

RWANDA / JUDGMENT

KAYUMBA V SIMACO

RCOMAA 00064/2019/CA

COURT

Court of Appeal

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KAYUMBA V SIMACO

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Text

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KAYUMBA v. SIMACO LTD N'ABANDI [Rwanda URUKIKO RW'UBUJURIRE – 00064/2019/CA (Karimunda, P.J., Nyirandabaruta na Munyangeri, J.) 03 Ukwakira 2019] Ingwate – amasezerano y'ingwate – Ihame rikuru kubijyanye n'uburenganzira ku mutungo ari uko ari ntavogerwa (peaceful enjoyment of property : usus, fructus, abusus).Iyo hari ikirego cy'uko ubwo burenganzira butubahirijwe hagomba gusuzumwa niba ibyakozwe kuri uwo mutungo byarakurikije amatekeko kandi ko byari bishingiye ku mpamvu zemewe kandi zumvikana – Umutungo wagurishijwe muri cyamunara mu buryo bunyuranyije n'Amabwiriza y'Umwanditsi Mukuru, iyo cyamunara iteshwa agaciro, ibintu bigasubira uko byari biri uwo mutungo utaragurishwa. Amabwiriza y'Umwanditsi Mukuru agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate, ingingo ya 10 , niya 12. Incamake y'ikibazo: IMBANK yahaye amasezerano Sosiyete SIMACO Ltd inguzanyo, itizwa ingwate yimitungo itimukanwa na zuwitwa Kalisa Jérémie na Ndikumana Léoncie nyuma yaho, amasezerano ntiyubahirijwe, ingwate zitezwa cyamunara n'ushinzwe kugurisha ingwate witwa Kayumba, ariko abatanze ingwate bavuze ko cyamunara yakozwe inyuranyije n'amategeko bituma batanga ikirego mu rukiko rw'ubucuruzi basaba ko iteshwa agaciro. Ururukiko rwanzuye ruvuga ko cyamunara

yakozwe igumana agaciro kayo kuko yubahirije amategeko, bityo ko ikirego cyabareze nta shingiro gifite. SIMACO Ltd ntiyishimiye imikirize y'urubanza maze ijurira mu rukiko rukuru rw'ubucuruzi ivuga ko cyamunara yakozwe itubahirije amabwiriza ya cyamunara kuko yakozwe ku masaha no ku munsu inyuranye niyari kumatangazo, isaba ko yateshwa agaciro, ivuga kandi ko nta n'umwe wigeze agaragaza procurement ya sosiyete bari bahagarariye nk'uko byari byategeswe mu mabwiriza, ko ingwate yagurishijwe ku mafaranga make. Uru rukiko rwemeje ko cyaunara iteshejwe agaciro, kuko nyuma yisesengura rwasanze koko ko itarubahirijwe. Ushinzwe kugurisha ingwate yajuririye mu rukiko rw'ubujurire asaba ko hasuzumwa niba itangazo rya cyamunara ritubahirije ibihe biteganywa n'amabwiriza y'Umwanditsi Mukuru kuko we asanga ibyo bihe byarubahirijwe. Safari Jean Claude yagobotse ku bushake mu rubanza, avuga ko arufitemo inyungu kuko ari we waguze ikibanza kimwe mu byagurishijwe muri cyamunara, avuga kandi ko nawe yaje kukigurisha nundi muntu. Abandi baburanyi bavugagako ukugoboka kutemewe mu bujurire, urukiko nyuma yisesengura rwasanze icyo itegeko ribuza ari ukugobokeshwa ku gahato mu Rukiko rw'Ikirenga cyangwa mu Rukiko rw'Ubujurire, rusanga nta kibanza umuburanyi ukugoboka ku bushake muri izo nkiko mu gihe afite inyungu mu rubanza, bityo ko ukugoboka kwa Safari kubahirije ibitanganyijwe n'amategeko, akaba yemerewe ukugoboka. Ushinzwe kugurisha ingwate asaba urukiko kwemeza ko cyamunara yubahirije ibiteganywa n'amategeko cyane ko SIMACO Ltd itabasha kugaragaza ukuntu amabwiriza ya cyamunara atubahirijwe nkuko ibivuga, bityo akaba asaba yuko urubanza rwajuririwe ruhindutse mu ngingo zarwo zose. Uhagarariye RDB we avuga ko asanga kuba SIMACO Ltd itabashije kugaragaza icyayibingamiye mu kutubahiriza ibihe by'iminsi irindwi mu kinyamakuru cyanditse, no kuba

