari ibyo rwari rukeneye gusobanuza ababuranyi. Byongeye kandi, rwasanze icyaha Sakina Hashim akurakiranyweho n'Ubushinjacyaha mu rubanza Nº RPA 00360/2020/HC/KIG – RPA 00419/2020/HC/KIG ari icyo guhimba cyangwa guhindura inyandiko no kuyikoresha, naho muri uru rubanza ikibazo nyamukuru gisuzumwa akaba aricyo kumenya niba Sakina Hashim yarahaye ububasha Mukuralinda Alain Bernard bwo kugurisha ikibanza cye, rwanzura ko nta mpamvu yatuma iburanisha risubikwa, rutegeka ko urubanza rukomeza humvwa ababuranyi nk'uko byari biteganyijwe.

[20] Muri uru rubanza harasuzumwa ingingo yo kumenya niba Mukuralinda Alain Bernard yari yarahawe na Sakina Hashim ububasha bwo kumugurishiriza umutungo utimukanwa ubaruye kuri N° UPI: 5/07/09/02/984 n'iyo kumenya ishingiro ry'indishyi zisabwa na buri ruhande.

III. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO.

II. 1. Kumenya niba Mukuralinda Alain Bernard yari afite ububasha bwo kugurisha ikibanza cya Sakina Hashim kibaruwe kuri Nº UPI: 5/07/09/02/984 nk'umuhagarariye.

[21] Me Nizeyimana Boniface, uburanira Kamugwiza Phoebe, avuga ko akarengane gashingiye ku kuba harirengagijwe procuration yo ku wa 09/05/2014, Sakina Hashim yahaye Mukuralinda Alain Bernard, akayisinyira imbere ya Noteri mu buryo bukurikije amategeko kugira ngo imufashe kumugurishiriza umutungo uburanwa. Asobanura ko kwirengagiza icyo kimenyetso byatumye Urukiko rutesha agaciro amasezerano y'ubugure yo ku wa 21/03/2015, Kamugwiza Phoebe yakoranye na Mukuralinda Alain Bernard, n'icyangombwa cy'umutungo Kamugwiza Phoebe yahawe ku wa 13/07/2015, nyamara mu rwego rw'amategeko ntahagaragajwe inenge ayo masezerano y'ubugure afite kuko yakozwe n'abantu babifitiye ububasha. Naho ku bijyanye n'icyangombwa cy'umutungo, avuga ko Ikigo gishinzwe imicungire n'imikoreshereze y'ubutaka cyahamije mu ibaruwa yo ku wa 11/07/2018, cyanditse ku busabe bw'Urukiko Rukuru, n'iyo ku wa 29/11/2017 yandikiwe Me Nizeyimana Boniface, ko ubutaka bwanditswe kuri Kamugwiza Phoebe ku wa 12/07/2015 hashingiwe ku masezerano y'ubugure yo ku wa 30/06/2015 yakorewe imbere y'umubitsi w'impapurompamo, ahabwa icyangombwa ku wa 13/07/2015.

[22] Avuga ko Ikigo gishinzwe imicungire n'imikoreshereze y'ubutaka cyasobanuye kandi ko icyangombwa cy'umutungo Sakina Hashim avuga ko yahawe ku wa 20/02/2015, ndetse n'ikindi cyo kuri iyo tariki uyu yitirira Kamugwiza Phoebe ntabyabayeho. Yongeraho ko ibivugwa na Sakina Hashim ko yari azi ko yasinye procuration imwe gusa ku wa 09/05/2014 ariko nyuma aza

gusanga hari n'indi bamuteze ivuga ko yemereye Mukuralinda Alain Bernard kugurisha umutungo we atari ukuri, kuko kuri uwo munsi hasinywe procuration imwe gusa. Akomeza avuga ko ibimenyetso biri muri dosiye bigaragaza ko Kamugwiza Phoebe yaguze umutungo uburanwa ndetse akawubonera ibyangombwa mu buryo bukurikije amategeko, bityo bikaba bitarasabaga Urukiko rw'Ubujurire gucukumbura byihariye kugeza ubwo rushingiye icyemezo cyarwo ku ngingo ya 104 n'iya 108 z'Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo,[1] ahubwo ko rwari gushingira ku biteganywa n'ingingo ya 13 y'iryo Tegeko rukabona ko procuration yahawe Mukuralinda Alain Bernard ku wa 09/05/2014 yakorewe imbere ya Noteri, bityo hamwe n'icyangombwa cy'umutungo cyahawe Kamugwiza Phoebe ku wa 13/07/2015, bikaba ari inyandiko-mvaho zidashobora guteshwa agaciro zitabanje kwemezwa ko ari impimbano.

