

RWANDA / JUDGMENT

MBERABAGABO ET AL v. FIAT AMELIE ET AL

RLR V.3 - 2015

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Text

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MBERABAGABO ET AL v. FIAT AMELIE ET AL [Rwanda SUPREME COURT – RS/REV/INJUST/COM 0001/13/SC (Kayitesi, P.J., Hatangimbabazi, Mukandamage, Rugabirwa and Gakwaya J.) 28 March, 2014] Law regulating the commercial procedure – The review of the judgment – The grounds for injustice – The party may not say that the court which has rendered the judgment for review of the judgment for extreme injustice was not competent in case it has decided basing on the provisions of the law for reviewing the judgment and the parties have based on them within their submissions filing the claim – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure article 186 paragraph 3 and 6. Law regulating the commercial procedure – Referring to two ways of appeal at the same time within one case – It is not considered as to refer to two procedures of appeal at the same time in case the party to the case has withdrawn with the procedure he has started – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure article, article 12. Law regulating the commercial procedure – Redeeming what had to be auctioned – The validity of the sale aiming to

the redemption before the auction – If the redemption results from the sale of the house, that contract is valid – Any person or the debtor may as long as it is made before the end of the sale, redeem the seized property if it is made in the interests of the creditor and of the debtor, the sum is meant to satisfy the debt of the distrainer and the seizure expenses –The sale contract aiming to the redemption of the seized property is valid – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure article, article 311. Law governing contracts or contractual obligations – The liability – The damages for the rent – The one who deprived the money from another person basing on the fact that he has bought it from the auction, while he has assisted the one who performed the auction in violating the law, they may jointly pay to him the damages – Law of 30/07/1888 relating to contracts or contractual obligations, article 258. Facts: 1. BANQUE COMMERCIAL DU RWANDA (BCR) which became I&M BANK has given the loan to Dunia Bakarani which he failed to reimburse and it made it to seize the court and it won him. There has started the procedures of executing the court judgment performed by the notary Kayitesi Judith, meanwhile Dunia has sold the house to Fiat Amelie and paid that debt and even the bank has notified to the notary that that debt has already been paid. The notary Kayitesi has ignored it and went on the auction and the house was bought by Mberabagabo two days after paying. Dunia lodged a claim before the Commercial High Court claiming to nullify the auction of his house which has been performed after paying the debt. Fiat Amélie who has bought that house from Dunia Bakarini by an agreement before the auction takes place has intervened in that case. The Commercial High Court decided that the auction has been legally performed, and that Fiat Amelie's claim is inadmissible since he has no quality and interests for claim.

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Dunia and Fiat appealed against that judgment before the Supreme Court but before being heard they have withdrawn that case and they rather seized again the Commercial High Court applying to review the judgment on the grounds that the court has confused the facts and that court decided that the auction performed is nullified, and condemned Kayitesi (the notary), Mberabagabo Innocent who worked together with the company and Butera who has bought the house in the auction to pay to Fiat Amelie 29,575,000 Frw for the rent of the house he would have earned for 13 months that house he has bought and was auctioned, and were condemned to pay also 500,000 Frw for the lawyer's fees. Kayitesi, Mberabagabo Innocent and Butera wrote to the Ombudsman requesting her to review the judgment for the injustice which is obvious to everyone since there are laws and the evidences which have been ignored and it was approved that it is reviewed for the grounds of injustice. Before the Supreme Court, Kayitesi, Mberabagabo Innocent, Butera explain that the injustice is proven in the fact that the Commercial High Court was not competent to review the judgment for the grounds of injustice, rather the Supreme Court was the only one which was competent thus the Commercial High Court would not have admitted Dunia and Fiat's claim for reviewing the judgment while there was an appeal they have lodged before the Supreme Court and that the sale of that house which has been made between Dunia and Fiat made the former get the payment to pay to BCR could not suspend the auction which has

been performed since that house was not yet within their hands. They have also said that the fact that Fiat Amelie was provided with the money for the rent decided by the Commercial High Court is an injustice since no fault has been committed. Fiat and Dunia have said that the Commercial High Court was the one which was competent to review the judgment for the grounds of extreme injustice since they have based on confusing the facts and they have based on the provisions relating to the review of the judgment. They have also said that they have not concurrently referred to two ways of appeal since in lodging the claim for reviewing the judgment they have proven that they have withdrawn the appeal they have lodged before the Supreme Court. They have also said that the sale which has been made between them is valid since Fiat has voluntarily executed the judgment and paid to BCR and issued to him the non crearance certificate and it notified to Kayitesi Judith requesting her to stop the auction. In addition to that they say that the fact that Mberabagabo Innocent and Butera have bought that house in the auction clearly knowing that it is the house which has been sold it is a serious fault for which they have to be held responsible and pay to Fiat the rent they have deprived from him. They have concluded claiming the damages for being involved within the court proceedings for no ground and the lawyer's fees. While Kayitesi Judith, Mberabagabo Innocent and Butera argued that the claimants of that money do not deserve it since they committed no fault. Held: 1. The party may not say that the court which has rendered the judgment for review of the judgment for extreme injustice was not competent in case it has decided basing on the provisions of the law relating to reviewing the judgment and the parties have based on them within their submissions filing the claim, thus the word "extreme" which has been used in the subject matter of the case has no effect in knowing the court which was competent to examine the case.

