

RWANDA / JUDGMENT

BINAMUNGU v. NATIONAL POST OFFICE (ONP)

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BINAMUNGU v. NATIONAL POST OFFICE (ONP) [Rwanda SUPREME COURT – RDA 0042/13/CS (Mukamulisa, P.J., Mukandamage and Gatete G., J.) October 10, 2014] Intellectual property – Copyright – Use of transferred work – Original work is defined as work which, by its characteristic features and in its form, or its form alone, allows individualization of its author – Unless proved otherwise, is presumed the author of the work, the person whose name or pseudonym leaving no doubt about the identity of the author, is shown on the work – The author of a protected work has the exclusive right to do or authorize the performance of any of the following acts on the entire work, or part of it such as its reproduction; transformation of the work and communication of the work to the public – The transfer of ownership of the single copy or copies shall not imply the transfer of copyright in the work – Law n° 27/1983 of 15/11/1983 on the protection of intellectual property, articles 1, 9, 10, 34, 53 paragraph 3, and 80. Damages – Detrimental use of copyright – counsel fees – Damages relating to detrimental use of artistic work are awarded upon discretion of the court – The party who continued to hire the services of the advocate at appellate level

should be awarded related counsel fees – Law of 30/07/1888 relating to contracts or obligations, article 258. Facts: The National Post Office (NPO) released tender to design artistic works to be used for making its post stamps, and Binamungu Epaphrodite participated in the tender competition and his 5 artistic works comprising: patrimoine, Agaseke et sourires, Intore, les mains habiles and Danse mixte won the tender. Binamungu filed a case against the NPO in the High Court alleging that the NPO used his artistic works in breach of the contract they had concluded because it reproduced; cut and modified them. He requested 200,000,000Frw as damages. The High Court ruled against NPO because it infringed in the use of Binamungu's artistic works, and awarded him 5,000,000Frw of damages for the reproduction, and use of his artistic works to make postal cards without his authorization. In addition, it awarded him 10,000,000Frw for cutting of his artistic works in the course of making post cards, printing and the absence of his pseudonym on them, and 1,000,000Frw of counsel fees. Both sides were not satisfied with the ruling of the case and appealed to the Supreme Court, whereby NPO alleges that the High Court misinterpreted the provisions of the contract they concluded because it did not raise the main issue concerning the status of the rights that Binamungu has over his artistic works transferred to NPO through bidding as they are folkloric, such that Binamungu cannot pretend to own them. He alleges in addition that the award of damages by the High court was done contrary to the Presidential order n° 276/14 of 6/5/1985. For Binamungu, he deems damages awarded to him insufficient and concerning the NPO appeal grounds, he alleges that his right over the artistic works transferred to NPO should be analysed in the context of the originality of them as provided for by article 1 of the Law of 15/11/1983 on the protection of intellectual property. Held: 1. Original work is defined as work which, by its characteristic features and in its form, or its form alone, allows individualization of its author.

2. Unless proven otherwise, it is presumed that the author of the work, the person whose name or pseudonym leaving no doubt about the identity of the author is shown on the work.

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3. The author of a protected work has the exclusive right to do or authorize the performance of any of the following acts on the entire work, or part of it; its reproduction; transformation of the work and communication of the work to the public.
4. The transfer of ownership of the single copy or copies shall not imply the transfer of copyright in the work
5. Damages relating to detrimental use of artistic work are awarded upon discretion of the court and those awarded by the High Court are in range
6. Concerning the counsel fees requested by the respondent on this level, is charged on the appellant because the latter was represented even at appeal level. Since what he requested for is excessive; the court upon its discretion, awards him 500,000Frw in addition to 1,000,000Frw awarded by the High Court. National Post Office's appeal has no merit. Binamungu's appeal has merit. Court fees to National Post Office. Statutes and statutory