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kutubahiriza iminsi irindwi ntacyo byangije, avuga ko ayo makosa atahanishwa gusesa cyamunara cyane cyane ko umurongo watanze n'Urukiko rw'Ikirenga mu rubanza rwa Habimana Vedaste na Banki ya Kigali, ari uko bitihagije ko usaba ko cyamunara iseswa agaragaza ko hari imigenzo itarubahirijwe ahubwo agomba no kugaragaza icyo kutubahiriza iyo migenzo byamubangamiyeho. Safari Jean Claude waguze ikibanza avuga ko yakiguze mu buryo bwemewe n'amategeko, avuga kandi ko kutubahiriza iminsi irindwi igihe cy'igurisha bifatwa nk'amakosa y'imigenzo (vice de procédure), avuga ko bene ayo makosa adakosorwa hatashwa agaciro ibyakozwe. Kalisa Jérémie uhagarariye SIMACO Ltd, bamwe mu bantu RDB yitwaza ko bari bahari cyamunara ikorwa ari abahamagawe mu muhanda, bahabwa ruswa kugirango buzuze umubare ariko baburizemo no kuzamura igiciro, ko yabiregeye mu Bugenzacyaha dosiye ikaba igikurikiranwa, ubwo buriganya akaba aribwo bukwiye gutuma cyamunara iteshwa agaciro. Uwegukanye ingwate muri cyamunara avuga ko mu gihe cyamunara yaba iteshejwe agaciro, asaba urukiko gutegeka banki kumusubiza ikiguzi yakiriye. Umwanditsi Mukuru, nawe avuga ko mu gihe cyamunara yaba iteshejwe agaciro, banki yategukwa gusubiza ayo mafaranga nayo igasubirana ingwate yayo. Incamake y'icyemezo: 1. Umutungo wagurishijwe muri cyamunara mu buryo bunyuranyije n'amabwiriza y'Umwanditsi Mukuru, iyo cyamunara iteshwa agaciro, ibintu bigasubira uko byari biri uwo mutungo utaragurishwa, byaba bigikenewe ukongera kugurishwa

hubahirijwe amategeko n'amabwiriza abigenga. Ubujurire nta shingiro bufite; Amagarama ahwanye n'ibyakozwe mu rubanza. Amategeko yashingiweho: Amabwiriza y'Umwanditsi Mukuru N° 03/2010/ORG yo ku wa 16/11/2010 agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate, ingingo ya 10, niya 12. Imanza zifashishijwe: Habimana v BK n'abandi, RCOMAA 00031/2016/SC-RCOMAA 00036/16/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 29/06/2018. Urubanza I.IMITERERE Y'URUBANZA [1] SIMACO Ltd yagiranye amasezerano y'inguzanyo na I&M Bank Rwanda Ltd, Kalisa Jérémie na Ndikumana Léoncie batiza SIMACO Ltd ingwate irimo ikibanza gifite No UPI 1/03/10/02/1150 n'ikindi kibaruwe kuri No UPI 1/2/11/04/1153. Byageze aho SIMACO Ltd ntiyubahiriza ibyo yari yumvikanye na I&M Bank Rwanda Ltd, bituma ku wa 05/04/2019,

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Kayumba Godfrey, ushinze kugurisha ingwate, ateza cyamunara izo ngwate kugirango hishyurwe umwenda SIMACO Ltd ibereyemo I & M Bank Rwanda Ltd. SIMACO Ltd na Kalisa Jérémie bavuze ko cyamunara yakozwe mu buryo bunyuranyije n'amategeko, batanga ikirego mu Rukiko rw'Ubucuruzi basaba ko iteshwa agaciro. [2] Mu rubanza RCOM 00803/2019/TC/NYGE rwaciwe ku wa 09/05/2019, Urukiko rw'Ubucuruzi rwasuzumye ibijyanye n'amasaha cyamunara yagombaga kuberaho, ibyigiciro cyatanzwe no kumenya niba uwegukanye ingwate muri cyamunara ari umuntu ku giti cye cyangwa niba yari ahagarariye sosiyete, rusanga ibyakozwe byose byubahirije ibiteganywa n'ingingo ya 12 y'Amabwiriza y'Umwanditsi Mukuru no 03/2010/ORG yo ku wa 16/11/2010 agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate ; rwanzura ruvuga ko ikirego cya SIMACO Ltd na Kalisa Jérémie nta shingiro gifite, ko cyamunara yakozwe ku wa 05/04/2019 igumanye agaciro kayo, bombi bategekwa gufatanya guha Kayumba Godfrey 500.000Frw y'igihembo cya Avoka na 100.000 Frw y'ikurikiranarubanza. [3] SIMACO Ltd ntiyishimiye imikirize y'urwo rubanza, ijuririra mu Rukiko Rukuru rw'Ubucuruzi ivuga ko cyamunara yabaye ku wa 05/04/2019 ikwiye guteshwa agaciro kuko amabwiriza ya cyamunara atubahirijwe. Basobanura ko cyamunara yari kuba saa munani z'amanya ariko ikorwa saa mbiri za mugitondo, bikorwa kandi iminsi irindwi yo kuyitangaza mu kinyamakuru itubahirijwe. SIMACO Ltd yavuze kandi ko mu bapiganwe nta n'umwe wigeze agaragaza « procuration » ya sosiyete bari bahagarariye nk'uko byari byategetswe mu mabwiriza, ko ingwate yagurishijwe ku mafaranga make, ndetse n'uwaguze atanga amafaranga ku bitabiriye cyamunara kugirango batazamura igiciro, ko ibyo bigaragazwa na sheki zatanze na MANUMETAL. [4]

