

RWANDA / JUDGMENT

RLR-V.1- 2016

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Supreme Court

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IRIBURIRO Basomyi bacu, Urwego rw'ubucamanza runejejwe no gutangaza numero ya kabili y'icyegeranyo cy'ibyemezo by'inkiko mu mwaka wa 2016. Turashishikariza abacamanza, abashinjacyaha, abavoka n'abandi banyamategeko bakoresha aka gatabo kuduha ibitekerezo byanyu kugirango turusheho kunoza imitegurire y'icyegeranyo cy'ibyemezo by'inkiko kuko intumbero yacu ari ugutegura icyegeranyo kiri ku rwego mpuzamahanga. Muri iyi numero y'icyegeranyo cy'ibyemezo by'inkiko murasangamo imanza cumi n'ebiri (12) zikubiyemo imanza umunane (8) z'imiburanishirize y'imanza, imanza ebyiri(2) z'ubucuruzi, imanza ebyiri (2) nshinjabyaha. Tuboneyeho kubamenyesha ko imanza ziri muri iki cyegeranyo ziboneka no ku rubuga rwa murandasi rw'Urukiko rw'Ikirenga ruborohereza kubona urubanza mukeneye mu buryo bwihuse, kuri <http://decisia.lexum.com/rlr/kn/nav.do> Prof. Sam RUGEGE Perezida w'Urukiko rw'Ikirenga Perezida w'Inama Nkuru y'Ubucamanza

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INYITO Imanza ziri muri iyi volime zikoreshwa muri ubu buryo:

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Cyamunara – Uberewemo cyangwa urimo umwenda asanze igiciro gitanzwe kidakwiye ashobora gusaba ko cyamunara gishyirwa ku wundi munsu, kuri uwo munsu wemejwe ibyo bintu bitezwa cyamunara byanze bikunze kandi agaciro k'inzu yatejwe cyamunara kagomba kureberwa igihe iyo cyamunara yabereyeho. MUKAMUSONI v. LETA Y'U RWANDA

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A. IMANZA ZEREKERANYE N'IMIBURANISHIRIZE Y'IMANZA Z'IMBONEZAMUBANO, IZ'UBUCURUZI, IZ'UMURIMO N'IZ'UBUTEGETSI

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AKARERE KA GATSIBO v. RUZABARANDE N'ABANDI [Rwanda URUKIKO RW'IKIRENGA – RADA0004/14/CS (Mutashya, P.J., Munyanyeri na Gakwaya, J.) 26 Nyakanga 2015] Amategeko agenga imiburanishirize y'imanza z'ubutegetsi – Inzitizi – Ububasha, inyungu n'ubushobozi bw'Akarere mu gutanga ikirego – Akarere gashobora gutanga ikirego mu izina ryako ariko kagomba guhamagarwa mu izina ry'umuyobozi wako – Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 3 n'ya 31. Amategeko agenga ububasha bw'Inkiko – Ububasha bw'Urukiko rw'Ikirenga nk'urukiko rw'ubujurire hashingiwe ku ndishyi zagenwe mu rubanza – Mu kumenya ububasha bw'Urukiko rw'Ikirenga nk'urukiko rw'ubujurire harebwa indishyi zagenwe mu rubanza aho kureba izahawe buri muburanyi mu rubanza – Itegeko Ngenga N°03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 28. Amategeko agenga imiburanishirize y'imanza z'ubutegetsi – Inzitizi yo kutakira ubujurire – Impamvu zimwe – Urubanza umuburanyi yatsinzwe ku rwego rwa mbere n'urwa kabiri ku mpamvu zimwe, ntirushobora kujuririrwa mu Rukiko rw'Ikirenga – Itegeko Ngenga N°03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 28. 1

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Incamake y'ikibazo: Ruzabarande na bagenzi be bareze akarere ka Gatsibo mu Rukiko Rwisumbuye rwa Nyagatare kuba karigabije amasambu yabo, kakayaha COOPRORIZ – NTENDEZI katabahaye ingurane n'agaciro k'ibyari biri kuri ubwo butaka. Akarere ka Gatsibo ko kireguye kavuga ko ubwo butaka atari ubwabo ahubwo ko ari igishanga cyako kishubije. Urwo Rukiko rwemeje ko Akarere ka Gatsibo katwaye mu buryo budakurikije amategeko ubwo butaka karegwa kuko nta ngurane ikwiye n'ikiguzi cy'ibyari biburiho kabanje kubaha, maze gategekwa guha Ruzabarande na bagenzi be ingurane ikwiye, ikiguzi cy'ibyari biburiho n'indishyi zibikomokaho. Ababuranyi bombi bajuririye uru rubanza mu Rukiko Rukuru, Urugereko rwa Rwamagana aho Akarere ka Gatsibo kavuga ko Urukiko rwagaciye indishyi kandi ubwo butaka ari igishanga cya Leta naho Ruzabarande na bagenzi be bakavuga ko bagenewe indishyi nkeya. Urwo Rukiko rwemeje ko ubujurire bw'Akarere ka Gatsibo nta shingiro bufitse naho Ruzabarande na bagenzi be rubagenera amafaranga y'igihembo cy'Avoka yiyongera kuyo buri wese yari yagenewe ku rwego

rwa mbere nk'igihembo cya avoka. Akarere ka Gatsibo kongeye kujuririra urwo rubanza mu Rukiko rw'Ikirenga. Mu gihe cy'iburanisha Ruzabarande na bagenzi be batanze inzitizi eshatu zigamije kutakira ubujurire bw'Akarere ka Gatsibo bavuga ko Akarere kareze ubwako aho kurega mu izina ry'umuyobozi wako; ko indishyi zatanze mu rubanza rujuririrwa zitagera ku mafaranga miliyoni 50 kubera ko Akarere kaburana n'abaturage 37 kandi buri wese akaba yarakoze umwanzuro we, atanga ikirego cye n'igarama rye, bityo ko n'urukiko rwaciye urubanza rutigeze ruha umuntu umwe indishyi zigeze kuri 50.000.000Frw n'ubwo izo ndishyi zose ziteranyijwe zibyara agera kuri 200.000.000Frw, ikindi ni 2 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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uko Akarere kajuririye urubanza katsinzwe ku rwego rwa mbere n'urwa kabiri ku mpamvu zimwe. Ku nzitizi ya mbere Akarere ka Gatsibo kavuga ko Itegeko rivuga uburyo bw'ihamagara ritavuga uburyo bwo gutanga ikirego. Ku nzitizi ya kabiri kavuga ko ikiburanwa ari igishanga, bityo hakaba hagomba gushingirwa ku mategeko agenga igishanga aho gushingirwa ku gaciro k'amafaranga naho ku nzitizi ya gatatu kavuga ko Umucamanza wo mu Rukiko Rwisumbuye yemeje ko isambu ikirego gishingiyeho ari igishanga kiri mu mutungo rusange wa Leta, kandi icyo cyemezo kikaba kitagaragara mu byo Urukiko Rukuru rwemeje, bityo impamvu zashingiweho akaba atari zimwe. Incamake y'icyemezo: 1. Akarere gashobora gutanga ikirego mu izina ryako ariko kagomba guhamagarwa mu izina ry'umuyobozi wako.

2. Mu kureba ububasha bw'Urukiko rw'Ikirenga nk'urukiko rw'ubujurire hashingirwa ku ndishyi zagenwe mu rubanza aho kureba izahawe buri muburanyi mu rubanza.
3. Kuba inkiko zombi zarasobanuye ko n'ubwo ahaburanwa haba hari igishanga, bitari kuba impamvu yo gusenyerera Ruzabarande na bagenzi be no kubononera ibyabo nta ngurane bahawe kandi bari barahawe n'ubuyobozi bubifitiye ububasha bigaragara ko katsinzwe mu rwego rwa mbere n'urwa kabiri ku mpamvu zimwe, bityo urubanza umuburanyi yatsinzwe ku rwego rwa mbere n'urwa kabiri ku mpamvu zimwe, ntirushobora kujuririrwa mu Rukiko rw'Ikirenga. Inzitizi ijyanye no kutakira ikirego kubwo gutsindwa ku mpamvu zimwe ifite ishingiye. 3 AKARERE KA GATSIBO v. RUZABARANDE N'ABANDI

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Ubujurire ntibwakiriwe. Amagarama aherereye ku wajuriye. Amategeko yashingiweho: Itegeko Ngenga N°03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 28. Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 3 n'ya 31. Nta manza zifashishijwe. Urubanza I. IMITERERE Y'URUBANZA. [1] Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Nyagatare, Ruzabarande Festo na bagenzi be barega Akarere ka Gatsibo kuba karigabije amasambu yabo, kakayabambura, kakayaha COOPRORIZ-NTENDEZI kugira ngo iyahingemo umuceri, basaba Urukiko gutegeka Akarere ka Gatsibo kubaha ingurane n'agaciro k'ibyari biri kuri ubwo butaka. Akarere ka Gatsibo ko kiregura kavuga ko aho hantu hatari

amasambu yabo ahubwo ko kishubije igishanga cyako cya Ntendezi. Urwo rukiko rwaciye urubanza RAD0038 – 0076/TGI/NYG, kuwa 11/7/2013, rwemeza ko Akarere ka Gatsibo katwaye mu buryo budakurikije amategeko ubutaka karegwa na Ruzabarande Festo na bagenzi be, kuko nta ngurane ikwiye n'ikiguzi cy'ibyari biburiho kabanje kubaha, rutegeka Akarere ka Gatsibo guha 4 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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Ruzabarande na bagenzi be ingurane ikwiye, ikiguzi cy'ibyari biburiho n'indishyi zibikomokaho. [2] Akarere ka Gatsibo na Ruzabarande na bagenzi be ntibishimiye imikirize y'urubanza bajuririra mu Rukiko Rukuru, Urugereko rwa Rwamagana. Akarere ka Gatsibo kavuga ko Urukiko rwagaciye indishyi kandi ubwo butaka ari igishanga cya Leta, naho Ruzabarande na bagenzi be bavuga ko Urukiko rwabageneye indishyi nkeya ugereranyije n'igihe ubwo butaka bamaze babwambuwe. [3] Urwo rukiko rwaciye urubanza RADA0016/13/HCI/RWG - RADA0054/13/HCI/RWG, kuwa 17/4/2014, rwemeza ko ubujurire bw'Akarere ka Gatsibo nta shingiro bufite, rwemeza ko urubanza rwajuririwe ruhindutse gusa ku ndishyi zijyanye n'igihembo cya avoka, buri wese mu bajuriye agahabwa 30.000Frw yiyongera kuri 100.000Frw buri wese yari yagenewe ku rwego rwa mbere nk'igihembo cya avoka. [4] Akarere ka Gatsibo ntikishimiye imikirize y'urubanza, karujuririra mu Rukiko rw'Ikirenga. Me Rumenge Victor yatanze inzitizi eshatu asaba ko ubujurire bw'Akarere ka Gatsibo butakirwa, kuko kareze ubwako aho kurega mu izina ry'umuyobozi wako, ko indishyi zatanzwe mu rubanza rujuririrwa zikaba zitagera kuri miliyoni 50, kandi Akarere kakaba karatsinzwe ku rwego rwa mbere n'urwa kabiri ku mpamvu zimwe. [5] Urubanza rwaburanishijwe ku nzitizi gusa mu ruhame kuwa 19/05/2015, Ruzabarande na bagenzi be baburanirwa na Me Rumenge Victor, Akarere ka Gatsibo gahagarariwe na Me Kayiranga Bernard. 5 AKARERE KA GATSIBO v. RUZABARANDE N'ABANDI

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II. ISUZUMWA RY'INZITIZI ZATANZWE MURI URU RUBANZA Ku byerekeranye n'inzitizi y'uko Akarere ka Gatsibo kareze ubwako atari mu izina ry'umuyobozi wako. [6] Me Rumenge Victor avuga ko inzitizi ya mbere irebana no kuba ikirego cyaratanzwe mu buryo budakurikije amategeko kuko Akarere ka Gatsibo (personne morale) kareze ubwako kandi ari urwego rwa Leta, kakaba karagombaga kurega mu izina ry'umuyobozi wako. Asobanura ko nk'uko bisanzwe bigenda, iyo urwego rwa Leta rutanga ikirego, rurega mu izina ry'umuyobozi cyangwa mu izina ry'uhagarariye icyo kigo cya Leta kirega. [7] Avuga ko ingingo ya 31 y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko Akarere (personne morale) gahamagazwa mu izina ry'Umuyobozi wako, akaba ari nako bigomba kugenda iyo karega. Avuga kandi ko ibyo bishimangirwa n'ingingo ya 2 y'iryo tegeko, mu gaka ka mbere kavuga ibisabwa kugira ngo ikirego cyakirwe, aho basobanura ko ikirego kitakirwa iyo urega adafite ububasha, inyungu n'ubushobozi, bityo Akarere ka Gatsibo kareze kakaba kadafite ububasha bwo kurega. [8] Me Kayiranga Bernard avuga ko iyo nzitizi nta shingiro ifite kubera ko Umuyobozi w'Akarere ka Gatsibo ariwe wasabye ko mandataire wa Leta atanga ikirego kandi akaburanira Akarere, ajuririra urubanza kari

karezwemo, ko rero Akarere ka Gatsibo katanze ikirego mu izina ry'Umuyobozi wako, ndetse ko no mu Rukiko Rwisumbuye ariwe wari ugahagarariye, bikaba bitari ngombwa ko hajyaho umukono we. 6 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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Avuga ko ingingo ya 31 y'Itegeko N°21/2012 ryavuzwe haruguru, ivuga uburyo bw'ihamagara, ko itavuga uburyo bwo gutanga ikirego.

UKO URUKIKO RUBIBONA [9] Ingingo ya 3 y'Itegeko N°21/2012 ryo kuwa 14/06/2012, ryavuzwe haruguru, iteganya ko: "Uretse iyo itegeko ribiteganya ukundi, ababuranyi bonyine nibo batanga ikirego. Bafite ubwisanzure bwo kugihagarika igihe cyose urubanza rutaracibwa cyangwa ngo kizime ku bw'itegeko". Naho ingingo ya 31 y'iryo tegeko, ivuga ku buryo bw'itumira bwihariye, ko Umuyobozi w'Akarere atumirwa mu izina ry'Akarere. [10] Urukiko rurasanga, hashingiwe kuri izi ngingo, Umushingamategeko yaragaragaje ko uwifuza kurega wese agomba gutanga ikirego, cyakora ko mu gihe cyo guhamagara ababuranyi, hari abakorerwa ihamagarwa ryihariye, ko Akarere runaka katahamagarwa nk'Akarere ahubwo ko kagomba guhamagarwa mu izina ry'umuyobozi wako, bikaba bisobanuye ko atari ngombwa ko Akarere karega mu izina ry'umuyobozi wako, ariko gahamagarwa, mu izina ry'umuyobozi wako. [11] Urukiko rurasanga, hashingiwe ku bisobanuro bitanzwe haruguru, ibyo Me Rumenge Victor avuga ko Akarere ka Gatsibo nk'urega muri uru rubanza kadafite ubushobozi nta gaciro byahabwa, inzitizi yo kutakira ubujurire bw'Akarere ka Gatsibo ku mpamvu zuko bwatanzwe mu buryo budakurikije amategeko, ikaba nta shingiro ifite.

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Kubyerekeranye n'inzitizi y'iburabubasha kubera ko indishyi zatanzwe mu rubanza rujuririrwa zitagera kuri miliyoni 50. [12] Me Rumenge Victor avuga ko inzitizi ya kabiri ari iyo babonye nyuma, bakaba barayishyikirije Urukiko mu mwanzuro w'inyongera, irebana n'uko Urukiko rw'Ikirenga rufite ububasha bwo kuburanisha imanza zaciwe n'Urukiko Rukuru iyo zagenwemo indishyi zingana na 50.000.000Frw cyangwa se harabayeho impaka, agaciro k'ikiburanwa kakemezwa n'umucamanza ko kangana na 50.000.000Frw, nyamara muri uru rubanza Akarere ka Gatsibo kaburana n'abaturage 37, buri wese yakozwe umwanzuro we, atanga ikirego cye n'igarama rye, ndetse buri wese agaragaza n'ibyo asaba ku giti, ndetse n'urukiko ruca urubanza kuri buri muntu ku giti cye, ko mu guca urubanza urukiko rutigeze ruha umuntu umwe indishyi zigeze kuri 50.000.000Frw, cyakora ko izo ndishyi ziteranyijwe zibyara agera kuri 200.000.000Frw, ariyo mpamvu basaba ko ubujuririe butakwakirwa. Asoza atanga urubanza rwazashingirwaho kuko ikiburanwa gisa n'icyo muri uru rubanza, urwo rubanza akaba ari RADAA0012/12/CS rwaciwe kuwa 14/6/2013, Akarere ka Gatsibo kaburana na Ntezirirazaza Adrien na bagenzi be, muri urwo rubanza, uru rukiko rukaba rwaremeje ko ikirego cy'Akarere ka Gatsibo kitakwakirwa kubera ko kajuririye inkiko zombi ku mpamvu zimwe. [13] Me Kayiranga Bernard avuga ko iyi nzitizi nayo nta shingiro ifite, kuko ikiburanwa ari ubutaka bwo mu gishanga, ko yaba ari amategeko

yahozeho cyangwa se amashya, usanga ateganya ubutaka bwinshi buri mu mutungo rusange wa Leta, kandi ko Urukiko rwemera ko ikiburanwa ari igishanga, nyamara ntirurebe amategako agenga igishanga, umutungo 8 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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rusange wa Leta, bityo bikaba bidashoboka ko hashingirwa ku gaciro k'amafaranga, kuko bitagereranywa n'umutungo rusange wa Leta. Akomeza avuga ko kuba uburanira abarega Akarere ka Gatsibo avuga ko bagenewe indishyi ziri muni ya 50.000.000Frw, byaba ari uguhindura ikiburanwa kuko ari umutungo wa Leta, n'ababuranyi bakaba babyemera, bityo ubujurire bukaba buri mu bubasha bw'uru rukiko, kuko iyo nzitizi nta shingiro zifite.

UKO URUKIKO RUBIBONA [14] Ingingo ya 28, igika cya kabiri, 7°, y'Itegeko Ngenga N°03/2012/OL ryo kuwa 12/06/2012 ryavuzwe haruguru, iteganya ko: "Urukiko rw'Ikirenga rufite kandi ububasha bwo kuburanisha mu rwego rw'ubujurire imanza zaciwe ku rwego rwa kabiri n'Urukiko Rukuru, Urukiko Rukuru rw'Ubucuruzi cyangwa Urukiko Rukuru rwa Gisirikare, iyo izo manza zagenwemo n'urukiko indishyi zingana nibura na 50.000.000Frw, cyangwa se zifite agaciro kagenwe n'umucamanza igihe habaye impaka, kangana nibura na 50.000.000Frw". [15] Urukiko rurasanga indishyi Akarere ka Gatsibo kaciwe mu Rukiko Rukuru zaragenwe mu rubanza rumwe RADA0016/13/HC/RWG - RADA0054/13/HC/RW, kandi zikaba zirenze 50.000.000Frw. [16] Naho kuvuga ko buri muburanyi yagenewe indishyi zitarenze 50.000.000Frw, bikaba bitaherwaho mu kubara indishyi zaciwe muri urwo rubanza, kuko Umushingamategeko yavuze indishyi zagenwe mu rubanza, ntabwo yavuze indishyi zahawe buri muburanyi mu rubanza, bityo hakurikijwe 9 AKARERE KA GATSIBO v. RUZABARANDE N'ABANDI

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ibiteganywa n'ingingo ya 28(7°) y'Itegeko Ngenga N°03/2012/OL ryavuzwe haruguru, inzitizi y'iburabubasha ishingiyeye ku gaciro k'indishyi zikurikiranywe ikaba nta shingiro ifite. Ku byerekeranye n'inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga kubera ko uwajuriye yatsinzwe ku rwego rwa mbere n'urwa kabiri ku mpamvu zimwe. [17] Me Rumenge Victor avuga ko inzitizi ya gatatu ari iyo kuba Urukiko rw'Ikirenga rudafite ububasha bwo kuburanisha ubujurire bw'Akarere ka Gatsibo kuko katsinzwe ku rwego rwa mbere no ku rwa kabiri ku mpamvu zimwe, kandi ingingo ya 28(9) y'Itegeko Ngenga rigenga imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, iteganya ko urubanza umuburanyi yatsinzwe ku rwego rwa mbere n'urwa kabiri ku mpamvu zimwe rudashobora kujuririrwa mu Rukiko rw'Ikirenga. Asobanura ko ku rwego rwa mbere, Urukiko Rwisumbuye rwa Nyagatare, ku rupapuro rwa cyenda, mu gace ka 24, mu rubanza rwaciwe kuwa 31/07/2013, rwavuze ko n'ubwo ahaburanwa ari igishanga kandi nk'uko byasobanuwe, Akarere kahisubije ku bw'inyungu rusange kandi kari karahahaye Ruzabarande Festo na bagenzi be, umucamanza akaba yaremeje ko abarega bari bagifite aho hantu ku buryo bw'umuco, bwo kuhagura cyangwa se kuhahabwa kubera gusaranganya. Naho mu Rukiko Rukuru, Urugereko rwa Rwamagana, urukiko rwavuze ko ubutaka buburanwa ari ubw'abaturage barega Akarere ka Gatsibo (urupapuro rwa munani agace ka 11), ndetse runagaragaza n'uburyo

babubonye, rusobanura neza ko bamwe babubonye ku buryo bwa gakondo n'ababyeyi babo, abandi babuguze naho abandi babusaranganyijwe. 10 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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[18] Me Kayiranga Bernard avuga ko inzitizi y'uko Akarere ka Gatsibo katsinzwe ku mpamvu zimwe mu nkiko ebyiri, atari ko biri kuko Umucamanza wo mu Rukiko Rwisumbuye yemeje ko ari igishanga, ni ukuvuga umutungo rusange wa leta, kandi icyo cyemezo kikaba kitagaragara mu byo Urukiko Rukuru rwemeje, bityo, iyo nzitizi ikaba nta shingiro ifite.

UKO URUKIKO RUBIBONA [19] Ku byerekeye ububasha bw'Urukiko rw'Ikirenga, ingingo ya 28(5°) y'Itegeko Ngenga N°03/2012/OL ryo kuwa 13/06/2012, rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga iteganya ko urubanza umuburanyi yatsinzwe ku rwego rwa mbere n'urwa kabiri ku mpamvu zimwe, rudashobora kujuririrwa mu Rukiko rw'Ikirenga. Muri uru rubanza hakaba hakwiye gusuzumwa niba impamvu zatumye Akarere ka Gatsibo karatsinzwe mu rwego rwa mbere ari nazo zatumye gatsindwa mu rwego rwa kabiri. [20] Nyuma yo gusesengura imikirize y'urubanza ku rwego rwa mbere, ni ukuvuga mu Rukiko Rwisumbuye rwa Nyagatare kimwe n'imikirize y'uburanza ku rwego rw'ubujurire mu Rukiko Rukuru, Urugereko rwa Rwamagana, Urukiko rurasanga mu kwemeza ko Akarere ka Gatsibo gatsinzwe, harasobanuwe muri izo nkiko zombi, ko n'ubwo ahaburanwa haba hari igishanga, bitari kuba impamvu yo kubasenyera no konona ibyabo nta ngurane bahawe kandi bari barahahawe n'ubuyobozi bubifitiye ububasha bwabahaye ibyemezo bigaragaza ko ari ahabo, mu gihe bahishubije bakaba baragombaga kubibahera indishyi ikwiye. 11 AKARERE KA GATSIBO v. RUZABARANDE N'ABANDI

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[21] Hashingiwe ku ngingo ya 28(5°) y'Itegeko Ngenga N°03/2012/OL ryo kuwa 13/06/2012 ryavuzwe haruguru iteganya ko urubanza umuburanyi yatsinzwe ku rwego rwa mbere n'urwa kabiri ku mpamvu zimwe rudashobora kujuririrwa mu Rukiko rw'Ikirenga, Urukiko rurasanga Akarere ka Gatsibo karatsinzwe ku rwego rwa mbere n'urwa kabiri ku mpamvu zimwe mu nkiko zombi zibanza, bityo ubujurire bwatanzwe n'Akarere ka Gatsibo bukaba kutagomba kwakirwa kuko butari mu bubasha bw'Urukiko rw'Ikirenga.

III. ICYEMEZO CY'URUKIKO. [22] Rwemeje ko inzitizi yatanze n'uburanira Ruzabarande Festo na bagenzi be ifite ishingiro. [23] Rwemeje ko ubujurire bw'Akarere ka Gatsibo butakiriwe. [24] Rutegetse ko amagarama y'uru rubanza aherereye ku Isanduku ya Leta.

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COGEBANQUE LTD v. GAHITIRA [Rwanda URUKIKO RW'IKIRENGA – RCOM 009/15/CS (Mukanyundo, P.J., Ngagi na Rugabirwa, J.) 31 Nyakanga 2015] Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Igihano gihatira kurangiza urubanza – Amananiza mu

kurangiza urubanza – Mu gihe Noteri ariwe wemerewe kwemeza ko inyandiko mpeshabubasha (procuration)yo gukora mu izina ry’undi muntu ari ukuri, kuba banki nk’umunyamwuga yakwanga gutanga ibyangombwa by’inzu igasaba Avoka inyandiko mpeshabubasha iriho umukono wa Noteri naho umuhesha w’inkiko ikamusaba amasezerano yanditse ateganywa n’amategeko, ntibiyafatwa nk’amananiza. Bityo igihano gihatira kurangiza urubanza kigomba kuvaho – Itegeko N°13 bis 2014 ryo kuwa 21/05/2014 rigena umurimo wa Noteri w’umwuga, ingingo ya 52 – Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y’imanza z’imbenezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi, ingingo ya 220. Incamake y’ikibazo: COGEBANQUE Ltd yahaye sosiyete yitwa DALBIT PETROLEUM inguzanyo. Iyi inanirwa kwishyura iyo nguzanyo bituma COGEBANQUE Ltd ifatira ingwate y’inzu ya Gahitira Cyusa Richard wari utaruzuzwa imyaka y’ubukure kubera ko iyi ngwate yatanzwe na se w’umwana watanze ikirego mu izina ry’umwana we, asaba ko ingwate yateshwa agaciro. Urukiko rwemeza ko amasezerano y’ingwate ateshejwe agaciro kubera ko hagwatirijwe inzu y’umwana muto nta burenganzira bw’urukiko bahawe. Impaka 13

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zavutse hagati y’ababuranyi kubijyanye n’ugomba gusubizwa ibyangombwa by’inzu byari bigifitwe na banki. Se w’umwana avuga ko ariwe ugomba guhabwa ibyangombwa by’inzu, COGEBANQUE Ltd yo ikavuga ko bigomba guhabwa DALBIT PETROLEUM kubera ko ariyo yahawe umwenda. Urukiko rw’Ikirenga rwemeza ko ari se w’umwana ugomba gusubizwa ibyangombwa kandi ko itabikoze mu minsi 30 izacibwa ibihano bihatira kwishyura bingana na 50.000Frw ku muni. Uwaburaniraga Gahitira ariwe se w’umwana yakomeje gusaba ibyangombwa by’inzu banki, iyi nayo ikamusaba procuration iriho umukono wa noteri cyangwa andi masezerano yanditse bagiranye na Gahitira kubera ko banki yari ifite amakuru ko umuryango wa Gahitira wose usigaye uba iburayi. Umuhesha w’inkiko Kanyana Bibiane nawe yakoze icyemezo gihatira banki gutanga icyangombwa cy’ubutaka no kwishyura 12.000.000Frw yakomotse ku gutinda kurangiza urubanza. Yafatiriye ndetse n’imodoka ya banki kugirango itezwe cyamunara ivemo amafaranga y’ubwishyu. COGEBANQUE Ltd nayo yahise itanga ikirego cyihutirwa mu Rukiko rw’Ikirenga isaba gukurirwaho igihano gihatira kurangiza urubanza. Uburanira Gahitira nawe atanga inzitizi isaba kutakira ikirego cya banki kubera ko ikirego cyihutirwa gitangwa mu rukiko rwaregwe ikirego cy’iremezo kitaraburanishwa. Urukiko rwemeza ko inzitizi nta shingiro ifite maze iburanisha mu mizi rirakomeza. Uhagarariye Gahitira avuga ko banki ariyo yashyizeho amananiza isaba inyandiko mpeshabubasha biba ngombwa ko biyambaza umuhesha w’inkiko kugirango banki itange ibyangombwa kugahato kubera ko nta tegeko risaba umuhesha 14 ICYEGERANYO CY’IBYEMEZO BY’INKIKO

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w’inkiko kwitwaza inyandiko mpeshabubasha mu irangizarubanza. Incamake y’icyemezo: 1. Kuba Banki nk’umunyamwuga yaranze gutanga ibyangombwa by’inzu igasaba avoka inyandiko mpeshabubasha iriho umukono wa noteri naho umuhesha w’inkiko ikamusaba amasezerano yanditse ateganywa n’amategeko, ntibiyafatwa nk’amananiza. Bityo ikirego cya banki kigamije

kuvanaho igihano gihatira kurangiza urubanza gifite ishingiro kubera ko itanze kururangiza, n'amafaranga yishyuzwa banki y'igihano gihatira kurangiza urubanza akaba agomba kuvaho. Ikirego cyihutirwa gifite ishingiro. Igihano gihatira kurangiza urubanza kivanyweho. Amagarama y'urubanza aherereye ku warezwe. Amategeko yashingiweho: Itegeko N°13 bis 2014 ryo kuwa 21/05/2014 rigena umurimo wa Noteri w'umwuga, ingingo ya 52. Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 220. Nta manza zifashishijwe.

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Urubanza I. IMITERERE Y'URUBANZA [1] COGEBANQUE Ltd yahaye Sosiyete DALBIT PETROLEUM inguzanyo. DALBIT PETROLEUM yananiwe kwishyura iyi nguzanyo, bituma COGEBANQUE Ltd ifatira ingwate y'inzu iri Nyarutarama ya Gahitira Cyusa Richard wari utaruzuzwa imyaka y'ubukure. Iyi ngwate yari yatanze na se Gahitira Bishumba Raymond waje no gutanga ikirego mu izina ry'uyu mwana we cyo gutesha agaciro iyo ngwate. [2] Urwo rubanza rwo gutesha agaciro ingwate rwarangiriye mu Rukiko rw'Ikirenga kuwa 13/09/2013, kuri N° RCOMA0121/11/CS hemezwa ko amasezerano y'ubugwate ateshejwe agaciro kuko Gahitira Bishumba Raymond yagwatirije inzu y'umwana we muto kandi atabihereye uburenganzira n'Urukiko. [3] Nyuma y'urwo rubanza havutse impaka hagati y'ababuranyi ku bijyanye n'ugomba gusubizwa ibyangombwa by'inzu byari bifitwe na COGEBANQUE Ltd. Gahitira Bishumba Raymond avuga ko ariwe ugomba kubihabwa nka se w'umwana, COGEBANQUE Ltd yo ikavuga ko bigomba gusubizwa DALBIT PETROLEUM, kuko ariyo yari yarahawe umwenda. [4] Gahitira Cyusa Richard uhagarariye na se yatanze ikirego mu Rukiko rw'Ikirenga kigamije gukemura izo mpaka. Uru Rukiko rwemeza mu rubanza RCOMA0004/14/CS- RCOMA0121/11/CS ko Gahitira Bishumba Raymond nka se w'umwana ariwe ugomba guhabwa ibyo byangombwa by'inzu 16 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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yari yatanze ingwate hishingirwa umwenda wahawe DALBIT PETROLEUM. Rutegeka kandi ko COGEBANQUE Ltd iramutse itabikoze mu gihe cy'iminsi 30 guhera isomwa ry'urubanza, izacibwa igihano gihatira kurangiza urubanza cya 50.000Frw ku muni. [5] COGEBANQUE Ltd ivuga ko Me Mutembe Protas waburaniraga Gahitira Cyusa Richard yayisabye kumuha ibyo byangombwa nayo imusaba "procuration" iriho umukono wa Noteri cyane ko yari ifite amakuru ko Gahitira n'umuryango we basigaye baba i Burayi, ariko Me Mutembe ntiyayitanga. Nyuma ngo Umuhesha w'Inkiko w'umwuga Kanyana Bibiane nawe yaje gusaba icyo cyangombwa ariko Banki imusaba "procuration" iriho umukono wa Noteri cyangwa amasezerano yanditse yaba yaragiranye na Gahitira Bishumba Raymond. [6] Nyuma, Umuhesha w'Inkiko w'umwuga Kanyana Bibiane yakoze icyemezo gihatira kwishyura kibanziriza ifatira- bwishyu, muri icyo cyemezo akaba yarahatiraga COGEBANQUE Ltd kwishyura 12.000.000Frw zabazwe hashingiwe ku rubanza RCOMA0004/14/C- RCOMA0121/11/CS no gusubiza Gahitira Raymond ibyangombwa

by'inzu. Yaje no gufatira imodoka ya COGEBANQUE Ltd yo mu bwoko bwa Ford ifite plaque N° RAB 779 V kugira ngo itezwe cyamunara ivemo amafaranga ahatira COGEBANQUE Ltd kwishyura ahwanye na 12.000.000Frw. Iyo cyamunara y'iyo modoka yari iteganyijwe kuwa 21/07/2015. [7] COGEBANQUE Ltd yatanze ikirego cyihutirwa mu Rukiko rw'Ikirenga isaba ko havanwaho igihano gihatira kurangiza urubanza (astreinte) cyatanzwe mu rubanza RCOMA0004/14/CS - RCOMA0121/11/CS kubera ko itanze 17 COGEBANQUE LTD v. GAHITIRA

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kurangiza urubanza, ko ahubwo yashyizweho amananiza yatumye itabasha kururangiza. [8] Urubanza rwaburanishijwe mu ruhamye kuwa 28/07/2015, COGEBANQUE Ltd iburanirwa na Me Kayitare Serge, Gahitira Cyusa Richard ahagaririwe na Me Mutembe Protais. [9] Me Mutembe Protais, ashingiye ku ngingo ya 316 y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, yatanze inzitizi yo kutakira ikirego cyatanzwe na COGEBANQUE Ltd avuga ko ikirego cyihutirwa gitangwa mu rukiko rwaregawe ikindi kirego cy'iremezo kitaraburanishwa, ko rero iki kirego kidakwiye kwakirwa. [10] Me Kayitare Serge avuga ko ingingo ya 220 y'Itegeko N°21/2012 ryavuzwe haruguru iteganya ko bisabwe n'uwahawe igihano gihatira kurangiza urubanza, urukiko rushobora, ruregawe mu buryo bw'ikirego cyihutirwa, kukivanaho, kugihagarika by'agateganyo mu gihe rugennye cyangwa kukigabanya, iyo uwagihawe atagishoboye burundu cyangwa se mu gihe iki n'iki kubahiriza imikirize y'urubanza rw'ibanze, atagishoboye kuyubahiriza yose cyangwa igice cyayo. Bityo akaba abona nta mpamvu iki kirego cyihutirwa kitakwakirwa n'Urukiko bitewe n'imiterere yacyo. [11] Nyuma yo kwiherera, Urukiko rushingiye ku ngingo ya 220 y'Itegeko N°21/2012 ryavuzwe haruguru, rurasanga inzitizi yatanzwe na Me Mutembe Protais nta shingiro ifite, maze iburanisha mu mizi rirakomeza. 18 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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II. IKIBAZO KIRI MU RUBANZA N'ISESENGURWA RYACYO Kumenya niba igihano gihatira kurangiza urubanza COGEBANQUE Ltd yategetswe gikwiye kuvanwaho. [12] Me Kayitare Serge avuga ko COGEBANQUE Ltd itigeze yanga gutanga "titre de propriété", ko ahubwo yasabye Me Mutembe kuyizanira "procuration" iriho umukono wa Noteri ahawe na Gahitira Bishumba Raymond cyangwa se yatanzwe na Ambassade, nkuko biteganywa n'ingingo ya 52 y'Itegeko N°13 bis 2014 ryo kuwa 21/05/2014 rigena umurimo wa Noteri w'umwuga. Avuga ko ntayo Me Mutembe yigeze yerekana. Nyuma y'aho haje umuhesha w'inkiko Kanyana Bibiane nawe COGEBANQUE imubaza iyo "procuration" cyangwa amasezerano yaba yaragiranye na Gahitira Bishumba Raymond, nawe ntiyabizana. icyakurikiyeho nuko kuwa 11/5/2015, Kanyana yakoze icyemezo gihatira kwishyura kibanziriza ifatira-bwishyu, muri icyo cyemezo akaba yarahatiraga COGEBANQUE Ltd kwishyura 12.000.000Frw, y'igihano gihatira kurangiza urubanza no gusubiza Gahitira B. Raymond ibyangombwa by'inzu. Ku itariki ya 10/7/2015, Kanyana Bibiane yafatiriye imodoka ya COGEBANQUE Ltd yo mu bwoko bwa FORD ifite plaque RAB 779 V kugira ngo itezwe cyamunara ivemo amafaranga yavuzwe haruguru. Me Kayitare Serge avuga ko atabona aho gufatira imodoka bihuriye na "titre de propriété". Yibaza impamvu Me Mutembe na Kanyana

batubahiriza ibyo amategako ateganya nyuma ngo babone guhabwa ibyo bifuza. Asanga babikora nkana kugira ngo icyo gihano gikomeze kwiyongera. Ari yo mpamvu COGEBANQUE Ltd isaba ko iki gihano kivanywaho kuko 19 COGEBANQUE LTD v. GAHITIRA

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itigeze yanga kurangiza urubanza, ahubwo yananijwe nk'uko byasobanuwe. [13] Me Kayitare Serge akomeza avuga ko kuva urubanza rwasomwa kuwa 06/08/2014 irangiza rubanza ryakozwe na Me Mutembe Protais, naho Umuhesha w'Inkiko Kanyana Bibiane, Banki yamubonye igihe yazanaga ibaruwa ye itegeka "astreinte" mu kwezi kwa gatanu 2015. Asobanura ko Kanyana Bibiane yaje asaba amafaranga, aho kuza asaba ibyangombwa by'inzu ya Gahitira Cyusa Richard; COGEBANQUE Ltd imubajije amasezerano yanditse yagiranye na Gahitira Bishumba Raymond ntiyayatanga, imusubiza ko yazazana ayo masezerano, ikazamuha ibyangombwa by'inzu. [14] Me Kayitare Serge asoza avuga ko Banki itigeze yanga gutanga ibyo yasabwe ahubwo yagiye ishyirwaho amananiza. Akomeza avuga ko Gahitira Bishumba Raymond aramutse yiyiziye cyangwa agatanga "procuration" iriho umukono wa Noteri, yahabwa ibyo byangombwa nta mananiza. Asaba uru Rukiko gukuraho iki gihano cya "astreinte" cyangwa kukigabanya kuko nabyo biteganywa n'ingingo ya 220 y'Itegeko N°21/2012 ryavuzwe haruguru. [15] Me Mutembe Protais avuga ko COGEBANQUE Ltd ariyo yashyize amananiza kuri Gahitira Bishumba Raymond imusaba "procuration" iriho umukono wa Noteri. Akomeza avuga ko kuba Banki yari yanze gutanga ibyo byangombwa by'inzu ku bwende, byabaye ngombwa ko Gahitira Bishumba Raymond yiyambaza Umuhesha w'Inkiko kugirango Banki ibitange ku gahato. Na none avuga ko Banki yagombaga guha Kanyana Bibiane ibyo byangombwa kuko nta tegeko risaba Umuhesha w'inkiko kwitwaza "procuration" mu irangiza rubanza. 20 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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[16] Me Mutembe Protais avuga ko kuba Kanyana Bibiane yaraje asaba amafaranga aho gusaba ibyangombwa by'inzu byatewe nuko Banki yabaruhije, babona binaniranye bagahitamo gukoresha inzira y'agahato. UKO URUKIKO RUBIBONA [17] Ku bijyanye na "procuration" iriho umukono wa Noteri COGEBANQUE Ltd isaba, Me Mutembe Protais uhagaririye Gahitira Cyusa Richard, Ingingo ya 52, igika cya mbere y'Itegeko N°13bis/2014 ryo kuwa 21/05/2014 rigenga umurimo w'Ubunoteri ivuga ko Umunoteri ubifitiye ububasha yemerewe kwemeza ko inyandiko y'iheshabubasha yo gukora mu izina ry'undi muntu umwe cyangwa benshi yahawe umuntu umwe cyangwa benshi ari ukuri. [18] Urukiko, rushingiye ku ngingo ya 52 ivuzwe haruguru, rusanga Noteri ariwe wemerewe kwemeza ko inyandiko y'iheshabubasha yo gukora mu izina ry'undi muntu ari ukuri. Nubwo ihame ari uko ubutumwa ari igikorwa gikomoka ku bwiyeemerere bwonyine bw'abagiranye amasezerano, ariko hashingiwe kuri kamere y'ubutumwa biba ngombwa ko umuntu utari muri ubwo butumwa asaba ko bwaba bufite umukono wa Noteri. Ibi ndetse bikaba bishimangirwa na Michel Beauchamp, umuhanga mu mategeko uvuga ko, kugira ngo harusheho kuba umutekano, ari uko inyandiko y'iheshabubasha yo gukora mu izina ry'undi muntu

yakorera imbere ya Noteri. Ibyo biyihesha agaciro, kuko Noteri yemeza ko uwatanze ubutumwa yifuza koko kugira inshingano aha intumwa, kandi ko niyo ntumwa 21
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yemeye izo nshingano¹. Kuba COGEBANQUE Ltd yarashatse kumenya ukuri kw'inyandiko y'iheshabubasha Gahitira Bishumba Raymond yahaye Me Mutembe Protais, igasaba ko iyo nyandiko yemezwa na Noteri ntabwo byafatwa nk'amananiza yashyizweho na Banki. Urukiko rusanga Banki nk'umunyamwuga itari gutanga ibyangombwa by'inzu ishingiyeye kuri "procuration" itariho umukono wa Noteri kabone nubwo yaba izanywe na Avoka. Kuba Banki yaragize amakenga igasaba "procuration" iriho umukono wa Noteri ntabwo byafatwa nk'amananiza, cyane cyane ko na Me Mutembe Protais nta mpamvu atanga yatumye iyo "procuration" idashyikirizwa Banki. [19] Ku bijyanye no kuba Banki yarashyize amananiza k'Umuhesha w'Inkiko w'umwuga Kanyana Bibiane, Urukiko rusanga nyuma y'icyemezo cy'Urukiko rw'Ikirenga mu rubanza N° RCOMA0004/14/CS - RCOMA0121/11/CS rwo kuwa 06/08/2014 kugeza tariki ya 09/03/2015, Kanyana Bibiane atarigeze yishyura COGEBANQUE Ltd; ko ku itariki ya 10/3/2015, ari bwo Kanyana Bibiane yashyikirije COGEBANQUE Ltd icyemezo gihatira kwishyura kibanziriza ifatira-bwishyu harangizwa urubanza rwavuzwe haruguru. [20] Urukiko rusanga ku itariki ya 10/03/2015, COGEBANQUE Ltd yarashubije Kanyana ko itanze kurangiza urubanza, ko ahubwo, itegereje ko Me Mutembe Protais

1 "Pour plus de sûreté,... il est conseillé de faire dresser une procuration notariée. «Elle a plus de valeur». En effet, le notaire s'assure que le mandant veut vraiment confier certaines responsabilités à son mandataire, et que le mandataire est d'accord pour les accepter" (Maryse Guénette, Prudence avec les procurations, <https://www.lebelage.ca/argent-et-droits/vos-droits/prudence-avec-les-procurations?page=all>, consulté le 31/7/2015). 22 ICYEGERANYO
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ayigezaho ibyangombwa yamusabye, inaboneraho isaba Kanyana kuyigaragariza nawe amasezerano yanditse yagiranye na Gahitira Bishumba Raymond amwemerera kurangiza urwo rubanza nk'uko biteganywa n'ingingo ya 382 y'Itegeko N°12/2013 ryo kuwa 22/03/2013 rigenga umurimo w'Abahesha b'Inkiko. Kuba Kanyana Bibiane ataragaragaje ayo masezerano yanditse ateganywa n'Itegeko, ngo abone guhabwa ibyangombwa, ntaho Urukiko rwahera rwemeza ko COGEBANQUE Ltd yanze kurangiza urubanza. [21] Urukiko, rushingiye ku ngingo ya 220 y'Itegeko N°21/2012 ryavuzwe haruguru no ku mpamvu zavuzwe, rurasanga ubujurire bwa COGEBANQUE Ltd bugamije kvanaho igihano gihatira kurangiza urubanza (astreinte) cyatanzwe n'Urukiko rw'Ikirenga mu rubanza RCOMA0004/14/CS - RCOMA0121/11/CS rwo kuwa 06/08/2014 gifite ishingiro kubera ko itanze kurangiza urubanza, bityo 12.000.000Frw yishyuzwa Banki y'igihano kirangiza urubanza agomba kvanwaho. III. ICYEMEZO CY'URUKIKO [22] Rwemeje ko ikirego cyihutirwa cyatanzwe na COGEBANQUE Ltd gifite ishingiro.

2 Mbere yo kurangiza urubanza, ibyemezo cyangwa, izindi nyandikompesha, umuhesha w'inkiko w'umwuga abanza kugirana amasezerano yanditse n'umwiyambaje, yerekana umubare w'amafaranga y'igihembo cy'umurimo n'uburyo azishyurwa. Ayo masezerano agomba kuba ashingiye ku giciro fatizo kivugwa mu ngingo ya 37 y'iri tegeko.

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[23] Rutegetse ko igihano gihatira kurangiza urubanza cyatanzwe mu rubanza RCOMA0004/14/CS - RCOMA0121/11/CS rwo kuwa 06/08/2014 itagomba kuyishyura. [24] Rutegetse ko 12.000.000Frw, COGEBANQUE Ltd yishyuzwa na Gahitira Bishumba Raymond mu mwana w'umwana we Gahitira Cyusa Richard y'igihano gihatira kurangiza urubanza avanyweho. [25] Rutegetse ko igihe Gahitira Bishumba Raymond azaba aje kwifatira ibyangombwa by'inzu y'umwana we Gahitira Cyusa Richard, cyangwa akohereza intumwa ye yitwaje "procuration" iriho umukono wa Noteri, COGEBANQUE Ltd ntitange ibyo byangombwa byavuzwe haruguru, izabarirwa igihano gihatira kurangiza urubanza cya 50.000Frw ku munsu kizatangira kubarwa guhera icyo gihe. [26] Rutegetse Gahitira Cyusa Richard gutanga amagarama y'uru rubanza angana na 100.000Frw.

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KARANGWA v. MUKASHARANGABO N'ABANDI [Rwanda URUKIKO RW'IKIRENGA – RC0005/15/CS (Mutashya, P.J., Munyangeri na Gakwaya, J.) 26 Kamena 2015] Amategeko agenga ububasha bw'Inkiko – Ububasha bw'Urukiko rw'Ikirenga – Inzitizi y'iburabubasha – Ubwoko bw'Ikirego gisaba guhagarika irangizarubanza by'agateganyo – Ikirego cyihutirwa – Kumenya niba Urukiko rw'Ikirenga ruri mu Nkiko zishobora kuregerwa ibirego byihutirwa – Kuba ikirego gisaba guhagarika irangizarubanza by'agateganyo ari ikirego kiburanishwa hakurikijwe imihango ijyanye n'iburanisha ry'ibirego byihutirwa, bisobanura ko bene ibyo birego bihuje kamere n'ibirego byihutirwa – Kuba Urukiko rw'Ikirenga rwaregerwa urubanza rw'iremezo rwerekeranye no gusubirishamo urubanza ku mpamvu z'akarengane, byumvikana ko runafite ububasha bwo gusuzuma ibirego byihutirwa birushamikiyeho – Ntacyabuza ko inzira yo gutanga ikirego cyihutirwa gishamikiye ku kirego cyatanzwe hisunzwe inzira zo kujurira zidasanzwe ikurikizwa no mu manza zirebana n'ibirego bigamije gusubirishamo urubanza ku mpamvu z'akarengane – Kuba icyemezo cyihutirwa cy'Urukiko rw'Ikirenga kitajuririrwa kubera ko ibyemezo byarwo bitajuririrwa, si mpamvu ishimangira ko uru rukiko rudafite ububasha bwo kuburanisha ibirego byihutirwa – Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 78 n'ya 89 – Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza 25

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z'imbenezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ingingo za 316(2o) n'ya 317. Amategeko agenga ububasha bw'Inkiko – Ububasha bw'Urukiko rw'Ikirenga – Gusubirishamo urubanza ku mpamvu z'akarengane – Ababuranyi mu rubanza rusubirishamo urubanza ku mpamvu z'akarengane – N'ubwo Urwego rw'Umuvunyi arirwo rusaba Urukiko rw'Ikirenga gusubiramo urubanza ku mpamvu z'akarengane ariko igihe cyo kuburanisha bene ibyo birego, ababuranyi baguma ari ababuranye urubanza rusubirishwamo ku mpamvu z'akarengane ndetse ni nabo batanga imyanzuro yo kurega n'yo kwiregura – Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 85 – Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbenezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ingingo za 179, 190, 214(2o) n'ya 316. Amategeko agenga imiburanishirize y'imanza mbenezamubano – Guhagarika irangizarubanza by'agateganyo – Mu gihe irangizwa ry'urubanza rishobora kononera bamwe mu baburanyi mu gihe baramuka batsinze urubanza baregeye, Urukiko rushobora guhagarika irangiza ry'urubanza mu nyungu z'ubutabera. Incamake y'ikibazo: Uru rubanza ku nzitizi rukomoka ku rubanza RCA0221/05/HC/KIG - RCA0221/09/HC/KIG rwaburanishijwe mu Rukiko Rukuru rukemeza ko abana bose Karimunda Gérard yabyaranye na Mukasharangabo Eugénie, Nyirakamana Marciana na Mukandori Epiphanie bagomba kumuzungura nta vangura bityo bakagabana umutungo wose uzabarurwa igihe cy'izungura kandi abitabye Imana 26 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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bakazungurwa n'ababakomokaho. Nyirakamana Marciana wari wagobotse muri urwo rubanza ntiyanyuze n'yo myanzuro maze aza kwiambaza Urwego rw'Umuvunyi avuga ko urwo rubanza rurimo akarengane. Urwo Rwego rwandikiye Perezida w'Urukiko rw'Ikirenga rumusaba kurubirishamo ku mpamvu z'akarengane. Hagati aho ariko, urwo rubanza rwarimo kurangizwa n'uwashinzwe ibyo gushyira mu bikorwa izungura kandi mu byemezo yari ari gushyira mu bikorwa harimo no kugurisha umutungo wose kugira ngo abazungura babone uko bagabana amafaranga azava mu igurisha. Urukiko rw'Ikirenga rumaze kwandika ikirego, Avoka uhagarariye Karangwa Denis yatanze ikirego cyihutirwa asaba Urukiko gufata icyemezo cy'agateganyo gihagarika irangizwa ry'urwo rubanza mu gihe isubirishamo ryarwo kubera akarengane ritarafatwaho icyemezo ashingiyeye ku kuba ngo hari inyandiko-mvugo y'inama y'abazungura yabaye hagati ya bamwe gusa kuko hari ubwumvikane buke hagati yabo, igaragaza mu ngingo zayo za 3 na 6 ko inzu iri Gikondo n'indi mitungo itimukanwa bigomba kugurishwa hanyuma bakagabana amafaranga. Yongeraho ko iryo subirishamo ry'urubanza kubera akarengane rishobora kuzavamo icyemezo cy'Urukiko kivuguruzanya n'icy'urubanza ruri kurangizwa, bityo ibyazaba byamaze gukorwa bikaba imfabusa kandi harimo imitungo yaba yaramaze kugurishwa. Iburanisha ritangiye, Me Twayigize Jean-Claude uhagarariye bamwe mu bazungura baregwa muri urwo rubanza yatanze inzitizi yo kutakira iki kirego cyihutirwa avuga ko kitari mu bwoko bw'ibirego byihutirwa kuko nta kirego remezo kigaragaza ko gishamikiyeho. Asobanura ko nta kirego remezo kiriho kuko ikirego cyo gusubirishamo urubanza ku mpamvu z'akarengane uwareze yashingiyeho ikirego cye asaba 27 KARANGWA v. MUKASHARANGABO

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guhagarika irangizarubanza by'agateganyo cyatanzwe n'Urwego rw'Umuvunyi bityo we akaba atari umuburanyi muri rwo, ndetse n'uru Rwego rukaba rutari umuburanyi mu kirego cyihutirwa. Yatanze kandi indi nzitizi avuga ko hashingiwe ku ngingo ya 317, 320 na 322 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, Urukiko rw'Ikirenga rudafite ububasha bwo gusuzuma ibirego byihutirwa kuko Umushingamategeko atigeze abiteganyako kuko kubishyiraho byari kubuza umuburanyi umwe uburenganzu bwo kujurira kuko icyo kirego cyaba kiburanishijwe ku rwego rwa mbere mu Rukiko rw'Ikirenga. Naho ku byerekeye imizi y'ikirego nyirizina, avuga ko ikirego cyatanzwe nabi kuko urega agaragaza ko icyo yaregeye nta kibazo agifiteho kubera ko irangiza ry'urubanza ririmo gukorwa n'uwashinzwe gushyira mu bikorwa izungura (liquidateur) aryemera ariko akaba yifuza gusa ko atagurisha. Akomeza avuga ko inzu iri Gikondo itari kugurishwa ndetse ko nta nzu yigeze igurishwa kuko Uwashinzwe gushyira mu bikorwa izungura akiri mu gihe cyo kumenya abazungura bose no kuzakorana nabo bikaba bitumvukana ukuntu urega we badakorana. Me Hakizimana John Uhagarariye urega avuga ko ibyavuzwe n'abaregwa nta shingiro bifite kuko ikirego remezo gihari kandi ko ababuranyi muri uru rubanza rurebana n'ikirego cyihutirwa ari bamwe n'abo mu kirego remezo. Yongeraho kandi ko atari Urwego rw'Umuvunyi rwatanze icyo kirego remezo ahubwo ko hareze ababuranyi bari mu kirego cyihutirwa, bityo ikirego cyihutirwa kikaba gishamikiye neza ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane. Akomeza avuga ko iyo hari ikirego cy'iremezo, Urukiko rwose rushobora 28 ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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kuregerwa ikirego cyihutirwa hagamijwe gutabara ibyakononekara ndetse ko atari ubwa mbere Urukiko rw'Ikirenga ruburanisha ibirego byihutirwa kuko hari n'izindi manza ruburanisha ku rwego rwa mbere aho itegeko ritateganyijemo inzira z'ubujurire, bityo ko mu rubanza mbonezamubano, Umucamanza aramutse asanze ntacyo Umushingamategeko yabivuzeho "vide juridique", nta cyamubuza kugenekereza agendeye ku biteganywa n'amategeko birebana no gusubirishamo urubanza ingingo nshya. Me Rusanganwa Jean-Bosco avuga ko GT Bank Ltd yarugobotsemo kugirango igaragaze gusa ko hari umwenda wayo ugomba kwitabwaho mu mitungo igomba kugabanywa. Incamake y'icyemezo: 1. Kuba ikirego gisaba guhagarika irangizarubanza by'agateganyo ari ikirego kiburanishwa hakurikijwe imihango ijyanye n'iburanisha ry'ibirego byihutirwa, bisobanura ko Umushingamategeko yashatse ko bene ibyo birego biba ibirego byihutirwa. Icyo kirego gishobora gutangwa mu Rukiko rw'ubujurire (ubujurire busanzwe: appel comme voie de recours ordinaire) igihe Urukiko rwa mbere rwemeje irangizwa ry'urubanza ry'agateganyo cyangwa imbere y'Urukiko ruburanisha ikirego cyo gutambamira urubanza rw'abandi ndetse n'imbere y'Urukiko ruburanisha ikirego cyo gusubirishamo urubanza ingingo nshya, ni ukuvuga mu gihe urubanza rujuriyirwa mu nzira idasanzwe (voies de recours extraordinaires: la tierce opposition et le recours en révision)

rwabaye itegeko.

2. N'ubwo ku byerekeye gusubirishamo urubanza ku mpamvu z'akaregane, nta kintu Umushingamategeko yavuze mu ngingo ya 85 y'Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, 29 KARANGWA v. MUKASHARANGABO N'ABANDI

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30 kirebana no gusaba guhagarika by'agateganyo irangiza ry'urubanza rujuririrwa ariko hashingiwe ku ngingo ya 89 y'iryo Tegeko Ngenga, nta cyabuza ko ibiteganywa ku birebana n'inzira zo kujurira zidasanzwe ziteganywa mu Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsu bikurikizwa no mu manza zirebana n'ibirego bigamije gusubirishamo urubanza ku mpamvu z'akarengane. Bityo umuburanyi watanze icyo kirego ashobora gusaba urukiko gutegeka mu buryo bwihutirwa ihagarikwa ry'irangizarubanza ry'agateganyo.

