

UMULINGA v NGIRINSHUTI ET AL.

[Rwanda SUPREME COURT – RS/INJUST/RC 00001/2021/SC – (Ntezilyayo, P.J., Nyirinkwaya, Cyanzayire, Hitiyaremye and Karimunda) December 17, 2021]

Procedure for the review of cases on the grounds of injustice – Time-limit for the review of cases on the grounds of injustice – Time limit for submitting a request for review of a case on grounds of injustice to the Office of the Ombudsman – Although the legislator has not specified the time limit for submitting a request for review of a case on grounds of injustice to the Office of the Ombudsman, the time limit for submitting such a request should be 30 days.

Procedure for the review of cases on the grounds of injustice – Calculation of the thirty-day period where a litigant has lodged two appeals in a single case – Where a litigant has lodged two appeals in a single case, the thirty-day time limit for applying for a review of a judgment on grounds of injustice should be calculated from the date of the Court's decision declaring the second appeal inadmissible.

Procedure for the review of cases on the grounds of injustice – Failure to raise for the first time at the review of the judgment on grounds of injustice a new issue not raised at the hearing of the case under review on grounds of injustice – There can be no claim of injustice on the part of a litigant in respect of an issue which has not been raised for consideration.

Land law – Selling someone else's property – The owner of a property has the right to pursue his property out of the hands of the possessor, without the need to invalidate the contract of sale, and the possessor must then deal with the seller of that property.

Facts: Umulinga and Muberuka, who were legally married, were later divorced, but there were still jointly owned properties, including plots land, which Nginshuti dared to sell to Nshimiyimana and Nsengiyumva without the owners' permission. Nginshuti was prosecuted in the Nyarugenge Intermediate Court for fraud and selling someone else's property, and Muberuka filed a civil suit against him. In judgment N° RP 0356/15/TGI/NYGE, the same court convicted him of both offences and also ordered him to reimburse Muberuka and Umulinga FRW 30,356,500 for the value of this property. Umulinga opposed that judgement on matters relating to civil suit, requesting to be given back her property and not its substitute, but the Court did not admit her request. The plaintiff appealed to the High Court, which found her appeal admissible and then remitted the case to the Nyarugenge Intermediate Court, which upheld the judgment N° RP 0356/15/TGI/NYGE on civil matters. Umulinga appealed to the High Court, which upheld the contested judgment. She also appealed to the Court of Appeal, which said it did not have jurisdiction because she had lost twice on similar grounds. The plaintiff even applied to the Court of Appeal for a review of this judgment on the grounds of injustice, but her application was not granted and she turned to the Office of the Ombudsman for a review of the judgment on the grounds of injustice.

After receiving the case file from the Office of the Ombudsman, the case was heard by the Supreme Court and the first issue discussed was whether the complaint had been submitted to the Office of the Ombudsman very late, as alleged by the defendants, while the complainant claimed that she had complied with the time limit.

The issue of whether Muberuka and Umulinga should be given back their disputed land, rather than its value, was also examined. The plaintiff seeks to have her right to the property she co-owns with Muberuka restored, arguing that those who own it received it from the person who defrauded her, and that the court should not have ignored the fact that the real owner of the property also needs it in order to use it. She explains that it is her right to pursue her property from the current owners, who should also pursue the person who sold it to them, knowing full well that it was not his. She also states that the fact that the Court ruled that the land should remain in the possession of the purchasers, while they have not carried out any additional activities on it, constitutes illicit enrichment. The defendants argue that what is not prohibited is permitted, and that Umulinga should explain what she is losing by not getting her land back and be paid its monetary value, given that the buyers bought in good faith.

Held: 1. Although the legislator did not provide for a time limit, the 30-day time limit for submitting an application to the President of the Court for a review of the judgment on the grounds of injustice should also apply to the time limit for submitting the application to the Office of the Ombudsman, since the intention was not to allow the litigant to do so whenever he/she wished, and therefore, the application was submitted in due time.

2. The sale of someone else's property is void, the owner of a property has the right to pursue his property out of the hands of the possessor without the need to invalidate the contract of sale, and the possessor must then deal with the seller of that property, and therefore, the fact that Nsengiyumva and Nshimiyimana bought the property from Ngirinshuti, who is not the real owner of that property, that property should be returned to the real owners, and Ngirinshuti, who sold them that property, should refund to the buyers the value of that property, calculated at the current rate.

**The application filed for the review of the judgment N° RCA 00123/2018/HC/KIG for being vitiated by injustice, has merit in part;
The ruling of the judgment N° RP 0356/15/TGI/NYGE is reversed on matters relating to what Ngirinshuti has to refund;
Nsengiyumva must return to Umulinga half of the land registered under UPI:1/01/08/04/1861 that he bought from Ngirinshuti.**

Statutes and statutory instruments referred to:

Law N° 15/2004 of 12/06/2004 on evidence and its production, article 3;

Law N° 22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure, articles 12 and 111;

Law N° 45/2011 of 25/11/2011 governing contracts, articles 64 and 113.