Urubanza RCOMA 00418/2019/HCC rwaburanishijwe RDB idahari ariko yarahamagajwe mu buryo bwemewe n'amategeko, rucibwa ku wa 31/07/2019, Urukiko Rukuru rw'Ubucuruzi rusanga ibijyanye n'isaha cyamunara yari kuberaho byarubahirijwe. Naho ku bijyanye n'iminsi itangazo ryari kumara mu kinyamakuru The New Times, rusanga iminsi irindwi ibanziriza umunsi wa cyamunara itarubahirijwe nk'uko biteganywa n'ingingo ya 12, igika cya 3, y'Amabwiriza y'Umwanditsi Mukuru no 03/2010/ORG yo ku wa 16/11/2010 agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate, bitewe n'uko itangazo ryatanzwe ku wa 30/03/2019, risohoka mu kinyamakuru ku wa 31/03/2019 no ku wa 01/04/2019, cyamunara iba

ku wa 05/04/2019 bivuze ko guhera ku wa 30/03/2019 kugeza umunsi cyamunara yabereyeho nta minsi 7 irindwi irimo. Urukiko rwemeje ko ubujurire bwa SIMACO Ltd bufite ishingiro, ko imikirize y'urubanza RCOM 00803/2019/TC rwaciwe ku wa 09/05/2019 ihindutse, cyamunara yabaye ku wa 05/04/2019 ku mitungo no UPI 1/03/10/02/1150 na no UPI 1/2/11/04/1153 iteshejwe agaciro. [5] Kayumba Godfrey ntiyishimiye imikirize y'urubanza ajuririra mu Rukiko rw'Ubujurire asaba ko hasuzumwa niba itangazo rya cyamunara ritarubahirije ibihe biteganywa n'amabwiriza y'Umwanditsi Mukuru kuko we asanga ibyo bihe RCOMAA 00064/2019/CA byarubahirijwe, ndetse ko n'Urukiko Rukuru rw'Ubucuruzi rwasheshe cyamunara ariko ntirwavugaga umutungo icyemezo cyarwo kireba uwo ariwo nyamara haragurishijwe imitungo ibiri itandukanye.

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[6] Safari Jean Claude yagobotse ku bushake mu rubanza, avuga ko arufitemo inyungu kuko ari we waguze ikibanza no UPI 1/03/10/02/1150 muri cyamunara ku giciro cya 102.100.000 Frw, amaze kubonera icyangombwa uwo mutungo awugurisha NAMARA Hannington. Yasobanuye ko mbere atamenye iby'uru rubanza kandi ko asanga amategako abimwemerera kuko ntaho bibujijwe ko umuntu agoboka kubushake kugirango arengere inyungu ze. [7] Urubanza rwaburanishijwe mu ruhamwe ku wa 30/09/2019, Kayumba Godfrey yunganiwe na Me Mugabo Samuel, SIMACO Ltd ihagarariwe n'Umuyobozi wayo Kalisa Jérémie, yunganiwe na Me Uwizeyimana Eric na Me Sebagabo MBERA Patrick, SAFARI Jean Claude ahagarariwe na Me Irafasha Félix, Ikigo cy'Igihugu cy'Iterambere (RDB) gihagarariwe na Me Kayigi Kajuga Leo, habanza gusuzumwa ububasha bwa Safari Jean Claude bwo kuba umuburanyi mu rubanza. Me Irafasha Félix yasobanuye inyungu Safari Jean Claude afite mu rubanza, imvugo ye ishimangirwa na Me Mugabo Samuel na Me Kayigi Kajuga Leo naho Me Uwizeyimana Eric abanza kuvuga ko kugoboka mu Rukiko rw'Ubujurire bitemewe, ariko asoza avuga ko mu gihe uwagobotse atazanywe mu rubanza ku gahato, ahubwo yizanye ku bushake hasuzumwa niba yatanze ikirego nk'uko amategako abiteganywa, Urukiko rwasanga ibyo amategako ateganywa byarubahirijwe, Safari Jean Claude akemererwa kugoboka mu rubanza. Nyuma yo kumva icyo ababuranyi bese bavugaga ku bubasha bwa SAFARI Jean Claude nk'umuburanyi mu rubanza, Urukiko rwasanze icyo ingingo ya 116, igika cya gatatu, y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ibuzaga ari ukugobokeshwa ku gahato mu Rukiko rw'Ikirenga cyangwa mu Rukiko rw'Ubujurire, rusanga nta kibaza umuburanyi kugoboka ku bushake muri izo nkiko mu gihe afite inyungu mu rubanza kandi n'abandi baburanyi akaba ari uko babibona, rufatiye icyemezo mu ntebe, rwemeza ko ukugoboka kwa SAFARI Jean Claude kwemewe, iburanisha rikomeza hasuzumwa ingingo iyanywe no kumenya niba itangazo rya cyamunara ryarubahirije ibihe biteganywa n'amategako. II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO II.1. Kumenya niba itangazo rya cyamunara ya nyuma ritarubahirije amabwiriza y'Umwanditsi Mukuru [8] Kayumba Godfrey avuga ko amatangazo yamanitse ku Murenge, ayatanzwe kuri radiyo no kuri televiziyo atari yo yateye impaka kuko Urukiko Rukuru rw'Ubucuruzi

