

RWANDA / JUDGMENT

RLR-V.1- 2014

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Supreme Court

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vii IRIBURIRO Basomyi bacu, Nyuma y'imyaka icyenda (9) Urwego rw'Ubucamanza rutangaza icyegeranyo cy'ibyemezo by'inkiko, Ubuyobozi bw'Urukiko rw'Ikirenga bwasanze ari ngombwa kuvugurura no kunoza imitegurire yacyo hagamijwe kurushaho korohereza abakoresha icyo cyegeranyo, gushyira ahagaragara umurongo ngenderwaho wakwifashishwa mu gusuzuma ibibazo by'amategako bisa n'ibiba byasuzumwe mu manza zitangazwa no kongera ubudakemwa bw'imanza muri rusange. Ni muri urwo rwego hashyizweho itsinda ry'abanyamategeko bategura imanza zitangazwa, bagaragaza mu buryo buhinnye ingeri y'amategako urubanza rubarizwamo, incamake y'ibibazo biri mu rubanza n'incamake y'icyemezo urukiko rwabifasheho, ibi bigafasha kubona ishusho y'urubanza muri rusange bitabaye ngombwa kurusoma rwose. Imanza zitangazwa kandi zihindurwa mu rurimi rw'icyongereza hagamijwe kurushaho kumenyekanisha ibyemezo by'inkiko z'u Rwanda mu buryo bwagutse. Mbere yo gutangazwa, imanza zisuzumwa kandi zikemezwa na Komite igizwe n'impuguke mu mategeko zihagarariye Urwego rw'Ubucamanza kimwe n'izindi nzego zinyuranye zifite aho zihuriye n'umurimo w'ubucamanza. Muri iyi nimeru ya mbere y'icyegeranyo kivuguruye cy'ibyemezo by'Inkiko mu Rwanda (Rwanda Law Reports) turasangamo urubanza rumwe (1) rwerekeranye no gusaba gukuraho ingingo z'amategako zinyuranyije n'Itegeko-Nshinga, urubanza rumwe (1) rwerekeranye n'amategako agenga amatora, imanza ebyiri (2) z'imbonezamubano,

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xix IBIKUBIYE MURI IKI CYEGERANYO IBIKUBIYE MURI IKI CYEGERANYO Iki cyegeranyo gikubiyemo imanza zaciwe n'Urukiko rw'Ikirenga zikoreshwa hakurikijwe nyito ivugwa hasi. INYITO Abashaka kwifashisha imanza ziri muri iki gitabo mu nyandiko zabo, babyandika mu buryo bukurikira: [V.1-2014]RLR

Cyateguwe n'Urukiko rw'Ikirenga

Cyatewe inkunga na Ambassade y'Ubuholandi & ICF i

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IMANZA ZISABA GUKURAHU AMATEGEKO ANYURANYIJE N'ITEGEKO NSHINGA

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1 Re MUHOZA (IKIREGO KIGAMIJE KUVANAHO INGINGO INYURANYIJE N'ITEGEKO NSHINGA) [Rwanda URUKIKO RW'IKIRENGA – RS/INCONST/CIV 0001/13/CS (Kayitesi, P.J., Mutashya, Mukanyundo, Kayitesi R, Hatangimbabazi, Kanyange, Mukandamage, Rugabirwa na Munyangeri, J.) 25 Ukwakira 2013] Itegeko Nshinga – Amategeko anyuranyije n'Itegeko Nshinga – Ikirego kigamije gukuraho igika cya kabiri cy'ingingo ya 176 y'itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi – Igihe umwe mu bashakanye aburanye umutungo bahuriyeho aba ahagarariye mugenzi we bawusangiye – Kutemerera uwashakanye n'umuburanyi gutambamamira urubanza si ukumwambura uburenganzira ku mutungo buteganywa n'Itegeko Nshinga – Itegeko Nshinga rya Repubulika y'u Rwanda ryo kuwa 04/06/2004 nkuko ryavugururwe kugeza ubu , ingingo 29 – Itegeko n° 22/99 ryo kuwa 12/11/1999 ryuzuzwa igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingingo ya 17. Incamake y'ikibazo: Karekezi Augustin, umugabo wa Muhoza Consolée yaburanye mu Rukiko Rwisumbuye rwa Gasabo isambu yabo yavugaga ko yabohojwe maze aratsindwa. Umuhiza Consolée yatambamiye urwo rubanza ariko asaba Urukiko kuba ruretse gufata icyemezo akabanza gutanga ikirego mu Rukiko rw'Ikirenga gisaba kuvanaho igika cya 2 cy'ingingo ya 176, y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi kuko kinyuranyije n'ingingo ya 29 y'Itegeko Nshinga. Mu kirego yashyikirije Urukiko rw'Ikirenga

yasobanuye ko ingingo ya 176 mu gika cya mbere, y'Itegeko n° 21/2012 ryo kuwa 14/06/2012

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2 ICYEGERANYO CY'IBYEMEZO BY'INKIKO ryavuzwe haruguru, ivuga ko abemerewe gutambamira urubanza ari abafite inyungu iyo ariyo yose mu rubanza rwaciwe, ariko igika cya kabiri cy'iyi ngingo kikaba kitemerera uwashakanye n'umuburanyi kuba yatambamira urubanza, kikaba rero kivuguruza ibiteganywa n'ingingo ya 29 y'Itegeko Nshinga iteganya ko "buri muntu afite uburenganzira ku mutungo we bwite, waba uwe ku giti cye cyangwa uwo afatanyije n'abandi", bityo iyi ngingo ikaba imwaka uburenganzira ahabwa n'Itegeko Nshinga, mu gihe afite uburenganzira ku butaka bw'umugabo we. Incamake y'icyemezo: Igika cya kabiri, ingingo ya 176 y'Itegeko n° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi ntaho inyuranije n'ingingo ya 29 y'Itegeko Nshinga, kuko mu gihe umwe mu bashakanye aburanye umutungo ahuriyeho na mugenzi we aba amuhagarariye ku buryo atahindukira ngo atambamire urwo rubanza kuko byaba binyuranyije n'icyo iyo nzira yashyirirwaho. Ikirego nta shingiro gifite. Amagarama y'urubanza aherereye ku rega. Amategeko yashingiweho: Itegeko nshinga rya Repubulika y'u Rwanda ryo kuwa 04/06/2004 nkuko ryavugururwe kugeza ubu, ingingo ya 29. Itegeko n° 22/99 ryo kuwa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, ingingo ya 17. Nta manza zifashishijwe. Inyandiko z'abahanga zifashishijwe: SERGE Guichard, Droit et Pratique de la procédure civile, Dalloz, 5^e, 2006, pp.1158, 1163.

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3 Re MUHOZA 3 Urubanza I. IMITERERE Y'URUBANZA [1] Umugabo wa Muhoza Consolée witwa Karekezi Augustin yareze Irambona Alphonse mu Rukiko rw'Ibanze avuga ko yabohojye isambu ye, urwo rukiko rwemeza ko Irambona agomba gusubiza Karekezi iyo sambu, ajuririra mu Rukiko Rwisumbuye rwa Gasabo rwemeza ko urubanza rwajuririwe ruhindutse mu ngingo zarwo zose, ko habaye isaranganya ry'iyi sambu buri ruhande rukaba rugomba kugumana aho rwahawe. [2] Urwo rubanza umugabo we yatsinzwemo, Muhoza Consolée yarakutambamiye mu Rukiko Rwisumbuye rwa Gasabo ariko asaba ko urukiko rwaba ruretse gufata icyemezo akabanza gutanga ikirego mu Rukiko rw'Ikirenga gisaba kvanaho ingingo ya 176, igika cya kabiri y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 rigena imiburanishirize y'imanza z'imbonezamubano, izubucuruza, iz'umurimo n'iz'ubutegetsi. [3] Me Nizeyimana Léopold yatanze ikirego mu Rukiko rw'Ikirenga mu mwanya wa Muhoza Consolée, asaba ko ingingo ya 176, igika cya kabiri y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryavuzwe haruguru yavanwaho kuko inyuranije n'Itegeko Nshinga, ikananyuranya n'ingingo za 35 na 36 z'Itegeko-Ngenga n° 08/2005 ryo kuwa 14/07/2005 rigena imikoreshereze n'imicungire y'ubutaka mu Rwanda. [4] Ikirego cya Muhoza Consolée cyasuzumwe mu iburanisha ryo kuwa 31/07/2013 Me Nizeyimana Léopold amuhagarariye, Minisitiri y'Ubutabera yari yasabwe gutanga ibitekerezo ihagarariwe n'Intumwa ya Leta, Me Rubango Epimague. [5] Me Nizeyimana yahawe umwanya yibutsa ikirego yatanze mu mwanya wa Muhoza Consolée, anavuga ko igice cy'ikirego kirebana n'ingingo za 35 na 36 z'Itegeko-Ngenga n°

08/2005 ryo ku wa 14/07/2005 rigena imikoreshereze n'imirungire y'ubutaka mu Rwanda