Cases referred to:

RS/INJUST/RC 00011/2019/SC; Mukamsoni and Nkundimana, rendered on 12/02/2021;

RS/INJUST/RC 00007/2020/SC; Twagirayezu and Twagirayezu et al, rendered on 10/12/2021.

RCAA 0117/11/CS; Nibasenge and Nahayo; rendered on 24/04/2015.

Judgment

I. BACKGROUND OF THE CASE

[1] Umulinga Consilde and Muberuka Jean Claude Bernard were legally married on 26/04/1961 in Rwanda, and they later moved Belgium. On 17/06/1998, they were granted divorce by the Court in that country. Umulinga Consilde states that there are still properties that she co-owns with Muberuka Jean Claude Bernard, including land in the Nyamirambo sector that was later sold by Ngirinshuti Michel to Nshimiyimana Augustin and Nsengiyumva Karim.

[2] Ngirinshuti Michel was later charged by the Public Prosecution with the offence of fraudulent acquisition of forged documents and papers issued by a competent authority and selling the property of another person, and Muberuka Jean Claude Bernard filed a civil suit in this case. On 23/12/2015, the Nyarugenge Intermediate Court delivered judgement N° RP 0356/15/TGI/NYGE, convicting Ngirinshuti Michel of both offences, sentencing him to seven years' imprisonment and ordering him to pay FRW 30,356,500, representing the value of the property belonging to Muberuka Jean Claude Bernard and Umulinga Consilde.

[3] Umulinga Consilde opposed this judgment on the issue of damages and sued Ngirinshuti Michel and Muberuka Jean Claude Bernard, and she also requested the intervention of Nshimiyimana Augustin and Nsengiyumva Karim, stating that Muberuka Jean Claude Bernard had filed a civil suit on his own because he could not represent her as they were divorced, and that the court had remained silent on the sale contract and the modalities of recovering their property, while they had not given Ngirinshuti Michel the power to sell it on their behalf. She then asked the court to overturn the decision, arguing that it was against her interests and her right to the property, which had been sold by a person who was not the owner.

[4] On 31/07/2017, the Intermediate Court of Nyarugenge issued judgment N° RCA 00373/2016/TGI/NYGE, declaring the application filed by Umulinga Consilde inadmissible for consideration, based on the fact that a criminal complaint had been filed to the Investigation by Umulinga Consilde and Muberuka Jean Claude Bernard initiating case No. RP 0356/15/TGI/NYGE, which is an indication that Umulinga Consilde was aware of the existence of the case she was opposing.

[5] Umulinga Consilde was not satisfied with this decision and appealed to the High Court in case number RCA 00288/2017/HC/KIG. On 26/01/2018, the High Court delivered its judgment and held that Umulinga Consilde's appeal had merit in part, that her appeal against judgment RP 0356/15/TGI/NYGE and her application to set aside the agreement of sale of the property in which she has an interest should be admitted for consideration, and ordered that the case be transferred to the Intermediate Court of Nyarugenge for trial at first instance.

[6] The High Court based its decision on the fact that Umulinga Consilde was already divorced from Muberuka Jean Claude Bernard at the time of the opposition hearing, that he was not representing her in the case and that there was no evidence that the prosecution was in the habit of informing Umulinga Consilde of the case file before sending it to the court.

[7] The case was transferred to the Nyarugenge Intermediate Court and docketed under number RC 00133/2018/TGI/NYGE. On 22/03/2018, the court delivered its judgment and ruled that Umulinga Consilde had lost the case on the issues relating to the invalidity of the sale contract

as requested, and ordered that the sale concluded between Ngirinshuti Michel and Nshimiyimana Augustin and Nsengiyumva Karim be upheld, and the same court also upheld judgment N° RP 0356/15/TGI/NYGE on the issues relating to damages, but ordered Ngirinshuti Michel to pay 2,000,000 Frw in addition to the amount ordered in the judgment under appeal, since he had sold her property without her consent.

[8] The Nyarugenge Intermediate Court based its ruling on the fact that all parties agree that Ngirinshuti Michel was the one who sold the property in bad faith, but that Nshimiyimana Augustin and Nsengiyumva Karim bought it from Ngirinshuti Michel after he had presented them with documents proving that he was the apparent owner, and the same court relied on these grounds to explain that the contested sale contract should not be annulled, but that Ngirinshuti Michel should pay Muberuka Jean Claude Bernard and Umulinga Consilde, who were the real owners of the disputed property, 30,356,500 CFA francs for the value of the land, as established in the judgment under opposition.

[9] Umulinga Consilde appealed before the High Court, based on the following grounds:

- The fact that the court disregarded Article 276 of the Civil Code, Book III, which states that the sale of another person's property is null and void, that the court's decision is contrary to the law because it is interpreted as a forced sale;
- The fact that the court ignored various pieces of evidence presented, including various positions taken by courts, a 2009 document imposing the caveat on the property, a letter from the Executive Secretary of the Nyamirambo sector, a letter from the National Land Use and Management Authority showing how Nshimiyimana Augustin registered the disputed property in his name.
- The fact that although Ngirinshuti Michel was the one who sold the property in bad faith, so were the buyers.