[23] Sakina Hashim avuga ko Mukuralinda Alain Bernard ari nk'umuvandimwe kuko bakuranye. Asobanura ko kuva mu mwaka wa 2000 yatangiye kugira ikibazo cyo kutabona neza bitewe n'ingaruka za diabète, guhera mu mwaka wa 2001, akajya ashaka abamufasha iyo yabaga afite aho ashaka kujya, akaba ari muri urwo rwego muri 2009 yiyambaje Mukuralinda Alain Bernard kugira ngo ajye amugurira ibibanza kuko bari baziranye, amufitiye icyizere kuko yabonaga ari umuntu uzi ubwenge kandi w'umunyamategeko. Avuga ko atigeze amuha ububasha bwo kumugurishiriza imitungo ahubwo yamuhaye ubwo kumugurira. Akomeza avuga ko mu mwaka wa 2014, Mukuralinda Alain Bernard yaje kumutwara mu rugo, amubwira ko yifuza ko amuhindurira procuration kuko irangamuntu ye yanditse muri procuration ya mbere yatakaye, nawe yumva koko ari ngombwa. Asobanura ko yamusabye ko yashaka umuherekeza, Mukuralinda Alain Bernard amubwira ko atari ngombwa ko aza kumufasha, bageze kwa Noteri bamusomera procuration ya mbere, bamubwira ko iya kabiri isa n'iyo amaze gusomerwa, nawe arabyizera kuko bari bamaze iminsi bakorana abona nta kibi yamukorera.

[24] Me Nsabimana Jean-Baptiste, uburanira Sakina Hashim, avuga ko procuration yo ku wa 09/05/2014 ariyo yashyikirijwe Ikigo gishinzwe ubutaka nk'ikimenyetso kigaragaza ko Mukuralinda Alain Bernard yari afite ububasha bwo kugurisha ubwo butaka. Anavuga ko nyamara iyo procuration atari yo yashingiweho Mukuralinda Alain Bernard agura ubwo butaka na Nzamwita Alphonse ku wa 14/07/2009 cyangwa agura ubutaka bwa Umutesi Assia na Umuhoza Zamda ku wa 27/06/2009 ari nabwo bwaje guhurizwa hamwe bukabyara ikibanza kibaruye kuri UPI: 5/07/09/02/984, ko iyo icyo Kigo gishishoza cyari kubona ko iyo procuration itari gukoreshwa isubira inyuma. Avuga ko ikindi gituma procuration yo ku wa 09/05/2014 itafatwa nk'iyahaye Mukuralinda Alain Bernard ububasha bwo kugurisha ari uko ntaho bigaragara ko ariyo yashingiweho hakorwa amasezerano y'ubugure yo ku wa 21/03/2015, ko ntaho ivuga ko itanze ububasha bwo kugurisha ikibanza kibaruwe kuri UPI: 5/07/09/02/984, ndetse ko nta n'ikimenyetso Mukuralinda Alain Bernard agaragaza gihamya ko icyo kibanza kigurishwa byunguye Sakina Hashim, cyane cyane ko avuga ko cyagurishijwe ku busabe bwa Famida Hashim, ibintu bitumvikana.

[1] Ingingo ya 104 iteganya ko "Ibimenyetso bicukumbuwe ni ingingo amategeko cyangwa urukiko bisesengura bishingiye ku kintu kizwi kugira ngo hagaragazwe ikitazwi" naho ingingo ya 108 igateganya ko "Ibimenyetso bicukumbuwe no gusesengura urubanza ni ibimenyetso bitacukumbuwe n'amategeko, bicukumburwa n'ubwenge n'ubushishozi bw'abacamanza. Abacamanza bagomba kwemera gusa ibyo bimenyetso iyo bikomeye, bisobanuye kandi bihuje."

[25] Avuga na none ko gutesha agaciro amasezerano y'ubugure yakozwe ku wa 21/03/2015 nta karengane byateye Kamugwiza Phoebe ku mpamvu zikurikira:

i. Hagurishije Mukuralinda Alain Bernard nyamara haragombaga kugurisha Sakina Hashim;

ii. Hagurishijwe umutungo wagaragarijwe ubuso bwa 36.433 m2, nyamara haragombaga no kugaragazwa UPI: 5/07/09/02/984, kutayigaragaza bikaba byaratewe n'uko Mukuralinda Alain Bernard agurisha nta cyangombwa yari afite;

iii. Kamugwiza Phoebe yavuze ko yabanje gusura iyo sambu ndetse yishyura 45.000.000 Frw amasezerano y'ubugure akimara gusinywa, nyamara Mugwiza Aimable na Tambwe Obed babaye abatangabuhamya kuri ayo amasezerano y'ubugure bemeza ko amasezerano bayasinyiye mu biro bya Kamugwiza Phoebe, ko batigeze bajya gusura iyo sambu, kandi ko nta mafaranga y'ikiguzi yigeze ahererekanywa hagati y'impande zombi.

iv. Mukuralinda Alain Bernard yavuze ko, mu izina rya Sakina Hashim, ahaye Kamugwiza Phoebe ibyangombwa by'umutungo uguzwe nyamara igihe ubwo ubugure bwakorwaga ku wa 21/03/2015, Kamugwiza Phoebe yari afite icyangombwa cy'uwo mutungo yari yarahawe ku wa 20/02/2015.