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4 ICYEGERANYO CY'IBYEMEZO BY'INKIKO akihoreye kuko iryo tegeko ryavuyeho, hagasuzumwa gusa ikirebana n'ingingo ya 176, igika cya kabiri y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryavuzwe haruguru, bityo ikirego uru rukiko rugomba gusuzuma kikaba ari icyerekeye iyo ngingo yonyine. [6] Me Rubango Epimague nawe yasobanuye igitekerezo cya Minisiteri y'Ubutabera ku kirego cya Muhoza Consolée. Ku byerekeye iyakirwa ry'ikirego n'ububasha bw'urukiko. [7] Inyandiko ziri muri dosiye zigaragaza ikiregerwa, itariki ikirego cyatangiweho hamwe n'umukono wa Me Nizeyimana wagitanze mu izina rya Muhoza Consolée. Zigaragaza kandi impamvu ikirego gishingiyeho n'ingwate y'amagarama yatanze na Muhoza Consolée. Uwareze yatanze kandi kopi y'igazeti ya Leta yo kuwa 16/07/2012 irimo ingingo y'itegeko asaba ko ivanwaho, bityo ibisabwa n'ingingo ya 54 y'Itegeko Ngenga n° 003/2012 ryo kuwa 13/06/2012 rigena imitunganirize, imikorere n'ububasha by'Urukiko rw'Ikirenga bikaba byarubahirijwe. [8] Muhoza Consolée afite kandi inyungu muri uru rubanza kuko avuga ko ingingo y'itegeko asaba ko ivanwaho asanga imubangamira kuko itamwemerera gutambamira urubanza umugabo we yatsinzwemo kandi ikiburanwa ari isambu y'umuryango nawe afiteho uruhare. [9] Ku byekeranye n'Uububasha bw'Urukiko rw'Ikirenga, ingingo ya 53 y'Itegeko Ngenga n° 003/2012 ryavuzwe haruguru iteganya ko "Urukiko rw'Ikirenga ari rwo ruburanisha ibirego byerekeranye no gusaba gukuraho Itegeko Ngenga, itegeko, itegeko-teka cyangwa itegeko ryemerera kwemeza amasezerano mpuzamahanga, haba kubikuraho byose cyangwa se zimwe mu ngingo zaryo zinyuranije n'Itegeko-Nshinga", bityo ikirego Muhoza Consolée yatanze kikaba kiri mu bubasha bw'Urukiko rw'Ikirenga.

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5 II. ISESENGURA RY'IKIBAZO KIRI MU RUBANZA Kumenya niba ingingo ya 176, igika cya kabiri, y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi, inyuranije n'ingingo ya 29 y'Itegeko Nshinga. [10] Me Nizeyimana Léopold avuga ko ingingo ya 176, igika cya mbere, y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryavuzwe haruguru, ivuga ko abemerewe gutambamira urubanza ari abafite inyungu iyo ariyo yose mu rubanza rwaciwe, ko ariko igika cya kabiri cy'iyi ngingo kitemerera uwashakanye n'umuburanyi kuba yatambamira urubanza, kikaba rero kivuguruzwa ibiteganywa n'ingingo ya 29 y'Itegeko Nshinga iteganya ko "buri muntu afite uburenganzira ku mutungo we bwite, waba uwe ku giti cye cyangwa uwo afatanyije n'abandi". [11] Asobanura ko ingingo y'Itegeko itashobora kuvanaho uburenganzira Muhoza Consolée ahabwa n'Itegeko Nshinga kuko afite uburenganzira ku isambu umugabo we yatanze atabyemeye, ariko ingingo ya 176, igika cya kabiri ikaba itamwemerera gukurikirana umutungo we mu nkiko ngo kuko uwo bashakanye yawutsindiwe. [12] Na none kandi ngo ntabwo umuryango wagereranywa na sosiyete y'ubucuruza nk'uko Intumwa ya Leta ibivuga kuko udafite ubuzima gatozi, ko kandi mu gihe Karekezi yaburanye agatsindwa uwo bashakanye atabizi, agomba kugira inzira yanyuramo kugira ngo akurikirane umutungo afiteho uburenganzira. [13] Me Rubango Epimague avuga ko ingingo

ya 176, igika cya kabiri, y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryavuzwe haruguru itanyuraniye n'ingingo ya 29 y'Itegeko Nshinga kuko umutungo Muhoza Consolée avuga atari uwe bwite ahubwo ari uw'umuryango afatanyije n'abandi, ko mu gihe umuryango ufite uwuhagarariye akaba ari nawe wawuburanye mu nyungu z'umuryango, ntaho ibyo binyuraniye n'Itegeko Nshinga. Re MUHOZA

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6 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [14] Avuga ko kuba ingingo isabirwa kuvanwaho itanga uburenganzira bwo gukurikira umutungo w'umuryango, ariko ikanagena ko iyo wakurikiranywe n'umwe mu babifitiye uburenganzira, bidakwiye ko nyuma y'aho abandi bose umwe kuri umwe nawe akurikirana ibyakurikiranywe n'uwari uhagarariye inyungu z'umuryango. Ko agereranya ibimaze kuvugwa na sosiyete igizwe n'abanyamigabane benshi ifite uyihagararira mu rwego rw'amategoko, ko nyuma y'urubanza rureba inyungu za sosiyete, buri wese mu banyamigabane atashoza urwe rubanza ku cyaburanwe kireba inyungu rusange zabo. [15] Asobanura ko agace k'ingingo isabirwa kuvaho kagiyeho kugira ngo imanza zijye zigira iherezaho kuko bitakumvikana ko urubanza rwajya rwitwa ko rurangiye burundu ari uko buri muntu mu muryango ategereje ko rucibwa kugira ngo nawe atange ikirego cye gituma urubanza rwa mbere rwongera kuburanishwa, ko urubanza ruburanywe mu nyungu z'umuryango ruba rureba abo mu muryango bose baba banafite inshingano yo kuba baruzi, banafite uburenganzira bwo kuruburana mu buryo bumvikanyeho. UKO URUKIKO RUBIBONA. [16] Ingingo ya 29 y'Itegeko Nshinga iteganya ko "Buri muntu afite uburenganzira ku mutungo bwite, waba uwe ku giti cye cyangwa uwo afatanyije n'abandi" naho ingingo ya 176 y'itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi igateganya ko "umuntu wese utareze cyangwa ngo aregwe mu rubanza ariko afite inyungu iyo ari yo yose muri rwo, ashobora gutambamira urwo rubanza rumurenganya ngo rusubirwemo iyo, ari we cyangwa ari n'abo ahagarariye nta warutumiwemo", igika cyayo cya kabili kigateganya ko "Ibivugwa mu gika cya mbere cy'iyi ingingo ntibireba uwashakanye n'umuburanyi cyangwa abana babo mu gihe ikiburanwa ari umutungo w'umuryango".

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7 [17] Ku birebana n'imicungire y'umutungo w'abashyingiranwe, ingingo ya 17 igika cya kabiri, y'Itegeko n° 22/99 ryo kuwa 12/11/1999 ryuzuza igitabo cya mbere cy'urwunge rw'amategoko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, iteganya ko "mu buryo bw'ivangamutungo rusange cyangwa ubw'ivangamutungo w'umuhahano, abashyingiranywe bumvikana ku ucunga umutungo bahuriyeho, bafite kandi ububasha bungana bwo kuwukurikirana no kuwuhagararira". [18] Ingingo imaze kuvugwa iha abashyingiranywe uburenganzira bwo kugena uburyo umutungo bahuriyeho uzacungwa, bakihitiramo uzawucunga yaba umugore cyangwa umugabo. Iyo ngingo ibaha kandi ububasha bungana bwo gukurikirana uwo mutungo no kuwuhagararira, bivuze ko yaba umugore cyangwa umugabo ashobora gukoresha ubwo bubasha mu nyungu z'umuryango, bitabaye ngombwa ko abigaragariza uburenganzira yahawe n'uwo bashyingiranywe mu gihe

babana mu buryo bwemewe n'amategeko. [19] Iyo ngingo yumvikanisha kandi ko mu gihe abashyingiranywe bahisemo ivangamutungo rusange cyangwa ivangamutungo w'umuhahano, uwo mutungo uba ari uw'umugabo n'umugore washyizwe hamwe kugira ngo utunge umuryango, bivuze ko udashobora kugabanywa (indivisible) ku buryo ari umugabo cyangwa umugore ntawavuga ko awufiteho uruhare yihariye. [20] Kuba rero umwe mu bashyingiranywe ashobora gukurikirana mu rubanza umutungo ahuriyeho na mugenzi we kandi ugenewe gutunga umuryango, bigomba kumvikana ko aba yabikoze ahagarariye uwo bawusangiye ku buryo utaragiye mu rubanza atafatwa nk'umuntu utarareze cyangwa ngo aregwe uvugwa mu ngingo ya 176, igika cya mbere, y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryavuzwe haruguru. [21] Ibimaze kuvugwa bihura kandi n'ibyanditswe n'umuhanga mu mategeko Serge Guinchard abishingiye ku biteganywa n'ingingo ya 1421 y'amategeko mbonezamubano yo mu gihugu cy'Ubufaransa nayo Re MUHOZA

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8 ICYEGERANYO CY'IBYEMEZO BY'INKIKO iteganya ko umugore n'umugabo bafite uburenganzira bungana ku micungire y'umutungo basangiye, akavuga ko muri icyo gihe gutambamira urubanza gukozwe n'umwe mu bashakanye utaraburanye kutagomba kwakirwa hatiriwe harebwa niba ari umugore cyangwa umugabo¹. [22] Kuba rero umwe mu bashakanye yarahagarariye mu rubanza rurebana n'umutungo w'umuryango, ntiyahindukira ngo arutambamire kuko byaba binyuranije n'icyo iyo nzira yashyiriweho nk'uko bivugwa mu gika cya mbere cy'ingingo yasabiwe kvanwaho, binahura n'ibyanditse n'abahanga mu mategeko nabo bagaragaza ko iyo nzira y'ubujurire idasanzwe igenewe gusa abantu batabaye ababuranyi, haba ku giti cyabo cyangwa bahagarariye². [23] Hashingiye ku byasobanuwe byose, Urukiko rurasanga ntaho ingingo ya 176, igika cya kabiri, y'Itegeko n° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi inyuranije n'ingingo ya 29 y'Itegeko Nshinga.