[10] On 10/09/2018, the High Court delivered its judgment N° RCA 00123/2018/HC/KIG, and ruled that the judgment N° RC 00133/2018/TGI/NYGE rendered by Nyarugenge Intermediate Court is sustained.

[11] Umulinga Consilde again appealed against that ruling to the Court of Appeal, and her appeal was docketed under N° RCAA 00068/2018/CA. On 29/05/2020, the Court of Appeal delivered its judgment, declaring her appeal inadmissible on the grounds that such an appeal was not within its jurisdiction, since she had lost the case before the Intermediate Court of Nyarugenge and the High Court on the same grounds.

[12] Umulinga Consilde wrote to the President of the Court of Appeal requesting a review of judgment RCA 00123/2018/HC/KIG on the ground that it was vitiated by injustice. The President of the Court of Appeal replied to her letter on 17 September 2020, stating that her request was inadmissible because she was simultaneously pursuing two avenues of appeal.

[13] Umulinga Consilde was not satisfied with this decision and on 29/09/2020 she wrote to the Office of the Ombudsman requesting a review of judgment RCA 00123/2018/HC/KIG on the basis that it was vitiated by injustice. After considering this request, on 04/11/2020, this Office wrote to

the President of the Supreme Court stating that the said judgment may be vitiated by injustice and that an analysis is required to decide whether it can be reviewed on the basis of injustice.

[14] On 22/12/2020, the President of the Supreme Court, in his decision no. 069/CJ/2020, ordered that the case be transferred to the Registry of the Supreme Court for rehearing.

[15] The hearing was held in public on 09.09.2021 and the parties appeared except for Muberuka Jean Claude Bernard who was summoned in accordance with the law but did not appear. Umulinga Consilde appeared assisted by Counsel Mukarusanga Florence and Counsel KAGAMBA Christophe, Nginshuti Michel assisted by Counsel Niyibizi Diogène; Nshimiyimana Augustin assisted by Counsel Habakurama François Xavier, whereas Nsengiyumva Karim was assisted by Counsel Ndacyayisenga Schadrack.

[16] Counsel Habakurama François Xavier raised an objection of inadmissibility of the application for the review of the judgment N° RCA 00123/2018/HC/KIG on the ground that it is vitiated by injustice, arguing that Umulinga Consilde did not comply with the thirty-day period provided under article 56 of the no 30/2018 of 02/06/2018 determining the jurisdiction of courts, since the judgment N° RCA 00123/2018/HC/KIG was delivered by the the High Court on 10/9/2018, and she lodged an appeal to the Court of Appeal, and the decision on this appeal was issued on 29/05/2020. She then wrote to the President of the Court of Appeal requesting a review of this judgment on the grounds that it was vitiated by injustice, who replied on 17/09/2020 that her request was inadmissible on the grounds that she had used two appeal procedures, which prompted Umulinga Consilde to write to the Office of the Ombudsman requesting a review of this judgment on the grounds that it was vitiated by injustice. Umulinga Consilde's side argues that she complied with the time limit for writing to the Ombudsman's office, as required by law, and that this objection is therefore unfounded.

[17] After hearing both parties on this issue, the Court ruled that, in accordance with the Supreme Court's precedents, the 30-day period for applying for a review of the High Court judgment on the ground that it was vitiated by an irregularity should be counted from the date of the Court of Appeal's decision not to admit the second appeal.¹ The very Court also found that, although the legislator did not provide for a time limit, the 30-day time limit for submitting an application to the President of the Court for a review of the judgment on the grounds of injustice should also apply to the time limit for submitting the application to the Office of the Ombudsman, since the intention was not to allow the litigant to do so whenever he/she wished. The very Court found that the judgment N° RCA 0123/2018/HC/KIG under the application for review on grounds of injustice was delivered by the High Court on 12/09/2018 and Umulinga Consilde appealed against it to the Court of Appeal, her application was docketed under N° RCAA 00064/2018/CA and delivered on 29/05/2020 and she again wrote to the President of the Court of Appeal and it was reviewed on 17/09/2020. It is very clear that the 30-day period for submitting an application to the Office of the Ombudsman starts from this very last date, and Umulinga Consilde having submitted her application on 29/09/2020, she has complied with the 30-day period. Thus, the objection raised by Nshimiyimana Augustin is unfounded.

¹An example cited here is of the judgment N°RS/INJUST/RC 00011/2019/SC, paragraph 36, rendered on 12/02/2021, for Mukamsoni Petronille vs Nkundimana Edison.