[26] Me Nsabimana Jean-Baptiste akomeza avuga ko urwandiko rw'umubitsi w'impapuro mpamo rwo ku wa 29/11/2017 rugaragaza ko ubutaka buburanwa bwabanje kwandikwa kuri Mukuralinda Alain Bernard na Gatabazi Martine, byumvikanisha ko Mukuralinda Alain Bernard yari yarabwambuye Sakina Hashim akabugira ubw'umuryango we. Avuga ko aya makuru atagaragara mu ibaruwa yanditswe n'Ikigo gishinzwe ubutaka ku wa 11/07/2018, ndetse ko iyi baruwa itavugisha ukuri ku ngingo nyinshi harimo n'izikurikira:

i. Kuba ivuga ko Mukuralinda Alain Bernard yashyikirije Ikigo gishinzwe ubutaka ibyangombwa by'umwimerere byanditse kuri Sakina Hashim nyamara ibyo byangombwa ari Sakina Hashim wabyitangiye ubwo yari agiye gukorerwa icyangombwa gishya ku wa 16/04/2019;

ii. Kuba ku wa 24/06/2015 aribwo Mukuralinda Alain Bernard yandikiye Akarere ka Bugesera asaba ko ubutaka buburanwa bwandikwa kuri Kamugwiza Phoebe, dosiye ibisaba ikakirwa mu biro by'umubitsi w'impapurompamo ku wa 30/06/2015, igasuzumwa, icyangombwa kigakorwa ndetse kigahabwa nimero Folio 160/VOL IV, ariko Ikigo gishinzwe ubutaka kikaba kivuga ko ubusabe bwa Mukuralinda Alain Bernard bwabaye ku wa 08/07/2015;

iii. Kuba itagaragaza amakuru ari muri raporo y'umunyamategeko w'Ikigo gishinzwe ubutaka yo ku wa 10/04/2018, ihamya ko kugeza kuri iyo tariki hari transactions esheshatu zari zimaze gukorwa ku butaka buburanwa harimo enye zatumye hasohoka ibyangombwa by'ubutaka, ko icyangombwa cyasohotse ku wa 13/07/2015 cyahagitswe hagati y'icyasohotse ku wa 18/02/2015 n'icyasohotse ku wa 20/02/2015, ko aya makuru ashimangirwa na raporo y'Ubugenzacyaha yo ku wa 29/03/2019

igaragaza ko Mukuralinda Alain Bernard nta bubasha yari yarahawe bwo kugurisha ubutaka bwa Sakina Hashim.

[27] Me Nsabimana Jean-Baptiste avuga ko kuva urubanza rwatangira mu Rukiko Rwisumbuye rwa Gasabo kugeza ruciwe ku wa 29/06/2017, Kamugwiza Phoebe nta kindi cyangombwa cy'ubutaka yaburanishaga uretse icyo ku wa 20/02/2015, bivuze ko icyo ku wa 13/07/2015 yagishatse nyuma. Avuga ko ikindi yibaza ari ukuntu mu Rukiko Rukuru, mu iburanisha ryabaye ku wa 23/04/2018, Mukuralinda Alain Bernard yavuze ko yagurishije ubutaka buburanwa abisabwe na Famida Hashim, nyamara procuration yari yarayihawe na Sakina Hashim. Yibaza icyari gutuma Famida Hashim amuha izo nshingano kandi uyu yarareze Mukuralinda Alain Bernard n'umugore we kumwambura 10.000.000 Frw yabagurije ku wa 15/10/2013 nk'uko byemejwe n'urubanza N° RCA 00056/2019/TGI/NYGE rwaciwe n'Urukiko Rwisumbuye rwa Nyarugenge ku wa 27/09/2019.

[28] Me NsabimanA Jean-Baptiste asoza avuga ko nta makosa Urukiko rw'Ubujurire rwakoze rucukumbura ibimenyetso rwashyikirijwe kubera ko hari urujijo muri procurations Mukuralinda Alain Bernard yaburanishaga, ndetse n'amakuru yerekeye ibyangombwa by'umutungo Kamugwiza Phoebe yishingikirizagaho akaba adafututse, naho kuba ibyangombwa by'umutungo byari bifitwe na Kamugwiza Phoebe byarateshejwe agaciro bikaba byaratewe n'uko Urukiko rwasanze yari yariyandikishijeho umutungo uburanwa atabikwiye, kubitesha agaciro bikaba bihura n'umurongo watanzwe n'uru Rukiko mu rubanza Harerimana Emmanuel yaburanaga na Sebukayire Tharcisse.

[29] Famida Hashim nawe avuga ko Mukuralinda Alain Bernard ari nk'umuntu wo mu muryango, baziranye kuva bakiri bato. Avuga ko mu mikoranire yabo yagiye kumwereka imitungo ya Sakina Hashim muri Banki ya Kigali. Asobanura ko ubusanzwe ari we usinyira Sakina Hashim inyandiko zisohora amafaranga kubera ko atabona, ko ari muri urwo rwego yaherekeje Sakina Hashim bajya gusinya procuration ya mbere, ariko bigeze ku ya kabiri, Mukuralinda Alain Bernard yihererana Sakina Hashim, amujyana wenyine. Avuga ko atigeze asaba Mukuralinda Alain Bernard kugurisha ikibanza cya Sakina Hashim kugira ngo hishyurwe ihazabu ingana na 7.300.000 Frw yaciwe n'Ikigo cy'Igihugu cy'Imisoro n'Amahôro nk'uko abivuga, ko ahubwo ubwo icyo kibanza cyagurishwaga atari akivugana na Mukuralinda Alain Bernard kuko yari yaramwambuye. Avuga ko uburiganya bwa Mukuralinda Alain Bernard bugaragazwa n'uko ikibanza yakigurishije nyirabukwe, amasezerano asinywaho n'umushoferi we na muramu we, akibaza impamvu atashyizwe kuri procuration ya kabiri cyangwa mu masezerano y'ubugure kandi yitirirwa kuba ari we watanze uburenganzira bwo kugurisha ikibanza cy'umuvandimwe we.