1 Chacun des époux administre les biens communs de telle sorte que la tierce opposition de l'époux non partie au procès est irrecevable, sans qu'il y'ait plus aujourd'hui à observer s'il s'agit du mari ou de la femme : Droit et Pratique de la procédure civile, Sous la direction de Serge Guichard, Dalloz, cinquième édition 2006, p.1163 2 S'agissant d'une voie de recours exceptionnelle destinée uniquement à protéger ceux, qui sans avoir été appelés au procès, peuvent pâtir de son résultat, l'accès doit être réservé aux personnes, qui n'ont effectivement pas été parties, soit directement ou par représentation au débat judiciaire: Droit et Pratique de la procédure civile, Op.Cit., p.1158.

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9 III. ICYEMEZO CY'URUKIKO [24] Rwemeye kwakira ikirego cya Muhoza Consolée kuko cyatanze mu buryo bwemewe n'amategeko; [25] Rwemeje ko nta shingiro gifite; [26] Rwemeje ko ingingo ya 176, igika cya kabiri, y'Itegeko n° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi,

itanyuranyije n'ingingo ya 29 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo kuwa 04/06/2003 nk'uko ryavugururwe kugeza ubu; [27] Rutegetse Muhoza Consolée gutanga amagarama y'urubanza angana na 9.600 Frw, atayatangira mu gihe cy'iminsi umunani, ayo mafaranga akavanwa mu bya leta ku ngufu za leta.

Re MUHOZA

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IMANZA ZEREKEYE AMATEGEKO Y'AMATORA

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11 Re RWAMUCYO (IKIREGO KIGAMIJE GUSESA AMATORA) [Rwanda URUKIKO RW'IKIRENGA – RS/SPEC/0001/13/CS (Rugege, P.J., Kayitesi Zayinabo, Mugenzi, Mutashya, Mukanyundo, Kayitesi Rusera, Hatangimbabazi, Kanyange na Mukandamanga, J.) 26 Nzeri 2013] Amategeko agenga amatora – Inzira zo gutangamo ibirego byerekeranye n'impaka zivuka mu matora ay'abagize Inteko Ishinga Amategeko – Ubusumbane bw'amategeko – Amabwiriza anyuranyije n'Itegeko Ngenga cyangwa Itegeko – Inkiko zikurikiza amateka cyangwa amabwiriza iyo atanyuranyije n'Itegeko Nshinga n'andi mategeko – Kutabanza gushyikiriza ikirego Komisiyo y'amatora mu gihe bidateganyijwe n'andi mategeko – Itegeko Nshinga rya Repubulika y'u Rwanda ryo kuwa 04/06/2004 nkuko ryavugururwe kugeza ubu, ingingo ya 141(3) – Itegeko Ngenga no 03/2012/OL ryo kuwa 13/06/2012 rigenga imiterere, imikorere, n'ububasha by'Urukiko rw'Ikirenga, ingingo za: 65, 66, 67 na 68. Uburenganzira bwo kwiyamamaza – Impamvu yo gusesa amatora – Gukoresha ubutumwa bugufi mu kwiyamamaza ubwabyo ntibibujijwe – Ikosa riboneka harebwe uburyo bwakoreshejwe, icyo buvuye n'igihe butangiye – Itegeko N° 27/2010 ryo kuwa 19/06/2010 rigenga amatora nk'uko ryahinduwe kandi ryujijwe kugeza ubu, ingingo za: 29 bis, 30. Amategeko agenga ibimeneyetso – Urega afite inshingano yo gutanga ibimeneyetso, iyo abibuze aratsindwa. Incamake y'ikibazo: Tariki ya 18/09/2013 Komisiyo y'Igihugu y'Amatora yakoresheje amatora ku mwanya w'Umudepite uhagarariye abafite ubumuga. Abari biyamamaje kuri uwo mwanya bari babiri gusa, umwe muri bo ntiyashimye uko amatora yakozwe avuga ko uwo bari bayahanganyemo yakoresheje umwanya yari afite nk'umuyobozi

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12 ICYEGERANYO CY'IBYEMEZO BY'INKIKO w'Inama y'Igihugu y'Abafite Ubumuga mu nyungu ze bwite, akoresha Umunyamabanga Nshingwabikorwa w'Inama y'Igihugu y'Abafite Ubumuga kugirango amwamamaze, ndetse ngo hari n'ubutumwa bugufi yoherezaga inteko itora ngo imutore hakaba n'amafaranga yahaye inteko itora, kubera izo mpamvu zose yatanze ikirego mu Rukiko rw'Ikirenga asaba ko aseswa hakabaho kuyasubiramo. Mu mwanzuro watanze n'uwari watsinze amatora avuga ko ikirego cyatanze mu nzira zidateganyijwe n'ingingo ya 82 y'Amabwiriza ya Komisiyo y'Igihugu y'Amatora, iteganya ko iyo havutse ibibazo mu gihe cyo kwiyamamaza bigomba kubanza gushyikirizwa Komisiyo mbere y'uko haregerwa inzego z'ubutabera zibifitiye ububasha, akaba asaba Urukiko kutakira ikirego. Incamake y'icyemezo: 1.

Iyakirwa ry'ikirego ntirashingirwa ku mabwiriza ya Komisiyo y'Igihugu y'Amatora N° 03/2013 yo kuwa 23/07/2013 agenga amatora y'abagize Inteko Ishinga Amategeko, Umutwe w'Abadepite kuko anyuranyije n'Itegeko Ngenga No 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere, n'ububasha by'Urukiko rw'Ikirenga n'Itegeko N° 27/2010 ryo kuwa 19/06/2010 rigenga amatora nk'uko ryahinduwe kandi ryujijwe kugeza ubu kuko yo ntaho ategenyako bene icyo kirego kigomba kubanza gushyikirizwa Komisiyo y'Igihugu y'Amatora mbere yo kuregera Inkiko kandi ingingo yi 141 y'Itegeko nshinga ivuga ko inkiko zikurikiza amateka cyangwa amabwiriza iyo atanyuranyije n'Itegeko Nshinga n'andi mategeko bityo iri Tegeko Ngenga akaba ari naryo rikwiye gushingirwaho kandi kuba urega yarubahirije igihe cy'amasaha 48 giteganyijwe mu ngingo ya 67 yaryo, ikirego kikaba gikwiye kwakirwa.

2. Uwareze nta kimenyetso yatanze kigaragaza ko uwatsinze amatora yakoresheje umwanya afite mu nyungu ze bwite n'icy'uko hari amafaranga yahawe inteko itora kugira ngo atorwe. Urega afite inshingano yo kugeza ku Rukiko ibimenyetso, iyo abibuze aratsindwa bityo amatora akaba atagomba guseswa.

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13 Ikirego nta shingiro gifite. Amatora ntasheshwe. Amategeko yashingiweho: Itegeko nshinga rya Repubulika y'u Rwanda ryo kuwa 04/06/2004 nkuko ryavugururwe kugeza ubu, ingingo za: 93, 141, 145 (5). Itegeko ngenga no 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere, n'ububashaby'Urukiko rw'Ikirenga, ingingo za: 67, 71-79. Itegeko no 27/2010 ryo kuwa 19/06/2010 rigenga amatora, ingingo ya 29 bis, 30. Amabwiriza ya komisiyo y'igihugu y'amatora, ingingo za 80, 82. Nta manza zifashishijwe. Urubanza I. IMITERERE Y'URUBANZA [1] Ku itariki ya 18/09/2013, Komisiyo y'Igihugu y'Amatora yakoresheje amatora ku mwanya w'Umudepite uhagarariye abafite ubumuga. Bamwe mu bakandida biyamamaje kuri uwo mwanya ni Rusiha Gastone na Rwamucyo Gisaza Séverin. Kuri uwo munsu, Komisiyo y'Igihugu y'Amatora yatangaje by'agateganyo ko Rusiha Gastone ariwe watsindiye uwo mwanya w'Umudepite uhagarariye abafite ubumuga. Ku itariki ya 20/09/2013, Rwamucyo Gisaza Séverin yatanze ikirego mu Rukiko w'Ikirenga kijuririra ibyavuye mu matora yabaye kuwa 18/09/2013 ku mwanya w'umudepite uhagarariye abafite ubumuga, asaba ko amatora yaseswa agasubirwamo.