[18] The hearing resumed with the merits of the case. Umulinga Consilde asked the court to hear the witnesses Kabanda Eugène and Murinda Fidèle to provide information on the fraud committed in the sale of the disputed land, while the defendants argued that the witnesses were not necessary as they had not been heard by previous courts. On the basis of their written testimonies, the Court itself asked the witnesses to take the oath for their testimonies, and the parties were allowed to question the witnesses about their testimonies. After discussing the question of whether Umulinga Consilde should be given back the property sold by Ngirinshuti Michel instead of its value, the hearing was closed and the parties were informed that the judgment would be delivered on 08/10/2021.

[19] The Court, in its discretion, decided that before making a final decision on the case, it must first visit the place where Umulinga Consilde's property is located in order for the Court to clarify the issues in the case.

[20] An investigation was conducted on 25/10/2021, on the location of the subject matter in Runyinya village, Rugarama cell, Nyamirambo sector, Nyarugenge district, City of Kigali. The hearing resumed on 18/11/2021 and the parties appeared with legal assistance as before, with the exception of Muberuka Jean Claude Bernard who did not appear although he had been notified of the hearing date in accordance with the law. On that day, the parties debated the report of the investigation carried out by the Court.

[21] The main issue in this case is whether Muberuka Jean Claude Bernard and Umulinga Consilde should be given back their property sold by Ngirinshuti Michel instead of its value.

II. ANALYSIS OF LEGAL ISSUES

A. Whether Muberuka Jean Claude Bernard and Umulinga Consilde should be given back their property instead of its value

[22] In their submissions and arguments before the Court, Umulinga Consilde and her lawyers state that the judgment in case N° RP 0356/15/TGI/NYGE ruled that Ngirinshuti Michel fraudulently sold another person's property, that the Court deprived them of their right to use their property as they wish because Muberuka Jean Claude Bernard sued to recover his property sold by Ngirinshuti Michel, but instead the Court awarded him its value as compensation, as determined by the property valuer, and that such a decision is contrary to the provisions of Law N° 43/2013 of 16/06/2013 on Land, Article 34, paragraph 2, which was in force at the time the action was brought.²

[23] Umulinga Consilde wants her right to the property she co-owns with Muberuka Jean Claude Bernard restored, arguing that those who now own it have been defrauded by the person who sold it to them, and that the court should not have ignored the fact that the real owner of the property also needs it to use it. She maintains that it is her right to pursue her property from those who now own it, who must also pursue Ngirinshuti Michel, who sold it to them, knowing full well that it was not his.

²The State recognizes the right to freely own land and shall protect the land owner from being dispossessed of the land whether totally or partially, except in case of expropriation due to public interest.

[24] With regard to the money awarded by the Court as compensation, Umulinga Consilde and her lawyers submit that the report of the National Land Use and Management Authority indicates that the disputed land registered under number 1860 belongs to Nsengiyumva Karim and that no additional activities are taking place on it, and that this land should be merged with plot number 1861 because these two parcels of land have constituted one plot since the beginning. They therefore believe that the fact that the court ruled that the land remains in the possession of those who bought it, without any other activities being added to it, constitutes unlawful enrichment, and they are asking the Supreme Court to rectify such an error.

[25] They further state that such a report is clear evidence that Nshimiyimana Augustin and Nsengiyumva Karim bought the disputed land fraudulently, since Nsengiyumva Karim bought from Mbabazi Felix in 2011, but during the transfer of the property, Nginshuti Michel appeared to be the one doing so, and such a contradiction of information is further evidence of fraud, and this is corroborated by the fact that Nshimiyimana Augustin first registered the land with the Land Authority as inherited land, but later registered it as purchased land. They are asking the court to return the property to its rightful owner, Umulinga Consilde, as there is no legal basis for awarding her its value as a substitute.

[26] Counsel Mukarusanga Florence, who is assisting Umulinga Consilde, states the buyers of the land were fully aware that Nginshuti Michel did not own it and that selling someone else's property is illegal. She further states that her basis for confirming that Nsengiyumva Karim and Nshimiyimana Augustin fraudulently acquired the disputed land is that the size/area of the land which appears on Nsengiyumva Karim's land titles is different from the 25m/30m which he claims to have bought from Nginshuti Michel, but in his submissions he stated that he bought another portion from Mbabazi Felix and later merged both portions of land under one number, thereby increasing the size of this land, which is untrue as the land was originally one with one origin, instead it was later divided into two portions. In addition, Mbabazi Felix also claims to have bought the land from Jasmini, however, this person has nothing to do with the land in question.

[27] Counsel Kagamba Christophe, who is also assisting Umulinga Consilde, adds that after receiving information that there had been an expropriation, she asked the people in charge to stop it, but they refused, and she asked the court to decide who should receive the compensation, since Nshimiyimana Augustin had appropriated the land for himself. He adds that the land title with UPI: 1/01/08/04/1635 shows that the size of her land is 2290 square metres, but the sale agreement indicates that the size is 750 square metres, and she refers to the judgment N° RCAA 0117/11/CS for Nibasenge Anathalie vs Nahayo François Xavier, delivered by the Supreme Court, and asks the Court to order that the entire land under UPI be registered: 1/01/08/04/1635 belongs to Umulinga Consilde, without necessarily annulling the contract of sale, since Nshimiyimana Augustin has no proof of the origin of this whole property, apart from his simple statements that he bought it from an old woman.