3. N'ubwo Urwego rw'Umuvunyi arirwo ruregera Urukiko rw'Ikirenga ibirego byerekeranye no gusubirishamo ku mpamvu z'akarengane urubanza rwaciye ku rwego rwa nyuma, ariko igihe cyo kuburanisha bene ibyo birego, ababuranyi baguma ari ababuranye urubanza rusubirishwamo ku mpamvu z'akarengane ndetse ni nabo batanga imyanzuro yo kurega n'iyo kwiregura. Bityo ababuranyi mu rubanza rwihutirwa RC0005/15/CS ni nabo bari ababuranyi mu rubanza remezo RS/REV/INJUST/CIV0007/15/CS uretse Urwego rw'Umuvunyi rutari umuburanyi muri zo manza.
4. Kuba Urukiko rw'Ikirenga rufite ububasha bwo kuregerwa ibirego byerekeranye no gusubirishamo ku mpamvu z'akarengane imanza zaciye ku rwego rwa nyuma, byumvikana nta gushidikanya ko, nk'Urukiko rwaregewe urubanza rw'iremezo rutaraburanishwa n'izindi nkiko, runafite ububasha bwo gusuzuma ibirego byihutirwa bishamikiye ku kirego cy'iremezo kiba cyarugejweho. 5. Kuba abazungura bose batumvikana ku mitungo nyakwigendera yasize, kuba nanone bigaragara ko iyo mitungo yose ishobora kugurishwa igihe cyose gishoboka, Urukiko ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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31 rw'Ikirenga rurasanga mu nyungu z'ubutabera ari ngombwa guhagarika irangiza ry'urubanza kuko irangiza ryarwo rishobora kononera bamwe mu bazungura ba nyakwigendera mu gihe baramuka batsinze urubanza yaregeye mu Rukiko rw'Ikirenga. Inzitizi nta shingo zifite. Ikirego cyihutirwa gifite ishingiro. Amagarama aherereye ku baregwa. Amategeko yashingiweho: Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 85 n'ya 89. Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsu, ingingo za 179, 190, 214(2o) n'ya 316. Nta manza zifashishijwe. Urubanza I. IMITERERE Y'URUBANZA [1] Tariki ya 30/04/2010, Urukiko Rukuru rwaciye urubanza RCA0221/05/HC/KIG - RCA0221/09/HC/

KIG, rwemeza ko abana bose ba Karimunda Gérard uko yababyaranye na Mukasharangabo Eugénie, Nyirakamana Marciana na Mukandori Epiphanie bagomba kuzungura ise nta vangura KARANGWA v. MUKASHARANGABO N'ABANDI

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32 bakagabana umutungo wose uzabarurwa igihe cy'izungura, abitabye Imana bakazungurwa n'ababakomokaho. [2] Nyirakamana Marciana yaje kwiambaza Urwego rw'Umuvunyi kubera akarengane yavuze ko yahuye na ko muri urwo rubanza, maze tariki ya 05/11/2014, urwo rwego rw'Umuvunyi rwandikira Perezida w'Urukiko rw'Ikirenga rumusaba gusubirishamo urubanza rwavuzwe haruguru ku mpamvu z'akarengane. [3] Hagati aho hari Umurangizazungura, Me Karambizi Canisius, wari urimo kurangiza urwo rubanza, mu byemezo yari ari gushyira mu bikorwa harimo no kugurisha umutungo wose kugira ngo abazungura bagabane amafaranga avuyemo. [4] Ku wa 28/4/2015, Me Hakizimana John, uhagarariye Karangwa Denis, asaba Urukiko gufata icyemezo cy'agateganyo gihagarika irangizwa ry'urwo rubanza mu gihe isubirishamo ryarwo kubera akarengane ritarafatwaho icyemezo. Asobanura ko ubwihutirwe buhari ari uko iryo subirishamo ry'urubanza kubera akarengane rishobora kuzavamo icyemezo cy'Urukiko kivuguruzanya n'icyo bari kurangiza, bityo ibyazaba byamaze gukorwa bikaba imfabusa kandi harimo ibyamaze kugurishwa. [5] Iburanisha mu ruhame ryabaye ku wa 22/6/2015, Karangwa Denis, Nyirakamana Marciana, Karigirwa Edinas, Kantamange Jacqueline na Centre Motors Parts Ltd baburanirwa na Me Hakizimana John, Mukasharangabo Eugénie, Mukashema Madeleine, Nyirashema Marie, abazungura ba Habimana Ildephonse (Shumbusho Fidèle na Habimana Nadine) baburanirwa na Me Nsabimana Jean-Baptiste, abazungura ba Bitwayiki Martin, aba Mukandekezi Alphonsine, aba ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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33 Mukanoheli Mariana n'aba Ntahobari Nasson baburanirwa na Me Twayigize Jean-Claude, akanunganira Kalimunda Hakizimana Alphonse naho GT Bank Ltd (ex-Fina Bank Ltd) iburanirwa na Me Rusanganwa Jean-Bosco . [6] Iburanisha ritangiye, Me Twayigize Jean-Claude yatanze inzitizi yo kutakira iki kirego cyihutirwa kuko kitari mu bwoko bw'ibirego byihutirwa, no kuba Urukiko rw'Ikirenga rudafite ububasha bwo kukiburanisha. Urukiko rw'Ikirenga rwafashe ku ntebe icyemezo cyo kuburanisha hamwe iyo nzitizi n'ikirego cyihutirwa mu mizi. II. ISESENGURA RY'IBIBAZO BIGIZE URUBANZA A) Kumenyana niba ikirego cyihutirwa cyatanzwe na Karangwa Denis kiri mu bwoko bw'ibirego byihutirwa. [7] Me Twayigize Jean-Claude avuga ko hashingiwe ku ngingo ya 316 y'Itegeko N°21/2012 ryo ku wa 16/07/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ikirego cyihutirwa cyatanzwe na Karangwa Denis kitari mu bwoko bw'ibirego byihutirwa kuko nta kirego remezo kigaragaza ko gishamikiyeho. Asobanura ko ikirego remezo kidahari kuko asaba ko irangiza rubanza ryahagarara ashingiye ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane cyatanzwe n'Urwego rw'Umuvunyi, rutari umuburanyi bityo akaba asanga hashingiwe ku Itegeko hagombaga kuba harareze umuburanyi wenyine, akanasaba ko irangiza ry'urubanza riba rihagaze. KARANGWA v. MUKASHARANGABO N'ABANDI

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34 [8] Me Twayigize Jean-Claude akomeza avuga ko hashingiwe ku ngingo ya 85 y'Itegeko Ngenga N° 03/2012/OL ryo ku wa 13/6/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ikirego cyo gusubirishamo kivugwa n'urega, kitagirwa ikirego cyihutirwa (référé) kuko iteganya ko gusubirishamo urubanza ku mpamvu z'akarengane bidahagarika irangizarubanza, akaba asanga nta kirego kihutirwa gishobora gutangwa gikomotse ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane, bityo icyo kirego cyihutirwa kikaba kidakwiye kwakirwa ngo gisuzumwe. [9] Me Hakizimana John avuga ko ibyavuzwe n'abaregwa nta shingiro bifite kuko ikirego remezo gihari ndetse ko bamaze no kugikorera itegurwa ry'urubanza (mise en état). Asobanura ko ababuranyi muri uru rubanza rurebana n'ikirego cyihutirwa ari bamwe mu kirego remezo. Yongeraho kandi ko atari Urwego rw'Umuvunyi rwatanze icyo kirego remezo ahubwo ko hareze ababuranyi bari mu kirego cyihutirwa, bityo ikirego cyihutirwa kikaba gishamikiye neza ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane. [10] Ku birebana n'ibiteganywa n'ingingo ya 85 y'Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 ryavuzwe haruguru, Me Hakizimana John avuga ko batanze ikirego cyihutirwa bashingiye ku ngingo ya 316 y'Itegeko N°21/2012 ryo ku wa 16/07/2012 ryavuzwe haruguru aho iteganya ko iyo hari ikirego cy'iremezo cyatanzwe mu Rukiko ndetse hari n'ikibazo kigomba gukemurwa mu buryo bwihutirwa, hatangwa ikirego kihutirwa muri urwo Rukiko. Akomeza asobanura ko kuba ari urubanza mbonezamubano, Umucamanza aramutse asanze ntacyo Umushingamategeko yabivuzeho "vide juridique", nta cyamubuza kugenekereza (gukora "analogie"), ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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35 agendeye ku biteganywa n'amategeko birebana no gusubirishamo urubanza ingingo nshya. [11] Me Nsabimana Jean-Baptiste avuga ko yemeranywa na Me Twayigize Jean-Claude kuko ikirego cyihutirwa gishamikiye ku kirego cyo gusubirishamo urubanza ku mpamvu z'akarengane cyatanzwe n'Urwego rw'Umuvunyi ndetse kigatangirwa amagarama. Asobanura ko ababuranyi batigeze batanga icyo kirego, bityo bakaba atari bamwe muri ibyo birego bibiri. [12] Me Nsabimana Jean-Baptiste akomeza avuga ko ibivugwa mu ngingo ya 85 y'Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 ryavuzwe haruguru ari ntakuka (impérative). [13] Me Rusanganwa Jean-Bosco avuga ko Urukiko rw'Ikirenga rwakemuye ikibazo cyo kumenya ababuranyi mu birego byo gusubirishamo urubanza ku mpamvu z'akarengane aho rwemeje ko Urwego rw'Umuvunyi atarirwo ruregera Urukiko rw'Ikirenga kandi ko hashingiwe ku ngingo ya 80 n'ya 81 z'Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 ryavuzwe haruguru, ari Perezida w'Urukiko rw'Ikirenga ufata icyemezo cyo kwandika icyo kirego mu bitabo by'Urukiko. [14] Me Rusanganwa Jean-Bosco akomeza avuga ko gusubirishamo urubanza ku mpamvu z'akarengane bidahagarika irangizwa ry'urubanza, ariko ko asanga imanza zose zo gusubirishamo urubanza zijya gusa ku buryo abona ko muri uru rubanza, uru Rukiko rugomba gukurikiza ibiteganywa mu birego byo gusubirishamo urubanza ingingo nshya. KARANGWA v. MUKASHARANGABO N'ABANDI

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36 UKO URUKIKO RUBIBONA [15] Ingingo ya 89 y'Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga iteganya ko "Ku bidateganyijwe n'iri Tegeko Ngenga birebana n'amategeko agenga imiburanishirize y'imanza imbere y'Urukiko rw'Ikirenga, hakurikizwa amategeko agenga imiburanishirize y'imanza mu nkiko zisanzwe". [16] Ingingo ya 316 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko "Iyo hari ikirego cy'iremezo, ariko hagomba kugira icyemezwaga by'agateganyo mu buryo bwihuta ku rubanza rwaregawe urukiko rutaraburanishwa, ikirego cyihutirwa gishyikirizwa umucamanza ushinze kurangiza impaka zihutirwa w'aho zigomba gukemurirwa hakurikijwe uburyo busanzwe bw'ihamagara". [17] Urukiko rw'Ikirenga rurasanga hashingiwe ku bivugwa mu ingingo ya 214, agace ka 2 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, byumvikana nta gushidikanya ko guhagarika irangizarubanza by'agateganyo ari ikirego kiburanishwa hakurikijwe imihango ijyanye n'iburanisha ry'ibirego byihutirwa, bisobanura ko Umushingamategeko yashatse ko bene ibyo birego biba ibirego byihutirwa. Rurasanga kandi icyo kirego gishobora gutangwa mu Rukiko rw'ubujurire (ubujurire busanzwe: appel comme voie de recours ordinaire) igihe Urukiko rwa mbere rwemeje irangizwa ry'urubanza ry'agateganyo cyangwa imbere y'Urukiko ruburanisha ikirego cyo gutambamira urubanza rw'abandi ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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37 ndetse n'imbere y'Urukiko ruburanisha ikirego cyo gusubirishamo urubanza ingingo nshya, ni ukuvuga mu gihe urubanza rujuriirwa mu nzira idasanzwe (voies de recours extraordinaires: la tierce opposition et le recours en révision) rwabaye itegeko. [18] Urukiko rw'Ikirenga rurasanga bene ibyo birego bitangwa mu gihe umuburanyi yatanze ikirego remezo cyangwa ikirego cy'ubujurire busanzwe (appel), cyangwa ikirego cyo gutambamira urubanza rw'abandi (tierce opposition) cyangwa se cyo gusubirishamo urubanza ingingo nshya (recours en révision). [19] Urukiko rw'Ikirenga rurasanga Karangwa Denis yatanze ikirego cyihutirwa kigamije gusaba guhagarika irangizwa ry'urubanza RCA0221/05/HC/KIG - RCA0221/09/HC/KIG mu gihe kugisubirishamo ku mpamvu z'akarengane bitararangira ndetse icyo kirego cyo gusubirishamo urwo rubanza ku mpamvu z'akarengane cyanditswe mu bitabo byabugenewe by'uru Rukiko kuri numero RS/REV/INJUST/CIV0007/15/CS, ni ukuvuga ko ikirego cyihutirwa gifite numero RC0005/15/CS gishamikiye ku kirego remezo RS/REV/INJUST/CIV 0007/15/CS. [20] Urukiko rw'Ikirenga rurasanga rero mu gihe bigaragara ko urubanza RC0005/15/CS rurebana n'ikirego cyihutirwa gisaba guhagarika irangiza ry'agateganyo ry'urubanza RCA0221/05/HC/KIG - RCA0221/09/HC/KIG rushamikiye ku rubanza RS/REV/INJUST/CIV0007/15/CS rurebana no gusubirishamo urubanza RCA0221/05/HC/KIG - RCA0221/09/HC/KIG ku mpamvu z'akarengane, ibivugwa na Me Twayigize Jean-Claude bikaba bidakwiye guhabwa agaciro. KARANGWA v. MUKASHARANGABO N'ABANDI

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38 [21] Byongeye kandi kuba ku bushake bw'Umushingamategeko, ikirego gisaba ihagarikwa ry'irangizarubanza ry'agateganyo muri kamere yacyo ari ikirego cyihutirwa kigomba guhamagazwa nibura mu munsu ibiri (2) y'akazi, ndetse icyemezo cy'urukiko kigomba gufatwa mu gihe kitarenze amasaha mirongo ine n'umunani (48) uhaye igihe iburanisha kuri icyo kibazo rirangiye, bityo, Urukiko rw'Ikirenga rurasanga ibivugwa na Me Twayigize Jean-Claude by'uko ikirego cyatanzwe na Karangwa Denis kitari ikirego cyihutirwa, bitagomba guhabwa agaciro. [22] Urukiko rw'Ikirenga rurasanga n'ubwo ku byerekeye gusubirishamo urubanza ku mpamvu z'akaregane, nta kintu Umushingamategeko yavuze mu ngingo ya 85 y'Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 ryavuzwe haruguru, kirebana no gusaba guhagarika irangiza ry'agateganyo ry'urubanza rujurirwa ariko hashingiwe ku ngingo ya 89 y'iryo Tegeko Ngenga, nta cyabuza ko ibiteganywa ku birebana n'inzira zo kujurira zidasanzwe cyane cyane mu ngingo ya 179, ibice bya 5 na 6 n'ya 190 z'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, bikurikizwa mu manza zirebana n'ibirego bigamije gusubirishamo urubanza ku mpamvu z'akaregane, ni ukuvuga ko umuburanyi watanze icyo kirego ashobora gusaba urukiko gutegeka mu buryo bwihutirwa ihagarikwa ry'irangizarubanza ry'agateganyo. [23] Usibye n'ibyo, n'ubwo Umushingamategeko atabiteganyije, bitabujijwe ko urega abisaba igihe abona ko abifitemo inyungu kuko Itegeko ritabibura, bityo kubisaba bikaba bitabangamiye ibivugwa mu ngingo ya 85 y'Itegeko Ngenga ryavuzwe haruguru. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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39 [24] Ku birebana n'ibivugwa na Me Twayigize Jean-Claude by'uko ikirego cyihutirwa cyatanzwe na Karangwa Denis kitagomba kwakirwa kuko ababuranyi bari muri uru rubanza atari bamwe n'abari mu rubanza remezo rurebana no gusubirishamo urubanza ku mpamvu z'akaregane, Urukiko rw'Ikirenga rurasanga n'ubwo Urwego rw'Umuvunyi arirwo ruregera uru Rukiko ibirego byerekeranye no gusubirishamo ku mpamvu z'akaregane urubanza rwaciye ku rwego rwa nyuma, ariko ko igihe cyo kuburanisha bene ibyo birego, ababuranyi baguma uko baburanye urubanza rusubirishwamo ku mpamvu z'akaregane ndetse ko ari nabo batanga imyanzuro yo kurega n'yo kwiregura, bityo ibivugwa na Me Twayigize Jean-Claude bikaba bitahabwa agaciro kuko ababuranyi mu rubanza rwihutirwa RC0005/15/CS aribo bari ababuranyi mu rubanza remezo RS/REV/INJUST/CIV0007/15/CS uretse Urwego rw'Umuvunyi rutari umuburanyi muri izo manza. [25] Hashingiwe ku bimaze kuvugwa mu bika bibanziriza iki, Urukiko rw'Ikirenga rurasanga iyi nzitizi yatanze na Me Twayigize Jean-Claude yo kutakira ikirego cyihutirwa nta shingiro ifite. B) Kumenyana niba Urukiko rw'Ikirenga rufite ububasha bwo kuburanisha ibirego byihutirwa. [26] Me Twayigize Jean-Claude avuga ko hashingiwe ku ngingo ya 317, 320 na 322 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu, Urukiko rw'Ikirenga rudafite ububasha bwo gusuzuma ibirego byihutirwa kuko Umushingamategeko atigeze abiteganya. KARANGWA v. MUKASHARANGABO N'ABANDI

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40 [27] Me Twayigize Jean-Claude asobanura ko kuba atarabiteganyije atari uko habayeho kwibeshya ahubwo ari uko iyo biza kubaho, umuburanyi umwe yashoboraga kubuzwa uburenganzira bwo kujurira kuko nta handi yajuririra, mu gihe ikirego cyihutirwa (référé) cyaba cyaburanishijwe ku rwego rwa mbere mu Rukiko rw'Ikirenga. Asoza avuga ko nta ngingo n'imwe y'amategeko yemerera Urukiko rw'Ikirenga kwakira ikirego cyihutirwa mu rwego rwa mbere ndetse hashingiwe ku ngingo ya 317 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, Urukiko rw'Ikirenga rutari mu Nkiko zemerewe kuregerwamo ibirego byihutirwa. [28] Me Hakizimana John avuga ko iyo hari ikirego cy'iremezo, Urukiko rwose rushobora kuregerwa ikirego cyihutirwa hagamijwe gutabara ibyakononekara. Akomeza avuga ko atari ubwa mbere Urukiko rw'Ikirenga ruburanisha ibirego byihutirwa ndetse ko hari n'izindi manza ruburanisha ku rwego rwa mbere aho itegeko ritateganyijemo inzira z'ubujurire (voie de recours). Asoza avuga ko mu gihe Urukiko rw'Ikirenga rufata icyemezo cy'agateganyo ku kirego cyihutirwa, ntacyo bitwaye kuko hari n'icyemezo kiba kizava mu rubanza ku kirego cy'iremezo. [29] Me Rusanganwa Jean-Bosco avuga ko itegeko ryatanze urutonde rw'Inkiko zitangwamo ibirego byihutirwa ariko ko Urukiko rw'Ikirenga rutarimo, cyakora ko asanga mu gukemura iki kibazo, uru Rukiko rugomba gukurikiza umurongo watanze n'ingingo ya 6 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru.

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41 UKO URUKIKO RUBIBONA [30] Ingingo ya 317, agace ka 1 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru iteganya ko "Perezida w'Urukiko rw'Ibanze cyangwa undi mucamanza wabiherewe ububasha yumva ibirego byihutirwa biboneka mu manza ziri mu bubasha bw'urwo Rukiko bakanabifatira umwanzuro". Agace kayo ka 2 gateganya ko "Perezida w'Urukiko Rwisumbuye cyangwa undi mucamanza wabiherewe ububasha yumva ibirego byihutirwa biboneka mu manza ziri mu bubasha bw'urwo Rukiko bakanabifatira umwanzuro". Naho agace kayo ka 3 gateganya ko "Perezida w'Urukiko Rukuru na Perezida w'Urukiko Rukuru rw'Ubucuruzi cyangwa undi mucamanza wabiherewe ububasha yumva ibirego byihutirwa biboneka mu manza ziri mu bubasha bw'urwo Rukiko bakanabifatira umwanzuro". [31] Urukiko rw'Ikirenga rurasanga kuba mu ngingo ya 317 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru, hatavugwamo Urukiko rw'Ikirenga, ari uko ububasha n'imikorere yarwo bigengwa n'Itegeko Ngenga ryarwo ryihariye, bikaba byumvikana ko ibijyanye n'ububasha buvugwa muri iyo ngingo bireba inkiko zo hasi yarwo (Urukiko rw'Ibanze, Urukiko Rwisumbuye n'Urukiko Rukuru). Rurasanga ariko hashingiwe ku ngingo ya 89 y'Itegeko Ngenga N°03/2012/OL ryo ku wa 13/6/2012 ryavuzwe haruguru, ibiteganywa n'ingingo ya 316 y'Itegeko N°21/2012 ryo ku wa 14/06/2012 ryavuzwe haruguru bigomba gukurikizwa n'imbere y'Urukiko rw'Ikirenga. [32] Urukiko rw'Ikirenga rurasanga nk'uko bivugwa mu ngingo ya 78 y'Itegeko Ngenga N°03/2012 ryo ku wa KARANGWA v. MUKASHARANGABO N'ABANDI

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42 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, Urukiko rw'Ikirenga ari rwo ruburanisha ibirego byerekeranye no gusubirishamo ku mpamvu z'akarengane imanza zaciwe ku rwego rwa nyuma. [33] Urukiko rurasanga rero nk'uko byasobanuye haruguru, kuba uru Rukiko rufite ububasha bwo kuregerwa ibirego byerekeranye no gusubirishamo ku mpamvu z'akarengane imanza zaciwe ku rwego rwa nyuma, byumvikana nta gushidikanya ko, nk'Urukiko rwaregewe urubanza rw'iremezo rutaraburanishwa n'izindi nkiko, runafite ububasha bwo gusuzuma ibirego byihutirwa bishamikiye ku kirego cy'iremezo kiba cyarugejejweho. [34] Urukiko rw'Ikirenga rurasanga kuba Umushingamategeko yarashatse ko ibirego byerekeranye no gusubirishamo ku mpamvu z'akarengane imanza zaciwe ku rwego rwa nyuma biburanishwa bwa mbere n'ubwa nyuma n'uru Rukiko, bitabuza ko ababuranyi batanga ibirego byihutirwa, kuko ikirego cyihutirwa kigamije gusa gusaba urukiko gufata icyemezo cy'agateganyo mu gihe urubanza remezo rutaraburanishwa kandi gishobora kuvanwaho n'icyemezo kizafatwa mu mizi y'urubanza. Byongeye kandi kuba icyemezo cyihutirwa gishobora gufatwa n'Urukiko rw'Ikirenga kitajuririrwa kubera ibyemezo byarwo bitajuririrwa, atari impamvu ishimangira ko uru rukiko rudafite ububasha bwo kuburanisha ibirego byihutirwa. [35] Hashingiwe ku bimaze kuvugwa, iyi nzitizi yatanzwe na Me Twayigize Jean-Claude yo kutakira ikirego cyihutirwa cya Karangwa Denis ikaba nta shingiro ifite. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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43 C) Kumenya niba irangiza ry'urubanza RCA0221/05/HC/KIG - RCA0221/09/HC/KIG ryaba rihagaritswe by'agateganyo mu gihe kurusubirishamo kubera impamvu z'akarengane bitaraburanishwa. [36] Me Hakizimana John avuga ko Karangwa Denis asaba Urukiko gufata icyemezo cy'agateganyo gihagarika irangizwa ry'urwo rubanza mu gihe isubirishamo ryarwo ku mpamvu z'akarengane ritarafatwaho icyemezo. Asobanura ko ubwihutirwe buhari ari uko iryo subirishamo ry'urubanza rishobora kuzavamo icyemezo cy'Urukiko kivuguruzanya n'icyo bari kurangiza, bityo ibyazaba byamaze gukorwa bikaba impfabusa kandi harimo ibyamaze kugurishwa. [37] Me Hakizimana John avuga kandi ko hari inyandiko- mvugo y'inama y'abazungura yabaye hagati ya bamwe kuko hari ubwumvikane buke hagati yabo, igaragaza mu ngingo zayo za 3 na 6 ko inzu iri Gikondo n'indi mitungo itimukanwa bigomba kugurishwa hanyuma bakagabana amafaranga. [38] Me Twagiyize Jean-Claude avuga ko icyo kirego cyatanzwe nabi kuko agaragaza ko icyo yaregeye nta kibazo agifiteho kubera ko irangiza ry'urubanza ririmo gukorwa n'umurangiza zungura (liquidateur) aryemera ariko akaba yifuza ko atagurisha. Akomeza avuga ko inzu iri Gikondo itari kugurishwa ndetse ko nta nzu yigeze igurishwa kuko umurangiza zungura akiri mu gihe cyo kumenya abazungura bose. Asoza avuga ko umurangiza zungura akorana n'abazungura mu buryo batabona impamvu ituma badakorana nawe. [39] Me Nsabimana Jean-Baptiste avuga ko urwo rubanza rwaciwe mu mwaka wa 2010, rutegeka ko umutungo wose KARANGWA v. MUKASHARANGABO N'ABANDI

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44 ugabanwa hagati y'abazungura bose. Akomeza avuga ko Karangwa Denis yari yarishimiye icyo cyemezo ariko ubu agatanga iki kirego, bityo akaba asanga nta bwihutirwe buri muri uru rubanza. [40] Me Rusanganwa Jean-Bosco avuga ko GT Bank Ltd igaragaza gusa ko hari umwenda wayo mu mitungo igomba kugabanywa. UKO URUKIKO RUBIBONA [41] Urukiko rw'Ikirenga rurasanga bigaragara mu ngingo ya 3 y'inyandiko-mvugo y'inama y'abazungura ba nyakwigendera Kalimunda Gérard yateranye ku wa 25/7/2014 ko abitabiriye iyo nama bemeje ko gucungira umutungo hamwe, harimo n'inzu y'ububiko iri Gikondo ituzuye, bidashoboka kuko abazungura batumvikana, bityo bakaba barafashe icyemezo cy'uko hatangira uburyo bwo kugurisha umutungo wose ukagabanywa abazungura. [42] Hashingiwe ku byavuzwe mu gika kibanziriza iki, Urukiko rw'Ikirenga rurasanga mu gihe abazungura bose batumvikana ku mitungo nyakwigendera Kalimunda Gérard yasize ndetse bamwe bavuga ko ari imitungo nyakwigendera yabahaye mbere y'uko yitaba Imana itagomba kuba mu rutonde rw'ibyo yasize, icyo kibazo kikaba n'impamvu yatumye bavuga ko habaye akarengane mu rubanza RCA0221/05/HC/KIG - RCA0221/09/HC/KIG, kuba nanone bigaragara ko iyo mitungo yose ishobora kugurishwa igihe cyose gishoboka, Urukiko rw'Ikirenga rurasanga mu nyungu z'ubutabera ari ngombwa guhagarika irangiza ry'urubanza rwavuzwe haruguru kuko irangiza ryarwo rishobora kononera bamwe mu bazungura ba ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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45 nyakwigendera mu gihe baramuka batsinze urubanza yaregeye mu Rukiko rw'Ikirenga. [43] Hashingiwe kuri ibyo bisobanuro, Urukiko rw'Ikirenga rurasanga ikirego cya Karangwa Denis gifite ishingiro, bityo irangizarubanza rikaba rigomba guhagarara mu gihe urubanza mu mizi rutaracibwa n'uru Rukiko, hagategerezwa icyemezo Urukiko ruzafata urubanza rurangije gucibwa mu mizi yarwo. III. ICYEMEZO CY'URUKIKO [44] Rwemeje ko inzitizi zatanze na Kalimunda Hakizimana Alphonse n'abazungura ba Bitwayiki Martin, ba Mukandekezi Alphonsine, ba Mukanoheli Mariana, ba Ntahobari Nasson baburanirwa na Me Twayigize Jean-Claude nta shingiro zifite. [45] Rwemeje ko ikirego cyihutirwa cyatanze na Karangwa Denis gifite ishingiro. [46] Rutegetse ko irangizarubanza ry'urubanza RCA0221/05/HC/KIG - RCA0221/09/HC/KIG riba rihagaze hagategerezwa ikiza ry'urubanza RS/REV/INJUST/CIV0007/15/CS. [47] Rutegetse Kalimunda Hakizimana Alphonse n'abazungura ba Bitwayiki Martin, aba Mukandekezi Alphonsine, aba Mukanoheli Mariana, aba Ntahobari Nasson kwishyura amagarama ry'urubanza angana na 100.000Frw.

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MUKAMUSONI v. LETA Y'U RWANDA N'ABANDI [Rwanda URUKIKO RW'IKIRENGA – RADA0030/12/CS – (Mukamulisa, P.J., Mukandamage na Gatete, J.) 10 Ukwakira 2014] Amategeko agenga imiburanishirize y'imanza z'ubutegetsi – Cyamunara – Urubanza rw'ikirego gisaba gukuraho cyamunara yakozwe mu buryo budakurikije amategeko – Urubanza rw'ikirego gisaba

gukuraho cyamunara yakozwe mu buryo budakurikije amategeko rwemerewe kujuririrwa kuko atari urubanza rw'impaka zivutse ku irangiza ry'urubanza – Itegeko-teka No09/80 ryo kuwa 07/07/1980 ryerekeye imitunganyirize n'ububasha by'inkiko, ingingo ya 176. Amategeko agenga imiburanishirize y'imanza z'ubutegetsi – Cyamunara – Uberewemo cyangwa urimo umwenda asanze igiciro gitanzwe kidakwiye ashobora gusaba ko cyamunara gishyirwa ku wundi muni, kuri uwo muni wemejwe ibyo bintu bitezwa cyamunara byanze bikunze kandi agaciro k'inzu yatejwe cyamunara kagomba kureberwa igihe iyo cyamunara yabereyeho – Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi, ingingo ya 336. Amategeko agenga imiburanishirize y'imanza z'ubutegetsi – Cyamunara – Gutanga ibintu bitimukanwa cyangwa ubundi buryo bwose bwo kwemera ko hagira undi ubigiraho uruhare bigizwe n'urimo umwenda yarahawe itegeko ryo kwishyura cyangwa yarabujijwe kugira icyo abikoraho ntabwo byemerwa, keretse ubihawe yemeye kwishyura umubare w'umwenda 47

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48 n'amagarama uwafatiriye agomba guhabwa – Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi, ingingo ya 331. Incamake y'ikibazo: Mu rwego rwo kurangiza urubanza RPA8787/KIG Mukamusoni yategetswemo kwishyura Ntiserurwa amafaranga 3.690.000Frw n'umusogogero wa Leta, umuhesha w'inkiko yateje inzu ya Mukamusoni cyamunara. Nyuma Mukamusoni yareze umuhesha w'inkiko hamwe n'umukoresha we Leta y'u Rwanda mu Rukiko Rukuru avuga ko iyo cyamunara yakozwe mu buryo budakurikije amategeko. Muri uru rubanza hagobotsemo Kamali waguze inzu na Yansoneye Consolée uvuga ko inzu yatejwe cyamunara ari iye yaguze mbere y'imihango ya cyamunara. Urwo Rukiko rwafashe icyemezo ko ikirego cye nta shingiro gifite, rumutegeka kwishyura Kamali indishyi z'akababaro, igihembo cya Avoka, umusogongero wa Leta n'amagarama y'urubanza. Mukamusoni yajuriye mu Rukiko rw'Ikirenga avuga ko umuhesha w'inkiko atubahirije imihango yo guteza cyamunara kubera ko atashyikirije Mukamusoni inyandiko zabugenewe, yateje inzu cyamunara ku giciro gito kandi arangiza urubanza ku musogongero wa Leta kandi warishyuye. Leta y'u Rwanda yatanze inzitizi yo kutakira ubujurire ku mpamvu y'uko urubanza ruciye ku bibazo bivutse mu irangiza ry'urubanza rutajuririrwa na Kamali nawe akavuga ko ikibazo kiri muri uru rubanza ari uburyo rwarangijwe rukaba rudakwiye kwakirwa. Mukamusoni na Yansoneye bo bavugaga ko ikirego cya Mukamusoni atari impaka zavutse mu irangiza ry'urubanza ahubwo ari ugukuraho cyamunara yakozwe mu buryo ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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49 budakurikije amategeko. Urukiko rwameje ko iyo nzitizi ya Leta y'u Rwanda nta shingiro ifite. Kubirebana nuko hari imihango ya ngombwa itarubahirijwe n'umuhesha w'inkiko hatezwa cyamunara, Leta y'u Rwanda ivuga ko Perezida w'Urukiko atanga itegeko ryo guteza cyamunara (ordonnance) amaze gusuzuma ko imihango yose ya ngombwa yubahirijwe kandi iryo tegeko rya Perezida ritarigeze riteshwa agaciro kuko Mukamusoni atarijuriye. Incamake y'icyemezo: 1. Urubanza rw'ikirego gisaba gukuraho cyamunara yakozwe mu buryo budakurikije amategeko rwemerewe kujuririrwa kuko atari urubanza rw'impaka zivutse mu irangiza ry'urubanza.

2. Uberewemo cyangwa urimo umwenda asanze igiciro gitanzwe kidakwiye ashobora gusaba ko cyamunara ishyirwa undi munsu, kuri uwo munsu wemejwe ibyo bintu bitezwa cyamunara byanze bikunze kandi agaciro k'inzu yatejwe cyamunara kagomba kureberwa igihe iyo cyamunara yabereyeho.
3. Gutanga ibintu bitimukanwa cyangwa ubundi buryo bwose bwo kwemera ko hagira undi ubigiraho uruhare bigizwe n'urimo umwenda yarahawe itegeko ryo kwishyura cyangwa yarabujijwe kugira icyo abikoraho ntabwo byemerwa, keretse ubihawe yemeye guha umucungamutungo wa Leta umubare w'umwenda n'amagarama uwafatiriye agomba guhabwa.
4. Urega agomba kugaragaza ibimenyetso by'ibyo aregera. Iyo abibuze, uwarezwe aratsinda. Bityo, kuba Mukamusoni atabashije kugaragaza inyandiko avuga ko zabugenewe atahawe n'umuhesha w'Inkiko bituma iyi ngingo nta shingiro yahabwa. MUKAMUSONI v. LETA Y'U RWANDA N'ABANDI

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5. Kamali yagenerwa indishyi z'uko inzu ye atayibayemo, ay'ikurikiranarubanza n'ayigihembo cy'Avoka ariko akagenwa mu bushishozi bw'Urukiko. Ubujurire bufite ishingiro kuri bimwe; Ubujurire bwuririye ku bundi bwatanzwe na Yansoneye nta shingiro bufite Ubujurire bwuririye ku bundi bwatanzwe na Kamali bufite ishingiro kuri bimwe; Cyamunara igumanye agaciro; Amagarama aherereye ku wajuriye no ku isanduku ya Leta. Amategeko yashingiweho: Itegeko Ngenga N°51/2008 ryo kuwa 09/09/2008 ryerekeye imiterere, imikorere n'ububasha by'inkiko, ingingo ya 93. Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 9. Itegeko-teka N°09/80 ryo kuwa 07/07/1980 ryerekeye imitunganyirize n'ububasha by'inkiko, ingingo ya 176. Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi, ingingo za 336, 351, 357 na 361. Nta manza zifashishijwe.

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51 Urubanza I. IMITERERE Y'URUBANZA [1] Mukamusoni Béatrice yareze umuhesha w'inkiko Kagaju hamwe n'umukoresha we Leta y'u Rwanda, asaba urukiko gusesa cyamunara yabaye tariki ya 21/6/2002 hakagurishwa inzu ye mu buryo avuga ko butakurikije amategeko, harangizwa urubanza RPA8787/KIG yategetswemo kwishyura uwitwa Ntiserurwa Christophe amafaranga 3.690.000Frw n'umusogongerwa wa Leta ungana na 147.600Frw. Muri urwo rubanza hagobotsemo Kamali Emmanuel waguze inzu na Yansoneye Consolée uvuga ko inzu yatejwe cyamunara ari iye yaguze na Mukamusoni. [2] Urukiko Rukuru rwaciye urubanza Kagaju na Yansoneye badahari, ariko barahamagajwe mu buryo bukurikije amategeko, rwemeza ko cyamunara yakozwe ku nzu

ya Mukamusoni Béatrice yabarizwaga mu kibanza N° 112 ku Kimironko igumana agaciro, kubera ko ibyo yaburanishaga avuga ko amategeko atubahirijwe by'uko cyamunara yakorewe ku mutungo utabaruye (maison non identifiée), ko umuhesha w'inkiko yirengagije gusubika cyamunara kubera igiciro gito kandi yabimusabye, ko umuhesha w'inkiko yashyize mu cyemezo cyishyura 147.600Frw y'umusogongerwa wa Leta kandi yarayishyuye, ko kandi atamusubije amafaranga yasaguye nyuma yo kurangiza urubanza, nta shingiro bifite. [3] Urukiko rwategetse Mukamusoni guha Kamali Emmanuel indishyi z'akababaro zingana na 1.000.000Frw n'igihembo cya avoka kingana na 300.000Frw yose hamwe MUKAMUSONI v. LETA Y'U RWANDA N'ABANDI

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52 akaba 1.300.000Frw, no kuyatangira umusogongerwa wa Leta uhwanyeye na 52.000Frw, akishyura n'amagarama y'urubanza. [4] Mukamusoni yajuririyeye Urukiko rw'Ikirenga, avuga ko umuhesha w'inkiko Kagaju atubahirije imihango yo guteza cyamunara, ko inzu yatejwe cyamunara ku giciro gito ariko umucamanza ntiyabihaga agaciro, ko yarangije urubanza ku musogongerwa wa Leta kandi warishyuye, ko atamuhaye amafaranga yasigaye amaze kugurisha inzu, ko kandi umucamanza yirengagije ibyo yagaragarijwe ko mu byatejwe cyamunara harimo inzu ya Yansoneye Consolée. [5] Leta y'u Rwanda nayo yatanze inzitizi yo kutakira ubujurire bwa Mukamusoni, uyihagarariye avuga ko urubanza ruciye ku bibazo bivutse mu irangiza ry'urubanza rutajuririrwa. [6] Yansoneye Consolée wagobotse mu rubanza avuga ko inzu yatejwe cyamunara ari iye kuko yayiguzye na Mukamusoni Béatrice. [7] Urubanza rwaburanishijwe mu ruhamye tariki ya 09/09/2014, Mukamusoni ahagarariye na Me Mbonyimpaye Elie, Leta y'u Rwanda iburanirwa na Me Ntaganda Félix, Intumwa ya Leta, Kamali Emmanuel ahagarariye na Me Bigaraba John, Yansoneye Consolée ahagarariye na Me Gumisiriza Hilary, naho Kagaju Alphonse atitabye ariko yarahamagawe ahatazwi mu buryo bukurikije amategeko.

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53 II. ISESENGURA RY'IBIBAZO BIRI MU RUBANZA Kumenya niba ubujurire bwa Mukamusoni butagomba kwakirwa. [8] Me Ntaganda uburanira Leta y'u Rwanda avuga ko ubujurire bwa Mukamusoni budakwiye kwakirwa kubera ko yareze Leta y'u Rwanda n'Umuhesha w'inkiko Kagaju wateje cyamunara inzu ye, asaba ko iyo cyamunara yateshwa agaciro kuko itakurikije amategeko, aregera Urukiko Rukuru rwasimbuye Urukiko rw'Ubuujurire rwa Kigali, kuko ari rwo rwaciye ku rwego rwa nyuma urubanza RPA8787/KIG rwarangizwaga, ko rero impaka zishingiye ku irangiza ry'urubanza zikemurwa n'urukiko rwaruciye bwa nyuma, ko kandi bene izo manza zitajuririrwa nk'uko biteganywa n'ingingo ya 208, igika cya 2, y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi. [9] Me Mbonyimpaye uburanira Mukamusoni avuga ko inzitizi yatanze na Leta y'u Rwanda nta shingiro ifite kuko ingingo ya 208, igika cya 1, y'Itegeko N°21/2012 ryo kuwa 14/06/2012 uburanira Leta ashingiraho asaba ko ubujurire bwa Mukamusoni butakirwa, ivuga impaka zavutse mu irangiza ry'urubanza ryaba ririmo kuba cyangwa ryararangiyeye, ibyo rero

bikaba bitandukanye n'ibyo Mukamusoni yaregeye byo gukuraho cyamunara kuko yabaye mu buryo budakurikije amategeko. [10] Yongeraho ko mu gutanga iyi nzitizi, Leta y'u Rwanda ishaka guhindura ikirego Mukamusoni yatanze mu Rukiko Rukuru, kandi itabyemerewe mu bujurire nk'uko MUKAMUSONI v. LETA Y'U RWANDA N'ABANDI

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54 biteganywa n'ingingo ya 4 y'Itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets. [11] Me Gumisiriza uburanira Yansoneye avuga nawe ko ikirego cyatanzwe mu Rukiko Rukuru na Mukamusoni cyari kigamije gukuraho cyamunara kubera ko itubahirije amategeko, bitandukanye no kuvuga ko hari impaka zavutse hagati y'impande zombi nk'uko uburanira Leta y'u Rwanda abivuga. Asanga harabayeho kutubahiriza amategeko y'ifatira n'igurisha ry'umutungo wagombaga kugurishwa n'utagomba kugurishwa, bityo Yansoneye akaba atagomba kubihomberamo, urukiko rero rukaba rukwiye gushingira ku ngingo ya 268 y'Itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ivuga ku bijyanye no kubuza igurisha ry'ibyafatiriwe, aho gushingira kuya 208 yaryo yavuzwe haruguru. [12] Me Bigaraba John uburanira Kamali avuga ko ikibazo kiri muri uru rubanza ari uburyo urubanza rwarangijwe, ko kuba Mukamusoni atararegeye izindi nkiko akaregera urukiko rwaciye urubanza bwa nyuma bigaragaza ko icyaregewe ari impaka zavutse mu irangizwa ry'urubanza, ko rero bene izo manza zitajuririrwa. UKO URUKIKO RUBIBONA [13] Ingingo ya 93 y'Itegeko Ngenga N°51/2008 ryo kuwa 09/09/2008 ryerekeye imiterere, imikorere n'ububasha by'inkiko, iteganya ko Urukiko Rukuru ruburanisha ibirego bijyanye n'imanza z'ubutegets kuva ku rwego rw'Intara n'urw'Umujyi wa Kigali kugeza ku rwego rwa Perezida ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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55 wa Repubulika byerekeye uburyozwe bushingiye ku zindi mpamvu zitari iza kontaro cyangwa andi masezerano, iyo ibyangijwe byatewe n'igikorwa cyangwa imyitwarire y'ubutegets cyangwa se bikaba byarangijwe n'ibikorwa by'imirimo rusange. [14] Ku byerekeye urukiko Mukamusoni yaregeye, inyandiko zikubiye muri dosiye zigaragaza ko nyuma ya cyamunara y'inzu ye yari mu kibanza N°112 ku Kimironko mu Mujyi wa Kigali yabaye tariki ya 21/06/2002, Me Pasteur Munyandamutsa Oscar wari umuhagarariye yatanze ikirego mu Rukiko rwa Mbere rw'Iremezo rwa Kigali asaba ko cyamunara yakozwe n'Umuhesha w'Inkiko Kagaju iseswa kubera ko itubahirije amategeko, ashingiye ku ngingo ya 176 igika cya 1 y'Itegeko-teka No09/80 ryo kuwa 07/07/1980 ryerekeye imitunganyirize n'ububasha by'inkiko ryateganyaga ko impaka zivutse mu irangizwa ry'imanza ziregerwa mu Rukiko rwa Mbere rw'Iremezo rw'aho iryo rangizwa rigomba kubera. [15] Iryo tegeko-teka ryaje guhinduka urubanza rutaracibwa ubwo habaga ivugurura ry'amategeko n'inzego z'ubucamanza mu mwaka wa 2004, maze urubanza rwimurirwa mu Rukiko Rukuru kubera ko ari rwo rwari rufite ububasha, rwandikwa kuri N° RAD0447/06/HC/KIG rucibwa kuwa 27/02/2009 ikirego nticyakirwa kuko nta ngwate y'amagarama yari yatanzwe, maze nyuma yo kuyitanga ikirego gihabwa N° RAD0078/09/HC/KIG muri urwo rukiko kuwa 22/07/2009, urwo rubanza akaba ari rwo rwajuririwe mu Rukiko rw'Ikirenga. [16] Urukiko rurasanga ibyo

uhagarariye Leta y'u Rwanda avuga ko Mukamusoni yaregeye urukiko rwaciye MUKAMUSONI v. LETA Y'U RWANDA N'ABANDI

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56 bwa nyuma urubanza RPA8787/KIG rwarangizwaga, ko rero yaregeye impaka zavutse mu irangizwa ry'urwo rubanza, nta shingiro bifite kuko yaregeye Urukiko rwa Mbere rw'Iremezo rwa Kigali nk'uko Itegeko-teka N°09/80 ryo kuwa 07/07/1980 ryerekeye imitunganyirize n'ububasha by'inkiko ryakurikizwaga igihe yatangaga ikirego ryabiteganyaga, urubanza rwoherezwa mu Rukiko Rukuru, ikirego cyandikwa hashingiwe ku mpamvu z'uko ari rwo rwari rufite ububasha bushingiye ku ngingo ya 93(3°) y'Itegeko N°51/2008 yavuzwe haruguru. [17] Ku kibazo cyo kumenya niba icyaregewe na Mukamusoni ari impaka zavutse mu irangizwa ry'urubanza, Urukiko rurasanga, hakurikijwe imiterere y'urubanza aho abamuburaniraga mu Rukiko Rukuru basobanuraga ko cyamunara yakorewe ku mutungo utabaruye (maison non identifiée), ko umuhesha w'inkiko yirengagije gusubika cyamunara kubera igiciro gito, ko yashyize mu cyemezo cyishyura 147.600Frw y'umusogongerwa wa Leta kandi yarayishyuye n'ibindi, icyaregewe ari cyamunara ubwayo banenga ko hari ibyo itubahirije biteganywa n'amategeko, akaba rero atari impaka zavutse mu irangizwa ry'urubanza RPA8787/KIG, kubera ko icyaregewe atari uko urwo rubanza rwarangijwe mu buryo bunyuranye n'ibyemezo byarufashwemo ubwabyo. [18] Hashingiwe ku bimaze kuvugwa, urukiko rurasanga inzitizi yo kutakira ikirego cya Mukamusoni yatanze n'uburanira Leta y'u Rwanda nta shingiro ifite.

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- b. Kumenya niba cyamunara itarubahirije amategeko Ku byerekeye imihango ya cyamunara. [19] Me Mbonyimpaye uburanira Mukamusoni avuga ko umuhesha w'inkiko Kagaju atubahirije imihango yo guteza cyamunara, muri yo hakaba harimo kuba atarashyikirije Mukamusoni inyandiko zabugenewe nk'uko byemejwe mu rubanza RP40276/Kig rwaciye n'Urukiko rwa Mbere rw'Iremezo rwa Kigali kuwa 15/07/2003 rwabaye itegeko, Mukamusoni yaregwagamo ko yaba yaramanuye amatangazo ya cyamunara kandi ntayabayeho. [20] Me Ntaganda Félix uburanira Leta y'u Rwanda avuga ko ibyo uburanira Mukamusoni avuga ko hari imihango ya ngombwa itarubahirijwe n'umuhesha w'inkiko bidakwiye guhabwa agaciro nk'impamvu yatuma cyamunara iseswa kubera ko Perezida w'Urukiko atanga itegeko ryo guteza cyamunara (ordonnance) ari uko amaze gusuzuma ko imihango yose ya ngombwa yubahirijwe. [21] Avuga ko umuhesha w'inkiko ateza cyamunara yubahiriza itegeko Perezida w'Urukiko yashyizeho (ordonnance), akaba ari icyemezo cy'urukiko kigomba kubahirizwa na buri wese kireba, kikaba kidashobora kuvaho bitanyuze mu nzira n'uburyo biteganywa n'amategeko nk'uko biteganywa mu ngingo ya 140 y'Itegeko Nshinga, akaba rero asanga iryo tegeko rya Perezida ritariyeze riteshwa agaciro kuko kugeza ubu Mukamusoni atarijuriye, no kuba ryarubahirijwe bikaba bifite agaciro. MUKAMUSONI v. LETA Y'U RWANDA

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58 [22] Me Ntaganda avuga kandi ko Mukamusoni atagaragaza imihango simusiga yaba itarubahirijwe nyuma y'icyo cyemezo cya Perezida, yatuma cyamunara iteshwa agaciro. [23] Me Bigaraba John uburanira Kamali avuga ko Mukamusoni adasobanura inyandiko umuhesha w'inkiko atamuhaye, ko ariko asanga imihango yose yarakozwe hakurikijwe amategeko kubera ko: Tariki ya 21/03/2001, umuhesha w'inkiko Sebagabo Stany yashyikirije Mukamusoni itegeko ryishyura (exploit de signification et commandement préalable à la saisie-exécution) rimusaba kwishyura, yaramuka atabikoze bigakurwa mu byo; Umuhesha w'inkiko amaze kubona ko Mukamusoni yateraye agati mu ryinyo, yakozwe inyandiko zifatira inzu ye iri mu kibanza N° 112 iri Nyagatovu/Kimironko/Kacyiru/Umujiyi wa Kigali nk'uko bigaragazwa n'inyandikomvugo y'itangaza (Procès-verbal d'affichage) yakozwe kuwa 26/06/2001; Tariki ya 03/10/2001 Mukamusoni yagurishije iyo nzu Yansoneye ku mafaranga 4.000.000Frw, biza kumenyekana inzu imaze gutezwa cyamunara. Tariki ya 16/10/2001 Urukiko rwa Mbere rw'Iremezo rwafashe icyemezo cy'uko cyamunara y'inzu izaba tariki ya 26/01/2002 saa yine, uwo munsu ntiyaba, yimurirwa kuwa 21/06/2002 inzu iragurishwa.

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59 UKO URUKIKO RUBIBONA [24] Ingingo ya 9, igika cya mbere y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko "urega agomba kugaragaza ibimenyetso by'ibyo aregera. Iyo abibuze, uwarezwe aratsinda". [25] Urukiko rurasanga Mukamusoni atagaragaza inyandiko avuga ko zabugenewe atahawe n'Umuhesha w'Inkiko, ndetse no mu rubanza RP40276/Kig rwaciwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali kuwa 15/07/2003 ashingiraho (reba urupapuro rwa 5), bikaba bigaragara ko urukiko rwagize ugushidikanya mu kumenya niba koko atarabonye impapuro zifatira inzu ye kubera ko atari we wazakiriye, rumugira umwera ku cyaha yari akurikiranyweho cyo kugurisha inzu itari iye, bityo ubujurire bwe kuri iyi ngingo bukaba nta shingiro bufite, kuko bigaragara ko ibyangombwa byose biteganywa n'amategeko byubahirijwe. Kuba umuhesha w'inkiko yaranze kwimura cyamunara y'inzu ya Mukamusoni kandi yabisabwe, akayigurisha ku mafaranga make. [26] Me Mbonyimpaye uburanira Mukamusoni avuga ko yagaragarije Urukiko ko umuhesha w'inkiko Kagaju yateje cyamunara inzu ya Mukamusoni ku giciro gito, bikaba byaragaragajwe ku nyandiko ya cyamunara n'uwaru umuhagarariye, no muri "rapport d'expertise", ariko ntirwabiha agaciro kandi ari rwo rwasabye iyo "expertise" mbere yo guca urubanza. MUKAMUSONI v. LETA Y'U RWANDA N'ABANDI

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60 [27] Me Ntaganda uburanira Leta y'u Rwanda avuga ko kuba Mukamusoni avuga ko inzu yagurishijwe ku giciro gito bidakuraho ko yanze kwishyura ku neza, ibye bikaba byaragombaga gutezwa cyamunara kugirango ubwishyu yatsindiwe buboneke, ko kandi kuba avuga ko igiciro ari gito atari impamvu yari gutuma byanze bikunze cyamunara iburizwamo mu gihe atishyuye ku neza. [28] Avuga ko itegeko ryariho ritategakaga umuhesha w'inkiko kutemeza cyamunara yakoze kubera ko igiciro ari gito, ko ahubwo ryamuhaga ububasha bwo kuba yashyira mu gaciro ubwe, yabyibwiriza cyangwa se yabisabwa, yasanga cyamunara ikwiye gusibikwa kubera igiciro gito akabikora, ko kandi n'iyi yabikora atyo atashoboraga kongera kuyisubika ku mpamvu nk'iyi. [29] Me Bigaraba John uburanira Kamali avuga ko n'ubwo Mukamusoni avuga ko inzu ye yagurishijwe amafaranga make, yirengagiza ko ku munsu yatejwe cyamunara yari yarabanje gusubikwa, ikaba rero itari kongera gusubikwa, ko rero igisubizo kiri mu ngingo ya 336 y'Itegeko ryo kuwa 15/07/1964 ryagengaga imiburanishirize y'imanza z'amahugu n'iz'ubucuruzi nk'uko ryagiye rivugururwa, aho ivuga ko ku munsu wa kabiri igiciro uko cyaba kiri cyemerwa. [30] Avuga na none ko n'iyi bijya kuba ari ubwa mbere, iyi ngingo igaragaza ko isubika rya cyamunara atari itegeko, ahubwo ari ubushishozi bw'umuhesha w'inkiko.

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61 UKO URUKIKO RUBIBONA [31] Ingingo ya 336 y'Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryakurikizwaga igihe inzu ya Mukamusoni yatezwaga cyamunara, yateganyaga ko "iyi bigaragara ko ibintu byafatiriwe bigurishijwe byahabwa igiciro kigayitse, umukozi wa Leta washinzwe guteza cyamunara, bisabwe n'uwafatiriye cyangwa abyikoreye ku bwe, ashobora kuba aretse guteza cyamunara. Muri icyo gihe juji Perezida w'urukiko ashahiraho undi munsu bizagurishwa akurikije igihe giteganywa mu ngingo ya 330 kandi agakora ibya ngombwa byose kugira ngo hatagira umuburanyi urengana. Kuri uwo munsu wemejwe ibyo bintu bitezwa cyamunara byanze bikunze". [32] Na none ingingo ya 351 y'iryo tegeko ivuga ko uberewemo cyangwa urimo umwenda asanze igiciro gitanzwe kidakwiye ashobora gusaba ko icyamunara gishyirwa ku wundi munsu, ariko udashobora kurenga ukwezi kuva umunsu icyamunara cya mbere cyatangiriye gutezwa. Itegeko rya juji Perezida ni ngombwa kugira ngo icyo gihe cyongerwe. [33] Urukiko rurasanga, nk'uko bigaragara mu ibaruwa yanditswe tariki ya 27/06/2002 na Me Pasteur Munyandamutsa Oscar wari uhagarariye Mukamusoni atanga ikirego, yemera ko cyamunara yari ibaye ubwa kabiri kuko yari yimuwe iva tariki ya 26/01/2002 igashyirwa ku ya 21/06/2002. Kuba Mukamusoni avuga ko inzu ye yagurishijwe ku mafaranga make, Urukiko rusanga nta shingiro bifite kuko yagurishijwe amafaranga 5.250.000Frw mu gihe avuga ko yayigurishije Yansoneye Consolée ku giciro cya 4.000.000Frw. MUKAMUSONI v. LETA Y'U RWANDA N'ABANDI

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62 [34] Urukiko rusanga kandi rutashingira ku gaciro kagaragajwe na “expertise” yakozwe kuwa 02/05/2012 Mukamusoni avuga ko yari yasabwe n’Urukiko rubanza, ngo rwemeze ko inzu yagurishijwe ku giciro gito, kuko agaciro k’inzu yatejwe cyamunara kagomba kureberwa igihe iyo cyamunara isabirwa guseswa yabaga tariki 26/01/2002. [35] Urukiko rusanga rero ubujurire bwa Mukamusoni kuri iyi ngingo nabwo nta shingiro bufite. Kuba umuhesha w’inkiko yararangije urubanza ku byatangiye kwishyurwa. [36] Me Mbonyimpaye uburanira Mukamusoni avuga ko yagaragarije urukiko ko umuhesha w’inkiko Kagaju yarangije urubanza ku byari byatangiye kwishyurwa birimo 147.600Frw y’umusogongero wa Leta nk’uko bigaragazwa n’icyemezo yishyuriyeho, umucamanza avuga ko nta shingiro ryabyo ngo kuko atigeze abyereka umuhesha w’inkiko kandi icyo gihe Mukamusoni yari afunze aregwa kuba yaramanuye amatangazo ya cyamunara atarabayeho nk’uko biri mu rubanza RP40276/KIG. [37] Me Ntaganda uburanira Leta y’u Rwanda avuga ko kuba Mukamusoni avuga ko cyamunara yakozwe yaratangiyeye kwishyura ntacyo byungura kuko atigeze agaragariza umuhesha w’inkiko ko yatangiye kwishyura, ko kandi ikibazo atari ugutangira kwishyura, ahubwo ari ukwishyura umwenda wose yari yatsindiwe. Yongeraho ko n’amafaranga avuga ko yishyuye ari ubusabusa, akaba yari ay’umusogongero wa Leta yishyuye ari uko agiye gusohoka muri gereza, akaba yayasubizwa. ICYEGERANYO CY’IBYEMEZO BY’INKIKO

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63 [38] Me Bigaraba uburanira Kamali avuga ko ibyo Mukamusoni avuga bitandukanye n’ukuri, kuko ntaho yigeze agaragariza umuhesha w’inkiko ko yishyuye ngo maze abirengeho ateze inzu cyamunara. Avuga ko icyo Mukamusoni yishyuye ari umusogongero wa Leta agira ngo afungurwe kuko yari arangije igihano cye cy’igifungo nk’uko bigaragara kuri “quittance” yo kuwa 19/01/2001 no ku nyandiko imusohora yo kuri uwo muni, ibyo rero bikaba bitari kubuza ko cyamunara iba. UKO URUKIKO RUBIBONA [39] Urukiko rurasanga kuwa tariki ya 21/03/2001 ubwo Mukamusoni yamenyeshwaga itegeko ryishyura n’umuhesha w’inkiko Stany Sebagabo kugeza cyamunara iba kuwa 26/01/2002, atarigeze agaragaza ko yishyuye amafaranga y’umusogongero wa Leta ngo umuhesha w’inkiko akomeze kuwumwishyura. [40] Urukiko rusanga ariko Mukamusoni yararushyikirije “quittance N° 0258424” igaragaza ko tariki ya 19/01/2001, mbere y’uko inzu ye itezwa cyamunara, yishyuye umusogongero wa Leta ungana na 147.600Frw harangizwa urubanza RP 8787/KIG rwo kuwa 18/01/2001 yatsindiwe, bityo Leta y’u Rwanda ikaba igomba kuyamusubiza kuko bigaragara ko yayishyujwe kabiri. Ku byerekeye amafaranga yasigaye nyuma yo guteza cyamunara Mukamusoni avuga ko atahawe. [41] Me Mbonyimpaye uburanira Mukamusoni avuga na none ko yagaragarije urukiko ko amafaranga yasigaye kuyatejwe cyamunara ntayo Mukamusoni yabonye cyangwa MUKAMUSONI v. LETA Y’U RWANDA N’ABANDI

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64 se ngo ashwirwe mu isanduku ya Leta, ibyo bikaba bigaragaza ko ibyo umuhesha w'inkiko Kagaju yakoraga byari binyuranye n'amategeko, urukiko ntirwabiha agaciro. [42] Me Ntaganda uburanira Leta y'u Rwanda avuga ko kuba Mukamusoni atarabonye amafaranga yasigaye ku cyamunara atari impamvu yatuma cyamunara iteshwa agaciro, ko ahubwo yaregera kuyahabwa mu kirego cyihariye gitandukanye n'icyo gutesha agaciro cyamunara, agaragaza ikinyuranyo hagati y'agaciro ka cyamunara yakozwe n'amafaranga yishyuriwe yavuye muri cyamunara kubera ko iryo koreshwa ry'amafaranga ari intambwe iterwa nyuma y'uko cyamunara yarangiye. Avuga ko ayo mafaranga Mukamusoni atigeze ayasaba ngo bayamwime, ku buryo n'ubu aje yayahabwa nta rubanza. [43] Me Bigaraba uburanira Kamali avuga ko kuba Mukamusoni avuga ko atabonye amafaranga yasigaye nyuma ya cyamunara atari impamvu yo kuvanaho cyamunara, ko ahubwo ari ikibazo cyo kwishyura amafaranga ye. UKO URUKIKO RUBIBONA [44] Ingingo ya 357 y'Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryakurikizwaga igihe inzu ya Mukamusoni yatezwaga cyamunara, iteganya ko "iyi ikiguzi cy'ikintu kitimukanwa kirenze umubare w'umwenda n'umusogongerwa, amafaranga arengaho kontabure ayasubiza urimo umwenda wafatirwe ibintu". ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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65 [45] Urukiko rurasanga uhagarariye Leta y'u Rwanda yemera ko amafaranga yasigaye ku mafaranga yatejwe cyamunara yayahabwa, bityo ikaba igomba kumusubiza ikinyuranyo hagati y'amafaranga yagombaga kwishyura Ntiserurwa Christophe n'ayavuye mu cyamunara mu buryo bukurikira: 5.250.000Frw – 3.690.000Frw = 1.560.000Frw. Kumenya niba mu byatejwe cyamunara harimo n'inzu ya Yansoneye Consolée. [46] Me Gumisiriza Hilary uburanira Yansoneye avuga ko mu rwego rwo kurangiza urubanza RPA0887/Kig, umuhesha w'inkiko Kagaju yateje cyamunara inzu ye nk'uko Mukamusoni abizi kandi abyemeza ko yakomatanyije umutungo wabo bombi akawuteza cyamunara kandi Yansoneye adafite aho ahuriye n'urubanza ruburanwa. [47] Avuga ko mu Rukiko Rukuru, ibyo Mukamusoni yabisobanuriye urwo rukiko ariko ntirwabyitaho, ikibazo ahari akaba ari uko urubanza rwaburanishijwe adahari. [48] Avuga ko ibimenyetso afite bigaragaza ko inzu ari iye ari: Inyandiko ya Mukamusoni yo kuwa 10/12/2001; icyemezo cy'umutungo N° 1650/0454 cyo kuwa 04/12/2001; icyemezo cy'ubuguzi cyo kuwa 02/11/2001; icyemezo cyo kuwa 04/12/2001 cyatanze n'Akarere ka Kacyiru cyerekana ko ari we usorera ikibanza kirimo inzu; MUKAMUSONI v. LETA Y'U RWANDA N'ABANDI

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66 Inyandiko y'ubuyobozi yo kuwa 03/02/2005 imusubiza inzu; icyemezo cy'urukiko cyo kuwa 15/07/2003 ko inzu ari iye; Ibaruwa ya Perezida w'icyahoze ari Urukiko rw'Umujyi wa Kigali yo kuwa 08/10/2004 wemeje ko inzu ari iye; icyemezo ko yatanze 6% (2.000.000Frw) yakiriwe na Leta kuwa 11/03/2002; PV y'ibazwa rya Rucamumpunzi P. Célestin wemeza ko Yansoneye yaguze inzu nta bibazo iragira, hari ubuyobozi, nta mpapuro za cyamunara zihamanitswe; PV y'ibazwa rya Mukamusoni yemeza ko ari we yamugurishije inzu; PV y'ibazwa rya Yansoneye mu

Bugenzacyaha n'Ubushinjacyaha asobanura ko yaguze inzu mu buryo bukurikije amategeko. [49] Asoza asaba ko Mukamusoni yamuha indishyi zingana na 2.000.000Frw y'ikurikiranarubanza n'igihembo cya avoka. [50] Me Ntaganda uburanira Leta y'u Rwanda avuga ko ubugure bwabaye hagati ya Mukamusoni na Yansoneye nta gaciro bukwije guhabwa kuko bwabaye bitagishoboka kugurisha kubera ko imihango yo guteza cyamunara ku ngufu yari yaratangiye kandi Mukamusoni abizi, ko ndetse n'igurisha ryabanjirijwe n'amatangazo, rinakorerwa ku nzu bireba, ku buryo nta kuntu ibyo byose byaba byarabaye Yansoneye azi neza ko yaguze iyo inzu, maze ngo aterere agati mu ryinyo. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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67 [51] Avuga ko kuba Yansoneye atararegeye ko inzu ye yatejwe cyamunara nta mwenda ategetswe kwishyura ubwabyo ari ibigaragaza ko ubugure bavuga bwabayeho ari ikinamico, atari ukuri. Asanga rero niba ubwo bugure bwarabayeho Mukamusoni akwiye kuzasubiza Yansoneye amafaranga ye kuko yamugurishije mu buriganya, azi neza ko agamije kugurisha umutungo we yabonaga ko uri hafi gutezwa cyamunara. [52] Me Bigaraba John uburanira Kamali avuga ko mu gihe Mukamusoni yari amaze gushyikirizwa inyandiko zishyuzwa n'iz'ifatira, atari agifite uburenganzira bwo kugurisha umutungo we uwo ariwo wose mu gihe atararangiza kwishyura umwenda. [53] Avuga ko ndetse nyuma y'uko hakorwa ifatira rikanamanikwa nk'uko bigaragazwa na "Procès verbal d'affichage" yakozwe n'Umuhesha w'inkiko Sebagabo kuwa 26/06/2001, Mukamusoni yirengagije ingingo ya 361 y'Itegeko ryo kuwa 15/07/1964 ryavuzwe (ihura n'iya 293 CPCCSA y'ubu), ko rero igurisha ryabaye kuwa 03/10/2001 nyuma y'uko iyo mihango yose yarangiye gukorwa ari impfabusa, bityo ubujurire bwa Yansoneye bukaba budafite ishingiro. [54] Me Mbonyimpaye uburanira Mukamusoni avuga ko yagaragarije urukiko ko mu mutungo umuhesha w'inkiko Kagaju yateje cyamunara harimo inzu ya Yansoneye Consolée, ko yaneretse urukiko ibaruwa Perezida w'icyahoze ari Urukiko rw'Umujyi wa Kigali yandikiye Umuyobozi w'icyahoze ari Akarere ka Kacyiru amusaba guha Yansoneye inzu ye kuko yayiguze mu buryo bukurikije amategeko, MUKAMUSONI v. LETA Y'U RWANDA N'ABANDI

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68 ariko urukiko ntirwabiha agaciro, ahubwo rubirengaho ruvuga ko cyamunara ikurikije amategeko. UKO URUKIKO RUBIBONA [55] Ingingo ya 361 y'Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryakurikizwaga igihe inzu ya Mukamusoni yatezwaga cyamunara, iteganya ko " gutanga ibintu bitimukanwa cyangwa ubundi buryo bwose bwo kwemera ko hagira undi ubigiraho uruhare bigizwe n'urimo umwenda yarahawe itegeko ryo kwishyura cyangwa yarabujijwe kugira icyo abikoraho ntabwo byemerwa, keretse ubihawe yemeye guha kontabure wa Leta umubare w'umwenda n'amagarama uwafatiriye agomba guhabwa". [56] Nk'uko bigaragazwa n'inyandiko ziri muri dosiye, Mukamusoni yahawe itegeko ryo kwishyura tariki ya 21/03/2001 n'umuhesha w'inkiko Stany Sebagabo, kuwa 26/06/2001 uwo muhesha w'inkiko amanika ku Rukiko rwa Mbere rw'Iremezo rwa Kigali, kuri Parike ya Repubulika i Kigali na Perefegitura y'Umujyi wa Kigali itangazo rifatira inzu iri mu kibanza N° 112 ya Mukankusi iri Nyagatovu, Kimironko, Umujyi wa Kigali, nyuma kuwa 03/10/2001 Mukankusi

agurisha Yansoneye Consolée iyo nzu yafatiriwe. [57] Hashingiwe ku ngingo y'itegeko imaze kuvugwa, Urukiko rurasanga Mukankusi atarashoboraga kugurisha inzu ye kandi yari azi ko yahawe itegeko ryishyuza (commandement), ubwo bugure rero bukaba butemewe, bityo cyamunara yabaye ku nzu ya Mukamusoni ikaba igomba kugumana agaciro kayo. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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69 [58] Ku byerekeye indishyi zingana na 2.000.000Frw y'ikurikiranarubanza n'igihembo cya avoka Yansoneye asaba Mukamusoni, urukiko rurasanga atazigenerwa kuko atagaragaza ishingiro ryazo. Ubujurire bwuririye ku bundi bwa Kamali Emmanuel. [59] Me Bigaraba uburanira Kamali avuga ko urukiko rutamugeneye indishyi yasabye ngo kubera ko kuba atarahawe inzu byategetswe n'Urukiko, nyamara hirengagijwe ko icyo cyemezo cyafashwe bisabwe na Mukamusoni. [60] Asanga rero cyamunara yarabaye kuwa 21/06/2002, ariko avutswa uburenganzira bwe ku nzu yaguze kandi ingingo ya 349 y'Itegeko ryo kuwa 15/07/1964 ryavuzwe ivuga ko uguze muri cyamunara yegukana icyo yaguze. [61] Ashingiye ku ngingo ya 258 CC LIII, asaba ko yahabwa indishyi zikurikira: 150.000Frw ku kwezi kuva umunsi agura inzu kugeza urubanza ruciwe kuko iyo akodesha aba yarayabonye (privation de droit d'usage); 10.000.000Frw z'uko inzu ye imaze gusaza atarayibayemo ngo ayifate neza (privation du droit de jouissance et indemnités de vétusté). 1.000.000Frw yishyuwe avoka ku rwego rwa kabiri. [62] Me Mbonyimpaye uburanira Mukamusoni avuga ko indishyi Kamali asaba nta shingiro ryazo.