rwasanze yarubahirije ibiteganywa n'amategako. Asobanura ko itangazo ryasohotse mu kinyamakuru cyanditse ari ryo Urukiko rwavuze ko ritubahirije ibihe by'iminsi irindwi iteganywa n'Amabwiriza y'Umwanditsi Mukuru, ariko ko Urukiko rwabisesenguye mu buryo butari bwo kuko icyo we yasabwaga ari "ugutanga" itangazo mu minsi irindwi, naho ibyo kuritangaza bikaba bitaramurebaga, ko nubwo byafatwa ko yari ashinzwe no gutangaza, asanga yarabikoze kuko amatangazo yatanze kuri radiyo, televiziyo n'ayamanitswe ku Murenge yari yihagije. Avuga ko nawe yemera ko akamaro ko gutangaza cyamunara ari ukugirango rubanda hamwe na nyir'umutungo bamenyeshwe ibigiye kuba, umutungo uzatezwa cyamunara na nyirawo ndetse n'igihe bizabera, ariyo mpamvu asanga yarubahirije ibyo amategako ateganya. [9] Me Mugabo Samuel, umwunganira, avuga ko iyo asuzumye ibyabaye asanga itangazo ryasohotse mu kinyamakuru ryaramaze iminsi itandatu, avuga ariko ko ibyo bidaturuka k'ushinzwe kugurisha ingwate ahubwo biterwa n'uburyo itegeko ryanditse n'imikorere

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y'ibinyamakuru byanditse, kuko itangazo risohoka ku muni ukurikira uwo ryatangiyeho. Asobanura ko hashingiwe ku kuba hagomba gusohoka amatangazo atatu muri numero zitandukanye z'ikinyamakuru, bidashoboka ko iminsi irindwi yubahirizwa kuko hagati y'itangazo rya gatatu n'umunsi wa cyamunara iminsi irindwi itarimo. Avuga ko kugeza ubu SIMACO Ltd itagaragaza icyayibangamiye muri cyamunara yakozwe hatubahirijwe amabwiriza kuko niyo ibihe byubahirizwa ntacyo byari kuyimarira bitewe n'uko umuguzi wa mbere yabonetse ku nshuro ya kane, akaba asanga mu gihe cyose SIMACO Ltd itagaragaza icyayibangamiye, uru Rukiko rukwiye kwemeza ko cyamunara yubahirije ibiteganywa n'amategako, rugatega ko urubanza rwajuririwe ruhindutse mu ngingo zarwo zose. [10] Me Kayigi Kajuga Leo, uhagarariye Ikigo cy'Igihugu cy'Iterambere (RDB), avuga ko iminsi 7 iteganyijwe mu Mabwiriza y'Umwanditsi Mukuru itarubahirijwe, kandi ko ari amakosa. Asobanura ko akamaro ko gutangaza cyamunara ari ukugirango nyir'umutungo na rubanda bamenye ko hari ingwate igiye kugurishwa nibishoboka haboneke abaguzi benshi, umutungo ugurwe ku giciro cyiza, naho akamaro ko gutegereza umunsi wa karindwi akaba ari ukugirango ababimenye nyuma bahabwe amahirwe yo gupiganwa. Asobanura ko atemeranywa na Kayumba Godfrey ko "gutanga" itangazo byihagije kuko inshingano z'ushinzwe kugurisha ingwate ari "ugutangaza", bivuze ko agomba gukurikirana akamenya ko itangazo ryatangajwe. [11] Icyakora, asobanura ko amatangazo yatanze ahantu hatandukanye, umunsi wa cyamunara ugeze, haboneka abaguzi barindwi mu gihe Amabwiriza ateganya ko iyo habonetse batanu cyamunara ikorwa, SIMACO Ltd ikaba itagaragaza icyayibangamiye mu kutubahiriza ibihe by'iminsi irindwi mu kinyamakuru cyanditse nyamara umurongo watanze n'Urukiko rw'Ikirenga mu rubanza Habimana Vedaste yaburanaga na Banki ya Kigali,¹¹ ari uko bitihagije ko usaba ko cyamunara iseswa agaragaza ko hari imigenzo itarubahirijwe ahubwo agomba no kugaragaza icyo kutubahiriza iyo migenzo byamubangamiyeho, ariyo mpamvu asanga mu gihe kutubahiriza iminsi irindwi ntacyo byangije, ayo makosa atahanishwa gusesa cyamunara, cyane cyane ko ari n'amakosa akunzwe gukorwa ku buryo gufata bene icyo cyemezo byagira ingaruka zikomeye ku bukungu bitewe n'uko hari