3 Reba ingingo ya 76, 4° y'Itegeko Nshinga "... Umutwe w'Abadepite ugizwe n'Abadepite 80 bakurikira : umwe uturwa n'inama y'igihugu y'abantu bafite ubumuga" Re RWAMUCYO 1 1

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14 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [2] Nk'uko Itegeko Ngenga no 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere, n'ububasha by'Urukiko rw'Ikirenga mu ngingo yaryo ya 66 ribiteganyako, kuwa mbere tariki ya 23/09/2013, Perezida w'Urukiko rw'Ikirenga yandikiye Minisitiri ufite amatora mu nshingano ze na Perezida wa Komisiyo y'Igihugu y'Amatora, abamenyesha ko Urukiko rw'Ikirenga rwashyikirijwe ikirego na Rwamucyo Gisaza Séverin asaba ko amatora yabaye kuwa 18/09/2013 ku mwanya w'Umudepite uhagarariye abafite ubumuga yaseswa, amatora agasubirwamo bushyashya. Ku munsu ukurikiyeho, Komisiyo y'Igihugu

y'Amatora na Rusiha Gastone bahamagawe mu bwanditsi bw'Urukiko rw'Ikirenga bahabwa imyanzuro ikubiyemo ikirego cyatanzwe na Rwamucyo Gisaza Séverin, basabwa kugira icyo bakivugaho mu nyandiko. [3] Ku itariki ya 25/09/2013, Urukiko rw'Ikirenga rwakiriye imyanzuro yatanzwe n'Intumwa ya Leta, Me Rubango Epimaque igaragaza icyo Komisiyo y'Igihugu y'Amatora ivuga ku kirego cyatanzwe na Rwamucyo Gisaza Séverin. Urukiko rw'Ikirenga rwanakiriye kandi imyanzuro yatanzwe na Rusiha Gastone igaragaza icyo avuga kuri icyo kirego. [4] Iburanisha ry'urubanza ryashyizwe ku itariki ya 25/09/2013, saa cyenda z'amanywa. Nkuko biteganywa n'ingingo ya 71 y'Itegeko Ngenga no 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere, n'ububasha by'Urukiko rw'Ikirenga, iburanisha ry'urubanza ryabereye mu ruhame, Urukiko ruburanisha rushingiye ku nyandiko gusa. Isomwa ry'urubanza ryashyizwe ku itariki ya 26/09/2013. II. IBIBAZO BIRI MU RUBANZA N'ISESENGURA RYABYO A. Kumenya niba ikirego cyatanzwe na Rwamucyo Gisaza Séverin kitagomba kwakirwa kuko atabanje kukigeza kuri Komisiyo y'Igihugu y'Amatora.

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15 [5] Mu nyandiko itanga ikirego mu Rukiko rw'Ikirenga, Rwamucyo Gisaza Séverin avuga ko ikirego yagishyikirije Urukiko ashingiye ku ngingo ya 145 y'Itegeko Nshinga iha ububasha Urukiko rw'Ikirenga bwo guca imanza zerekeye amatora y'abagize Inteko Ishinga Amategeko. [6] Mu mwanzuro we, yisobanura ku kirego cyatanzwe na Rwamucyo Gisaza Séverin, Rusiha Gastone asaba Urukiko kutakira ikirego kuko uwagitanze atabanje kukigeza kuri Komisiyo y'Igihugu y'Amatora nk'uko biteganywa n'ingingo ya 82 y'Amabwiriza ya Komisiyo y'Igihugu y'Amatora n° 03/2013 yo kuwa 23/07/2013 agenga amatora y'abagize Inteko Ishinga Amategeko, Umutwe w'Abadepite. UKO URUKIKO RUBIBONA [7] Ingingo ya 145, 5° y'Itegeko Nshinga ivuga ko Urukiko rw'Ikirenga rushinzwe by'umwihariko guca imanza zerekeye amatora ya Perezida wa Repubulika, ay'abagize Inteko Ishinga Amategeko, n'aya referandumu. Iyi ngingo y'Itegeko Nshinga igaragaza ko Urukiko rw'Ikirenga rwahawe ububasha bwo kuburanisha imanza zerekeye amatora y'abagize Inteko Ishinga Amategeko, yunganirwa n'andi mategeko asobanura mu buryo burambuye uko iki kirego gitangwa, abafite uburenganzira bwo kugitanga n'uko kiburanishwa mu Rukiko rw'Ikirenga. [8] Ingingo ya 82 y'Amabwiriza ya Komisiyo y'Igihugu y'Amatora n° 03/2013 yo kuwa 23/07/2013 agenga amatora y'abagize Inteko Ishinga Amategeko, Umutwe w'Abadepite, yo ivuga ko iyo havutse ibibazo mu gihe cyo kwiyamamaza, Abakandida bagomba kwiya mbaza urwego rwa Komisiyo y'Igihugu y'Amatora, ibyo bibazo byaba bidakemutse hakaregerwa inzego z'ubutabera zibifitiye ububasha. [9] Nubwo ingingo ya 82 y'Amabwiriza ya Komisiyo y'Igihugu y'Amatora ivugwa mu gika kibanziriza iki, iteganya ko iyo havutse ibibazo mu gihe cyo kwiyamamaza bigomba kubanza gushyikirizwa Re RWAMUCYO

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16 ICYEGERANYO CY'IBYEMEZO BY'INKIKO Komisiyo mbere yuko haregerwa inzego z'ubutabera zibifitiye ububasha, Itegeko Ngenga no 03/2012/OL ryo ku wa 13/06/2012 rigena imiterere, imikorere, n'ububasha by'Urukiko rw'Ikirenga ryo ntiriteganywa ko ikirego cyerekeranye n'impaka zivuka mu bikorwa by'amatora kibanza gushyikirizwa Komisiyo y'Igihugu y'Amatora mbere yuko

gitangwa mu Rukiko rw'Ikirenga. [10] Ingingo ya 67 y'iryo Tegeko Ngenga ivuga ko iyo hari impaka ku bijyanye n'iyandikwa ry'abakandida ku mwanya wa Perezida wa Repubulika cyangwa uw'abagize Inteko Ishinga Amategeko, cyangwa se ku mihango y'amatora n'uburyo amatora yakozwemo yaba aya Perezida wa Repubulika, ay'abagize Inteko Ishinga Amategeko kimwe n'aya Referendumu, ababifitiye uburenganzira bavuzwe mu ngingo ya 664 y'iri Tegeko Ngenga baregera Urukiko rw'Ikirenga basaba kvanaho icyemezo kibabangamiye cyangwa gusesa amatora yakozwe bitewe n'ikibazo icyo ari cyo cyose mu gihe kitarenze amasaha mirongo ine n'umunani (48) uhareye igihe ilisiti y'abakandida itangarijwe cyangwa igihe ibyavuye mu matora byatangarijweho by'agateganyo. Iyi ngingo igaragaza ko Urukiko rw'Ikirenga rufite ububasha bwo kuburanisha ikirego cyerekeranye n'impaka zivuka mu bikorwa by'amatora, ikanagena uburyo icyo kirego gitangwamo. Iyo ngingo y'Itegeko Ngenga ntiteganyako mbere yo gutanga ikirego kibanza gushyikirizwa Komisiyo y'Igihugu y'Amatora. [11] Uretse Itegeko Ngenga rigena imiterere, imikorere, n'ububasha by'Urukiko rw'Ikirenga, n'Itegeko n° 27/2010 ryo kuwa 19/06/2010 rigenga amatora nkuko ryahinduwe kandi ryujijwe kugeza ubu, rigena kuwa ku ngingo yaryo ya 71 kugeza kuya 79 inzira ikurikizwa mu manza zirebana n'amatora ya referendumu, aya Perezida wa Repubulika, n'ay'abagize Inteko Ishinga Amategeko, iri Tegeko Ngenga naryo, nta na hamwe rivuga ko ibirego muri izi manza bibanza

4 Ingingo ya 66 ivuga iti "uburenganzira bwo kuregera Urukiko rw'Ikirenga buhariwe buri mwenegihugu wese, buri mukandida, buri mutwe wa Politiki, cyangwa Komisiyo y'Igihugu y'Amatora....."

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17 kugezwa kuri Komisiyo y'Igihugu y'Amatora mbere yuko bitangwa mu Rukiko. [12] Ingingo ya 93 y'Itegeko Nshinga rya Repubulika y'u Rwanda ryo kuwa 04/06/2003 nk'uko ryavugururwe kugeza ubu igena uburyo amategeko atorwamo n'ubusumbane bwayo. Mu gika cya nyuma cy'iyi ngingo, harimo ko nta na rimwe itegeko ngenga rivuguruza Itegeko Nshinga, nta nubwo itegeko risanzwe cyangwa itegeko teka rivuguruza itegeko ngenga, cyangwa se ngo iteka cyangwa amabwiriza bivuguruzwe itegeko. Iyi ngingo kandi yuzuzwa n'iya 141, igika cya gatatu ivuga ko Inkiko zikurikiza amateka cyangwa amabwiriza iyo atanyuranyije n'Itegeko Nshinga n'andi mategeko. Urukiko rw'Ikirenga rushingiye kuri izi ngingo, rusanga iyakirwa ry'ikirego rwashyikirijwe na Rwamucyo Gisaza Séverin rigomba gushingira ku Itegeko Ngenga no 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere, n'ububasha by'Urukiko rw'Ikirenga aho gushingira ku ngingo ya 80 y'amabwiriza ya Komisiyo y'Igihugu y'Amatora N° 03/2013 yo kuwa 23/07/2013 agenga amatora y'abagize Inteko Ishinga Amategeko, Umutwe w'Abadepite. [13] Rwamucyo Gisaza Séverin yatanze ikirego igihe cy'amasaha 48 kivugwa mu ngingo 67 y'Itegeko Ngenga No 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere, n'ububasha by'Urukiko rw'Ikirenga kitararangira kuko yagitanze ku itariki 20/09/2013. Bikaba bitari ngombwa ko abanza kugeza icyo kirego kuri Komisiyo y'Igihugu y'Amatora. Urukiko rw'Ikirenga rukaba rusanga yatanze ikirego anyuze mu nzira ziteganywa n'amategeko, bityo ikirego yatanze kikaba gikwiye kwakirwa. B.