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70 UKO URUKIKO RUBIBONA [63] Ku byerekeye indishyi z'amafaranga y'ubukode Kamali asaba Mukamusoni, urukiko rurasanga atayahabwa kuko nta bimenyetso ayatangira. [64] Naho ku kijyanye n'indishyi za 10.000.000Frw z'uko inzu ye ishaje atarayibayemo, urukiko rurasanga izo ndishyi asaba ari ikirenga, ahubwo hagumaho iza 1.000.000Frw yari yagenewe n'Urukiko Rukuru kuko ziri mu rugero rukwiye. [65] Ku byerekeye 1.000.000Frw y'ikurikiranarubanza Kamali Emmanuel asaba Mukamusoni, urukiko rurasanga atagaragaza uburyo ayabara, rukaba rusanga yagenerwa mu bushishozi bwarwo 500.000Frw kuri uru rwego yiyongera kuri 300.000 yagenewe n'Urukiko Rukuru, yose hamwe akaba 800.000Frw. [66] Urukiko rurasanga indishyi zose Mukamusoni agomba guha Kamali zingana na 1.000.000Frw + 800.000Frw = 1.800.000Frw. III. ICYEMEZO CY'URUKIKO [67] Rwemeje ko ubujurire bwa Mukamusoni Béatrice bufite ishingiro kuri bimwe; [68] Rwemeje ko ubujurire bwuririye ku bundi bwatanzwe na Yansoneye Consolée nta shingiro bufite; [69] Rwemeje ko Ubujurire bwuririye ku bundi bwatanzwe na Kamali Emmanuel bufite ishingiro kuri bimwe; ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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71 [70] Rutegetse ko cyamunara yabaye tariki ya 21/06/2002 y'inzu ya Mukamusoni Béatrice iri mu kibanza N° 112 Nyagatovu, Kimironko, Umujyi wa Kigali igumanye agaciro; [71] Rutegetse Leta y'u Rwanda kwishyura Mukamusoni Béatrice amafaranga 147.600 yishyujwe kabiri na 1.560.000Frw yasigaye ku giciro cy'inzu ye, yose hamwe akaba 1.707.600Frw; [72] Rutegetse Mukamusoni Béatrice kwishyura Kamali Emmanuel indishyi zingana na 1.800.000Frw nk'uko yasobanuwe haruguru. [73] Rutegetse Mukamusoni Béatrice kwishyura ½ cya 100.000Frw y'amagarama y'urubanza, ni ukuvuga 50.000Frw ahereye kuyo yatanze ajurira, andi asigaye agaherera ku isanduku ya Leta.

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NYIRAMANA v. NAYINO [Rwanda URUKIKO RW'IKIRENGA – RCA 005/13/CS (Mutashya, P.J., Rugabirwa na Gakwaya, J.) 10 Gashyantare 2014] Amategeko agenga imiburanishirize y'imanza mbonezamubano – Ubujurire – Ikirego cyihutirwa – Irangizarubanza – Ikirego kigamije guhagarika irangizarubanza – Ibirego byihutirwa bigomba kuba byujuje ibintu bitatu by'ingenzi aribyo ubwihutirwe kugira ngo bigire icyo biramira ku buryo bitinze haba igihombo kitagira igaruriro, kuba icyemezo ari icy'agateganyo no kuba kitagomba kubangamira urubanza mu mizi – Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 316 n'ya 320. Incamake y'ikibazo: Imvano y'uru rubanza RCA005/13/CS ni imanza RCA0111/12/HC/KIG na RCA0112/12/HC/KIG zaciwe n'Urukiko Rukuru kuwa 07/06/2013, Nyiramana akaba yaraziburanyemo na Nayino maze akazitsindwa kandi agategekwa kumusubiza imitungo baburanaga. Nyuma yaho Nyiramana yaje kuzisubirishamo ingingo nshya mu rubanza RC0385/13/HC/KIG maze ikirego cye kimaze kwandikwa aboneraho gutanga ikirego cyihutirwa RC0038/13/HC/KIG kigamije guhagarika irangiza rya ziriya manza zavuzwe haruguru kugeza igihe urubanza RC0385/13/HC/KIG ruciriwe, icyakora urukiko rwemeza ko ikirego cye cyihutirwa nta shingiro gifite. Nyiramana ntiyishimiye imikirize y'urubanza rwaciwe, maze arujuririra mu Rukiko rw'Ikirenga. Mu mpamvu atanga, avuga 73

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74 ko yasohowe mu nzu hirengagijwe ko nta handi yabona aba nta n'ukundi yabaho, ndetse ko mu byafatiriwe harimo n'inzu yiyubakiye ku giti cye itarigeze iburanwaho kandi ko uwo mutungo wose uramutse ushyizwe mu maboko y'uwo baburana, kuwugaruza byazagorana. Nayino Patricie we avuga ko hashize imyaka 7 atsindiye imitungo ye ariko akaba atarayisubizwa, ko kandi iyo nzu avuga ko itigeze iburanwa, igihe cy'urubanza mu mizi nikigera bizatangirwa ibimenyetso. Yongeraho ko ibyo Mukamana avuga nta bwihutire burimo, ko agomba gusubiza ibyo yatsindiwe kuko urubanza rwabaye itegeko rugomba kurangizwa, kwitwaza ko bakwicwa n'ubukene bakabura aho baba, we abimazemo imyaka 7 yarabuze aho aba kubera kudahabwa imitungo ye yatsindiye. Incamake y'icyemezo: 1. Ibirego byihutirwa bigomba kuba byujuje ibintu bitatu

by'ingenzi aribyo ubwihutirwe kugira ngo bigire icyo biramira ku buryo bitinze haba igihombo kitagira igaruriro, kuba icyemezo ari icy'agateganyo no kuba kitagomba kubangamira urubanza mu mizi.

2. Kuba mu mitungo irangirizwaho urubanza haba harimo idahuye n'ikiburanwa ndetse n'iyahawe umwana urega arera, ntibyaba impamvu yo guhagarika irangiza ry'urubanza rwabaye itegeko kuko nta gihamba ndakuka ubisaba abitangira, kandi biramutse ari nako bimeze zaba ari impaka zivutse mu irangiza ry'imanza, bikababifite uko byateganyijwe mu mategeko.
3. Nta kosa umucamanza wo mu Rukiko Rukuru yakoze yemeza ko nta bimenyetso uwajuriye yerekanye by'ubwihutirwe buboneka mu kirego yatanze asaba guhagarika irangiza ry'urubanza, no muri uru rukiko akaba atarabashije kwerekana icyakononekara kitazabasha gusubizwa mu buryo ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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75 mu gihe yaramuka atsinze urubanza yaregeye mu Rukiko Rukuru. Ubujurire nta shingiro bufite. Amagarama aherereye ku wajuriye. Amategeko yashingiweho: Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 316 n'ya 320. Nta manza zifashishijwe. Urubanza I. IMITERERE Y'URUBANZA [1] Nyuma y'uko Nyiramana Chantal aburanye urubanza rufite numero RCA0111/12/HC/KIG na RCA0112/12/HC/KIG rwaciwe n'Urukiko Rukuru kuwa 07/06/2013 agatsindwa agategekwa gusubiza imitungo uwitwa Nayino Patricie baburanaga, yarusubirishijemo ingingo nshya, ikirego gihabwa N° RC0385/13/HC/KIG. [2] Amaze gutanga icyo kirego, yanatanze ikirego cyihutirwa kigamije guhagarika irangiza rya ruriya rubanza rwavuzwe haruguru kugeza igihe urubanza RC0385/13/HC/KIG ruciriwe, gihabwa N° RC0038/13/HC/KIG. NYIRAMANA v. NAYINO

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76 [3] Urubanza rwaciwe kuwa 10/09/2013, urukiko rwemeza ko ikirego cyihutirwa nta shingiro gifite. Nyuma Nyiramana Chantal yaje gutanga ikirego cyo gukosoza inenge yari mu myandikire irebana n'umwironzoro we, bikorwa mu rubanza RC0042/13/HC, icyemezo gikosora gifatwa kuwa 24/09/2013. [4] Nyiramana Chantal ntabwo yishimiye imikirize y'urubanza rwaciwe, maze arujuririra mu Rukiko rw'Ikirenga. Mu mpamvu atanga, avuga ko yasohowe mu nzu hirengagijwe ko nta handi yabona aba nta n'ukundi yabaho, ko harimo n'inzu yafatiriwe kandi itarigeze iburanwaho. [5] Urubanza rwaburanishijwe mu ruhamwe kuwa 04/02/2014, Nyiramana Chantal aburanirwa na Me Butera Dismas naho Nayino Patricie aburanirwa na Me Kamali Nyampatsi Valens. II. IKIBAZO KIGIZE URUBANZA N'ISESENGURA RYACYO [6] Ikibazo kigomba gusuzumwa muri uru rubanza, ni ukumenya niba ikirego cyihutirwa cyatanzwe na Nyiramana Chantal mu Rukiko Rukuru cyari cyujwe ibisabwa n'amategeko kugira ngo urubanza N° RCA0111/12/HC/KIG na N° RCA0112/12/HC/KIG yasubirishijemo ingingo nshya rutarangizwa. [7] Me Butera Dismas uburanira Nyiramana Chantal avuga ko uwo aburanira yasohowe mu nzu hirengagijwe ko nta handi yabona aba nta n'ukundi yabaho, ko harimo n'inzu yafatiriwe kandi itarigeze iburanwaho.

Avuga ko ruriya rubanza ruramutse rurangijwe, byatera uwo aburanira igihombo gikomeye kuko mu ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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77 mitungo yafatiriwe, harimo inzu Nyiramana Chantal abamo, izo yiyubakiye ku giti cye akodesha agakuramo amafaranga yo kumutunga n'abana be, ku buryo uwo mutungo wose uramutse ushyizwe mu maboko y'uwo baburana, byamutera igihombo gikomeye kubera ko yakurwa mu nzu bikamutera kwangara kandi urubanza rugikomeza, akabura ikimutunga n'abana be, kandi no kuyagaruza bikazagorana. [8] Me Kamali uburanira Nayino Patricie we avuga ko hashize imyaka 7 Nayino atsindiye imitungo ye ariko akaba atarayisubizwa, ko kandi iyo nzu avuga ko ari iy'umwana we itigeze iburanwa, ko igihe nikigera bizatangirwa ibimenyetso. Ko kuba Umuhesha w'inkiko yaragiye gufatira inzu y'i Byumba, ari uko yashakaga ubwishyu bw'ibyo Mukamana agomba gusubiza, ko kandi ibyo Mukamana avuga nta bwihutire burimo, ko agomba gusubiza ibyo yatsindiye kuko urubanza rwabaye itegeko rukaba rugomba kurangizwa, kwitwaza ko bakwicwa n'ubukene bakabura aho baba, Nayino we abimazemo imyaka 7 yarabuze aho aba kubera kudahabwa imitungo ye yatsindiye ubu akaba aba ku Kamonyi ku mukobwa we kandi ari umuntu ugeze mu za bukuru. UKO URUKIKO RUBIBONA [9] Ingingo ya 316 y'itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko "iyi hari ikirego cy'iremezo, ariko hagomba kugira icyemezwa by'agateganyo mu buryo bwihutirwa ku rubanza rwaregwe urukiko rutaraburanishwa, ikirego cyihutirwa gishyikirizwa umucamanza ushinze kurangiza impaka zihutirwa w'aho zigomba gukemurirwa hakurikijwe uburyo NYIRAMANA v. NAYINO

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78 busanzwe bw'ihamagara". Naho ingingo ya 320 y'iryo tegeko igateganya ko "Umucamanza uburanisha ibirego byihutirwa afata icyemezo ku bibazo byose byihuta, ariko mu buryo butabangamiye urubanza rw'iremezo mu mizi yarwo". [10] Isesengura ry'izi ngingo nk'uko byagiye binemazwa no mu zindi manza zaciwe n'uru Rukiko, ryerekana ko ibirego byihutirwa bigomba kuba byujujwe ibintu bitatu by'ingenzi aribyo ubwihutirwe kugira ngo bigire icyo biramira ku buryo bitinze haba igihombo kitagira igaruriro, kuba icyemezo ari icy'agateganyo no kuba kitagomba kubangamira urubanza mu mizi. [11] Urukiko rurasanga impamvu Nyiramana Chantal atanga asaba ko irangiza ry'urubanza yasabiye gusubirishamo ingingo nshya ryahagarara, zitagaragaza nk'uko umucamanza wo mu Rukiko Rukuru yabyemeje, ubwihutirwe cyangwa igihombo ndasubirwaho kubera ko, kuvuga ko aramutse akuwe mu nzu yatsindiye yabura aho aba, bitakwitiranywa no kuba byateza igihombo kitagira igaruriro kuko iyo nzu ntaho iba igiye iramutse inagurishijwe mu rwego rwo guhunga ko Nyiramana Chantal yazayitsindira mu kirego yatanze asubirishamo urubanza ingingo nshya, hari izindi nzira amategako yateganyije yanyuramo kugirango ayigaruze. [12] Ku bijyanye no kuvuga ko mu mitungo bashaka kurangirizaho urubanza yatsinzwe harimo idahuye n'ikiburanwa ndetse n'iyahawe umwana arera, Urukiko rurasanga nabyo bitaba impamvu yo guhagarika irangiza ry'urubanza rwabaye itegeko n'ubwo nta gihamba ndakuka abitangira, biramutse ari ICYEGERANYO CY'IBYEMEZO

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79 nako bimeze zaba ari impaka zivutse mu irangiza ry'imanza, ibi nabyo bikaba bifite uko byateganyijwe mu mategeko. [13] Urukiko rurasanga nta kosa umucamanza wo mu Rukiko Rukuru yakoze yemeza ko nta bimenyetso Nyiramana Chantal yerekanye by'ubwihutirwe buboneka mu kirego yatanze asaba guhagarika irangiza ry'urubanza N° RCA0111/12/HC/KIG na N° RCA0112/12/HC/KIG rwaciwe n'Urukiko Rukuru mu gihe hagitegerejwe ko urubanza N° RCA0385/13/HC/KIG rucibwa burundu, no muri uru rukiko akaba atarabashije kwerekana icyakononekara kitazabasha gusubizwa mu buryo mu gihe yaramuka atsinze urubanza yaregeye mu Rukiko Rukuru. III. ICYEMEZO CY'URUKIKO [14] Rwemeje kwakira ubujurire ku kirego cyihutirwa cyatanzwe na Nyiramana Chantal ariko nta shingiro bufite; [15] Rutegetse Nyiramana Chantal gutanga amagarama y'urubanza angana na 21.800Frw akayatanga mu gihe gitegetswe, atayatanga agakurwa mu bye ku ngufu za Leta.

1 Reba ingingo ya 208 y'itegeko N°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetswe. NYIRAMANA v. NAYINO

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RE SOCOBICO INDUSTRIES S.A [Rwanda URUKIKO RW'IKIRENGA – RS/INTER/CIV0001/14/CS (Mukanyundo, P.J., Hatangimbabazi na Gakwaya, J.) 20 Kamena 2014] Amategeko agenga imiburanishirize y'imanza mbonezamubano – Ikirego gisaba gusobanura urubanza – Ikirego gisaba gusobanura urubanza kigomba kugaragaza icyibeshyweho; icyemejwe mu buryo butumvikana cyangwa mu buryo bushobora kumvikana mu buryo bunyuranye – Bene iki ikirego ntigihabwa ishingiro igihe igisabwa gusobanurwa kitigeze kiburanwaho mu rubanza rusabirwa gusobanurwa – Itegeko N°21/2012 ryo kuwa 14/6/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetswe, ingingo ya 154. Incamake y'ikibazo: ECOBANK Ltd yahaye inguzanyo SOCOBICO Industries S.A maze itanga ingwate y'inzu ikorerwamo imirimo ijyanye n'inganda iri mu kibanza N° 1109 n'izindi zicyubatseho n'izizacyubakwaho. Mu masezerano y'uwo mwenda, bumvikanye ko mu gihe SOCOBICO Industries S.A izaba itishyuye, ingwate itanze izatezwa cyamunara bitanyuze mu rubanza. ECOBANK Ltd yasabye Urukiko Rwisumbuye rwa Nyarugenge kuyiha icyemezo cyo guteza cyamunara iyo ngwate yahawe kuko SOCOBICO Industries S.A itishyuye umwenda wayo maze Perezida w'urwo Rukiko ateguka ko iyo ngwate itezwa cyamunara. Umuhesha w'Inkiko ashingiye kuri icyo cyemezo yateje cyamunara iyo ngwate yegukanwa na TRUST Industries Ltd. 81

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82 SOCOBICO Industries S.A yatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge ivuga ko iyo cyamunara yakozwe mu buryo budakurikije amategeko; urwo Rukiko rwemeza ko cyamunara yakozwe ivuyeho kuko itakurikije amategeko, rutegeka TRUST Industries Ltd gusubiza SOCOBICO Industries S.A amafaranga yishyuye nyuma y'uko cyamunara iba, rutegeka ECOBANK Ltd,

Notaire na TRUST Industries Ltd gufatanya guha, SOCOBICO Industries indishyi mbonezamusaruro, iz'akababaro hamwe n'amafaranga y' ikurikiranarubanza n'igihembo cy'Avoka. ECOBANK Ltd, TRUST Industries Ltd na Notaire ntibishimiye imikirize y'urubanza, bajurira mu Rukiko Rukuru, bavuga ko Urukiko Rwisumbuye rwirengagije ko cyamunara yakozwe ku ngwate yatanze, rukanirengagiza amategeko ndetse n'imvugo z'ababuranyi. Urwo Rukiko rwemeje ko cyamunara igumanye agaciro kayo, ariko ko indishyi zagenwe mu rubanza rwajuririwe zikuweho. SOCOBICO Industries S.A yajuriye mu Rukiko rw'Ikirenga ivuga ko ikiguzi cy'inzu ubwacyo cyari gihagije ngo hishyurwe umwenda wa ECOBANK Ltd, bikaba bitumvikana ukuntu hagurishijwe inzu n'ibigize umutungo w'ubucuruzi wayo. Urwo rukiko rutegetse TRUST Industries Ltd gusubiza SOCOBICO Industries SA ibigize umutungo w'ubucuruzi yafatiriye muri cyamunara, kandi rwemeza ko ibirego biregera kwiregura bya ECOBANK Ltd na TRUST Industries Ltd nta shingiro bifite. SOCOBICO Industries S.A yatanze ikirego gisaba gusobanura igika cya 121 cy'urubanza RCAA0011/13/CS rwaciwe n'uru Rukiko kuko isanga kiriya cyemezo cy'Urukiko kidashobora gushyirwa mu bikorwa mu gihe urukiko rutagennye agaciro kibigize umutungo w'ubucuruzi, bityo igasaba Rukiko kugena agaciro kibigize umutungo w'ubucuruzi rwategetse ko isubizwa. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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83 Incamake y'icyemezo: Ikirego gisaba gusobanura urubanza kigomba kugaragaza icyibeshyweho; icyemejwe mu buryo butumvikana cyangwa mu buryo bushobora kumvikana mu buryo bunyuranye kandi bene iki ikirego ntigihabwa ishingiro igihe igisabwa gusobanurwa kitigeze kiburanwaho mu rubanza rusabirwa gusobanurwa . Ikirego nta shingiro gifite; Amategeko yashingiweho: Itegeko N°21/2012 ryo kuwa 14/6/2012 ryerekeye imiburanishirize y'imanza z'imbonezambano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingoya 154. Nta manza zifashishijwe. Ibitekerezo by'abahanga: Albert FETTWEIS, Manuel de procédure civile, 2e édition, Liège, 1987, p. 259. Urubanza I. IMITERERE Y'URUBANZA [1] Kuwa 09/09/2008, SOCOBICO Industries S.A. ku nguzanyo ingana na 379.000.000Frw yahawe na ECOBANK Ltd, yatanze ingwate y'inzu ikorerwamo imirimo ijyanye n'inganda iri mu kibanza N°1109 n'izindi zicyubateho n'izizacyubakwaho, biherereye mu Karere ka Nyarugenge mu RE SOCOBICO INDUSTRIES S.A

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84 Mujiyi wa Kigali (En sureté et garantie de remboursement de toutes sommes dues en principal, intérêts, commissions et frais dont il est ou se trouverait débiteur, le crédit déclaré affecté au profit de la Banque l'immeuble énuméréci-après et les constructions y érigées ou à y ériger, il s'agit de l'immeuble à usage exclusivement industriel sis dans la parcelle N0 1109 à Nyarugenge/ Kigali). Mu masezerano y'uwo mwenda, bumvikanye ko mu gihe SOCOBICO Industries S.A izaba itishyuye, ingwate itanze zizatezwa cyamunara bitanyuze mu rubanza (vente par voie parée). [2] SOCOBICO Industries S.A ntiyishyuye uwo mwenda, ECOBANK Ltd isaba Urukiko Rwisumbuye rwa Nyarugenge kuyiha icyemezo cyo guteza cyamunara iyo ngwate yahawe, Perezida w'urwo Rukiko yategetse ko ingwate yatanze na SOCOBICO Industries S.A izagurishwa kuwa 16/08/2010.

Umuhesha w'Inkiko mu Karere ka Nyarugenge ashingiye kuri icyo cyemezo yagurishije ingwate kuwa 17/09/2010 maze yegukanwa na TRUST Industries Ltd, ihagarariwe na Mugabo Claver, ku mafaranga 320.150.000. [3] SOCOBICO Industries S.A ntiyishimiye iyo cyamunara, itanga ikirego mu Rukiko Rwisumbuye rwa Nyarugenge ivuga ko yakozwe mu buryo budakurikije amategeko. Urwo Rukiko rwaciye urubanza kuwa 25/11/2011, rwemeza ko ikirego cya SOCOBICO Industries S.A gifite ishingiro kuri bimwe, rwemeza ko cyamunara yakozwe kuwa 17/09/2010 ivuyeho kuko itakurikijeamategeko, rutegeka TRUST Industries Ltd gusubiza SOCOBICO Industries SA 11.498.750Frw kubera ko bigaragara ko yayishyuwe nyuma y'uko cyamunara iba, rutegeka ECOBANK Ltd, Notaire Uwitonze Nasira na TRUST Industries Ltd guha, bafatanyije, SOCOBICO Industries S.A ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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85 60.000.000Frw y'indishyi mbonezamusaruro, 7.500.000Frw y'indishyi z'akababaro na 1.500.000Frw y'ikurikiranarubanza n'igihembo cya avoka. [4] ECOBANK Ltd, TRUST Industries Ltd na Notaire Uwitonze Nasira ntibishimiye imikirize y'urubanza, bajurira mu Rukiko Rukuru, bavuga ko Urukiko Rwisumbuye rwirengagije ko cyamunara yakozwe ku ngwate yatanzwe, rwirengagije amategeko ndetse n'imvugo z'ababuranyi. Urwo Rukiko rwemeje ko ubwo bujurire bufite ishingiro, rwemeza ko cyamunara yakozwe kuwa 17/09/2010 igumanye agaciro kayo, rwemeza kandi ko indishyi zagenwe mu rubanza rwajuririrwa zikuweho. [5] SOCOBICO Industries SA ntiyishimiye imikirize y'urubanza, irujuririra mu Rukiko rw'Ikirenga, itanga impamvu zikurikira: Kuba umucamanza wo mu Rukiko Rukuru yaraburanishije urubanza atagombaga kwakira kubera ko icyari cyaraburanishijwe ari impaka zavutse mu kurangiza icyemezo cy'urukiko bivuze ko urubanza rwaciwe rutagombaga kujuririrwa, hakurikijwe ingingo ya 219 y'Itegeko N°21/2012 ryo kuwa 14/6/2012 ryerekeye imiburanishirize y'imanza z'imbonezambano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets. Kuba Urukiko Rukuru rwariyegagije ko ikiguzi cy'inzu ubwacyo cyari gihagije ngo hishyurwe umwenda wa ECOBANK Ltd, bikaba bitumvikana ukuntu hagurishijwe inzu na "Fonds de commerce" yayo; RE SOCOBICO INDUSTRIES S.A

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86 Kuba Urukiko rutaritaye ku mihango itarubahirijwe nko kuba cyamunara itarigeze itanganzwa; Kuba cyamunara yarajemo abantu babiri gusa, ingwate zikagurishwa ku giciro gito cyane ugereranyije n'agaciro nyako kandi Notaire akaba yari afite inyandiko y'umuhanga igaragaza agaciro k'ingwate akemera akayigurisha kuri kiriya giciro, n'igiciro gitanzwe ntigihite cyishyurwa kuko hatanzwe sheki itazigamiwe, amafaranga akaba yarishyuwe nyuma y'amezi abiri; Kuba umucamanza yarahinduye ikiburanwa kuko icyaburanwaga cyari impaka zavutse mu gushyira mu bikorwa icyemezo cy'Urukiko; Kuba Umucamanza yarakoresheje nabi inyandiko z'abahanga zijyanye no gutandukanya "Fonds de Commerce" n'ikitimukanwa, akaba kandi yarishe imihango ijyanye no kugurisha ingwate nta rubanza, anirengagiza imvugo za Notaire Uwitonze Nasira wiyemereye ko atigeze agurisha "Fonds de commerce", no kuba atarategetse ko SOCOBICO Industries SA isubizwa amafaranga yasigaye ku cyamunara. [6] Urukiko rw'Ikirenga rwaciye urubanza RCAA0011/13/CS kuwa 15/11/2013, rwemeza ko ubujurire bwa SOCOBICO

Industries SA bufite ishingiro kuri bimwe, rutegeka TRUST Industries Ltd gusubiza SOCOBICO Industries SA ibigize umutungo w'ubucuruzi "fonds de commerce" yafatiriye muri cyamunara yo kuwa 17/09/2010, rutegeka kandi ko ibirego biregera kwiregura bya ECOBANK Ltd na TRUST Industries Ltd nta shingiro bifite. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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87 [7] Kuwa 17/01/2014, SOCOBICO Industries SA yatanze ikirego gisaba gusobanura igika cya 121 cy'urubanza RCAA0011/13/CS rwaciwe n'uru Rukiko kuwa 15/11/2011. II. ISESENGURA RY'IKIBAZO Kumenya niba impamvu y'ikirego cyatanze na SOCOBICO Industries S.A mu Rukiko rw'Ikirenga iri mu rwego rw'isobanura rubanza. [8] SOCOBICO Industries SA ivuga, mu kirego cyayo cyo gusobanura urubanza RCAA0011/13/CS, ko ihereye kuri "nature même" y'icyo bita "fonds de commerce", isanga kiriya cyemezo cy'Urukiko kidashobora gushyirwa mu bikorwa, uretse mu gihe Urukiko rwagena agaciro k'ibigomba gusubizwa SOCOBICO Industries Ltd, bityo muri urwo rubanza hakaba harimo "imprécision" yo kuba batamenya ikigomba gusubizwa uwatsinze, ikaba isaba Urukiko rw'Ikirenga ko rwagena agaciro k'ibigize "fonds de commerce", rwategetse ko isubizwa. [9] SOCOBICO Industries SA ivuga kandi ko iyo urebye imiterere cyangwa se "définition du fonds de commerce", usanga ari ikintu kigenda gihinduka mu gaciro (valeur), bityo kikaba kitasubizwa kitagenewe agaciro mu mafaranga. Ibyo kandi bikaba byari byanasabwe ku buryo bwumvikana mu iburanisha, aho abahagarariye SOCOBICO Industries SA bashyikirije inteko iburanisha inyigo (expertise) igaragaza neza agaciro k'iyi "fonds de commerce", kandi kakaba kiyongera kuva yigabizwa, ni ukuvuga kuva cyamunara yaba kuwa 17/09/2010, kandi ako gaciro kakaba katasubizwa "en nature".

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88 UKO URUKIKO RUBIBONA [10] Ingingo ya 154, agace ka mbere y'Itegeko N°21/2012 ryo kuwa 14/6/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko "ibirego bisaba gukosora imyandikire y'icyo bibeshyeho cyangwa gusobanura urubanza rwaciwe mu buryo butumvikana cyangwa mu buryo bushobora kumvikana mu buryo bunyuranye biburanishwa mu muhezo ababuranyi batongeye kuvuguruzanya kandi nta gihinduwe ku byerekeranye n'uwatsinze urubanza, isobanura mpamvu y'uko ibintu byagenze n'uko amategeko abiteganya byemejwe n'urukiko". [11] Urukiko rw'Ikirenga rurasanga mu rubanza RCAA0011/13/CS, mu gika cya (121), Urukiko rwategetse TRUST Industries Ltd gusubiza ibigize umutungo w'ubucuruzi "fonds de commerce" wa SOCOBICO Industries SA yafatiriye muri cyamunara yo kuwa 17/09/2010. [12] Urukiko rw'Ikirenga rusanga imbere y'Urukiko Rwisumbuye, SOCOBICO Industries SA itanga ikirego, yarasabaga ibi bikurikira: Gukemura impaka zavutse mu irangiza ry'urubanza; Restituer à la demanderesse les biens constituant son fonds de commerce attribués frauduleusement à TRUST Industries Ltd par ECOBANK Ltd et le Notaire; Manque à gagner depuis le 17/09/2010 jusqu'à la restitution; Dommages et intérêts moraux et frais de procédure; ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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89 A titre provisoire, nommer un tiers indépendant comme gestionnaire de l'entreprise en litige. [13] Urukiko rw'Ikirenga rurasanga kandi mu cyemezo y'imyanzuro yayo (dispositif des conclusions) mbere y'Urukiko Rwisumbuye, SOCOBICO Industries SA yarasabaga ibi bikurikira: De recevoir la présente action et la dire fondée; D'ordonner la restitution des biens composant le fonds de commerce de la SOCOBICO S.A. en leur valeur; Condamner solidairement les défenderesses aux Dommages et intérêts et frais tel que justifié et arrêté ci- avant; Ordonner l'annulation de la vente effectuée le 17/09/2010; Statuer pour le reste comme de droit. [14] Ku byerekeye ibisabwa na SOCOBICO Industries SA, uretse ko mu Rukiko Rwisumbuye rwa Nyarugenge, yasabaga ko ababuranyi bayo bategekwa kuyisubiza agaciro ka "fonds de commerce" no mu Rukiko rw'Ikirenga yatanze ibyo yita inyigo (expertise; Estimation de la perte totale de la SOCOBICO Industries SA suite à l'occupation de son fonds de commerce par TRUST Industries Ltd) yikoreye, igaragaza agaciro kayo, Urukiko rw'Ikirenga rurasanga, haba mu myanzuro yayo y'ubujurire, haba no mu miburanire yayo igihe cy'iburanisha, SOCOBICO Industries SA itarongeye gusaba ko yagenerwa agaciro k'amafaranga ya "fonds de commerce" mu mwanya w'ibiyigize, bityo mu gihe Urukiko rutaburanishije ibirebana n'agaciro ka "fonds de commerce" kandi bitanavugwa mu RE SOCOBICO INDUSTRIES S.A

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90 bisobanuro byarwo (motivations) mu rubanza rusabirwa¹ gusobanurwa, byumvikana ko kugena ubu agaciro ka "fonds de commerce" mu mafaranga mu rubanza rusobanura urundi byaba birenze gusobanura urubanza uko rwaciwe, ahubwo byaba ari ugufata ikindi cyemezo ku kintu kitaburanishijwe². [15] Hakurikijwe ibisobanuro bigaragara mu gika kibanziriza iki, Urukiko rw'Ikirenga rurasanga, hashingiwe ku ngingo ya 154, agace ka mbere k'Itegeko N° 21/2012 ryo kuwa 14/6/2012 ryavuzwe haruguru, urubanza RCAA0011/13/CS rutaraciwe mu buryo butumvikana cyangwa mu buryo bushobora kumvikana mu buryo bunyuranye kuko igika cyarwo cya 121 gisobanutse neza, aho Urukiko rwategetse Trust Industries Ltd gusubiza SOCOBICO Industries S.A ibigize "fonds de commerce" yayo, yatwaye mu gihe cy'icyamunara³, bityo rukaba rusanga, mu by'ukuri, SOCOBICO Industries S.A isaba ko hafatwa icyemezo ku kibazo kitigeze kigibwaho impaka mu iburanisha.

¹ "Les motifs d'une décision doivent s'interpréter les uns par les autres et le dispositif doit être interprété à la lumière des motifs", Cass. 12 décembre 1980, Pas., 1981, I, 432 in Albert FETTWEIS, Manuel de procédure civile, 2e édition, Liège, 1987, p. 259). ² "C'est pourquoi le juge, en interprétant, ne peut étendre, restreindre ou modifier les droits qu'il a consacrés. Il doit se borner à fixer le sens et la portée des dispositions du jugement sans les dénaturer. Il doit maintenir sa décision initiale en lui donnant une forme meilleure sans pouvoir modifier ou compléter l'acte juridictionnel "Albert FETTWEIS, ibidem. ³ "C'est dans l'exercice de son pouvoir souverain qu'une Cour d'Appel, qui énonce exactement qu'en application des articles 1351 du Code civil et 461 du nouveau Code procédure civile, les juges saisis d'une contestation relative à l'interprétation d'une précédente décision ne peuvent, sous le prétexte d'en déterminer le sens,

apporter une modification aux dispositions précises de celle-ci, décide qu'il n'y a pas lieu à interprétation d'un jugement qui ne comporte aucune ambiguïté", Cass., soc., 23 mars 1995, JCP G 1995, IV, 1257. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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91 [16] Kubera izo mpamvu zose, Urukiko rw'Ikirenga rurasanga ikirego cya SOCOBICO Industries SA gisaba isobanururubanza kidakurikije ibiteganywa n'amategeko kuko kitagaragaza icyibeshyweho cyangwa icyemejwe mu buryo butumvikana cyangwa mu buryo bushobora kumvikana mu buryo bunyuranye, bityo kikaba nta shingiro gifite. III. ICYEMEZO CY'URUKIKO [17] Rwemeje ko ikirego cya SOCOBICO Industries S.A gisaba gusobanura urubanza RCAA0011/13/CS rwaciwe kuwa 15/11/2013 nta shingiro gifite. [18] Rwemeje ko nta mpamvu yo gusobanura igika cya 121 cy'urubanza RCAA0011/13/CS.

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B. IMANZA ZEREKEYE IMIBURANISHIRIZE Y'IMANZA NSHINJABYAHA

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UBUSHINJACYAHA v. HAKIZIMANA [Rwanda URUKIKO RW'IKIRENGA – RPA0002/GEN/13/CS (Kayitesi Z., P.J., Nyirinkwaya na Mukamulisa, J.) 11 Ugushyingo 2013] Amategeko yerekeye imiburanishirize y'imanza nshinjabyaha – Ubujurire – Kujuririra icyemezo cy'urukiko cyemeza ko rufite ububasha bwo kuburanisha urubanza – Umuburanyi utishimiye icyo cyemezo akijuririra hamwe n'urubanza mu mizi – Itegeko- Ngenga N°03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo za 90(2) na 18(6) – Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ingingo za 162(2). Amategeko yerekeye imiburanishirize y'imanza nshinjabyaha – Ubujurire – Kujuririra urubanza rwasubirishijwemo ingingo nshya – Urubanza rwasubirishijwemo ingingo nshya ntirujuririrwa n'ubwo rwaba rwaraciwe ku rwego rwa mbere – Itegeko- Ngenga N°03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 34(11) – Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ingingo ya 193. Incamake y'ikibazo: Mu Rukiko rwa Mbere rw'Iremezo rwa Kigali, urugereko rwihariye ruburanisha imanza z'ibyaha by'itsembabwoko n'itsembatsemba n'ibyaha byibasiye inyoko- muntu n'ibindi byaha bifitanye isano, Hakizimana Augustin yahamijwe icyaha cya jenocide, icyaha cy'ubuhotozi no kurema 95

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96 umutwe w'abagizi ba nabi. Yahanishijwe kwicwa no kwishyura indishyi z'akababaro zingana na 10.000.000Frw. Yajuririye mu Rukiko rw'Ubujurire rwa Kigali rwemeza ko ikirego cye nta shingiro gifite. Yasabye ko urwo rubanza ruseswa mu Rukiko Rusesa Imanza. Nyuma y'ivugurura ry'Inzego z'Ubucamanza, ikirego cye cyaburanishijwe n'Urukiko rw'Ikirenga nticyakirwa kuko cyari cyaje mu nzira zinyuranyije n'amategako. Hakizimana Augustin yasubirishijemo urubanza ingingo nshya mu Rukiko Rwisumbuye rwa Gasabo avuga ko nyuma yo gucikirwa urubanza hari abantu bagaragaye ko bakiriho n'abandi bapfuye nyuma ya Jenocide ndetse akaba hari abantu yahamijwe ko yishe kandi hari abantu Inkiko Gacaca zahamije urupfu rw'abo bantu kandi ababahamijwe bakaba baratamushinje. Yanavugaga ko hari abatangabuhamya bamushinjura ko nta ruhare yagize muri Jenocide. Urukiko Rwisumbuye rwa Gasabo rwemeje ko ikirego cye gifite ishingiro kuri bimwe ariko ingingo yatanze zerekeye imanza zaciwe n'Inkiko Gacaca n'ubuhamya bw'abantu batandukanye zimuhanaguraho urupfu rw'abantu batandukanye zo ntizahabwa ishingiro. Yajuririye urwo rubanza mu Rukiko Rukuru, Ubushinjacyaha bubyutsa inzitizi y'iburabubasha buvuga ko urubanza rwasubirishijwemo ingingo nshya rutajuririrwa. Rwemeje ko iyo nzitizi nta shingiro ifite. Nyuma Urukiko Rukuru rwamuhanaguyeho ibyaha aregwa rutegeka ko ahita arekurwa. Ubushinjacyaha bwajuririye urwo rubanza mu Rukiko rw'Ikirenga buvuga ko urubanza rwasubirishijwemo ingingo nshya rutajuririrwa. Abahagarariye ushinjwa batanze inzitizi yo kutakira ikirego ngo kuko Ubushinjacyaha butemerewe kujurira à titre principal ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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97 icyemezo cy'urukiko cyemeza ko rufite ububasha bwo kuburanisha urubanza. Ubushinjacyaha bwo buvuga ko iyo nzitizi nta shingiro ifite kuko ingingo zerekeye imiburanishirize y'imanza z'imbonezamubano ababuranira ushinjwa bavuga zitabuza kujuririra iburabubasha, ahubwo zisobanura ko iyo urukiko rwemeje ko rufite ububasha, icyo cyemezo kijuririrwa hamwe n'urubanza mu mizi. Incamake y'icyemezo: 1. Iyo Urukiko rwemeje ko rufite ububasha bwo kuburanisha, umuburanyi utishimiye icyo cyemezo akijuririra hamwe n'urubanza mu mizi. Ikibujijwe ni ukukijuririra urubanza mu mizi rutaracibwa.

2. Imanza zasubirishijwemo ingingo nshya ntizijuririrwa kuko gusubirishamo urubanza ingingo nshya ari uburyo budasanzwe buha umucamanza kwisubiraho iyo habonetse impamvu mu zo itegeko riteganywa igaragaza ko urubanza rwari gucibwa mu bundi buryo iyo ruburanishwa iyo mpamvu izwi. Gusa ntibugamije kongera gufungura ubujurire bwarangiye ku rubanza rwaciwe burundu kuko urubanza rusubirishijwemo rufata kamere y'urwo rusimbuye. Bivuze ko rudashobora kongera kujuririrwa n'ubwo rwaba rwaraciwe ku rwego rwa mbere.

3. Ku byerekeranye no kwita ku kuri nk'uko bigenda muri Common Law nta shingiro byahabwa kuko uretse no kuba batirengagiza izindi manza zaciwe n'amategako akurikizwa, ikibazo gisuzumwa muri uru rubanza ntaho gihuriye no kumenya niba uregwa ahamwa n'icyaha cyangwa kitamuhama; ahubwo igisuzumwa ni ububasha bw'Urukiko Rukuru. UBUSHINJACYAHA v. HAKIZIMANA

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98 Ubujurire bufite ishingiro. Urukiko Rukuru ntirwari rufite ububasha. Urubanza RPA/ GEN/0001/12/HC/KIG ruteshejwe agaciro. Amagarama y'urubanza aherereye ku isanduku ya Leta. Amategako yashingiweho: Itegeko- Ngenga N°03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo za 18, 34 na 90. Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo za 162 na 193. Imanza zifashishijwe: Nzabandora v. Leta y'u Rwanda, RADA0026/10/CS, Rwaciwe n'Urukiko rw'Ikirenga kuwa 4 Werurwe 2011. Mulemba v Kabona, RCAA0065/09/CS, Rwaciwe n'Urukiko rw'Ikirenga, kuwa 2 Nyakanga 2010. Nzabamwita v SONARWA, RCOMA001/06/CS, Rwaciwe n'Urukiko rw'Ikirenga kuwa 2 Gashyantare 2007. Ubushinjacyaha v. Rwahama, RS/REV/GEN0005/07/CS, rwaciwe n'Urukiko rw'Ikirenga kuwa 24 Nyakanga 2009. Urubanza I. IMITERERE Y'URUBANZA [1] Hakizimana Augustin yahamijwe ibyaha byavuzwe haruguru usibye icyo kuyogozza igihugu mu rubanza ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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99 RP209/CSK rwo kuwa 06/04/2001 rwaciwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali, urugereko rwiheriye ruburanisha imanza z'ibyaha by'itsembabwoko n'itsembatsemba n'ibyaha byibasiye inyoko-muntu n'ibindi byaha bifatanye isano, ahanishwa igihano cyo kwicwa, ategakwa no gutanga indishyi z'akababaro za 10.000.000Frw ku bangirijwe n'ubwicanyi yakoze. [2] Hakizimana yajuririye urwo rubanza mu Rukiko rw'Ubujurire rwa Kigali, rwemeza ko ubujurire bwe nta shingiro bufite. Urwo rubanza yarusabiye iseswa mu Rukiko Rusesa Imanza, nyuma y'ivugururwa ry'inzeho z'ubucamanza ikirego cye kiburanishwa n'Urukiko rw'Ikirenga ruvuguruwe, rwemeza ko ikirego cye kitakiriwe kuko cyaje mu nzira zidakurikije amategako. [3] Hakizimana yasubirishijemo ingingo nshya urubanza RP209/CSK mu Rukiko Rwisumbuye rwa Gasabo, avuga ko nyuma yo gucibwa urubanza hari abantu byagaragaye ko bakiriho n'abandi bapfuye nyuma ya jenocide kandi yarahaniwe ko yabishe muri jenocide. Yavugaga kandi ko hari abo yahamijwe ko yishe nyamara Inkiko Gacaca zarahamije abandi bantu icyaha cyo kwica abo bantu, abo bantu bakaba bataramushinje ko bafatanyije. Yanavugaga ko hari n'abatangabuhamya bamushinjura ko nta ruhare yagize muri jenocide. [4] Urukiko Rwisumbuye rwa Gasabo rwaciye urubanza RP/GEN0001/10/TGI/GSBO kuwa 02/02/2012, rwemeza ko ikirego cya Hakizimana gifite ishingiro ku byerekeye umugore wa Célestin yashinjwaga ko yishe kandi yarapfuye urupfu rusanzwe nyuma ya jenocide, na Ndayisenga Bernard ukiriho. Rwemeje ariko ko izindi ngingo yatanze zishingiye ku manza UBUSHINJACYAHA v. HAKIZIMANA

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100 zaciwe n'inkiko gacaca zo mu murenge wa Kacyiru, n'ubuhamya bw'abantu batandukanye zimuhanaguraho urupfu rw'abandi bantu ashinjwa ko yagize uruhare mu rupfu rwabo nta shingiro zifite. [5] Hakizimana yajuririye urwo rubanza mu Rukiko Rukuru. Ubushinjacyaha bubutsa inzitizi y'iburabubasha buvuga ko urubanza rwasubirishijwemo ingingo nshya rutajuririrwa, urukiko rwemeza mu rubanza rubanziriza urundi rwo kuwa 08/02/2013 ko iyo nzitizi nta shingiro ifite. [6] Rwasobanuye ko urubanza rwasubirishijwemo ingingo nshya rujuririrwa rwaciwe n'Urukiko Rwisumbuye rwa Gasabo ku rwego rwa mbere kuko rwafashe kamere y'urwa mbere rwaciwe ku rwego rwa mbere, ko rero nta cyarubuza kujuririrwa mu Rukiko Rukuru kuko itegeko rigena imiterere, imikorere n'ububasha by'inkiko riha Urukiko Rukuru ububasha bwo kuburanisha mu bujuriye imanza zaciwe n'Urukiko Rwisumbuye ku rwego rwa mbere. [7] Ku bijyanye n'imanza Ubushinjacyaha bwari bwatanze nk'ikimenyetso cy'uko urubanza ruciwe ku kirego cyo gusubirishamo urubanza ingingo nshya rutajuririrwa hagenewe ku murongo watanze n'Urukiko rw'Ikirenga, rwavuze ko zitakwifashishwa muri uru rubanza kuko atari imanza z'inshinjabyaha, zikaba zaraciwe ku rwego rwa nyuma, ku buryo nta handi zajuririrwa, ibyo bikaba bitandukanye n'uru rubanza rwaciwe ku rwego rwa mbere. [8] Rwavuze kandi ko ingingo ya 193 y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu ibuzura kujuririra urubanza rwasubirishijwemo ingingo nshya, ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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101 itashingirwaho muri uru rubanza kuko ikurikizwa mu manza nshinjabyaha iyo nta tegeko ryihariye rihari, akaba atariko bimeze muri uru rubanza kuko ibyo gusubirishamo urubanza ingingo nshya biteganyijwe mu ngingo za 180 kugeza ku ya 183 z'Itegeko N°13/2004 ryo kuwa 17/05/2004 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ndetse ibyerekeranye n'ubujurire bw'izo manza bikaba biteganyijwe muri rusange mu itegeko rigena imiterere, imikorere n'ububasha by'inkiko ivuga ko imanza z'inshinjabyaha ziciwe ku rwego rwa mbere n'Urukiko Rwisumbuye zijuririrwa mu Rukiko Rukuru. [9] Nyuma y'urwo rubanza rubanziriza urundi, urubanza rwaburanishijwe mu mizi, urukiko ruca urubanza kuwa 21/06/2013, rwemeza ko Hakizimana agizwe umwere ku byaha byose aregwa, rutegeka ko ahita afungurwa. [10] Ubushinjacyaha bwajuririye urwo rubanza mu Rukiko rw'Ikirenga kuwa 12/07/2013, buvuga ko Urukiko Rukuru rwirengagije ko ntaho biteganyijwe mu mategeko ko urubanza rwasubirishijwemo ingingo nshya rujuririrwa. [11] Urubanza rwaburanishijwe mu ruhame kuwa 07/10/2013, Hakizimana yunganiwe na Me Murinzi Jean de Dieu, Me Mutarindwa Félix na Me Protais Mutembe, naho Ubushinjacyaha buhagarariwe na PN Ruberwa Bonaventure.

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102 II. ISESENGURA RY'IBIBAZO BIGIZE URU RUBANZA A. Kumenya niba ubujurire bw'Ubushinjacyaha butagomba kwakirwa. [12] Abunganira Hakizimana batanze inzitizi yo kutakira ikirego cy'Ubushinjacyaha bavuga ko butemerewe kujurira à titre principal icyemezo cy'urukiko cyemeza ko rufite ububasha bwo kuburanisha urubanza, ndetse ko ikirego cyabwo kitagombaga kwandikwa mu gitabo cy'ibirego, bakaba basaba uru rukiko gukosora ikosa ryakozwe n'Umwanditsi Mukuru w'Urukiko rw'Ikirenga. [13] Basobanura ko iyo nzitizi bayishingira ku ngingo ya 18 n'ya 90 z'Itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi. [14] Ubushinjacyaha buvuga ko iyo nzitizi nta shingiro ifite kuko ntaho ziriya ngingo z'itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano zibuza kujuririra iburabubasha, ahubwo zisobanura ko iyo urukiko rwemeje ko rufite ububasha, icyo cyemezo kijuririrwa hamwe n'urubanza mu mizi, bivuze ko ikibujijwe ari ukujuririra urubanza rubanziriza urundi rwemeje ko urukiko rufite ububasha, mbere y'uko urubanza mu mizi rucibwa. [15] Ubushinjacyaha buvuga kandi ko n'ingingo ya 28 y'Itegeko - Ngenga N°03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga nayo ishimangira ko Urukiko rw'Ikirenga rufite ububasha bwo kuburanisha imanza zaciwe n'Urukiko Rukuru mu rwego ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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103 rw'ubujurire iyo izo manza zaciwe n'urukiko rutabifitiye ububasha. [16] Ingingo ya 90(2) y'itegeko ryavuzwe ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi ivuga ko "iyo urukiko rwemeje ko rufite ububasha, umuburanyi utishimiye icyo cyemezo akijuririra hamwe n'urubanza rw'iremezo", naho iya 18 (6) y'iryo tegeko irebana n'ibirego Umwanditsi w'Urukiko adashobora kwakira ngo abyandike mu bitabo by'Urukiko, ikavuga ko atakira "ubujurire ku cyemezo cy'urukiko rwemeza ko rufite ububasha bwo kuburanisha". [17] Urukiko rusanga ingingo ya 90(2) itabuza kujuririra icyemezo cy'urukiko cyemeza ko rufite ububasha bwo kuburanisha urubanza, ahubwo icyo ibuza ari ukukijuririra cyonyine, hadategerejwe icyemezo cyarwo ku birebana n'urubanza mu mizi. [18] Ku bijyanye n'ingingo ya 18(6) Urukiko rusanga iyo irebwe hamwe n'ya 90(2) yumvikanisha ko ikirego Umwanditsi w'Urukiko abujijwe kwakira ari ubujurire ku cyemezo cy'urukiko rwemeje ko rufite ububasha kije urubanza mu mizi rutaracibwa. [19] Urukiko rusanga kandi abunganira Hakizimana mu isesengura bakora ry'ingingo za 18(6) na 90(2) birengagiza ko impamvu ituma icyo cyemezo cy'ububasha kigomba kujuririrwa hamwe n'urubanza mu mizi ari uko kiri mu rwego rw'imanza zibanziriza izindi, ingingo ya 162(2) y'itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano ikaba ivuga ko kujuririra imanza zibanziriza izindi bikorwa gusa iyo urubanza rw'iremezo rwaciwe kandi bigakorera rimwe. UBUSHINJACYAHA v. HAKIZIMANA

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104 [20] Hashingiwe kuri ibyo bisobanuro, Urukiko rurasanga inzitizi yo kutakira ikirego yatanzwe n'abunganira Hakizimana Augustin nta shingiro ifite, hakaba hagomba gusuzumwa ubujurire bwatanzwe n'Ubushinjacyaha. B. Kumenya niba Urukiko Rukuru rutari rufite ububasha bwo kwakira ubujurire ku rubanza Hakizimana yasubirishijemo ingingo nshya mu Rukiko Rwisumbuye rwa Gasabo. [21] Ubushinjacyaha buvuga ko urubanza rwaciwe n'Urukiko Rukuru rukwiye guteshwa agaciro kuko ntaho biteganyijwe ko urubanza rwasubirishijwemo ingingo nshya rujuririrwa. [22] Busobanura ko mu rubanza RS/REV/GEN0005/07/CS bwaregagamo Rwahama Anaclet, Urukiko rw'Ikirenga rwasobanuye neza ko urubanza rusubirishijwemo ingingo nshya rufata kamere y'urwasubirishijwemo, bityo narwo rukaba ruhita ruba itegeko ntirube rucyongeye kujuririrwa, ndetse ko hari n'izindi manza nyinshi zashimangiye uwo murongo nka RADA0026/10/CS (Nzabandora Alex Vs Leta y'u Rwanda), RCAA0065/09/CS (Mulemba Vs Kabona Justin) na RCOMA001/06/CS (Nzabamwita Emmanuel Vs SONARWA), Urukiko Rukuru rukaba rwaragombaga kugendera muri uyu murongo kuko ibyemezo by'Urukiko rw'Ikirenga bigomba kubahirizwa n'izindi nkiko. [23] Buvuga kandi ko n'ubwo itegeko ryerekeye imiburanishirize y'imanza z'inshinjabyaha ryariho igihe urubanza rwacibwaga mu Rukiko Rukuru ntacyo ryavugaga ku byerekeye ubujurire bw'imanza zasubirishijwemo ingingo nshya, Urukiko rukuru rwari no gushingira ku Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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105 y'imanza z'imbonezamubano, ivuga mu ngingo yaryo ya 192 ko icyemezo cyafashwe mu gusubirishamo urubanza ingingo nshya kitemera inzira z'ubujurire izo arizo zose. [24] Abunganira uregwa bavuga ko ingingo ya 192 Ubushinjacyaha buburanisha ntaho ihuriye n'ibyo aburanisha kuko ivuga gusa ko gusubirishamo urubanza ingingo nshya bidashoboka iyo urwo rubanza rwigeze gusubirishwamo ingingo nshya "révision sur révision ne vaut". [25] Bavuga kandi ko ingingo ya 373(3) y'Itegeko N°21/2012 ryo kuwa 14/06/2012 rigenga imiburanishirize y'imanza z'imbonezamubano, ivuga ko iryo tegeko ridakurikizwa iyo ribangamiye uburenganzira bw'umuburanyi yari afite mbere y'uko rijyaho, ko rero Urukiko rutagomba gushingira kuri iryo tegeko kuko ryaba rirenganya Hakizimana. [26] Ku bijyanye n'imanza zatanzwe n'Ubushinjacyaha mu rwego rwo gusobanura ikirego cyabwo, bavuze ko ntaho zihuriye n'urubanza rwa Hakizimana kuko zo zari zaraburanishijwe ku rwego rwa nyuma, mu gihe uru rwaburanishijwe ku rwego rwa mbere, hakaba nta cyabuza ko rujuririrwa. [27] Bavuga kandi ko Urukiko rw'Ikirenga nk'urukiko rukuriye izindi, rwazanashingira ku kuri rukarenganura Hakizimana bitabaye ngombwa gutsimbarara ku bintu byanditse kandi umuntu arengana, ngo kuko ariko bigenda muri "common law" kandi n'u Rwanda rukaba ariho ruri kwerekeza.

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106 UKO URUKIKO RUBIBONA [28] Urukiko rw'Ikirenga mu manza nyinshi1 zaciwe hagikurikizwa Itegeko No13/2004 ryagengaga imiburanishirize y'imanza z'inshinjabyaha n'Itegeko N°18/2004 ryo kuwa 20/06/2004 ryagengaga imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi rwasobanuye ko nubwo ayo mategeko atabisobanuraga mu buryo bweruye, imanza zasubirishijwemo ingingo nshya zitajuririrwa kubera ko "révision" ari uburyo budasanze buha umucamanza inzira yo kwisubiraho (rétractation) iyo habonetse impamvu mu zo itegeko riteganywa, igaragaza ko urubanza rwari gucibwa mu bundi buryo iyo ruburanishwa iyo mpamvu izwi, ariko ko butagamije kongera gufungura ubujurire bwarangiye ku rubanza rwaciwe burundu kuko urubanza rusubirishijwemo rufata kamere y'urwo rusimbuye, narwo ruba rwaraciwe burundu. [29] Urukiko rusanga ibyo Urukiko Rukuru rwavuze ko umurongo watanze n'Urukiko rw'Ikirenga warebaga gusa imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi nta shingiro bifite kuko hari imanza z'inshinjabyaha zaciwe kuri icyo kibazo, urugero akaba ari urubanza Ubushinjacyaha bwaregagamo Rwahama Anaclet rwaciwe kuwa 24/07/20092 rwasobanuyemo ko nta rukiko itegeko ngenga rigenga imiterere, imikorere n'ububasha by'inkiko rwahaye ububasha bwo kujuririrwa imanza zasubirishijwemo ingingo nshya. Ikindi kandi nta mpamvu

1 RADA 0026/10/CS (Nzabandora v. Leta y'u Rwanda), RCAA0065/09/CS (Mulemba Vs Kabona Justin), RCOMA 001/06/CS (Nzabamwita Emmanuel

v. SONARWA. 2 RS/REV/GEN0005/07/CS (MP v. Rwahama Anaclet). ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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107 ishingiyeye ku mategeko yari gutuma hemezwa ko imanza z'inshinjabyaha zasubirishijwemo ingingo nshya zishobora kujuririrwa, mu gihe nyamara bidashoboka ko imanza z'imbonezamubano zisubirishijwemo ingingo nshya zijuririrwa. [30] Urukiko rusanga n'ibyo Urukiko Rukuru rwavuze ko umurongo watanze n'Urukiko rw'Ikirenga warebaga gusa imanza zaciwe ku rwego rwa nyuma ntaho bishingiyeye kuko n'ubundi imanza zaciwe ku rwego rwa nyuma ziba zitagishobora kujuririrwa mu nzira zisanze. [31] Urukiko rusanga kandi imanza zaciwe burundu ziba zinganywe uburemere hatitawe ku rwego zarangiriyeho kuko urubanza ruciwe ku rwego rwa mbere ntirujuririrwe, cyangwa rukajuririrwa ariko ubujurire ntibwakirwe rurangizwa kimwe n'urwaciwe ku rwego rwa nyuma, kuba rero urubanza rusubirishijwemo ingingo nshya rufata kamere y'urwo rusimbuye, ibyo byumvikanisha ko rudashobora kongera kujuririrwa nubwo rwaba rwaraciwe ku rwego rwa mbere kuko n'urwo rusimbuye rwari rwarangiye kuba itegeko. [32] Urukiko rusanga umurongo rwafashe ku bijyanye n'ubujurire bw'imanza zasubirishijwemo ingingo nshya waraje no gushimangirwa n'Itegeko N°21/2012 ryo kuwa 14/06/2012 rigenga imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi ryasohotse mu igazeti ya Leta mbere y'uko Urukiko Rukuru rufata icyemezo cyarwo, ivuga mu ngingo yaryo ya 193 ko icyemezo gifashwe mu gusubirishamo urubanza

ingingo nshya nta na rimwe kijuririrwa cyangwa ngo gisubirwemo, ibi nabyo bikaba byumvikanisha ko urubanza rwasubirishijwemo ingingo nshya ruba ruciwe burundu nk' urwo rusimbuye. UBUSHINJACYAHA v. HAKIZIMANA

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108 [33] Urukiko rusanga nanone uwo murongo waraje no gushimangirwa n'Itegeko-Ngenga N°03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga ryasohotse mu igazeti ya Leta kuwa 09/07/2012 mbere y'uko Urukiko Rukuru rufata icyemezo cyarwo, ivuga mu ngingo yaryo ya 34(11) ko Umwanditsi Mukuru adashobora kwakira ikirego cy'ubujurire ku rubanza rwasubirishijwemo ingingo nshya, ibi nabyo bikaba byumvikanisha ko bene izo manza (ari iz'imbonezamubano, ari n'iz'inshinjabyaha) zitajuririrwa kuko nta mpamvu yatuma ubujurire budashoboka mu Rukiko rw'Ikirenga ariko bugashoboka mu nkiko zo hasi. [34] Ku bijyanye n'ibyo ababuranira Hakizimana bavuga ko urukiko rwareba ahari ukuri ntirwite ku bintu byanditse gusa nk'uko bigenda muri "common law", urukiko rusanga nta shingiro bifite kuko uretse no kuba muri "common law" batirengagiza imanza zaciwe n'amategeko akurikizwa, ntaho ikibazo gisuzumwa muri uru rubanza gihuriye no kumenya niba uregwa ahamwa n'icyaha cyangwa kitamuhama, ahubwo igisuzumwa ni ububasha bw'Urukiko Rukuru ku bujurire bw'urubanza rwasubirishijwemo ingingo nshya mu Rukiko Rwisumbuye. [35] Hashingiwe kuri ibyo bisobanuro byose rero, uru rukiko rurasanga Urukiko Rukuru nta bubasha rwari rufite bwo kuburanisha mu bujurire urubanza rwasubirishijwemo ingingo nshya mu Rukiko Rwisumbuye. III. ICYEMEZO CY'URUKIKO: [36] Rwemeje ko ubujurire bw'Ubushinjacyaha bufite ishingiro. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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109 [37] Rwemeje ko Urukiko Rukuru rutari rufite ububasha bwo kwakira ubujurire bw'urubanza RP/GEN0001/10/TGI/GSBO rwaciwe kuwa 02/02/2012. [38] Rwemeje ko urubanza RPA/GEN0001/12/HC/KIG ruteshejwe agaciro. [39] Ruvuze ko amagarama y'urubanza aherera ku isanduku ya Leta.