[28] Nginshuti Michel, assisted by his Counsel Niyibizi Diogène, argues that Umulinga Consilde should not refuse to accept the 30,356,500 Frw awarded by the court as the judgment is already final and not the one she sought to have reviewed on the grounds of injustice. They add that it is not possible to return the land to Umulinga Consilde because part of it is land expropriated by Nyarugenge District, which has not been asked to intervene in this case.

[29] Nsengiyumva Karim and his Counsel argue that the root cause of the problem is a criminal judgment convicting Ngirinshuti Michel of the crime of selling another person's property; and they submit that the land purchased by Nsengiyumva Karim was registered under UPI: 1/01/08/04/1861, and that he carried out some activities on that land and did so in good faith as found by the court. They submit that in the appeal, they found it with a different number, which is UPI: 1/01/08/04/1860 while he had bought such portion from Mbabazi Felix.

[30] They claim that Umulinga Consilde wrote to the National Land Use and Management Authority asking for the relationship between the two plots of land, and that the Authority replied to her that plot n°1860 was adjacent to plot n°1861, both registered to Nsengiyumva Karim, that the two plots of land do not have the same origin and that they were bought in different years, as he bought one from Mbabazi Felix in 2011 and another from Ngirinshuti Michel in 2014, and that the latter is not even built on but has trees (forest) on it.

[31] Counsel Habakurama François Xavier representing Nshimiyimana Augustin, states that what is not prohibited is accepted, that instead, Umulinga Consilde should explain what she may lose by accepting the money as the value of the land instead of the land itself, and they base this on the fact that they did it in good faith, especially since she had never resided in that land, since she had spent over 15 years in Belgium, which pushed Ngirinshuti Michel to sell it because, it was a non-owner's land, and that land was located in a hilly area, and they find that Umulinga Consilde should accept the money and buy a good location.

[32] It further states that the judgment was based on the theory of appearance, and this is not a peculiarity of the judgment N° RC 0133/2018/TGI/NYGE or N° RCA 0123/2018/HC/KIG, as it is also referred to by the Supreme Court to protect those who bought in good faith. He cites as an example the judgment N° RCOMA 0002/2013/CS of 23/10/2015 for KOBIL PETROLEUM RWANDA SARL vs. GARAJE AUTO IMPERIAL, with the intervention of Mukaremera Francine, where the Supreme Court ruled that Mukaremera Francine should remain in possession of a petrol station as she had bought it in good faith as she had no prior knowledge of what had happened before, rather Umulinga Consilde should be paid by Ngirinshuti Michel with whom she had a relationship and who had offended her.

[33] He also argues that Umulinga Consilde's request for the return of her land is not possible because the land in question has already been expropriated by Nyarugenge District, and the money from the expropriation cannot be given to Umulinga Consilde because the activities on that land were carried out by Nshimiyimana Augustin.

DETERMINATION OF THE COURT

[34] In order for the Court to be able to address the question of whether Muberuka Jean Claude Bernard and Umulinga Consilde should be returned the disputed property in lieu of its value, it is important to analyse the following issues:

- To determine the land contested in the case N° RP 0356/15/TGI/NYGE, which is the main subject matter in this case;
- Whether the purchase agreement between Ngirinshuti Michel, Nsengiyumva Karim and Nshimiyimana Augustin was concluded in bad faith;

- Whether Nsengiyumva Karim and Nshimiyimana Augustin should return back the property they bought from Ngirinshuti Michel.

a. To determine the land contested in the case N° RP 0356/15/TGI/NYGE

[35] According to the case file of the judgment subject to the application for review on grounds of injustice, judgment N° RCA 00123/2018/HC/KIG stems from the opposition against judgment No. RP 0356/15/TGI/NYGE of the Nyarugenge Intermediate Court of 23/12/2015, in which Ngirinshuti Michel was convicted of the offence of fraudulent acquisition of forged documents and papers issued by a competent authority and of selling the property of another person and was therefore sentenced to seven years imprisonment and ordered to pay Muberuka Jean Claude Bernard and Umulinga Consilde 30,356,500 Frw as the equivalent of the value of their land which he sold, including the cost of the proceedings.

[36] The case file further indicates that the offence of fraudulent acquisition of forged documents and papers issued by a competent authority and selling the property of another person, for which Ngirinshuti Michel was convicted, stems from the fact that he sold to Nsengiyumva Karim the land registered under UPI: 1/01/08/04/1861 located in Runyinya village, Rugamama cell, Nyamirambo sector, Nyarugenge district, and the land with UPI: 1/01/08/04/1635, as well as the 25m/30m of land he sold to Nshimiyimana Augustin.