cyamunara nyinshi zabaye zitubahirije iyo minsi. [12] Me Irafasha Félix, uhagarariye Safari Jean Claude, avuga ko uyu yaguze mu buryo bwemewe n'amategeko, ko kuba iminsi irindwi itarubahirijwe ari amakosa y'imigenzo (vice de procédure) kandi bene ayo makosa akaba adakosorwa hateshwa agaciro ibyakozwe. [13] Kalisa Jérémie, uhagarariye SIMACO Ltd, avuga ko bamwe mu bantu barindwi RDB yitwaza ko bari bahari cyamunara ikorwa ari abahamagawe mu muhanda, bahabwa ruswa kugirango buzuze umubare ariko baburizemo no kuzamura igiciro, ko yabiregeye mu Bugenzacyaha dosiye ikaba igikurikiranwa, ubwo buriganya akaba aribwo bukwiye gutuma cyamunara iteshwa agaciro. [14] Me Uwizeyimana Eric na Me Sebagabo Mbera Patrick, bamwunganira, bavuga ko kutubahiriza iminsi irindwi byaburijemo abari kugura ingwate ku giciro kiri hafi cyangwa kiruta agaciro kayo, ko kuba RDB yaramenyereye kutubahiriza iminsi irindwi iteganywa mu Mabwiriza y'Umwanditsi Mukuru cyangwa kuba Urukiko Rukuru rw'Ubucuruzi rutaragaragaje icyo SIMACO Ltd na Kalisa Jérémie yabangamiweho atari byo bivanaho ko ayo mabwiriza 11 Reba urubanza no RCOMAA 00031/2016/SC rwaciwe n'Urukiko rw'Ikirenga ku wa 29/06/2018.

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agomba kubahirizwa, ko iyo mikorere ya RDB yo kwica amategeko iyazi ariyo yatumye bagana inkiko kugirango ikosorwe, ko iyo basanga ibihe biteganywa n'amategeko bidashoboka ko byubahirizwa, hari gutangwa itangazo risohoka mu buryo bwihariye (special) cyangwa cyamunara ikimurwa kugirango iminsi iteganywa n'amategeko yubahirizwe, ariyo mpamvu basaba uru Rukiko kwemeza ko ubujurire nta shingiro bufite, hagahamaho imikirize y'urubanza rwajuririwe. RCOMAA 00064/2019/CA UKO URUKIKO RUBIBONA [15] Ingingo ya 10 y'Amabwiriza y'Umwanditsi Mukuru N° 03/2010/ORG yo ku wa 16/11/2010 agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate iteganywa ko: « Mbere y'iminsi 15 ibanziriza igurishwa ry'umutungo watanze ingwate, uwahawe ububasha bwo guteza cyamunara ingwate afite inshingano zo kumenyekanisha igikorwa cy'igurisha giteganijwe mu buryo bukurikira: Itangazo byibura inshuro 3 muri kimwe mu bitangazamakuru bisomwa cyane mu Rwanda, itangazo kuri radiyo cyangwa se televiziyo byibura inshuro eshatu, kumanika itangazo ku ngwate izatezwa cyamunara ahantu hagaragara ndetse no ku Murenge uri mu ifasi y'aho ingwate iherereye. Itangazo ry'igurisha rigomba kugaragaza umutungo uzagurishwa, aho uherereye, aho cyamunara izabera, igihe ndetse n'isaha cyamunara izaberaho.» [16] Ingingo ya 12 igika cya 3 y'ayo mabwiriza iteganywa ko: "Mbere y'iminsi irindwi (7) ibanziriza igihe icyamunara yimuriweho, ushinze kugurisha umutungo utimukanwa atanga itangazo rimenyesha igurisha nk'uko biteganywa mu ngingo ya 10 y'aya mabwiriza.» [17] Dosiye y'urubanza igaragaza ko Urukiko Rukuru rw'Ubucuruzi rwasanze itangazo rimenyesha cyamunara ryaratanze mu kinyamakuru The New Times ku wa 30/03/2019, risohoka ku wa 31/03/2019 no ku wa 01/04/2019, rikaba ryaravugaga ko cyamunara y'imitungo ibaruwe kuri UPI 1/03/10/02/1150 na UPI 1/02/11/04/1153 izakorwa ku wa 05/04/2019, rwanzura ko kuva igihe itangazo ryatangiwe kugeza umunsi cyamunara yari kubera ari iminsi itandatu kandi ingingo ya 12 y'Amabwiriza y'Umwanditsi Mukuru N° 03/2010/ORG yo ku wa 16/11/2010 yavuzwe haruguru ateganywa iminsi irindwi, bityo cyamunara yakozwe hashingiwe kuri iryo tangazo ikwiye