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UBUSHINJACYAHA v. MBABAJENDE N'ABANDI [Rwanda URUKIKO RW'IKIRENGA – RPA0148/11/CS (Mukamulisa P.J., Munyangeri na Hitiyaremye, J.) 11 Ukuboza 2015] Amategeko agenga imiburanishirize y'imanza nshinjabyaha – icyaha gikomeye – ubusaze bw'ikirego cy'ikurikiranacyaha – kuba harabayeho ibikorwa by'iperereza, ndetse n'Urukiko rukaba rwararegwe mu gihe giteganywa n'amategeko ariko ntihagire igikorwa na kimwe cy'ikurikiranacyaha kigeze kiba ngo gihagarike ubusaze, ntibihagarika ubusaze bw'ikirego cy'ikurikiranacyaha – Itegeko N°30/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 2(1&2), iya 5, iya 7(1) n'iya 8(1&2). Incamake y'ikibazo: Kubera urupfu rw'abana babiri ba Samunane rwabaye ku wa 5/1/1993, Nyirandegeya yaketswe ko ariwe wamuroze. Abitwa Hategekimana Dismas, Mbabajende Jean Baptiste, Turikunkiko Jean Claude,

Uwizeyumuremyi Claude, Sebahire Lucien, Ruzindana Augustin n'abandi bagenzi babo bahise bafata umugambi wo kujya kumwica, bagabayo igitero bambaye ibyatsi kugira ngo biyoberanye, bageze iwe baramuhondagura, bakomereza kuri Mukamusoni no ku mukobwa we Mukansanga kuko bavugaga ko bafatanyaga kuroga, bose barabakubita kugeza bapfuye, uwitwa Mukandanga na we icyo gihe baramukubise bamusiga ari intere ariko ku bw'amahirwe ntiyapfa. 111

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112 Nyuma yo gutangira iperereza, ubushinjacyaha bwakurikiranye abantu batandukanye harimo n'abajuriye muri uru rubanza, babajijwe bamwe bahakana icyaha abandi baracyemera. Ku wa 11/11/1993, hatanzwe ikirego mu Rukiko rwa Mbere rw'Iremezo rwa Byumba mu ibaruwa N° I/0097/RMP15076/GTBO/MF ariko urubanza ntirwaburanishwa kugeza ubwo habayeho ivugururwa ry'inzeho z'ubutabera mu 2004, rwoherezwa mu Rukiko Rukuru ku itariki ya 13/10/2004, nyuma ku itariki ya 24/7/2009 urwo rukiko rufata icyemezo ruvuga ko nta bubasha bushingiye ku ifasi rufite, rutegeka ko rwoherezwa mu Rukiko Rukuru, Urugereko rwa Rwamagana ngo abe ari rwo ruruburanisha. Urukiko Rukuru, Urugereko rwa Rwamagana, rwahamije icyaha abajuriye muri uru rubanza urushingiye ku kuba mu maperereza yakozwe ndetse n'imbere y'urukiko, baremeye icyaha, maze ruhanisha buri wese igifungo cy'imyaka makumyabiri (20); runemeza ko habayeho ubuzime bw'ikirego cy'ikurikiranacyaha kuri bamwe kuko bitabye Imana. Ntuyenabo Simon na bagenzi be, bajurirye iki cyemezo mu Rukiko rw'Ikirenga bavuga ko batagombaga kuburanishwa kubera ko habayeho ubusaze bw'ikirego cy'ikurikiranacyaha naho ku birebana n'imizi y'urubanza, bavuga ko hatagaragajwe icyishe ba nyakwigendera, ko umucamanza yaciriye urubanza ku cyo ataregewe (statuer ultra petita), ko kandi atabagabanyirije igihano kandi bari baburanye bemera icyaha. Ubushinjacyaha bwo buvuga ko nta busaze bwabayeho kuko ikirego cyageze mu Rukiko Rukuru ruvuye mu Rukiko rwa Mbere rw'Iremezo. Urukiko rw'Ikirenga rwasuzumye ingingo y'ubujurire irebana n'ubusaze bw'ikirego cy'ikurikiranacyaha. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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113 Incamake y'icyemezo: Kuba harabayeho ibikorwa by'iperereza, ndetse n'Urukiko rukaba rwararegewe mu gihe giteganywa n'amategeko ariko ntihagire igikorwa na kimwe cy'ikurikiranacyaha kigeze kiba ngo gihagarike ubusaze, ntibihagarika ubusaze bw'ikirego cy'ikurikiranacyaha. Bityo Urukiko Rukuru, Urugereko rwa Rwamagana, rukaba rutari rukwiye kuba rwarakiriye iki ikirego ngo rugisuzume, akaba ariyo mpamvu uru rukiko rutesheje agaciro urubanza rwaciye n'urwo rukiko kuri iki kirego kuko habayeho ubusaze bw'ikirego cy'ikurikiranacyaha. Inzitizi yatanze n'abajuriye ifite ishingiro. Habayeho ubusaze bw'ikirego cy'ikurikiranacyaha. Urubanza rwajuririye ruteshejwe agaciro. Amagarama aherereye ku isanduku ya Leta. Amategeko yashingiweho: Itegeko N° 30/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 2(1&2), iya 5, iya 7(1) n'ya 8(1&2). Nta manza zifashishijwe. Inyandiko z'abahanga: Henri Bosly et Damien Vandermeersch, Droit de la procédure pénale, Ed. 2005, p.209 in fine. Michel Franchimont et alii, Manuel de procédure pénale, 2 e Edition Larcier, 2006, p.109. Serge Guinchard et Jacques Buisson, Procédure Pénale,

3ème édition, p. 619, para. 1162. UBUSHINJACYAHA v. MBABAJENDE N'ABANDI

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114 Urubanza I. IMITERERE Y'URUBANZA [1] Ku wa 5/1/1993 uwitwa Samunane yapfushije abana babiri (2), maze hakekwa ko barozwe na Nyirandegeya. Abitwa Hategekimana Dismas, Mbabajende Jean Baptiste, Turikunkiko Jean Claude, Uwizenyumuremyi Claude, Sebahire Lucien, Ruzindana Augustin n'abandi bagenzi babo bahise bafata umugambi wo kujya kumwica, bagabayeho igitero bambaye ibyatsi kugira ngo biyoberanye, bageze iwe baramuhondagura, bakomereza kuri Mukamusoni no ku mukobwa we Mukansanga kuko bavugaga ko bafatanyaga kuroga, bese barabakubita kugeza bapfuye, uwitwa Mukandanga na we icyo gihe baramukubise bamusiga ari intere ariko ku bw'amahirwe ntiyapfa. [2] Iperereza ryahise ritangira, hakurikiranwa Hategekimana Dismas, Mbabajende Jean Baptiste, Turikunkiko Jean Claude, Sebahire Lucien, Nzamwita Félicien, Ruzindana Augustin, Uwizenyumuremyi Claude, Ngiruwonsanga Alphonse, Bizimana Théogène, Harerimana Faustin, Harerimana Théogène, Ntuyenabo Simon na Kamuhanda Théoneste, babajijwe bamwe bahakana icyaha abandi baracyemera. [3] Nyuma y'iperereza, Ubushinjacyaha bwabaregeye Urukiko rwa Mbere rw'Iremezo rwa Byumba ku wa 11/11/1993 mu ibaruwa N° I/0097/RMP15076/GTBO/MF, urubanza ntirwaburanishwa kugeza ubwo habayeho ivugururwa ry'inze z'ubutabera mu 2004, rwoherezwa mu Rukiko Rukuru ku itariki ya 13/10/2004, nyuma ku itariki ya 24/7/2009 urwo rukiko rufata icyemezo N° RP0038/05/HC/KIG ruvuga ko nta bubasha bushingiye ku ifasi rufite, rutegeka ko rwoherezwa mu Rukiko ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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115 Rukuru, Urugereko rwa Rwamagana ngo ari rwo ruruburanisha. [4] Ku itariki ya 6/5/2011, Urukiko Rukuru, Urugereko rwa Rwamagana, rwemeje ko Mbabajende Jean Baptiste, Nzamwita Félicien, Uwizenyumuremyi Claude, Ntuyenabo Simon na Kamuhanda Théoneste bahamwe n'icyaha cy'ubuhotozi bwakorewe ba nyakwigendera Nyirandegeya, Mukamusoni na Mukansanga, rushingiye ku kuba mu maperereza yakozwe ndetse n'imbere y'urukiko, baremeye icyaha, maze ruhanisha buri wese igifungo cy'imyaka makumyabiri (20); naho kuri Hategekimana Dismas, Turikunkiko Jean Claude, Sebahire Lucien, Ruzindana Augustin, Ngiruwonsanga Alphonse, Bizimana Théogène, Harerimana Faustin na Harerimana Théogène, rwemeza ko habayeho ubuzime bw'ikirego cy'ikurikiranacyaha kuko bitabye Imana. [5] Iki cyemezo nticyashimishije Ntuyenabo Simon na bagenzi be, bakijuririra mu Rukiko rw'Ikirenga bavugaga ko batagombaga kuburanishwa kubera ko habayeho ubusaze bw'ikirego cy'ikurikiranacyaha, ku birebana n'imizi y'urubanza, bavugaga ko hatagaragajwe icyishe ba nyakwigendera, ko umucamanza yaciriye urubanza ku cyo ataregawe (statuer ultra petita), ko kandi atabagabanyirije igihano kandi bari baburanye bemera icyaha. [6] Iburanisha ry'urubanza ryabaye mu ruhame ku itariki ya 26/10/2015, hitabye Ntuyenabo Simon na Kamuhanda Théoneste bunganiwe na Me Ndutiye Yussuf, Nzamwita Félicien na Uwizenyumuremyi Claude batitabye ariko barahamagajwe mu buryo bukurikije amategeko, naho Mbabajende Jean Baptiste umuhesha w'inkiko yagaragaje ko yitabye Imana nk'uko byemejwe n'Ubuyobozi bw'Akagari ka

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116 Nyamirama, Ubushinjacyaha buhagarariwe na Mutayoba Alphonse, Umushinjacyaha ku Rwego rw'Igihugu, maze kuri uwo muni, hagibwa impaka kuri imwe mu ngingo z'ubujurire irebana n'ubusaze bw'ikirego cy'ikurikiranacyaha (prescription de l'action publique). II. IKIBAZO KIRI MU RUBANZA N'ISESENGURA RYACYO. Kumenya niba harabayeho ubusaze bw'ikirego cy'ikurikiranacyaha ku cyaha Ntuyenabo Simon na bagenzi be bakurikiranyweho n'Ubushinjacyaha. [7] Me Ndutiye Yussuf avuga ko ikirego cy'ikurikiranacyaha ku cyaha Ntuyenabo Simon na bagenzi be bakurikiranyweho cyashaje kubera ko cyakozwe ku itariki ya 5/1/1993, inyandiko isoza iperereza igakorwa ku itariki ya 28/09/1993. Avuga ko, n'ubwo handitswe ibaruwa ku wa 11/11/1993 yohereza dosiye mu Rukiko rwa Mbere rw'Iremezo rwa Byumba, ntakigaragaza ko yakiriwe, ko ahubwo ikigaragara ari uko dosiye yageze mu Rukiko Rukuru mu mwaka wa 2005, hashize imyaka cumi n'ibiri (12) yose nta kintu kiyikozweho, akavuga ko habayeho ubusaze bw'ikirego cy'ikurikiranacyaha hashingiwe ku ngingo ya 111 y'Itegeko-Teka N°21/77 ryo ku wa 18 Kanama 1977 rishyiraho igitabo cy'amategeko ahana ryakoreshezwaga icyo gihe, agasanga rero ikirego mu Rukiko Rukuru kitaragombaga gusuzumwa. [8] Uhagarariye Ubushinjacyaha avuga ko, nk'uko n'uwunganira abaregwa abiyemerera, icyaha cyakozwe ku itariki ya 5/1/1993, dosiye irakorwa ishyikirizwa Urukiko rwa Mbere rw'Iremezo rwa Byumba ku itariki ya 11/11/1993, ko ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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117 rero icyo gihe nta busaze bw'ikirego cy'ikurikiranacyaha bwari bwakaba. Avuga ko dosiye yagaragaye mu Rukiko Rukuru mu mwaka wa 2005 yari ivuye mu Rukiko rwa Mbere rw'Iremezo rwa Byumba, ko itari ivuye mu Bushinjacyaha, ko ahubwo ikigaragara ari uko dosiye yatinze mu rukiko. Arangiza avuga ko, hakurikijwe ingingo abajuriye baburanisha, nta busaze bw'ikirego cy'ikurikiranacyaha bwabayeho kubera ko Ubushinjacyaha bwaregeye Urukiko mu gihe giteganywa n'amategeko. UKO URUKIKO RUBIBONA [9] Ingingo ya 5 y'Itegeko N°30/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha igira iti: "Uretse icyaha cya jenocide, ibyaha byibasiye inyokomuntu n'ibyaha by'intambara bidasaza, ikirego cy'ikurikiranacyaha ku bindi byaha bisaza mu gihe cy'imyaka icumi (10) yuzuye ku byaha by'ubugome; mu gihe cy'imyaka itatu (3) ku byaha bikomeye; mu gihe cy'umwaka umwe (1) wuzuye ku byaha byoroheje". [10] Ingingo ya 7, igika cya mbere, y'iryo tegeko igateganya ko "Ubusaze bw'ikirego cy'ikurikiranacyaha buhagarikwa n'ibikorwa by'iperereza cyangwa by'ikurikiranacyaha, iyo bikozwe mu bihe biteganyijwe n'ingingo ya 5 y'iri tegeko". [11] Naho ingingo ya 2, agace ka mbere n'aka 2, y'iryo Tegeko igasobanura ko "Igikorwa cy'iperereza ari igikorwa cyose kigamije gushakisha ibyaha, gukusanya ibimenyetso byaba ibishinja cyangwa ibishinjura kimwe n'igikorwa kigamije gusuzuma niba ushinjwa agomba gukurikiranwa cyangwa kudakurikiranwa ; naho igikorwa cy'ikurikiranacyaha cyo akaba UBUSHINJACYAHA v. MBABAJENDE N'ABANDI

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118 ari igikorwa kigamije kuregera urukiko, guhamagaza ababuranyi no kwitaba urukiko, gutegura iburanisha ry'urubanza, kuburana kimwe no kwiambaza inzira z'ubujurire". [12] Ingingo ya 8, igika cya mbere n'icya 2, y'Itegeko ryavuzwe haruguru, iteganya ko "Ubusaze bw'ikirego cy'ikurikiranacyaha busubikwa igihe cyose iperereza cyangwa ikurikiranacyaha ribujijwe n'inkomyi ntarengwa, iturutse ku itegeko cyangwa ku nzitizi itagobotorwa. Iyo inzitizi ivuyeho, ubusaze bwari bwarasubitswe bukomeza kubarwa guhera ku munsu iyo nzitizi yaviriyeho". [13] Ku birebana n'uru rubanza, inyandiko ziri muri dosiye zigaragaza ko icyaha abaregwa bakurikiranweho cyakozwe ku itariki ya 5/1/1993, nyuma y'iperereza Ubushinjacyaha buregera Urukiko rwa Mbere rw'Iremezo rwa Byumba ku itariki ya 11/11/1993, dosiye yandikwa mu bitabo ku itariki ya 17/01/1994. Izo nyandiko zigaragaza kandi ko ikindi gikorwa cyakozwe kuri iyo dosiye cyabaye ku itariki ya 13/10/2004 ubwo dosiye yoherezwaga mu Rukiko Rukuru kugira ngo ari ho iburanishirizwa. [14] Hashingiwe ku mategeko no ku bikubiye muri dosiye nk'uko bimaze gusobanurwa haruguru, Urukiko rurasanga ubusaze bw'ikirego cy'ikurikiranacyaha Ubushinjacyaha bwatanze mu Rukiko rwa Mbere rw'Iremezo rwa Byumba ku itariki ya 11/11/1993 bwarahagaritswe (interruption) no kucyandika mu bitabo by'ibirego byakozwe ku itariki ya 17/01/1994 nk'uko byagaragajwe haruguru, bityo icyo kirego kikaba cyaragombaga gusaza ku itariki ya 16/01/2004, ni ukuvuga mu gihe cy'imyaka icumi (10) uhereye ku munsu ubanziriza uwo igikorwa cya nyuma cyabereyeho. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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119 [15] Ku bivugwa n'Ubushinjacyaha ko nta buzime bw'ikirego cy'ikurikiranacyaha bwabayeho bushingira ku kuba harabayeho ibikorwa by'iperereza, ndetse n'Urukiko rukaba rwararegwe mu gihe giteganywa n'amategeko, Urukiko rw'Ikirenga rurasanga ibyo nta shingiro byahabwa, kuko kuva Urukiko rwaregerwa, nta gikorwa na kimwe mu biteganyijwe n'ingingo ya 2, agace ka mbere n'aka 2, y'Itegeko ryibukijwe haruguru, kigeze kiba ngo gihagarike ubusaze. Ibi kandi bikaba bihura n'ibyemezwa n'abahanga mu mategeko bavuga ko ku birebana n'ubusaze bw'ikirego cy'ikurikiranacyaha, bidahagije kuregera urukiko mu gihe cyateganyijwe gusa, ko ari ngombwa ko icyo kirego kiburanishwa kitarasaza. (Il ne suffit pas que l'action publique soit introduite devant le juge pénal en temps utile, encore faut-il qu'elle soit jugée dans les délais de prescription)¹. [16] Undi muhanga na we akavuga ko ubusaze bw'ikirego cy'ikurikiranacyaha umuntu amenya niba bwarabayeho cyangwa se butarabayeho ku munsu w'icibwa ry'urubanza. Akavuga ko urubanza rwaciwe burundu kandi ababuranyi bombi bahari rurangiza ibirebana n'ubusaze bw'ikirego cy'ikurikiranacyaha, mu gihe urwo rubanza rutasabiwe iseswa (C'est au jour du jugement qu'il faut apprécier si la prescription est ou non acquise. Ainsi, le jugement qui statue définitivement et contradictoirement sur l'action publique met fin à celle-ci, en l'absence de cassation)².

1 Michel Franchimont et alii, Manuel de procédure pénale, 2e Edition Larcier, 2006, p.109. 2Henri Bosly et Damien Vandermeersch, Droit de la procédure pénale, Ed. 2005, p.209 in fine

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120 [17] Isesengura ry'ibivugwa n'abo bahanga, ndetse n'ibiteganywa n'ingingo ya 2, agace ka mbere n'aka 2, y'Itegeko ryavuzwe, iteganya ibikorwa bihagarika ubusaze bw'ikirego cy'ikurikiranacyaha, rigaragaza ko ntacyabuza ko ikirego cy'ikurikiranacyaha gisazira mu rukiko mu gihe kitaburanishijwe hatarabaho ubusaze bwacyo, cyane cyane ko no mu bikorwa bihagarika ubusaze bw'icyo kirego harimo n'ibikorwa mu rukiko nk'uko bivugwa muri iyo ingingo ndetse n'abahanga mu mategeko³. [18] Urukiko rw'Ikirenga rurasanga nyamara ariko, jenocide yakorewe abatutsi mu Rwanda kuva ku itariki ya 07/04/1994 yarasubitse ubusaze bw'ikirego cy'ikurikiranacyaha (a suspendu la prescription de l'action publique), iryo subika rikaba kandi rigomba kubarwa kugeza igihe Urukiko rwa Mbere rw'Iremezo rwa Byumba rwari rwararegewe rwasubukuriye imirimo yarwo nyuma y'ihagarikwa rya jenocide, ni ukuvuga ku itariki ya 10/11/1994 nk'uko bigaragazwa n'igitabo cyandikwamo ibirego Ubwanditsi bw'urwo Rukiko bwashyikirije Urukiko rw'Ikirenga. [19] Ibivugwa mu gika kibanziriza iki, Urukiko rw'Ikirenga rurabishingira ku ngingo ya 8, igika cya mbere n'icya 2, y'Itegeko ryagarutsweho haruguru, ibiyikubiyemo bikaba bihura n'ibivugwa n'abahanga mu mategeko bemeza ko mpamvu zituma habaho isubika ry'ubusaze bw'ikirego cy'ikurikiranacyaha zishobora guturuka ku mbogamizi zitunguranye zikomoka ku mpamvu zitigobotorwa zituma urega adashobora kugira icyo akora. Muri izo mpamvu bavugamo intambara, imyuzure cyangwa ibindi biza, ndetse n'igihe uregwa yaba yarahungiyemo mu mahanga, ni ngombwa gutegereza

3 Idem, pp.212-216. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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121 ko yoherezwa kugira ngo akurikiranwe (Les causes de suspension de la prescription peuvent aussi résulter de tous obstacles de fait, constitutifs de force majeure ou de circonstance insurmontable, empêchant la partie poursuivante d'agir. Ainsi pourrait-il en aller de la guerre ou d'une inondation ou d'une catastrophe, mais aussi du fait que la personne impliquée s'était réfugiée à l'étranger, il faut attendre que l'extradition sollicitée ait été accordée par l'Etat requis pour entrer en voie de poursuite)⁴. [20] Urukiko rw'Ikirenga rurasanga, kuva ikirego cyanditswe mu gitabo cy'ibirego ku itariki ya 17/01/1994, icyo kirego cyaragombaga gusaza ku itariki ya 17/01/2004, icyo gihe ariko kikaba kigomba kongerwaho igihe ubusaze bwashyirahamwe nk'uko byasobanuwe mu gika cya 18 cy'uru rubanza, ni ukuvuga kuva ku itariki ya 7/04/1994 kugeza ku itariki ya 10/11/1994 bihanywe n'amezi arindwi (7) n'iminsi ine (4), bivuze ko ubusaze bw'icyo kirego bwabaye ku itariki ya 4/7/2004, bityo igikorwa cyongeye gukorwa kuri icyo dosiye ku itariki ya 13/10/2004 cyo kuyohereza mu Rukiko Rukuru kikaba cyarabaye ikirego cyaramaze gusaza. [21] Hashingiye ku bisobanuro byose byatanze haruguru, Urukiko rw'Ikirenga rukaba rurasanga Urukiko Rukuru, Urugereko rwa Rwamagana, rutari rukwiye kuba rwarakiriye ngo rusuzume iki kirego, akaba ari yo mpamvu uru rukiko rutesheje agaciro urubanza rwaciye n'urwo rukiko kuri iki kirego.

4 Serge Guinchard et Jacques Buisson, Procédure Pénale, 3ème édition, p.619, para.1162.
UBUSHINJACYAHA v. MBABAJENDE N'ABANDI

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122 III. ICYEMEZO CY'URUKIKO [22] Rwemeje ko inzitizi yatanzwe na Ntuyenabo Simon na Kamuhanda Théoneste ku byerekeye ubusaze bw'ikirego cy'ikurikiranacyaha ifite ishingiro; [23] Rwemeje ko habayeho ubusaze bw'ikirego cy'ikurikiranacyaha; [24] Ruvuze ko urubanza RP0043/09/HC/RWG rwaciwe n'Urukiko Rukuru, Urugereko rwa Rwamagana, ku wa 6/5/2011 ruvanyweho; [25] Ruvuze ko amagarama y'ibyakozwe muri uru rubanza aherera ku Isanduku ya Leta.

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IMANZA Z'UBUCURUZI

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GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD [Rwanda URUKIKO RW'IKIRENGA – RCOMA0162/12/CS (Nyirinkwaya, P.J., Mukandamage na Kanyange, J.) 12 Kamena 2015]
Amategako agenga ububasha bw'inkiko – Amasezerano y'ubwikorezi – Ububasha bw'urukiko mu gihe humvikanywe ko impaka zizavuka mu masezerano zizakemurwa n'Urukiko rwo mu mahanga – Kuba mu masezerano y'ubwikorezi impande zombi zakoze harateganyijwe ko urukiko rwa London arirwo ruzababuranisha mu gihe hazavuka impaka hagati yabo nta gaciro byahabwa kubera ko ababisaba batagaragaza ko urwo rukiko rufite ububasha bwo kuruburanisha bushingiye ku kiburanwa cyangwa se ngo bagaragaze ko ari byo biboroheye kurusha kuburanira mu nkiko z'u Rwanda harebwe ibigenda ku rubanza n'agaciro k'ikiburanwa – Itegeko Ngenga N°51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, ingingo ya 121. Amategako agenga amasezerano – Inyungu z'ubucuruzi n'iz'ubukererwe – Umwe mu bakoze amasezerano ntiyavugaga ko nta nyungu z'ubukererwe zayavuzwemo kandi ko izisabwa n'urundi ruhande ari ikirenga mu gihe impande zombi zumvikanye uburyo amafaranga y'inyungu z'ubukererwe azishyurwa mu gihe hatabayeho kubahiriza amasezerano – Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ingingo ya 168. 125

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126 Incamake y'ikibazo: DAMCO TANZANIA Ltd yareze GREAT LAKES CEMENT Ltd mu Rukiko Rukuru rw'Ubucuruzi iyisaba kuyishyura 85.805USD yasigaye ku giciro cy'ubwikorezi bw'ibicuruzwa byayo yavanye mu Bushinwa ibigeza i Musanze mu Rwanda, inasaba inyungu zitandukanye hamwe n'igihano gihatira kwishyura. GREAT LAKES CEMENT Ltd nayo yahise itanga inzitizi zo kutakira ikirego cya DAMCO TANZANIA Ltd ivuga ko iyi igomba gutanga ingwate y'amagarama itangwa n'abanyamahanga baburanira mu nkiko zo mu Rwanda, inasaba indishyi

z'akababaro ivuga ko DAMCO TANZANIA Ltd yayiteje igihombo kuko itikoreye ibicuruzwa byayo byose ndetse n'umuyobozi wayo ahamagarwa kuri police. Ikomeza ivuga ko uru rukiko rudafite ububasha bwo kuburanisha uru rubanza kubera ko mu masezerano y'ubwikorezi impande zombi zagiranye bumvikanye ko zizaburanishwa n'Urukiko Rukuru rwa London. Urukiko rwemeza ko DAMCO TANZANIA Ltd itagomba gutanga ingwate itangwa n'abanyamahanga kuko ari sosiyete yo mu gihugu cyo mu muryango wa Africa y'Iburasirazuba. Ku byerekeye iburabubasha ry'inkiko zo mu Rwanda, urukiko rwemeje ko nta shingiro bifite kuko mu baburanyi ntawugaragaza ko afite ubwenegihugu bw'ubwongereza cyangwa se ngo bagaragaze ko ibicuruzwa bikomoka muri icyo gihugu. Urukiko rwemeje ko nta ndishyi z'akababaro n'iz'igihombo GREAT LAKES CEMENT Ltd yahabwa kuko ariyo igomba kwishyura DAMCO TANZANIA Ltd. GREAT LAKES CEMENT Ltd yajuririye mu Rukiko rw'Ikirenga ivuga ko Urukiko Rukuru rw'Ubucuruzi rudafite ububasha bwo kuburanisha uru rubanza kuko urubifitiye ububasha ari urwa London kuko rudashobora kubogama nk'uko ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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127 byumvikanywe mu masezerano. DAMCO TANZANIA Ltd yo ivuga ko impamvu y'ubujurire yatanze na GREAT LAKES CEMENT Ltd nta shingiro ifite kubera ko ikirego cyayo kitari gishingiye ku mpamvu yo kutubahiriza amasezerano ahubwo ko cyari gishingiye ku nyandiko zandikiwe mu Rwanda aho umuyobozi mukuru wa GREAT LAKES CEMENT Ltd yiyandikiye inyandiko zigaragaza umwenda asigayemo DAMCO TANZANIA Ltd. Ikomeza ivuga ko ntaho inkiko zo mu bwongereza zahurira n'uru rubanza kuko ikibazo cyavukiye mu Rwanda kandi n'urega nawe akaba ariho atuye. Incamake y'icyemezo: 1. Kuba mu masezerano y'ubwikorezi impande zombi zakoze harateganyijwe ko urukiko rwa London arirwo ruzababuranisha mu gihe hazavuka impaka hagati yabo nta gaciro byahabwa kubera ko ababisaba bataragaza ko urwo rukiko rufite ububasha bwo kuruburanisha bushingiye ku kiburanwa cyangwa se ngo bagaragaze ko ari byo biboroheye kurusha kuburanira mu nkiko z'u Rwanda harebwe ibigenda ku rubanza n'agaciro k'ikiburanwa.

2. Umwe mu bakoze amasezerano ntiyavugaga ko nta nyungu z'ubukererwe zayavuzwemo kandi ko izisabwa n'urundi ruhande ari ikirenga mu gihe impande zombi zumvikanye uburyo amafaranga y'inyungu z'ubukererwe azishyurwa mu gihe hatabayeho kubahiriza amasezerano. Bityo uwajuriye agomba kwishyura inyungu za 12% zikabarwa guhera mu kwezi kwa Nyakanga 2010 kugeza umunsi urubanza rusomeweho. Ubujurire nta shingiro bufite. Ubujurire bwuririye ku bundi bufite ishingiro kuri bimwe. Amagarama y'urubanza aherereye ku wareze. GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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128 Amategako yashingiweho. Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ingingo ya 168. Itegeko Ngenga N°51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, ingingo ya 121. Nta manza zifashishijwe. Urubanza I. IMITERERE Y'URUBANZA [1] DAMCO TANZANIA

Ltd yareze GREAT LAKES CEMENT Ltd mu Rukiko Rukuru rw'Ubucuruza isaba kwishyurwa 85.805USD yasigaye ku giciro cy'ubwikorezi bw'ibicuruzwa byayo yakoze ibivana mu Bushinwa ibigeza i Musanze mu Rwanda, inyungu y'ubucuruza za 25% ku mwaka, inyungu y'ubukererwe ya 19% ku mwaka zayo, amafaranga y'ikurikiranarubanza n'igihembo cya Avoka, igihano gihatira kwishyura (astreinte) n'irangizarubanza ry'agateganyo. [2] Muri urwo rubanza GREAT LAKES CEMENT Ltd yatanze inzitizi zigamije kutakira ikirego cya DAMCO TANZANIA Ltd zirimo iy'ingwate igomba gutangwa n'abanyamahanga baburanira mu nkiko z'u Rwanda n'iy'iburabubasha bw'urukiko, inasaba amafaranga y'igihembo cya Avoka n'indishyi z'akababaro kubera ko DAMCO TANZANIA Ltd yayiteje igihombo kuko itayikorereye ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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129 ibicuruzwa byayo byose, ndetse umuyobozi wayo ahamagarwa muri "Police". [3] Urukiko Rukuru rw'Ubucuruza rwemeje ko DAMCO TANZANIA Ltd itagomba gutanga ingwate itangwa n'abanyamahanga kuko ari iyo mu gihugu cyo mu Muryango wa Africa y'Iburasirazuba. [4] Ku byerekeye ububasha bw'urukiko, urukiko rwasanze ibyo GREAT LAKES CEMENT Ltd iburanisha ko inkiko zo mu Rwanda nta bubasha zifite bwo kuburanisha uru rubanza kubera ko mu masezerano y'ubwikorezi impande zombi zemeranyijwe ko zizaburanishwa n'Urukiko Rukuru rwa London nta shingiro bifite, kuko mu baburanyi ntawe ugaragaza ko afite ubwenegihugu bw'Ubwongereza, ko ibicuruzwa bikomoka muri icyo gihugu, cyangwa se ko byahanyuze, ndetse nta n'uwashoboye kurusobanurira impamvu bahisemo urwo rukiko rudafite aho ruhuriye n'ikiburanwa ndetse n'ababuranyi, n'itegeko bashingiraho baha urwo rukiko ububasha bwo kubaburanisha, maze rushingiye ku ngingo ya 121 y'Itegeko Ngenga N°51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, rwemeza ko rufite ububasha bwo kuburanisha urubanza kuko uregwa atuye mu Rwanda. [5] Ku byerekeye umwenda waregwe, Urukiko rwategutse GREAT LAKES CEMENT Ltd kwishyura DAMCO TANZANIA Ltd 85.805USD yasigaye ku bwikorezi bw'ibicuruzwa, inyungu zayo zingana na 31.604USD, inyungu z'ubukererwe zingana na 3.718USD, no kwishyura 6.500Frw y'amagarama y'urubanza. Urukiko rwasanze kandi nta gihano gihatira kwishyura (astreinte) GREAT LAKES CEMENT Ltd ikwiye gucibwa, ko ndetse nta rangizarubanza ry'agateganyo rigomba kubaho, runavuga ko idakwiye guhabwa indishyi GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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130 z'akababaro isaba ku mpamvu y'uko ariyo igomba kwishyura DAMCO TANZANIA Ltd, kandi nta terabwoba umuyobozi wayo yashyizweho ubwo yahamagarwaga muri "Police". [6] Ku birebana n'ikirego kigamije kwiregura cyatanzwe na GREAT LAKES CEMENT Ltd gisaba indishyi z'igihombo yatejwe no kuba ibicuruzwa byayo byose itarabishyikirijwe, indishyi z'akababaro zo kuba umuyobozi wayo yarajyanywe muri "Police" agasinyira umwenda kubera iterabwoba, n'amafaranga y'igihembo cya Avoka, Urukiko rwasanze rutabimugenera kuko ari we ugomba kwishyura. [7] GREAT LAKES CEMENT Ltd yajuririye Urukiko rw'Ikirenga ivuga ko Urukiko Rukuru rw'Ubucuruza rwaburanishije urubanza rudafitiye ububasha kubera ko urukiko rufite

ububasha bwo gukemura impaka zose zakomoka ku iyubahirizwa ry'amasezerano yagiranye na DAMCO TANZANIA Ltd ari Urukiko Rukuru rwa London mu Bwongereza. [8] Mu bujurire bwuririye ku bundi, DAMCO TANZANIA Ltd nayo isaba ko indishyi yagenewe zahuzwa n'igihe, ko kandi igihembo cya Avoka yagenewe ari gito. [9] Urubanza rwaburanishijwe mu ruhamye tariki ya 06/01/2015 no kuwa 28/04/2015, GREAT LAKES CEMENT Ltd ihagarariwe na Me Bimenyimana Eric, naho DAMCO TANZANIA Ltd ihagarariwe na Me Nzamwita Toy.

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131 II. BIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

- a. Kumenya niba Urukiko Rukuru rw'Ubucuruzi rwari rufite ububasha bwo kuburanisha ikirego cyatanze na DAMCO TANZANIA Ltd. [10] Me Bimenyimana uburanira GREAT LAKES CEMENT Ltd avuga ko mu ngingo ya 3 y'amasezerano y'ubwikorezi yagiranye na DAMCO TANZANIA Ltd tariki ya 10/11/2010, impande zombi zumvikanye ko ikibazo kizavuka mu iyubahirizwa ryayo kizakemurwa gusa n'Urukiko Rukuru rwa London mu Bwongereza, kubera ko zabonaga rushobora kutabogama (jurisdiction neutre) aho kwiambaza inkiko zo mu Rwanda cyangwa se zo muri Tanzania. Asanga rero ikibazo cy'ububasha bw'urukiko bushingiye ku ifasi atari indemyagihugu ku buryo umucamanza yari kubahitiramo urukiko rufite ububasha. [11] Me Nzamwita uburanira DAMCO TANZANIA Ltd avuga ko impamvu y'ubujurire yatanze na GREAT LAKES CEMENT Ltd nta shingiro ifite, kuko ikirego cya DAMCO TANZANIA Ltd kitari gishingiye ku mpamvu yo kutubahiriza amasezerano y'ubwikorezi kubera ko ayo masezerano yasohojwe n'impande zombi, ahubwo cyari gishingiye ku nyandiko zandikiwe mu Rwanda (ordre de paiement et reconnaissance de dette) na bwana Nemeyebahizi Jean Baptiste wari umuyobozi Mukuru wayo, aho kuwa 21/3/2011 no kuwa 28/04/2011 yiyandikiye ubwe inyandiko igaragaza umwenda asigayemo. GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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132 [12] Avuga kandi ko ntaho inkiko zo mu Bwongereza zahurira n'uru rubanza kuko ikibazo cyavukiye mu Rwanda ari naho uregwa atuye. UKO URUKIKO RUBIBONA [13] Ingingo ya 89, igika cya 1 y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko "umuburanyi ubyukije inzitizi y'iburabubasha agomba kuyisobanura no kugaragaza urukiko avuga ko rufite ububasha bwo kumuburanisha". [14] Mu ngingo ya 3 y'amasezerano y'ubwikorezi GREAT LAKES CEMENT Ltd na DAMCO TANZANIA Ltd bagiranye tariki ya 10/11/2010 bumvikanye ko ayo masezerano azakurikiza amategeko y'Ubwongereza, ko ari mu bubasha bw'Urukiko Rukuru rwa London gusa, ko kandi mu gihe atazubahirizwa n'umwe muri bo bazakemura ikibazo mu bwumvikane, byanarirana bakitabaza urukiko. [15] Urukiko rurasanga ibyo uburanira DAMCO TANZANIA Ltd avuga ko ikirego yatanze kidashingiye kuri ayo masezerano nta gaciro byahabwa kuko inyandiko itanga ikirego n'imyanzuro igiherekeje yakoze, igaragaza ko

1 Iyo ngingo ivuga ngo: “This Agreement shall be governed by English law, and is subject to the exclusive jurisdiction of High Court of Justice, London. In case there is any breach of contract, any amount outstanding shall be settled by Client. Any dispute shall be resolved in an amicable manner, and in the event of inability to solve things amicably, such matter shall be taken to court”.

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133 85.805USD akomoka ku masezerano y'ubwikorezi (contrat de transport). [16] Urukiko rurasanga na none kuba GREAT LAKES CEMENT Ltd na DAMCO TANZANIA Ltd barumvikanye ku mategeko agenga amasezerano yabo ndetse n'Urukiko ruzakemura ibibazo byavuka mu iyubahirizwa ryayo rudafite aho ruhuriye n'amasezerano ubwayo cyangwa ababuranyi, ari ihame ryemewe mu ikorwa ry'amasezerano mpuzamahanga, ariko amategeko y'u Rwanda ntacyo abivugaho ku buryo byafasha mu kumvikanisha iki kibazo cy'ububasha bw'urukiko. [17] Inkiko zo muri Amerika, mu manza zinyuranye, nazo zasanze zikwiye kubahiriza uburenganzira bw'abagiranye amasezerano mpuzamahanga bwo guhitamo urukiko ruzabakemurira ibibazo, uretse iyo bigaragaye ko gushyira mu bikorwa ingingo ibiteganywa idashyize mu gaciro (unreasonable), cyangwa ibogamye (injust), cyangwa se bigaragara ko ingingo y'amasezerano ihitamo urukiko nta gaciro ifite (invalid) kubera uburiganya (fraud) cyangwa hari aho irengera (overreaching). [18] Mu rubanza C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc., rwaciwe n'Urukiko rw'Ubujurire rwa Minnesota, mu mwaka wa 2009, hemejwe ko ingingo y'amasezerano iba ibogamye cyangwa idashyira mu gaciro iyo aho urukiko rwahiswemo n'abagiranye amasezerano ruri (election de for) hababangamiye mu buryo bugaragara, iyo ingingo y'amasezerano yateguwe n'uruhande rumwe (contrat d'adhésion), cyangwa amasezerano adashyira mu gaciro2.

2 In the case C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc., it was stated that a “clause is unfair or unreasonable if chosen forum is seriously GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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134 [19] Ku birebana n'ingingo ya 3 y'amasezerano y'ubwikorezi yabaye hagati ya GREAT LAKES CEMENT Ltd na DAMCO TANZANIA Ltd tariki ya 10/11/2010, bahisemo Urukiko Rukuru rwa London bifuzaga kubona urukiko rutabogamye rwabakemurira ibibazo. Urukiko rurasanga ariko iyo ngingo idashyize mu gaciro kubera ko bidahagije gushyiraho urukiko ruzakemura ibibazo, udatekereje ku bubasha bw'ubushyirahamwe ku kiburanwa (compétence matérielle) ndetse no ku bigenda ku rubanza bigereranyijwe n'agaciro k'ikiburanwa mu gihe havuka urubanza. GREAT LAKES CEMENT Ltd rero yifuza kuburanishwa n'urwo rukiko ntigaragaza ko rufite ububasha bushyirahamwe ku kiburanwa bwo kuburanisha uru rubanza, cyangwa se ko ari byo biyoroheye kurusha kuburanira mu nkiko z'u Rwanda harebwe ibigenda ku rubanza n'agaciro k'ikiburanwa, bikaba rero bigaragara ko iyo ngingo idashyize mu gaciro ku baburanyi bombi. [20] Urukiko

rusanga ahubwo Urukiko Rukuru rw'Ubucuruzi, nk'uko rwabyemeje mu rubanza rwajuririwe, rwari rufite ububasha bwo kuburanisha urubanza buteganywa n'ingingo ya 121 y'Itegeko Ngenga N°51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, kubera ko GREAT LAKES CEMENT Ltd ifite icyicaro mu Rwanda kandi ariho amasezerano yarangirijwe.

- b. Ubujurire bwuririye ku bundi bwa DAMCO Tanzania [21] Me Nzamwita uburanira DAMCO TANZANIA Ltd avuga ko yatanze ubujurire bwuririye ku bundi isaba urukiko gusubira mu mibare (actualisation) y'inyungu z'ubucuruzi (17%)

inconvenient, the clause is [a] contract of adhesion, or agreement is otherwise unreasonable". 772 N.W.2d 528 (Minn. Ct. App. 2009).

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135 ku mwaka) hamwe n'inyungu z'ubukererwe (2% ku mwaka) guhera mu kwezi kwa Nyakanga 2010 nk'uko zemejwe n'urukiko ku rwego rwa mbere kugeza umunsi urubanza ruzacibwaho (imyaka ine n'amezi 6), kuko GREAT LAKES CEMENT Ltd yajuriye nta mpamvu aho kwishyura umwenda, maze ikishyura inyungu zose zingana na $85.805\text{USD} \times \text{imyaka } 4 \times \text{n'amezi } 6 \times 17\% = 65.641.000\text{USD}$, hiyongereyeho inyungu z'ubukererwe zihwanye na $+ 7.000\text{USD}$ n'igihembo cya Avoka kingana na 18.169USD kubera ko umucamanza ntacyo yakivuzeho, nyamara hari amasezerano yagiranye na DAMCO TANZANIA Ltd n'inyandiko z'ayo yamaze kwishyurwa, nayo agahuzwa n'igihe akaba 23.650USD . [22] Me Bimenyimana uburanira GREAT LAKES CEMENT Ltd avuga ko uru rubanza rushingiye ku kirego kitari mu bubasha bw'inkiko z'u Rwanda. Yongereho ko inyungu DAMCO TANZANIA Ltd isaba ari ikirenga kuko mu masezerano hateganyijwe ko inyungu zizacibwa ari 1%, ku kwezi ni ukuvuga 12% ku mwaka, hakaba nta nyungu z'ubukererwe zavuzwemo. [23] Ku byerekeye igihembo cya Avoka, avuga ko kidakwiye gushingira ku kiburanwa kuko amategako atabyemera, kubera ko n'iyi DAMCO TANZANIA Ltd yatsindwa igomba kwishyura igihembo cya Avoka wayiburaniye. UKO URUKIKO RUBIBONA [24] Ingingo ya 168, igika cya 2 y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryavuzwe haruguru ivuga ko "ababuranyi bashobora kwaka inyungu, ibyishyuwe ku bukodeshe n'ibindi bintu by'inyongera byabonetse kuva aho urubanza rwaciriwe, GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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136 n'indishyi z'akababaro umuburanyi yagize kuva urubanza ruciwe". [25] Mu ngingo ya 5 y'amasezerano yavuzwe haruguru, GREAT LAKES CEMENT Ltd na DAMCO TANZANIA Ltd bumvikanye ko nitishyura amafaranga cy'ubwikorezi uko babyumvikanyeho izacibwa 1% ku kwezi, ni ukuvuga 12% ku mwaka. [26] Urukiko rurasanga iyo nyungu ya 12% ariyo GREAT LAKES CEMENT Ltd igomba gutanga ku mafaranga atarishyuwe, inyungu zikabarwa guhera mu kwezi kwa Nyakanga 2010 kugeza umunsi urubanza rusomeweho mu buryo bukurikira: $85.805\text{USD} \times 12 \times \text{iminsi } 1739 = 49.738\text{USD}$ $100 \times \text{iminsi } 360$ [27] Ku byerekeye igihembo cya Avoka, urukiko rurasanga ingingo ya 62 igika cya kabiri y'Itegeko N°83/2013 ryo kuwa 11/09/2013 rishyiraho

Urugaga rw'Abavoka mu Rwanda rikanagena imitunganyirize n'imikorere byarwo, ivuga ko bibujijwe ko Avoka ashiraho igihembo ashingiye ku buryo urubanza ruzakizwa kuko ashinzwe gukoresha ubushobozi bwe, bityo DAMCO TANZANIA Ltd ikaba igenewe mu bushishozi bw'urukiko igihembo cya Avoka kingana na 1.000.000Frw ku nzego zombi yaburaniyeho. [28] Urukiko rurasanga amafaranga yose GREAT LAKES CEMENT Ltd igomba kwishyura DAMCO TANZANIA Ltd ari 85.805USD y'umwenda yemejwe n'Urukiko Rukuru rw'Ubucuruzi + 49.738USD y'inyungu = 135.543USD na 1.000.000Frw y'igihembo cya Avoka. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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137 III. ICYEMEZO CY'URUKIKO [29] Rwemeje ko ubujurire bwatanzwe na GREAT LAKES CEMENT Ltd nta shingiro bufite; [30] Rwemeje ko ubujurire bwuririye ku bundi bwatanzwe na DAMCO TANZANIA Ltd bufite ishingiro kuri bimwe; [31] Rutegetse GREAT LAKES CEMENT Ltd kwishyura DAMCO TANZANIA Ltd 135.543USD y'umwenda n'inyungu, na 1.000.000Frw y'igihembo cya Avoka. [32] Rutegetse GREAT LAKES CEMENT Ltd kwishyura 100.000Frw y'amagarama y'urubanza.

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RWANDAIR LTD v. KARANGWA [Rwanda URUKIKO RW'IKIRENGA – RCOMAA0025/13/CS (Mutashya, P.J., Nyirinkwaya na Hitiyaremye, J.) 31 Nyakanga 2015] Amategeko agenga gutwara abantu mu ndege – Ibikomere by'umutima bikomoka ku mpanuka y'indege – Amasezerano mpuzamahanga ya Varsovie ateganya ko ibigomba gutangirwa indishyi mu gihe habaye impanuka y'indege, ari urupfu, ibisebe cyangwa se ibindi bikomere by'umubiri, ibikomere by'umutima bikaba bitari mu bitangirwa indishyi – Amasezerano mpuzamahanga ya Varsovie yo kuwa 12/10/1929 yerekeye gutwara abantu mu ndege, ingingo ya 17. Incamake y'ikibazo: Karangwa Oreste yagiranye amasezerano na RWANDAIR Ltd yo kumutwara mu ndege kuva i Kigali kugera Uganda ikanamugarura. Ku munsu w'urugendo iyo indege yakozwe impanuka igihaguruka ku kibuga cy'indege i Kanombe. Karangwa Oreste yaje gutanga ikirego mu Rukiko Rwisumbuye rwa Gasabo asaba indishyi zishingiye ku masezerano yo gutwara abantu mu ndege atarubahirijwe, urwo rukiko ruca urubanza ruvuga ko nta bubasha rufite bwo gusuzuma ikirego cye. Yaje kongera gutanga ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge, RWANDAIR Ltd itanga inzitizi ivuga ko ikirego cyashajwe kuko atubahirije ibihe byo kurega biteganywa n'itegeko. Urukiko rwaciye urubanza rubanziriza urundi rwemeza ko iyo nzitizi nta shingiro ifite. Urubanza rwaburanishijwe mu mizi, Urukiko rwemeza ko Karangwa Oreste atsinze, rutegeka RWANDAIR Ltd kumuha indishyi 139

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140 zingana na miliyoni eshatu (3.000.000) n'amafaranga ibihumbi magana atatu (300.000) y'igihembo cya avoka. RWANDAIR Ltd ntiyishimiye imikirize y'urubanza, irujuririra mu Rukiko Rukuru rw'Ubucuruzi, ivuga ko Urukiko rw'Ubucuruzi rutahaye agaciro ibyerekeranye n'ubuzime bw'icyaha, ko no mu kubara indishyi hakoreshejwe amategeko atariyo, Karangwa Oreste na we atanga ubujurire bwuririye ku bundi avuga ko indishyi yagenewe zabazwe nabi. Uru Rukiko rwaciye urubanza rwemeza ko Karangwa atsinze, rutegeka RWANDAIR Ltd kumwishyura amadorali 183.523USD, amafaranga y'amanyarwanda ibihumbi magana atanu (500.000) y'ikurikiranarubanza n'igihembo cya avoka ku rwego rw'ubujurire, rutegeka kandi ko ku bindi hubahirizwa icyemezo cy'Urukiko rubanza. RWANDAIR Ltd ntiyishimiye imikirize y'urubanza, irujuririra mu Rukiko rw'Ikirenga, ivuga ko yaburanye isobanura ko Karangwa Oreste atari agifite uburenganzira bwo kurega kuko yarengeje igihe giteganywa n'amategeko, igasobanura ko impanuka yabaye ku itariki ya 12/11/2009, ko hashingiwe ku ngingo ya 29 ya Convention de Varsovie, itariki ya nyuma yo kurega yari iya 11/11/2011. Ivuga kandi ko Urukiko rutagombaga gutanga indishyi rushingiye ku ntimba Karangwa Oreste avuga yatewe n'impanuka, kuko nta bikomere ku mubiri iyo mpanuka yamuteye, ko n'indishyi zatanze zabazwe mu buryo bunyuranyije n'amategeko. Uburanira Karangwa avuga ko yakomeretse, akaba agomba kubibonera indishyi, ko ibikomere bivugwa mu masezerano yashingiweho mu rubanza atari ibyo ku mubiri gusa, ko ahubwo n'ibikomere byo ku mutima birimo kandi hakaba hari impapuro zo kwa muganga zerekana ko ibyo bikomere yabigize kuko yahungabanye bikomeye. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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141 Ku munsu w'iburanisha, uburanira Karangwa yatanze inzitizi yo kutakira ubujurire bwa RWANDAIR avuga ko yatsinzwe ku mpamvu zimwe ku rwego rwa mbere n'urwa kabiri, maze Urukiko rw'Ikirenga rufata icyemezo mu rubanza rubanziriza urundi ko iyo nzitizi nta shingiro ifite. Urukiko rw'Ikirenga kandi rwemeje mu rubanza rubanziriza urundi, ko ibijyanye n'ubuzime bw'ikirego nta shingiro bufite. Incamake y'icyemezo: Kuba abateguye aya Masezerano Mpuzamahanga ya Varsovie, barateganyije mu ngingo yayo ya 17 ko ibigomba gutangirwa indishyi mu gihe habaye impanuka y'indege, ari urupfu (la mort), ibisebe (blessures) cyangwa se ibindi bikomere by'umubiri (ou toute autre lésion corporelle), ayo yose akaba ari amagambo asobanura ibintu bifatika, iyo n'ibikomere byo ku mutima cyangwa se ihungabana (blessures psychiques, traumatisme), ibintu bidafatika cyangwa se bitaboneshwa amaso, biba mu bushake bw'abateguye aya masezerano, ntibiba byarabananiye kubyandikamo mu buryo bweruye. Bityo, urega nta ndishyi yabibonera kubera ko bene ibyo bikomere bitari mu bitangirwa indishyi hakurikijwe amasezerano ya varsovie yaburanishijwe muri uru rubanza. Ubujurire bufite ishingiro. Urubanza rwajuririwe ruhindutse muri byose. Amagarama y'urubanza aherereye ku warezwe. Amategeko yashingiweho: Amasezerano mpuzamahanga ya Varsovie yo kuwa 12/10/1929 yerekeye gutwara abantu mu ndege, ingingo ya 17. Nta manza zifashishijwe. RWANDAIR LTD v. KARANGWA

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142 Urubanza I. IMITERERE Y'URUBANZA [1] Karangwa Oreste yagiranye amasezerano na RWANDAIR Ltd yo kumutwara kuva i Kigali kugera Uganda ikanamugarura, maze ku itariki ya 12/11/2009 indege yari igiye Entebe muri Uganda igihaguruka ku kibuga cy'indege i Kanombe ikora impanuka. Ku itariki ya 11/11/2011 Karangwa Oreste yatanze ikirego mu Rukiko Rwisumbuye rwa Gasabo asaba indishyi zishingiye ku masezerano yo gutwara abantu mu ndege ngo atarubahirijwe, mu rubanza rwo ku wa 24/04/2012 urwo rukiko ruca urubanza ruvuga ko nta bubasha rufite bwo gusuzuma ikirego cye. [2] Karangwa yaje kongera gutanga ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge, RWANDAIR Ltd itanga inzitizi ivuga ko ikirego cyashaje kuko atubahirije ibihe byo kurega biteganywa n'itegeko, ku itariki ya 4/3/2013 Urukiko ruca urubanza rubanziriza urundi RCOM0102/13/TC/NYGE rwemeza ko iyo nzitizi nta shingiro ifite. Urubanza rwaburanishijwe mu mizi, ku itariki ya 22/4/2013 Urukiko rwemeza ko Karangwa Oreste atsinze, rutegeka RWANDAIR kumuha indishyi zingana n'amafaranga y'u Rwanda miliyoni eshatu (3.000.000) n'amafaranga ibihumbi magana atatu (300.000) y'igihembo cya avoka. [3] RWANDAIR Ltd ntiyishimiye imikirize y'urubanza, irujuririra mu Rukiko Rukuru rw'Ubucuruzi, ivuga ko Urukiko rw'Ubucuruzi rutahaye agaciro ibyerekeranye n'ubuzime, ko no mu kubara indishyi hakoreshejwe amategeko atariyo, Karangwa Oreste na we atanga ubujurire bwuririye ku bundi avuga ko ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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143 indishyi yagenewe zabazwe nabi. Uru Rukiko rwaciye urubanza RCOMA0180/13/HCC rwemeza ko Karangwa atsinze, rutegeka RWANDAIR Ltd kumwishyura amadorali 183.523USD, amafaranga y'amanyarwanda ibihumbi magana atanu (500.000) y'ikurikiranarubanza n'igihembo cya avoka ku rwego rw'ubujurire, rutegeka kandi ko ku bindi hubahirizwa icyemezo cy'Urukiko mu rubanza RCOM0102/13/TC/Nyge. [4] RWANDAIR Ltd ntiyishimiye imikirize y'urubanza, irujuririra mu Rukiko rw'Ikirenga, ivuga ko yaburanye isobanura ko Karangwa Oreste atari agifite uburenganzira bwo kurega kuko yarengeje igihe giteganywa n'amategeko, igasobanura ko impanuka yabaye ku itariki ya 12/11/2009, ko hashingiwe ku ngingo ya 29 ya Convention de Varsovie, itariki ya nyuma yo kurega yari iya 11/11/2011. Ivuga kandi ko Urukiko rutagombaga gutanga indishyi rushingiye ku ntimba Karangwa Oreste avuga yatewe n'impanuka, kuko nta bikomere ku mubiri iyo mpanuka yamuteye, ko n'indishyi zatanze zabazwe mu buryo bunyuranyije n'amategeko. [5] Ku itariki ya 6/05/2014 ababuranyi bitabye Urukiko, iburanisha ribera mu ruhame RWANDAIR Ltd ihagarariwe na Me Nkurunziza François Xavier, naho Karangwa Oreste aburanirwa na Me Rwihandagaza Richard. Kuri uwo munsu uburanira Karangwa yatanze inzitizi yo kutakira ubujurire bwa RWANDAIR Ltd avuga ko yatsinzwe ku mpamvu zimwe ku rwego rwa mbere n'urwa kabiri, maze ku itariki ya 06/06/2014 Urukiko rw'Ikirenga rufata icyemezo mu rubanza rubanziriza urundi ko iyo nzitizi nta shingiro ifite, rutegeka ko iburanisha rizakomeza ku itariki ya 23/09/2014. [6] Ku itariki ya 23/09/2014 ababuranyi bitabye Urukiko bunganiwe nka mbere, hasuzumwa ingingo y'ubujurire bwa RWANDAIR LTD v. KARANGWA

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144 RWANDAIR Ltd yavugaga ko ikirego cya Karangwa Oreste kitagombaga kwakirwa ngo kuko yagitanze kandi harabaye ubuzime, ku itariki ya 14/11/2014 Urukiko rw'Ikirenga rwanzura ko iyo ngingo y'ubujurire nta shingiro ifite, rutegeka ko urubanza mu mizi ruzakomeza ku itariki ya 20/01/2015. [7] Kuri uwo munsu iburanisha ryabaye mu ruhame, ababuranyi bitabye kandi bahagarariwe nka mbere. Nyuma yo kumva ibisobanuro by'impande zombi, ababuranyi bamenyeshejwe ko isomwa ry'urubanza rizaba ku itariki ya 27/2/2015, ariko uwo munsu ugeze Urukiko rufata icyemezo ko iburanisha rizongera gufungurwa kugira ngo ababuranyi bagire icyo bavuga ku nyandiko zagejwe muri dosiye nyuma y'isozwa ry'iburanisha, rishyirwa ku itariki ya 21/4/2015, uwo munsu ugeze urubanza ntirwaburanishwa kubera ubwire iburanisha ryimurirwa ku itariki ya 13/5/2015. II. IKIBAZO KIGIZE URUBANZA N'ISESENGURWA RYACYO ³/₄Kumenya niba ibikomere byo ku mutima (blessures psychiques) bikomoka ku mpanuka y'indege byatangirwa indishyi ziteganyijwe mu ngingo ya 17 y'Amasezerano ya Varsovie arebana n'ibyo gutwara abantu n'ibintu mu ndege yashyizweho umukono ku itariki ya 12/10/1929. [8] Me Nkurunziza François Xavier uburanira RWANDAIR Ltd avuga ko impamvu yabateye kujurira ari uko umucamanza waciye urubanza bajuririye yageneye Karangwa Oreste indishyi ashingiye ku ntimba avuga ko yatewe n'impanuka y'indege ya RWANDAIR Ltd yaburiyemo inshuti ye magara, kandi bo basanga indishyi zivugwa mu ngingo ya 17 y'Amasezerano ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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145 Mpuzamahanga ya Varsovie zigomba gukomoka ku ngaruka zitaziguye umuntu yatewe n'impanuka, akavuga ko izo ngaruka zigomba kuba zigaragara kandi zifatika. [9] Avuga ko bizwi ko Karangwa Oreste nta bikomere by'umubiri yatewe n'impanuka y'indege ya RWANDAIR Ltd, ko ahubwo ibyo avuga ari uguhungabana yatewe n'iyo mpanuka, ko ibyo ari byo byose n'ibimenyetso bishingiye ku maraporo yakozwe n'abaganga yerekana bidafite ireme. [10] Avuga ko ingingo ya 17 y'Amasezerano ya Varsovie iteganya ko mu gihe cy'impanuka y'indege, indishyi zigenwa gusa iyo habayeho urupfu cyangwa se ibikomere by'umubiri kandi Karangwa akaba atagaragaza ko ibyo bikomere yabigize. Yongeraho ko n'iyo Urukiko rwasanga n'ibikomere byo ku mutima (blessures psychiques) bigomba gutangirwa indishyi, Karangwa atazihabwa kuko muganga yemeje ko ibyo bikomere yabitewe n'intimba yari afite kubera gutakariza inshuti ye magara mu mpanuka, ko rero ibyo bikomere by'umubiri nta sano itaziguye bifitanye n'impanuka yakozwe n'indege ya RWANDAIR Ltd. [11] Me Nkurunziza François Xavier mu nyandiko yashyikirije urukiko, avuga ko no mu zindi nkiko hagiye hafatwa ibyemezo ko ibikomere bitangirwa indishyi iyo bikomoka ku mpanuka y'indege hashingiwe ku ngingo ya 17 y'Amasezerano ya Varsovie, ari ibikomere by'umubiri gusa. Aha yatanze urugero rw'urubanza Morris v. KLM Royal Dutch Airlines rwabereye mu Bwongereza aho umukobwa w'umyaka cumi n'itanu (15) yasagariwe n'umugenzi mu ndege, akajya kurega avuga ko ibyo byamuhungabanyije, agasaba indishyi ashingiye ku ngingo 17 y'Amasezerano amaze kuvugwa, the House of Lords, ifatwa nk'Urukiko rw'Ikirenga, ikanzura ko nta RWANDAIR LTD v. KARANGWA