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2. It is not considered as concurrently referring to two ways of appeal in case the one who applied for the review of the case has withdrawn the appeal before the hearing of the case.
3. Any person or the debtor has the right to redeem the seized property by satisfying the damages and the costs of the seizure, as long as it is made before the end of the sale, in the interests and with the consent of the debtor, it is not necessary to request to the Court the order suspending the auction before redeeming the seized property.
4. The one who deprived another person the money for the rent of the house he has legally bought basing on the fact that he is the one who bought it from the auction while it was illegal, they jointly held responsible with the one who performed it. However, the one who was within the same company with the one who bought it is not held responsible for it in case he has personally bought it. Butera's claim has merit. The claim by others appellant has no merit 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 procedure article 186, paragraph 3 and 6, that of 293, and article 311, Law of 30/07/1888 relating to the contracts or contractual obligations, article 258 No cases referred to: Authors cited: Albert FETTWEIS, Manuel de procédure civile, deuxième édition, Faculté de droit de Liège, 1987,

PP 479-480, Michel Franchimont, Ann Jacobs et Adrien Masset, Manuel de procédure pénale, 2e édition, Larcier, Bruxelles, 2006, p. 927.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] BANQUE COMMERCIAL DU RWANDA (BCR) which became I&M BANK has given the loan to Dunia Bakarani which failed to reimburse it as agreed upon, at the extent that there started the procedures of executing the judgment RCOM 0005/09/HCC which became executable since it has won the judgment RCOMA 0013/10/CS. Dunia Bakarani lodged a claim before the Commercial High Court for staying the auction on his house which is located in the plot no 339 in Rubavu Town, due to the auction effected by the notary Kayitesi Judith while on 15/12/2011 he was notified that BANQUE COMMERCIAL DU RWANDA was already paid on 13/12/2011. Fiat Amélie for him voluntarily intervened in that case since he has made a sale contract on the house with Dunia Bakarini before the auction. [2] On 18/10/2012 the Commercial High Court decided the judgment RCOM 0070/12/HCC it was seized with and decided that the auction was legal, and that the claim of Dunia Bakarini, who voluntarily intervened, had not to be admitted since he had no capacity and interests of claiming, more importantly that the sold house was not his yet.

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[3] Dunia Bakarani and Fiat Amélie seized again the Commercial High Court applying for the review of the case RCOM 0070/12/HCC basing on the article 186 in its paragraph 3 and 6 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure. [4] The Commercial High Court decided the judgment RCOM 0306/12/HCC on 21/01/2013 and decided that Fiat Amélie and Dunia Bakarani's claim has basis, and declared that Kayitesi Judith, Mberabagabo Innocent and Butera Jean-Pierre loss the case, and nullified the auction of 15/12/2011 on the house which is located in the plot no 339 in Rubavu Town. [5] The court also condemned Kayitesi Judith, Mberabagabo Innocent and Butera Jean- Pierre all together to pay to Fiat Amélie the money amounting to 29.575.000 Frw for the rent of the house and 500,000 Frw for the lawyer's fees, which make in total 30.575.000 Frw, after the pronouncement of the court decision they started with the money that the notary Kayitesi Judith has deposited in the National Bank after the auction, and condemned them to pay all together to pay the court fees amounting to 9,000 Frw. [6] On 6/2/2013, the Ombudsman wrote to the Supreme Court requesting that RCOM 0306/12/HCC rendered by the Commercial High Court be reviewed for the injustice grounds resulting from the fact that there have been the laws and the evidences which were ignored. [7] After analysing the report of the Chief Inspector of courts on this judgment, the Chief Justice in the Supreme Court, basing on the article 80 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, on 27/3/2013 decided that the judgment to be submitted in the registrar of the Supreme Court to be heard again. [8] Kayitesi Judith, Mberabagabo Innocent and Butera Jean-Pierre applied for the review of the judgment RCOM 0306/12/HCC on the following injustice grounds:

- a. To ignore the evidences and laws that are obvious to everyone, they claim the judge to have ignored article 78 and 79 of the of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court.
- b. To admit and analyze the claim while the law provides it otherwise, they argue that even if he could have the capacity, the judge could not have admitted the claim and analyze it basing on the article 12 of the Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.
- c. To have supported the fraud and faults of the plaintiffs, arguing that the claim of the plaintiffs was based on the fraud and violating the law for staying the auction, arguing basing on the sale contract on the house which was seized which was not in the possession of its owner which is supported by the article no 295 of the Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure which was in force at that time.