[37] The foregoing is also confirmed by the fact that on 27 August 2014, Nkurunziza Alexis, who was the Executive Secretary of the Nyamirambo sector, wrote to the District Police Commander of the Nyarugenge district, requesting him to prosecute Ngirinshuti Michel for selling the land with UPI: 1/01/08/04/1635 to Nshimiyimana Augustin and the forest purchased by Nsengiyumva Karim.

[38] The Court therefore finds that the property at issue in the criminal proceedings is the property registered under UPI: 1/01/08/04/1861, consisting of the forest sold by Ngirinshuti Michel to Nsengiyumva Karim on 27 February 2014, and the property registered under UPI: 1/01/08/04/1635, measuring 750 square metres (25x30 m), sold by Ngirinshuti Michel to Nshimiyimana Augustin.

[39] The Court finds that, both during the hearing of the present case and during the investigation carried out by the Court on the spot, Umulinga Consilde continued to argue that the size of the property in dispute exceeded the size of the property in dispute in the criminal case, as indicated in the previous paragraph. In analysing this issue, the Court notes that it has to consider only the property at issue in the criminal proceedings, since it was in that case that a civil judgment was given, which Umulinga Consilde opposed until she applied to the High Court for a review of the judgment on the grounds that it was vitiated by injustice.

[40] The Court finds that the fact that Muberuka Jean Claude Bernard or Umulinga Consilde never raised the issue of the size of the plots of land sold by Ngirinshuti Michel to Nsengiyumva Karim and Nshimiyimana Augustin before the Court in the Criminal case on which the judgment under review due to injustice was based, which means that such an issue was not raised before the Court, does not allow Umulinga Consilde to claim that the Court erred in this respect.

[41] Not hearing an issue for the first time at the level of injustice, which was not raised in the judgment under review, is the same position adopted by the Supreme Court in the case of GAHIRE Athanase vs. MUKARUSHAKIRO Gloriose et al., where the Court held that a litigant cannot claim to have suffered injustice on an issue which he/she did not raise before the judge for consideration.³

b. Whether the purchase agreement between Ngirinshuti Michel, Nsengiyumva Karim and Nshimiyimana Augustin was concluded in bad faith

[42] Among the evidence relied upon by Umulinga Consilde to establish that Nshimiyimana Augustin and Nsengiyumva Karim purchased the disputed land in bad faith, is the difference between the size of the land appearing on the titles and the size appearing in the sale agreement concluded between Nsengiyumva Karim and Ngirinshuti Michel, and the fact that Nsengiyumva Karim states that he purchased this land from Mbabazi Felix in 2011, but during the transfer of title, only Ngirinshuti Michel appears. With regard to Nshimiyimana Augustin, she claims that such fraud is justified by the fact that he first registered the land with the National Land Use and Management Authority as inherited land and then later registered it as purchased land.

[43] Article 3, paragraph one, of the Law N° 15/2004 of 12/06/2004 on evidence and its production in courts provides that “Each party has the burden of proving the facts it alleges”. Provisions of this article corroborates with the provisions of article 12 of the Law N° 22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure reads that “The claimant must prove a claim, failing which the respondent wins the case”.

[44] The size of the land sold by Ngirinshuti Michel to Nshimiyimana Augustin and that which he sold to Nsengiyumva Karim, who was prosecuted in the criminal case from which the civil action brought by Umulinga Consilde arose, was clarified in the examination of the first question in this case. Other land claimed by Umulinga Consilde includes the land that Nsengiyumva Karim claims to have bought from Mbabazi Felix, or the land that Nshimiyimana Augustin claims to have annexed to the land he bought from Ngirinshuti Michel, but both parts constitute the land that Umulinga Consilde claims to be hers, which was not an issue in the judgment under review on grounds of injustice, so the Court has no basis to decide this issue at this level.

[45] With regard to the issue of Nshimiyimana Augustin first registering the land with the National Land Use and Management Authority as inherited land and then later registering it as purchased land, at the hearing on 18 November 2001, where Nshimiyimana Augustin himself appeared and stated that he had acquired the land by sale, he stated that he had no idea about the statement that it had been acquired by inheritance. What is clear to the Court is that there is the contract of sale which confirms that the disputed land was acquired by sale, which is supported by Ngirinshuti Michel who sold to them, and even the Intermediate Court of Nyarugenge took the same position in Judgment No RP 0356/15/TGI/NYGE; and the statement that it was acquired by inheritance is considered to be a typographical error on the land titles.

³ Judgment n° RS/INJUST/RC 00008/2019/SC for GAHIRE Athanase vs MUKARUSHAKIRO Gloriose et al., rendered on 12/11/2021, page 14, paragraph 30.