[30] Me Nsabayezu Evariste, uburanira Famida Hashim, avuga ko bitumvikana uburyo Mukuralinda Alain Bernard yaba yaragurishije ikibanza kugira ngo hishyurwe ihazabu Famida Hashim yari yaciwe ngo namara kugurisha ntahite amuha amafaranga yavuye muri ubwo bugure, ko kuba Mukuralinda Alain Bernard avuga ko yamuhaye ayo mafaranga urusorongo ahubwo byumvikanisha ko nta bwihutirwe bwari buhari. Asobanura ko kugeza ubu nta kimenyetso Mukuralinda Alain Bernard agaragaza cyerekana ko yari yemerewe kugurisha ikibanza kiburanwa.

[31] Me Nsabayezu Evariste asobanura ko procurations ebyiri Mukuralinda Alain Bernard aburanisha zigaragaza uburiganya kuko iyo ku wa 09/05/2014 yagombaga gusimbura iyo ku wa

15/01/2009, ariko ko atari uko byagenze, ndetse ko na procuration ya gatatu ahakana, iri muri dosiye kuva urubanza rwatangira ariko ntiyigeze ayiregera ko ari inyandiko mpimbano. Avuga ko bitumvikana uburyo Kamugwiza Phoebe yakorewe ihererekanyamutungo kandi ibyangombwa by'umwimerere bikibitswe na Sakina Hashim, bisobanuye ko kugeza ubu Kamugwiza Phoebe atabasha kugaragaza inkomoko y'umutungo aburana, ariyo mpamvu hashingiwe ku biteganywa n'ingingo ya 104 n'iya 108 z'Itegeko ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 34 y'Iteka rya Minisitiri N° 002/2008 ryo ku wa 01/04/2008 rigena uburyo iyandikisha ry'ubutaka rikorwa ndetse n'umurongo watanzwe n'uru Rukiko mu rubanza Harerimana Emmanuel yaburanaga na Sebukayire Tharcisse, nta karengane kabaye mu rubanza rwaciwe n'Urukiko rw'Ubujurire, asaba uru Rukiko kwemeza ko ikirego cya Kamugwiza Phoebe nta shingiro gifite.

[32] Mukuralinda Alain Bernard avuga ko aziranye na Sakina Hashim kuva kera kuko bari baturanye, ababyeyi babo bacururiza hamwe. Asobanura ko Sakina Hashim yabanje kumuha procuration yo ku wa 15/01/2009 yaguriyeho ibibanza bitanu, ariko amafaranga akayahabwa na Famida Hashim ntaho bandikiranye kuko bakoreraga ku cyizere. Avuga ko bigeze mu mwaka wa 2014, Famida Hashim yamubwiye ko Ikigo cy'Imisoro n'Amahôro cyamuciye ihazabu, bityo kugira ngo aryishyure agomba kugurisha ikibanza kiri mu Bugesera, bituma ategura procuration yo ku wa 09/05/2014, Sakina Hashim yasinyiye imbere ya Noteri amaze kuyimusomera, ko rero nta procurations ebyiri zabayeho umunsi umwe. Ku kibazo cyo kumenya impamvu atashyize muri procuration umwirondoro w'umutungo ugurishwa kandi yari awuzi, avuga ko icyo yacyibagiwe, ariko ko bari babiziranyeho, kandi ko nta handi yakoresheje iyo procuration uretse ku mutungo ubaruye kuri UPI: 5/07/09/02/984.

[33] Ahakana ibivugwa na Sakina Hashim by'uko yagize ibibazo byo kutabona neza kuva mwaka wa 2001, kuko bajyanye kwa Noteri muri 2009 nta kibazo afite, ndetse ko n 'impamvu hakozwe procuration ya kabiri yo ku wa 09/05/2014 atari uko yamubwiye ko irangamuntu ye yatakaye, ko n 'ubwo nimero ze z'irangamuntu zitandukanye kuri procurations yo mu mwaka wa 2009 n'iyo mu mwaka wa 2014, ataricyo cyatumye procuration ya kabiri ikorwa kuko mu mwaka 2014 atari akigurira Sakina Hashim imitungo. Avuga na none ko kuba ikibanza kiburanwa cyarigeze kumwandikwaho we n'umugore atari uko bari bagamije kugihuguza, ahubwo ko habayeho kwibeshya biturutse ku kuba ari we wari warakiguze, ariko ko byahise bikosorwa cyandikwa kuri Sakina Hashim.

[34] Akomeza avuga ko impamvu hari kugurishwa umutungo wa Sakina Hashim kugira ngo hishyurwe ihazabu yaciwe Famida Hashim, ari uko uyu yari yaramubwiye ko asangiye umutungo na Sakina Hashim, n'ikimenyemenyi bakaba bari basangiye konti muri Banki ya Kigali. Avuga ko icyatumye yizera Famida Hashim ari uko ari we wasohoraga amafaranga y'ibyakorwaga buri munsi, ko rero atari kumubwira ko bashaka kugurisha ikibanza cyo mu Bugesera, akanamuzanira irangamuntu ya Sakina Hashim n'icyangombwa cy'umwimerere ngo abyange kuko yibwiraga ko icyo kibanza nacyo bagifatanyije. Asobanura ko ikibanza yakigurishije Kamugwiza Phoebe kuri 45.000.000 Frw akacyishyura mu mafaranga yari amufitiye, kandi ko amafaranga atayahaye Sakina Hashim, ko ahubwo yafashwe na Famida Hashim urusorongo kugeza ashize.