instruments referred to: Law n° 27/1983 of 15/11/1983 on the protection of intellectual property, articles 1, 9, 10, 34, 53 paragraphs 3, and 80. Law of 30/07/1888 relating to contracts or obligations, article 258. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Binamungu Epaphrodite's 5 artistic works which are patrimoine, Agaseke et sourires, Intore, les mains habiles and Danse mixte won the tender offer that was released by National Post Office relating to the production of artistic work to be used for post-stamps graphic design. Binamungu sued NPO before the High Court alleging that he was surprised to realize that this institution used his works in contradiction with the contract as it reproduced, cut into parts and modified them. He therefore requested 200,000,000 as damages. [2] The High Court dismissed NPO because it has misused Binamungu's works and awarded him 5,000,000Frw as damages for extension and use of his artistic works in production of postal cards without his authorization. It also awarded him 10,000,000Frw for cutting in parts his artistic works during the graphic design of postal cards and for the lack of his pseudonym on them, and 1,000,000Frw as counsel fees. [3] Both sides were not satisfied with the ruling of the case and they submitted their appeal to the Supreme Court. [4] Public hearing was conducted on 09 September 2014, whereby NPO was represented by Counsel Ndagijimana Emmanuel while Binamungu Epaphrodite was represented by Counsel Budongo Innocent.

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II. ANALYSIS OF LEGAL ISSUES

- a) Whether Binamungu had no right over the artistic works presented in NPO tender. [5] Counsel Ndagijimana Emmanuel for NPO states that the High Court misinterpreted the provisions of the contract between both parties where it did not raise the crucial issue concerning the status of ownership right of Binamungu over the works transferred to NPO through the tender competition. He states also that the Court has not analysed well the provision of article 53, paragraph 9 of the Law n° 27/1983 of 15/11/1983 on the protection of intellectual property¹ and realize that Binamungu could not claim ownership over them because they are folkloric works therefore; he holds no right of ownership over them. [6] In this context, he presents further example that no artist may claim ownership over Intore because it is commonly known to be one of the indicator of Rwandan culture (folklore) and indeed, the above mentioned Law n° 27/1983 protect even culture in general such that any artist who exploit the folklore for his own interests may be punished by article 78 of the same Law. [7] Counsel Budongo for Binamungu in his arguments rejects the allegations of Counsel Ndagijimana Emmanuel on behalf of the NPO finding them baseless. He argues also that in order to examine if Binamungu has ownership right over his artistic works, it should be referred to article 1 of the Law n° 27/1983 stated above, which provides that original work is defined as work which, by its characteristic features and in its form, or its form alone, allows individualization of its author. Therefore, it should be considered that the owner of

the artistic works is obviously Binamungu since the said artistic works are his own original works produced and protected in accordance with the above mentioned Law n° 27/1983, especially that even his pseudonym appears on them. Thus, nobody can claim ownership over them. [8] He refutes in addition the arguments of NPO that the High Court misinterpreted the provision of article 9 of the aforementioned Law n° 27/1983, because according to him that provision is very clear since it states that the author of artistic work has the right to prohibit its modification, reproduction, redesign or use of it in any modifying way and this is in relation to what the NPO did because it modified, reproduced and used his works in breach of their agreements. [9] Concerning article 53 of the Law n° 27/1983 stated by Counsel for NPO stating that the Law was misinterpreted by the court, Counsel Budongo on behalf of Binamungu refutes his argument by saying that this provision is also clear because it provides that in order to settle the disputes, the scope is limited to the exploitation modes specified in the contracts but all that the author did not expressly transfer is reserved for him. [10] He argues regarding the rights of artists that the copyright was expressed in the judgment RCOMA 0014/08/CS rendered by the Supreme Court on 06 August 2010, opposing 1Article 9 of that Law indicates the list of different rights of the author of works, while its last paragraph states as such: "...the total or partial disposal of a work inspired by folklore or the exclusive license relating to such a work is valid only if it has received the approval of the Rwandan Department responsible for the management of copyright". Among the readings of article 53 of the aforementioned Law include: "...In case of transfer of all or part of any of the rights mentioned in Article 9, the scope is limited to the exploitation modes specified in the contracts. All that the author did not have expressly transferred is reserved for him. The transfer of ownership of the single copy or copies shall not imply the transfer of copyright in the work...."