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- [9] Fiat Amélie requests the Supreme Court to condemn the plaintiffs to pay to him 3.500 USD each month for the period of 13 months for the rent of the house he bought before the auction, together with Dunia Bakarani request to condemn the plaintiff to give then 2.000.000 Frw for having involved them in the court proceedings for no ground and 2.000.000 Frw for the lawyer's fees. I&M Bank (the former Banque Commerciale du Rwanda) also lodged a cross appeal upon that of the plaintiffs requesting the Supreme Court to condemn them to pay to it the procedural damages amounting to 500,000 Frw and the lawyer's fees amounting to 500,000 Frw. [10] The public hearing was held on 4/2/2014, Mberabagabo Innocent, Butera Jean-Pierre and Kayitesi Judith represented by Counsel Counsel NZAMWITA Toy and Counsel TWAGIRAYEZUChristophe, Fiat Amélie and Dunia Bakarani were represented by Me Shema Gakuba Charles and Me Buhuru Pierre-Célestin while I&M Bank (the former Banque Commerciale du Rwanda) was represented by Counsel Me BATWARE Jean-Claude. [11] The hearing was held in public on 4/2/2014, MBERABAGABO Innocent, BUTERA Jean Pierre and KAYITESI Judith represented by Counsel NZAMWITA Toy and Counsel TWAGIRAYEZUChristophe, Fiat Amélie and DUNIA BAKARANI represented by Counsel SHEMA GAKUBA Charles and Me BUHURU Pierre-Célestin and I&M BANK (ex-Rwanda Commercial Bank) represented by Counsel BATWARE Jean-Claude. II. LEGAL ISSUES AND THEIR ANALYSIS To know whether the Commercial High Court is competent to hear the case RCOM 0306/12/HCC [12] Counsel NZAMWITA Toy, the counsel of MBERABAGABO Innocent, BUTERA Jean-Pierre and KAYITESI Judith asserts that the Commercial High Court was not competent to hear the case RCOM 0306/12/HCC since FIAT Amélie and DUNIA BAKARANI instituted the claim for review due to excessive injustice the judgment RCOM 0070/12/HCC the was rendered at the last instance by that Court, yet according to the provisions of 78 and 79 of the organic law No 03/2012 of 13/6/2012 determining the organization, functioning and jurisdiction of the Supreme Court, that

complaint had not to be instituted before that court because it is only the Supreme Court that has jurisdiction to hear claims for review due to injustice, therefore he submits that since the Commercial High Court overstepped its jurisdiction, this is the ground indicating injustice that occurred in this case. [13] Counsel NZAMWITA Toy explains that FIAT Amelie and DUNIA BAKARANI in instituting the claim before the Commercial High Court should have not have not based on 186 of the law 21/2012 of 14/6/2012 relating to civil, commercial, labor and administrative procedure since the application for review due to injustice is instituted pursuant to articles 78 and 79 of the organic law No 03/2012 stated above. Counsel TWAGIRAYEZU Christophe, the counsel of MBERABAGABO Innocent, BUTERA Jean Pierre and KAYITESI Judith expalians that under paragraph 8 of the judgement RCOM 0306/12/HCC, the Commercial High Court based on article 189 of the law No 21/2012 of 14/6/2012 stated above and decided that it has jurisdiction to admit the claim for review, but that Court disregarded that there is an organic law that gives jurisidiction to the Supreme Court to hear complaints of review due to injustice.