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146 ndishyi agomba guhabwa hashingiwe kuri iyo ngingo kubera ko nta bikomere byo ku mubiri yagaragazaga. [12] Me Rwihandagaza Richard uburanira Karangwa Oreste avuga ko yakomeretse, akaba agomba kubibonera indishyi hashingiwe ku ngingo ya 17 y'Amasezerano ya Varsovie. Avuga ko ibikomere bivugwa muri iyi ngingo atari ibikomere byo ku mubiri (blessures physiques) gusa, ko ahubwo n'ibikomere byo ku mutima (blessures psychiques) birimo kandi hakaba hari impapuro zo kwa muganga zerekana ko ibyo bikomere yabigize kuko yahungabanye bikomeye. [13] Ku birebana n'ingaruka ibyo bikomere byamugizeho mu kazi ke, Me Rwihandagaza avuga ko n'ubwo atari inzobere muri ibyo bibazo, asanga ihungabana Karangwa yakomoye muri iyo mpanuka ryaramugizeho ingaruka mu kazi ke ka buri muni, ko n'abaganga b'inzobere biyambajwe babisonuye mu maraporo yabo. [14] Ku birebana no kuba iryo hungabana Karangwa Oreste yararitewe no kubura inshuti ye, Me Rwihandagaza Richard umuburanira avuga ko na byo byamuhungabanyije kuko umudamu witwa Azera watakariye ubuzima muri iyo mpanuka ari Karangwa wari umujyanye muri Uganda, ko ndetse na ticket ye ari we wari wayiguze, agahora yishinja ko ari we wabaye nyirabayazana mu rupfu rwe. [15] Mu nyandiko Me Rwihandagaza Richard yashyikirije Urukiko, avuga ko inkiko zo mu Bufaransa zitigeze zishaka kumenya ubwoko bw'ibikomere ushaka kuregera indishyi aba yagiriye mu ndege, niba ari ibikomere by'umubiri cyangwa se ibikomere byo ku mutima (les juridictions françaises n'ont toujours pas eu à se prononcer sur la question de savoir ce que ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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147 recouvre la notion de “lésion corporelle”, si elle comprend uniquement la lésion qui n'entraîne qu'un préjudice physique ou si elle comprend également une lésion qui occasionna un préjudice psychique). Atanga urugero rw'urubanza rwaciwe n'Urukiko Rusesa imanza mu 1982, aho rwafashe icyemezo, ko rushingiye ku ngingo ya 17 y'Amasezerano ya Varsovie, umugenzi afite uburenganzira bwo gusaba indishyi zikomoka ku ihungabana, n'ubwo umwikorezi (le transporteur aérien) nta ruhare yaba yabigizemo, ariko rwerekanye ingaruka abagenzi batewe n'ishimutwa ry'indege, zaba ingaruka zishingiye ku bikomere by'umubiri cyangwa ku ihungabana. [16] Avuga ko muri urwo rubanza basanze nta ruhare umwikorezi afite muri izo ngaruka, zaba izishingiye ku bikomere by'umubiri cyangwa ku ihungabana, atari uko ingaruka zishingiye ku ihungabana zidatangirwa indishyi, ko ahubwo umwikorezi yashoboye kugaragazako yari yakoze ibishoboka byose mu rwego rwo kwirinda izo ngaruka hashingiwe ku biteganywa n'ingingo ya 20 y'Amasezerano ya Varsovie. [17] Muri iyo nyandiko Me Rwihandagaza avuga ko mu birebana n'amategeko y'umurimo, Urukiko Rusesa imanza rwo mu Bufaransa rwafashe ihungabana (trouble psychique) nk'ibikomere bisanzwe by'umubiri (lésion corporelle), akavuga ko urwo rukiko rwemeje iyo nyito ubwo rwasuzumaga ikibazo cy'umukozi wagize ihungabana arimo akorerwa igenzurwa. [18] Arangiza asaba Urukiko ko rwabafasha gusobanukirwa icyo ijambo blessures (ibikomere) rivugwa mu ngingo ya 17 y'Amasezerano ya Varsovie risobanura kuko ababuranyi bataryumva kimwe, aho bamwe bavugaga ko ibikomere byo ku mubiri gusa (blessures physiques) aribyo birebwa n'iyi ngingo, RWANDAIR LTD v. KARANGWA

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148 abandi bo bakumva n'ibikomere byo ku mutima (blessures psychiques) iyo ngingo nabyo ibireba. UKO URUKIKO RUBIBONA [19] Ingingo ya 17 y'amasezerano ya Varsovie yo kuwa 12/10/1929 nk'uko yahinduwe n'Amasezerano y'i La Haye yo ku wa 28/09/1955 u Rwanda rwashyizeho umukono ivuga ko utwara abagenzi mu ndege ariyozwa urupfu rw'abo atwaye cyangwa ibikomere bagize iyo bikomoka ku mpanuka yabaye umuntu ari mu ndege, ayizamukamo cyangwa ayimanukamo (Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement). [20] Ku birebana n'uru rubanza, Me Rwihandagaza Richard uburanira Karangwa Oreste avuga ko ibikomere bivugwa mu ngingo ya 17 y'Amasezerano amaze kuvugwa atari ibikomere by'umubiri gusa, ko ahubwo n'ibikomere by'umutima ari nabyo uwo aburanira yemeza ko yagiriye mu mpanuka y'indege ya RWANDAIR Ltd akabisabira indishyi, mu gihe Me Nkurunziza François Xavier uburanira RWANDAIR Ltd we avuga ko ibikomere birebwa n'ingingo ya 17 y'Amasezerano yibukijwe haruguru, ari ibikomere by'umubiri gusa, ko ibyo ku mutima bitarimo. [21] Ikibazo cyo kumenya niba ibikomere umugenzi yagize abitewe n'impanuka yabaye ari mu ndege ari iby'umubiri gusa (blessures physiques) cyangwa se niba n'ibikomere by'umutima (blessures psychiques) birebwa n'iyi ngingo, Urukiko ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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149 rw'Ikirenga rurasanga ari ikibazo kigomba kubonerwa igisubizo hifashishijwe ubusesenguzi bwakorewe iyi ngingo n'abahanga bayikozeho ubushakashatsi n'ibyemezo by'izindi nkiko zahuye n'ikibazo nk'iki. [22] Mu nyandiko ye yise "La réparation du préjudice moral dans les accidents de transport aérien"¹, Me Kenneth WEISSBERG, avoka mu Rugaga rw'i Paris, avuga ko Amasezerano Mpuzamahanga ya Varsovie ateganya ibintu bitatu bishobora gutuma umuntu aregera urukiko asaba indishyi. Urupfu, ibisebe n'ibikomere by'umubiri (la mort, les blessures et les lésions corporelles). Muri iyo nyandiko avuga ko n'ubwo amagambo "urupfu" n'ibisebe nta kibazo kidasanzwe ateye mu buryo yumvikana, ko atari ko bimeze ku birebana n'ijambo "ibikomere by'umubiri". Akavuga ko ikibazo ari ukumenya niba iryo jambo rivugwa mu ngingo ya 17 y'Amasezerano Mpuzamahanga ya Varsovie rikomatanya n'intimba, agahinda n'ibindi bikomere byo ku mutima, ibi bikaba byatuma uwabigize abibonera indishyi hashingiwe kuri iyi ngingo imaze kuvugwa. [23] Nyuma yo gusoma ibyemezo bitandukanye byafashwe n'inkiko nyinshi ubwo zabaga zagejweho ibirego bisaba indishyi zikomoka ku bikomere by'umutima (préjudice moral), uyu munyamategeko asanga inkiko nyinshi zaragiye zanzura ko, kugira ngo ibikomere byo ku mutima bitangirwe indishyi, bigomba kuba biherekejwe n'ibikomere by'umubiri bikomoka ku mpanuka. Avuga ko ari na wo murongo wafashwe n'Urukiko rw'Ikirenga rwo muri Amerika mu rubanza Eastern Airlines,

1 www.weissbergavocats.com/publications/prejudice-moral-accidents-aeriens.pdf

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150 Inc. v. Floyd, (1991) aho rwanzuye ko, hashingiwe ku ngingo ya 17 y'Amasezerano ya Varsovie Ikigo gitwara abantu mu ndege kidashobora kugira icyo kiryoza mu gihe umugenzi ataguye mu mpanuka cyangwa ngo imutere ibikomere by'umubiri (We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury or physical manifestation of injury)². [24] Mu rubanza Edith Rosman et al., Appellants, v. Trans World Airlines, Inc., Respondent. Miriam Herman, an Infant, by Alexander Herman, Her Father and Natural Guardian, et al., Appellants, v. Trans World Airlines, Inc., Respondent, rwaciwe n'Urukiko rw'Ubujurire rwa Leta ya New York (Court of Appeals of State of New York) ku itariki ya 13/06/1974, abarega basabaga indishyi zo kuba barahungabanye, ubwo ku itariki ya 6/09/1970 indege bari barimo ibyihabe byayiyobyaga bari mu nzira bava Tel Aviv, Israel, berekeza New York City. Umucamanza yavuze ko, hashingiwe ku ngingo ya 17 y'Amasezerano Mpuzamahanga ya Varsovie, abarega bagomba kwerekana ibimenyetso by'uko bagize ibikomere by'umubiri bifatika byaba byaratewe n'ihungabana cyangwa se n'uburyo mu ndege hari hameze, ko ariko ihungabana ryonyine ritinjira mu biteganyijwe n'iyi ngingo (At the trial, plaintiffs should be allowed to prove damages for palpable, objective bodily injuries suffered, whether caused by psychic trauma or by the physical conditions on the aircraft, irrespective of impact, but not for psychic trauma alone)³.

² caselaw.findlaw.com/us-supreme-court/499/530/html ³ http://www.leagle.com/decision/197441934NY2d385_1368.xml/ROSMAN V. TRANS WORLD AIRLINES#

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151 [25] Mu myumvire y'uru Rukiko, runashingiye kandi ku bimaze kwerekanwa haruguru, kuba abateguye aya Masezerano Mpuzamahanga ya Varsovie, barateganyije mu ngingo yayo ya 17 ko ibigomba gutangirwa indishyi mu gihe habaye impanuka y'indege, ari urupfu (la mort), ibisebe (blessures) cyangwa se ibindi bikomere by'umubiri (ou toute autre lésion corporelle), ayo yose akaba ari amagambo asobanura ibintu bifatika, iyo n'ibikomere byo ku mutima cyangwa se ihungabana (blessures psychiques, traumatisme), ibintu bidafatika cyangwa se bitaboneshwa amaso, biba mu bushake bw'abateguye aya masezerano, ntibiba byarabananiye kubandikamo mu buryo bweruye. Ibi kandi akaba ari nako byumviswe n'inkiko zinyuranye zo mu mahanga zahuye n'ikibazo cy'abaregeraga indishyi zikomoka ku bikomere byo ku mutima bavuga ko byaturutse ku mpanuka z'indege. [26] Hashingiwe ku bisobanuro bimaze gutangwa, kuba Karangwa Oreste avuga ko yahungabanye cyangwa yagize ibikomere byo ku mutima byaturutse ku mpanuka y'indege ya RWANDAIR Ltd yari arimo, ariko akaba atagaragaza ko hari ibikomere by'umubiri iyo mpanuka yamusigiye cyangwa se byaba byaturutse kuri iryo hungabana avuga ko yatewe n'iyi mpanuka, Urukiko rw'Ikirenga rurasanga nta ndishyi yabibonera kubera ko bene ibyo bikomere bitari mu bitangirwa indishyi hashingiwe ku ngingo ya 17 y'Amasezerano

Mpuzamahanga ya Varsovie yibukijwe haruguru. [27] Nyuma yo gusanga nta ndishyi Karangwa Oreste agomba guhabwa nk'uko bimaze gusobanurwa, Urukiko rw'Ikirenga rurasanga atari ngombwa gusuzuma ingingo ya RWANDAIR Ltd irebana n'uburyo izo ndishyi zibarwa.
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152 [28] Hashingiwe ku bisobanuro bimaze gutangwa, Urukiko rw'Ikirenga rurasanga ubujurire bwa RWANDAIR Ltd bufite ishingiro, bityo urubanza RCOMA0180/13/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku itariki ya 04/10/2013 rukaba ruhindutse muri byose. III. ICYEMEZO CY'URUKIKO [29] Rwemeje ko ubujurire bwa RWANDAIR Ltd bufite ishingiro; [30] Ruvuze ko urubanza RCOMA 0180/13/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku itariki ya 04/10/2013 ruhindutse muri byose; [31] Rutegetse Karangwa Oreste gutanga amagarama y'urubanza ahwanye n'amafaranga ibihumbi ijana (100.000).

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IMANZA NSHINJABYAHA

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KARANGIRA v. IYABURUNGA [Rwanda URUKIKO RW'IKIRENGA – RPA0076/15/CS (Hatangimbabazi P.J., Karimunda na Gakwaya, J.) 6 Ugushyingo 2015] Amategeko mpanabyaha – Ifungwa rinyuranyije n'amategeko – Irangizwa ry'ibihano ku manza zitandukanye zifite ibihano bitandukanye – Uwahawe ibihano ku byaha bitandukanye ntabwo arangiriza igihano mu kindi ahubwo arindira ko kimwe kirangira agatangira ikindi – Itegeko-Ngenga No01/2012/OL ryo ku wa 02/05/2012 rishyiraho Igitabo cy'Amategeko Ahana, ingingo ya 40(7). Incamake y'ikibazo: Karangira Jean de Dieu yareze Iyaburunga Innocent, Umuyobozi wa Gereza ya Mpanga kumufunga binyuranije n'amategeko avuga ko yagombaga kurekurwa ku wa 17/04/2015 ariko ntibyakorwa nyamara yarafashwe n'Ubugenzacyaha ku wa 17/05/2009 akurikiranweho icyaha cya ruswa ari nacyo yaje guhanirwa n'Urukiko Rwisumbuye rwa Gasabo, mu rubanza RP503/09/TGI/GSBO rwaciwe ku wa 14/08/2009 agakwirwa igihano cy'igifungo cy'imyaka itandatu (6 ans). N'ubwo urega yasabaga ko yafungurwa nyuma yo kurangiza igihano cya mbere, byagaragaraga ko hari imanza eshatu zitandukanye kuri we; urwo ku wa 27/11/2009 rwamuhanishije igifungo cy'imyaka itandatu (6 ans), rukurikirwa n'urwo ku wa 21/04/2010 rumuhanisha igifungo cy'imyaka itatu (3 ans) hagaheruka urwo ku wa 31/01/2013 rumuhanisha igifungo cy'imyaka itandatu (6 ans). Urega yavugaga ko niyo haba hari imanza zategetswemo ibindi bihano, bikwiye gufatwa ko ibyo 155

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156 bihano byarangiranye n'igihano cya mbere kubera ko aricyo cyari kirekire ariko uregwa n'umwunganira bo bakavuga ko ibyo binyuranyije n'amategeko. Urukiko Rukuru rwaregwe, rwasanze kuba Karangira Jean de Dieu yarakatiwe ibihano birenze kimwe kandi akiri mu irangizwa ryabyo, igifungo cya kabiri kigomba gutangira ku italiki igifungo cya mbere kirangiriyeho, bityo ko ifungwa rye ritanyuranyije n'amategeko. Urega yajuririye Urukiko rw'Ikirenga ku mpamvu z'uho ku Itegeko-Teka No21/77 ryo ku wa 18 Kanama 1977 rishyiraho igitabo cy'amategeko ahana ryakoreshwaga icyo gihe, ntaho riteganywa mu buryo buziguye uko impurirane y'ibihano byatanze ku byaha bitandukanye no mu bihe bitandukanye irangizwa, ariko isesengura ry'ingingo ya 36 n'ya 37 zaryo ndetse n'umuco wa za Gereza mu Rwanda bikaba bigaragaza ko ari ibisanzwe kubirira ibihano bito mu gihano kirekire umugororwa yakatiwe ndetse yongeraho ko kudasubira inyuma kw'itegeko mpanabyaha rishya uretse igihe riri mu nyungu z'uregwa ari ihame rusange ry'amategeko bityo ko ingingo ya 40, igika cya 7 y'Itegeko-Ngenga No21/2012/OL ryo ku wa 02/05/2012 rishyiraho Igitabo cy'Amategeko ahana itagombaga gukoreshwa muri uru rubanza. Iyaburunga n'umwunganira bo bavugaga ko gufungwa kwe bikurikije amategeko. Uhagarariye ubushinjacyaha we avugaga ko Karangira avugisha amategeko ibyo atavugaga kuko ingingo avugaga hejuru zitavuguruzanya. Incamake y'icyemezo: Uwakatiwe ibihano kubya bitandukanye ntabwo arangiriza igihano mu kindi ahubwo arindira ko kimwe kirangira agatangira ikindi. Bityo nta fungwa rinyuranyije n'amategeko ryabayeho ku wareze. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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157 Ubujurire nta shingiro bufite. Nta gihindutse ku rubanza rwajuririwe. Uwajuriye agomba kwishyura uwarezwe indishyi. Amagarama y'urubanza aherera ku isanduku ya Leta. Amategeko yashingiweho: Itegeko-Ngenga No01/2012/OL ryo ku wa 02/05/2012 rishyiraho Igitabo cy'Amategeko Ahana, ingingo ya 40(7). Itegeko-Teka No21/77 ryo ku wa 18 Kanama 1977 rishyiraho igitabo cy'amategeko ahana, ingingo ya 36 n'ya 37. Nta manza zifashishijwe. Inyandiko z'ababanyarwanda: Michel Franchimont et alii, Manuel de procédure pénale, Bruxelles, Larcier, 2eme édition, 2006, p.735. Urubanza I. IMITERERE Y'URUBANZA [1] Imbere y'Urukiko Rukuru, Urugereko rwa Nyanza, rwaregwe, Karangira Jean de Dieu yakurikiranyeho Iyaburunga Innocent, Umuyobozi wa Gereza ya Mpanga kumufunga binyuranyije n'amategeko avugaga ko yagombaga kurekurwa ku wa 17/04/2015 ariko ntibyakorwa nyamara yarafashwe n'Ubugenzacyaha ku wa 17/05/2009 akurikiranweho icyaha cya ruswa ari nacyo yaje guhanirwa n'Urukiko Rwisumbuye rwa Gasabo, mu rubanza KARANGIRA v. IYABURUNGA

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158 RP503/09/TGI/GSBO rwaciye ku wa 14/08/2009 agakatirwa igihano cy'igifungo cy'imyaka itandatu (6 ans), bivuze ko igihano yakatiwe cyarangiyeho guhera ku wa 17/04/2015, kandi ko mu gihe haba hari imanza zategatswemo ibindi bihano, bikwiye gufatwa ko ibyo bihano byarangiranye n'igihano cya mbere kubera ko aricyo cyari kirekire. [2] Mu rubanza RP0004/15/

HC/NYA rwaciwe ku wa 29/05/2015, Urukiko Rukuru rwasanze kuba Karangira Jean de Dieu yarakatiwe ibihano birenze kimwe kandi akiri mu irangizwa ryabyo, igifungo cya kabiri kigomba gutangira ku italiki igifungo cya mbere kirangiriyeho, bityo ko ifungwa rye ritanyuranyije n'amategeko. [3] Karangira Jean de Dieu ntiyishimiye icyo cyemezo akijuririra mu Rukiko rw'Ikirenga. [4] Iburanisha mu ruhamye ryabaye ku wa 05/10/2015, Karangira Jean de Dieu ahari kandi yunganiwe na Me Mbaga Tuzinde Mbonyimbuga, Iyaburunga Innocent nawe yitabye kandi yunganiwe na Me Munyemana Pascal naho Ubushinjacyaha buhagarariwe na Bunyoye Grâce, Umushinjacyaha ku rwego rw'Igihugu. II. IKIBAZO KIGIZE URU RUBANZA N'ISESENGURA RYACYO II.1. Kumenya niba mu gihe mu manza zitandukanye zabaye ndakuka hatanzwe ibihano bitandukanye, ibihano bito bibarirwa mu gihano kirekire cyagenwe na rumwe muri izo manza. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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159 [5] Karangira Jean de Dieu avuga ko kuva yafungwa ku wa 17/05/2009 atarafungurwa kandi ko ahanwa hashingiwe ku Itegeko-Teka No21/77 ryo ku wa 18 Kanama 1977 rishyiraho igitabo cy'amategeko ahana ryakoreshwaga icyo gihe, iryo Tegeko-Teka rikaba ntaho riteganywa mu buryo buziguye uko impurirane y'ibihano byatanzwe ku byaha bitandukanye no mu bihe bitandukanye irangizwa, ariko isesengura ry'ingingo ya 36 n'ya 37 zaryo ndetse n'umuco wa za Gereza mu Rwanda bikaba bigaragaza ko ari ibisanzwe kubarira ibihano bito mu gihano kirekire umugororwa yakatiwe, kandi ko ari uko biteganywa n'amategeko y'ahandi nko mu Bufaransa, akaba asanga kuba Urukiko Rukuru rwarabirenzeho rwitwaje icyuho kiri mu Itegeko-Teka ryavuzwe haruguru, rugategeka ko arangiza buri gihano yakatiwe rushingiye ku ngingo ya 40, igika cya 7 y'Itegeko-Ngenga No01/2012/OL ryo ku wa 02/05/2012 rishyiraho Igitabo cy'Amategeko Ahana kandi iri Tegeko- Ngenga ryaraje amaze imyaka itanu afunze ari uguhonyanga uburenganzira bwe bwo kudacibwa urubanza hashingiwe ku Itegeko rishya iyo ritari mu nyungu z'uregwa. [6] Akomeza avuga ko kudasubira inyuma kw'itegeko mpanabyaha rishya uretse igihe riri mu nyungu z'uregwa ari ihame rusange ry'amategeko riteganywa kandi n'ingingo ya 765 y'Itegeko-Ngenga No01/2012/OL ryo ku wa 02/05/2012 ryavuzwe haruguru, ingingo ya 15 y'Amasezerano Mpuzamahanga yerekeranye n'uburenganzira mbonezamubano n'ubwa politiki, ndetse n'ingingo ya 20 y'Itegeko Nshinga ryo ku wa 04/06/2003 nk'uko ryahinduwe kandi ryujujwe kugeza ubu, byose bigaragaza ko Urukiko Rukuru, Urugereko rwa Nyanza rwishe amategeko, akaba asaba uru Rukiko gukosora amakosa yakozwe, akarenganurwa. KARANGIRA v. IYABURUNGA

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160 [7] Me Mbaga Tuzinde Mbonyimbuga umwunganira avuga ko ihame rusange rikubiye mu ngingo ya 36 n'ya 37 z'Itegeko- Teka No21/77 ryo ku wa 18 Kanama 1977 ryavuzwe haruguru ryakoreshwaga Karangira Jean de Dieu ahanwa ni uko ibihano bito bibarirwa mu gihano kirekire kandi ko mu bisanzwe itegeko mpanabyaha ribanza kumenyesha mbere yo guhana, bivuze ko iyo ingingo ya 40, igika cya 7 y'Itegeko-Ngenga No21/2012/OL ryo ku wa 02/05/2012 ryavuzwe haruguru iba itariho, Karangira Jean de Dieu aba yararekuwe, bityo kuba iyo ngingo

yarashingiweho agakomeza gufungwa kandi yaraje nyuma bikaba binyuranije n'amateguko kandi bihonyanga uburenganzira bwe. [8] Iyaburunga Innocent avuga ko Karangira Jean de Dieu yahaniwe ibyaha bitatu kandi afite amarangizarubanza y'ibyo bihano yahaniwe, ayo marangizarubanza bakaba bayashyira mu bikorwa uko bayashyikirijwe kuko inshingano zabo muri Gereza ari ukubahiriza ibyemezo by'Inkiko, akaba asanga nta kosa yakoze agumisha Karangira Jean de Dieu muri Gereza kubera ko atari gusohoka atararangiza ibihano yakatiwe. [9] Me Munyemana Gatsimbanyi Pascal wunganira Iyaburunga Innocent avuga ko nta mpamvu n'imwe y'ifunga mu buryo bunyuranije n'amateguko iteganywa n'ingingo ya 90, igika cya 4 y'Itegeko No30/2013 ryo ku wa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha Karangira Jean de Dieu agaragaza, ko yafunzwe n'imanza zaciwe mu bihe bitandukanye, rumwe rukaba rwaciwe ku wa 21/11/2009, urundi rugacibwa ku wa 31/01/2013, bigaragaza ko urubanza ruheruka rwaciwe nyuma y'uko Itegeko-Ngenga No21/2012/OL ryo ku wa 02/05/2012 ryavuzwe haruguru ritangajwe mu Igazeti ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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161 ya Leta, bityo hakaba nta cyabuzaga ko iryo Tegeko-Ngenga rikurikizwa. [10] Uhagarariye Ubushinjacyaha avuga ko Karangira Jean de Dieu avugisha ingingo ya 36 n'ya 37 z'Itegeko-Teka No21/77 ryo ku wa 18 Kanama 1977 rishyiraho Igitabo cy'amateguko ahana icyo zitavuga kuko nta tandukanyirizo riri hagati yazo n'ingingo ya 40, igika cya 7 y'Itegeko-Ngenga No01/2012/OL ryo ku wa 02/05/2012 rishyiraho Igitabo cy'Amateguko Ahana, bivuze ko mu gihe nta ngingo y'Itegeko afite ashingiraho ikirego cye, ingingo ya 40, igika cya 7 y'Itegeko-Ngenga No01/2012/OL ryo ku wa 02/05/2012 ryavuzwe haruguru ariyo ikwiye gukurikizwa kuko atavugaga ko imuremereye mu gihe atagaragaza imworohera. UKO URUKIKO RUBIBONA [11] Ingingo ya 36 y'Itegeko-Teka No21/77 ryo ku wa 18 Kanama 1977 rishyiraho Igitabo cy'amateguko ahana ryakoreshwaga Karangira Jean de Dieu ahanwa iteganya ko "Igihe cy'igifungo cyose kibarwa kuva ku munsu urubanza ruhana umuntu rwaciriweho kandi rutagisubiwemo". Naho ingingo ya 37 y'iri Tegeko-Teka iteganya ko "Igihe umuntu amaze mu gifungo cy'agateganyo, uko cyakabaye, kivanwa mu gihe cy'igihano urubanza rwategutse". [12] Ingingo ya 40, igika cya 7, y'Itegeko-Ngenga No01/2012/OL ryo ku wa 02/05/2012 rishyiraho igitabo cy'amateguko ahana, iteganya ko "igihe umuntu akatiwe ibihano by'ibifungo bibiri bikurikirana, igifungo cya kabiri gitangira ku itariki igifungo cya mbere kirangiriyeho". KARANGIRA v. IYABURUNGA

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162 [13] Dosiye y'urubanza igaragaza ko mu rubanza No RP0503/09/TGI/GSBO rwaciwe ku wa 14/08/2009, Karangira Jean de Dieu yakurikiranweho icyaha cya ruswa, icyaha kiramuhama, ahanishwa igifungo cy'imyaka itandatu (6 ans) n'ihazabu y'amafaranga y'u Rwanda miliyoni imwe (1.000.000Frw). Karangira Jean de Dieu n'Ubushinjacyaha bajuririye icyo cyemezo mu Rukiko Rukuru, ku cyicaro cyarwo i Kigali narwo ruka urubanza RPA10891130/09/HC/KIG ku wa 27/11/2009 rwemeza ko urubanza rwajuririwe rudahindutse (cotes 11 na 18). [14] Karangira Jean de Dieu yongeye na none gukurikiranwaho icyaha cy'inyandiko-mpimbano mu Rukiko Rwisumbuye rwa Gasabo. Urwo Rukiko rwemeza ko icyaha kimuhama, ahanishwa igifungo

cy'imyaka itatu (3 ans). Karangira Jean de Dieu yajuririye icyo cyemezo, noneho mu rubanza No RPA0140-0318/10/HC/KIG rwaciwe ku wa 21/04/2010, Urukiko Rukuru rusanga ubujurire bwe nta shingiro bufite, bityo ko nta gihindutse ku mikirize y'urubanza rwajuririwe (cote 24). [15] Karangira Jean de Dieu yakurikiranwe kandi imbere y'Urukiko Rwisumbuye rwa Gicumbi ku byaha by'inyandiko- mpimbano n'ubufatanyacyaha mu gutangira ubusa ibya Leta. Urwo Rukiko rwaciye urubanza No RPA0198 - 1130/09/TGI/GIC ku wa 19/02/2010, rwemeza ko ari umwere ku cyaha cy'inyandiko-mpimbano ariko ko ahamwa n'icyaha cy'ubuhemu n'ubufatanyacyaha mu cyaha cyo gutangira ubusa ibya Leta ahanishwa igifungo cy'imyaka itanu (5 ans) n'ihazabu y'amafaranga ibihumbi makumyabiri (20.000Frw). Karangira Jean de Dieu n'Ubushinjacyaha bajuririye urwo rubanza mu Rukiko Rukuru, narwo ruca urubanza no RPA0252 - ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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163 0303/HC/KIG ku wa 31/01/2013, rwemeza ko ahamwa n'icyaha cyo gukoresha inyandiko-mpimbano n'icyaha cy'ubuhemu, rumuhanisha igifungo cy'imyaka itandatu (6 ans) (cotes 25-46). [16] Urukiko rurasanga urubanza rwa mbere ruhana Karangira Jean de Dieu ari urwo ku wa 27/11/2009 rwamuhanishije igifungo cy'imyaka itandatu (6 ans), rukurikirwa n'urwo ku wa 21/04/2010 rumuhanisha igifungo cy'imyaka itatu (3 ans) hagaheruka urwo ku wa 31/01/2013 rumuhanisha igifungo cy'imyaka itandatu (6 ans), buri rubanza rukaba rwihariye kuko yahaniwe ibyaha bitandukanye, mu Nkiko zitandukanye no mu bihe bitandukanye, ibihano biheruka bisanga atararangiza ibya mbere, bivuze ko atashoboraga guhita abyubahiriza kandi bidashobora kuvanwa mu bihano byatanzwe mbere kubera ko, hashingiwe ku ngingo ya 37 y'Itegeko-Teka No21/77 ryo ku wa 18 Kanama 1977 ryavuzwe haruguru, igishobora kuvanwa mu gihano ari igifungo cy'agateganyo gihabwa umuntu ugukurikiranwa n'Inkiko ushobora no kuba umwere kandi ufatwa nk'umwere buri gihe cyose atarahamwa n'icyaha, igifungo cy'agateganyo kikaba kitakwitiranwa n'igihano cyatanzwe mu rubanza rwabaye ndakuka nk'uko Karangira Jean de Dieu na Me Mbagi Tuzinde Mbonimbuga bashakira kubyumvikanisha. [17] Urukiko rurasanga hashingiwe ku ngingo ya 36 y'Itegeko-Teka No21/77 ryo ku wa 18 Kanama 1977 ryavuzwe haruguru kandi ryakoreshwaga Karangira Jean de Dieu ahanwa, igihano cy'imyaka itandatu (6 ans) yakatiwe ku wa 31/01/2013 kizategereza ko abanza kurangiza icy'imyaka itatu (3 ans) yakatiwe ku wa 21/04/2010, iki nacyo kizategereza ko abanza kurangiza icy'imyaka itandatu (6 ans) yakatiwe ku wa 27/11/2009 kubera ko ataragiriza igihano mu kindi. KARANGIRA v. IYABURUNGA

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164 [18] Urukiko rurasanga uyu murongo uhuye n'ibiteganywa n'amategako y'ahandi nk'aho mu Bufaransa ingingo ya 3, igika cya 2 y'Itegeko No2005-1549 ryo ku wa 12/12/2005 iteganya ko "ibihano byatanzwe ku byaha byasanze uregwa hari ibindi byaha yahaniwe bivangwa n'ibihano bya mbere hatitawe ku ngano yabyo kandi bidashoboka ko ibihano bitanzwe nyuma bivanwa mubyatanzwe mbere"1 kandi bishimangirwa n'abahanga mu mategeko bemeza ko "iyi umugororwa afungirwa impamvu iyi n'iyi, irangizagihano ririmurwa kugeza igihe azarangiriza

igihano yakatiwe mbere”² byose bigaragaza ko Karangira Jean de Dieu agomba kurangiza buri gihano yakatiwe mbere yo kurekurwa. [19] Urukiko rurasanga ingingo ya 40, igika cya 7 y’Itegeko-Ngenga No01/2012/OL ryo ku wa 02/05/2012 rishyiraho Igitabo cy’Amategeko Ahana idakwiye gufatwa nk’iyashyizeho ihame rishya mu byerekeranye n’irangiza ry’impurirane ry’ibihano ahubwo yarasobanuye kurushaho ihame ryari risanzwe riri mu ngingo ya 36 y’Itegeko-Teka No21/77 ryo ku wa 18 Kanama 1977 ryavuzwe haruguru, uku kudasobanuka neza kw’iyi ngingo ya 36 kukaba gushobora kuba ariko kwateraga imigirire (pratique) itandukanye muri za Gereza nk’uko Karangira Jean de Dieu abivuga, bivuze ko n’iyo Urukiko Rukuru rutari gushingira ku itegeko rishya, ntibyari kurubuza kugera ku

1 “Les peines prononcées pour l’infraction commise en réitération se cumulent sans limitation de quantum et sans possibilité de confusion avec les peines définitivement prononcées lors de la condamnation précédente”. Article 3, alinéa 2, Loi no 2005-1549 du 12 décembre 2005. 2 “Si le condamné est déjà détenu pour une ou d’autres causes, l’exécution de la peine est reportée dans le temps après qu’il ait purgé la première peine”. Michel Franchimont et alii, Manuel de procédure pénale, Bruxelles, Larcier, 2eme édition, 2006, p.735.

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165 mwanzuro rwagezeho, bityo ibyo Karangira Jean de Dieu aburanisha by’uko uburenganzira bwe bwo kudaciribwa urubanza hashingiwe ku itegeko mpanabyaha rishya iyo ritari mu nyungu ze bwahonyanzwe bikaba nta shingiro bifite. [20] Hashingiwe ku byasobanuwe mu bika bibanziriza iki, Urukiko rurasanga Karangira Jean de Dieu afunzwe hashingiwe ku byemezo by’Inkiko byabaye ndakuka, kandi mu gihe ari kurangiza ibihano byatanze mu buryo bukurikije amategeko hagendewe ku byaha byamuhanye, atahindukira ngo avuge ko afunzwe mu buryo bunyuranije n’amategeko. II.2. Kumenya niba Iyaburunga Innocent yahabwa indishyi asaba. [21] Iyaburunga Innocent avuga ko asaba indishyi z’ibyo yatanze k’umwunganira mu Rukiko rw’Ikirenga n’iz’uko yashowe mu manza nta mpamvu, zose hamwe akaba asaba miliyoni eshatu z’amafaranga y’u Rwanda (3.000.000Frw). [22] Karangira Jean de Dieu avuga ko nta ndishyi zikwiye guhabwa Iyaburunga Innocent mu gihe ariwe uri mu karengane. UKO URUKIKO RUBIBONA [23] Urukiko rurasanga kuba Iyaburunga Innocent yararezwe mu Rukiko bigatuma ashaka umwunganira mu mategeko (avoka) byaratumye agira ibyo atakaza, bityo indishyi z’ibyo yatakaje mu rubanza akaba akwiye kuzihabwa hashingiwe ku ngingo ya 258 y’Igitabo cya gatatu cy’urwunge rw’amategeko mbonezamubano, iteganya ko “igikorwa cyose cy’umuntu cyangirije undi, gitegeka nyirugukora ikosa rigikomokaho kuriha ibyangiritse”. KARANGIRA v. IYABURUNGA

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166 [24] Urukiko rurasanga nta kimenyetso Iyaburunga Innocent arugaragariza cyerekana amafaranga yumvikanye n’umwunganira ko ariyo azamuhemba, bityo n’ubwo akwiriye indishyi z’ibyo yatakaje biturutse kuri uru rubanza, miliyoni eshatu z’amafaranga y’u Rwanda

(3.000.000Frw) Iyaburunga Innocent yasabye akaba ari umurengera, akaba ahawe indishyi zingana n'amafaranga ibihumbi magana inani (800.000Frw), agenwe mu bushishozi bw'Urukiko. III. ICYEMEZO CY'URUKIKO [25] Rwemeje ko ubujurire bwa Karangira Jean de Dieu nta shingiro bufite; [26] Rwemeje ko nta gihindutse ku mikirize y'urubanza No RP0004/15/HC/NYA rwaciwe n'Urukiko Rukuru, Urugereko rwa Nyanza ku wa 29/05/2015; [27] Rutegetse Karangira Jean de Dieu kwishyura Iyaburunga Innocent indishyi zingana n'ibihumbi magana inane (800.000Frw) y'igihembo cya Avoka; [28] Rutegetse ko amagarama y'urubanza aherera ku Isanduku ya Leta. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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UBUSHINJACYAHA v. KWITONDA [Rwanda URUKIKO RW'IKIRENGA – RPAA0305/11/CS (Hatangimbabazi, P.J., Kalimunda na Gakwaya, J.) 27 Ugushyiraho 2015] Amategeko mpanabyaha – Itegeko rikoresheye mu gihe hari amategeko abiri ahana avuguruzanya – Mu gihe hari amategeko abiri ahana, rimwe ryariho mu gihe icyaha cyakorwaga, irindi ryatangajwe kuva icyaha gikozwe, ariko urubanza rutaracibwa burundu, itegeko rishya niryo ryonyine rigomba gukurikizwa iyo riteganyaga igihano cyoroheje – Itegeko Ngenga No01/2012/OL ryo kuwa 02/05/2012 rishyiraho igitabo cy' amategeko ahana, ingingo ya 8. Amategeko mpanabyaha – Uburyozwacyaha – Gushidikanya ku munsu n'ukwezi uregwa yavutseho – Mu manza nshinjabyaha, iyo habayeho gushidikanya, ibintu bifatwa mu nyungu z'uregwa, bityo mu gihe hatazwi umusi n'ukwezi yavukiye hafi umunsi wa nyuma w'ukwezi kwa nyuma k'umwaka uzwi yavukiye – Itegeko Ngenga No01/2012/OL ryo kuwa 02/05/2012 rishyiraho igitabo cy' amategeko ahana, ingingo ya 72. Incamake y'ikibazo: Uregwa yakurikiranywe mu Rukiko Rwisumbuye rwa Gasabo aregwa icyaha cyo gusambanya umwana. Yatangiye ahakana icyaha ariko Urukiko rurakimuhamya maze rumuhanisha igifungo cy'imyaka 12 n'ihazabu ingana na 100.000Frw n'amagarama y'urubanza. Ntiyishimiye imikirize y'urubanza, arujuririra mu Rukiko Rukuru narwo rwemeza ko imikirize y'urubanza rwa mbere igumye. Yajuririyemo mu Rukiko rw'Ikirenga avuye ku yemeye 167

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168 icyaha kubera ko yakubiswe, ko Urukiko rwamuhamije icyaha rugendeye ku mvugo y'Ubushinjacyaha no ku nyandiko-mvugo yakozwe n'Umugenzacyaha. Mu gihe cy'iburanisha ariko, yamenyesheje Urukiko ko ahinduye imiburanire ye, ko agiye kuburana yemera icyaha aregwa ariko ko yagikoze ari umwana utarageza ku myaka cumi n'ine. Ubushinjacyaha bwo buvuye ku uregwa yiyemereye ko yari afite imyaka cumi n'ine (14 ans) y'amavuko, ko nta mpamvu rero yo gushyiraho icyemezo cy' amavuko. Bukomeza buvuye ku mugihe umunsi n'ukwezi by'amavuko by' amavuko, hagomba kumvikana ko yavutse ku itariki ya 1/1/1991, bityo bukaba busanga kuba yari afite imyaka cumi n'ine (14 ans) y'amavuko, agomba gushyirwa mu rwego rw'abahanze n'icyaha. Incamake y'icyemezo: 1. Mu gihe hari amategeko abiri ahana, rimwe ryariho mu gihe icyaha cyakorwaga, irindi ryatangajwe kuva icyaha gikozwe, ariko urubanza rutaracibwa burundu, itegeko rishya niryo ryonyine rigomba gukurikizwa iyo riteganyaga igihano

cyoroheje.

2. Hashingiwe ku ihame ry'amategako rivuga ko mu manza nshinjabyaha, mu gihe hariho gushidikanya, ibintu bigomba gufatwa mu nyungu z'ushinjwa, kuba umunsi n'ukwezi by'amavuko by'uregwa bitazwi, byumvikanisha ko umunsi we w'amavuko ari umunsi wa nyuma w' ukwezi kwa cumi n'abiri (31/12) ku mwaka uzwi yavutsemo. Kubera iyo mpamvu, Urukiko rwemeje ko uregwa yavutse ku itariki ya 31/12/1991 aho kuba ku itariki ya 1/1/1991 nk'uko ubushinjacyaha bubivuga, bityo akaba ataryozwa icyaha cyo gusambanya U.L ndetse agomba kurekurwa uru rubanza rukimara gusomwa, kuko yakozwe icyaha afite imyaka cumi n'itatu n'amezi atandatu. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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169 Ubujurire bufite ishingiye. Uregwa ntiyaryozwa icyaha aregwa. Urubanza rwajuririwe ruhindutse mu ngingo zarwo zose. Uregwa agomba kurekurwa urubanza rukimara gusomwa. Amagarama aherereye ku isanduku ya Leta. Amategako yashingiweho: Itegeko-Teka No21/77 ryo kuwa 18/8/1977 rishyiraho Igitabo cy'Amategako ahana, ingingo ya 77. Itegeko Ngenga No01/2012/OL ryo kuwa 02/05/2012 rishyiraho igitabo cy' amategako ahana, ingingo ya 8 na 72. Nta manza zifashishijwe. Inyandiko z'abahanga: Vade-mecum, "Le crime de genocide et les crimes contre l'humanite devant les juridictions ordinaires du Rwanda", Avocats sans frontieres, 2004, pp.194-195. Urubanza I. IMITERERE Y'URUBANZA [1] Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Gasabo, Ubushinjacyaha bukurikiranyeho Kwitonda Jean Damascene icyaha cyo gusambanya umwana U.L w'imyaka 4 y'amavuko, buvuga ko yemeye icyaha mu Bugenzacyaha no mu Bushinjacyaha. Kwitonda Jean Damascène yaburanye atemera icyaha. UBUSHINJACYAHA v. KWITONDA

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170 [2] Kuwa 29/09/2006, urwo Rukiko rwaciye urubanza RP/Min0003/06/TGI/GSBO, rwemeza ko Kwitonda Jean Damascene ahamwa n'icyaha maze rumuhanisha igifungo cy'imyaka 12 no gutanga ihazabu ingana na 100.000Frw n'amagarama y'urubanza. [3] Kwitonda Jean Damascene ntiyishimiye imikirize y'urubanza, arujuririra mu Rukiko Rukuru. Kuwa 28/10/2011, Urukiko Rukuru rwaciye urubanza RPA956/08/HC/KIG, rwemeza ko imikirize y'urubanza rwa mbere igumyeho. [4] Kwitonda Jean Damascene ntiyishimiye imikirize y'urubanza, ajuririra mu Rukiko rw'Ikirenga avuga ko yemeye icyaha kubera ko yakubiswe, ko Urukiko rwamuhamije icyaha rugendeye ku mvugo y'Ubushinjacyaha no ku nyandiko-mvugo yakozwe n'Umugenzacyaha. [5] Urubanza rwaburanishijwe mu ruhame ku wa 19/10/2015, Kwitonda Jean Damascene yunganiwe na Me Rwigema Vincent, naho Ubushinjacyaha buhagarariwe na Nkusi Faustin, Umushinjacyaha ku rwego rw'Igihugu. Igihe cy'iburanisha, Kwitonda Jean Damascene yamenyesheje Urukiko ko ahinduye imiburanire ye, ko agiye kuburana yemera icyaha aregwa ariko akavuga ko hashingiwe ku ngingo ya 23 y'Itegeko-Teka No21/77 ryo kuwa 18/8/1977 rishyiraho Igitabo cy' amategako ahana cyakoreshwaga igihe icyaha cyakorwaga atahamwa na cyo ndetse yagikoze ari umwana utarageza ku myaka cumi n'ine.

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171 II. IBIBAZO BIRI MU RUBANZA N'ISESENGURA RYABYO Kumenya niba Kwitonda Jean Damascene ataryozwa icyaha aregwa. [6] Kwitonda Jean Damascene avuga ko kuwa 16/07/2005, mu ma saa tanu, yari kwa nyirakuru Mukasinamenye Xaviere, nyina wa U.L, yabonye uwo mwana yagiye kwihagarika, agakuramo ikariso, atangira gutekereza kumusambanya. Nyuma, U.L akaza kumusanga ku buriri, agashaka kumurongora ariko ntabigereho. [7] Kwitonda Jean Damascene asobanura ko nyirakuru Mukasinamenye Xaviere yaje kugaruka, U.L akamubwira ibyamubayeho. Asobanura ko yaje guhakana icyo cyaha kubera ibyo abantu bagendaga bamubeshya, bamubwira ko naramuka abyemeye azahanwa cyane. [8] Me Rwigema Vincent avuga ko ibisobanuro byatanze na Kwitonda Jean Damascene muri uru Rukiko bihuye n'ibyo yaravuze mu Bugenzacyaha no mu Bushinjacyaha ariko hashingiwe ku ngingo ya 77 y'Itegeko-Teka No21/77 ryo kuwa 18/8/1977 ryavuzwe haruguru, akaba asanga mu gihe muri dosiye y'urubanza, nta kimenyetso simusiga kigaragaza imyaka nyakuri Kwitonda Jean Damascene na U.L bari bafite icyaha gikorwa, Kwitonda Jean Damascene ataryozwa icyo cyaha (irresponsabilite penale) kuko atari arengeje imyaka cumi n'ine (14 ans) nk'uko byavuzwe n'Ubushinjacyaha n'ubwo ntacyo bagaragaje cyashingiweho. [9] Ubushinjacyaha bukomeza buvuga ko Kwitonda Jean Damascene yemeye wenyine ko yari afite imyaka cumi n'ine UBUSHINJACYAHA v. KWITONDA

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172 (14 ans) y'amavuko, nta mpamvu rero yo gushaka icyemezo cye cy'amavuko. Bukomeza buvuga ko mu gihe umunsi n'ukwezi by'amavuko bye bitazwi, hagomba kumvikana ko yavutse ku itariki ya 1/1/1991, bityo bukaba busanga kuba yari afite imyaka cumi n'ine (14 ans) y'amavuko, agomba gushyirwa mu rwego rw'abahanze n'icyaha. Busoba busaba ko icyemezo cyajuririwe cyagumaho. UKO URUKIKO RUBIBONA [10] Ingingo ya 77 y'Itegeko-Teka No21/77 ryo kuwa 18/8/1977 ryavuzwe rishyiraho Igitabo cy'Amategeko ahana cyakoreshejwe igihe icyaha cyakorwaga iteganya ko "Iyo uwakoze icyaha cy'ubugome cyangwa gikomeye cyangwa icyitso cye, afite imyaka y'amavuko irenze cumi n'ine ariko idashyitse cumi n'umunani mu gihe icyaha gikorwa, iyo bibaye ngombwa guca igihano, ibihano bitangwa ni ibi: Iyo akwiye igihano cyo (...) cyangwa cyo gufungwa burundu, azacibwa igihano cy'igifungo cy'imyaka kuva kw'icumi kugeza kuri makumyabiri (...)" [11] Ingingo ya 72(10) y'Itegeko Ngenga No01/2012/OL ryo kuwa 02/05/2012 rishyiraho Igitabo cy'Amategeko ahana iteganya ko "Iyo uwakoze icyaha cyangwa icyitso cye, afite nibura imyaka cumi n'ine (14) y'amavuko ariko atageze kuri cumi n'umunani (18) mu gihe icyaha cyakorwaga, iyo bibaye ngombwa gutanga ibihano, ibihano bitangwa ni ibi: Iyo yari guhanishwa igifungo cya burundu cyangwa cya burundu cy'umwihariko, ahanishwa igifungo cy'imyaka cumi n'itanu (15)". [12] Hashingiwe ku ngingo ya 8 y'Itegeko Ngenga No01/2012/OL ryo kuwa 02/05/2012 ryavuzwe haruguru ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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173 iteganya ko “Mu gihe hari amategeko abiri ahana, rimwe ryariho mu gihe icyaha cyakorwaga, irindi ryaratangajwe kuva icyaha gikozwe, ariko urubanza rutaracibwa burundu, itegeko rishya niryo ryonyine rigomba gukurukizwa iyo riteganya igihano cyoroheje”, Urukiko rw’Ikirenga rurasanga isuzumwa ry’ingingo ya 77 y’Itegeko Teka No21/77 ryo kuwa 18/8/1977 ryavuzwe haruguru n’irya 72 y’Itegeko Ngenga No01/2012/OL ryo kuwa 02/05/2012 ryavuzwe haruguru, rigaragaza ko muri uru rubanza hagomba gukurikizwa ibiteganywa n’ingingo ya 72 y’Itegeko Ngenga No01/2012/OL ryo kuwa 02/05/2012 kuko ariryo riteganya igihano cyoroheje. [13] Urukiko rw’Ikirenga rurasanga kandi isuzumwa ry’ingingo ya 72 y’Itegeko Ngenga No01/2012/OL ryo kuwa 02/05/2012 ryavuzwe haruguru ryumvikanisha ko igihe uwakoze icyaha utarengeje imyaka cumi n’ine y’amavuko (14 ans), adashobora kuryozwa icyo cyaha aregwa (cause d’irresponsabilité pénale ou cause de non imputabilité). [14] Urukiko rw’Ikirenga rurasanga n’ubwo muri dosiye y’uru rubanza nta cyemezo cy’amavuko cya Kwitonda Jean Damascène kigaragaramo ariko mu gihe yemeza nta gushidikanya ko yavutse mu mwaka wa 1991 ndetse n’ubushinjacyaha bubyemeza, uwo mwaka w’amavuko ariwo ugomba gufatwa nk’ukuri. [15] Urukiko rw’Ikirenga rurasanga nubwo umunsi n’ukwezi by’amavuko bya Kwitonda Jean Damascène bitazwi ariko hashingiwe ku ihame ry’amategeko rivuga ko mu manza nshinjabyaha, mu gihe hariho gushidikanya, ibintu bigomba gufatwa mu nyungu z’ushinjwa, ibyo byumvikanisha ko igihe umunsi n’ukwezi by’amavuko z’ushinjwa bitazwi, hagomba kwemezwa ko yavutse ku munsi wa nyuma w’ukwezi kwa cumi UBUSHINJACYAHA v. KWITONDA

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174 n’abiri (31/12) ku mwaka uzwi yavutsemo, bityo tukaba rugomba kwemeza ko Kwitonda Jean Damascène yavutse ku itariki ya 31/12/1991 aho kuba ku itariki ya 1/1/1991 nk’uko ubushinjacyaha bubivuga. [16] Urukiko rw’Ikirenga rurasanga igihe Kwitonda Jean Damascène yakoraga icyaha aregwa ku itariki ya 16/7/2005 nk’uko bigaragara mu nyandiko-mvugo y’imenesha icyaha yakozwe n’Ubugenzacyaha ku wa 22/7/2005, yari afite imyaka cumi n’itatu n’amezi atandatu y’amavuko (13 ans et 6 mois), bityo rukaba rusanga ataryozwa icyaha cyo gusambanya U.L ndetse agomba kurekurwa uru rubanza rukimara gusomwa. [17] Hashingiwe ku byavuzwe mu gika kibanziriza iki, nta mpamvu yo gusuzuma izindi mpamvu z’ubujurire bwa Kwitonda Jean Damascène.

1 Il peut également arriver que le mineur ne dispose pas du tout de document de l’état civil ou alors dispose d’un document ne mentionnant que son année de naissance (....) Les exemples les plus pertinents en l’espèce sont celui dans lequel l’on dispose d’un document qui indique que le prevenu est né en 1980, et donc qu’il a eu son 14^{ème} anniversaire dans le courant de l’année 1994, sans précision de jour ou de mois (...) En l’absence d’indications précises, le mineur doit se voir appliquer l’hypothèse la plus favorable, c’est à dire que l’on devra agir comme s’il était né le 31 Décembre 1980 (...). Le raisonnement doit amener à considérer, que le prevenu n’avait pas atteint l’âge de quatorze ans lors des événements qui se sont déroulés d’avril à juillet, et qu’il ne peut être poursuivi ni sanctionné”, in Vade-mecum, Le crime de genocide et les crimes contre

l'humanite devant les juridictions ordinaires du Rwanda, Avocats sans frontières, 2004, pp.194-195. ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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175 III. ICYEMEZO CY'URUKIKO [18] Rwemeje ko ubujurire bwa Kwitonda Jean Damascene bufite ishingiro. [19] Rwemeje ko Kwitonda Jean Damascene ataryozwa icyaha aregwa. [20] Rwemeje ko imikirize y'urubanza No RPA956/08/HC/KIG rwaciwe kuwa 28/10/2011 ihindutse kuri byose. [21] Rwemeje ko Kwitonda Jean Damascene agomba kurekurwa uru rubanza rukimara gusomwa. [22] Rutegetse ko amagarama y'urubanza aherera mu Isanduku ya Leta.

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vi PREFACE Dear Readers, The Rwandan Judiciary is pleased to publish the second volume of Rwanda Law Report for the year 2016. We encourage judges, prosecutors, advocates and other legal professionals to give us ideas on how we can improve the preparation of Law Reports since our main intention is to prepare a law report which meets the international standards. In this volume of Rwanda Law Reports, you will find twelve

- (12) cases including eight (8) procedural cases, two (2) commercial cases and two (2) criminal cases. We are pleased to inform you that published cases can be accessed on the website of the judiciary which facilitates the users to find cases easily and quickly on <http://decisia.lexum.com/rlr/en/nav.do> Prof. Sam RUGEGE President of the Supreme Court President of the High Council of Judiciary

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A. CASES RELATING TO CIVIL, COMMERCIAL, LABOUR AND ADMINISTRATIVE PROCEDURE

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COGEBANQUE LTD v. GAHITIRA [Rwanda SUPREME COURT – RCOM009/15/CS (Mukanyundo, P.J., Ngagi and Rugabirwa, J.) July 31, 2015] Commercial procedure – Penalty forcing execution of judgment – Hindrances to the execution of judgment – Since the Notary is the only competent to certify the authenticity of the power of attorney to act on behalf of another person, the bank's refusal, as a professional, to deliver the house title deed prior to production of the notarized power of attorney by the advocate and written contract by the court bailiff as provided by the law cannot be considered as hindrance to the judgment execution, therefore, the penalty forcing judgment execution should be cancelled – Law N°13bis/2014 of 21/05/2014 governing the Office of Notary, article 52(1) – Law N°21/2012 of 14/06/2012 governing the civil, commercial, labour and administrative procedure, article 220. Facts: COGEBANQUE Ltd granted the loan to DALBIT PETROLEUM Company. The latter failed to repay the loan and this prompted COGEBANQUE Ltd to attach the mortgaged house belonging to Gahitira Cyusa Richard who was still a minor because it was mortgaged by his father who filed the claim on behalf of the child praying for invalidation of the mortgage. The Court invalidated the mortgage agreement because they mortgaged a house belonging to a minor without prior authorization by the court. The dispute arose between parties about the person to whom the house title deed that was still in possession of the bank should be returned. The child's father argues that he is the one to whom it should be handed 1

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2 RWANDA LAW REPORTS back while COGEBANQUE Ltd argues that it should rather be handed over to DALBIT PETROLEUM as it is the borrower. The Supreme Court held that the title deed should be handed back to the child's father and in case of the bank's failure to comply within 30 days it shall be liable to the penalty forcing execution of 50,000Frw per day. The father of Gahitira who is his representative kept requesting the house title deed from the Bank, but the latter requested him to present the notarized power of attorney or any other written contract with

Gahitira because the bank had information that the entire family of Gahitira now lives in Europe. As for her, Bailiff Kanyana Bibiane issued the order forcing the bank to pay to deliver the emphyteutic lease title and 12,000,000Frw as a result of penalty forcing judgment execution. She also attached the Bank's car for its auctioning so as to get payment. COGEBANQUE Ltd also immediately filed with the Supreme Court a summary procedure claim requesting cancellation of the penalty forcing execution of judgment. The representative of Gahitira also raised the objection praying for inadmissibility of the claim of the bank on the ground that the summary procedure claim is filed when the court was seized with the principal claim which is pending. The Court rejected the objection and the hearing on merits resumed. The representative of Gahitira submits that it is the bank that hindered the execution by requiring the power of attorney which prompted him to seek assistance of the bailiff since the latter is not required by any law to have the power of attorney in the judgment execution process. Held: 1. The fact that the Bank, as a professional, has refused to hand over the house title deed and required prior production of a

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notarized power of attorney by the advocate and the written contract by the bailiff as provided by the law cannot be considered as hindering judgment execution. Therefore, the appeal of the Bank praying for cancellation of the penalty forcing judgment execution has merit because it has not refused to execute the judgment and the amount of money claimed from the bank as a penalty forcing execution of judgment should be cancelled as well. The Summary procedure claim has merit. The penalty forcing execution of the judgment is cancelled. Court fees to the defendant. Statute and statutory instruments referred to: Law N°13bis/2014 of 21/05/2014 governing the Office of Notary, article 52(1). Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 220. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] COGEBANQUE Ltd granted the loan to DALBIT PETROLEUM Company. DALBIT PETROLEUM failed to repay the loan and COGEBANQUE Ltd attached the mortgaged house located at Nyarutarama belonging to Gahitira Cyusa 3
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4 RWANDA LAW REPORTS Richard who was still a minor. The house was mortgaged by his father Gahitira Bishumba Raymond who later filed the claim for cancellation of that mortgage on behalf of this child. [2] The case about cancellation of the mortgage was finally settled by the Supreme Court on 13/09/2013 through judgment N° RCOMA0121/11/CS whereby it was held that the mortgage is cancelled because Gahitira Bishumba Raymond has mortgaged a house of his minor child without prior authorization by the court. [3] After that judgment, disputes arose between parties about the person to whom the house title deed that was still in possession of

COGEBANQUE Ltd should be returned. Gahitira Bishumba Raymond argues that it should be returned to him as the father of the child while COGEBANQUE Ltd states it should be returned to DALBIT PETROLEUM in its capacity of the borrower. [4] Gahitira Cyusa Richard represented by his father filed a claim with the Supreme Court praying for settlement of that dispute. In the

judgment

RCOMA0004/14/CS - RCOMA0121/11/CS, this Court ruled that in his capacity as the father of the child Gahitira Bishumba Raymond is the one to whom the title deed of the house mortgaged to secure the loan granted to DALBIT PETROLEUM should be handed back. It ruled that in case of failure to comply by COGEBANQUE Ltd within 30 days from the date of judgment delivery, it shall be subjected to the penalty forcing execution of judgment of 50,000Frw per day. [5] COGEBANQUE Ltd argues that it was requested by Counsel Mutembe Protais who represented Gahitira Cyusa

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5 Richard to hand to him that title deed and in return it requested him to first present the notarized power of attorney with more reasons that it had information that Gahitira and his entire family were then living in Europe; but Mutembe did not comply. Thereafter, the professional Bailiff Kanyana Bibiane has also requested that title deed, but the bank also requested her to present the notarized power of attorney or a written contract that might exist between her and Gahitira Bishumba Raymond. [6] Later on, the Professional Bailiff Kanyana Bibiane issued an enforcement order preceding the distraint by which she ordered COGEBANQUE Ltd to pay 12,000,000Frw computed pursuant to judgment RCOMA0004/14/CS - RCOMA 0121/11/CS and to hand back the house title deed to Gahitira Raymond. Later, she has also attached the Ford brand car plate N° RAB 779 V of COGEBANQUE for its auction to get 12,000,000Frw of the penalty forcing COGEBANQUE to pay. The public auction of that car was scheduled on 21/07/2015. [7] COGEBANQUE Ltd filed a summary procedure claim with the Supreme Court requesting cancellation of the penalty forcing judgment execution (astreinte) imposed by judgment RCOMA0004/14/CS - RCOMA0121/11/CS because it has not refused to execute the judgment, but it was rather blocked from executing the judgment. [8] The case was heard in public on 28/07/2015 where COGEBANQUE Ltd was represented by Counsel Kayitare Serge while Gahitira Cyusa Richard was represented by Counsel Mutembe Protais. COGEBANQUE LTD v. GAHITIRA

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6 RWANDA LAW REPORTS [9] Pursuant to article 316 of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, Counsel Mutembe Protais raised an objection of inadmissibility of the claim of COGEBANQUE Ltd arguing that the summary procedure claim is filed with the court seized with the principal claim still pending; therefore this claim should not be admitted. [10] Counsel Kayitare Serge submits that article 220 of the

aforesaid Law N°21/2012 provides that the court may, upon summary proceedings by the penalised person cancel, suspend the penalty forcing execution during a specified period or reduce it, if the person ordered to pay finds it temporarily or permanently impossible to pay the total or part of the principal penalty awarded. Therefore, he finds no ground why this Court should not admit this summary procedure claim account taken of its nature. [11] After deliberations in camera and pursuant to article 220 of the aforesaid Law N°21/2012, the Court rejected the objection raised by Counsel Mutembe Protais and the hearing on merits resumed. II. ANALYSIS OF LEGAL ISSUES Whether the penalty forcing execution of judgment imposed on COGEBANQUE Ltd should be cancelled. [12] Counsel Kayitare Serge submits that COGEBANQUE Ltd has not refused to deliver the ownership title deed, but it instead requested Counsel Mutembe to produce the notarized power of attorney signed by Gahitira Bishumba Raymond or issued by the Embassy as provided for by article 52 of Law

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7 N°13bis/2014 of 21/05/2014 governing the Office of Notary. He states that Counsel Mutembe has never presented it. Thereafter, came also the Professional Bailiff Kanyana Bibiane to whom COGEBANQUE also requested the same power of attorney or any contract that might exist between her and Gahitira Bishumba Raymond and which she also failed to produce. What followed is that on 11/5/2015, Kanyana issued an enforcement order preceding the distraint whereby she ordered COGEBANQUE to pay 12,000,000Frw of penalty forcing execution of the judgment and to return the house title deed to Gahitira B. Raymond. On 10/7/2015, Kanyana attached the Ford branded car plate N° RAB 779 V of COGEBANQUE for its auction to get the aforesaid amount of money. Counsel Kayitare Serge argues that he fails to understand any link between attachment of the car and the ownership title deed. He has questions about why Counsel Mutembe and Kanyana do not first abide by the law in order to get reply to their requests. He finds that they purposefully do so to increase the amount of fees of that penalty. This is why COGEBANQUE Ltd requests cancellation of this penalty as it has never refused to execute the judgment, but it was rather blocked from executing it. [13] In addition, Counsel Kayitare Serge submits that from the date of judgment delivery on 06/08/2014 the execution of judgment was followed up by Counsel Mutembe while the Bank has only seen Bailiff Kanyana Bibiane in May 2015 when she brought her letter ordering payment of the penalty forcing execution of judgment. He explains that Kanyana Bibiane came to request money instead of requesting the title deed for the house of Gahitira Cyusa Richard; and when COGEBANQUE Ltd requested her to present the written contract between her and Gahitira Bishumba Raymond she did not produce it and it COGEBANQUE LTD v. GAHITIRA

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8 RWANDA LAW REPORTS replied her that once she will present that contract and it will give her the title deed. [14] Counsel Kayitare Serge concludes submitting that the Bank has never refused to comply with what it was requested to hand over; but it was instead blocked from doing so. He further argues that in case Gahitira Bishumba Raymond may personally come or give the

notarized power of attorney, he may be given that title deed without any obstacle. He requests the Court to cancel the penalty forcing execution of judgment or reduce it as also provided by article 220 of the aforesaid Law N°21/2012. [15] Counsel Mutembe Protais argues that it is rather COGEBANQUE Ltd that blocked Gahitira Bishumba Raymond by requesting a notarized power of attorney. He further argues that the Bank had refused to voluntarily hand over that title deed which prompted Gahitira Bishumba Raymond to hire the services of a Bailiff for its forceful hand over by the bank. Moreover, he says that the Bank should have handed over that title deed to Kanyana Bibiane since the bailiff is not required by any law to be in possession of the power of attorney for purposes of judgment execution. [16] Counsel Mutembe Protais submits that Kanyana Bibiane came to request money instead of the house title deed because the Bank has blocked them and when they realised nothing could be done they resorted to the forceful procedure. THE VIEW OF THE COURT [17] In respect to the notarized power of attorney requested by COGEBANQUE Ltd, Counsel Mutembe Protais representing

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9 Gahitira Cyusa Richard argues that article 52, paragraph one of Law N°13bis/2014 of 21/05/2014 governing the Office of Notary provides that the competent Notary shall be qualified to certify the authenticity of a power of attorney issued to one or more persons in order to act on behalf of one or more persons. [18] Pursuant to the aforesaid article 52, the Court finds that only the Notary is competent to certify the authenticity of the power of attorney to act on behalf of another person. Even if the principle is that the mandate contract is concluded by the mere consents of the parties, the third party may require the notarized power of attorney account taken of the nature of the mandate. This is emphasized by the legal scholar Michel Beauchamp who points out that for more safety, the power of attorney should be notarized. This gives it more value as the Notary certifies that the principal really wants to entrust some powers to his/her agent who also agrees to accept¹. The fact that COGEBANQUE Ltd wanted to ascertain the authenticity of the power of attorney given by Gahitira Bishumba Raymond to Counsel Mutembe Protais and required its authentication by the Notary cannot be considered as an obstacle set by the Bank. The Court finds that the Bank, as a professional, could not hand over the house title deed simply on the basis of the power of attorney that is not notarized even if it was presented by an advocate. The fact that the Bank doubted and required a notarized power of attorney

1 “For more safety,... it is advisable to execute a notarized power of attorney. “It has more value. Indeed, the notary certifies that the principal really wants to entrust some powers to his agent who also agrees to accept” (Maryse Guénette, Prudence avec les procurations,<https://www.lebelage.ca/argent-et-droits/vos-droits/prudence-avec-les-procurations?page=all>, accessed on 31/7/2015).