[46] The Court also finds that Nsengiyumva Karim and Nshimiyimana Augustin bought from Ngirinshuti Michel, who convinced them that he was the owner of the property by presenting documents issued by the competent authorities. Meaning that article 35, paragraph 2 of the Law N° 43/2013 of 16/06/2013 governing land in Rwanda referred to by Umulinga Consilde should not be applied.⁴

[47] For all the foregoing reasons, the Court finds that Umulinga Consilde has not adduced any evidence to prove that the sale and purchase agreement concluded between Ngirinshuti Michel, Nsengiyumva Karim and Nshimiyimana Augustin was fraudulent.

c. Whether Nsengiyumva Karim and Nshimiyimana Augustin should return back the property they bought from Ngirinshuti Michel

[48] Umulinga Consilde requests that the sale contract between Nsengiyumva Karim, Nshimiyimana Augustin and Ngirinshuti Michel be declared null and void and that the property she co-owns with Muberuka Jean Claude Bernard be returned to her. Article 64 of the Law N° 45/2011 of 25/11/2011 provides that Contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. And article 113, paragraph one of the same Law reads that Contracts shall have effect only on contracting parties. They shall not cause any prejudice to a third party and shall only benefit to him/her in case of provisions in favour of a third party.

[49] The court ruled that Umulinga Consilde should not seek the annulment of a contract to which she was not a party, but that she has the right to claim the property she claims is hers from the person who owns it. The issue of the right to pursue an immovable property from the person who owns it without necessarily to seek for the annulment of the contract of sale has been analysed by the instant Court in various cases, such as in the case of Mukaruhanga Alexia vs Nyirahabimana Emertha and KOLD HANSEN Jesper. In this case, the Court elucidated that it is not necessary to first invalidate the contract of sale of another person's property in order for the true owner of that property to sue for its return.⁵

[50] The Court finds that the fact that Nsengiyumva Karim and Nshimiyimana Augustin bought a property from Ngirinshuti Michel, who is not the true owner, means that they must return that property to its true owner, but that Ngirinshuti Michel, who sold it to them, must pay them its value.⁶ However, as Muberuka Jean Claude Bernard is satisfied with the judgement N° RP 0356/TGI/NYGE, which ordered Ngirinshuti Michel to pay him and Umulinga Consilde 30,35,500 Frw, while Umulinga Consilde decided to oppose this judgement, Ngirinshuti Michel will pay 15,178,250 Frw to Muberuka Jean Claude Bernard.

⁴ However, this does not prohibit any other person to own buildings, crops and any other works on other person land in accordance with procedures provided for by this Law, other laws or agreement with the land owner.

⁵ See judgment N° RCAA 00045/2016/SC rendered by the Supreme Court on 24/05/2019, from paragraph 25 to 34.

⁶ This Court took the same decision in the judgment RS/INJUST/RC 00007/2020/SC for Twagirayezu Alice vs Twagirayezu Alphonsine et al., rendered on 10/12/2021, paragraphs 40 and 41; Judgment RCAA 0117/11/CS rendered by the Supreme Court on 24/04/2015 for Nibasenge Anathalie vs Nahayo Francois Xavier.

[51] The Court finds that, on matters relating to the land bought by Nshimiyimana Augustin registered under UPI: 1/01/08/04/1635⁷, as reiterated above, that was expropriated by Nyarugenge district, Nshimiyimana Augustin has to return to Umulinga Consilde a half of the value of that land received from the expropriation of the portion he bought from Ngirinshuti Michel measuring (25m/30m) (sqm 750). Meaning $(20,666,286 \text{ frw} \div 2,039 \text{ sqm}) \times 750 \text{ sqm} = 7,601,625 \text{ frw} \div 2 = 3,800,812 \text{ Frw}$. This is also the same amount Ngirinshuti Michel has to refund to Nshimiyimana Augustin.

[52] With regard to the land with UPI: 1/01/08/04/1861 bought by Nsengiyumva Karim, the Court finds that Umulinga Consilde has to be given back a half of that land, and another half reserved for Muberuka Jean Claude Bernard to remain in the possession of Nsengiyumva Karim, since Muberuka Jean Claude Bernard has not appealed against the judgment N° RP 0356/15/TGI/NGE as reiterated above. Nsengiyumva Karim, as presented to the Court during the investigation, did not add anything to this land, therefore he must be reimbursed by Ngirinshuti Michel the value of the part of the land to be returned to Umulinga Consilde, calculated by reference to Rwanda's 2021 land reference prices.⁸ This means that for 750 sqm, by using Weighted Average Value per sqm, the value of the land should be $31,483 \text{ Frw} \times 750 = 23,612,250 \text{ Frw}$, meaning that Ngirinshuti Michel should refund to Nsengiyumva Karim a half of this amount equal to 11,806,125 Frw.

B. Whether requested damages should be awarded

[53] Umulinga Consilde and her Counsels claim that she has been deprived of her right to her property and she has been pursuing it for seven (7) years now in legal proceedings that have caused her loss as she has been travelling to and from Belgium, paying for an expensive accommodation, electricity and water, food to cope with the diabetes she suffers from, medical fees while in Rwanda as this type of medical treatment is free in Belgium. She is thereof requesting damages amounting to fifteen million Rwandan francs (15,000,000 Frw). They base this on water, electricity, medical care and drugs invoices.