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- [14] Counsel BUHURU Pierre Célestin, the counsel of Fiat Amelie and DUNIA BAKARANI asserts athat in the judgement RCOM 0306/12/HCC the plaintiffs were applying for review due to injustice of the judgment RCOM 0070/12/HCC and the court that rendered the judgment is the one that is competent to hear the claim relating to its review pursuant to articles 186 and 189 of the law No 21/2012 of 14/06/2012 stated above, therefore he finds that as long as those articles gives jurisdiction to the court that rendered the judgment at the last instance for which the review is sought, there is no error committed by the Commercial High Court since it is itself that rendered the judgement RCOM 0070/12/HCC. [15] Counsel SHEMA GAKUBA Charles, the counsel Fiat Amelie and DUNIA BAKARANI, asserts that the applicants instituted the application for review due to injustice of the judgment RCOM 0070/12/HCC since there has been gross bad qualification of facts based on article 186, paragraphs 3 and 6 of the law No 21/2012 of 14/6/2012 stated above, yet article 78 and 79 of the organic law No 03/2012 sated above does not provide for bad qualification of the facts as a ground for application for review due to injustice, therefore that argument should be considered. [16] Counsel Me BATWARE Jean-Claude, the counsel of I&M BANK (Ex- Rwanda Commercial Bank) asserts that the judgement RCOM 0306/12/HCC requested the review of the judgement RCOM 0070/12/HCC that based on excessive injustice and serious errors of bad qualification of facts as provided under article 186, paragraphs 3 and 6 of the law No 21/2012 of 14/6/2012 stated above, and that is indicated in the subjected matter of the case RCOM 0306/12/HCC, therefore he finds that no where FIAT Amelie and DUNIA BAKARANI would have instituted their complaint other than filing it before the Commercial High Court that rendered the judgment RCOM 0070/12/HCC that passed to the force of res judicata. COURT FINDINGS [17] The Supreme Court find that the subject matter of the case RCOM 0306/12/HCC is the review of the judgment RCOM 0070/12/HCC due to excessive injustice arising from this case and the gross errors of bad qualification of facts (article 186, paragraphs 3 and 6 of the law No

21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure). [18] When one reads the point 8 of the judgement RCOM 0306/12/HCC, it is clear that the Commercial High Court ruled that it is competent to hear that case since article 189 of the law No 21/2012 of 14/06/2012 stated above provides for that the claim for review is referred before the court that rendered that judgement and the judgment RCOM 0070/12/HCC for which the review is sought was rendered by that court and by instituting their claim, the plaintiffs based on article 186, paragraphs 3 and 6 of the law ° 21/2012 of 14/06/2012 stated above. [19] Article 186, paragraph 3 of the law No 21/2012 of 14/6/2012 sated above provides for that “there may be the application for review when after the judgment is rendered there appeared conclusive evidence indicating the injustice caused by the judgment for which the review is sought, that evidence might be included in the documents submitted to the court but it did not find it or it was presented later on”, and paragraph 6 of that article 186 provides for that “there may be the application for review when in rendering that judgment there have been gross errors of bad qualification of facts or it was based on the non-existent law.”

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[20] Article 189, paragraph 1 of the law No 21/2012 of 14/06/2012 stated above provides for that the principal action review of the judgment rendered at the last resort is referred before the court that judgment but composed by another or other judges who did not hear it. [21] Article 78 of the organic law No 03/2012 of 13/6/2012 determining the organization, functioning and the jurisdiction of the Supreme Court provides for that the Supreme Court is competent to hear complaints of review due to injustice of judgment rendered at the last instance after the decision of the chief justice, and article 179 of that organic law stated above provides about the procedure of seizing the Supreme Court with claim of review due to injustice of judgment rendered at the last instance. [22] When one examines the provisions of these articles and the subject matter in the case RCOM 0306/12/HCC it is obvious, beyond any doubt that before the Commercial High Court; FIAT Amelie and DUNIA BAKARANI instituted the claim for review of the judgment RCOM 0070/12/HCC pursuant to article 186, paragraphs 3 and 6 of the law No 21/2012 of 14/6/2012 stated above, which is indicated under paragraph 10 of the submissions that FIAT Amelie and DUNIA BAKARANI submitted to the Commercial High Court that the ir claim is based on articles 186, 187 and 189 of the alw No 21/2012 of 14/6/2012 stated above, therefore that Court was competent to hear it since it was it itself that rendered at the last instance the judgment RCOM 0070/12/HCC. [23] With regard to the arguments of the plaintiffs that FIAT Amelie and DUNIA and BAKARANI in instituting their claim before Commercial High Court, they were applying for the review of the judgment RCOM 0070/12/HCC due to excessive injustice, that they had to refer their claim before the Supreme Court, the Court is of the view that this is wrong since it is obvious under article 186, paragraph 3 of the law No 21/2012 of 14/6/2012 stated above that the litigant who has the right to apply for review can exercise it on the ground that after the judgment is rendered, there have been conclusive evidence indicating injustice caused by the judgment for wich the review is sought , therefore, the word “execessive” used in the

object matter is immaterial with regard to determining the competent court to hear the case RCOM 0306/12/HCC so long as it is clear that the claim instituted in this case is based on aforementioned articles of the law No 21/2012 of 14/6/2012. [24] Pursuant to the all foregoing explanations, the Supreme Court finds that that arguments of the plaintiffs is not founded since the Commercial High Court has the full jurisdiction to hear the complaint of FIAT Amelie and DUNIA BAKARANI for review of the judgment RCOM 0070/12/HCC.