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10 RWANDA LAW REPORTS cannot be considered as setting obstacles with more reasons that Counsel Mutembe Protais does not explain any ground of his failure to present that power of attorney to the bank. [19] With regard to the fact that the Bank blocked the Professional Bailiff Kanyana Bibiane from executing the judgment, the Court finds that after delivery of the Supreme Court judgment N° RCOMA0004/14/CS - RCOMA0121/11/CS of 06/08/2014 to 09/03/2015, Kanyana Bibiane has not requested COGEBANQUE Ltd to pay and that she only notified to COGEBANQUE Ltd the enforcement order preceding dstraint in execution of the aforesaid judgment on 10/3/2015. [20] The Court finds that on 10/03/2015, COGEBANQUE Ltd replied to Kanyana that it has not refused to execute the judgment, but it is rather waiting for Counsel Mutembe Protais to submit the necessary document it requested him to submit and on the same occasion it also requested her to present the written contract between her and Gahitira Bishumba Raymond empowering her to execute that judgment pursuant to article 382 of Law N°12/2013 of 22/03/2013 governing the Bailiff Function. Since Kanyana Bibiane has not presented that written contract provided for by the law before she could be given the title deed, the Court cannot find any ground to decide that COGEBANQUE Ltd refused to execute the judgment.

2 Before executing any judgment, decisions or any other enforcement orders, the professional bailiff shall conclude a written contract with the client specifying the amount of his/her fees and the modalities of payment. That contract must take into account the scale referred to in article 37 of this Law.

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11 [21] Pursuant to article 220 of the aforesaid Law N°21/2012, the Court finds with merit the appeal of COGEBANQUE Ltd praying for cancellation of the penalty forcing execution of the judgment (astreinte) imposed by judgment RCOMA0004/14/CS

- RCOMA0121/11/CS of 06/08/2014; therefore 12,000,000Frw claimed from the Bank as the penalty forcing execution should be cancelled. III. THE DECISION OF THE COURT [22] The Court decides that the summary procedure claim filed by COGEBANQUE Ltd has merit. [23] The Court rules that the penalty forcing execution of the

judgment

ordered in

judgment

RCOMA0004/14/CS - RCOMA0121/11/CS of 06/08/2014 should not be executed. [24] The Court rules that 12,000,000Frw; Gahitira Bishumba Raymond claims from COGEBANQUE Ltd on behalf of his child Gahitira Cyusa Richard as a penalty forcing execution of the judgment are cancelled. [25] The Court rules that once Gahitira Bishumba Raymond will personally come to collect the title deed of the house of his child Gahitira Cyusa Richard or send an agent with notarized power of

attorney and GOGEBANQUE Ltd refuses to hand over the aforesaid title deed it shall be subjected to the penalty forcing judgment execution of 50,000Frw per day that shall be computed from that day. [26] The Court orders Gahitira Cyusa Richard to pay court fees equal to 100,000Frw.

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GATSIBO DISTRICT v. RUZABARANDE ET AL [Rwanda SUPREME COURT – RADA0004/14/CS (Mutashya, P.J., Munyangeri and Gakwaya, J.) July 26, 2015] Administrative procedure – Preliminary objection – Interest of the District to file an action – A district has powers to file an action in its name but its Mayor is summoned in the name of the district – Law N°21/2012 of 14/06/2012, relating to the civil, commercial, labour and administrative procedure, articles 3 and 31. Laws determining the jurisdiction of the courts – Preliminary objection – The pecuniary jurisdiction of the Supreme Court as an appellant court basing on the damages awarded in the appealed judgment – In determining the appellate pecuniary jurisdiction, all damages awarded in the appealed judgment are the ones considered rather than considering separate damages awarded to each individual in the judgment – Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28. Administrative procedure – Preliminary objection – Inadmissibility of the appeal – Similar grounds – A case lost by a party on the same grounds in the first and second levels of court cannot be appealed against in the Supreme Court – Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28. 13

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14 RWANDA LAW REPORTS Facts: Ruzabande and others filed a case against Gatsibo district in the Intermediate Court of Nyagatare claiming that it unlawfully dispossessed them from their land and then transferred it to COOPRORIZ – NTENDEZI without payment of compensation. In its defence, Gatsibo District adduced that this land has never belonged to the respondents; rather it was a marshland belonging to the District it repossessed. That Court held that Gatsibo District unlawfully took the disputed land because it did not first compensate or pay the value of the properties which were on that land. It was therefore ordered to pay adequate compensation to Ruzabande and others for the value of the property and moral damages. Both parties appealed against the judgment in the High Court, Chamber of Rwamagana whereby Gatsibo District claimed that the court charged it with damages whereas the land is among government's marshlands. Ruzabande and others argued that they were awarded inadequate damages. That Court held that the appeal of Gatsibo District has no merit and Ruzabande and others were awarded counsel fees in addition to the one which was awarded to each of them at the first instance level. Gatsibo District appealed again in the Supreme Court, and at the time of hearing Ruzabande and others raised three preliminary objections on the point of law for inadmissibility of the appeal alleging that the district filed a case in its own name instead of filing in the name of its Mayor, the damages awarded in the appealed judgment do not amount to fifty million because the District is opposed to with 37 people whom each had filed his/her own claim

and submission, and each paid the court fees, therefore even though the Court awarded damages amounting to 200,000,000Frw, no one was awarded damages amounting to 50,000,000Frw. Another one is that the District appealed against

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15 the judgment it lost on both the first and the second level based on the same grounds. Regarding the first preliminary objection, Gatsibo District adduces that the law provides for the summoning not for the lodging of the claim, and on the second one it asserts that the subject matter is a government marshland, therefore the laws to be referred to should be those regulating marshland instead of basing on the value of money awarded in judgment and on the third objection, it states that the judge in the Intermediate Court held that the land is a marshland, which implies that it is a public property of the state and this decision does not appear in the decisions of the High Court, therefore the appeal does not rely on similar grounds. Held: 1. A District has the status to file an action in its name but it is summoned in the name of its Mayor.

2. In determining the appellate pecuniary jurisdiction, all damages awarded in the appealed judgment are the ones considered rather than considering separate damages awarded to each individual in the judgment.
3. Both courts held that even though the disputed land is a marshland, it is not a ground for destroying the properties of Ruzabarande and others without adequate compensation while that land was given to them by competent authority, therefore it is apparent that the District lost on the first and second instance on the same grounds, thus the case cannot be appealed in the Supreme Court. GATSIBO DISTRICT v. RUZABARANDE ET AL

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16 RWANDA LAW REPORTS The preliminary objection on inadmissibility of the claim based on the ground of losing the case on the same grounds has merit. The appeal rejected. Court fees to the appellant. Statutes and statutory instruments referred to: Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28. Law N°21/2012 of 14/06/2012, relating to the civil, commercial, labour and administrative procedure, articles 3 and 31. No case referred to.

Judgment

I. BACKGROUND OF THE CASE [1] This case begun in the Intermediate Court of Nyagatare, where Ruzabarande and others filed a case against Gatsibo district for taking their land and later gave it to COOPRORIZ – NTENDEZI to grow rice, they requested the Court to order the district to compensate them with the value of the land and the property which was on that land. In the defence of Gatsibo District, it argued that it repossessed its marshland of Ntendezi. Judgment RADA0038 – 0076/TGI/NYG, was rendered by that court on 11/7/2013, where it ruled that Gatsibo

District unlawfully possessed the land of Ruzabarande and others because it did not adequately compensate them, it ordered it also

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17 to pay them adequate compensation, the value of the property that was on the land and other related damages. [2] Both Gatsibo District and Ruzabarande and others both appealed to the High Court, chamber of Rwamagana where Gatsibo District was arguing that the Court charged it damages while that was a marshland of the state and Ruzabarande and others were claiming that the court awarded them fewer damages, considering the time they were dispossessed from it. [3] The court rendered the

Judgment

RADA0016/13/HCI/RWG - RADA0054/13/HCI/RWG on 17/1/2014, and ruled that the appeal of Gatsibo District has no merit but overruled the appealed judgment only with regards to the counsel fees, whereby each one being given 30,000Frw in addition to 100,000Frw of counsel fees which was awarded to each one of them at the first instance level. [4] Gatsibo District was not contented with the ruling of the case and appealed to the Supreme Court. Counsel Rumenge Victor raised three preliminary objections on point of law, for the inadmissibility of the claim saying that; the district filed a case in its own name instead of filing it in the name of its Mayor, the damages awarded in the appealed court does not reach 50 million and the district lost on the same grounds on both on the first and second level. [5] The case was heard in public on 19/05/2015 whereby the Court first examined the preliminary objections on point of law raised and, Ruzabarande and others were represented by Counsel Rumenge Victor, and Counsel Kayiranga Bernald was representing Gatsibo District. GATSIBO DISTRICT v. RUZABARANDE ET AL

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18 RWANDA LAW REPORTS II. ANALYSIS OF THE OBJECTIONS IN THIS CASE A. Regarding the preliminary objection concerning the fact that Gatsibo District filed on its own instead of filing in the name of its Mayor. [6] Counsel Rumenge Victor argued that the first objection relates to the irregularity in instituting the claim because Gatsibo district (moral person) instituted a legal claim on its own while it is a government organ, which had to file a case in the name of its Mayor. He explains that in general, when a government organ institutes a legal action it does so in the name of its administrator or in the name of a representative of that government institution. [7] He argues that article 31 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, provides that the District (moral person) is summoned in the name of its Mayor and it should be in the same way when instituting a claim and this is emphasised in the first paragraph of article 2 of that law, where it provides for the requirements for the admissibility of the claim and states that a claim cannot be accepted in court unless the plaintiff has the status, interest and capacity to bring the suit. Hence, Gatsibo District does not

have the capacity to institute a legal action. [8] Counsel Kayiranga Bernald states that the objection has no merit, because the Mayor of Gatsibo District is the one who requested the State Attorney to institute an action and plead for the District on the appeal level in a case in which it was a party, therefore Gatsibo District instituted an action in the name of its Mayor, and even in the Intermediate Court the district was

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19 represented by its Mayor, thus the Mayor's signature was not necessary. He affirms that article 31 of the Law No21/2012 mentioned above stipulates on how summon are served but not how claims are instituted. THE VIEW OF THE COURT [9] Article 3 of the Law N°21/2012 of 14/06/2012, stated above, provides that "only the interested parties can introduce an action, except when the law provides otherwise. They have the right at any time to withdraw their claim before the judgment or before its prescription in accordance with the law". Article 31 of that law also regards the special procedure of summons where the Mayor of the district is summoned in the name of the district. [10] Pursuant to those articles, the Court is of the view that the law maker established that whoever seeks to initiate an legal action has to submit a claim, but during the summoning of the parties, there are those who are summoned in a special procedure, and a district is not summoned as such, rather, it must be summoned in the name of its Mayor, which implies that it is not necessary for the district to institute a legal action in the name of its mayor but it is summoned in the name of its mayor. [11] Pursuant to the explanations given above, the Court is of the view that the assertions of Counsel Rumenge Victor that Gatsibo district as an appellant in this case lacks the status, should not be considered. The preliminary objection of inadmissibility of the appeal of Gatsibo District on the ground that it was not lawfully lodged has no merit. GATSIBO DISTRICT v. RUZABARANDE ET AL

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20 RWANDA LAW REPORTS B. Regarding the preliminary objection of inadmissibility on the ground of lack of pecuniary jurisdiction due to the damages not amounting to 50 million. [12] Counsel Rumenge Victor states that they realized the second preliminary objection later and they submitted it to the Court in the additional submission. It concerns that the Supreme Court has the pecuniary jurisdiction to hear cases rendered by the High Court if damages awarded are worth 50,000,000Frw or when the value of the case, as determined by the judge in case of a dispute, is equal to 50,000,000Frw; however, in this case Gatsibo district was sued by 37 people whereby everyone made his own submission, claim and paid his/her court fees, and everyone presented his/her prayers. Moreover, in the course of adjudication, the Court addressed the case individually and therefore it award to every person 50,000,000Frw of damages, which amount to 200,000,000Frw in total; the reason why they request for the rejection of the appeal. He concludes in presenting the case law to be referred to because the subject matter is similar, and that case is RADAA0012/12/CS rendered on 14/06/2013 between Gatsibo district vs Ntezirirazaza Adrien and others. In that case, this Court held that the claim of Gatsibo district should be inadmissible because it was appealed in both Courts on similar grounds. [13] Counsel Kayiranga Bernard states

that this preliminary objection is also baseless, because the subject matter is a marshland and that either abrogated laws or current ones, usually provides for several categories of land which falls into the category of the public domain, and the Court admits that the subject matter is a marshland but disregards the law governing the marshland (swamps) falling within the public domain;

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21 therefore it is impossible to base on the pecuniary value because the public domain cannot be evaluated as such. He continues arguing that the arguments of the Counsel for the respondents who filed against Gasabo District in respect of which his clients were awarded damages which are less than 50,000,000Frw, would result in the modification of the subject matter, because it is in public domain, and this is admitted by the parties; thus the appeal falls into the jurisdiction of the High Court as that objection is baseless. VIEW OF THE COURT [14] Article 28(7) of the Organic Law N°03/2012/OL of 12/06/2012 mentioned above provides that the Supreme Court shall have appellate jurisdiction over cases heard and decided upon in the first instance by the High Court, the Commercial High Court or by the Military High Court, if it involves the judgment in respect of which there was an award of damages of at least fifty million Rwandan francs (50,000,000Frw), or when the value of the case, as determined by the judge in the case of a dispute, is at least fifty million Rwandan francs (50,000,000Frw). [15] The Court finds the damages charged to Gatsibo district at the High Court were awarded in one judgment RADA0016/13/HC/RWG - RADA0054/13/HC/RW, moreover they are exceeding 50,000,000Frw. [16] Hence, the arguments in respect of which each individual on the plaintiff side was awarded damages not exceeding 50,000,000Frw cannot be based on for computation of damages awarded in that judgment, because the legislator GATSIBO DISTRICT v. RUZABARANDE ET AL

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22 RWANDA LAW REPORTS provided for damages awarded in the judgment, rather than damages awarded to each individual in the judgment. Therefore according to the provision of article 28(7) of the Organic Law N°03/2012/OL mentioned above, the preliminary objection for lack of pecuniary jurisdiction relying on the amount of the damages awarded, has no merit. C. Regarding the objection of lack of jurisdiction of the Supreme Court relying to the fact for the appellant to have lost the case on similar grounds at the first and second instance level. [17] Counsel Rumenge Victor states that the third preliminary objection consists of lack of jurisdiction of the Supreme Court to hear the appeal of Gatsibo district because it lost the case at the first and second instance on similar grounds, and in support of that, article 28(9) of the Organic Law determining the organization, functioning and jurisdiction of the Supreme Court, provides that a case lost by a party on the first and second instances on similar grounds shall not be appealed for to the Supreme Court. He explains that at the first instance, the Intermediate Court of Nyagatare declared, on page nine, paragraph 24 in the judgment rendered on July 31, 2013, that even if the subject matter concerns a swamp land as it is explained, which the district repossessed in the public interest while it had given it to Ruzabarande Festo and others, the

plaintiffs acquired it through custom, purchase or through the policy of land sharing; whereas at the High Court, Chamber of Rwamagana, it was declared on page eight paragraph eleven, that the land in litigation belongs to the people who filed against Gatsibo district and it was demonstrated the way they acquired it with a convincing motivation in respect of which some of

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23 them acquired it traditionally from their parents, others through purchase and land sharing policy. [18] Kayiranga Bernard states that the preliminary objection of law concerning the ground that Gatsibo district lost the case on similar grounds at the first and second instance lacks merit because the judge of Intermediate Court held that the subject matter concerns a marshland, which implies it falls into the public domain and that decision does not figure among the decisions of the High Court, therefore, that objection has no merit. VIEW OF THE COURT [19] Concerning the jurisdiction of the Supreme Court, article 28(5) of the Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, provides that a case lost by a party to in the first and second instances basing on similar grounds shall not be appealed for to the Supreme Court. The court will examine whether the grounds which led Gatsibo district to lose the case at the first instance are the same with those which led it to lose it again at the second instance. [20] After analysing the ruling of the judgment at the first instance, that is at the Intermediate Court of Nyagatare as well as the ruling of the judgment at appeal level in the High Court, Chamber of Rwamagana, the Court finds that in the course of the deliberation in respect of which Gatsibo district lost the case, it was held in both Courts that even if the land in litigation is a marshland, it would not be the reason of destroying their assets without paying them related compensation, yet they GATSIBO DISTRICT v. RUZABARANDE ET AL

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24 RWANDA LAW REPORTS acquired that land from the competent authorities who gave them their titles deeds. Therefore, in case the district repossesses it, then fair compensation should be paid to them by the district. [21] Basing on article 28(5) of the Organic Law N°03/2012/OL of 13/06/2012 mentioned above which provides that a case lost by a party in the first and second instances on similar grounds shall not be appealed to the Supreme Court; the Court finds that Gatsibo district lost the case for the first and second instance on similar grounds in both previous Courts, therefore the appeal lodged by Gatsibo district is inadmissible because it does not fall into the jurisdiction of the Supreme Court. III. DECISION OF THE COURT [22] Holds that the preliminary objection raised by the Counsel for Ruzabarande Festo and others has merit. [23] Rejects the appeal of Gatsibo District. [24] Orders that the Court fees be borne by the public treasury.

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KARANGWA v. MUKASHARANGABO ET AL [Rwanda SUPREME COURT – RC0005/15/CS (Mutashya, P.J., Munyangeri and Gakwaya, J.) June 26, 2015] Law determining the jurisdiction of courts – Jurisdiction of the supreme court – Objection of inadmissibility – The nature of the claim relating to provisional suspension of the execution of the judgment – Whether or not the Supreme Court is competent to hear summary procedure claims – The fact that the hearing of the claim relating to provisional suspension of execution of the judgment follows the rules of procedure for summary procedure claims, implies that such claims are of summary procedure claims in nature – The fact that the Supreme Court has jurisdiction to hear main claims related to case review due to injustice, implies decidedly that, it has also jurisdiction to hear summary procedure claims which are accessory to the main claim – Nothing is likely to prevent the process for summary procedure claim accessory to the main claim filed in accordance with extraordinary remedies to be followed even for claims for case review due to injustice – Considering that the Supreme Court judgment on summary procedure claim is not subject to appeal since its decisions are not subject to appeal, is not a ground for lack of jurisdiction by the Supreme Court over summary procedure claims – Organic Law N°03/2012/OL of 13/6/2012 determining the organisation, functioning and jurisdiction of the Supreme Court, articles 78, 85 and 89 – Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, articles 316(2) and 317. 25

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26 RWANDA LAW REPORTS Law determining the jurisdiction of courts – Jurisdiction of the Supreme Court – Review of a judgment due to injustice – Parties in a case under review due to injustice – Provisional suspension of judgment execution – Even if it is the Office of the Ombudsman which requests for review of final judgments due to injustice to the Supreme Court, but during the hearing, the parties remain those who were involved in the final judgments and they are the ones who submit their submissions for allegations and defence to the court – Organic Law N°03/2012/OL of 13/6/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 85 – Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, articles 179, 190, 214(2o) and 316. Civil procedure – Provisional suspension of judgment execution – If the execution of the judgment is likely to result in damages to the detriment of some litigants in case they win the case, the Court may suspend the execution of the judgment in the interest of justice.

Facts:

This case originates from the

judgment

RCA0221/05/HC/KIG - RCA0221/09/HC/KIG which was rendered by the High Court and decided that all children of Karimunda Gérard fathered with Mukasharangabo Eugénie, Nyirakamana Marciana and Mukandori Epiphanie should inherit his assets without any discrimination and therefore will share the whole property after its inventory for that purpose and that those who died shall be represented by their offsprings. Nyirakamana Marcianna who intervened in the case was not satisfied with the decision and informed the Office of the Ombudsman on the injustice comprised in the decision. The

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27 Office of the Ombudsman requested in writting the President of the Supreme Court to review the jugdment due to injustice. Meanwhile, the same judgment was being executed by the appointed liquidator of inheritance and among the decisions he was implimenting includes the one relating to auction of all assets in order to facilitate the sharing of the proceeds among the heirs. After the Supreme Court recorded the claim, the counsel for Karangwa Denys filed a summary procedure claim praying the court to provisionally suspend the execution of the judgment while the decision on case review due to injustice was still pending. He relies his prayers on the ground that there are minutes of a meeting held among some of the heirs only because there was misunderstanding between all heirs. The minutes indicate in articles 3 and 6 that the house located at Gikondo and other immovable properties should be auctioned in order to share the proceeds of sale. He further argues that the review of the judgment due to injustice would result in the decision which is contrary to the decision which is being executed, therefore all prior steps would be nullified while some properties would have already been auctioned. At the beggining of the hearing, Counsel Twayigize Jean- Claude for some of defendent heirs raised an objection of inadmissibility of this summary procedure claim alleging that it does not consist of summary procedure nature as long as the main claim is inexistant. He further explains the lack of the main claim stating that the application for case review due to injustice on which the applicant relied on the request for the provisional suspension of the execution of the judgment was submitted by the Office of Ombudsmen, therefore he is not a party to this case and the Office of Ombudsmen is not party to the summary procedure. He also raised another objection stating KARANGWA v. MUKASHARANGABO ET AL

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28 RWANDA LAW REPORTS that pursuant to articles 317, 320 and 322 of the Law N°21/2012 of 14/06/2012 relating to civil, commercial, social and administrative procedure, the Supreme Court is not competent to hear summary procedure claims as the legislator did not provide for it because it would deprive one party of the right to appeal as the claim would be heard for the first instance at the Supreme Court. Concerning the merits of the case, he states that the claim was irregularly submitted since the claimant does not have any legal ground because he admits the execution of the judgment which is being conducted by the liquidator but his concern is only to

suspend the auction. He further states that the house located at Gikondo is not being auctioned and that the liquidator is still identifying all heirs in order to collaborate with them, therefore it is uncomprehensible how the claimant does not need to collaborate with him. Hakizimana John, counsel for the claimant declares the statements of the defendants without merit since there exists the main claim and the parties in this case concerning the summary procedure are the same as in the main claim. He states in addition that it is not the Office of the Ombudsman which seized the Court with the main claim, rather, the claimants that are parties in the summary procedure claims, therefore, the summary procedure is directly connexed to the application for review of judgment due to injustice. He further states that, whenever there is a main claim, any court may be seized through a summary procedure claim in order to preserve potential damages and that is not the first time for the Supreme Court to hear the summary procedure claims because there are other instances where the Supreme Court hears cases at the first instance where the law did not provide for appeal, therefore if in

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29 a civil case the judge finds that the law is silent, nothing prevents him/her from ruling *ex aequo et bono* considering the provisions of the law regarding the application for review. Counsel Rusanganwa Jean-Bosco states that GT Bank Ltd intervened in the case to only indicate its credit which has to be considered at the time of assets sharing. Held: 1. Considering that the hearing of the claim for the provisional suspension of the execution of the judgment is conducted as that of summary procedure claims, this entails that the legislator intended for those cases to be of summary procedure claims in nature. Such claim can be initiated before the court of appeal (ordinary appeal) if the Court at the first instance ordered the provisional execution of the judgment, or it can be initiated in the court which was seized by the third-party opposition claim as well as before the court seized by application for review; meaning in case the judgment is subject to extraordinary way of appeal (third party opposition and application for review), become final.

2. Considering that article 85 of the Organic Law No03/2012/OL of 13/6/2012 determining the organization, functioning and jurisdiction of the Supreme Court concerning the application for the provisional suspension of the execution of the appealed judgment is silent about review of a judgment due to injustice; pursuant to article 89 of the same Organic Law, nothing can prevent the provisions of the Law N°21/2012 of 14/06/2012 relating to civil, commercial, social and administrative procedure concerning the extraordinary ways of appeal to be applied in case of applications for review of a judgment due to injustice. Therefore, the party who lodged such KARANGWA v. MUKASHARANGABO ET AL

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30 RWANDA LAW REPORTS claim can pray the court for provisional suspension of a judgment execution through a summary procedure claim.

3. Though it is the Office of the Ombudsman which initiates applications for final judgment review due to injustice to the Supreme Court, but in the course of hearing the parties remain the same as of those in the judgment under review due to injustice and the same parties provide court submissions. Therefore, parties in the judgment RC0005/15/CS are the same as those in the main case RS/REV/INJUST/CIV0007/15/CS except the Office of the Ombudsman which was not party to these cases.
4. Considering that the Supreme Court is competent to hear applications for review of final judgments due to injustice, it is undoubtedly that, as a Court seized with the main case which is not heard by other courts, has also jurisdiction to hear summary procedure claims which are accessory to that main claim.
5. Considering that all the heirs are in disagreement on the inheritance, and taking into account that those assets can be sold at any time, the Supreme Court finds that, in the interest of justice, it is necessary to suspend the execution of the judgment because its execution is likely to be detrimental to some of the heirs' interests in case they win the case initiated to the Supreme Court. Objection rejected. Summary procedure claim admitted. Court fees shall be paid by the respondents.

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31 Statutes and statutory instruments referred to: Organic Law N°03/2012/OL of 13/6/2012 determining the organisation, functioning and jurisdiction of the Supreme Court, articles 78, 85 and 89. Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, articles 179, 190, 214(2°), 316(2°) and 317. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] On 30 April 2010, the High Court rendered the judgment RCA0221/05/HC/KIG - RCA0221/09/HC/KIG, in which it ruled that all children of Karimunda Gérard fathered from Mukasharangabo Eugénie, Nyirakamana Marciana and Mukandori Epiphane should inherit him without any discrimination basis and share all assets to be valued at the time of succession and that those who died shall be represented by their offspring. [2] Nyirakamana Marciana submitted a claim to the Office of the Ombudsman alleging the injustice she faced in that judgment and on 5 November 2014, the Office of the Ombudsman wrote to the President of the Supreme Court requesting the review of the aforementioned judgment due to injustice. KARANGWA v. MUKASHARANGABO ET AL

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32 RWANDA LAW REPORTS [3] Meanwhile, Counsel Karambizi Canisius, the liquidator of the inheritance was executing the judgment and among the ruling of the judgment includes the auction of all assets to facilitate the sharing of the proceeds. [4] On 28 April 2015, Hakizimana John counsel for Karangwa Denis, prayed the Court to suspend the execution of the judgment

provisionally while its review due to injustice is still pending adjudication. He explains that the urgency relies on the fact that the adjudication on the application for review due to injustice would result in the decision which contradicts the ruling in the judgment under execution and therefore all execution steps be void while some assets would have already been auctioned. [5] The hearing was held in public on 22 June 2015, Karangwa Denis, Nyirakamana Marciana, Karigirwa Edinas, Kantamage Jacqueline and Centre Motors Parts Ltd represented by counsel Hakizimana John while Mukasharangabo Eugénie, Mukashema Madeleine, Nyirashema Marie, Habimana Ildephonse's heirs (Shumbusho Fidèle and Habimana Nadine) represented by counsel Nsabimana JeanBaptiste, and the heirs of Bitwayiki Martin, Mukandekezi Alphonsine, Mukanoheli Mariana and those of Ntahobari Nasson represented by counsel Twayigize Jean Claude who also assisted Kalimunda Hakizimana Alphonse, while GT bank Ltd (ex-Fina bank Ltd) was represented by counsel Rusanganwa Jean Bosco. [6] In the course of the hearing, Counsel Twayigize Jean Claude raised an objection of inadmissibility of the summary procedure claim since it is not among the summary procedure claims and that the Supreme Court is not competent to hear it.

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33 The Supreme Court decided to hear both this objection and summary procedure claim in merits. II. ANALYSIS OF LEGAL ISSUES A) To examine whether the claim initiated by Karangwa Denis is a summary procedure claim in nature. [7] Counsel Twayigize Jean Claude states that in accordance with article 316 of Law N°21/2012 of 16/07/2012 relating to civil, commercial, social and administrative procedure, the summary procedure claim initiated by Karangwa Denis is not a summary procedure claim in nature due to the lack of the main claim to which it is attached. He explains the inexistence of the main claim by declaring that the claimant requests the suspension of the execution of the judgment basing on the application for judgment review due to injustice which was initiated by the Office of the Ombdsman that was not a party to the case, therefore he finds that according to the law, the claim should have been initiated by the claimant himself, who then would request for the suspension of the execution of the

judgment.

[8] Counsel Twayigize Jean Claude keeps stating that pursuant to article 85 of the Organic Law N°03/2012/OL of 13/6/2012 determining the organisation, functioning and jurisdiction of the Supreme Court, the application for review mentioned by the claimant should not be considered as a summary procedure claim since this article provides that a review of a final decision due to injustice shall not suspend the execution of the judgment, therefore he finds that it is impossible to initiate a summary procedure claim accessory to KARANGWA v. MUKASHARANGABO ET AL

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34 RWANDA LAW REPORTS the application for final judgment review due to injustice. Therefore that summary procedure should not be admitted. [9] Counsel Hakizimana John refutes the allegations of the defendants arguing that there is a main claim, especially that it has been prepared for hearing. He also states that the parties in this summary procedure claim are the same as those ones in the main claim. He further argues that it is not the Office of the Ombudsman which seized the court with that main claim, rather, it is the claimants who lodged the summary procedure claim, hence, this summary procedure claim is really accessory to the application for review of final judgment due to injustice. [10] Regarding article 85 of the aforementioned Organic Law N°03/2012/OL of 13/6/2012, Counsel Hakizimana John states that they based the initiation of their summary procedure claim on article 316 of the aforementioned Law N°21/2012 of 16/07/2012 which provides that whenever there exists a main claim in a court and a need to have an interim ruling on a matter which requires urgent resolution, an action for summary procedure shall be filed in that same court. He further argues that this case being civil, if the judge finds that the legislator was silent (Loophole), it is not forbidden to rule by analogy in accordance with the provisions of the law relating to the review of final judgments. [11] Counsel Nsabimana Jean Baptiste states that he concedes to the arguments of Counsel Twayigize Jean Claude since the summary procedure claim is accessory to the main claim submitted by the Office of the Ombudsman and in respect of which court fees were paid. He argues that the parties to the case have never initiated that claim and therefore parties are not identical in both cases.

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35 [12] Counsel Nsabimana Jean Baptiste further argues that the provision of article 85 of the aforementioned Organic Law N°03/2012/OL of 13/6/2012 is imperative. [13] Counsel Rusanganwa Jean Bosco states that the Supreme Court has decided on the issue of identification of parties as far as application for judgment review due to injustice is concerned, where it ruled that the Office of the Ombudsman is not the applicant to the Supreme Court, and in accordance with articles 80 and 81 of the aforementioned Organic Law N°03/2012/OL of 13/6/2012, it is the President of the Supreme Court who decides on the recording of this claim in court's registry. [14] Counsel Rusanganwa Jean Bosco states in addition that the application for judgment review due to injustice does not entail the suspension of the execution of the judgment, but he is of the view that all cases relating to application for review are almost similar and he finds that in this case, the Court should apply the provisions relating to the application for review. OPINION OF THE COURT [15] Article of Organic Law N°03/2012/OL of 13/6/2012 determining the organization, functioning and jurisdiction of the Supreme Court provides that "With regard to matters not provided for in this Organic Law relating to rules of procedure applicable to proceedings before the Supreme Court, the rules of procedure governing proceedings before other ordinary courts shall apply". KARANGWA v. MUKASHARANGABO ET AL

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36 RWANDA LAW REPORTS [16] Article 316 of Law N°21/2012 of 14/06/2012 relating to civil, commercial, social and administrative procedure provides that “When there is need to have an interim ruling on a matter which requires urgent resolution, an action shall be filed in accordance with the ordinary procedure regarding principal suits, before an urgent applications judge in the jurisdiction where the urgent measure is required in accordance with ordinary summons procedure”. [17] The Supreme Court finds that pursuant to article 214(2°) of the aforementioned Law N°21/2012 of 14/06/2012, it is undoubtedly comprehensible that the provisional suspension of the execution of the judgment is the claim which is heard in accordance with the procedure for summary procedure claims, and this implies that the legislator intended for such claims to be considered as summary procedure claims. The court also finds that such claim may be filed to the appellate Court (appeal as an ordinary remedy) in case the first instance court decided the provisional execution of the judgment, or it would be filed to the court which was seized by a third party opposition claim and to the court which is seized by the application for review of final judgment, consequently in case of a judgment subject to extraordinary procedures of appeal (third party opposition and application for review) become final. [18] The Supreme Court finds that such claims are filed when the party has filed a main claim or an ordinary appeal or a third- party opposition or an application for review. [19] The Supreme Court finds that Karangwa Denis has filed a summary procedure claim requesting the suspension of the execution of the

judgment

RCA0221/05/HC/KIG - RCA0221/09/HC/KIG while the application for judgment

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37 review due to injustice is still pending and furthermore, that claim of application for judgment review due to injustice was recorded in the appropriate court registry on RS/REV/INJUST/CIV0007/15/CS, implying that the summary procedure claim which is recorded on RC0005/15/CS is accessory to the main claim RS/REV/INJUST/CIV0007/15/CS. [20] The Supreme Court finds that, considering that the judgment RC0005/15/CS related to summary procedure claim requesting the provisional suspension of the execution of the judgment RCA0221/05/HC/KIG - RCA0221/09/HC/KIG is accessory to the judgment RS/REV/INJUST/CIV0007/15/CS related to the review of the judgment RCA0221/05/HC/KIG - RCA0221/09/HC/KIG due to injustice; the statements of counsel Twayigize Jean Claude are without merit. [21] In addition, considering that the legislator has fairly determined the claim for provisional suspension of execution of the judgment as a summary procedure claim in nature in respect of which summon to appear should be served within two (2) working days and consequently the court should decide within forty eight (48) days computed from the day of the last hearing; the Supreme Court finds that the statements of Counsel Twayigize Jean Claude according to which the claim submitted by Karangwa Denis is not a summary procedure claim cannot be considered. [22] The Supreme Court finds that albeit

article 85 of the aforementioned Law N°03/2012/OL of 13/6/2012 is silent about the application for review of a judgment due to injustice, but pursuant to article 89 of the aforementioned Organic Law, there is nothing likely to prevent the provisions relating to extraordinary ways of appeal, especially article 179, litera 5 and KARANGWA v. MUKASHARANGABO ET AL

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38 RWANDA LAW REPORTS 6 and article 190 of the aforementioned Law N°21/2012 of 14/06/2012 to be applied to cases concerning applications for review of a judgment due to injustice. This implies that the party who filed the application for review of a judgment due to injustice can pray the Court to urgently order the provisional suspension of the execution of the judgment. [23] Except that, even if the law was silent, it is not forbidden to the applicant to request for it if he/she finds it beneficial since the law does not prohibit it, therefore to request it does not contravene the provision of article 85 of the aforementioned Organic Law. [24] Regarding the statements of counsel Twayigize Jean Claude which mention that the summary procedure claim filed by Karangwa Denis should not have been admitted because the parties in this case are different from parties in the main claim relating to the review of judgment due to injustice; the Supreme Court finds that though it is the Office of the Ombudsman which addresses applications for review of final judgments due to injustice to this Court, but in the course of the hearing, parties to the case remains the same as in the case under review and it is up to them to submit court briefs, therefore the arguments of counsel Twayigize Jean Claude should not be considered since parties in the summary procedure claim RC0005/15/CS were the same as in the main claim RS/REV/INJUST/CIV0007/15/CS apart from the Office of the Ombudsman which was not party to those cases. [25] Considering the statements mentioned in previous paragraphs, the Supreme Court finds that the objection of inadmissibility of the summary procedure claim raised by Counsel Twayigize Jean-Claude is without merit.

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39 B) To examine whether the Supreme Court has jurisdiction to hear summary procedure claims. [26] Counsel Twayigize Jean Claude states that pursuant to articles 317, 320 and 322 of Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, the Supreme Court is not competent to hear summary procedure claims as the law is silent. [27] Counsel Twayigize Jean Claude explains that the fact that the law is silent is not a mistake, rather, its provision would lead to the prevention of one of the parties of the right to appeal since there is no other way of appeal available in case the summary procedure claim is heard at the first instance by the Supreme Court. He finally states that there is no any provision of the law which assigns the Supreme Court the jurisdiction to hear the summary procedure claim at the first instance and in accordance with article 317 of the aforementioned Law N°21/2012 of 14/06/2012, the Supreme Court is not among competent courts to be filed with summary procedure claims. [28] Counsel Hakizimana John states that when there exists a main claim, any court may be seized with a summary procedure claim in order to avoid loss. He further states that it is not the first time for the Supreme Court to hear such claim and that there are other case instances

whereby the Supreme Court hears cases at the first instance in case the law does not provide for appeal. He finally argues that there is no any obstruction towards the Supreme Court to decide on summary procedure claim especially that there will be a decision on the main claim. [29] Counsel Rusanganwa Jean Bosco states that the law established a list of courts which have jurisdiction to hear KARANGWA v. MUKASHARANGABO ET AL

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40 RWANDA LAW REPORTS summary procedure claims but the Supreme Court does not appear among them. However, he finds that in order to resolve this issue, the Supreme Court should apply the provision of article 6 of the aforementioned Law N°21/2012 of 14/06/2012. OPINION OF THE COURT [30] Article 317(1) of the aforementioned Law N°21/2012 of 14/06/2012, provides that “The President of the Primary Court or another designated judge shall hear summary procedure cases that fall within the jurisdiction of that Court and thereafter take a decision”. Its paragraph 2 states that “The President of the Intermediate Court, Commercial Court or another designated judge shall hear summary procedure cases that fall within the jurisdiction of that court and thereafter take a decision”, while its paragraph 3 reads that “The President of the High Court, the Commercial High Court or another designated judge shall hear summary procedure cases that fall within the jurisdiction of that court and thereafter take a decision”. [31] The Supreme Court finds that article 317 of the aforementioned Law N°21/2012 of 14/06/2012 does not mention Supreme Court because its jurisdiction and functioning are determined by a specific Organic Law, therefore it is comprehensible that the provisions of that article which relate to the jurisdictions of court concern the lower courts to the Supreme Court (Primary Court, Intermediate Court and High Court). It finds however that pursuant to article 89 of the aforementioned Organic Law N°03/2012/OL of 13/6/2012, the provisions of article 316 of the above mentioned Law N°21/2012 of 14/06/2012 should be applied even to the Supreme Court.

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41 [32] The Supreme Court finds that in accordance with article 78 of the Organic Law N°03/2012 of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, the latter has jurisdiction to hear applications for review of final judgment due to injustice. [33] It finds therefore that as above explained, the fact that the Supreme Court is competent to hear applications for review of final judgments due to injustice, it undoubtedly implies that as a court seized with the main claim which does not fall within the jurisdiction of any other court, it has also jurisdiction to hear summary procedure claims which are accessory to the main claim of which it is seized with. [34] The Supreme Court finds that as the law has provided that the applications for review of final judgments due to injustice shall be heard at the first and last instance by this court, this is not likely to prevent parties to submit summary procedure claims because such a claim is only intended to pray the Court to take a provisional decision while the main claim is still pending and it is likely to be overruled by the decision on the merits of the case. In addition, the fact that the urgent decision of the Supreme Court is not appealable because its decisions are not subject to appeal, is not a ground to substantiate that it has no jurisdiction to

hear summary procedure claims. [35] Considering the above arguments, this objection of inadmissibility of the summary procedure claim initiated by Karangwa Denis as raised by counsel Twayigize Jean Claude is without merit. KARANGWA v. MUKASHARANGABO ET AL

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42 RWANDA LAW REPORTS C) To examine whether the execution of the judgment RCA0221/05/HC/KIG - RCA0221/09/HC/KIG would be provisionally suspended pending the decision on the application for review of a final judgment due to injustice. [36] Counsel Hakizimana John states that Karangwa Denis prays the Court to provisionally order the suspension of the execution of that judgment whereas the decision on its application for review due to injustice still pending. He explains that the existant urgency relies on fact that the decision on the review of that judgment could result in contradiction with the decision in the course of execution and this is likely to make void all execution steps whereas some of the assets would have been auctioned. [37] Counsel Hakizimana John also states that there are minutes of meeting which was held among some of the heirs because there were disputes among them. They indicate in clauses 3 and 6 that the house located in Gikondo and other immovable assets should be auctioned and proceeds thereto be shared. [38] Counsel Twayigize Jean-Claude states that the claim was irregularly submitted because the claimant admits that he has no concern with the subject matter of the claim and he agrees with the execution of the judgment which is being performed by a liquidator but his only wish is to avoid the auction. He keeps saying that the house located in Gikondo is not on sale and that no any other house was auctioned because the liquidator is still identifying all heirs. He concludes his statements mentioning that the liquidator collaborates with heirs and he does not realize why they do not need to collaborate with him.

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43 [39] Counsel Nsabimana Jean Baptiste states that the judgment was rendered in 2010, and it was decided that all assets be shared among all heirs. He states in addition that Karangwa Denis was satisfied with that ruling but thereafter, he files this claim, therefore no urgent measure is manifest in this case. [40] Counsel Rusanganwa Jean Bosco states that GT Bank Ltd appeared to only justify the existence of its credit encumbrances on assets to be shared. OPINION OF THE COURT [41] The Supreme Court finds that according to article 3 of the minutes of late Kalimunda Gérard's heirs meeting which was held on 25 July 2014, the participants decided that the management of the inheritance, which includes the uncompleted warehouse located in Gikondo, is impossible because the heirs are in disagreement, and therefore they decided to initiate the auction of all assets for the sharing of the proceeds among all heirs. [42] Considering the arguments mentioned in the previous paragraph, the Supreme Court finds that as all the heirs disagree on the total of the assets left by Kalimunda Gérard and indeed some of them claim that he has granted to them some of assets before his death, therefore they should not be included in the inheritance, and this being the ground of injustice declared in the judgment RCA0221/05/HC/KIG - RCA0221/09/HC/KIG; considering that those assets could be sold at any time, the Supreme Court finds that in the interest of justice, it is fair to suspend the execution of the aforementioned

judgment since its KARANGWA v. MUKASHARANGABO ET AL

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44 RWANDA LAW REPORTS execution is likely to be detrimental to some of the heirs' interests in case they win the case they initiated in the Supreme Court. [43] Considering these grounds, the Supreme Court finds that the action initiated by Karangwa Denis has merit, therefore the execution of the judgment should be suspended until the decision of the judgment on merit as long as the adjudication by this Court is still pending. III. DECISION OF THE COURT [44] The Supreme Court decides that the objections raised by Kalimunda, Hakizimana Alphonse and the heirs of Bitwayiki Martin, Mukandekezi Alphonsine, Mukanoheri Mariana and those of Ntahobari Nasson represented by counsel Twayigize Jean Bosco, is without merit. [45] The Supreme Court decides that the summary procedure claim initiated by Karangwa Denis has merit. [46] The Supreme Court orders the suspension of the execution of the

judgment

RCA0221/05/HC/KIG - RCA0221/09/HC/KIG until the ruling of the judgment RS/REV/INJUST/CIV0007/15/CS. [47] The Supreme Court orders Kalimunda Hakizimana Alphonse and the heirs of Bitwayiki Martin, Mukandekezi Alphonsine, Mukanoheri Mariana and those of Ntahobari Nasson to pay court fees amounting to 100,000Frw.

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MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL. [Rwanda SUPREME COURT – RADA0030/12/CS – (Mukamulisa, P.J., Mukandamage and Gatete, J.) October 10, 2014]. Administrative procedure – Public auction – The Case requesting for annulment of the auction conducted unlawfully can be subject to appeal since it is not a case relating to dispute arising from enforcement of the judgment – Decree Law N°09/80 of 07/07/1980 relating to organisation and jurisdiction of Courts, article 176. Administrative procedure – Public auction – A creditor or a debtor who deems that the bid price is low may request the public auction to be adjourned to another specific day on which day the public auction has to be conducted and the value of the property must be ascertained on the current market value – The law of 15/07/1964 of civil and commercial procedure, article 336. Administrative procedure – Public auction – Alienation of an immovable property or any other form of creation of rights in favour of a third party by the debtor after being served with the writ of attachment is impossible unless the beneficiary accepts to pay the debt and the court fee owed to the creditor – The law of 15/07/1964 of civil and commercial procedure, article 361. Facts: In the context of enforcement of the judgment RPA8787/KIG in which Mukamusoni was ordered to pay 3,690,000Frw to Ntiserurwa and the prorated fee the court bailiff auctioned the house of Mukamusoni. Thereafter, 45

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46 RWANDA LAW REPORTS Mukamusoni filed a case against the court bailiff and his employer which is the Government of Rwanda before the High Court asserting that the auction was unlawfully conducted. Kamali, who bought that house from Yansoneye Consolée who asserts that the house auctioned is a property he bought before the commencement of public auction process, intervened in the case. The Court decided that her claim is not founded and ordered her to pay Kamali damages, counsel fees, prorated fee and court fees. Mukamusoni appealed before the Supreme Court asserting that the Court bailiff did not respect the procedure of auction, because he did not serve Mukamusoni with prescribed documents, he auctioned the property on a lower price and he executed the judgment on the prorated fee, yet it was paid. The State raised an objection on inadmissibility of appeal on the ground that the judgment was rendered on the disputes arising from the enforcement of the judgment which is not subject to appeal while Kamali asserts that the issue in this case relates to the way the judgment was enforced and therefore, it should not be admitted. Mukamusoni and Yansoneye assert that the claim of Mukamusoni is not related to disputes arising from enforcement of the judgment but instead, it is based on annulment of the public auction conducted unlawfully. The Court decided that the objection raised by the State of Rwanda has no merit. With regard to the assertion that there are necessary procedures that were not respected by the court bailiff while conducting the auction, the State of Rwanda asserts that the president of the court issues the auction order after examining whether all formalities were respected and that order of the president of the

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47 court has never been invalidated, since Mukamusoni did not appeal against it. Held: 1. The Case requesting for annulment of the auction conducted unlawfully can be subject to appeal since it is not a case relating to disputes arising from enforcement of the

judgment.

2. A creditor or a debtor who deems that the bid price is low may request the public auction to be adjourned to another specific day on which day the public auction has to be conducted and the value of the property must be ascertained on the current market value.
3. Alienation of an immovable property or any other form of creation of rights in favour of a third party by the debtor after being served with the writ of attachment is void unless the beneficiary accepts to pay the debt and the court fee owed to the creditor.
4. The plaintiff must prove his allegations, failure of which the defendant wins the case. The fact that Mukamusoni failed to indicate the prescribed documents she asserts she was not served by the court bailiff, lends this ground baseless.

5. Kamali should be awarded damages for not residing in his house, procedural and counsel's fees, but all has to be determined within the discretion of the Court. Appeal has merit in part. The objection raised by Yansoneye is overruled. Cross appeal raised by Kamali has merit in part. The public auction conducted is valid. MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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48 RWANDA LAW REPORTS Court fees to be borne by the appellant and government treasury. Statutes and statutory instruments referred to: Organic Law N°51/2008 of 9/9/2008 determining the organization, functioning and jurisdiction of Courts, article 93. Law N°21/2012 of 14/6/2012 relating to the civil, commercial, labour and administrative procedure, article 9. Decree Law N°09/80 of 07/07/1980 relating to organisation and jurisdiction of Courts, article 176. The Law of 15/07/1964 of civil and commercial procedure, articles 336, 351, 357 and 361. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Mukamusoni Béatrice filed a case against the court bailiff Kagaju and his supervisor, the Government of Rwanda requesting the court to invalidate the public auction conducted on 21/06/2002 in the course of which her house was illegally sold while enforcing the judgment RPA8787/KIG which ordered her to pay Ntiserurwa Christophe 3,690,000Frw and the prorated fee equal to 147,600Frw. Kamali Emmanuel who bought the house and Yansoneye Consolée who asserts that the

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49 auctioned house belongs to him because she bought it from Mukamusoni, intervened in the case. [2] The High Court rendered the judgment in default of Kagaju and Yansoneye, while they were legally summoned. It decided that the auction of the house of Mukamusoni Béatrice that was located in the plot N° 112 at Kimironko remains valid, because her arguments that there have been irregularities, that the public auction was made on an unidentified house (maison non identifiée), that the court bailiff did not adjourn the auction due to the low price, yet she had requested him to do so, that the court bailiff mentioned 147,600Frw of prorated fee in the writ of attachment yet she had paid it, and that she did not refund her the balance after enforcement of the judgment, have no merit. [3] The Court ordered Mukamusoni to pay Kamali Emmanuel damages equal to 1,000,000Frw and the counsel fees equal to 300,000Frw which in total equal to 1,300,000Frw and the payment of its prorated fee equal to 52,000Frw and to pay the court fees. [4] Mukamusoni appealed before the Supreme Court asserting that the bailiff Kagaju did not respect the procedure of the public auction, that the house was auctioned at a lower cost but the judge did not consider it, that he enforced the judgment on the prorated fee yet it was paid, she was not given the balance of money after the auction of the house and the judge disregarded the submissions proving that among the auctioned assets included a house belonging to Yansoneye Consolée. [5] The Attorney General for the Government of Rwanda raised an objection of

inadmissibility of the appeal lodged by Mukamusoni, asserting that the judgment rendered on the MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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50 RWANDA LAW REPORTS disputes arising from enforcement of judgment is not subject to appeal. [6] Yansoneye Consolée who intervened in the case asserts that the house that was auctioned belongs to her because she bought it from Mukamusoni Béatrice. [7] The hearing was heard in public on 09/09/2014, Mukamusoni being represented by Counsel Mboniyimpaye Elie, while the State of Rwanda was represented by Ntaganda Felix, the Principal State Attorney, Kamali Emmanuel being represented by Counsel Bigaraba John, Yansoneye Consolée represented by Counsel Gumisiriza Hilary and Kagaju Alphonse defaulted while he was summoned to unknown address in accordance with the law. II. ANALYSIS OF LEGAL ISSUES A. To determine whether the appeal of Mukamusoni should not have been admitted. [8] Ntaganda, the State attorney for the Government of Rwanda asserts that the appeal of Mukamusoni should not be admitted as she filed against the State of Rwanda and the court bailiff Kagaju who auctioned her house, claiming for the annulment of that auction because of irregularities and she filed before the High Court that replaced the Court of Appeal of Kigali, as it was the one that rendered at the last instance the judgment RPA8787/KIG that was to be enforced, thus the disputes based on the enforcement of the judgment are heard by the court that rendered it at the last instance and those judgments are not subject to appeal as provided for under article

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51 208(2) of the Law No21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure. [9] Counsel Mboniyimpaye on behalf of Mukamusoni asserts that the objection raised by the State of Rwanda has no ground since article 208(1) of the Law N°21/2012 of 14/06/2012 on which the principal State attorney bases his objection of inadmissibility, provides for the disputes that arise in the course of enforcement of the judgment whether in process or already closed which is different from the claim of Mukamusoni consisting of annulment of the public auction conducted in violation of the law. [10] He adds that the invocation of this objection leads to the modification, by the Government, of the claim filed by Mukamusoni in the High Court and this is prohibited on appeal level as provided for in article 4 of the Law relating to civil, commercial, labour and administrative procedure. [11] Counsel Gumisiriza on behalf of Yansoneye also asserts that the claim instituted before the High Court by Mukamusoni was meant for the annulment of the public auction conducted in violation of the law, which is different from asserting that there are disputes arising between two parties as asserted by the State Attorney. He finds that there have been irregularities in the seizure and the auction of the property meant to be sold and the one which was not supposed to be sold; thus Yansoneye should not be the victim, and the court should base on article 268 of the law relating to civil, commercial, labour and administrative procedure which states about prohibition of sale of the seized assets, instead of basing on the aforementioned article 208. MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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52 RWANDA LAW REPORTS [12] Counsel Bigaraba John representing Kamali asserts that the issue in this case concerns the way the judgment was enforced, therefore the fact that Mukamusoni did not seize other courts, rather she seized the court that rendered the judgment at the last level indicates that the subject matter consists of the disputes that arose from the enforcement of the judgment, and the resulting judgment is not subject to appeal. THE VIEW OF THE COURT [13] Article 93(3°) of the Organic Law No51/2008 relating to the organization, functioning and jurisdictions of courts provides that the High Court hears the claims relating to administrative cases at the level of the Province and Kigali City up to the Office of the President of the Republic relating to actions relating to damages based on grounds other than contractual or quasi contractual, if the damage is a result of an act or omission of the administration or due to acts carried out in public interest. [14] With regards to the court that Mukamusoni seized, the documents included in the case file indicate that after the public auction of her house located in the plot N° 112 in Kimironko in the City of Kigali that took place on 21/06/2002, Counsel Pasteur Munyandamutsa Oscar who represented her instituted the claim in the first Instance Tribunal of Kigali requesting for the invalidation of the auction conducted by the court bailiff Kagaju because it did not respect the law, basing on article 176(1) of the Law No09/80 of 07/07/1980 relating to the organization and competence of courts which provided that the disputes arising from the enforcement of judgments are referred

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53 before the First Instance Tribunal of the place of that enforcement. [15] That Decree Law was repealed before the judgment was rendered during the law reform and judicial reforms in 2004 and the case was transferred to the High Court as it was the one with jurisdiction to hear it. It was registered on RAD0447/06/HC/KIG and the judgment was rendered on 27/02/2009 whereby the claim was dismissed as no security for court fee was paid. After its payment, the claim was recorded on RAD0078/09/HC/KIG in the same court on 22/07/2009 and it is this judgment which was appealed against before the Supreme Court. [16] The Court finds that the statements of the Attorney General in respect of which Mukamusoni seized the court that ruled on the judgment RPA8787/KIG that was being enforced at the last level and thus her claim relates to disputes arising from enforcement of that judgment, is not founded because she seized the First Instance Tribunal of Kigali in accordance with the Law No09/80 of 07/07/1980 relating to organization and judicial competence that was into force at the time she instituted the claim, and the case was transferred in the High Court, where the claim was registered basing on the fact that it was the one with competence basing on article 93(3°) of the Law No51/2008 stated above. [17] With regards to the issue of determining whether the claim of Mukamusoni is based on the disputes arising from the enforcement of the judgment, the Court finds that basing on the facts of the case where her counsels explained before the High Court that the public auction was conducted on an unidentified property, that the court bailiff disregarded the suspension of the MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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54 RWANDA LAW REPORTS auction due to the low price, that he included in the writ of attachment 147,600Frw of prorated fee yet it was paid and so on; the subject matter of the case relates to the irregularities of the auction itself as there are some legal provisions it did not respect. Therefore, it does not consist of disputes arising from the enforcement of the judgment RPA8787/KIG, because the subject matter of the claim does not relate to the execution of the judgment in contradiction with its rulings. [18] Pursuant to the aforementioned explanations, the Court finds that the objection of inadmissibility of the claim of Mukamusoni raised by the State attorney is not founded. b. To determine whether the public auction had irregularities. Regarding the procedure of conducting a public auction. [19] Counsel Mbonyimpaye on behalf of Mukamusoni asserts that the court bailiff Kagaju did not respect the formalities of the public auction, including the fact that he did not serve Mukamusoni with the prescribed documents as ruled in the final Judgment RP40276/Kig rendered by the First Instance Tribunal of Kigali on 15/07/2003, in which Mukamusoni was accused of having plucked off the displayed announcement of the public auction, yet it was not conducted. [20] The State Attorney Ntaganda Félix, asserts that the arguments of the counsel of Mukamusoni that there are compulsory formalities that were not respected by the court bailiff should not be considered to be worth as the cause of nullity of the auction since the president of the Court issues an order of public auction after verification of the compliance with all formalities.

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55 [21] He goes on to say that in the course of auction, the court bailiff complies with the order of the president of the court which is a decision to be respected by whoever is concerned and could be cancelled only through procedures provided for by the law under article 140 of the Constitution. He thus finds that, the order of the president has never been invalidated because Mukamusoni has never appealed against it so far, thus its enforcement remains valid. [22] Counsel Ntaganda also asserts that Mukamusoni does not indicate the compulsory formalities that were not respected after the issuance of the order of the president that would cause the annulment of the auction. [23] Counsel Bigaraba John on behalf of Kamali asserts that Mukamusoni does not indicate the documents that the court bailiff did not serve her, but he finds that all formalities were undertaken in accordance with the law, since: On 21/03/2001, the court bailiff Sebagabo Stany served Mukamusoni an order of payment, failure of which would lead to the forceful recovery from her assets; After realizing that Mukamusoni was indifferent, he drafted an attachment order of her house located in the plot No 112 in Nyagatovu/Kimironko/Kacyiru/in Kigali City as indicted by the display affidavit drafted on 26/06/2001; On 03/10/2001 Mukamusoni sold that house to Yansoneye on 4,000,000Frw and this sale was realized after the house was auctioned. On 16/10/2001 the First Instance Tribunal released an order for the public auction of the house to take place on MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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56 RWANDA LAW REPORTS 26/01/2002 at 10h00 a.m and that at day it did not take place, rather, it was adjourned and scheduled on 21/06/2002. THE VIEW OF THE COURT [24] Article 9(1) of the Law No21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure provides that “Every plaintiff must prove a claim. Failure to obtain proof, the defendant wins the case”. [25] The Court finds that Mukamusoni fails to indicate the prescribed deeds that she contends to have not been served by the court bailiff. Indeed, even in the Judgment RP40276/Kig rendered by the First Instance Tribunal of Kigali on 15/07/2003 on which she relied (see page 5), it is obvious that the court doubted on whether she did not really receive the writs of attachment of her house because they were not served to her in person, therefore she was acquitted on the offense of selling some one else’s house, thus her appeal on this ground is not founded as it is obvious that all procedures provided for by the law were respected. Regarding the fact that the court bailiff refused to adjourn the auction as requested for by Mukamusoni and went ahead to auction the house on a low price. [26] Counsel Mbonyimpaye representing Mukamusoni asserts that she proved before the court that the court bailiff auctioned her house on a low price as it was indicated on the affidavit of the auction by her representative and in the valuation report but it did not consider it while this was requested before the deliberation of the case.