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the artist Bushayija Pascal and COGEBANQUE S.A in which this artist initiated the case alleging that this bank used his artistic works on its bank cheques without his authorization and the Court gave merit to his claim. FINDINGS OF THE COURT [11] Article 1 of the Law n° 27/1983 states that "the authors of literary, artistic and original scientific works benefit from the protection of their works in accordance with this Act. It further stipulates that "the original work is defined as work which, by its characteristic features and in its form, or its form alone, allows the identification of its author". [12] Article 34 of Law n° 27/1983 states that, it is presumed author of the work, unless proven otherwise, the person whose name or pseudonym as marked on it leaves no doubt about the identity of the author. [13] In addition, article 9 of the aforementioned law provides that the author of a protected work has the exclusive right to do or authorize the performance of any of the following acts on the totality or part thereof; reproduce the work by making one or more copies, make any other alteration, and communicate the work to the public, while article 53 paragraph 3 of the same Law provides that "the transfer of ownership of the single copy or copies shall not imply the transfer of copyright in the work". [14] Through the NPO bidding offer for the design of post stamps, it called the participation of all desiring and competent artists to design

post stamps on the following themes: Beijing Olympic Games, Rwandan baskets, Rwandan Culture (Danse and Decoration), etc. As far as the Rwandan culture was concerned, the NPO put it clear in that offer that the artist's drawings should relate to various aspects of dance and decoration in the context of Rwandan culture. [15] Binamungu having participated in the competition and drawn Rwandan cultural works on which he mentioned his pseudonym, which were retained by NPO and put them on its post stamps, does not preclude the originality of his artistic work as explained by article 1 of the Law n° 27/1983 since contrariwise, that originality and inventiveness of his drawings were the key factor for winning the competition. [16] Based on all these explanations, the Court finds that the statements of the Counsel for NPO, that Binamungu should not claim the authorship of folkloric works lack merit because it was highlighted that he has the right over those works which is protected by the Law. [17] More so, as decided by the High Court, since NPO does not deny that Binamungu submitted his artistic works designed in accordance to its offer which indicated the specifications of those works, the court therefore finds no reason for it to reverse from the reality and argue that Binamungu cannot claim authorship or has no copyright over them.

- b) Whether NPO used the artistic works of Binamungu in infringement of copyright. [18] Counsel Ndagijimana states that NPO did not infringe in the use of Binamungu's artistic works because it did not trade them, rather, it only put them on post stamps in the context of exhibition of Rwandan culture and that it displayed them once in exhibition, and this is different from reproduction for the commercial purpose.

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- [19] He states in addition that the High Court should have not relied on the judgment RCOMA 0014/08/CS rendered by this Court on 6 August 2010 between COGEBANQUE against Bushayija because it has no link with this case, especially that in the first one, COGEBANQUE used the works in commercial context, while it is known that the Postal Office does not engage in business deals and the nature of works differ in both cases. [20] Counsel Ndagijimana adds that due to the size of the works submitted by Binamungu, It was impossible to incorporate them on postal card entirely as it was done for post stamps, the reason why NPO incorporated them in part, but that should not be considered as work alteration. [21] Counsel Budongo argues that NPO reproduced and cut in parts the artistic works of Binamungu through the printing of postal cards. He states that on the post stamps they appear as entirely conceived by him, which is different from how it appears on postal cards. He states in addition that, despite even their alteration, NPO did not mention his pseudonym on those postal cards. [22] In his appeal, the counsel for Binamungu blames the Court to have held that NPO did not alter his artistic works in the course of postal cards graphic design in the context of commerce, but rather, it held that it intended to exhibit the culture. Therefore, he finds the decision far from the truth since Binamungu produced evidences before the court, including various invoices which include even those submitted by individual traders. [23] He states in addition that, despite those mentioned evidences, there exists an abstract of the broadcast interview submitted to the Court, which was held by