- b. To know whether FIAT Amelie and DUNIA BAKARANI used two distinct avenues of appeal at the same time [25] Counsel NZAMWITA Toy asserts that pursuant to article 12 of the law No 21/2012 of 14/6/2012 relating to civil, commercial, labor and administrative procedure, the Commercial High Court should have not admitted the action for review and thus examine it since FIAT Amelie and DUNIA BAKARANI had already on 26/10/2102 instituted an appeal before the Supreme Court appealing against the judgment RCOM 0070/12/HCC, and they later on 6/11/2012 instituted another claim for review of that judgment before the Commercial High Court, and thus he submits that since they used two different avenues of appeal at the same time,

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appeal and application for review yet the first avenue deprives one the right to use the other FIAT Amelie and DUNIA BAKARANI do not have the right to apply for the review of the judgment RCOM 0070/12/HCC since they had already appealed before the Supreme Court. [26] Counsel BUHURU Pierre Célestin asserts that the provisions of article 12 of the law no 21/2012 of 14/6/2012 stated above relates to ordinary avenues of appeal, that is appeal and opposition, and the review is an extra ordinary avenue of appeal, that is not the same as those ordinary avenues of appeal. He explains that since the judgment RCOM 0070/12/HCC was rendered on the execution of the judgment and was not subjected to appeal FIAT Amélie and DUNIA BAKARANI basing on article 26 of the law No 21/2012 of 14/6/2012 stated above, immediately abandoned their appeal and instituted the claim for review before the Commercial High Court and in addition article 26 of the law No 21/2012 of 14/6/2014 when one party desist the claim the consent of the other party is not required. [27] Counsel Me BATWARE Jean Claude asserts that the review is extra ordinary avenue of appeal, and during the proceedings before the Commercial High court, FIAT Amelie and DUNIA BAKARANI had indicated that they have abandoned their claim of appeal pending before the Supreme Court, thus he submits that the disistment of their action was sufficient as it does not require the view of the other party. COURT FINDINGS [28] With regard to the incident raised before the Commercial High Court by MBERABAGABO Innocent, BUTERA Jean-Pierre and KAYITESI Judith of the dismissal of the claim of FIAT Amelie and DUNIA BAKARANI on the ground that they have resorted to the two avenues of appeal at the same time, the Supreme Court finds that under paragraph 6 of the judgment RCOM 0306/12/HCC that court held that they did not resort to the two avenues of appeals since the calim for review was instituted after they were no longer interested in the appeal lodged before the Supreme Court. [29] Article 12 of the law No 21/2012 of 14/6/2012 relating to civil, commercial, labor and administrative procedure provides for that “no litigant can at the same time use the appeal and

opposition at the same. The first avenue opted for deprives them the right to use another avenue.” [30] With analysis of the provisions of that article, the Supreme Court finds that it clear that avenues of appeal provided under this article are ordinary avenues of appeal, that is appeal and opposition, however, without prejudice to the foregoing statements, nothing would prevent the application, in this case, of principles of law governing cases relating to simultaneous resort to ordinary avenues of appeal. It also finds that what the legislator prohibits the use of the two distinct avenues of appeal¹, however in this case, it is obvious that Fiat Amelie and DUNIA 1 “Ce que la règle <<Electa una via non datur recursus ad alteram>> prohibe, c’est la poursuite parallèle, simultanée des deux voies de recours contre une même décision” Albert FETTWEIS, Manuel de procédure civile, deuxième édition, Faculté de droit de Liège, 1987, PP 479-480. Il a été jugé que l’appel du jugement par défaut, interjeté après une opposition, mais en temps utile, doit être reçu si l’opposition est elle-même non recevable”, in Michel Franchimont, Ann Jacobs et Adrien Masset, Manuel de procédure pénale, 2e édition, Larcier, Bruxelles, 2006, P.