guteshwa agaciro kuko itubahirije ibyo amategeko ateganya. [18] Urukiko rurasanga ababuranyi bose bemera ko iminsi irindwi yo kumenyekanisha igihe cyamunara yimuriweho itubahirijwe nk'uko biteganywa n'ingingo ya 12, igika cya 3, y'Amabwiriza y'Umwanditsi Mukuru, ndetse Umwanditsi Mukuru akaba yivugira ko ari amakosa, ariko ko imwe mu mpamvu ikwiye gutuma cyamunara idateshwa agaciro ari uko ayo makosa yabaye akamenyero ku buryo gutesha agaciro cyamunara muri uru rubanza byabyutsa izindi manza kuri za cyamunara zakozwe ibihe bitubahirijwe. Uretse kubivuga atyo gusa, izo cyamunara ntizashikirijwe uru rukiko kugirango hasuzumwe niba zihuje kamere, imiterere cyangwa ibibazo na cyamunara isabirwa guteshwa agaciro muri uru rubanza, bityo iyo mpamvu yonyine ikaba itashingirwaho hahishirwa amakosa ushinze kugurisha ingwate n'Umwanditsi Mukuru biyemerera ko yakozwe, ahubwo ayo makosa akwiye gukosorwa, guhera uru rubanza ruciwe, cyamunara ikubahiriza imigenzo, amabwiriza n'amategeko RCOMAA 00064/2019/CA ayigenga nk'uko byateganyijwe mu Mabwiriza y'Umwanditsi Mukuru N°03/2010/0RG yo ku wa

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16/11/2010 agenga ibyerekeye gukodesha, kugurisha muri cyamunara ndetse no kwegukana ingwate. [19] Urukiko rurasanga na none ibyo uburanira Umwanditsi Mukuru avugisha urubanza Habimana Vedaste na Banki ya Kigali baburanye na Asimwe Frank na bagenzi be by'uko iyo nyir'umutungo atagaragaje icyo kutubahiriza ibihe bya cyamunara byamwangije, iyo cyamunara idateshwa agaciro, nta shingiro bikwiye guhabwa, kuko ataribyo byemejwe muri urwo rubanza. Muri urwo rubanza nyir'umutungo yari yasabye ko hakorwa irindi genagaciro bitewe n'uko iryakozwe ryari ryatubije bikabije agaciro k'umutungo katanzweho ingwate muri banki ntibyakorwa, byongeye kandi ugurisha ingwate ararengera yiha inshingano z'Umwanditsi Mukuru atabyemerewe. Mu gika cya 45 cy'urwo rubanza, Urukiko rusanga « imvugo y'ababuranira Habimana Vedaste, Bank of Kigali Ltd na Musunguzi Hannington ko kuba Asimwe Frank yarashyikirijwe kopi y'inyandiko y'amabwiriza na Me Habimana Vedaste ntacyo byamwangirije, ikaba taba impamvu yo gutesha agaciro cyamunara, cyane cyane ko imigenzo ya cyamunara atari ndemyagihugu, itahabwa ishingiro, kuko muri rusange amabwiriza yashyirweho kugirango uburenganzira bwa buri ruhande cyamunara ireba bwubahirizwe kandi ibintu bikorwe kuri gahunda, kuba bitarubahirijwe birahagije kugirango Asimwe Frank asabe ko bikorwa mu buryo bwateganyijwe bitabaye ngombwa atanga ibimenyetso y'ibyangirijwe. » 2 [20] Urukiko rurasanga muri icyo gika Urukiko rw'Ikirenga rwarasobanuye neza ko icya ngombwa atari ukumenya niba ibihe n'imigenzo biteganywa n'amabwiriza agenga cyamunara ari ndemyagihugu cyangwa atari ndemyagihugu, ko icy'ingenzi ari ukumenya niba ibyo amategeko ateganya byarubahirijwe, byaba bitarubahirijwe uwo byabangimiye akabiregera, ibyakozwe bigateshwa agaciro. Bisobanuye ko kuba nyir'umutungo agaragaza ko imitungo ye yagurishijwe amategeko atubahirijwe byihagije kugirango ibikorwa byakozwe cyangwa ibyemezo byafashwe iyo mitungo igurishwa biteshwe agaciro.³³ Rusanga kandi Me IRAFASHA Félix atagaragaza ko ikibazo ari uko itangazo ryaba ritagaragaza igihe ryatangiwe (omission) nyamara ryaratanze mu minsi irindwi mbere y'uko cyamunara iba, ngo yerekane ko ryatangiwe igihe ariko, kubwo kwibeshya, handikwaho itariki ya nyuma y'igihe ryatangiwe (erreur), cyangwa ngo agaragaze ko

ibihe biteganywa n'Amabwiriza y'Umwanditsi Mukuru kugirango cyamunara ibe ari ibyo kumenyesha icyemezo cyafashwe (règle de notification) cyangwa ko imigenzo iteganyijwe ari yo gusa kugaragaza uburyo ibyemezo bijyanye na cyamunara byandikwa (règle formelle de redaction),⁴⁴ byose bigaragaza ko ibyo aburanisha ko kutubahiriza ibihe byateganyijwe n'amategeko ari amakosa y'imyandikire (vice de procédure) adahanishwa gutesha agaciro ibyakozwe nta shingiro bifite. [21] Urukiko rurasanga gutangaza cyamunara atari umuhango gusa, uhubwo ni uburyo bwo kumenyesha nyir'umutungo, ushobora kuba atari kumwe nawo, kumenyesha abandi baba bafite inyungu mu kurengera uwo mutungo, kumenyesha uberewemo umwenda wasabye ko uwo mutungo ugurishwa, abandi nyir'umutungo yaba abereyemo imyenda, abaguzi cyangwa uwo 22 Urubanza RCOMAA 00031/2016/SC-RCOMAA 00036/16/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 29/06/2018, igika cya 45. 33 Urubanza no RCOMAA 00031/2016/SC-RCOMAA 00036/16/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 29/06/2018, igika cya 45. 44 "Le vice de forme est l'omission ou le non respect d'une règle formelle de redaction ou de notification d'un acte...", Serge Guinchard [ed.], Droit et pratique de la procédure civile, Dalloz, Paris, 2014, p.506.