[35] Me Niyitegeka Eraste, uburanira MukuralindA Alain Bernard, avuga ko Sakina Hashim na Famida Hashim bakoreraga hamwe, ari nacyo cyatumye Famida Hashim aha Mukuralinda Alain Bernard ibyagombwa bya Sakina Hashim kugira ngo akore procuration ya kabiri. Asobanura ko

Sakina Hashim atagaragaza igikorwa Mukuralinda Alain Bernard yakoze kirenze ububasha yahawe, kuko yabanje kumuha procuration yo ku wa 15/01/2009, igihe cyayo kirangiye, amuha indi, isinyirwa imbere ya Noteri ku wa 09/05/2014, iyi ikaba yarongereye Mukuralinda Alain Bernard ububasha ndetse aba ari nayo ashingiraho akorana na Kamugwiza Phoebe amasezerano y'ubugure yo ku wa 21/03/2015. Avuga kandi ko Ikigo gishinzwe ubutaka mu Rwanda cyemeje ko nta cyagombwa cyatanze ku wa 20/02/2015, ko icyangombwa kizi ari icyahawe Kamugwiza Phoebe ku wa 13/07/2017, bivuze ko ibyangombwa Sakina Hashim aburanisha ari ibihimbano. Avuga ko bemeranya na Kamugwiza Phoebe ko ibimenyetso bigaragaza ko yaguze kandi akegukana umutungo uburanwa mu buryo bukurikije amategeko nta rujijo biteye ku buryo byari gutuma Urukiko rw'Ubujurire rushingira icyemezo cyarwo ku bimenyetso bicukumbuye, ari naho akarengane gashingiye.

UKO URUKIKO RUBIBONA

[36] Ingingo ya 9, igika cya mbere, y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko iyo Urukiko rusanze nta tegeko rijyanye n'ikiburanwa rihari, rushobora gushingira ku mategeko rusanga rwashyiraho mu gihe rwaba rushinzwe kuyashyiraho rwifashishije ibyemezo byagiye bifatwa n'inkiko, umuco, amahame rusange agenga amategeko n'inyandiko z'abahanga mu mategeko.

[37] Dosiye y'urubanza igaragaza ko procuration yo ku wa 09/05/2014, Mukuralinda Alain Bernard avuga ko yashingiyeho agurisha ikibanza cya Sakina Hashim kibaruwe kuri Nº UPI: 5/07/09/02/984 nk'umuhagarariye igira iti: "Bwana Mukuralinda Alain Bernard afite ububasha bwose busesuye bwo gukora mw'izina ryanjye ibikorwa byose byo kwagura no kwongera uwo mutungo agura ibiwongera cyangwa agurisha ibiwugize igihe cyose abona ari ngombwa ariko buri gihe, akabikora agamije igituma umutungo wunguka, kandi yubahiriza ibyo amategeko y'u Rwanda ateganya. Ibyo yongeye ku mutungo wanjye byose abinyandikishaho."

[38] Iyo procuration ababuranyi ntibayemeranywaho kuko Mukuralinda Alain Bernard avuga ko Sakina Hashim yayimuhaye mu buryo bukurikije amategeko kandi ko yamuhaga ububasha bwo kugurisha ikibanza kiburanwa, naho Sakina Hashim akavuga ko Mukuralinda Alain Bernard yayimusinyishije mu buriganya, ayisinya atazi ko bamuteze ijambo ″ kugurisha″, bityo ko n'ubugure bushingiye kuri iyo procuration nta gaciro bufite. Icyakora, mbere yo gusuzuma niba uburiganya buvugwa na Sakina Hashim bwarabayeho cyangwa butarabayeho, ni ngombwa gusuzuma niba imiterere ya procuration yahawe Mukuralinda Alain Bernard ituma afatwa nk'wahawe ububasha bwo kugurisha ikibanza cya Sakina Hashim.

[39] Itegeko ryo ku wa 30 Nyakanga 1888 rishyiraho Igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano ryariho iyo procuration ikorwa ryateganyaga, mu ngingo yaryo ya 530, igika cya mbere, ko "ubutumwa butanzwe mu buryo rusange burebana gusa n'ibikorwa byo gucunga umutungo/ Le mandat conçu en termes généraux n'embrasse que les actes d'administration", mu gika cya kabiri igateganyaga ko "Iyo ari ibikorwa byerekeye guhara cyangwa gutanga ingwate ku bitimukanwa, cyangwa ikindi cyemerewe nyir'ibintu gusa, amasezerano y'ubutumwa agomba kubigaragaza ku buryo bweruye/. S'il s'agit d'aliéner ou hypothéquer ou de quelque autre acte de propriété, le mandat doit être exprès".