Kumenya niba hari impamvu amatora yabaye ku itariki ya 18/09/2013 ku mwanya w'Umudepite uhagarariye abafite ubumuga akwiye guseswa. [14] Rwamucyo Gisaza Séverin watanze ikirego asaba ko amatora ku mwanya w'Umudepite uhagarariye abafite ubumuga yabaye kuwa 18/09/2013 yaseswa kubera ko Rusiha Gastone watangajwe by'agateganyo ko ariwe watsinze kuri uwo mwanya, yatsinze Re RWAMUCYO 2

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18 ICYEGERANYO CY'IBYEMEZO BY'INKIKO hakoreshejwe umwanya abayobozi bafite mu nyungu zabo bwite bagatanga "briefing" ndetse ngo hakaba haranabonetse ruswa ikabije. [15] Rwamucyo Gisaza Séverin avuga ko Rusiha Gastone yakoresheje umwanya afite mu nyungu ze bwite nk'umuyobozi w'Inama y'Igihugu y'Abafite Ubumuga, anakoresha Ndayisaba Emmanuel, Umunyamabanga Nshingwabikorwa w'Inama y'Igihugu y'Abafite ubumuga kugirango amwamamaze. Akomeza avuga ko Ndayisaba Emmanuel yahamagaye abahuzabikorwa b'Inama y'Igihugu y'Abafite ubumuga b'Intara y'Amajyaruguru, Intara y'Amajyepfo n'Umujyi wa Kigali ababwira ko bagomba gushyigikira no kwamamaza Rusiha Gastone. [16] Akomeza avuga ko hari na sms zoherejwe n'abo bahuzabikorwa zisaba inteko itora, gutora Rusiha Gastone. Ko kandi icyo gikorwa cyaranzwe na ruswa yagaragajwe na cheque yahawe Sekamonyo Venuste ingana na 500.000 FRW yahawe abari bagize inteko itora hakoreshejwe MTN mobile money na TIGO Cash. [17] Intumwa ya Leta, Me Rubango Epimague uhagarariye Komisiyo y'Igihugu y'Amatora, yavuze ko ibyo Rwamucyo Gisaza Séverin yavuze nta bimenyetso yabitangiye, akaba asanga gahunda yo kwiyamamaza kw'abakandida bafite ubumuga yagenze neza, nta gikorwa kinyuranije n'ingingo ya 80 y'Amabwiriza ya Komisiyo y'Igihugu y'Amatora cyabayeho, cyane cyane ko nta n'ikirego Komisiyo yakiriyemuri urwo rwego. [18] Rusiha Gastone avuga ko Rwamucyo Gisaza Séverin atigeze agaragaza ibikorwa binyuranije n'amategeko byaba byarakozwe na Ndayisaba Emmanuel amwamamaza, ko na sms nk'uburyo bw'itumanaho zitabujijwe n'amategeko mu gikorwa cyo kwiyamamaza. Rusiha Gastone avuga kandi ko atigeze asaba Ndayisaba Emmanuel kumwamamaza. Ku byerekeye cheque, Rusiha Gastone avuga ko ntayo yigeze aha abamutoye kandi n'wareze nta kimenyetso abitangira.

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19 [19] Rusiha Gastone avuga na none ko atigeze akoresha umwanya w'ubuyobozi bw'Inama y'Igihugu y'Abafite ubumuga kuko igihe amatora yabaga yari yarahagaritse imirimo ye kuri uwo mwanya by'agateganyo. UKO URUKIKO RUBIBONA [20] Rwamucyo Gisaza Séverin avuga ko uburyo Rusiha Gastone yakoresheje yiyamaza butanyuze mu nzira zikurikije amategeko. Amabwiriza ya Komisiyo y'Igihugu y'Amatora mu ngingo yayo ya 80 ateganya uko kwiyamamaza kw'abakandida bafite ubumuga bikorwa, Itegeko N° 27/2010 ryo kuwa 19/06/2010 rigenga amatora nkuko ryahinduwe kandi ryujijwe kugeza ubu, mu ngingo yaryo ya 30 ryo ryerekana ibibujijwe mu gihe cyo kwiyamamaza. [21] Ingingo ya 80 y'Amabwiriza ya Komisiyo y'Igihugu y'Amatora n° 03/2013 yo kuwa 23/07/2013 agenga amatora y'abagize Inteko Ishinga Amategeko, Umutwe w'Abadepite igira iti "Abakandida ku mwanya w'Umudepite ufite ubumuga biyamamaza ku munsu w'itora imbere y'abagize Inteko itora, bahurizwa hamwe ku rwego rw'Igihugu ahagenwa na

Komisiyo y'Igihugu y'Amatora. Ariko mbere y'umunsi w'itora, Umukandida ubyifuje ashobora gutegura gahunda ye yihariye yo kwiyamamaza imbere y'Abagize inteko itora, akayimenyesha mu nyandiko ubuyobozi bw'Akarere k'aho yifuza kwiyamamariza hasigaye nibura amasaha makumyabiri n'ane (24) kugira ngo yiyamamaze. Ishami rya Komisiyo y'Igihugu y'Amatora ku rwego rw'Akarere ry' aho ashaka kwiyamamariza rigenerwa kopi kugira ngo rishobore gukurikirana ukwiyamamaza kw'Abakandida". Iyi ngingo igaragaza ku buryo busobanutse uko Abakandida ku mwanya w'Umudepite ufite ubumuga biyamamaza. icyo Rwamucyo Gisaza Séverin avuga ko kitagenze nkuko iyi ngingo ibiteganyaga, n'uko haba harabayeho kwiyamamaza no kwamamaza Rusiha Gastone mbere y'uko abagize Inteko itora, bahurizwa hamwe ku rwego rw'Igihugu ahagenwe na Komisiyo y'Igihugu y'Amatora. Re RWAMUCYO

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20 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [22] Urukiko rusanga imvugo ya Rwamucyo Gisaza Séverin yuko Ndayisaba Emmanuel, Umunyamabanga Nshingwabikorwa w'Inama y'Igihugu y'Abafite ubumuga yahamagaye abahuzabikorwa b'Inama y'Igihugu y'Abafite ubumuga b'Intara y'Amajyaruguru, iy'Amajyepfo n'Umujyi wa Kigali mbere yuko inteko itora ihurizwa hamwe, akabasaba gutora no gutoresha Rusiha Gastone rutayishingiraho rwemeza ko kwamamaza Rusiha Gastone byatangiyemo mbere y'igihe kivugwa mu ngingo ya 80 y'Amabwiriza ivugwa mu gika kibanziriza iki, kuko uretse kubivuga nta kimenyetso na kimwe yigeze ageza ku Rukiko kigaragaza ko ibyo bintu byabayeho. [23] Kubirebana no kuba Rusiha Gastone yarakoresheje umwanya afite mu nyungu ze bwite nk'umuyobozi w'Inama y'Igihugu y'Abafite Ubumuga akiyamamaza mbere yuko abagize Inteko itora, bahurizwa hamwe ku rwego rw'Igihugu ahagenwe na Komisiyo y'Igihugu y'Amatora, Urukiko rurasanga uretse kubivuga gusa nta kimenyetso na kimwe gitangwa na Rwamucyo Gisaza Séverin kigaragaza ukuri kw'ibyo avuga. Uretse nibyo kandi, ku itariki ya 22/08/2013, Rusiha Gastone yandikiye Visi Perezida w'Inama y'Igihugu y'Abafite ubumuga amumenyesha ko ahagaritse by'agateganyo imirimo yo kuba Perezida w'iyi Nama. [24] Ku birebana n'ibyo Rwamucyo Gisaza Séverin avuga ko hari sms zaba zaroherejwe inteko itora, bigomba gusuzumwa hagenewe ku biteganywa n'amategako. Ingingo ya 29 bis y'Itegeko N° 27/2010 ryo kuwa 19/06/2010 rigenga amatora nkuko ryahinduwe kandi ryujijwe kugeza ubu, igira iti "mu matora yose, umukandida afite uburenganzira bwo kumanika ibimwamamaza no gukoresha ibindi byose bimwamamaza.....". Ingingo ya 30 y'iri Tegeko yo ikagira iti "birabujijwe mu gihe cyo kwiyamamaza cyangwa kwamamaza gukora ibintu bikurikira hagamijwe guhindura cyangwa kugerageza guhindura imitekerereze by'ugomba gutora: Gukoresha umutungo wa Leta aho waba uri hose mu buryo bunyuranyije n'amategako; Gutuka cyangwa gusebya mu buryo ubwo aribwo bwose undi mukandida; Gushingira ku ivangura iryo ariryo ryose n'amacakubiri"