927. Lorsqu’ une opposition a été formée postérieurement à un appel, si l’appel est irrecevable, il n’y aurait pas d’obstacle à la recevabilité d’une opposition régulière, faite pour la première fois ultérieurement, Michel

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BAKARANI lodged an appeal before the Supreme Court on 26/10/2012, and later on the instituted the claim for review before the Commercial High Court on 6/11/2012, and they desisted that appeal on 11/12/2012, therefore is clear that Fiat Amelie and DUNIA BAKARANI did not simultaneously resort to the two avenues of appeal since they institute an appeal *sitricto sensu* on 26/10/2012, after 12 days that is on 6/11/2012 they instituted an extra ordinary claim for review and the desisted the appeal lodged before the Supreme Court. [31] Pursuant to the foregoing statements, the Supreme Court finds that the allegations of the plaintiffs on that ground of injustice have not to be considered since there are no errors committed by the Commercial High Court.

c. To whether the sale between FIAT Amélie and DUNIA BAKARANI should not be considered valid [32] Nzamwita Toy, the counsel, says that basing on the provisions of the article 295 of the law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure which was in force when the sale contract of the house between Fiat Amélie and Dunia Bakarani was made, that sale may not be taken as valid since Fiat Amélie has taken the money got from the sale and deliver it to I&M BANK (the former Banque Commercial du Rwanda) instead of delivering it to the State Treasurer, thus he realizes that the non-clearance certificate that I&M BANK (the former Banque Commercial du Rwanda) issued to Dunia Bakarani itself was not enough to stay the auction. He says again that the notary had no obligation of staying the auction basing on that certificate since it required another decision of the President of Rubavu Intermediate Court ordering him to stay the auction. He concludes saying that the provisions of the article 318 of the law n° 18/2004 of 20/06/2004 mentioned above which was in force at that time may not be based on in this case, in case

the provisions of the article 295 of the law n° 18/2004 of 20/06/2004 mentioned above are not fulfilled. He concludes asserting that the provisions of article 318 of the law No 18/2004 of 20/06/2004 stated above that was in force by that time should not be applicable in this case so long as the provisions of article 295 of the law no 18/2004 of 20/06/2004 stated above was not complied with. [33] Counsel SHEMA GAKUBA Charles asserts that the fact that FIAT Amelie bought the house and latter on he paid I&M BANK (former Rwanda Commercial Bank) indicates that there has been the voluntary enforcement of the judgment by DUNIA BAKARANI, and he submits that since I&M BANK (former Rwanda Commercial Bank) gave DUNIA BAKARANI the certificate of non-indebtedness and notified the notary KAYITESI Judith request her to suspend the auction, there are no errors on behalf of the Commercial High Court since the sale of the house was effected before the auction and the price was given to I&M BANK (former Rwanda Commercial Bank), therefore he finds that it was not necessary to give the proceeds of the sale to the public manager since the seizure of the house of DUNIA BAKARANI was made in the interest of I&M BANK (former Rwanda Commercial Bank). [34] Counsel BATWARE Jean-Claude asserts that pursuant to article 314 of the law No 21/2012 of 14/06/2012 relating to civil, commercial, labor and administrative procedure any Franchimont, Ann Jacobs et Adrien Masset, Manuel de procédure pénale, 2e édition, Larcier, Bruxelles, 2006, P. 927.

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person has the right to redeem what have been seized when he pays the debt in the interest of the person who seized and upon their consent. He explains that before the auction takes place, I&M BANK (former Rwanda Commercial Bank) had already agreed with DUNIA BAKARANI as it paid him voluntarily and it notified it to the notary, thus he submits that that auction that took place did not respect the law. COURT FINDINGS [35] Article 293 of the law No 21/2012 of 14/6/2012 relating to civil, commercial, labor and administrative procedure (it was article 295 of the law No 18/2004 of 20/6/2004 that was in force by the time of the sale of the house between FIAT Amelie and DUNIA BAKARANI) provides for that “the donation of an immovable property or any grant of rights over them made by the debtor who was given the writ compelling him to pay or prohibiting him to pose any act over them is not valid, except if the person to whom they are given accepts to give the public manager the security equal to the debt that the person who has seized has to paid.” [36] Article 313 of the law No 21/2012 of 14/6/2012 stated above (that was article 317 of the law No 18/2004 of 20/6/2004 stated above) provides for that “the debtor whose assets have been seized can at any time redeem those assets, by depositing on the securities account of the court the sufficient amount to satisfy the debt that led to the seizure of their assets, including the debt itself, interests, court fees and the redeemer has to explain clearly that that amount is for he payment of the debt of the person who seized those assets, in case there is evidence to prove they owe it.” [37] Article 314 of the law No 21/2012 of 14/6/2012 stated above (that was article 318 of the law No 18/2004 of 20/6/2004 stated above) provides for that “any person has the right to redeem the seized assets when they pay the debt cause of the seizure and the attachment fee, provided that it is made in the interest of the person whose assets were seized and upon their consent