[40] Urukiko rurasanga igika cya kabiri cy'ingingo ya 530 y'Igitabo cya gatatu cy'urwunge rw'amategeko cyakoreshwaga Sakina Hashim aha Mukuralinda Alain Bernard ubutumwa bwo ku wa 09/05/2014, cyumvikanisha ko iyo ubutumwa bureba ibikorwa byerekeye guhara ikintu (aliénation) cyangwa gutanga ingwate ku bintu bitimukanwa cyangwa ikindi gikorwa cyemerewe nyiri umutungo gusa, amasezerano y'ubutumwa agomba kubigaragaza ku buryo bweruye (exprès). Ubutumwa bweruye, bwaba butanzwe mu magambo cyangwa mu nyandiko ni ubuha uwatumwe ububasha mu buryo busobanutse neza (clearly), burambuye (detailed) ndetse budateye urujijo (without confusion).[2]

[41] Urukiko rurasanga abahanga Philippe Malaurie na bagenzi be bavuga ko ubutumwa bweruye ari ubugaragaza ibikorwa byasobanuwe cyangwa ubureba umutungo runaka wagaragajwe. Basobanura ko akamaro ko gutanga ubutumwa bweruye ari ukurengera uwabutanze kugira ngo butamugiraho ingaruka mbi, ko iyo ubutumwa ari rusange buba bugamije gucunga gusa. Bavuga ko umuntu wahawe ubutumwa rusange aba ameze nk'uwashinzwe kurengera inyungu z'umwana utarageza imyaka y'ubukure cyangwa umuntu mukuru udafite ubushobozi bwo kwifatira ibyemezo. Bavuga kandi ko ibikorwa byose bikomeye nko kwivanaho umutungo burundu cyangwa kuwushyira mu bugwate bisaba ubutumwa bweruye.[3] Naho François Collart Dutilleul na Philippe Delebecque bavuga ko iyo ibikorwa bisabwa uwahawe ubutumwa ari ibyo kwivanaho umutungo, kuwutangaho ingwate cyangwa kuwukodesha igihe kirekire, uwahawe ubutumwa agomba kwerekana ko yahawe ubutumwa bweruye.[4]

[42] Urukiko rurasanga ibimaze kuvugwa haruguru byongera gushimangirwa na Jacques Raynard na Jean-Baptiste Seube nabo bavuga ko akamaro k'ubutumwa kagaragarira mu gikorwa kirebwa n'ubwo butumwa mu rwego rw'amategeko, icyo gikorwa kikaba kigomba kuba kigaragara cyangwa gishobora kugaragazwa, bityo ko ubutumwa bwo kugurisha ikintu kitagaragajwe cyangwa kidashobora kugaragazwa hashingiwe kuri ubwo butumwa ari imfabusa kubera ko nyine amasezerano y'ubutumwa aba atagaragaza ikigomba gukorwa.[5] By'umwihariko bavuga ko ubutumwa bwo kugurisha umutungo utimukanwa budashobora kwitirirwa inyandiko itavuga mu buryo bweruye uwo mutungo uwo ariwo.[6]

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[2] Authority given to the agent by explicit agreement, either orally or in writing. B.A. Garner, Black's law dictionary, ST. PAUL, MINN., WEST PUBLISHING CO., 2019, 11th ed., p.128.

[3] "Le pouvoir peut être spécial, c'est-à-dire n'avoir pour objet que des actes limitativement énumérés, par exemple un acte déterminé ou un bien déterminé… Lorsque le mandat est conçu en termes généraux, le Code civil précise qu'il n'embrasse que les actes d'administration… sous couvert d'interprétation, la loi impose une règle de fond, non parce que la volonté du mandant serait obscure mais afin de le protéger contre lui-même. Le mandataire a alors les mêmes pouvoirs que ceux que la loi donne au tuteur d'un majeur protégé et à l'administrateur légal d'un mineur, c'est-à-dire qu'il a le pouvoir de faire les actes normaux et courants. Les actes les plus graves (aliénation définitive et hypothèque) impliquent un mandat exprès." Reba Philippe Malaurie, Laurent Aynès na Pierre Yves Gautier, Droit des contrats spéciaux, Paris, L.G.D.J., 2018, pp.345-346.

[4] "Si les actes qu'on lui demande de faire sont des actes de disposition (aliénation, constitution d'hypothèque, bail de longue durée, il doit justifier d'un mandat exprès." Reba Francois Collart Dutilleul et Philippe Delebecque, Contrats civils et commerciaux, Paris, Dalloz, 2019, p.548.

[5] "L'objet du mandat résidant dans l'acte juridique à accomplir, cet acte doit être suffisamment déterminé ou déterminable. Ainsi le mandat de vendre un bien non précisé et impossible à identifier serait certainement nul en raison de l'indétermination de son objet." Reba Jacques Raynard et Jean-Baptiste Seube, Droit des contrats spéciaux, Lexis-Nexis, Paris, 2019, p.397.

[6] "le mandat d'aliéner un immeuble ne peut se voir déduit d'une correspondance qui ne le mentionne pas de manière nette et précise." Reba Jacques Raynard et Jean-Baptiste Seube, Droit des contrats spéciaux, Lexis-Nexis, Paris, 2019, p.398.