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ariwe wese ufite icyo yabaza kuri uwo mutungo, ko washyizwe ku isoko kugirango habanze hishyurwe umwenda runaka. Kuwugurisha ibihe byateganyijwe n'amategeko bitaragera bikaba byatuma nyir'umutungo cyangwa abandi bifuzwa kuwucungura baburizwamo, abafite ibyo bari kubaza kuri uwo mutungo bikabambura ubwo burenganzira ndetse bikaba byatesha amahirwe abaguzi baba bacyisuganya kugirango bazawugure ku giciro cyiza. Ibi byose bikaba byatuma nyir'umutungo ndetse n'abandi babihomberamo mu buryo budakwiye, ariyo mpamvu, mu gihe u Rwanda ruri mu bihugu byateganyije igihe gito gishoboka cyo gutangaza cyamunara mbere y'uko ikorwa,⁵ abashinzwe kugurisha ingwate bakwiye kubahiriza ibiteganywa n'amabwiriza, byaba bitubahirijwe, ibyakozwe bigateshwa agaciro kuko biba byanyuranyije n'amategeko. [22] Urukiko rurasanga umutungo w'umuntu ari ntavogerwa, ubu akaba ari uburenganzira bwa muntu bwibukijwe mu ngingo ya 34 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo mu 2003 ryavuguruwe mu 2015 ko buri muntu afite uburenganzira ku mutungo bwite, waba uwe ku giti cye cyangwa uwo asangiye n'abandi, kandi ko uwo mutungo ntavogerwa ndetse n'uburenganzira umuntu awufiteho ntibuhungabanywe keretse ku mpamvu z'inyungu rusange kandi hakurikijwe amategeko.⁶⁶ Ikigaragarira Urukiko akaba ari uko ingaruka za cyamunara iburanwa muri uru rubanza ari ukugurisha ingwate kugirango hishyurwe umwenda bwite SIMACO Ltd ibereyemo I & M Bank Rwanda Ltd, bivuze ko uwatanze ingwate ahita atakaza uburenganzira kuri uwo mutungo, ariyo mpamvu iyo bidakozwe mu buryo bwateganyijwe n'amategeko, nyir'ingwate aba ahungabanyirijwe uburenganzira ku mutungo we bwite, ibyo akaba aribyo bibujijwe n'Itegeko Nshinga, ku buryo hatakwemezwa ko kuba ayo makosa yarakozwe kenshi, ubwinshi bwayo bwabyaye ihame ry'amategeko ryarutishwa uburenganzira bw'umuturage buteganywa n'Itegeko Nshinga, nabyo RCOMAA 00064/2019/CA bishimangira ko mu gihe bigaragara ko cyamunara yakozwe ku wa 05/04/2019 itubahirije ibiteganywa n'amategeko ikwiye guteshwa agaciro, ibintu bigasubira uko byari biri cyamunara itarakorwa. [23] Urukiko rurasanga ihame ry'uko umutungo bwite ari ntavogerwa kandi ko uburenganzira kuri wo ari ndahungabanywa keretse mu buryo

buteganyijwe n'amategako byaribukijwe n'Urukiko rw'Uburayi rushinzwe kuburanisha imanza zerekera n'Uburenganzira bw'Ikiremwa muntu aho rwibukije ko ihame rikuru kubijyanye n'uburenganzira ku mutungo ari uko ari ntavogerwa (peaceful enjoyment of property : usus, fructus, abusus), ko iyo hari ikirego cy'uko ubwo burenganzira butubahirijwe hagomba gusuzumwa niba ibyakozwe kuri uwo mutungo byarakurikije amategako kandi ko byari bishingiye ku mpamvu zemewe kandi zumvikana, 7 nabyo bishimangira ko mu gihe umutungo wa KALISA Jérémie na NDIKUMANA Léoncie wagurishijwe muri cyamunara mu buryo bunyuranyije n'Amabwiriza y'Umwanditsi Mukuru, iyo cyamunara ikwiye guteshwa agaciro, ibintu bigasubira uko byari biri uwo mutungo utaragurishwa, byaba bigikenewe ukongera kugurishwa hubahirijwe amategako n'amabwiriza abigenga. 7 II.2. Kumenya niba I&M Bank Rwanda Plc yasubiza ikiguzi cy'ingwate yari yarahawe. 55 Nko mu Bwongereza hateganyijwe igihe cy'amezi abiri (2) kandi itangazo rigacishwa mu Igazeti no mu binyamakuru. Reba ingingo ya 27 (1) na (2) ya Trustee Act 1925 ryavugururwe na Trustee Act 2000. 66 Reba ingingo ya 34 y'Itegeko-Nshinga ryo mu 2003 ryavugururwe mu 2015. 7 Reba urubanza Hutten-Czapska v Poland [GC] no 35014/97, ECHR 2006-VIII, para 165.