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21 [25] Urukiko rurasanga, hashingiwe ku bivugwa mu ngingo zivugwa mu gika kibanziriza iki, gukoresha sms mu kwiyamamaza no kwamamaza ubwabyo bitabujijwe, ahubwo ikibazo gishobora kuba uburyo izo sms zikoreshejwe, icyo zivugwa n'igihe zitangiwe. Kubirebana n'uru

rubanza, sms zatanzwe na Rwamucyo Gisaza nk'ikimenyetso, ntizisobanutse. Ni izo yoherejwe nyuma y'amatora, ntabwo ari izakoreshejwe mu kwiyamamaza cyangwa mu kwamamaza Rusiha Gastone. Nta nubwo zigaragaza ko Rusiha Gastone yatowe ku gahato, n'uwaba yarabigizemo uruhare. Zigaragaza gusa imvugo zitagize icyo zisobanuye nko kuvuga ngo "byananiranye, barashaka ko turobinga so wanyu RG, ariko twifashe turindiriye ibyo mu kazu", "hari iturufu ije ngo nadatorwa arivumbura, ngibyo aho byavuye", "pole badukozeho nyine". [26] Kubirebana na ruswa yaba yatanzwe binyuze kuri cheque ya 500.000 FRW Rwamucyo Gisaza Séverin avuga ko yahawe Sekamonyo Venuste ngo ahabwe abagize inteko itora, iyo cheque ntabwo yigeze yerekwa Urukiko. Uretse nibyo, ntabwo Rwamucyo Gisaza Séverin atanga andi makuru kuri iyo cheque nka Banki yari kwifashishwa mu kubikuzza iyo cheque, numero zayo, ndetse n'uwayitanze, n'ikimenyetso cyuko ayo amafaranga yari guhabwa abagize inteko itora. Ibi byose byari gufasha Urukiko gusuzuma icyo kimenyetso avuga. [27] Urukiko rurasanga byaba gukoresha umwanya umuntu afite mu nyungu ze bwite, na cheque ya 500.000 FRW Rwamucyo Gisaza Séverin avuga ko yari igenewe inteko itora, nta kimenyetso na kimwe uwareze abitangira. Naho kubirebana n'ibyo asaba ko Urukiko rwamushakira, Urukiko rurasanga amakuru yarushyikirije adahagije ku buryo byarworohereza kumenya uwohereje amafaranga n'ubwoyoherejwe, n'impamvu ayo mafaranga yoherejwe. Ikindi kandi, uwareze niwe ufite inshingano yo kugeza ku Rukiko ibimenyetso. Iyo abibuze aratsindwa. Re RWAMUCYO

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22 ICYEGERANYO CY'IBYEMEZO BY'INKIKO III. ICYEMEZO CY'URUKIKO [28] Urukiko rw'Ikirenga rwemeye kwakira ikirego rwashyikirijwe na Rwamucyo Gisaza Séverin. [29] Rwemeje ko icyo kirego kidafite ishingiro. [30] Rwemeje ko amatora yabaye ku itariki 18/09/2013 ku mwanya w'uhagarariye abafite ubumuga mu Nteko Ishinga Amategeko adasheshwe.

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IMANZA Z'UBUTEGETSI

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24 BUGIRIMFURA v. UMUJYI WA KIGALI N'ABANDI [Rwanda URUKIKO RW'IKIRENGA – RADA 0033/11/CS (Mutashya, P.J., Mukanyundo na Kayitesi, J.) 11 Nzeri 2013] Amategeko agenga imiburanishirize y'imaza z'ubutegetsi – Iyakirwa ry'ikirego gisaba gukuraho icyemezo cy'umuyobozi – Mbere yo kuregera Urukiko, unenga icyemezo agomba kubanza gutakambira uwagifashe cyangwa umuyobozi w'urwego rwisumbuyeho igihe cyo kuregera Urukiko kitararenga – Itegeko ryo kuwa 23/02/1963 ritunganya Urukiko rw'Ikirenga, ingingo ya 106 igika cya 6. Incamake y'ikibazo: Bugirimfura Alfred avuga ko yari afite ikibanza mu Murenge wa Gatenga, Akarere ka Kicukiro akaza kucyamburwa n'Umujiyi wa Kigali mu buryo bunyuranyije n'amategeko ukagiha Fariyara John. Kuwa 04 Ugushyingo 1999 yatakambiye ubuyobozi bw'Umujiyi wa Kigali ntiyagira igisubizo ahabwa maze kuwa 30 Werurwe 2002, aregera Urukiko rwa mbere rw'iremezo, nyuma y'ivugururwa ry'amategeko, urwo rubanza ruburishwa n'urukiko Rukuru ku

rwego rwa mbere kuko ari rwo rwari rufite ububasha, rwemeza ko ikirego kitakiriwe kuko yaregeye urukiko akererewe nyuma yo gutakamba. Bugirimfura yajuririyeye Urukiko rw'Ikirenga avuga ko umucamanza w'Urukiko Rukuru yibeshye akavuga ko urubanza rwatangiye muri 2007 nyamara rwaratangiye muri 2002 bituma yemeza ko ikirego cyatanzwe gitinze atariko biri. Incamake y'icyemezo: 1. Kuba unenga icyemezo yaratakambiye ubuyobozi bw'umujyi wa Kigali kuwa 4 Ugushyirye 1999 hagashira igihe cy'amezi abiri atarahabwa igisubizo bifatwa nk'aho nta cyahindutse ku cyemezo cyatakambiye bityo kuregara Urukiko kuwa 30 Mata 2002, n'ukuvuga amezi atatu itegeko ryamuteganyirizaga kuba yaregeye Urukiko yararenze bituma ikirego cye kitakwirwa kuko yagitanze akererewe.

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25 BUGIRIMFURA v. UMUJYI WA KIGALI N'ABANDI Ubujurire nta shingiro bufite Amagarama y'urubanza aherereye ku regwa. Amategeko yashingiweho : Itegeko ryo kuwa 23/02/1963ritunganya Urukiko rw'Ikirenga, ingingo ya 106. Nta manza zifashishijwe. Urubanza I. IMITERERE Y'URUBANZA [1] Bugirimfura Alfred avuga ko yari afite ikibanza mu Murenge wa Gatenga, Akarere ka Kicukiro akaza kucyamburwa n'Umuji wa Kigali mu buryo bunyuranyije n'amategeko ukagiha Fariyara John. Bugirimfura Alfred yatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge maze Urukiko rwemeza ko rudafite ububasha bwo kuburanisha urwo rubanza rurwohereza mu Rukiko Rukuru. [2] Urukiko Rukuru mbere yo kuburanisha urubanza mu mizi rwabajije Bugirimfura Alfred niba yarabanje gutakambira umutegetsi wafashe icyemezo cyo kumwambura ikibanza, asubiza ko yatakambiye ubuyobozi kuwa 04/11/1999 ntagire igisubizo ahabwa agatangira kuregera inkiko muri 2001. Urukiko Rukuru rwafashe icyemezo kuri icyo nzitizi rwemeza ko ikirego cya Bugirimfura Alfred kitakiriwe kubera ko atubahirije ibijyanye n'imihango yo gutakamba. [3] Urukiko Rukuru rwasanze n'ubwo Bugirimfura Alfred yatakambye mbere y'umwaka wa 2004 mbere y'uko hajyaho itegeko riteganyije igihe cy'amezi atandatu k'uwumva atanyuzwe agomba gutangamo ikirego n'uburyo ayo mezi 6 abarwa, ariko ntacyo yakozwe nyuma y'aho iryo tegeko rigiriyeho, bikarinda kugera aho atanga

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26 ICYEGERANYO CY'IBYEMEZO BY'INKIKO ikirego mu rukiko nyuma y'imyaka irindwi (7) mu gihe itegeko riteganyije igihe cy'amezi atandatu(6) gusa. [4] Bugirimfura Alfred yajuririyeye urubanza mu Rukiko rw'Ikirenga, avuga ko impamvu zatumye ajurira ari uko Umucamanza yibeshye akavuga ko urubanza rwatangiye muri 2007 kandi ataribyo kuko rwatangiye muri 2002, uko kwibeshya kukaba kwatumye yemeza ko ikirego cyatanzwe gitinze nyamara atariko biri. [5] Iburanisha ryashyizwe kuwa 02/07/2013, uwo munsu ababuranyi baritaba, Bugirimfura Alfred yunganiye na Me Hakizimana Aloys, abazungura ba Fariyara John bahagarariye na Me Manirahari Nouredine, naho Umujyi wa Kigali uhagarariye na Me Rubango Epimaque. [6] Ikibazo kigomba gusuzumwa muri uru rubanza, ni icyo kumenya niba BUGIRIMFURA yarubahirije igihe cyo gutanga ikirego mu nkiko nyuma y'itakamba. II. ISESENGURA RY'IKIBAZO N'UKO URUKIKO RUBIBONA [7] Mu gusobanura ubujurire bwe, Bugirimfura Alfred n'umwunganira bavugaga ko umucamanza wo mu Rukiko Rukuru atasesenguye neza inyandiko ziri

muri dosiye, ngo kuko iyo azisesengura, yari kubona ko atatanze ikirego mu Rukiko Rwisumbuye rwa Nyarugenge muri 2007 nkuko abivuga, ahubwo ko yagitanze mu Rukiko rwa Mbere rw'Iremezo rwa Kigali kuwa 30/03/2002 kigahabwa n° RC 37.938/02. Avuga ko urwo rubanza rwamaze igihe kigera ku myaka ine (4) rutaraburanishwa ku buryo ivugurura ry'amategeko ryasanze rukiri ahongaho ruhabwa indi numero ariyo RAD 0016/07/NYGE. [8] Bakomeza bavuga ko kubera kwibeshya ku gihe ikirego cyatangiwe, byatumye umucamanza yemeza ko hatubahirijwe igihe cy'amezi atandatu (6) ikirego kigomba kuba cyagejejwe mu Rukiko