[54] They also state that because Umulinga Consilde has been dragged into unnecessary lawsuits, she is asking for three million francs (3,000,000 frw) as procedural fee, based on the search for documents and their copies, the cost of correspondence with various courts, correspondence with various administrative bodies, transport costs (taxi voiture) for any time to and from her home, and she is also asking for the reimbursement of the counsel fee of five million francs (5,000,000 frw).

[55] Ngirinshuti Michel and his Counsel argue that Umulinga Consilde should not be awarded damages because there is no injustice in this case. Instead, they are asking the court to order Umulinga Consilde to pay Ngirinshuti Michel moral damages in the sum of 2, 000, 000 Frw for dragging him through unnecessary lawsuits.

⁷As explained, UPI: 1/01/08/04/1835 registered as the land Nshimiyimana Augustin bought from Ngirinshuti Michel measures 750 sqm, and the land merged with it to come up with 2.039 sqm land as it is indicated on the land titles.

⁸ Rwanda land reference prices 2021, prepared by the Institute of Real Property Valuers in Rwanda (IRPV), Official Gazette No. Special of 01/12/2021, p. 192. The Court uses Weighted Average Value per sqm.

[56] Nsengiyumva Karim and his Counsel also find that no damages should be awarded to Umulinga Consilde since she is the one who dragged herself in unnecessary, rather, she is the one to pay Nsengiyumva Karim moral damages in the amount of 2,000 000 Frw for dragging him in unnecessary lawsuits, 500,000 Frw for Counsel fee and 500,000 Frw for procedural fee.

[57] Counsel Habakurama François Xavier representing Nshimiyimana Augustin finds damages requested by Umulinga Consilde baseless, rather, based on article 111 of the Law N° 22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure, Umulinga Consilde should be ordered to pay Nshimiyimana Augustin 1,500,000 Frw for Counsel fee at this instance and 500,000 Frw for procedural fee for frequently dragging him in unnecessary lawsuits.

DETERMINATION OF THE COURT

[58] Article 111 of the Law N° 22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure provides that “The claim for representation fees is an incidental claim to the principal claim aiming to repay expenses incurred during judicial proceedings. The claim for legal costs is adjudicated at the same time with the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted”.

[59] The Court finds that Umulinga Consilde, Nsengiyumva Karim and Nshimiyimana Augustin deserve the representation fees and costs that they have requested, as it has been necessary for them to pursue their case because Ngirinshuti Michel sold the disputed property in full knowledge that it belonged to Muberuka Jean Claude Bernard and Umulinga Consilde, and they were well obliged to engage lawyers to assist them. However, since the requested amount is excessive, in the discretion of the Court, they are each awarded 500,000 Frw for counsel fee and 300,000 Frw for procedural fee, making a total of 800,000 Frw, to be paid by Ngirinshuti Michel.

[60] The Court further finds that, on the basis of Umulinga Consilde's submissions requesting 15,000,000 Frw, this amount should not be awarded as she is unable to provide evidence that such an amount was actually used in the follow-up of this case.

[61] With regard to damages in the amount of 2,000,000 Frw for being dragged in unnecessary lawsuits requested by Nsengiyumva Karim, as well as the same amount requested by Ngirinshuti Michel, the Court finds that those damages should not be awarded to them since they are not the ones who applied for the review of the judgment due to injustice. In addition, Ngirinshuti Michel won nothing in this case.

III. DECISION OF THE COURT

[62] Holds that the application filed by Umulinga Consilde seeking the review on grounds of injustice of the judgment No RCA 00123/2018/HC/KIG rendered by the High Court on 10/09/2018 where it maintained the judgment No RP 0356/15/TGI/NYGE rendered by Nyarugenge Intermediate Court on 23/12/2015, has merit in part;

[63] Decides that the ruling in the judgment N° RP 0356/15/TGI/NYGE rendered by Nyarugenge Intermediate Court on 23/12/2015 is reversed on matters relating to what Ngirinshuti Michel has to return back;

[64] Orders Ngirinshuti Michel to pay Muberuka Jean Claude Bernard 15,178,250 Frw;

[65] Orders Nshimiyimana Augustin to reimburse Umulinga Consilde 3,800,812 Frw;

[66] Orders Nsengiyumva Karim to return back to Umulinga Consilde a half of the land with UPI:1/01/08/04/1861 bought from Ngirinshuti Michel;

[67] Orders Ngirinshuti Michel to refund Nshimiyimana Augustin 3,800,812 Frw;

[68] Orders Ngirinshuti Michel to pay Nsengiyumva Karim 11,806,125 Frw as the value of the land to be returned back to Umulinga Consilde;

[69] Orders Ngirinshuti Michel to pay Umulinga Consilde, Nshimiyimana Augustin and Nsengiyumva Karim 800,000 Frw each for both counsel fee and procedural fee.