[43] Urukiko rurasanga ibimaze gusobanurwa haruguru byumvikanisha ko umuntu wahawe ubutumwa rusange afite gusa ububasha bwo gukora ibikorwa bisanzwe byo gucunga umutungo no kuwungura, naho igikorwa gikomeye nk'icyo kugurisha, kivugwa muri uru rubanza, gisaba ubutumwa bweruye bugaragariza uwabuhawe nibura umwirondoro w'umutungo ugomba kugurishwa. Bitabaye ibyo, uwatanze ubutumwa yakwisanga ayoborwa n'ubushake bw'uwabuhawe cyangwa uwatanze ubutumwa akaba yafatwa nk'utakiriho. Niyo mpamvu procuration yanditswe mu buryo bwa rusange ikwiye gufatwa nk'iyari igamije gucunga umutungo mu rwego rwo kurengera uwayitanze kuko bitashoboka ko umuntu ukiriho, ufite ubushobozi n'ububasha atanga uburenganzira bw'uko imitungo yose afite n'iyo azagira igurishwa n'undi. Ibi byumvikanisha ko ubutumwa bwo kwivanaho umutungo mu buryo ubwo aribwo bwose bugomba kuba butari rusange, bugomba kugaragaza uwo mutungo mu buryo bugaragara kandi budateye urujijo.

[44] Uru Rukiko rwemeranya kandi n'umurongo watanzwe n'Urukiko Rusesa Imanza rwo mu Bufaransa[7] ndetse n'Urukiko rw'Ikirenga rw'Ubuhindi[8] w'uko isesengura ry'ubutumwa ritagomba gukorwa ku buryo bugenekereje, ahubwo ko amagambo agize ubutumwa agomba gufatwa uko ari, bityo kugira ngo habeho igurisha, intumwa ikaba isabwa guhabwa ubutumwa bweruye bwo gukora amasezerano y'ubugure, harimo no gushyikiriza inyandiko ndetse no kwemererwa ishyirwa mu bikorwa ry'izo nyandiko imbere y'inzego zibifitiye ububasha, ariko ko ububasha bwo gucunga butavuze ubwo gucyririkanya, ubwo gucyririkanya butavuze ubwo kugurisha, n'ubwo kugurisha butavuze ubwo kwakira igiciro.

[45] Urukiko rurasanga procuration yo ku wa 09/05/2014, Mukuralinda Alain Bernard yashingiyeho agurisha ikibanza cya Sakina Hashim ifite inenge y'ibanze yo kutagaragaza umwirondoro w'ikibanza cyagombaga kugurishwa, yaba nimero yacyo, aho giherereye cyangwa ubuso bwacyo. Ariko na none ntigaragaza igiciro fatizo cyari guherwaho iyo sambu Mukuralinda Alain Bernard avuga ko yari aziranyeho na Sakina Hashim igurishwa, uburyo igiciro kizatangwa n'uzakira amafarangacyangwa uburyo ibyaguzwe bizashyikirizwa umuguzi.

[46] Hashingiwe ku bisobanuro byatanzwe haruguru, Urukiko rurasanga procuration yo ku wa 09/05/2014 itarashoboraga gushingirwaho hagurishwa umutungo uwo ariwo wose wa Sakina Hashim kuko yari ikozwe mu buryo bunyuranyije n'amategeko, bityo Mukuralinda Alain Bernard akaba nta bubasha yari afite bwo kugurisha ikibanza cya Sakina Hashim kibaruye kuri UPI 5/07/09/02/984 kuko inyandiko avuga ko yashingiyeho akigurisha itari yubahirije ibiteganywa n'amategeko.

[47] Kubera iyo mpamvu, Urukiko rurasanga ibyakozwe byose hashingiwe kuri iyo procuration, harimo n'amasezerano y'ubugure bw'ikibanza yakozwe hagati ya Mukuralinda Alain Bernard na Kamugwiza Phoebe ku wa 21/03/2015 ndetse n'icyangombwa cy'umutungo cyahawe

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[7] Reba imanza Cass. Civ. 1ère, 21 décembre 1976, Bull.Civ. I, N° 421

[8] … "It is settled that a power of attorney has to be strictly construed. In order to agree to sell or effect a sale by a power of attorney, the power should also expressly authorize the power to agent to execute the sale agreement/sale deed i.e., (a) to present the document before the Registrar; and (b) to admit execution of the document before the Registrar. Reba urubanza rwa The Church of Christ Charitable Trust & Educational Charitable Society v. M/s Ponniamman Educational Trust, rwaciwe n'Urukiko rw'Ikirenga rw'Ubuhinde, ku wa 03/07/2012, para 14. Reba urubanza rwa Mrs. Umadevi Nambiar v. Thamarasseri Roman Catholic Diocese Rep By Its Procurator Devssia's Son Rev. Father Joseph Kappil, rwaciwe n'Urukiko rw'Ikirenga rw'Ubuhinde, ku wa 01/04/2022, para 09, 17-18.

Kamugwiza Phoebe ku wa 13/07/2015, nta gaciro bifite, bityo bikaba bitakiri na ngombwa gusuzuma izindi ngingo zijyanye n'ubugure bw'ikibanza cya Sakina Hashim.

II.2. Kumenya ishingiro ry'indishyi zisabwa muri uru rubanza.