the Director of Marketing known as Maniraguha Bisengimana Dieudonné in which he explained that NPO exercises commercial activities, therefore he finds that NPO should not deny it and that the High Court was legally right when relying on the judgment RCOMA 0014/08/CS it rendered on 06 August 2010 between COGEBANQUE and Bushayija because they have same facts. THE VIEW OF THE COURT [24] The provision of article 9 of the Law n° 27/1983 points to the exclusive right to do or authorize to doing one act on the totality of the work or part thereof like reproduction, transformation or communication of it to the public. [25] Article 10 of the same Law provides that “the fulfillment of one of the acts mentioned in Article 9 by a third party can take place only with the express written authorization of the author or his beneficiaries duly endorsed by a notary or legalized by a competent authority. [26] Pursuant to the highlighted provisions, the Court is of the view that the essential issue that should be examined is to know whether NPO exploited the artistic works of Binamungu according to what is agreed upon in the contract. [27] The Court finds that whereas in the bid announcement released by NPO it was well clear that it concerned “call for competition to draw post stamps”, NPO does not deny that, despite that it incorporated Binamungu’s artistic works on the post stamps as it was agreed upon, it also pasted them on its postal cards. Consequently, it is obvious that NPO did not respect the clauses of the contract as far as the use of his artistic works is concerned.

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- [28] Regarding the use of the artistic works of Binamungu by NPO as the High court reasoned it, the court finds that the works were not incorporated on the postal cards entirely and despite being minimized only as argued by NPO, they were even cut in pieces, and his pseudonym did not appear on them. Consequently, there is no doubt, irrespective of the context NPO used them, their use is contravening.
- c) Concerning various damages requested for and awarded on this level.
1. Damages relating to the reproduction and use of Binamungu’s artistic works for commercial purposes by NPO. [29] Counsel Budongo states that Binamungu requests for 150,000,000Frw as damages for the use of his 5 artistic works for commercial purpose by NPO (meaning 30,000,000Frw per each piece of work). He requests in addition the increase of the awarded damages to Binamungu for the reproduction of the same works, therefore he requests for 4,000,000Frw per each piece of work amounting to 20,000,000Frw. [30] Counsel Ndagijimana argues that NPO does not exercise commercial activities and that it has never commercialised postal cards with Binamungu’s artistic works, rather, it exhibited them once in the context of Rwandan cultural exposition, of which was even expressed in the works that Binamungu pretends to have invented. He states also that in the determination of damages awarded to Binamungu, the High Court did not follow the provisions of the presidential Order n° 276/14 of 6/5/1985. [31] Counsel Budongo adds that this Presidential Order n° 276/14 determines damages and the exercise of resale right as provided for by articles 11 to 14 of the Law n° 27/1983, but goes on to argue that those provisions relate to

interests earned from the proceeds of the sale or auction of their works with the agreement of both parties, which is different in this case as NPO exploited the works of Binamungu without his consent. THE VIEW OF THE COURT [32] The Court shares the view with the High Court that there is no evidence indicating the commercialization of Binamungu's artistic works especially that he was unable to demonstrate the number of commercialized pieces of work and the amount of money gained, therefore, the court finds that NPO should be held liable of modifying Binamungu's artistic works contrary to their agreement.. [33] Concerning the reproduction of Binamungu's works by NPO without his authorization, as stated above, NPO acted in contravention with the law, beyond the end use purpose and copyright since it did not exhibit them entirely, therefore it is undoubtful that the acts of NPO infringed Binamungu's copyright. [34] However, regarding the amount of compensation awarded in the judgment RCOMA 0014/08/CS between Bushayija Pascal and COGEBANQUE S.A and pursuant to the provision of article 80 of the Law n° 27/1983 which states that Civil law applies to civil actions arising from the exercise of copyright, the court should rely on article 258 of the civil code book III which provides that "any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to pay for reparation" for the determination of compensations.