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57 [27] The State Attorney Ntaganda argues that the fact that Mukamusoni claimed that the house was auctioned on a lower price does not motivate the fact that she failed to pay, and her assets had to be auctioned to obtain payment of the debt and her ground in respect of which the price was lower is baseless to entail the annulment of the auction as long as she did not pay voluntarily. [28] He asserts that the law that was into force by then did not oblige the court bailiff suspend the auction because the price is lower, instead it gave him/her the discretion to appreciate, on his/her own initiative or upon the request, and in case he/she may find that the auction should be adjourned due to the lower price, he could do that, and however, even when he could do suspend it for lower price reason, he could not adjourn the auction on that ground anymore. [29] Counsel Bigaraba John on behalf of Kamali asserts that although Mukamusoni argues that her house was sold on a lower price, she disregarded the fact that the auction took place after it has been adjourned before, and the answer to this issue relies on the provision of article 336 of the Law of 15/07/1964 that governed the civil and commercial procedure as modified which provided that at the second instance, any price offered is accepted. [30] He also asserts that even if it would have been the first time, this article indicates that the adjournment of the auction is not compulsory; instead it is in the discretion of the court bailiff.

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58 RWANDA LAW REPORTS THE VIEW OF THE COURT [31] Article 336 of the Law of 15/07/1964 relating to civil and commercial procedure that was in force by the time the house of Mukamusoni was auctioned, provided that “when it is obvious that the attached property could be sold at a lower price, the civil servant mandated to auction, upon the request of the distrainer or on his own initiative, can suspend the auction. In that case, the president of the court schedules another day of the auction basing on the period provided for under article 330 and complies with all requirements to avoid that any party to incur the loss. On that scheduled day, those assets must be auctioned in any situation whatsoever”. [32] Again, article 351 of that law provided that “In case the debtor or the creditor finds the given price to be inadequate, he can request for the adjournment of the auction, but which cannot exceed one month from the time the first auction took place. The order of the president of the court is necessary for that adjournment”. [33] The Court finds that as indicated under the letter dated 27/06/2002 by Counsel Pasteur Munyandamutsa Oscar who initiated the claim on behalf of Mukamusoni, admits that the auction was conducted twice as it was adjourned from 26/01/2002 to 21/06/2002. The court finds without merit the allegations of Mukamusoni in respect of which her house was auctioned on the lower price, because it was auctioned on 5,250,000Frw while she argues that she sold it to Yansoneye Consolée for 4,000,000Frw.

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59 [34] The Court also finds that it cannot base on the value indicated by the valuation conducted on 02/05/2012 which Mukamusoni states that it was requested for by the lower court, so that it can determine whether the house was sold at a lower price, because the value of the auctioned house has to be determined at the time that challenged auction was conducted which is on 26/01/2002. [35] The Court thus finds that the appeal of Mukamusoni with regards to this ground also has no merit. Whether the Court bailiff has enforced the judgment while the payment was in process. [36] Counsel Mbonyimpaye on behalf of Mukamusoni argues that he proved to the court that the Court bailiff Kagaju enforced the judgment while the payment was in progress, including 147,600Frw of the prorated fee as indicated by the proof of payment, and the judge had decided that it has no merit because she did not indicate it to the Court bailiff while by that time, Mukamusoni was in prison for the charges to have removed the announcements, yet that did not happen as stated in the Judgment RP40276/Kig. [37] The State Attorney Ntaganda adduces that the statements of Mukamusoni in respect of which she declares that the auction was conducted after she had started to pay does not matter because she did not prove it to the Court bailiff and the importance does not rely on the beginning of the payment, rather, on the payment of the entire debt she was ordered to pay. He adds that even the amount she asserts to have paid is very slight, and consisted of the prorated fee she paid by the time she MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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60 RWANDA LAW REPORTS was about to be acquitted from the prison, and she can be refunded that amount. [38] Counsel Bigaraba on behalf of Kamali asserts that the arguments of Mukamusoni are far from the truth as she never showed the Court bailiff that she paid and pretend that he disregarded and proceed with the auction of her house. He states that what Mukamusoni paid for is the prorated fee for her release from prison at the completion of her as indicated on the invoice dated on 19/10/2001 and the statement of release issued the same day; and this was not likely to prevent the auction. VIEW OF THE COURT [39] The Court finds that from 21/03/2001 when Mukamusoni was notified of the order to pay by the court bailiff Stany Sebagabo until the day of the auction on 26/01/2002, she had never shown that she had paid the prorated fee and proves that the court bailiff continued requesting her to pay it. [40] The Court finds however that Mukamusoni submitted to it the invoice N°0258424 proving that before the auction of her house, she had paid on 19/01/2001, the prorated fee amounting to 147,600Frw in enforcement of the judgment RP8787/KIG of 18/01/2001 she lost, thus the State of Rwanda should refund it to her because she paid it twice. Regarding the balance from the auction that Mukamusoni claims to have not been reimbursed. [41] Counsel Mbonyimpaye representing Mukamusoni asserts also that the Court disregarded the fact that the balance of proceeds of the auction was neither given to Mukamusoni nor

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61 deposited in the public treasury, while this indicates that the acts of the court bailiff Kagaju were in contradiction with the law. [42] The attorney Ntaganda states that the fact for Mukamusoni to have not received the balance of the proceeds of the auction cannot be a ground for the cancellation of the auction, rather she can file a separate action from the action of auction cancellation for its recovery by indicating the difference between the proceeds obtained from the auction and the amount of payment because the allocation of the proceeds constitutes a step that comes after the auction is completed. He stresses that Mukamusoni has never claimed for that amount and be denied its reimbursement, and goes on to say that whenever she decide to get reimbursed, the money shall be paid without dispute. [43] Counsel Bigaraba on behalf of Kamali declares that the fact that Mukamusoni argued that she did not receive the balance on the proceeds of the auction is not a ground of cancellation of the auction, rather, it is an issue of recovery. VIEW OF THE COURT [44] Article 357 of the Law of 15/07/1964 relating to civil and commercial procedure that was in force when the house of Mukamusoni was auctioned provides that “when the price of an immovable property is higher than the amount of the debt and the prorated fee, the balance is refunded by the accountant to the distrainee”. [45] The Court finds that the State Attorney admits that the balance from the auction proceeds can be refunded to her, thus it should refund her the balance between the amount owed to MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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62 RWANDA LAW REPORTS Ntiserurwa Christophe and the proceeds of the auction in the following way: 5,250,000Frw – 3,690,000Frw = 1,560,000Frw. To examine whether among the auctioned assets included the house of Yansoneye Consolée. [46] Counsel Gumisiriza Hilary on behalf of Yansoneye asserts that in the course of enforcement of the judgment RPA0887/Kig, the court bailiff Kagaju auctioned her house and this is known and affirmed by Mukamusoni that Kagaju compiled their properties and auctioned them while Yansoneye has no relationship with the case. [47] He asserts that in the High Court, Mukamusoni explained all that but this court did not take it into consideration and the issue is probably that the case was heard in her default. [48] He asserts that the following evidence prove her ownership over the house: The document of Mukamusoni of 10/12/2001; The ownership title N° 1650/0454 of 04/12/2001; The proof of sale of 02/11/2001; The certificate of 04/12/2001 issued by the district of Kacyiru indicating that she is the one who pays tax for the plot in which the house is located; The administration affidavit of 03/02/005 asserting the restitution of the house to her; The decision of the court of 15/07/2003 awarding her the house;

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63 The letter of the president of the former Court of Kigali City of 08/10/2004 which affirmed that the house belongs to her; The bill issued by the government on 11/03/2002 to acknowledge the payment of 6% (2,000,000Frw); The interrogation affidavit of Rucamumpunzi P. Célestin who affirms that Yansoneye bought the house before occurrence of any dispute on it, in presence of the administration and without any displayed announcement of the auction; The affidavit of interrogation of Mukamusoni in which she admits that she sold the house to her; The affidavit of interrogation of Yansoneye before the Judicial Police and prosecution whereby she explains that she acquired the house in compliance with the law. [49] He concluded by requesting that Mukamusoni pay her damages amounting to 2,000,000Frw of proceedings and counsel fees. [50] The State Attorney Ntaganda, declares that the sale between Mukamusoni and Yansoneye is null and void because it was concluded when the transfer was no longer possible since all formalities relating to the auction had started and Mukamusoni was aware of that, and the auction was preceded by announcements and it was conducted on the concerned house, to the extent that all this could occur while Yansoneye knew that she bought the house without intervening. [51] He asserts again that the fact that Yansoneye did not institute a claim against the auction of her house while she did MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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64 RWANDA LAW REPORTS not owe any debt, indicates that, the alleged sale was a parody not reality. He thus finds that if at all that sale was really concluded Mukamusoni must refund Yansoneye her money as she sold her in bad faith knowing that she aimed at selling her property that was about to be auctioned. [52] Counsel Bigaraba John on behalf of Kamali states that after Mukamusoni had been served with the court order to pay and the writ of attachment, she no

longer had the right to sale her property before the full payment of the debt. [53] He further declares that after the attachment and its display as indicated by the affidavit of display made by the court bailiff Sebagabo on 26/06/2001, Mukamusoni disregarded the provision of article 361 of the law of 15/07/1964 stated above (similar to article 293 of the current CCLAP) thus the sale concluded on 03/10/2001 after all formalities had been accomplished is null and void, therefore, the appeal of Yansoneye is not founded. [54] Counsel Mbonyimpaye on behalf of Mukamusoni asserts that she proved before the court that the property that the Court bailiff Kagaju auctioned, included the house of Yansoneye Consolee, and she also produced the letter of the president of the former Court of Kigali City addressed to the Mayor of Kacyiru district requesting him to give Yansoneye her house because she bought it in accordance with the law, but the court disregarded that, and ruled that the auction respected the law.

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65 VIEW OF THE COURT [55] Article 361 of the law of 15/07/1964 relating to civil and commercial procedure that was in force when the house of Mukamusoni was auctioned provides that “the transfer of ownership of immovable or transfer of any other related right by the debtor after receiving the order of payment or after having been prohibited to undertake any act over them shall not be accepted, except if the beneficiary accepts to pay in the hands of the public accountant the amount of the debt and court fees owed to the distrainer”. [56] As indicated in the documents of the case file, Mukamusoni was served the order to pay on 21/03/2001 by the court bailiff Stany Sebagabo. on 26/06/2001 that court bailiff displayed on the First Instance Tribunal of Kigali, on the office of the Prosecutor General of the Republic in Kigali and the Prefecture of Kigali City the announcement of seizure of the house located at plot No 112 of Mukankusi in Nyagatovu, Kimironko, the City of Kigali, and on 03/10/2001 Mukankusi sold to Yansoneye Consolee that seized house. [57] Basing on the abovementioned article of the law, the Court finds that Mukankusi was unable to sell her house as long as she knew that she received the order to pay, therefore, that sale is not valid, and the auction of the house of Mukamusoni remains valid. [58] With regards to damages amounting to 2,000,000Frw of procedural and lawyer’s fees that Yansoneye claims for, the court finds that she should not be awarded it because she does not prove their basis. MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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66 RWANDA LAW REPORTS Cross appeal of Kamali Emmanuel. [59] Counsel Bigaraba John on behalf of Kamali alleges that the court did not award damages to his client on the ground that the rejection to be delivered her house was ordered by the court, but this is in disregard with the fact that this decision was taken upon the request of Mukamusoni. [60] He thus finds that the auction was conducted on 21/06/2002, and he was deprived of his rights over the house he bought yet article 349 of the aforementioned law of 15/07/1964 states that the person who bought an asset in the auction becomes its owner. [61] Basing on article 258 of the CCB III, he claims to be awarded by the court the following damages:

- 150,000Frw a month from the day he bought the house until the day of the judgment, because, if he let the house he should have gained that amount of money (deprivation of usus).
- 10,000,000Frw of deterioration of his house before he dwelled in it and to maintain it (deprivation of the right of enjoyment and benefits of obsolescence);
- 1,000,000Frw paid to the lawyer on the second Level of the court. [62] Counsel Mbonyimpaye on behalf of Mukamusoni states that the damages Kamali claims for have no merit.

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67 VIEW OF THE COURT [63] With regards to damages of the rent that Kamali claims for against Mukamusoni, the court finds that he should not be awarded them since he does not provide evidence for it. [64] And for damages equal to 10,000,000Frw for the deterioration of his house without having dwelled in it, the court finds that those damages are excessive, instead 1,000,000Frw ordered by the High Court should be upheld because it is fair. [65] With regards to 1,000,000Frw of procedural and the counsel fees that Kamali claims for against Mukamusoni, the court finds that he does not justify how they were calculated, and it thus finds that he can be awarded 500,000Frw in the discretion of the court on this instance, in addition to 300,000Frw awarded by the High Court, which in total equal to 800,000Frw. [66] The court finds that, all damages that Mukamusoni has to pay to Kamali equal to 1,000,000Frw + 800,000Frw = 1,800,000Frw. III. DECISION OF THE COURT [67] The Court holds that the appeal of Mukamusoni has partial merit; [68] The Court holds that the cross appeal of Yansoneye Consolée has no merit. MUKAMUSONI v. GOVERNMENT OF RWANDA ET AL

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[69] The Court decided that the cross appeals of Kamali Emmanuel has merit in part. [70] The Court orders that the auction conducted on 21/06/2002 in regard to the house of Mukamusoni Béatrice located in the plot No 112 in Nyagatovu, Kimironko, in the City of Kigali remains valid. [71] The Court orders the State of Rwanda to pay to Mukamusoni Béatrice 147,600Frw she paid twice and 1,560,000Frw of the balance on the auction price of the house, which in total is 1,707,600Frw. [72] The Court orders Mukamusoni Béatrice to pay to Kamali Emmanuel damages equal to 1,800,000Frw as explained above. [73] The Court also orders Mukamusoni Béatrice to pay ½ of 100,000Frw of the court fees, which is 50,000Frw, in addition to what she paid while lodging her appeal and the remaining ½ is to be bore by the government.

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NYIRAMANA v. NAYINO [Rwanda SUPREME COURT – RCA005/13/CS (Mutashya, P.J., Rugabirwa and Gakwaya, J.) February 10, 2014] Civil procedure – Summary procedure claim – Execution of judgment – Claim for suspension of execution of judgment – Summary procedure claims should

fulfil three main requirements which are: urgency in order to prevent an irretrievable loss that would otherwise result from delay, the provisional nature of the decision and the fact that it should not prejudice the merits of the principal suit – Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and commercial procedure, articles 316 and 320. Facts: This judgment RCA005/13/CS derives from the judgments RCA0112/12/HC/KIG and RCA0112/12/HC/KIG rendered by the High Court on 07 June 2013 in which Nyiramana sued Nayino but lost the case and was ordered to hand back all the assets which were in disputes. Afterwards, Nyiramana applied for review of both cases and the application was recorded under RC0385/13/HC/KIG and after its recording; she lodged a summary procedure claim RC0038/13/HC/KIG requesting for the suspension of the execution of both the aforementioned judgments until the ruling of the case RC 0385/13/HC/KIG. However, the court declared her summary procedure claim without merit. Nyiramana being unsatisfied with the ruling, she appealed to the Supreme Court. She invokes, among her reasons of appeal, the fact that she was expelled from the house without taking into account that she could not find another dwelling nor other 69

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70 RWANDA LAW REPORTS means of living, and that the seized properties include her house she constructed on her own which was not the subject matter of the case and that in case the respondent is given possession of all the assets in disputes, it would be hard to take them back. As for her, Nayino Patricie states that she won the judgment whereby she was awarded her assets 7 years ago; but they were never handed back to her, and that evidence in respect to the house Nyiramana alleges was not at issue in the case, shall be presented during the hearing of the case on merits. She argues in addition that the prayers of Mukamana do not require celerity, therefore she should execute the judgment that is final and thus enforceable, without pretending that her family would become destitute and homeless because for her, she has also spent 7 years in such a situation because she was not given possession of the assets she was awarded by the judgment she has won. Held: 1. Summary procedure claims should fulfil three main requirements which are: urgency in order to prevent an irretrievable loss that would otherwise result from delay, the provisional nature of the decision and the fact that it should not prejudice the merits of the principal suit.

2. The fact that there are some of the assets included in the execution of judgment while they are not part of the matter of litigation and those awarded to the child under the care of the applicant, this is not a relevant ground for the suspension of execution of the final judgment since there is no supporting evidence thereto, and if it were the case, they would be considered as a dispute regarding the execution of judgment of which settlement is provided for by the law.
3. The decision of the High Court confirming that the appellant did not provide evidence proving urgency of her claim for

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71 suspension of execution of the judgment is not erroneous. In this Court too, she was unable to indicate the irretrievable loss likely to be suffered in case she wins the case pending before the High Court. Appeal without merit. Court fees to the appellant. Statutes and statutory instruments referred to: Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and commercial procedure, articles 316 and 320. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] After Nyiramana Chantal became party to cases RCA0111/12/HC/KIG and RCA0112/12/HC/KIG rendered by the High Court on 07 June 2013 but lost them and was ordered to hand back the properties to his opponent Nayino Patricie, she filed an application for case review and it was recorded under number RC0385/13/HC/KIG. [2] After filing that claim, she also initiated a summary procedure claim which was recorded under number RC0038/13/HC/KIG whereby she prayed for suspension of the NYIRAMANA v. NAYINO

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72 RWANDA LAW REPORTS execution of the aforementioned judgment until the trial of judgment RC0385/13/HC/KIG. [3] The judgment was pronounced on 10/09/2013, and the Court ruled that the summary procedure claim was without merit. Afterwards, Nyiramana Chantal filed a claim for rectification of the error relating to her identification and this was done in the rectifying judgment RC0042/13/HC rendered on 24 September 2013. [4] Unsatisfied with the outcome of the rendered judgment, Nyiramana Chantal appealed to the Supreme Court. She invokes, among her grounds of appeal, the fact that she was expelled from the house while disregarding that she could not find another shelter and that she cannot secure her living by any other means, and that there is a house seized while it was not part of the subject matter of the claim. [5] The case was heard in public on 04 February 2014 where Nyiramana Chantal was represented by Counsel Butera Dismas while Nayino Patricie was represented by Counsel Kamali Nyampatsi Valens. II. ANALYSIS OF LEGAL ISSUE [6] The legal issue to be examined in this case is to know whether the summary procedure claim filed with the High Court by Nyiramana Chantal fulfilled the legal requirements for the suspension of the execution of

judgment

N° RCA0111/12/HC/KIG and N° RCA0112/12/HC/KIG for which she applied for review.

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73 [7] Counsel Butera Dismas representing Nyiramana Chantal states that his client was expelled from the house disregarding that she could be homeless and there is no other way she could secure her living. He further argues that there is a house that was seized while it was not included in the subject matter of the case. In addition, he alleges that the execution of that judgment would result in a big loss due to the fact that the seized properties include the house in which

Nyiramana lives, the houses she constructed on her own that she rents to gain her living and her children as well such that if all these properties are handed to her opponent, it would result in a big loss due to the fact that she would be expelled from the house and fall in total destitution with her children and would be unable to regain them while the case is still pending. [8] Counsel Kamali representing Nayino Patricie states that Nayino won the case for her properties 7 years ago; but they were not handed back to her. He added that the house she claimed to belong to her child was not part of the subject matter of the litigation and that; this will be presented at the right time. He further argues that the court bailiff has seized the house located in Byumba to secure payment in compensation of what Mukamana was ordered to hand back. He also argued that the claims of Nyiramana are not urgent which implies that she must hand back what she has lost in the final judgment to be enforced; He states in addition that her alleged reason that they would become destitute and homeless is irrelevant as it is 7 years that Nayino is homeless because she was not given back her properties and due to that she lives in Kamonyi with her daughter while she is very old.

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74 RWANDA LAW REPORTS OPINION OF THE COURT [9] Article 316 of Law N°21/2012 of 14/06/2012 relating to civil, commercial, social and administrative procedure provides that “When there is need to have an interim ruling on a matter which requires urgent resolution, an action shall be filed in accordance with the ordinary procedure regarding principal suits, before an urgent applications judge in the jurisdiction where the urgent measure is required in accordance with ordinary summons procedure”. In addition, article 320 of the same law states that “The summary procedure judge shall decide by way of orders, but without prejudicing the merits of the principal suit”. [10] The analysis of these provisions, as even held in other previous decisions of this Court, indicates that summary procedure claims should fulfil three main requirements which are: the urgency in order to prevent irretrievable loss that would otherwise result from the delay, the provisional nature of the decision and the fact that it should not prejudice the merits of the principal suit. [11] The Court finds that the grounds presented by Nyiramana Chantal for the suspension of execution of the judgment for which she initiated an application for case review do not demonstrate any urgency or irretrievable loss as held by the High Court, because the argument that if she is expelled from the house she would become homeless should not be assimilated to irretrievable loss since the house cannot be moved and in case it may be sold in order to avoid its repossession by Nyiramana Chantal in case she wins the case

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75 on the application for case review she has initiated, the law provides for other remedies to get it back. [12] Concerning the claim that the properties to be attached in execution of the judgment she lost include some that are not part of the subject matter of litigation and those granted to the

child under her guardianship, the Court finds that, though she does not produce irrefutable evidence thereof, this is not a ground for suspension of the execution of the final judgment; and if it is the case, they would be considered as disputes arising from the execution of judgment and this is well regulated by the law¹. [13] The Court finds that the judge of the High Court did not error by confirming that Nyiramana Chantal did not present evidence to substantiate the urgency of her claim for suspension of the execution of the judgment N° RCA0111/12/HC/KIG and N° RCA0112/12/HC/KIG rendered by the High Court pending the adjudication of the case N° RCA0385/13/HC/KIG. Moreover, even before this Court, she failed to demonstrate any likely irretrievable loss in case she wins the case pending before the High Court. III. DECISION OF THE COURT [14] The Court admits the appeal on the summary procedure claim filed by Nyiramana Chantal, but finds it without merit;

1 See article 208 of Law N°21/2012 of 14/06/2012 relating to civil, commercial, social and administrative procedure. NYIRAMANA v. NAYINO

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76 RWANDA LAW REPORTS [15] The Court orders Nyiramana Chantal to pay court fees amounting to 21,800Frw within the fixed time; default of which, payment shall be sought through State's coercion.

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RE SOCOBICO INDUSTRIES S.A. [Rwanda SUPREME COURT – RS/INTER/CIV0001/14/CS (Mukanyundo, P.J., Hatangimbabazi and Gakwaya, J.) June 20, 2014] Civil procedure – Application for interpretation of a judgment – An application for interpretation of the judgment must demonstrate an error or a decision which is ambiguous or susceptible to divergent interpretation – This kind of claim has no merit when the issue or the provision requested to be interpreted was not subject to debate in the course of the hearing of the case in respect of which it is requested interpretation – Law N°21/2012 of 14/6/2012 relating to the civil, commercial, labour and administrative procedure, article 154. Facts: ECOBANK Ltd gave a loan to SOCOBICO Industries S.A and the latter provided the mortgage of an industrial house located on plot No1109 and other buildings erected and those will be erected thereon. In that loan contract, they agreed that in case SOCOBICO Industries S.A fails to pay, the properties it has mortgaged shall be auctioned without recourse to judicial proceedings. ECOBANK Ltd requested the Intermediate Court of Nyarugenge to issue an order for auctioning that mortgage because SOCOBICO Industries S.A has failed to pay its loan and the President of that Court ordered the auction of that mortgage. Pursuant to that order, the court bailiff auctioned that mortgage which was then acquired by TRUST Industries Ltd. 77

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78 RWANDA LAW REPORTS SOCOBICO Industries S.A filed a claim at the Intermediate Court of Nyarugenge stating that the auction was unlawfully conducted. That Court held that the auction is invalidated because it was unlawfully conducted, it ordered TRUST Industries Ltd to reimburse to SOCOBICO Industries SA the amount of money which were paid after conducting the auction, it ordered ECOBANK Ltd, Notary and TRUST Industries Ltd to pay jointly pecuniary damages, moral damages and procedural fees and counsel fees to SOCOBICO Industries SA. ECOBANK Ltd, TRUST Industries Ltd and Notary were not satisfied with the ruling of the judgment and appealed to the High Court stating that the Intermediate Court disregarded that the auction was conducted in realization of the provided mortgage and disregarded the laws as well as the statements of the parties. That Court ruled that the auction remains valid and also held that the damages awarded in the appealed judgment are set aside. SOCOBICO Industries SA appealed before the Supreme Court stating that the house price was enough for the payment of the loan of ECOBANK Ltd and it is not thus clear why both the house and its goodwill were sold; that Court ordered TRUST Industries Ltd to give back to SOCOBICO Industries SA the goodwill which it seized in the auction. It also ruled that the counterclaims of ECOBANK Ltd and TRUST Industries Ltd have no merit. SOCOBICO Industries SA filed application for interpretation of paragraph 121 of the judgment RCAA0011/13/CS rendered by the Supreme Court because it finds that the decision of the Court cannot be executed in case the Court did not determine the value of the goodwill, therefore it is requesting to determine

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79 the value of goodwill which it ordered to give back to the former. Held: An application for interpretation of the judgment must indicate an error or a decision which is ambiguous or susceptible to divergent interpretation. This kind of claim has no merit when the issue or the provision requested to be interpreted was not debated on in the course of the hearing of the case in respect of which it is sought to be interpreted. The claim has no merit. Statutes and statutory instruments referred to: Law N°21/2012 of 14/6/2012 relating to the civil, commercial, labour and administrative procedure, article 154. No case referred to. Author cited: Albert FETTWEIS, Manuel de procédure civile, 2e édition, Liège, 1987, p.259.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] On 09 September 2008, SOCOBICO Industries S.A mortgaged industrial house located on plot No 1109 and other RE SOCOBICO INDUSTRIES S.A.

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80 RWANDA LAW REPORTS buildings erected and to be erected thereon, located in Nyarugenge District, Kigali City to secure the loan of 379,000,000Frw it was given by ECOBANK Ltd (To secure and guarantee the repayment of all amounts owed in principal debt, interests, commissions and fees of which it is or would be the debtor, the borrower allocates in favor of the Bank the real

estate as detailed below as well as buildings erected or to be erected thereon: it is the building affected exclusively for industrial use located in the plot No 1109 in Nyarugenge/Kigali). Under that loan contract, they agreed that if SOCOBICO Industries S.A fails to pay, the mortgage which it provided shall be auctioned without recourse to judicial proceedings. [2] SOCOBICO Industries S.A did not repay that loan and ECOBANK Ltd requested the Intermediate Court of Nyarugenge to issue an order for auction of that mortgage it was given. The President of that Court ordered that the mortgage which was given by SOCOBICO Industries S.A shall be auctioned on 16 August 2010. Basing on that decision, the court bailiff auctioned the mortgage on 17 September 2010 and it was bought at the price of 320,150,000Frw by TRUST Industries Ltd represented by Mugabo Claver. [3] SOCOBICO Industries S.A was not satisfied with that auction, and it filed a claim at the Intermediate Court of Nyarugenge stating that it was unlawfully conducted. That Court rendered the judgment on 25 November 2011 whereby it held that the claim of SOCOBICO Industries S.A has merit in part and ruled that the auction conducted on 17 September 2010 is invalidated because it was unlawful; it ordered TRUST Industries Ltd to give back 11,498,750Frw to SOCOBICO

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81 Industries SA because it is obvious that it was paid after conducting the auction; it ordered ECOBANK Ltd, Notary Uwitonze Nasira and TRUST Industries Ltd to pay jointly 60,000,000Frw of pecuniary damages, 7,500,000Frw of moral damages and 1,500,000Frw of procedural fees and counsel fees to SOCOBICO Industries SA. [4] ECOBANK Ltd, TRUST Industries Ltd and Notary Uwitonze Nasira were not satisfied with the ruling of the judgment and appealed to the High Court stating that the Intermediate Court disregarded that the auction was conducted on the provided mortgage and disregarded the laws as well as the statements of the parties. That Court ruled that the appeal has merit and that the auction conducted on 17 September 2010 remains valid. It also held that the damages awarded in the appealed judgment are dismissed. [5] SOCOBICO Industries SA was not satisfied with the ruling and appealed to the Supreme Court invoking the following grounds:

1. The fact that the judge of the High Court heard the case which he would not have admitted because the subject matter was the disputes regarding the execution of the judgment which means that the delivered judgment should not be subject to appeal, according to article 219 of Law N°21/2012 of 14/6/2012 relating to the civil, commercial, labour and administrative ruled that the appeal procedure.
2. The fact that the High Court disregarded that house price was enough for the repayment of the loan of ECOBANK Ltd and it is not thus clear why both the house and its assets of business were sold. RE SOCOBICO INDUSTRIES S.A.

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3. The fact that the Court disregarded the procedures which were not followed such as absence of publication of the auction;
4. The fact that only two persons attended the auction and the mortgages were sold at a very low price in comparison with the real value while Notary was in possession of the report of the expert demonstrating the value of the mortgage, but she decided to sell it at that price; on top of that the offered price was not paid immediately because the check drawn bounced and the amount was paid after two months.
5. The fact that the judge changed the subject matter because it was the disputes regarding the execution of the decision of Court.
6. The fact that the judge misinterpreted the scholar's writings about the difference between the Goodwill and immovable property; also the judge violated the procedure of selling the mortgage without recourse to judicial proceedings, and the fact that the judge did not order refund to SOCOBICO Industries SA of the balance of auction proceeds. [6] The Supreme Court rendered the

judgment

RCAA0011/13/CS on 15/11/2013 and held that the appeal of SOCOBICO Industries SA has merit in part. It ordered TRUST Industries Ltd to give back the goodwill which it seized during the auction of 17 September 2010 to SOCOBICO Industries SA and ordered that the counterclaims of ECOBANK Ltd and TRUST Industries Ltd have no merit.

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83 [7] On 17 January 2014, SOCOBICO Industries SA filed application for interpretation of paragraph 121 of the judgment RCAA0011/13/CS rendered by this Court on 15 November 2011. II. ANALYSIS OF THE LEGAL ISSUE Whether the ground of the claim filed by SOCOBICO Industries SA with the Supreme Court is in the framework of judgment interpretation. [8] In its claim for interpretation of the judgment RCAA 0011/13/CS, SOCOBICO Industries SA states that basing on the nature of the goodwill, it realizes that the decision of the Court cannot be executed except in case the Court decides the value of things which must be given back to SOCOBICO Industries Ltd; therefore, that judgment is imprecise in respect to ascertainment of what shall be given back to the winner. Thus, it requests the Supreme Court to determine the value of elements of the goodwill which it ordered to be given back to the former. [9] In addition, SOCOBICO Industries SA states that if one considers the structure or definition of Goodwill (Fonds de commerce), it is clear that it is something of which value fluctuates; therefore it cannot be given back without determining its monetary value. This had been clearly requested during the hearing, whereby Counsels for SOCOBICO Industries SA submitted to the bench the valuation demonstrating clearly the value of that goodwill and which is increasing since its appropriation; that is from the day of auction on 17 September 2010; moreover that value cannot be given back in kind. RE SOCOBICO INDUSTRIES S.A.

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84 RWANDA LAW REPORTS VIEW OF THE COURT [10] Article 154(1) of Law N°21/2012 of 14/6/2012 relating to the civil, commercial, labour and administrative procedure provides for that “applications seeking to rectify an apparent error on the record or clarifying a decision which is ambiguous or susceptible to divergent interpretation shall be decided in camera without adversarial arguments and without alteration regarding the winning party, explanatory notes on how the case was ruled, and what the law stipulates as well as the decision taken by court”. [11] The Supreme Court finds that in

judgment

RCAA0011/13/CS, paragraph 121, the Court ordered TRUST Industries Ltd to give back elements of the goodwill of SOCOBICO Industries SA which it seized in auction of 17 September 2010. [12] The Supreme Court finds that before the Intermediate Court, when SOCOBICO Industries SA filed a claim, it requested for the following:

- To resolve the disputes that arose in execution of the judgment;
- To restore to the plaintiff the properties constituting its goodwill allocated fraudulently to TRUST Industries Ltd by ECOBANK Ltd and the Notary;
- Shortfall from 17/09/2010 until the date of restitution;
- Moral damages and interests and procedural fees as well;

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- The provisional appointment of an independent third party as the manager of the company at issue. [13] In addition, the Supreme Court finds that in the conclusion of its submissions before the Intermediate Court, SOCOBICO Industries SA requested the following:
- To admit this claim and decide it has merit;
- To order the restitution of the goods constituting the goodwill of SOCOBICO SA in their value;
- To condemn the defendants to pay jointly and severally damages and costs as explained and ordered above;
- To order the invalidation of the sale of 17/09/2010;
- To decide on any other issue pursuant to the law. [14] Concerning the request of SOCOBICO Industries SA, except its prayer to the Intermediate Court of Nyarugenge to order its opponents to retribute to it the value of the Goodwill and its submission to the Supreme Court of the document it calls the valuation (Valuation: Estimation of the total loss of SOCOBICO Industries SA following the occupation of its goodwill by TRUST Industries Ltd)

made by itself demonstrating its value, the Supreme Court finds that either in its submission of appeal or in its pleading during the hearing, SOCOBICO Industries SA did no longer request to be awarded the monetary value of the Goodwill instead of its components. Therefore, in case the Court did not examine anything in respect to the value of the goodwill and nothing in this respect is stated in its motivation of the judgment to be interpreted¹, it is clear

¹ “The reasons for a decision must be interpreted one in light of the other and the decision must be interpreted in the light of the reasons”, Cass. 12 RE SOCOBICO INDUSTRIES S.A.

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86 RWANDA LAW REPORTS that to determine the value of the Goodwill in terms of money in the judgment interpreting the other is going beyond the interpretation of the judgment as it was rendered and would rather amount to deciding on the subject matter which was not heard². [15] According to the motivations in the previous paragraph, the Supreme Court finds that basing on article 154(1) of Law N°21/2012 of 14/6/2012 mentioned above,

judgment

RCAA0011/13/CS was not rendered in ambiguous way or a way susceptible to divergent interpretation because its paragraph 121 is clear enough whereby the Court ordered Trust Industries Ltd to give back to SOCOBICO Industries SA the components of its goodwill, it acquired through the auction³; therefore it finds that SOCOBICO Industries SA actually requests to decide on an issue which was not debated on during the hearing.

décembre 1980, Pas., 1981, I, 432 in Albert FETTWEIS, Manuel de procédure civile, 2e édition, Liège, 1987, p.259). ² “That is why while interpreting the judgment the judge, cannot extend, limit or amend the rights he/she has granted. He/she must confine him/herself to ascertaining the meaning and scope of provisions of the judgment without denaturing them. He/she must maintain his/her original decision, giving it a better shape without being able to amend or supplement the judicial act ' Albert FETTWEIS, ibidem. ³ “It is in the exercise of its sovereign power that a Court of Appeals, which states exactly that, pursuant to Articles 1351 of the Civil Code and 461 of the new Civil Procedure Code, the judges hearing a dispute concerning the interpretation of a previous decision cannot, under the pretext of determining their meaning, amend its specific provisions, decides that there is no room for interpretation of a judgment which is unambiguous”, Cass., soc., 23 mars 1995, JCP G 1995, IV, 1257.

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87 [16] In light of all those grounds, the Supreme Court finds that the claim of SOCOBICO Industries SA for interpretation of the judgment does not fulfill legal requirements because it does not demonstrate any error or decision which is ambiguous or susceptible to divergent interpretation; therefore it has no merit. III. DECISION OF THE COURT [17] The Court decides that the claim of SOCOBICO Industries SA for interpretation of the

judgment

RCAA0011/13/CS rendered on 15 November 2013 has no merit. [18] The Court rules that there is no ground for interpreting paragraph 121 of the judgment RCAA0011/13/CS.

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B. CRIMINAL PROCEDURE CASES

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PROSECUTION v. HAKIZIMANA [Rwanda SUPREME COURT – RPA0002/GEN/13/CS (Kayitesi Z., P.J., Nyirinkwaya and Mukamulisa, J.) November 11, 2013] Criminal procedure law – Appeal – Appeal against the court decision confirming its jurisdiction to try the case – If the court rules that it has jurisdiction, the party that is not contented with the decision appeals against it with the main suit – Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 18, 90 and 162. Criminal procedure law – Appeal against judgment which has been adjudicated through review – The judgment resulting from a case review is not subject to appeal even in case it was adjudicated on the first instance – Organic Law N°03/2012/OL of 13/06/2012 Determining Organization, functioning and the competence of the Supreme Court, article 34(11o) – Law N°21/2012 of 14/06/2012 Relating to the civil, commercial, labour and administrative procedure, article 193. Facts: In the First Instance Court of Kigali, Special Chamber with jurisdiction to try the crime of genocide, crimes against humanity and other related crimes, Hakizimana Augustin was convicted of genocide, murder and constitution of a criminal gang. He was sentenced to death penalty and a payment of moral damages equivalent to 10,000,000Frw. He appealed to the Court of Appeal of Kigali. The latter held that his appeal was not substantiated. He requested for cassation of the judgment by the Court of Cassation. After the judicial 91

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92 RWANDA LAW REPORTS reform, his case was heard by the Supreme Court but was not admitted as it was not filed in compliance with the rules of procedure. He applied for review against the judgment before Intermediate Court of Gasabo alleging that after the judgment, it was known that some of the alleged people were still alive while some others died just after the

genocide. He insisted that he was convicted of having killed some other persons while there are people who had been convicted for having murdered them by Gacaca Court and who did not witness against him. He stressed that there are witnesses who could testify that he played no role in the perpetration of genocide. The Intermediate Court of Gasabo found that his application had merit in parts. However some grounds of appeal about the judgments of Gacaca Courts and the testimonies exculpating him of the murder of various alleged people were not considered. He appealed to the High Court and the Prosecution raised an objection of lack of jurisdiction submitting that the judgment resulting from case review can never be subject to appeal. The High Court held that the objection raised had no merit. It acquitted him of all charges and ordered immediate release. The prosecution appealed to the Supreme Court alleging that the judgment which had been adjudicated through review is not subject to appeal. The counsels for the accused raised also the objection of inadmissibility of the action since, according to them; the Prosecution is not allowed to lodge an appeal against the decision of the court declaring itself competent to try the case.

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93 As to the Prosecution, the objection lacks merit because the provisions of the law relating to civil procedure referred to by the counsel for the accused does not prohibit the appeal against the judgment on issue of lack of jurisdiction. Rather, the law states that in case the Court declares itself competent to try the case, that decision is appealed against with the decision of judgment in merit. Held: 1. If the court rules that it has jurisdiction, the party that is not contented with the decision appeals against it with the main suit; therefore it is prohibition while the case in merit is still pending.

2. The judgments which were rendered through review cannot be appealed because review is an extra ordinary remedy which allows the judge to review the judgment after he/she finds one of the grounds provided for by the law, indicating that the case would have been adjudicated otherwise if that ground was known. However, it does not aim at opening the appeal for the final judgment since the judgment subject to review takes the same nature as that it replaces which is final as well, that is, it cannot be appealed against even in case it became final after it was adjudicated at the first instance.
3. With regarding to being governed by equity as it is a tradition in common law system, this cannot be considered because, apart from the fact that the system does not leave out its decided case law, the legal issue of the case is not whether or not the accused is guilty; rather it is the competence of the High Court Appeal has merit. The High Court lacks jurisdiction. The judgment RPA/GEN/0001/12/HC/KIG is invalidated. PROSECUTION v. HAKIZIMANA

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94 RWANDA LAW REPORTS Court fees to the public fund. Statutes and statutory instruments referred to: Organic Law N°03/2012/OL of 13/06/2012, determining the Organization, functioning and competence of the Supreme Court, articles 18, 34(11o) and 90. Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, articles 162 and 193. Cases referred to: Nzabandora v. Government of Rwanda, RADA 0026/10/CS, Rendered by the Supreme Court, on 4 March 4, 2011. Mulemba v. Kabona, RCAA 0065/09/CS, rendered by the Supreme Court on July 2, 2010. Nzabamwita v. SONARWA, RCOMA 001/06/CS, rendered by the Supreme Court on February 2, 2007. Prosecution v. Rwahama, RS/REV/GEN 0005/07/CS, rendered by the Supreme Court on July 24, 2009.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] In the judgment RP209/CSK rendered on April 6, 2001 the First Instance Court of Kigali, Special Chamber trying the crime of genocide, the crimes against humanity and other related crimes convicted Hakizimana Augustin of genocide and crimes against humanity and other related offences. He was

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95 sentenced to death penalty and ordered to pay the moral damages equal to 10,000,000Frw to the victims the killing he committed. [2] Hakizimana Augustin appealed against the judgment to the Kigali Court of Appeal which held in turn that his appeal has no merit. He applied for cassation of the judgment in the Court of Cassation. After the judicial reform, his application was heard by the Supreme Court which dismissed it on the grounds that it was filed in contradiction with the rules of procedure. [3] Hakizimana Augustin applied for review against the judgment RP209/CSK to Gasabo Intermediate Court alleging that after the delivery of the judgment, there are people who were still alive and some other who died after the genocide while he had been convicted of their murder during genocide. He emphasized that there are persons of whom he had been convicted of having killed while Gacaca Courts convicted some other people for being liable of their death. He explained that those convicts had never accused him of being their coauthor. He added that there are witnesses who testify that he had never played any role in the perpetration of genocide. [4] In the judgment RP/GEN0001/10/TGI/GSBO rendered on February 2, 2012, Gasabo Intermediate Court decided that his application had merit with regard to the wife of Célestin whom he was accused of having killed, yet she died of ordinary death after the genocide as well as Ndayisenga Bernard who is still alive. However, the Court rejected other grounds of his application as based on the judgments decided by Gacaca Court of Kacyiru Sector as well as the testimonies deposited by PROSECUTION v. HAKIZIMANA

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96 RWANDA LAW REPORTS various witnesses exculpating him of the alleged death of other individuals. [5] Hakizimana appealed the judgment to the High Court. The Prosecution then raised an objection of lack of jurisdiction stating that the judgment that had been decided under review can never be subject to appeal. In the interlocutory judgment of February 8, 2013, the Court decided that the objection has no merit. [6] The Court precised that the judgment which had been tried through review and which is at appeal before it, had been heard by the Intermediate Court of Gasabo at the first instance level since it was of the same nature as of the one rendered at the first instance and hence there is no reason for the High Court to dismiss it at appeal level because the Law determining organization, functioning and competence of courts grants the competence to the High Court to hear at appeal level the judgment rendered by Intermediate Court at the first instance. [7] With regard to the case laws cited by the Prosecution in order to indicate that the case which had been heard under review cannot be subject to appeal according to the position of the Supreme Court, the Court held that they cannot be applicable in the case because they are not criminal cases and, in addition, they had been decided at the last instance in a such a way that they cannot be subject to any other judicial remedy which differs from the case at hand which had been decided at the first instance. [8] Furthermore, the Court held that the article 193 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure prohibiting the appeal

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97 against the judgment heard under review cannot be applicable in the case since it is referred to in criminal cases in case of absence of specific provisions, which is not the case since the review of criminal cases is provided for by articles 180 - 183 of the Law N°13/2004 of 17/05/2004 relating to the code of criminal procedure and with regard to the appeal against such cases is provided for in general in the law determining organization, functioning, and competence of courts which states that criminal cases decided at the first instance by Intermediate Court are appealed for to the High Court. [9] After that interlocutory judgment, the Court acquitted Hakizimana of all charges and ordered his immediate release in the judgment on merit rendered on June 21, 2013. [10] In its appeal of July 12, 2013 to the Supreme Court, the Prosecution alleged that the High Court disregarded that the law does not provides for the possibility of appeal against the judgment decided under review. [11] The hearing was held in public on July 10, 2013 Hakizimana assisted by counsel Murinzi Jean de Dieu, counsel Mutarindwa Félix and counsel Protais Mutembe, while the Prosecution was represented by National Prosecutor Ruberwa Bonaventure. II. ANALYSIS OF LEGAL ISSUES A. Whether the appeal filed by the Prosecution must not be admitted. [12] Counsels for Hakizimana raised an objection of inadmissibility of the action of the Prosecution indicating PROSECUTION v. HAKIZIMANA

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98 RWANDA LAW REPORTS primarily that the latter is not allowed to lodge an appeal against the court decision declaring itself competent. They added that the action should not have been recorded in the court's registry. Finally they requested the court to order for rectification of the mistake made by the Chief Registrar of the Supreme Court. [13] In support of that, they explain that their objection is provided for in articles 18 and 90 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure. [14] The Prosecution declared that the objection lacks merit since the cited articles of civil, commercial, labour and administrative procedure do not prevent to lodge an appeal against a decision on the competence of the court; rather, they provide that in case the court deems itself competent to hear the case this decision is subject to appeal together with the judgment in merit, that is, the prohibition relates to the lodging of appeal against the interlocutory judgment in which the court declared itself competent while the hearing of the case on merit is still pending. [15] The Prosecution further contends that even article 28 of Organic Law N°03/2012/OL of 13/06/2012 determining organization, functioning and competence of the Supreme Court emphasizes the competence of the Supreme Court to hear the appeal of the judgment delivered by the High Court at appeal level in case such judgment were rendered by the incompetent court. [16] Article 90(2o) of the Law relating to civil, commercial, labour and administrative procedure provides that "if the court rules that it has jurisdiction, one of the litigants who is not

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99 contented with the decision appeals against it with the main suit" while article 18(6o) of the same law which concerns the nature of actions that the Court registrar cannot receive and record in the registers of the courts precises that he/ she cannot receive and record in the court register in case of appeal on a judgment rendered upon a case review. [17] The Court finds that article 90(2°) of the law referred to above concerning civil, commercial, labour and administrative procedure does not prohibit appeal against a decision of the court declaring itself competent to try the case, rather it prohibits to anticipate the appeal against it before the delivery of the judgment in merit. [18] The Court finds that when article 18(6o) is analyzed together with article 90(2°) imply that the claim that the Court Registrar is prohibited from receiving is the appeal against the decision of the court which declared itself competent to hear the case while the main case is awaiting trial. [19] The Court finds further that the analysis of articles 18(6o) and 90(2°) made by counsels for Hakizimana does not pay attention to the fact that the reason as to why such an order must be appealed with case on merit is that it is in the context of the interlocutory judgment whereby article 162(2°) concerning civil, commercial, labour and administrative procedure provides that appeal against interlocutory judgments is only done after the main claim had been ruled on, and it must be done together. [20] Based on all those holdings, the Court decides that the objection raised by Hakizimana's counsels regarding inadmissibility of the claim has no merit and hence there should be an examination of the appeal lodged by the Prosecution.

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100 RWANDA LAW REPORTS B. Whether the High Court had no competence to receive appeal of the judgment that Hakizimana has applied for review to Intermediate Court of Gasabo. [21] The Prosecution alleged that the appealed judgment must be quashed since the law does not provide for the possibility of appeal against the judgment which had been heard upon review. [22] The Prosecution explains that reference made to the case RS/REV/GEN0005/07/CS where prosecution sued Rwahama Anaclet, the Supreme Court clearly held that the judgment decided upon review takes the nature of the original judgment, hence becomes also final and not susceptible of any judicial remedies. The Prosecution also stated that there are many other decided cases which emphasized this position among others RADA0026/10/CS (Nzabandora Alex v. State of Rwanda), RCAA0065/09/CS (Mulemba v. Kabona Justin) and RCOMA001/06/CS (Nzabamwita Emmanuel v. SONARWA). He concluded that the High Court might have taken the same position given that the decisions of the Supreme Court are binding to other courts. [23] The Prosecution further submitted that though the law relating to criminal procedure which was into force at the time when the case was decided before the High Court, was silent vis-à-vis appeal against the judgment decided upon review, the High Court might have based on the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure which states that the case decided upon review cannot be subject to any other judicial remedy.

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101 [24] Counsels for the accused argue that article 192 raised by the Prosecution in their plea has no relationship with their defense because it only provides that application for review becomes impossible in regard to the judgment which had ever been decided upon review “révision sur révision ne vaut”. [25] They further argue that article 373(3°) of the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure provide that that law is not referred to in case it is likely to obstruct the rights the litigant had prior to its promulgation, therefore the Court should not rely on that law since it is prejudicial to Hakizimana. [26] Regarding the case laws cited by the Prosecution in the context of clarifying its action, they responded that the cited cases have no relationship with the case of Hakizimana since those case laws had been tried at the last instance while the case at hand was decided at the first instance which is not an impediment to appeal. [27] They argue in addition that the Supreme Court as the highest to all other courts will have to base only on the truth in order to administer justice for Hakizimana instead of being enslaved by the written law while the accused is facing injustice; given that it is the practice in common law system that Rwanda is moving to.

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102 RWANDA LAW REPORTS THE VIEW OF THE COURT [28] In its many decided cases¹ at the time the law No13/2004 relating to the code of criminal procedure was still into force as well as the Law N°18/2004 of 20/06/2004 relating to civil, commercial, labour and administrative

procedure, the Supreme Court held that though those laws did not explicitly stipulate about it, the judgment which had been decided upon review are not subject to appeal because the application for review is an extraordinary remedy which allows the judge to retract his decision in case it is found a reasonable ground among those set for by the law likely to indicate that the judgment would have been adjudicated in the contrary manner if that ground was known. However, the Court reiterated that this remedy does not aim at opening appeal against the judgment which is final because the judgment decided upon review takes the nature of that it replaces, therefore being final as well. [29] The Court finds that the holdings of the High Court that the position of the Supreme Court is only concerned with civil, commercial, labour and administrative cases have no merit because there are criminal cases which have been adjudicated alike for example *Prosecution v. Rwahama Anaclet* decided on July 24, 2009² in which the Court decided that there is no court assigned by the Organic Law to try appeal of cases which had been heard upon review. Moreover, there is no legal reason as to

1RADA0026/10/CS (Nzabandora Alex Vs State of Rwanda), RCAA0065/09/CS (Mulemba Vs Kabona Justin), RCOMA001/06/CS (Nzabamwita Emmanuel Vs SONARWA. 2 RS/REV/GEN0005/07/CS (MP vs Rwahama Anaclet).

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103 why criminal cases which had been decided upon review would be subject to appeal while the same cannot be done for civil cases. [30] The Court finds that the holdings of the High Court that the position of the Supreme Court concerned only the judgment decided at the last instance has no ground since, even all the cases which had been decided at the last instance cannot be appealed through ordinary remedies of appeal. [31] Furthermore, the Court reiterates that final judgment has the same effects regardless of the degree of instance to which it had been decided since the judgment decided at the first instance and never be appealed against or in respect of which the appeal became inadmissible are both executed in the same way as those decided at last instance. Therefore, the fact that the judgment decided upon review takes the nature of the one it replaces, which implies that it cannot be subject to any other judicial remedy though it might have been decided at the first instance since the one it replaces has already become *res judicata*. [32] The Court reiterates that its position regarding appeal against judgments rendered upon case review was subsequently emphasized in the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure which was published in the official gazette prior to the decision of the High Court which states in its article 193 that a decision rendered upon review can never be subject to appeal or reviewed. It implies that judgment which is tried upon case review becomes final as the one it replaces. PROSECUTION v. HAKIZIMANA

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104 RWANDA LAW REPORTS [33] The Court notes further that the same position was again emphasized by Organic Law N°03/2012/OL of 13/06/2012 determining, organization, functioning and jurisdiction of the Supreme Court which was published in the official gazette on July 9, 2012

prior to the decision of the High Court. It states in its article 34(11°) that the Chief Registrar shall not register a lodged appeal in the event of appeal against the judgment rendered upon case review. This also implies that such cases are not appealable because there is no reason as to why such cases (either civil or criminal) cannot be subject to appeal before the Supreme while the same it is possible before lower courts. [34] With regard to statements made by counsels for the accused that the Court would seek to know the truth instead of being a slave of the written law only as it is the practice in the Common Law System, the Court finds that it has no merit since, aside that Common Law System does not disregard its case law and applicable law, the legal issue at hand is not whether the accused is guilty or not; rather it is the examination on the competence of the High Court vis-à-vis appeal against a judgment resulting from a case review that was rendered by the Intermediate Court. [35] Therefore, based on all those grounds, the Court finds that the High Court had no competence to try the case at the appeal level the judgment which had been reviewed by the Intermediate Court. III. THE DECISION OF THE COURT [36] Decides that appeal lodged by the Prosecution has merit.

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105 [37] Rules that the High Court had no competence to admit the appeal lodged against the case RP/GEN 0001/10/TGI/GSBO rendered by Intermediate Court of Gasabo on February 2, 2012. [38] Quashes the judgment RPA/GEN/0001/12/HC/KIG. [39] Orders the court fees to be paid by the government.

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PROSECUTION v. MBABAJENDE ET AL [Rwanda SUPREME COURT – RPA0148/11/CS (Mukamulisa, P.J., Munyangeri and Hitiyaremye, J.) December 11, 2015] Criminal Procedure Law – Felony – Prescription of a criminal action – The fact that there have been some acts of investigations and that the case was submitted to the court within the time limit, but without any act of prosecution does not interrupt the prescription of a criminal action – Law No30/2013 of 24/5/2013 relating to the Code of criminal procedure, articles 2(1&2), 5, 7(1) and 8(1&2). Facts: As a consequence of the death of two children of Samunane that happened on 5 January 1993, Nyirandegeya was suspected to have poisoned them. Hategekimana Dismas, Mbabajende Jean Baptiste, Turikunkiko Jean Claude, Uwizeyumuremyi Claude, Sebahire Lucien, Ruzindana Augustin and their other colleagues immediately plotted to kill her and then attacked her home covered up with herbs with intention of misleading people to avoid being recognized. When they reached her home, they beat her first and thereafter beat Mukamusoni and her daughter Mukansanga since they said that they are her accomplices in poisoning. They beat all of them until they died. At the same time they also seriously beat the person named Mukandanga, but fortunately, she did not die. After opening investigations, the Prosecution has accused different people including the appellants and during their interrogation some of them pleaded guilty while others pleaded 107

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108 RWANDA LAW REPORTS not guilty. On 11/11/1993, the case was filed before the Court of First Instance of Byumba through the letter No 1/0097/RMP 15076/GTBO/MF, but the case was not heard until the Judicial reform in 2004 after which the case was transferred to the High Court on 13/10/2004 and after on 24/7/2009 that Court took the decision No RP0038/05/HC/KIG whereby it ruled that it does not have territorial jurisdiction and thus ordered its transfer to the High Court, Rwamagana Chamber, for trial by the latter. The High Court, Rwamagana Chamber, considering their guilty plea during investigations and before the court, ruled that the appellants are convicted of that offence and sentenced each of them to twenty (20) years of imprisonment while it ruled that there has been prescription of the criminal action since they have died. Ntuyenabo Simon and others were not satisfied with the verdict and then appealed before the Supreme Court stating that they should not have been tried since there has been prescription of the criminal action and regarding the judgment in substance, they alleged that there was no evidence of the cause of death of the deceased. They also alleged that the judge ruled ultra petita and that they did not benefit from penalty reduction while they pleaded guilty. The Prosecution state that there is no prescription of the criminal action since the case reached the High Court from The Court of First Instance of Byumba. The court ruled on one ground of appeal regarding the prescription of the criminal action. Held: The fact that there have been some acts of investigations and that the case was submitted to the court within the time limit, but without any act of prosecution does not interrupt the prescription of the criminal action.

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109 The objection raised by the appellants has merit. There has been prescription of the criminal action. The appealed judgment is reversed. The court fees are allocated to public purse. Statutes and Statutory instruments referred to: Law No30/2013 of 24/5/2013 relating to the Code of criminal procedure, articles 2(1&2), 5 and 7(1) and 8(1&2). No case referred to. Authors cited: Henri Bosly et Damien Vandermeersch, *Droit de la procédure pénale*, Ed. 2005, p.209 in fine. Michel Franchimont et alii, *Manuel de procédure pénale*, 2e Edition Larcier, 2006, p.109. Serge Guinchard et Jacques Buisson, *Procédure Pénale*, 3ème édition, p.619, paragraph 1162.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] On 5 January 1993, two (2) children of Samunane died and it was suspected that they were poisoned by Nyirandegeya. Hategekimana Dismas, Mbabajende Jean Baptiste, Turikunkiko Jean Claude, Uwizenyumuremyi Claude, Sebahire Lucien, Ruzindana Augustin and their other colleagues immediately plotted to kill her and then attacked her home covered up with PROSECUTION v. MBABAJENDE ET AL

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110 RWANDA LAW REPORTS herbs with intention of misleading people to avoid being recognized. When they reached her home, they first beat her and after beat Mukamusoni and her daughter Mukansanga since they said that they are her accomplices in poisoning. They beat all of them until they died. At the same time they have seriously beaten the person named Mukandanga, but fortunately, she did not die. [2] Investigations commenced immediately and Hategekimana Dismas, Mbabajende Jean Baptiste, Turikunkiko Jean Claude, Sebahire Lucien, Nzamwita Félicien, Ruzindana Augustin, Uwizeyumuremyi Claude, Ngiruwonsanga Alphonse, Bizimana Théogène, Harerimana Faustin, Harerimana Théogène, Ntuyenabo Simon and Kamuhanda Théoneste were charged and, during their interrogations, some of them pleaded guilty while others pleaded not guilty. [3] After investigations, the Prosecution submitted a case to the Court of First Instance of Byumba on 11/11/1993 through the letter No 1/0097/RMP15076/GTBO/MF, but the case was not heard until the Judicial reform in 2004 after which the case was transferred to the High Court on 13/10/2004 and after on 24/7/2009 that Court took the decision No RP0038/05/HC/KIG and ruled that it does not have territorial jurisdiction and thus ordered its transfer to the High Court, Rwamagana Chamber, for its trial by the latter. [4] On 6/5/2011 the High Court, Rwamagana Chamber, basing on their guilty plea during all investigations carried out and before the court, ruled that Mbabajende Jean Baptiste, Nzamwita Félicien, Uwizeyumuremyi Claude, Ntuyenabo Simon and Kamuhanda Théoneste are convicted of assassination of late Nyirandegeya, Mukamusoni and

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111 Mukansanga sentenced each of them to twenty (20) years of imprisonment. As regards Hategekimana Dismas, Turikunkiko Jean Claude, Sebahire Lucien, Ruzindana Augustin, Ngiruwonsanga Alphonse, Bizimana Théogène, Harerimana Faustin and Harerimana Théogène, the Court ruled that there has been prescription of the criminal action since they have died. [5] This decision did not please Ntuyenabo Simon and his colleagues and they appealed against it before the Supreme Court stating that they should not have been tried since there has been prescription of the criminal action and regarding the judgment in substance, they alleged that there was no evidence of the cause of death of the deceased. They also alleged that the judge ruled ultra petita and that they did not benefit from penalty reduction while they pleaded guilty. [6] The hearing was publicly held on 26/10/2015 where Ntuyenabo Simon and Kamuhanda Theoneste appeared being assisted by Counsel Ndutiye Yussuf while Nzamwita Felicien and Uwizeyimana Claude did not appear, but having been lawfully summoned while for Mbabajende Jean Baptiste, the court bailiff proved that he had died as confirmed by Nyamirama Cell leaders and the Prosecution was represented by Mutayoba Alphonse, the National Public Prosecutor. On this day, there have been discussions on one ground of appeal regarding the prescription of the criminal action.

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112 RWANDA LAW REPORTS II. ANALYSIS OF LEGAL ISSUE Whether there has been prescription of the criminal action for the offense Ntuyenabo Simon and his fellows are charged with by the Prosecution. [7] Counsel Ndutiye Yussuf states that there has been prescription of the criminal action for the offense Ntuyenabo Simon and his co-accused are charged with since it was committed on 5/1/1993 while the document that closed the investigations was drafted on 28/9/1993. He stated that despite the existence of a letter of 11/11/1993 that transferred the file to the Court of First Instance of Byumba, there is no proof that it was received, but it is only clear that the dossier reached the High Court in 2005, after 12 years without any thing done upon the dossier. Therefore, he stated that there has been prescription of the criminal action basing on article 112 of the Decree Law No 21/77 of 18 August 1977 instituting the penal code that was into force at that time and he thus realizes that this case should not have been examined by the High Court. [8] The representative of the Prosecution states that as accepted by the legal counsel for the accused himself, the offense was committed on 5/1/1993 and the file was prepared and filed to the Court of First Instance of Byumba on 11/11/1993 which implies that there was no prescription of the criminal action at this time. He stated that the case file that appeared in the High Court in 2005 was coming from the Court of First Instance of Byumba and not from the Prosecution and it is rather clear that it delayed in the court. He concludes stating that, basing on the grounds invoked by the appellants, there is no prescription of the criminal action since the Prosecution seized the court within the period provided for by the law.