[48] Me Nizeyimana Boniface avuga ko kuba Kamugwiza Phoebe aburanira, yaravukijwe uburenganzira ku mutungo we ku maherere kandi yarawuguze mu buryo bukurikije amategeko, Urukiko rw'Ikirenga rugomba gutegeka Sakina Hashim kumusubiza 1.500.000 Frw yishyuye arangiza imanza No RCA 00265/2017/HC/KIG na No RCAA 00001/2019/CA, kumwishyura 10.000.000 Frw y'indishyi zo kumushora mu manza nta mpamvu no kumuha 5.000.000 Frw akubiyemo amafaranga y'ikurikiranarubanza n'igihembo cya Avoka.

[49] MukuralindA Alain Bernard asaba ko Urukiko rwategeka Sakina Hashim kumwishyura 3.000.000 Frw y'indishyi z'akababaro na 2.000.000 Frw akubiyemo ay'ikurikiranarubanza n'igihembo cya Avoka.

[50] Me Nsabimana Jean-Baptiste uhagarariye Sakina Hashim avuga ko indishyi zisabwa na Kamugwiza Phoebe ndetse na Mukuralinda Alain Bernard nta shingiro zifite, kuko bigaragara ko Kamugwiza Phoebe ariwe wishoye mu manza ashutswe n'umukwe we Mukuralinda Alain Bernard wamufashije kubona ibyangombwa by'ubutaka ataguze. Asaba ko Kamugwiza Phoebe yategekwa guha Sakina Hashim 20.000.000 Frw y'indishyi z'akababaro kubera kumushora mu manza z'amaherere kugeza n'ubwo ashatse kumufungisha na 1.500.000 Frw akubiyemo ay'ikurikiranarubanza n'igihembo cya Avoka.

[51] Me Nsabayezu Evariste avuga ko kuba Kamugwiza Phoebe akomeje gushora Famida Hashim aburanira mu manza z'amaherere, asaba Urukiko gutegeka Kamugwiza Phoebe kumwishyura 3.000.000 Frw y'indishyi z'akababaro, 2.000.000 Frw y'igihembo cya Avoka na 500.000 Frw y'ikurikiranarubanza.

[52] Ku bijyanye n'indishyi zisabwa na Sakina Hashim, uburanira Kamugwiza Phoebe avuga ko nta shingiro zifite kubera ko Sakina Hashim yatanze ikirego kandi azi ko umutungo yawugurishije mu buryo bukurikije amategeko, bityo akaba agomba kwirengera ibyakozwe mu rubanza yashoje nta mpamvu.

UKO URUKIKO RUBIBONA

[53] ngingo ya 111 y'Itegeko N° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko "ikirego cy'amafaranga y'ikurikiranarubanza ni ikirego gishamikira ku kirego cy'iremezo kigamije kwishyuza ibyakoreshejwe mu rubanza. Ikirego cy'amafaranga y'ikurikiranarubanza kiburanishirizwa rimwe n'ikirego cy'iremezo. Gishobora kandi kwakirwa kikanaburanishwa n'iyo ikirego cy'iremezo cyaba kitakiriwe."

[54] Urukiko rurasanga indishyi zisabwa na Kamugwiza Phoebe n'izisabwa na Mukuralinda Alain Bernard batazihabwa kuko ntacyo batsindiye muri uru rubanza.

[55] Urukiko rurasanga kandi indishyi z'akababaro zisabwa na Sakina Hashim ndetse n'izisabwa na Famida Hashim, badakwiye kuzihabwa kuko mu gusubirishamo urubanza ku mpamvu z'akarengane, Kamugwiza Phoebe yarimo ashyira mu bikorwa uburenganzira yemererwa n'amategeko, ibyo akaba ataribyo byatera abaregwa akababaro ku buryo babisabira indishyi.

[56] Ku birebana n'amafaranga y'ikurikiranarubanza ndetse n'igihembo cya Avoka basaba, Urukiko rurasanga, hashingiwe ku biteganywa n'ingingo ya 111 y'Itegeko no 22/2018 ryo ku wa 29/04/2018 yibukijwe haruguru, bakwiye kuyahabwa kuko bashowe mu manza bituma biyambaza ababunganira mu mategeko, icyakora bakaba bagomba kuyagenerwa mu bushishozi bw'Urukiko kuko ayo bagaragaje baterekana uburyo yabazwemo ngo banabitangire ibimenyetso bihamya ko ariyo yagiye kuri uru rubanza. Kubera iyo mpamvu, mu bushishozi bw'Urukiko, Sakina Hashim na Famida Hashim bakaba bagenewe 800.000Frw buri wese, akubiyemo 500.000 Frw y'igihembo cya Avoka na 300.000 Frw y'ikurikiranarubanza, agomba gutangwa na Kamugwiza Phoebe.

IV. ICYEMEZO CY'URUKIKO

[57] Rwemeje ko ikirego cyatanzwe na Kamugwiza Phoebe cyo gusubirishamo ku mpamvu z'akarengane urubanza N° RCAA 00001/2019/CA rwaciwe n'Urukiko rw'Ubujurire ku wa 06/05/2020, nta shingiro gifite;

[58] Rutegetse Kamugwiza Phoebe kwishyura Sakina Hashim na Famida Hashim amafaranga ibihumbi magana inani (800.000 Frw) buri wese, akubiyemo ay'igihembo cya Avoka n'ay'ikurikiranarubanza.