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- [35] The Court finds that damages for reproduction of artistic works and for sale of postal cards should not be separated because those two acts are linked to the NPO's daily sale activity of postal cards as it is explained in its letter of 14 September 2011 in response to the one wrote to it by Binamungu. [36] Concerning the determination of damages, the court finds that the counsel for NPO failed to justify how the court disregarded the Presidential Order n° 274/14 of 6/5/1985, despite that it could not even be applied while the artistic works were used in contradiction to the agreement concluded with Binamungu. [37] Given the motivation above, the court is of the view that compensations should be determined upon the discretion of the court, thus the amount of 5,000,000Frw as damages awarded by the High Court upon its discretion are in range.
2. Compensation for transformation by cutting in pieces Binamungu's artistic works by NPO. [38] Counsel Budongo declares that damages awarded to Binamungu which amount to 10,000,000Frw for NPO's act of cutting his artistic works in pieces, which were later put on its postal cards omitting his name, are insufficient and this acts of NPO caused him a big loss because his clients who used to recognize him for his fame home and abroad lost trust in him. Consequently, he prays the court to award him 6,000,000Frw for each pece of artistic work, thus amounting to 30,000,000Frw for all 5 works. [39] Counsel Ndagijimana states that Binamungu does not deserve to be awarded compensation and should have not been awarded them at the High Court because he fails to justify how the use of his works by NPO affected him and the loss it caused him as likely to be relied on by the court for its discretionary award of damages. THE VIEW OF THE COURT [40] According to the motivation of the High Court, the modification in pieces of the artistic works of Binamungu

without his consent by NPO is certainly a fault and it is in contradiction with the Law. However, the counsel for Binamungu failed to demonstrate to the Court the loss relating to the trust in him lost by his clients in order for the Court to rely on it for the award of damages, the reason why even if he deserves them, but they should be determined upon the discretion of the Court and in this context, the court deems that those amounting to 10,000,000Frw awarded by the High Court are in range.

- c. Concerning counsel fees [41] Counsel Ndagijimana blames the High Court in its decision to have awarded 1,000,000Frw as counsel fees while it was unclaimed. He also argues that in case the court finds NPO's appeal claim with merit, it shall award 2,000,000Frw of counsel fees to NPO. [42] Counsel Budongo states in response that the amount awarded to Binamungu was requested for, and therefore the court was not wrong. He contends in addition that NPO does not deserve counsel fees because it committed faults. He furthermore prays for the award of advocate fees and procedural costs amounting to 1,500,000Frw in addition to what was awarded by the High Court to Binamungu.

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THE VIEW OF THE COURT [43] The court finds that Binamungu engaged in law suits due to the faults of NPO and it is clear in the submission of his counsel before the High Court that he requested 1,000,000Frw for procedural expenses and counsel fees, therefore the High Court committed no error in awarding them to him. [44] Regarding the counsel fees requested by Binamungu on this level, the court finds that NPO should pay them because it was necessary for him to hire the services of the advocate, since the requested fees is excessive, he should be awarded 500,000Frw in addition to 1,000,000Frw awarded by the High Court, thus amounting to 1,500,000Frw. III. DECISION OF THE COURT [45] Decides that the appeal lodged by National Post Office (NPO) has no merit. [46] Decides that the appeal lodged by Binamungu Epaphrodite has merits in part. [47] Modifies the ruling of the judgment RAD 0106/12/HC/KIG rendered on 3 may 2013 solely in relation to the counsel fees to be paid by NPO to Binamungu Epaphrodite. [48] Orders National Post Office to pay 15,000,000Frw to Binamungu for damages and 1,000,000Frw for advocate fees awarded by the High Court in addition to 500,000Frw awarded on this level. The total amount to be paid by NPO to him shall be 16,500,000Frw. [49] Orders the National Post Office to pay court fees for this case.

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