prior to the auctioned of their assets.” [38] Those article sof laws indicates that though there has been the seizure of the debtor’s assets, any person or the debtor themselves can, at any time but before the auction, redeem the seized assets on condition that it is made in the interest of the creditor, which means that amount paid in the interest of the debtor is to satisfy the debt of the person who seized the assets and the attachment fee. [39] With regard to article 293 of the law no 21/2012 of the law 14/6/2012 of the law stated above, the Supreme Court finds that giving the public manager the amount equal to the debt and court fees owed to the person who seized is not conclusive or a public order formality since what matters is that the creditor be paid, in addition to that article 293 of the law stated above is not of public order. [40] With regard to the contentions of the plaintiffs that the sale of the house between FIAT Amelie and DUNIA BAKARANI should not be considered valid since it was necessary to have an other writ of the president of the intermediate court stopping the auction, the Supreme Court is of the view that this is not true because ans there is no law that provides for this, but instead as indicated above any person or the debtor themselves can at any time, but before the auction takes

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place, redeem the seized assets as long as it made in the interests of the creditor and the debtor, therefore it is not necessary to request the president of the intermediate court the writ stopping the auction prior to the redemption of the seized assets. [41] For the foregoing reasons, the Supreme Court finds that the sale between FIAT Amelie and DUNIA BAKARANI must be considered valid since it was concluded for the purpose of redeeming that was made seized by I&M BANK (former Rwanda Commercial Bank), which was paid and notified that payment to the notary KAYITESI Judith before the auction takes place. To know whether the damages of lease awarded by the Commercial High Court are founded [42] Counsel Counsel NZAMWITA Toy asserts that the condemnation of Notary KAYITESI Judith, MBERABAGABO Innocent and BUTERA Jean-Pierre to payment of damages to FIAT Amelie and DUNIA BAKARANI equal to 30, 000, 000 Rwf is injustice because since they did not commit any fault, and the Notary KAYITESI Judith was found not guilty in all two courts. He asserts that BUTERA Jean-Pierre could not committed any fault since he did not sell the house and he did not even buy it, that MBERABAGABO Innocent did not commit any fault since he had seen the announcement and participated in the auction and bought the house, therefore he finds there no basis for the Commercial High court to award those damages. [43] Counsel BUHURU Pierre Célestin asserts that the Commercial High Court held that the auction was administered by the notary KAYITESI Judith did no respect the law and deprived FIAT Amelie and DUNIA BAKARANI the fruits from its lease since that house was let for 3,500 USD per month before its sale and those who bought it in the auction committed fraud and it was BUTERA Jean Pierre who concluded that contract. He explains that before the auction MBERAGABO Innocent, BUTERA Jean Pierre and BISAMAZA constituted the company called Prime Lodge and they immediately changed the destination of the business carried out in the hosue sold, therefore he finds that since the Commercial high court endorsed the decision taken on those explanation, clearly indicates that it well explained the fault they committed. [44] Me GAKUBA SHEMA Charles asserts that on 13/12/2011 I&M BANK

(former Rwanda Commercial Bank) wrote a letter to the notary KAYITESI Judith requesting her to stop the auction because there was not debt owed towards it by DUNIA BAKARANI whereas MBERABAGABO Innocent and BUTERA Jean Pierre bought that house while they were aware that it is fraud, he finds them to serious faults that they have to be liable for. FINDINGS OF THE COURT [45] The Supreme Court finds that under paragraph 14 of the judgment appealed against, the Commercial High Court held that “that faults committed deprived FIAT Amelie who bought the house before the auction the rent of his house equal to 3,500 USD a month within the priod of 13 months which in total equal to 45, 500 USD which is equal to 29,575,000 and that amount during the enforcement of the judgment will be withdrawn from the amount deposited in BNR after the auction (article 258 of the CCB III)”, therefore it ordered notary KAYITESI Judith, MBERABAGABO Innocent and BUTERA Jean Pierre to jointly pay FIAT Amelie 30, 575,000