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[24] Me Irafasha Félix avuga ko mu gihe cyamunara yaba iteshejwe agaciro, uru Rukiko rwatega I & M Bank Rwanda Plc yakiriye ikiguzi cyayo gihwanye na 102.100.000 Frw kuyasubiza Umwanditsi Mukuru, nawe akazayaha SAFARI Jean Claude wari wegukanye ingwate muri cyamunara. [25] Kayumba Godfrey na Me Kayigi Kajuga Leo, uburanira Umwanditsi Mukuru, bavuga ko nyuma ya cyamunara, raporo y'ibyakozwe ishyikirizwa Ikigo cy'Igihugu cy'Iterambere, amafaranga yishyurwe muri cyamunara akavanwa kuri konti agashyirwa kuri konti y'uwaru ubereyemo umwenda, bakaba basaba ko mu gihe cyamunara yaba iteshejwe agaciro, banki yategakwe gusubiza ayo mafaranga nayo igasubirana ingwate yayoye. UKO URUKIKO RUBIBONA [26] Ingingo ya 155 y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko «Ikirego cy'ubujurire cyakiriwe gituma ikibazo gisubira uko cyari kimeze mbere y'uko gicibwaho urubanza rujuririrwa, ariko ku ngingo zajuririwe gusa.» [27] Urukiko rurasanga muri dosiye nta kigaragaza ko ingingo y'uko I & M Bank Rwanda Plc yasubiza amafaranga yakiriye yigeze iregerwa cyangwa ngo iburanweho mu nkiko zo hasi, I & M Bank Rwanda Ltd ntiyigeze iba umuburanyi muri uru rubanza kuva rwatangira ku buryo yarufatirwamo ibyemezo itarireguye, byongeye kandi nta bujurire bwuririye ku bundi Safari Jean Claude yatanze asaba ko I&M Bank Rwanda Plc isubiza amafaranga yahawe, bityo uru Rukiko rukaba ntaho rwahera rusuzuma ishingiro ry'ibyo Safari Jean Claude asaba. II.3. Kumenya niba indishyi zisabwa zifite ishingiro. [28] Kayumba Godfrey avuga ko SIMACO Ltd yamushoye mu manza zidafite ishingiro bituma atakaza byinshi mu gukurikirana iki kirego, akaba asaba Urukiko rw'Ubujurire gutegeka SIMACO Ltd kumwishyura 1.500.000 Frw y'ikurikiranarubanza n'igihembo cya Avoka. [29] Kalisa Jérémie avuga ko indishyi Kayumba Godfrey asaba nta shingiro zifite kuko nta makosa yaba we cyangwa SIMACO Ltd bakoze, ahubwo ari we ukwiye guhabwa 1.000.000 Frw y'igihembo

cya Avoka kuri uru rwego kuko yashowe mu manza kubw'amaherere. UKO URUKIKO RUBIBONA [30] Ingingo ya 111 y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu iteganya ko «Ikirego cy'amafaranga y'ikurikiranarubanza ni ikirego gishamikira ku kirego cy'iremezo kigamije kwishyura ibyakoreshejwe mu rubanza. Ikirego cy'amafaranga y'ikurikiranarubanza kiburanishirizwa rimwe n'ikirego cy'iremezo. Gishobora kandi kwakirwa kikanaburanishwa n'uyo ikirego cy'iremezo cyaba kitakiriwe.» [31] Urukiko rurasanga amafaranga y'ikurikiranarubanza n'igihembo cya Avoka bisabwa na Kayumba Godfrey atayahabwa kuko yateje ingwate muri cyamunara mu buryo budakurikije

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amategeko, naho asabwa na SIMACO Ltd ikaba yayahabwa kuko hari ibyo yatakaje kugirango uru rubanza ruburanwe. Mu bushishozi bw'urukiko, SIMACO Ltd ikaba igenewe 700.000Frw y'igihembo cya Avoka wayiburaniye kuri uru rwego. III. ICYEMEZO CY'URUKIKO [32] Rwemeje ko ubujurire bwa Kayumba Godfrey nta shingiro bufite; [33] Rwemeje ko imikirize y'urubanza RCOMA 00418/2018/HCC rwaciye ku wa 31/07/2019 ihindutse gusa ku bijyanye n'indishyi; [34] Rutegetse Kayumba Godfrey kwishyura SIMACO Ltd 700.000Frw y'igihembo cya Avoka kuri uru rwego ; [35] Ruvuze ko amagarama yatanzwe ahwanye n'ibyakozwe mu rubanza.

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