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113 OPINION OF THE COURT [9] Article 5 of Law No30/2013 of 24/5/2013 relating to the Code of criminal procedure provides that “Except the crime of genocide, crimes against humanity and war crimes which are not subject to prescription, a criminal action for other offenses shall lapse after a period of ten (10) years for felonies; a period of three (3) years for misdemeanors; a period of one year for petty offences”. [10] Article 7(1) of this Law provides that “The prescriptive period of a criminal action shall be interrupted by conducting investigation or prosecution within the period provided for under article 5 of this Law”. [11] As for article 2(1&2) of this Law, it explains that “Investigation is any act aimed at detecting offences, gathering evidence, whether of an incriminating or exculpatory nature and any act aimed at determining whether or not to prosecute the suspect and that prosecution is any act aimed at referring a matter to the court, summoning parties, appearing before court, preparing the hearing, litigating and using procedures of appeal”. [12] Article 8(1&2) of the above mentioned Law provides that “The prescriptive period of a criminal action shall be suspended whenever investigation or prosecution is precluded by an inevitable obstacle arising from the law or by an event of force majeure. When such an obstacle is removed, the prescriptive period which was suspended shall continue to run from the removal of the obstacle”. PROSECUTION v. MBABAJENDE ET AL

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114 RWANDA LAW REPORTS [13] Concerning this case, all documents included in the case file prove that the offense alleged against the accused was committed on 5/1/1993, and after investigations, the Prosecution submitted the case to the Court of First Instance of Byumba on 11/11/1993 and the case was recorded in the court registers on 17/1/1994. These documents also prove that another action relating to this case was carried out on 13/10/2004 when the dossier was transferred to the High Court for its trial. [14] Basing on the laws and the case file elements explained above, the Court finds that the prescription of the criminal action of the case lodged in the Court of First Instance of Byumba on 11/11/1993 was interrupted by its recording in the registers of claims on 17/1/1994 as explained above; which implies that this action should have lapsed on 16/01/2004; that is in a period of ten (10) years from the day preceding the one on which the last act relating to the case was accomplished. [15] Concerning the statement of the Prosecution that there is no prescription of the criminal action basing on the fact that some acts of investigations were carried out and that the case was referred to the court within the time limit, the Supreme Court finds that this cannot be considered since no act among those provided by article 2(1&2) of the above mentioned Law was performed from the time when the court was seized so that it may have interrupted the prescription. This is in line with opinions of legal scholars who state that, regarding the prescription of the criminal action, it is not enough to submit the case to the court within the time limit provided for, but that it is also necessary to hear it before its prescription (Il ne suffit pas que l'action publique soit introduite devant le juge pénal en

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115 temps utile, encore faut-il qu'elle soit jugée dans les délais de prescription)1. [16] Another legal scholar moreover states that it is on the date of judgment delivery that it is assessed whether there has been prescription of the criminal action or not. He states that it is the final judgment rendered on a criminal action in the presence of both parties that terminates the prescriptive period if there is no application for judgment cassation. (C'est au jour du jugement qu'il faut apprécier si la prescription est ou non acquise. Ainsi, le jugement qui statue définitivement et contradictoirement sur l'action publique met fin à celle-ci, en l'absence de cassation)2. [17] The analysis of opinions of these legal scholars and provisions of article 2(1&2) of the above mentioned Law which provides for acts which interrupt the prescription of the criminal action shows that nothing interrupts prescription of a criminal action pending in court in case it was not heard before its prescription; especially that acts which interrupt the prescription of that action include those performed in court as provided by that article and stressed by legal scholars3. [18] However, the Supreme court finds that the genocide against Tutsi that happened in Rwanda from 7/4/1994 has suspended the prescription of the criminal action (a suspendu la prescription de l'action publique) and that suspension of

1 Michel Franchimont et alii, Manuel de procédure pénale, 2e Edition Larcier, 2006, p.109. 2
Henri Bosly et Damien Vandermeersch, Droit de la procédure pénale, Ed. 2005, p.209 in fine. 3
Idem, p.212-216. PROSECUTION v. MBABAJENDE ET AL

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116 RWANDA LAW REPORTS prescription must be considered until the time when the Court of First Instance of Byumba that was seized has restarted its functioning after genocide; that is on 10/11/1994 as proved by the claims' registers that its Registry has given to the Supreme Court. [19] The Supreme Court substantiates statements in the previous paragraph by article 8 par 1 and 2 of the Law mentioned above; of which content is similar to opinions of legal scholars who confirm that the reasons of suspension of prescription of a criminal action can derive from all unexpected factual hindrances constituting force majeure or insurmountable circumstances which cannot allow the prosecution to do anything. It could thus be the case for war, flood or disaster; but also when the accused has fled abroad, it is necessary to wait until the requested extradition is granted so as to start the prosecution (Les causes de suspension de la prescription peuvent aussi résulter de tous obstacles de faits, constitutifs de force majeure ou de circonstance insurmontable, empêchant la partie poursuivante d'agir. Ainsi pourrait-il en aller de la guerre ou d'une inondation ou d'une catastrophe, mais aussi du fait que la personne impliquée s'était réfugiée à l'étranger, il faut attendre que l'extradition sollicitée ait été accordée par l'Etat requis pour entrer en voie de poursuite)⁴. [20] The Supreme Court finds that from the time the complaint was recorded in the register of claims on 17/01/1994, that action should have lapsed on 17/01/2004; but the time of

4 Serge Guinchard et Jacques Buisson, Procédure Pénale, 3ème édition, p.619, paragraph 1162.

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117 suspension of prescription as explained in paragraph 18 of this judgment should be added to the time of prescription; this means that from 7/04/1994 until 10/11/1994 which is equal to seven (7) months and four (4) days. It means that the prescription of that action has occurred on 4/7/200. Therefore, another act which was done on this file of transmitting it to the High Court on 13/10/2004 was carried out after the prescription of the criminal action. [21] Basing on the above explanations, the Supreme Court finds that the High Court, Rwamagana Chamber, should not have received and tried this case which is the reason why this Court nullifies the judgment rendered by that Court on this case. III. DECISION OF THE COURT [22] The Court rules that the objection raised by Ntuyenabo Simon and Kamuhanda Theoneste regarding the prescription of the criminal action has merit, [23] The Court rules that there has been prescription of the criminal action; [24] The Court rules that the judgment RP0043/09/HC/RWG rendered by the High Court, Chamber of Rwamagana on 6/5/2011 is vacated; [25] The Court rules that the court fees are allocated to the Public Purse.

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COMMERCIAL CASES

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GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD [Rwanda SUPREME COURT – RCOMA0162/12/CS (Nyirinkwaya, P.J., Mukandamage and Kanyange, J.) June 12, 2015] Law determining jurisdiction of courts – Carriage contract – Jurisdiction of the court where it was agreed to give exclusive jurisdiction to a foreign court to hear any contractual dispute – The fact that in their carriage contract, both parties have agreed that London Court shall have exclusive jurisdiction to hear any dispute between them cannot be considered because they do not prove whether that Court has material jurisdiction to hear the case nor that it is more convenient for them than being heard by Rwandan courts account taken of the court proceedings' costs and the value of the subject matter – Organic Law N°51/2008 of 09/09/2008 governing organization, functioning and jurisdiction of courts, article 121. Law of contracts – Business interests and for delay – One of parties to the contract cannot argue the contract has not provided for interests for delay and that those claimed by the other party are excessive while both parties have agreed on the method of payment of interests for delay in case of breach of the contract – Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 168. Facts: DAMCO TANZANIA Ltd sued GREAT LAKES CEMENT Ltd before the Commercial High Court praying to be paid the balance of 85,805USD on the freight of its goods it 121

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122 RWANDA LAW REPORTS transported from China to Musanze in Rwanda and various damages plus the penalty forcing execution. Immediately, GREAT LAKES CEMENT Ltd has also raised the objection for inadmissibility of the claim of DAMCO TANZANIA Ltd, arguing the latter should pay security deposit furnished by foreigners who are parties to the case before Rwandan courts and requested damages because DAMCO TANZANIA Ltd has caused loss to it by its failure to transport all its goods and its manager was summoned by the Police as well. It further argues that this court lacks jurisdiction to hear this case because both parties agreed in their carriage contract that it shall be subject to the exclusive jurisdiction of London High Court of Justice. The Court ruled that DAMCO TANZANIA Ltd must not pay the security deposit furnished by foreigners because it is a registered company in one of East African Community member States. In respect to lack of jurisdiction of Rwandan courts, the Court ruled that this cannot be considered as none of the parties has proved to be of English national nor have they proved that the goods originated from that country. The Court held that Great Lakes should not be awarded damages since it is the one that should pay them to DAMCO TANZANIA Ltd. GREAT LAKES CEMENT Ltd appealed to the Supreme Court submitting that the Commercial High Court lacks jurisdiction to hear this case because the competent court is London High Court of Justice which is likely to be impartial as agreed upon in the contract. On its side, DAMCO TANZANIA Ltd argues that the ground of appeal of GREAT LAKES CEMENT Ltd is without merit because its claim did not relate to the breach of

the contract; rather, it was based on documents written in Rwanda where the Managing Director of GREAT LAKES

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123 CEMENT Ltd wrote documents showing the outstanding debt towards DAMCO TANZANIA Ltd. He further argues that this case has no connection with English courts because the dispute arose in Rwanda where the defendant resides as well. Held: 1. The fact that the parties have agreed in their carriage contract that any dispute between them shall be referred to the exclusive jurisdiction of London High Court of Justice cannot be considered as long as parties do not prove that it has material jurisdiction to try this case nor that it is more convenient for them than being heard by Rwandan courts, account taken of the court proceedings' costs and the value of the subject matter.

2. One of parties to the contract cannot argue the contract has not provided for interests for delay and that those claimed by the other party are excessive while both parties have agreed on their method of payment in case of breach of the contract. Therefore, the appellant must pay interests amounting to 12% computed from July 2010 until the day of the judgment delivery. Appeal is without merit. Cross appeal has merit in part. Court fees to the appellant. Statutes and statutory instruments referred to: Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative, article 168. Organic Law N°51/2008 of 09/09/2008 governing organization, functioning and jurisdiction of courts, article 121. No case referred to. GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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Judgment

I. BRIEF BACKGROUND OF THE CASE [1] DAMCO TANZANIA Ltd sued GREAT LAKES CEMENT Ltd before the Commercial High Court praying to be repaid the balance amounting to 85,805USD left from the cost of the freight for its goods it transported from China to Musanze in Rwanda, commercial interests of 25% per year, 19% of interests for delay per year, procedural and advocate's fees, penalty forcing execution and provisional judgment execution. [2] In that case, GREAT LAKES CEMENT Ltd raised the objections for inadmissibility of the claim of DAMCO TANZANIA Ltd including the objection relating to security deposit furnished by foreigners who are parties to case before Rwandan courts and the objection of lack of jurisdiction and requested damages for procedural and advocate's fees and moral damages as well damages for the incurred loss from the failure by DAMCO TANZANIA Ltd to transport all its goods and the fact that its manager was summoned by the Police. [3] The Commercial High Court held that DAMCO TANZANIA Ltd must not pay the security deposit furnished by foreigners because it is a registered company from East African Community. [4] In respect to the jurisdiction of the court, the Court found that the argument of GREAT LAKES CEMENT Ltd that Rwandan courts lack

jurisdiction to hear this case because in their carriage contract both parties agreed that London High

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125 Court of Justice shall have jurisdiction to try the case is without merit since none of litigants proves to be an English citizen, that those goods are from UK or that they have transited there and none of them has managed to explain to it why they have elected that court without any link with the subject matter or parties or the law they rely on to give that court jurisdiction to try the case; thus pursuant to article 121 of Organic Law N°51/2008 of 09/09/2008 determining organization, functioning and jurisdictions of courts, it ruled that it has jurisdiction to try the case because the defendant resides in Rwanda. [5] With regards to the debt sued over, the Court ordered GREAT LAKES CEMENT Ltd to pay DAMCO TANZANIA Ltd 85,805USD of the balance on the freight, interests thereon amounting to 31,604USD, delay interests equal to 3,718USD and pay 6,500Frw of court fees. The Court held that no penalty forcing execution should be imposed and nor should there be provisional judgment execution. It also held that it should not be awarded moral damages because it is the one that should rather pay DAMCO TANZANIA Ltd and that its manager was not threatened when he was summoned by the Police. [6] In respect to the counterclaim of GREAT LAKES CEMENT Ltd requesting damages for loss suffered because it has not received all its goods, moral damages because its manager was taken to the Police and signed for the debt under threat and advocate's fees, the Court found that it should not award them because it is the one that which is liable to pay. [7] GREAT LAKES CEMENT Ltd appealed to the Supreme Court submitting that the Commercial High Court tried the case while it has no jurisdiction to do so because the competent court to hear any disputes arising out of the contract GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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126 RWANDA LAW REPORTS between the latter and DAMCO TANZANIA Ltd is the London High Court of Justice in UK. [8] In its cross appeal, DAMCO TANZANIA Ltd also requests to update the amount of damages it was awarded and that it was awarded fewer amount of advocate's fees. [9] The case was heard in public on 06/01/2015 and 28/04/2015 where GREAT LAKES CEMENT Ltd was represented by Counsel Bimenyimana Eric whereas DAMCO TANZANIA Ltd was represented by Counsel Nzamwita Toy. II. ANALYSIS OF LEGAL ISSUES

- a. Whether the Commercial High Court had jurisdiction to try the case filed by DAMCO Tanzania. [10] Counsel Bimenyimana representing GREAT LAKES CEMENT Ltd submits that in article 3 of the carriage contract they entered into with DAMCO TANZANIA Ltd on 10/11/2010, both parties agreed that London High Court of Justice has exclusive jurisdiction to settle any dispute that would arise from that contract because they considered it as the impartial court (jurisdiction neutre) rather than referring to Rwandan or Tanzanian courts. He finds that the matter of territorial jurisdiction is not of public policy to the extent that the judge should have chosen for them the competent court. [11] Counsel Nzamwita

representing DAMCO TANZANIA Ltd argues that the ground of appeal of Great Lakes Cement has no merit because the claim of DAMCO TANZANIA Ltd did not arise out of the contract because it was terminated by both parties, it was rather based on documents written on 21/3/2011

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127 and 28/04/2011 in Rwanda (payment order and acknowledgment of debt) by Mr. Nemeyebahizi Jean Baptiste who was its Managing Director, where he personally wrote a document showing the outstanding debt towards DAMCO TANZANIA Ltd. [12] In addition, he argues that this case has no connection with English court because the dispute arose in Rwanda where the defendant resides as well. THE VIEW OF THE COURT [13] Article 89(1) of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that “the party raising an objection of lack of jurisdiction shall justify it and identify the court to which he/she wants the case to be transferred”. [14] Under article 3 of carriage contract between GREAT LAKES CEMENT Ltd and DAMCO TANZANIA Ltd concluded on 10/11/2010, they agreed that the contract shall be governed by English Law and is subject to the exclusive jurisdiction of High Court of Justice of London and that in case there is any breach of contract the dispute shall be resolved amicably, failure of which, such matter shall be taken to court¹.

1 That article provides that: “This Agreement shall be governed by English law, and is subject to the exclusive jurisdiction of High Court of Justice, London. In case there is any breach of contract, any amount outstanding shall be settled by Client. Any dispute shall be resolved in an amicable manner, and in the event of inability to solve things amicably, such matter shall be taken to court”. GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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128 RWANDA LAW REPORTS [15] The Court finds without merit the argument of Counsel for DAMCO TANZANIA Ltd that the claim it filed is not connected to the contract because from the plaintiff's document instituting the proceedings and related court submissions, it is clear that 85,805USD results from carriage contract. [16] In addition, the Court finds that the agreement between GREAT LAKES CEMENT Ltd and DAMCO TANZANIA Ltd to refer the governance of their contract to the law and the disputes likely to arise from its execution to the Court which have no connection with parties nor the contract is a principle recognized in international contracts. However, the Rwandan law is silent therefore does not offer any help to explain this issue of jurisdiction of the court. [17] American Courts have also, in different cases, held that they should respect the right of parties to the international contracts to choose the court with jurisdiction to settle disputes thereof except where the enforcement of such a provision is unreasonable, unjust or where such a provision is invalid because of fraud or it is overreaching. [18] In the case C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc., delivered by Minnesota Court of Appeals in 2009, it was held that the contractual clause is unfair or unreasonable if the chosen forum is seriously inconvenient, the clause is a contract of adhesion, or the contract is otherwise unreasonable².

2 In the case *C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc.*, it was stated that a “clause is unfair or unreasonable if chosen forum is seriously inconvenient, the clause is [a] contract of adhesion, or agreement is otherwise unreasonable”. 772 N.W.2d 528 (Minn. Ct. App. 2009).

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129 [19] With regard to the provision of article 3 of the carriage agreement between GREAT LAKES CEMENT Ltd and DAMCO Tanzania of 10/11/2010, they chose the High Court of Justice of London with the intention to have a neutral court to settle disputes between them. However, the Court finds that clause unreasonable because it is not enough to choose the court with jurisdiction without taking into account its material jurisdiction and the costs of the lawsuit, if any, in relation to the value of the subject matter. So, Great Lakes Cement that wishes to be heard by that Court does not prove whether it has material jurisdiction to try this case or that it is more convenient for it than being heard by Rwandan courts account taken of the court proceedings costs and the value of the subject matter. It is thus clear that this article is not reasonable for both parties. [20] The Court finds that, as held in its judgment under appeal, the Commercial High Court rather has jurisdiction to try the case as provided for by article 121 of Organic Law N°51/2008 of 09/09/2008 determining organization, functioning and jurisdiction of courts because Great Lakes has its headquarters in Rwanda and this is the place of contract formation.

- b. Cross-appeal of DAMCO Tanzania [21] Counsel Nzamwita representing DAMCO TANZANIA Ltd submits that it raised the cross-appeal praying the Court to update calculation of commercial interests (17% per year) and delay interests (2% per year) from July 2010 as ruled by the previous court until the day of judgment delivery (one year and six months) because GREAT LAKES CEMENT Ltd unreasonably appealed instead of paying the debt and it should thus pay total interests amounting to 85,805USD x 4 years and 6 GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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130 RWANDA LAW REPORTS months x 17% = 65,641,000USD plus delay interests equal to 7,000USD and the advocate's fees equal to 18,169USD because the judge has not ruled over them while there is a contract made with DAMCO TANZANIA Ltd and there are documents proving the amount he has already paid and this amount should also be updated to make 23,650USD. [22] Counsel Bimenyimana representing GREAT LAKES CEMENT Ltd submits that this case is about the claim over which Rwandan courts lack jurisdictions. He adds that the interests DAMCO TANZANIA Ltd requests are excessive as the contract stipulated for the interests of 1% per month that is 12% per year and no delay interests were agreed on. [23] In respect to the advocate's fees, he argues that it should not be awarded in relation to the subject matter because it is illegal and in case DAMCO TANZANIA Ltd loses the case it should pay its advocate. THE VIEW OF THE COURT [24] Article 168(2) of Law N°21/2012 of 14/06/2012 mentioned above provides that “parties my claim interests, rents and other accessories which were realised since the pronouncement of the judgment and moral damages for the loss suffered from the time the judgment was

delivered”. [25] Under article 5 of the aforesaid contract, GREAT LAKES CEMENT Ltd and DAMCO TANZANIA Ltd agreed that in case of failure to pay freight as agreed, it shall be liable for 1% per month, i.e. 12 % per year.

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131 The Court finds that GREAT LAKES CEMENT Ltd should pay the interests of 12% on the outstanding debt and interests should be computed from July 2010 until the day of the judgment delivery as follows: $85.805\text{USD} \times 12 \times 1739 \text{ days} = 49,738\text{USD}$ $100 \times 360 \text{ days}$ [26] With respect to advocate's fees, the Court finds that article 62(2) of Law N°83/2013 of 11/09/2013 establishing the Bar Association in Rwanda and determining its organization and functioning states that an advocate shall not fix fees on the basis of the decision of the court because an advocate has to use all possible means and not to ensure result from the trial, therefore DAMCO TANZANIA Ltd is awarded at Court's discretion the advocate fees equal to 1,000,000Frw for all levels of trial. [27] The Court finds that the total amount of money GREAT LAKES CEMENT Ltd must pay DAMCO TANZANIA Ltd is 85,805USD of the debt decided by the Commercial High Court + 49,738USD of interests = 135,543USD and 1,000,000Frw for advocate's fees. III. THE DECISION OF THE COURT [28] The Court decides that the appeal of GREAT LAKES CEMENT Ltd has no merit. [29] The Court decides that the cross appeal of DAMCO TANZANIA Ltd has merit in part. GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

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132 RWANDA LAW REPORTS [30] The Court orders Great Lakes Cement to pay DAMCO TANZANIA Ltd 135,543USD of the main debt and interests and 1,000,000Frw of the advocate's fees. [31] The Court orders GREAT LAKES CEMENT Ltd to pay 100,000Frw of court fees.

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RWANDAIR LTD v. KARANGWA [Rwanda SUPREME COURT – RCOMAA0025/13/CS (Mutashya, P.J., Nyirinkwaya and Hitiyaremye, J.) July 31, 2015] Laws Governing Air Transportation – Trauma resulting from a plane crash – International agreement of Varsovie provides what should be indemnified in case of a plane crash are death, injury or any other body injuries, Trauma is not among things that can be awarded damages for – International agreement of Varsovie of 12/10/1929 relating Air Transportation of people, article 17. Facts: Karangwa Oreste entered into a contract with RWANDAIR Ltd of transporting him in an Aeroplane from Kigali to Uganda and back. On departure day, that plane had an accident soon after its take off from Kigali International Airport. Karangwa Oreste later filed a claim in the Intermediate Court of Gasabo requesting for damages based on the Air transportation Contract that was not respected and that Court ruled on the case and pronounced that it had no competence to examine that case. He filed another case in the Commercial Court of Nyarugenge, where RWANDAIR Ltd submitted an objection saying that there has been the prescription of the claim because Karangwa never respected days put in place by the law to file a case. The Court took a preliminary judgment and

decided that this objection has no merit. The case was heard in merit, and the Court decided that Karangwa Oreste has won the case and ordered RWANDAIR Ltd to give him damages equivalent to 133

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134 RWANDA LAW REPORTS three million Rwandan francs (3,000,000Frw) and three hundred thousand (300,000) Rwandan francs as the lawyer's fees. RWANDAIR Ltd was not happy with the decision taken and appealed against it in the Commercial High Court, stating that the Commercial Court never gave value the prescription of the crime, that even when calculating damages, the court erred in law. Karangwa Oreste also submitted a cross appeal claiming that there was miscalculation of damages awarded to him. This Court ruled on the case and decided that Karangwa has won the case, and ordered RWANDAIR to pay him 183,523USD; five hundred thousand Rwandan francs (500,000Frw) for procedural and lawyer's fees on the appeal level, and on the rest, the court upheld the first court's decision. RWANDAIR Ltd was not satisfied with the decision again and appealed against it to the Supreme Court, stating that in its pleadings, it explained that Karangwa Oreste had no longer rights to file a case because the time provided for by the law elapsed, because the accident occurred on 12/11/2009 and that based on article 29 of the Convention of Varsovie, the last date to file the case was 11/11/2011. RWANDAIR states also that the court should not have awarded damages based on the depression Karangwa Oreste was caused by the accident, because there were no body injuries caused by that accident, and that even the awarded damages were calculated contrary to the law. The Lawyer on behalf of Karangwa states that he was injured and he should be awarded damages for that and that the injuries mentioned in the contract which was based on in the case, refer not only to body injuries but even to the trauma which are even indicated by medical documents because he was seriously traumatized.

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135 On the hearing day, the Lawyer for Karangwa submitted an objection of inadmissibility of the appeal of RWANDAIR Ltd on the ground that he lost the case on the first and second level for similar reasons and the Supreme Court rejected that objection in an interlocutory judgment. The Supreme Court also decided in a preliminary case that the prescription of the claim has no merit. Held: The fact that the initiators of the International convention of Varsovie, provided in article 17, instances in respect of which damages should be awarded in case of a plane crash, which are death, wounds or other body injuries, all these words implying physical things, if psychological injuries or trauma considered as moral element were intended by the initiators of the Convention, they would not have failed to include them in it clearly. Therefore, the plaintiff should not be awarded damages for that because such injuries are not included among injuries in respect of which damages are awarded in accordance to the Varsovie convention referred to by parties in this case. Appeal has merit. Appealed judgment overruled. Court fees to the respondent. Statutes and statutory instruments referred to: International Convention of Varsovie of 12/10/1929, relating to Air transportation of people, article 17. No case referred to. RWANDAIR

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Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Karangwa Oreste entered into a contract with RWANDAIR Ltd of taking him in an Aeroplane from Kigali to Uganda in a round trip. On 12/11/2009, the departure day, the plane in which Karangwa boarded which was departing to Entebbe in Uganda had an accident soon after its take off from Kanombe Airport. On 11/11/2011 Karangwa Oreste filed a claim in the Intermediate Court of Gasabo requesting for damages, based on the Air transportation Contract that was not respected and on 24/04/2012, the Court took decision and ruled that it had no competence to examine that case. [2] Karangwa filed a case again in the Commercial Court of Nyarugenge and RWANDAIR Ltd also raised an objection stating that there was prescription of the claim because Karangwa never respected the time limit provided for by law for initiation of the case. On 4/3/2013, the Court took decision in a preliminary judgment RCOM0102/13/TC/NYGE and ruled that the objection has no merit. The merit of the case was heard on 22/4/2013, where the court declared Karangwa Oreste the winning party of the case and ordered RWANDAIR Ltd to give him damages equivalent to three million Rwandan francs (3,000,000Frw) and three hundred thousand Rwandan francs (300,000) of Lawyer's fees. [3] RWANDAIR Ltd was not satisfied with the decision again and appealed against it to the Commercial High Court, stating that the Commercial Court did not consider the

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137 prescription of the action and concerning calculation of damages, it was erred in law. Karangwa Oreste filed a cross appeal stating that the damages awarded to him were erroneously calculated. This Court decided upon the case RCOMA0180/13/HCC and ruled that Karangwa has won the case and ordered RWANDAIR Ltd to give him 183,523USD, five hundred thousand Rwandan francs (500,000) for procedural and Lawyer's fees on the appeal level and ordered also that for the rest, the decision of the court in the case RCOM0102/13/TC/Nyge should be upheld. [4] RWANDAIR Ltd was not satisfied with the decision and appealed against it to the Supreme Court, stating that it explained in its hearing arguments, that Karangwa Oreste had no longer the right to file a case, because the time provided for by the law elapsed, explaining that the accident occurred on 12/11/2009 and that based on article 29 of the Convention of Varsovie, the last date to file a case was 11/11/2011. RWANDAIR Ltd also states that the court should not have awarded damages based on the depression occasioned by the accident to Karangwa Oreste, because there were no body injuries caused by that accident, and that even the awarded damages were calculated contrary to the law. [5] On 6/05/2014 the parties appeared in Court, the hearing was conducted in public where RWANDAIR was represented by Counsel Nkurunziza François Xavier, while Karangwa Oreste was represented by Counsel Rwihandagaza Richard. On that day, the

Lawyer on behalf of Karangwa submitted an objection requesting the court to dismiss the appeal lodged by RWANDAIR on the ground that it lost the case in the first and second level for the same reasons, and on 06/06/2014 the RWANDAIR LTD v. KARANGWA

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138 RWANDA LAW REPORTS Supreme Court held in a preliminary case, that this objection lacks merit and ordered for the hearing to resume on 23/09/2014. [6] On 23/09/2014, the parties appeared in Court assisted as before and the appeal of RWANDAIR was examined where it was stating that the claim of Karangwa Oreste was not supposed to have been admitted because it was filed after there was prescription and on 14/11/2014, the Supreme Court rejected that appeal ground and ordered that the hearing of the case in merit will proceed on 20/01/2015. [7] On that day the hearing was held in public, the parties were present and represented as before. After hearing the submissions from both sides, the parties to the case were informed that the judgment on the case will be delivered on 27/2/2015, but on that day, the court decided to resume the hearing and scheduled it on 21/4/2015, in order to allow the parties to have their comments on the letters that were submitted in the file after the closure of hearing. On that day the hearing was adjourned to 13/5/2015 because the day time was over. II. ANALYSIS OF THE LEGAL ISSUES ¾To determine whether it should be awarded damages in respect of the psychological injuries that resulted from the accident of the Aeroplane provided for in article 17 of the Convention of Varsovie relating to transportation of people in an aeroplane that was signed on 12/10/1929. [8] Counsel Nkurunziza François Xavier on behalf of RWANDAIR Ltd states that the reasons that led them to appeal, was that the Judge who decided upon the appealed case awarded

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139 Karangwa Oreste damages based on the sorrow caused by the accident of RWANDAIR's Aircraft in which he lost his closest friend, while they find the damages mentioned in article 17 of Varsovie international Convention should result from direct effects caused by the accident, of which effect should be both visible and tangible. [9] He says that it is known that Karangwa Oreste has no body injuries caused in an accident of RWANDAIR's Aircraft, instead that, his statements relate to distress caused by that accident, and that all evidence he holds which are based on reports done by Medical doctors are baseless. [10] He states also that article 17 of the Varsovie Convention provides that, in case of an accident of the aircraft, damages are determined only when death occurs or body injuries and Karangwa does not indicate that he had those injuries. He adds that even if the Court finds damages to be awarded in respect of psychological injuries too, Karangwa should not be awarded any because the Medical doctor confirmed that those injuries were caused by the distress he had for losing his close friend in the accident. Therefore his injuries have no direct relations with the accident of the Aircraft belonging to RWANDAIR Ltd. [11] Counsel Nkurunziza François Xavier states in a document submitted to Court, that even in other jurisdictions, decisions were taken that; injuries in respect of which damages are awarded are only those originating from the accident, and based on article 17 of the Varsovie convention, only body injuries. He provides a model case law which Morris vs KLM

Royal Dutch Airlines that was taken in England where a girl aged fifteen years old (15) was offended by a passenger in an Aircraft, and went to court to seek for damages on the basis that RWANDAIR LTD v. KARANGWA

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140 RWANDA LAW REPORTS she was traumatized but based on article 17 of the Convention previously mentioned, the House of Lords, considered as the Supreme Court, decided that she deserves no damages based on the same article because there were no body injuries indicated. [12] Counsel Rwihandagaza Richard on behalf of Karangwa Oreste states that he had injuries and should be awarded damages for that, based on article 17 of the Varsovie convention. He states that the said injuries in this article is not only body injuries, but also psychological injuries and there are documents from the Hospital that indicate that he suffered of those injuries because he was seriously traumatized. [13] Regarding the effect of those injuries he had in relation to his job, Counsel Rwihandagaza states that even if he is not an expert in relation to those problems, he finds that the trauma suffered by Karangwa due to this accident impacted his daily activities, and that it has been even evidenced in Medical doctors reports. [14] Concerning the fact that this trauma Karangwa Oreste suffered was caused by the loss of his close friend, his Counsel Rwihandagaza Richard states that this also traumatized him because it was Karangwa who was taking a lady named Azera who lost her life in this accident to Uganda, and even her ticket was bought by him, therefore he always regrets her death by accusing himself of being the catalyst. [15] Counsel Rwihandagaza Richard states in the documents submitted to the Court, that French courts have never had to rule on the question of what is meant by the concept of “body injury”, whether it includes only the injury which causes only a physical injury or if it also includes a lesion which caused a

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141 mental injury, (les juridictions françaises n'ont toujours pas eu à se prononcer sur la question de savoir ce que recouvre la notion de “lésion corporelle”, si elle comprend uniquement la lésion qui n'entraîne qu'un préjudice physique ou si elle comprend également une lésion qui occasionna un préjudice psychique). He gave an example of the case decided by the “Cour de cassation” in 1982, where it took a decision based on article 17 of the Varsovie Convention, that a passenger has the right to request for damages resulting from the trauma, though the transporter (le transporteur aérien) had play no role in it, but indicated the effects caused to the passengers as a result of the Aircraft hijacking, whether they are effects based on body injuries or trauma. [16] He states that in this case, it was found that there was no role played by the transporter in the occurrence of such effects, whether based on body injuries or trauma, not because no damages are awarded in respect of the effects based on trauma, but because the transporter managed to prove that he/she took all possible measures to prevent those effects in compliance with the provision of article 20 of the Varsovie Convention. [17] In that document, Counsel Rwihandagaza states that in regards to Labour legislation, “Cour de cassation” in France regarded trauma (trouble psychique) as normal body injuries (lésion corporelle), whereby this Court confirmed

this qualification when it was examining the claim of an employee who suffered trauma when he was being inspected. [18] He concludes his remarks by requesting the court to assist for interpretation of the word injuries (blessures) stated in article 17 of the Varsovie Convention because the parties have controversial interpretation, where some say it is only body RWANDAIR LTD v. KARANGWA

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142 RWANDA LAW REPORTS injuries (blessures physiques) which are concerned in this article while others regard it to include also psychological injuries (blessures psychiques). THE VIEW OF THE COURT [19] Article 17 of the Varsovie Convention of 12/10/1929 as amended by the La Haye Convention of 28/09/1955 which Rwanda ratified, states that the carrier is liable for damage occurred in case of death, injury or any other bodily injury suffered by a passenger if the accident that caused the injury occurred while on board of the aircraft or during any operations of embarkation and disembarkation. (Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement). [20] Regarding this case, Counsel Rwihandagaza Richard on behalf of Karangwa Oreste states that the injuries referred to in article 17 of the Convention previously mentioned, are not only body injuries, but instead they are psychological injuries which he confirms his client suffered in an accident of RWANDAIR's Aircraft and as a result, he requests for damages, while Counsel Nkurunziza François Xavier on behalf of RWANDAIR states that injuries which are considered in article 17 of the aforementioned convention are only body injuries, therefore psychological injuries are not included. [21] The Supreme Court finds that an answer to the question to know whether the injuries suffered by a passenger due to the

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143 accident that occurred when he was on board of the plane are only body injuries (blessures physiques) or whether the psychological injuries (blessures psychiques) are also concerned by this article, must be found with the help of the analysis of this article made by experts who did research on it and other courts case laws that addressed similar issue. [22] In his document entitled "La réparation du préjudice moral dans les accidents de transport aérien"¹, Counsel Kenneth WEISSBERG, an advocate in the Paris bar, states that the Varsovie Convention provides for three circumstances in respect of which a person may file a case to the court claiming for damages which are death, wound and body injuries (la mort, les blessures et les lésions corporelles). In that document, he says that even if words "death" and "wounds" has no unusual confusion about their sense, but it is the case in regards to the word "body injuries". He says the problem is to know whether that word mentioned about in article 17 of the Varsovie Convention combines even the depression, sorrow, and other psychological injuries, and this would result in awarding the victim damages based on that aforementioned article. [23] After reading different decisions taken by several courts when seized with claims of damages resulting from moral

injuries (préjudice moral), this Law scholar finds that so many courts decided that, in order for damages to be awarded in respect of psychological injuries, they must be the result of body injuries resulting from the accident. He says that it is even the position of the Supreme Court in America in the case *Eastern Airlines, Inc. v. Floyd*, (1991) where it was concluded that

1 www.weissbergavacats.com/publications/prejudice-moral-accidents-aeeriens.pdf. *RWANDAIR LTD v. KARANGWA*

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144 RWANDA LAW REPORTS based on 17 of the Varsovie convention, air carrier cannot be held liable when an accident has not caused a passenger to suffer death, physical injury or physical manifestation of injury². [24] In the case, *Edith Rosman et al., Appellants, v. Trans World Airlines, Inc., Respondent. Miriam Herman, an Infant, by Alexander Herman, Her Father and Natural Guardian, et al., Appellants, v. Trans World Airlines, Inc., Respondent*, decided upon by the court of appeal of the State of New York Court of Appeals of State of New York) on 13/06/1974, the appellant were praying for damages for having been traumatized, when on 6/09/1970 the plane on which they boarded was rerouted by terrorists when they were on their way from Tel Aviv, Israel, to New York City. The judge said that, based on article of the 17 of the Varsovie international convention. At the trial, plaintiffs should be allowed to prove damages for palpable, objective bodily injuries suffered, whether caused by psychic trauma or by the physical conditions on the aircraft, irrespective of impact, but not for psychic trauma alone³. [25] In the understanding of this court, based on what has been presented above, The fact that the initiators of the International convention of Varsovie, provided in article 17, instances in respect of which damages should be awarded in case of a plane crash, which are death, wounds or other body injuries, all these words implying physical things, if psychic injuries or trauma considered as moral element were intended

² 2, Case law.find law.com/us-supreme-court/499/530/html. ³ 3, http://www.leagle.com/decision/197441934NY2d385_1368.xml/ROSMAN V. TRANS WORLD AIRLINES#

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145 by the initiators of the Convention, they would not have failed to include them in it openly. This is also how it was comprehended by different international courts that encountered cases of people claiming for damages resulting from the psychic injuries alleging to have resulted from the accident of the aircraft. [26] Consideration made of aforementioned grounds, Karangwa Oreste having stated that he has been traumatized or had psychic injuries resulting from an accident of the aircraft of RWANDAIR Ltd in which he boarded, but without providing evidence of body injuries he was caused by that accident or that has resulted from that trauma he said was caused by that accident, the Supreme Court finds that, based on article 17 of the Varsovie international convention mentioned above, no damages should be awarded to him because such injuries are not included among injuries in respect of which damages are awarded. [27] After finding that no damages must be awarded to Karangwa Oreste as previously explained, the

Supreme Court finds that it is not necessary to examine RWANDAIR's point of appeal regarding the calculation of such damages. [28] Based on the explanations given above, the Supreme Court finds the appeal of RWANDAIR Ltd with merit, therefore, the judgment RCOMA0180/13/HCC rendered by the Commercial High Court on 04/10/13 is overruled.

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146 RWANDA LAW REPORTS III. THE DECISION OF THE COURT [29] The Court decides that, the appeal lodged by RWANDAIR Ltd has merit. [30] The Court Rules that, the case RCOMA 0180/13/HCC rendered by the Commercial High Court on 04/10/2013 is overruled. [31] The Court orders Karangwa Oreste to pay court fees, equal to one hundred thousand francs (100,000).

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KARANGIRA v. IYABURUNGA [Rwanda SUPREME COURT – RPA0076/15/CS (Hatangimbabazi, P.J., Karimunda and Gakwaya, J.) November 6, 2015] Criminal Law – Unlawful detention – Execution of different penalties imposed by two different judgments – The convict who was sentenced to penalties for different offences cannot execute those penalties simultaneously; rather, he waits until the first one is fully served and starts executing another – Organic Law No01/2012/OL of 02/05/2012 instituting the Penal Code, article 40(7). Facts: Karangira Jean de Dieu accused Iyaburunga Innocent, the Director of Mpanga Prison, of unlawful detention stating that he would have been released on 17 April 2015 which did not happen considering that he was arrested by the Judicial Police on 17 May 2009 being accused of corruption for which he was punished by Intermediate Court of Gasabo in judgment RP503/09/TGI/GSBO rendered on 14 August 2009 in which he was sentenced to 6 years of imprisonment. Even though the plaintiff requested that he should be released after executing the first sentence, it was found that there were three different judgments in which he was involved, which are; the judgment of 27/11/2009 which sentenced him to six years of imprisonment followed by the judgment of 21/04/2010 which sentenced him to three (3) years of imprisonment and finally the one of 31/01/2013 which sentenced him to six (6) years of imprisonment. The plaintiff argued that even if there might be other judgments that have imposed other penalties, they should 149

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150 RWANDA LAW REPORTS be considered to have been fully served subsequently with the expiry of the first penalty as it was the most severe penalty; but the defendant and his counsel argued that this is contrary to the law. The High Court which was seized with the case held that since Karangira Jean de Dieu was sentenced to more than one penalty while he is still serving them, the execution of the second penalty must start on the date of expiry of the first sentence

and thus his detention is not unlawful. The plaintiff appealed to the Supreme Court with grounds that the Decree Law No21/77 of 18 August 1977 instituting the penal Code that was in force at that time, does not implicitly provide for the execution of concomitant penalties imposed for different offences committed in different periods but that the analysis of its articles 36 and 37 and the practice of prisons in Rwanda prove that it is normal to compute the least sentence as taken in the heavy sentence imposed on the prisoner. He further states that the non-retroactivity of the new penal law except in case it favours the accused is a general principle of law implying that article 40(7) of Organic Law No01/2012/OL of 02/05/2012 instituting the penal code should not have been referred to in this judgment. Iyaburunga and his counsel state that he is legally detained. The representative of the prosecution states that the plaintiff misinterprets the law because the provisions he mentions do not contradict each other. Held: The convict who was sentenced to different penalties for different offences cannot execute them simultaneously; rather, he waits until the first one is fully served and starts executing another.

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151 Appeal without merit. Appealed judgment is upheld. The plaintiff must pay damages to the respondent. Court fees are charged to the public treasury. Statutes and Statutory instruments referred to: Organic Law No01/2012/OL of 02/05/2012 instituting the penal code, article 40(7). Decree Law No21/77 of 18 August 1977 instituting the penal code, articles 36 and 37. No case referred to. Author cited: Michel Franchimont et al., *Manuel de procédure pénale*, Bruxelles: Larcier, 2eme édition, 2006, p.735.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Karangira Jean de Dieu accused Iyaburunga Innocent, the Director of Mpanga Prison, of illegally detaining him before the High Court, Nyanza Chamber, stating that he would have been released on 17 April 2015 but this did not happen. He explained that he was arrested by the Judicial Police on 17 May 2009 being accused of corruption for which he has been punished by Intermediate Court of Gasabo in the judgment RP503/09/TGI/GSBO which was rendered on 14 August 2009 KARANGIRA v. IYABURUNGA

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152 RWANDA LAW REPORTS and got sentenced to 6 years of imprisonment; this implying that the sentence he was given has already been fully served on 17 April 2015. He added that in case there might be other sentences given to him for other offences, it would be considered as if those penalties have been executed with the first penalty since it is the heaviest one. [2] In the judgment RP0004/15/HC/NYA rendered on 29 May 2015, the High Court held that since Karangira Jean de Dieu has been sentenced to more than one penalty while still executing them, the execution of the second sentence should start at the end of the first one and thus concluded that his detention was not unlawful. [3] Karangira Jean de Dieu was not satisfied with the decision and thus appealed to the Supreme Court. [4] The hearing was held in public on 5 October 2015, where

Karangira Jean de Dieu was present and assisted by Counsel Mbaga Tuzinde Mbonyimbuga while Iyaburunga Innocent had appeared being assisted by Counsel Munyemana Pascal and the Prosecution was represented by Bunyoye Grace, Prosecutor at National level. II. ANALYSIS OF THE LEGAL ISSUE II.1. Whether in case of different final judgments that have imposed different sentences, the less severe penalties should be counted as taken in the heaviest one that was imposed by one of those judgments. [5] Karangira Jean de Dieu states that from his detention on 17 May 2009, he has never been released while he was punished

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153 pursuant to Decree Law No21/77 of 18 August 1977 instituting the penal Code that was in force at that time, whereby this Decree-Law does not implicitly provide for the execution of concomitant penalties imposed for different offences committed in different periods but that the analysis of its articles 36 and 37 and the practice of prisons in Rwanda prove that it is normal to count the least sentence as taken in the heavy sentence imposed on the prisoner and that this is how it is provided by foreign laws such as in France. He thus finds that the fact that the High Court did not consider that basing on the loophole found in the Decree-Law mentioned above and ordered that he must execute each separate sentence imposed on him basing on article 40 paragraph 7 of Organic Law No01/2012/OL of 02/05/2012 instituting the Penal Code while this Organic Law was adopted after he had spent five years in prison should be considered as violating his right not to be judged basing on the new law when it is not in favour of the accused. [6] He further states that the non-retroactivity of the new penal law except in case it favours the accused is a general principle of law which is provided for by article 765 of Organic Law No01/2012/OL of 02/05/2012 mentioned above, and article 15 of ICCPR and article 20 of the Constitution of 4 June 2003 as amended to date; indicate that the High Court, Nyanza Chamber, has violated the law and he thus requests this Court to rectify the mistakes made and thus serve him justice. [7] Counsel Mbaga Tuzinde Mbonyimbuga who assists him states that the principle provided for by articles 36 and 37 of Decree Law No21/77 of 18 August 1977 mentioned above which was in force when Karangira Jean de Dieu was punished is that the least sentence is taken in the heaviest one and that in KARANGIRA v. IYABURUNGA

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154 RWANDA LAW REPORTS general a penal law must first inform before punishing which implies that if article 40(7) of Organic Law No01/2012/OL of 02/05/2012 mentioned above had not existed, Karangira Jean de Dieu should have been released. Therefore, the fact that this provision has been considered to keep him in prison while it was enacted later is contrary to law and violates his rights. [8] Iyaburunga Innocent states that Karangira Jean de Dieu was punished for three offences and that he has copies of judgments sentencing him to those penalties and those decisions have to be executed as received since their role in Prison is to enforce the decisions of courts and thus he finds that there is no mistake committed in retaining Karangira Jean de Dieu in prison since he should not be released before serving the sentence. [9] Counsel Munyemana Gatsimbanyi Pascal who assists Iyaburunga Innocent states that there is no ground for unlawful

detention provided for by article 90(4) of Law No30/2013 of 24/05/2013 relating to Criminal Procedure raised by Karangira Jean de Dieu, since he is imprisoned in order to serve execution of judgments which have been rendered in different periods whereby one judgment was rendered on 21/11/2009, another one on 31/01/2013 which proves that the last judgment was rendered after that Organic Law No01/2012/OL of 02/05/2012 above mentioned was published in official gazette. Therefore, nothing was likely to prevent the application of this Organic Law. [10] The representative of the Prosecution states that Karangira Jean de Dieu misconstrues articles 36 and 37 of Decree Law No21/77 of 18 August 1977 instituting the penal Code since there is no difference between them and article 40(7)

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155 of the Organic Law No01/2012/OL of 02/05/2012 instituting the Penal Code. It implies that in case he has no legal basis for his complaint, article 40(7) of Organic Law No01/2012/OL of 02/05/2012 mentioned above must apply as he cannot say that it is severe against him without showing another one which is less severe. OPINION OF THE COURT [11] Article 36 of the Decree Law No21/77 of 18 August 1977 instituting the penal Code that was in force when Karangira Jean de Dieu was convicted provides that “The term of an imprisonment shall be calculated from the day the judgment has become final” while article 37 of this Decree Law provides that “The period of pre-trial detention shall be fully deducted from the duration of the penalty imposed”. [12] Article 40 paragraph7 of Organic Law No01/2012/OL of 02/05/2012 instituting the Penal Code provides that “When a person is sentenced to two successive penalties of imprisonment, the second imprisonment shall start from the expiry date of the first one”. [13] It is indicated in the case file that in the judgment No RP0503/09/TGI/GSBO rendered on 14 August 2009, Karangira Jean de Dieu was prosecuted and convicted for the offence of corruption of that offense and got sentenced to 6 years of imprisonment and a fine of one million Rwandan francs (1,000,000Frw). Karangira Jean de Dieu and the Prosecution appealed to the High Court, at its headquarters in Kigali, and this Court delivered the judgment RPA10891130/09/HC/KIG KARANGIRA v. IYABURUNGA

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156 RWANDA LAW REPORTS on 27/11/2009 whereby it ruled that the decision of the appealed judgment is upheld (identification marks 11 and 18). [14] Karangira Jean de Dieu was also accused of forging document in the Intermediate Court of Gasabo. This Court convicted him of that offense and he was sentenced to three (3) years of imprisonment. Karangira Jean de Dieu appealed against that decision and in judgment RPA0140 - 0318/10/HC/KIG rendered on 21/04/2010, the High Court found the appeal without merit and that consequently the decision of the appealed judgment remains unchanged (identification mark 24). [15] Karangira Jean de Dieu was also accused before the Intermediate Court of Gicumbi for the offense of forging document and complicity in mismanagement of state assets. That Court rendered the

judgment

No RPA0198 - 1130/09/TGI/GIC on 19/02/2010 whereby it ruled that he is not guilty of the offense of forging document but convicted him for breach of trust and mismanagement of state properties and was sentenced to five (5) years of imprisonment and a fine of twenty thousand Rwandan francs (20,000Frw). Karangira Jean de Dieu and the Prosecution appealed against that decision before the High Court and it delivered the judgment RPA0252 - 0303/HC/KIG on 31/01/2013 in which it ruled that he is convicted of breach of trust and use of counterfeited document and sentenced him to six (6) years of imprisonment (identification marks 25-46). [16] The Court finds that the first judgment in which Karangira Jean de Dieu was convicted is that of 27/11/2009 which sentenced him to six (6) years of imprisonment and it is followed by the judgment of 21/04/2010 which sentenced him to three (3) years of imprisonment and lastly the judgment of

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157 31/01/2013 which sentenced him to six (6) years. Therefore, every judgment is separate and independent from the other since he was punished for different offences, by different courts and in different periods. Therefore, as the latest penalties were imposed on him before the execution of the first penalties, it means that he could not immediately execute them while they could not be deducted from the previous penalties, since basing on article 37 of Decree Law No21/77 of 18 August 1977 mentioned above, what is deducted from the duration of the penalty is the pre-trial detention imposed on the suspect against whom a case is pending before courts; and who can be acquitted and who is presumed innocent until his/her conviction. Therefore, there is no confusion between pre-trial detention and the penalty which has been imposed on him in a judgment which has become final as Karangira Jean de Dieu and Counsel Mbaga Tuzinde Mbonimbuga intended to interpret it. [17] The Court finds that, basing on article 36 of Decree Law No21/77 of 18 August 1977 mentioned above and that was into force when Karangira Jean de Dieu was punished, the execution of the sentence of six (6) years of imprisonment imposed on him on 31/01/2013 will be pending until the completion of the first penalty of three (3) years of imprisonment that was imposed on him on 21/04/2010 which will also be pending until full execution of the sentence of six (6) years of imprisonment that was imposed on him on 27/11/2009 since he cannot simultaneously execute different sentences. [18] The Court finds that this position is similar to what is provided by foreign laws like in France, where article 3, paragraph 2 of Law No2005-1549 of 12/12/2005 provides that “Penalties imposed for offences committed in reiteration are KARANGIRA v. IYABURUNGA

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158 RWANDA LAW REPORTS mixed with the previous penalties irrespective of their length and without any possibility of deducting them from penalties that were previously imposed”¹ and it is also emphasized by the law scholars who confirm that “when a convict is jailed for any reason, the execution of the sentence is postponed until full execution of the first penalty”². All this,

proves that Karangira Jean de Dieu must execute each sentence before his release. [19] The Court finds that article 40, paragraph 7 of Organic Law No01/2012/OL of 02/05/2012 instituting the Penal Code should not be considered as having set a new principle regarding the execution of concomitant penalties; rather it explained in details the principle enshrined in article 36 of Decree Law No21/77 of 18 August 1977 mentioned above and the ambiguity of this article 36 might have been the origin of different practices of prisons as alleged by Karangira Jean de Dieu. This means that even though the High Court had not based on the new law, this could not have prevented it from reaching the same decision. Therefore, the arguments of Karangira Jean de Dieu that his rights consisting of not to refer to a new penal law for the trial of his case while it is not in his favour, have been violated, lacks merit.

1 “Penalties imposed for offences committed in reiteration are mixed with the previous penalties irrespective of their length and without any possibility of deducting them from penalties that were previously imposed”, article 3, paragraph 2 of Law No 2005-1549 of 12/12/2005. 2 “When a convict is jailed for any reason, the execution of the sentence is postponed until full execution of the first penalty”, Michel Franchimont et alii, *Manuel de procédure pénale*, Bruxelles, Larcier, 2eme édition, 2006, p.735.

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159 [20] Basing on the grounds in the previous paragraphs, the Court finds that Karangira Jean de Dieu is imprisoned basing on final decisions of courts and that when he is executing the penalties lawfully imposed basing on the offences in respect of which he was convicted, therefore he cannot refute this and state that he is unlawfully imprisoned. II.2. Whether Iyaburunga Innocent can be awarded requested damages. [21] Iyaburunga Innocent states that he requests fees amounting to three millions (3,000,000Frw) for advocate before the Supreme Court and damages for being drugged in unreasonable lawsuits. [22] Karangira Jean de Dieu states that Iyaburunga Innocent cannot be awarded damages since it is Karangira who is the victim. OPINION OF THE COURT [23] The Court finds that Iyaburunga Innocent incurred a loss from the fact that he was accused in court which drove him to seek for a legal counsel. Therefore, he has right to be awarded damages incurred during the lawsuits basing on 258 of the Civil Code Book Three which provides that “Every act of a person which damages another obliges the person whose fault caused damage to repair the loss”. [24] The Court finds that there is no evidence produced by Iyaburunga Innocent proving the advocate fees agreed on with the lawyer; therefore, even though he deserves damages resulting from this case, three millions (3,000,000Frw) that was KARANGIRA v. IYABURUNGA

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160 RWANDA LAW REPORTS requested by Iyaburunga Innocent is excessive and he is thus awarded eight hundred thousand (800,000Frw) upon the discretion of the Court. III. DECISION OF THE COURT [25] The Court rules that the appeal of Karangira Jean de Dieu has no merit; [26] The Court rules that the decision of the judgment RP0004/15/HC/NYA rendered by the High Court,

Chamber of Nyanza, on 29/05/2015 is sustained; [27] The Court orders Karangira Jean de Dieu to pay Iyaburunga Innocent damages equal to eight hundred thousand (800,000Frw) of advocate fees. [28] The Court rules that the court fees are charged to the public treasury.

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PROSECUTION v. KWITONDA [Rwanda SUPREME COURT – RPAA0305/11/CS (Hatangimbabazi, P.J., Kalimunda and Gakwaya, J.) November 27, 2015]. Criminal Law – Applicable law in case of conflict of two criminal laws – In case of conflict of two criminal laws, including the old one under which the offence was committed and the new one enacted after the offence was committed but before the final judgment is delivered, the new law shall be applied, if it provides for a lesser penalty – Organic Law No01/2012/OL of 02/05/2012 instituting the penal code, article 8. Criminal Law – Criminal liability – Doubt on the day and month on which the accused was born – In criminal cases, any doubt favours the accused, thus in case the day and month on which the accused was born is unknown, the last day of the last month of the year in which he was born is considered – Organic Law No01/2012/OL of 02/05/2012 instituting the penal code, article 72. Facts: The accused was prosecuted before the Intermediate Court of Gasabo for child defilement. He started pleading not guilty but the court convicted him and sentenced him to twelve years of imprisonment and a fine of 100,000Frw. Not pleased with the decision, he lodged an appeal before the High Court which sustained the appealed judgment. He appealed again in the Supreme Court, stating that he pleaded guilty while he was under torture and that the court found him guilty basing on the statement of the Judicial Police and the one made by the 161

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162 RWANDA LAW REPORTS prosecution. However, during the hearing, he changed his pleading into guilty plea, but also said that he was under fourteen years old when he committed the offence. The Prosecution argued that the accused himself said that he was fourteen years old, and that then there was no need to look for his birth certificate. He kept on stating that in case the day and the month of his birth are unknown, it should have been presumed that he was born on 1st January 1991, and then as he was 14 years old, he is criminally liable. Held: 1. In case of conflict of two criminal laws including the old one under which the offence was committed and the new one enacted after the offence was committed but before the final judgment is delivered, the new law shall be applied, if it provides for a lesser penalty.

2. Considering the principle that in case of doubt in criminal cases, the things turn in favour of the accused, although the date and the month in which the accused was born are unknown, it is emphasized that he/she was born on the last day of the last month of the known year of his/her birth (31/ December). Thus, it must be decided that the accused was born on 31 December 1991 instead of 1 January 1991 as the Prosecution contends. Therefore, the accused is not criminally liable of having defiled U.L and he must be immediately released, as he committed the offence when he was aged thirteen years and six months old. Appeal has merit. Accused not criminally liable. Appealed judgment overturned. Accused must be

immediately released. Court fees should be paid by the State.

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163 Statutes and statutory instruments referred to: Decree – Law No21/77 of 18/8/1977 instituting the penal code, article 77. Organic Law No01/2012/OL of 02/05/2012 instituting the penal code, articles 8 and 72. No case referred to. Author cited: Vade-mecum, Le crime de génocide et les crimes contre l'humanité devant les juridictions ordinaires du Rwanda, Avocats sans frontières, 2004, pp.194-195.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] The case started before the Intermediate Court of Gasabo, where the prosecution was alleging against Kwitonda Jean Damascene for child defilement committed against a four year old child named U.L. The prosecution was pretending that the accused had admitted to the offence before the Judicial Police and the Prosecution but Kwitonda Jean Damascène pleaded not guilty. [2] The court rendered the verdict of the case RP/Min0003/06/TGI/GSBO on 29 September 2006, finding Kwitonda Jean Damascene guilty and sentenced him to 12 years of imprisonment with the fine of 100,000Frw and court fees.

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164 RWANDA LAW REPORTS [3] Not pleased with the decision, Kwitonda Jean Damascene lodged an appeal before the High Court. The High Court decided upon the case RPA956/08/HC/KIG on 28 October 2011 and sustained the appealed judgment. [4] Kwitonda Jean Damascene was not satisfied with the decision and appealed against it before the Supreme Court, stating that he pleaded guilty while under torture, and that the court found him guilty basing only on the statements of the Judicial Police and the prosecution. [5] The hearing was held in public on 19 October 2015, where Kwitonda Jean Damascene was assisted by Counsel Rwigema Vincent, while the prosecution was represented by Nkusi Faustin, the National Prosecutor. During the hearing, Kwitonda Jean Damascene communicated to the court that he is changing his pleadings, with pleading guilty but then he added that pursuant to article 23 of the Decree - Law No21/77 of 18/8/1977 instituting the penal code that was in force at the time the offence was committed, he could not be held criminally liable as he committed it while he was under fourteen years old. II. ANALYSIS OF THE LEGAL ISSUES To determine whether Kwitonda Jean Damascene should not be held criminally liable. [6] Kwitonda Jean Damascene states that on 16 July 2005, around 11h00 a.m, he was at his grandmother Mukasinamenye Xaviere's place, the mother of U.L, and that he saw the victim urinating and when she removed her underwear, he felt the need to sex her but when she later joined him in bed, he intended to defile her though he never succeeded.

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165 [7] Kwitonda Jean Damascene explained that his grandmother Mukasinamenye Xaviere came back and then U.L told her what happened to her. He does explained that he kept on pleading not guilty due to people who kept on telling him that if he pleads guilty, he will be punished severely. [8] Counsel Rwigema Vincent states that explanations given by Kwitonda Jean Damascene in this court meet the statements he made in the Judicial Police and Prosecution, but that pursuant to article 77 of the Decree Law No21/77 of 18/8/1977 above mentioned, he finds that, in case there is no relevant evidence proving the real age of Kwitonda Jean Damascene and U.L at the time the offence was committed, therefore, Kwitonda Jean Damascene should not be criminally liable because he was under fourteen years old (14 years) as proven by the Judicial Police and the Prosecution although there was no supporting document. [9] The Prosecution argues that Kwitonda Jean Damascene himself said that he was fourteen years old, and then there was no need to look for his birth certificate. He keeps on stating that in case the day and month of his birth are unknown, it should be presumed that he was born on 1st January 1991. Therefore, given that he is 14 years old, he must be criminally liable. The prosecution concluded by requesting that the appealed judgment be sustained. OPINION OF THE COURT [10] Article 77 of the Decree-Law No21/77 of 18/8/1977 instituting the penal code that was in force at the time of commission of the crime, stipulates that “When an offender or PROSECUTION v. KWITONDA

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166 RWANDA LAW REPORTS an accomplice is aged at least fourteen (14) but less than eighteen (18) years at the time of commission of an offence and if the sentencing appears necessary, the following penalties shall apply: if he/she would be subjected to a life imprisonment or life imprisonment with special provisions, he/she shall be liable to a term of imprisonment of ten (10) years to fifteen (20) years [...]”. [11] Article 72(1o) of the Organic Law No01/2012/OL of 02/05/2012 instituting the penal code provides that “When an offender or an accomplice is aged at least fourteen (14) but less than eighteen (18) years at the time of commission of an offence and if the sentencing appears necessary, the following penalties shall apply: if he/she would be subjected to a life imprisonment or life imprisonment with special provisions, he/she shall be liable to a term of imprisonment of ten (10) years to fifteen (15) years”. [12] Pursuant to article 8 of the Organic Law No01/2012/OL of 02/05/2012 above mentioned states that “In case of conflict of two criminal laws including the old one under which the offence was committed and the new one enacted after the offence was committed but before the final judgment is delivered, the new law shall be applied, if it provides for a lesser penalty”. The Supreme Court finds that article 77 of the Decree Law No21/77 of 18/8/1977 as mentioned above and article 72 of the above mentioned Decree Law No01/2012/OL of 02/05/2012, prove that article 72 of the Organic Law No01/2012/OL of 02/05/2012 shall be referred to as it provides for the lesser penalty. [13] Furthermore, the Supreme Court finds that the analysis of article 72 of the above mentioned Organic Law

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167 No01/2012/OL of 02/05/2012, emphasizes that the offender aged of least fourteen (14) years cannot be criminally liable. [14] The court finds that, although in the case file there is no birth certificate of Kwitonda Jean Damascène, but as long as he stated without any doubt that he was born in 1991, especially that even the prosecution agreed on that, the year must be considered as the one in which he was born. [15] The Supreme Court finds that although the date and month in which Kwitonda Jean Damascene was born are unknown; considering the principle that in case of doubt in criminal cases, the things turn in favour of the accused, it is emphasized that in case the day and month in which the accused was born are unknown, what must be considered is the last day of the last month of the known year of his/her birth (31/ December). Therefore, it must be decided that Kwitonda Jean Damascene was born on 31st December 1991 instead of 1st January 1991 as the Prosecution argued.

1 Il peut également arriver que le mineur ne dispose pas du tout de document de l'état civil ou alors dispose d'un document ne mentionnant que son année de naissance (...). Les exemples les plus pertinents en l'espèce sont celui dans lequel l'on dispose d'un document qui indique que le prevenu est né en 1980, et donc qu'il a eu son 14 ème anniversaire dans le courant de l'année 1994, sans précision de jour ou de mois (...). En l'absence d'indications précises, le mineur doit se voir appliquer l'hypothèse la plus favorable, c'est à dire que l'on devra agir comme s'il était né le 31 Décembre 1980 (...). Le raisonnement doit amener à considerer, que le prevenu n'avait pas atteint l'âge de quatorze ans lors des evenements qui se sont deroulés d'avril à juillet, et qu'il ne peut être poursuivi ni sanctionné", in Vade-mecum, Le crime de genocide et les crimes contre l'humanite devant les juridictions ordinaires du Rwanda, Avocats sans frontières, 2004, pp.194-195. PROSECUTION v. KWITONDA

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168 RWANDA LAW REPORTS [16] The Supreme Court finds that when Kwitonda Jean Damascene committed the offence on 16 July 2005 as included in the statements made by the Judicial Police made on 22 July 2005, he was aged thirteen years and six months (13 years and 6 months), therefore, he is not criminally liable of having defiled U.L and he must be immediately released. [17] Based on what was mentioned in the previous paragraph, there is no reason to why other grounds of appeal of Kwitonda Jean Damascene should be examined. III. THE DECISION OF THE COURT [18] Finds the appeal of Kwitonda Jean Damascene with merit. [19] Decides that Kwitonda Jean Damascene is not criminally liable. [20] Decides that the judgment RPA956/08/HC/KIG rendered on 28 October 2011 is overturned. [21] Orders for the immediate release of Kwitonda Jean Damascene from the prison. [22] Orders that the court fees be paid by the State.

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