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27 nyuma yo gutakambira umutegetsi wafashe icyemezo nkuko byateganywaga n'ingingo ya 339 y'itegeko n° 18/2004 ryo ku wa 20/06/2004 ryagengaga imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi. [9] Bavuga nanone ko uko kwibeshya kwatumye umucamanza yemeza ko kuwa 04/11/1999 itariki yatakambiyeho (Bugirimfura Alfred) kwa Perefe w'Umujyi wa Kigali, kugeza muri 2007 umwaka yatangiyeho ikirego mu Rukiko Rwisumbuye rwa Nyarugenge, ya mezi atandatu(6) yavuzwe haruguru yari yararenze, bakaba basanga iryo tegeko ritari gushingirwaho kuko ryagiye hashize igihe urwo rubanza rwararegewe. [10] Me Manirahari Nouredine uhagarariye abazungura ba Fariyara John avuga ko Bugirimfura Alfred yagombye kuba yaratangiye "procédure" nshyashya kubera ko ibya mbere byari byarangiye akaba yatanze ikirego muri 2001 akaza kukireka bityo ibintu bigasubira uko byari bimeze, akaba rero yaragombaga gutakamba nk'uko Urukiko Rukuru rwabyemeje. [11] Me Rubango Epimaque uhagarariye Umujyi wa Kigali avuga ko ababuranyi bombi bemeranya ko itakamba ryabaye muri 1999, ko rero niba hakurikijwe ibyo Bugirimfura Alfred avuga ko urubanza rwatangiriye mu Rukiko rwa Kanto muri 2001, rugakomeza muri 2002 no muri 2007, ikirego cyaba cyaratanze igihe cyararenze haherewe kuwa 04/11/1999 avuga ko ariho yatakambye, kuko haba ku bw'Itegeko ryo kuwa 23/02/1963 ritunganya Urukiko rw'Ikirenga ryakurikizwaga mbere ya 2004, ndetse n'Itegeko n° 18/2004 ryo ku wa 20/06/2004 ryagengaga imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, nta gihe gutakamba bitari biteganyijwe muri ayo mategeko yombi, ko aho byari bitandukaniye gusa, hari ku ngano y'igihe ikirego cyagombaga gutangirwamo haherewe igihe itakamba ryabereye, ko rero umwanzuro Urukiko rwafashe w'uko igihe cyo gutanga ikirego nyuma y'itakamba kitubahirijwe, ugomba kugumaho. BUGIRIMFURA v. UMUJYI WA KIGALI N'ABANDI

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28 ICYEGERANYO CY'IBYEMEZO BY'INKIKO UKO URUKIKO RUBIBONA [12] Inyandiko ziri muri dosiye zigaragaza ko kuwa 04/11/1999, Bugirimfura Alfred yandikiye uwari Perefe wa Perefegitura y'Umujyi wa Kigali atakamba amusaba kurenge urubanza uburenganzira ku kibanza yari yambuwe n'Umujyi wa Kigali, kiri muri serire ya Kanengwa, Segiteri Gatenga. Bugirimfura Alfred mu miburanire ye, avuga ko Perefe wa Perefegitura y'Umujyi wa Kigali atigeze amubaza aricyo cyatumye atanga ikirego mu Rukiko rwa Kanto rwa Nyamirambo kuwa 24/04/2001. [13] Ingingo ya 106 igika cya 6 y'Itegeko ryo kuwa 23/02/1963 ritunganya Urukiko rw'Ikirenga ryakurikizwaga igihe Bugirimfura Alfred yatakambaga, yavugaga ko mbere yo kujuririra Urukiko rw'Ubutegetsi,

abarenganijwe bagomba kubanza gutakira ababarenganiye cyangwa abakuru babo ngo bakize ako karengane, kandi bakabigira igihe cyo kujuririra Urukiko rw'Ubutegetsi kitarashira. [14] Mu gika cyayo cya 7 ikavuga ko umutegetsi watakambiwe abifitiye ububasha ntagire icyo asubiza hakarinda gushira amezi 2, ni nkaho yahakanye icyo kibazo. Igika cya 8 cy'iyi ngingo kikavuga ko igihe cy'amezi 3 cyateganyirijwe urega kuba yagejeje ikirego mu Rukiko, gitangira kubarwa kuva aho uwatakiye umutegetsi amenyeresherejwe igisubizo kimuhakanira, byaba bishyize kera kikabarwa kuva aho amezi 2 yateganijwe muri iyi ngingo arangiriye. [15] Hashingiwe kuri iyi ngingo, Urukiko rurasanga Bugirimfura Alfred yaratakambye kuwa 04/11/1999 atanga ikirego mu Rukiko rwa Kanto rwa Nyamirambo kuwa 24/04/2001 hashize umwaka hafi n'igice amezi 3 itegeko ryamuteganyirije kuba yagejeje ikirego mu Rukiko yararenze kera, bivuze ko ikirego yatanze niyo ataza kukireka nkuko yabigenje muri urwo Rukiko, nubundi kitari kwakirwa, urubanza rukaba rurangiriye aho, na "procédure" yatangiye ikaba irangiriye aho. [16] Urukiko rurasanga ibyo Bugirimfura Alfred avuga ko yatanze ikirego mu Rukiko rwa Mbere rw'Iremezo rwa Kigali kuwa 30/03/2002

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29 ashingiye ku itakamba yakoze kuwa 04/11/1999, nabyo ntacyo byamumarira kuko nabwo yari kuba yarakorerewe gutanga ikirego, kuko nkuko byavuzwe haruguru, amezi 3 itegeko ryamuteganyirizaga kuba yagejeje ikirego mu Rukiko nyuma yuko hashize amezi 2 umutegetsi adasubije, yari yararenze. [17] Urukiko rurasanga kubera izo mpamvu, nkuko umucamanza wo mu Rukiko Rukuru yabibonye, ikirego Bugirimfura Alfred yatanze mu Rukiko rwa Mbere rw'Iremezo rwa Kigali kuwa 30/03/2002 kigahabwa n° RC 37.938/02 kikaza kuburanishwa mu rwego rwa mbere n'Urukiko Rukuru kubera ivugurura ry'amategeko, yaragitanze akorerewe kikaba kitagomba kwakirwa. [18] Urukiko rurasanga nubwo umucamanza wo mu Rukiko Rukuru nawe yari yemeje ko ikirego kitagomba kwakirwa, atari gushingira icyemezo cye ku itegeko n°18/2004 ryo ku wa 20/06/2004 ryagengaga imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi kuko ryari ritarajyaho ahubwo yari kugishingira ku itegeko ryo kuwa 23/02/1963 ritunganya Urukiko rw'Ikirenga ryakoreshwaga igihe BUGIRIMFURA Alfred yatakambaga. III. ICYEMEZO CY'URUKIKO [19] Rwemeje ko ubujurire bwa Bugirimfura Alfred nta shingiro bufite; [20] Rumutegetse gutanga amafaranga y'amagarama angana na 37.500 Frw habariwemo n'ayo mu Rukiko Rukuru, atayatangira akava mu byo ku ngufu za Leta.

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30 NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI [Rwanda URUKIKO RW'IKIRENGA – RADA0032/11/CS (Kanyange, P.J., Mukandamage na Rugabirwa, J.) 06 Nzeri 2013] Amategeko y'ubutegetsi – Ikirego kigamije iseswa rya cyamunara – Agaciro k'ikirego gisaba gusesa cyamunara yabaye hashingiwe ku cyemezo cy'Urukiko mu gihe habaye ukwibeshya kuri numero yacyo mu nyandiko y'igurisha – Uko kwibeshya kuri numero y'icyemezo gufatwa nk'ikosa ry'imyandikire rishobora gukosorwa – Ntacyatuma cyamunara iseswa mu gihe urega ntacyo

anenga icyemezo cy'urukiko cyashingiweho mu kuyikora. Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Indishyi zinyuranye zikomoka ku kirego gisaba iseswa rya cyamunara – Indishyi z'ikurikiranarubanza n'igihembo cy'Avoka – Indishyi zisabwa n'urega ntiyazihabwa mu gihe cyamunara idasheshwe, ariko abaregwa bahabwa indishyi z'ikurikiranarubanza n'igihembo cya Avoka. Incamake y'ikibazo: Tariki ya 07/01/1994

Ndagijimana Jean Pierre yafashe umwenda muri BACAR ubu yahindutse FINA BANK Ltd yishingirwa n'umugore we Murekatete hamwe na Nshimyumuremyi. Ndagijimana yananiwe kwishyura umwenda maze BACAR iregera Urukiko rwa mbere rw'Iremezo rwa Kigali, rutegeka Ndagijimana, Murekatete na Nshimyumuremyi kwishyura umwenda batawishyura ukavanwa mu byabo ku ngufu. Ishingiye kuri urwo rubanza, BACAR yasabye Perezida w'Urukiko rwa mbere rw'Iremezo rwa Kigali icyemezo cyo guteza cyamunara inzu eshatu harimo n'iya Nshimyumuremyi yari mu kibanza no 345 i Nyarugenge maze Urukiko rufata icyemezo no 501/99 gitegeka ko izo nzu zitezwa cyaunara, iya Nshimyumuremyi igurwa na Rubangura Vedaste. Nshimyumuremyi yareze Leta y'u Rwanda, Mutabazi Etienne (Noteri wa Leta), FINA BANK, BCR n'abazungura ba Rubangura mu Rukiko

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31 Rukuru asaba ko cyamunara y'inzu ye yakozwe kuwa 06/02/2000 yaseswa agasubizwa inzu ye cyangwa agaciro kayo, hiyongereyeho amafaranga y'ubukode, agahabwa n'indishyi. Avuga ko cyamunara yakozwe mu buryo bunyuranyije n'amategeko kuko notaire wa Leta yateje cyamunara ashingiye ku cyemezo no 478/99 kitabayeho, kivugwa mu nyandiko y'igurisha mu cyamunara. Abaregwa bose baburana bemeza ko cyamunara yakozwe mu buryo bwemewe n'amategeko, bityo ko itagomba guseswa, Urukiko rwemeje ko ikirego cya Nshimyumuremyi nta shingiro gifite kuko cyamunara yakozwe hashingiwe ku cyemezo cy'Urukiko rwa mbere rw'Iremezo rwa Kigali no 501/99. Nshimyumuremyi yajuririje Urukiko rw'Ikirenga avuga ko Urukiko rwemeje nta mpamvu ko inzu ye yatejwe cyamunara hashingiwe ku cyemezo cy'Urukiko n° 501/99 kandi atari byo, ko ahubwo hashingiwe ku cyemezo n° 478/99 kitabayeho, kigaragara mu cyandiko y'igurisha mu cyamunara itaravugurujwe n'uwayikoze. Incamake y'icyemezo: 1. Mu gihe cyamunara yakozwe hashingiwe ku cyemezo cy'Urukiko no 501/99 kandi urega akaba ntacyo akinenga, ariko mu nyandiko y'igurisha hakagaragaramo ko cyamunara yashingiye ku cyemezo numero 478/99, bifatwa nk'ikosa ry'imyandikire rishobora gukosorwa n'uwariwe wese ubifitemo inyungu cyane cyane ko ibivugwa muri iyo nyandiko y'igurisha ari ibijyanye n'icyemezo no 501/99. Bityo nta cyatuma cyamunara yagishingiyeho iseswa, inzu yatejwe cyamunara ikaba igomba kuguma mu maboko y'abazungura b'uwayiguze.