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Rwf after the pronounce of this judgment starting on the amount that KAYITESI Judith deposited in BNR from 19/12/2011 after the auction. [46] With regard to notary KAYITESI Judith, the Supreme Court finds that since I&M Bank (former Rwanda Commercial Bank) notified her before the auction that DUNIA BAKARANI had already paid and she disregarded that and auctioned the house in the plot n° 339 in RUBAVU (former Gisenyi) constitutes a fault liable to damages since this act caused damage to FIAT Amelie by depriving him the rent of the house he bought before the auction equal to 3,500 USD a month during 13 months period which is in total equal to 45, 500 USD that is equal to 29.575.000 Rwf by the time the Commercial High Court rendered this judgment. The Supreme Court finds that the fact that KAYITESI Judith was found innocent in criminal cases cannot prevent her from being liable of her faults (tortuous and quasi-tortuous liability) committed against FIAT Amelie, thus KAYITESI Judith has to repair the damage. [47] With regard to MBERABAGABO Innocent, the Supreme Court finds that since he was notified that the house he bought in the auction was subjected to dispute because there is another person who bought it, but he remained with it and change its destination, constitutes the faults that he has to be liable for since he deprived FIAT Amelie the rent of the house he bought before the auction equal to 3,500 USD a month during 13 months period which is in total equal to 45, 500 USD that is equal to 29.575.000 Rwf by the time the Commercial High Court rendered this judgemnt, thus MBERABAGABO Innocent has to repair the damage. [48] With regard to BUTERA Jean-Pierre, the Supreme Court finds that he did not commit any act that caused the damage to FIAT Amelie since he did not buy that house in the auction and the fact he was a shareholder in Prime Lodge is ground for being liable due to the faults committed by MBERABAGABO Innocent, therefore BUTERA Jean Pierre cannot be laible for the faults of MBERABAGABO Innocent. [49] For all the foregoing reasons, pursuant to article 258 of the civil code book III which provides for that “any act of a person that cause the damage to another obliges the author of the fault result there from to pay damages”, the Supreme Court finds that notary KAYITESI Judith and MBERABAGABO Innocent only must pay FIAT Amelie 29.575.000 Rwf of rent of the house he bought before the auction, equal to 3,500 USD a month during the period of 13 months, thus the judgment RCOM 0306/12/HCC is modified with regard to BUTERA Jean Pierre only since it ordered him with others

to pay that amount to FIAT Amelie. To know whether the defendants should be awarded damages they claim [50] Counsel BUHURU Pierre Célestin and Me GAKUBA SHEMA Charles request the Supreme Court to condemn Notary KAYITESI Judith, MBERABAGABO Innocent and BUTERA Jean Pierre to payment of damages to FIAT Amelie and DUNIA BAKARANI equal to 2,000,000 Rwf due to abuse of procedure and 2,000,000 rwfs of the counsel's honorary. [51] Counsel BATWARE Jean-Claude requests the Notary KAYITESI Judith, MBERABAGABO Innocent and BUTERA Jean-Pierre to pay I&M Bank (former Rwanda Commercial Bank) damages of proceedings equal to 500,000 Rwf and the counsel's honorary equal to 500,000 Rwf.

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[52] Counsel Counsel NZAMWITA Toy asserts that the defendants should not be awarded these damages since no faults were committed by the plaintiffs. COURT FINDINGS [53] The Supreme Court finds 2,000,000 rwfs FIAT Amelie and DUNIA BAKARANI claim should not be awarded it since they had the right to institute this claim as long as they found that they suffered injustice. [54] With regard to 2,000,000 Rwfs of the counsel's honorary that FIAT Amelie and DUNIA BAKARANI claims, the Supreme Court finds that they should be awarded but because it is excessive, in its discretion it awards them 500,000 Rwf of the counsel's honorary. [55] With regard to 500,000 Rwf of damages of proceedings fee and the counsel's honorary equal to 500,000 Rwf that I&M BANK (former Rwanda Commercial Bank) requests, the Supreme court finds it to be excessive and in its discretion award it 500,000 Rwfs. [56] Due to the foregoing reasons, the Supreme Court has to order Notary KAYITESI Judith and MBERABAGABO Innocent to pay FIAT Amelie and DUNIA BAKARANI 500,000 rwf of the consel's honorary and pay I&M Bank (former Rwanda Commercial Bank) 500,000 Rwf of proceedings fee and counsel's honorary. III. DECISION [57] It hols that the claim instituted by notary KAYITESI Judith and MBERABAGABO Innocent is not founded. [58] It holds that that the claim of BUTERA Jean Pierre is founded. [59] It ordered Notary KAYITESI Judith and MBERABAGABO Innocent to jointly pay FIAT Amélie 29.575.000 Rwf of the rent of the house. [60] It ordered the notary KAYITESI Judith and MBERABAGABO Innocent to jointly pay FIAT Amélie and DUNIA BAKARANI the counsel's honorary equal to 500.000 Rwf in addition to 500.000 Rwf ordered by the Commercial High Court which is in total 1.000.000 Rwf. [61] It ordered notary KAYITESI Judith and MBERABAGABO Innocent to jointly pay I&M Bank (former Rwanda Commercial Bank) 500.000 Rwf of the counsel's honorary and the proceedings fee. It ordered notary KAYITESI Judith and MBERABAGABO Innocent to pay the courtfee equal to 14.

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