2. Mu gihe cyamunara idasheshwe, indishyi zitandukanye urega asaba abaregwa nta shingiro ziba zifite. Abaregwa bahabwa amafaranga y'ikurikiranarubanza n'igihembo cya Avoka, naho urega ntayahabwe kuko ubujurire bwe nta shingiro bufite. Ubujurire nta shingiro bufite. Uwajuriye ategetswe kwishyura abaregwa indishyi z'ikurikiranarubanza n'igihembo cy'avoka. Amagarama aherereye ku regwa. NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI

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32 ICYEGERANYO CY'IBYEMEZO BY'INKIKO Amategeko yashingiweho: Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo 276. Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi, ingingo ya 321, 322, 345, 346, 363, 369. 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. Nta manza zifashishijwe. Urubanza I.IMITERERE Y' URUBANZA [1] Nshimyumuremyi Ephron yatanze ikirego mu Rukiko Rukuru asaba iseswa rya cyamunara yakozwe tariki ya 06/02/2000 na Notaire wa Leta, ku nzu ye iri mu kibanza n° 345 i Nyarugenge, quartier commercial, mu Mujyi wa Kigali, bisabwe na FINA BANK harangizwa urubanza RC 30039/99, ikagurwa na Rubangura Védaste, avuga ko yakozwe mu buryo budakurikije amategeko. [2] Mu gutanga icyo kirego, ababuranira Nshimyumuremyi bavugaga ko icyemezo n° 501/99 cy'Urukiko rwa Mbere rw'Iremezo rwa Kigali gitegeka ko inzu itezwa cyamunara cyafashwe n'abacamanza batatu aho gufatwa na Perezida w'Urukiko, ko muri icyo cyemezo havugwamo iyo nzu kandi itaratanzweho ingwate ya FINA BANK, ko na Notaire yayigurishije azi neza ko atari ingwate yayo, bagasaba ko Leta yamuha indishyi kubera ayo makosa yakozwe n'abakozi bayo. [3] Ikindi ababuranira Nshimyumuremyi bashingiragaho basaba ko cyamunara iseswa ngo ni uko muri icyo cyemezo n° 501/99 havugwamo Nshimyumuremyi Ephron, aho kuba Ndagijimana Jean Pierre wari ubereyemo umwenda FINA BANK. Banavugaga ko iyo

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33 Banki yasabye ko inzu igurishwa kandi izi ko atari ingwate yayo kandi na nyirayo nta mwenda ayifitiye, ko ndetse itubahirije ingingo z'Itegeko ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryariho, zerekeranye na cyamunara y'imitungo itimukanwa, bagasaba ko FINA BANK ibimuhara indishyi. [4] Mu kirego cya Nshimyumuremyi yasabye kandi ko Abazungura ba Rubangura Védaste waguze inzu bayimusubiza kuko yayiguze mu cyamunara kidakurikije amategeko, bitashoboka bakamuha agaciro kayo, BCR nayo ikamuha indishyi kuko ari yo yatanze "certificat d'enregistrement" y'inzu kandi yari yarayihawe ingwate kubera undi mwenda. [5] Igihe cy'iburanisha, ababuranira Nshimyumuremyi bavuze ko batagishingiye iseswa rya cyamunara ku nenge zavuzwe haruguru bavugaga ko ziri mu cyemezo n° 501/99, ko ahubwo bashingiye ku mpamvu y'uko Notaire wa Leta yateje cyamunara iyo nzu ashingiye ku cyemezo n° 478/99 kivugwa muri "acte d'adjudication" kitabayeho (imaginaire). [6] Urukiko Rukuru rwaciye urubanza rwemeza ko ikirego cya Nshimyumuremyi nta shingiro gifite, kuko rwasanze cyamunara isabirwa guseswa yarakozwe hashingiwe ku cyemezo n° 501/99 cyafashwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali kandi ntacyo akinenga, cyane cyane ko atigeze asaba ko gihindurwa cyangwa se ko kivanwaho, ko rero hatashingiwe ku cyemezo n° 478/99 kuko nta cyerekana ko cyabayeho. [7] Ku byerekeranye n'imihango iteganywa n'amategeko ibanziriza cyamunara, Urukiko rwavuze ko idashobora gutandukanywa n'icyemezo n° 501/99 cyavuzwe, ko kugira ngo urukiko rutegeke ko cyamunara ikorwa rwagombaga kubanza gusuzuma niba ibiteganywa n'amategeko byarakozwe, ruvuga ko urega nta kimenyetso yarugaragarije ko ibyo bitakozwe, akaba ataranaregeye urukiko igihe igwatira ry'inzu ryakorwaga nk'uko

yabyemererwaga n'ingingo ya 363 NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI

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34 ICYEGERANYO CY'IBYEMEZO BY'INKIKO y'Itegeko ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryakurikizwaga icyo gihe, ngo asabe ko amategeko yubahirizwa. [8] Urukiko rwasanze kandi azi ko inzu itagomba kugurishwa nk'uko urega abivuga, ruvuga ko Notaire wa Leta atari afite inshingano n'ububasha byo guhindura icyemezo cy'urukiko, ngo agire ibyo akuramo, kabone n'ubwo yari kuba nta kosa yakozwe, ko nta n'ikimenyetso rwashyikirijwe cy'akagambane kavugwa ko yagiranye n'abacamanza bafashe icyemezo ndetse na FINA BANK. [9] Urukiko rwageneye mu bushishozi buri wese mu barezwe amafaranga 300.000 Frw y'ikurikiranarubanza n'igihembo cya Avoka. [10] Nshimyumuremyi yajuririye Urukiko rw'Ikirenga avuga ko urukiko rwemeje nta mpamvu ko inzu ye yatejwe cyamunara hashingiwe ku cyemezo cy'urukiko n° 501/99 kandi atari byo, ko ahubwo hashingiwe ku cyemezo n° 478/99 kitabayeho kigaragara muri "acte d'adjudication" itaravugurujwe n'uwayikoze, ko rero atashoboraga kujuririra icyemezo kitabayeho, atabonye. Avuga na none ko cyamunara yakozwe igomba guseswa agasubizwa inzu ye cyangwa agaciro kayo, hiyongereyeho amafaranga y'ubukode bwayo kuko yakozwe mu buryo budakurikije amategeko ku buriganya bwa FINA BANK, Notaire na BCR, abo baregwa bose bakamuha indishyi. [11] Abaregwa bavuga, buri wese, ko nta kosa ryakozwe mu igurishwa ry'inzu ya Nshimyumuremyi mu cyamunara ku buryo yaryozwa indishyi, ko kandi cyamunara yakurikije amategeko, ko rero yagumana agaciro kayo, ko nta n'indishyi akwiye guhabwa, ko ahubwo ariwe ugomba kubaha indishyi zo kuba yarabashoye mu rubanza nta mpamvu n'ibihembo by'aba avoka bababuraniye. [12] Urubanza rwaburanishijwe mu ruhamwe tariki ya 09/04/2013 no kuwa 02/07/2013, Nshimyumuremyi Ephron aburanirwa na Me Munderere Léopold, Me Buhuru Pierre Célestin na Me Ntampuhwe Juvens, FINA BANK iburanirwa na Me Karangwa Vincent, BCR ihagarariye na Me Batware Jean Claude, Leta y'u Rwanda iburanirwa

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35 na Me Sebazungu Alphonse, Intumwa Nkuru ya Leta yungirije, Mutabazi Etienne yunganiwe na Me Baragondoza Jean Damascène na Me Nzaramba Janvier, naho Abazungura ba Rubangura Védaste bahagarariye na Me Rwagatare Janvier. II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

1. Kumenya niba Urukiko Rukuru rwaribeshye rukemeza ko inzu iri mu kibanza n° 345 i Nyarugenge, quartier commercial, mu Mujyi wa Kigali ya Nshimyumuremyi yagurishijwe mu cyamunara hashingiwe ku cyemezo n° 501/99 cy'Urukiko rwa Mbere rw'Iremezo rwa Kigali. [13] Ababuranira Nshimyumuremyi bavuga ko Urukiko Rukuru rwemeje ko inzu ye iri mu kibanza n° 345 i Nyarugenge, quartier commercial, mu Mujyi wa Kigali yatejwe cyamunara na Notaire wa Leta Mutabazi Etienne ashingiye ku cyemezo cy'urukiko n° 501/99 kandi atari byo, kuko mu nyandiko ya cyamunara (acte d'adjudication) Notaire yakozwe igaragaza ko hashingiwe ku cyemezo n° 478/99 kitabayeho, bakaba batumva aho urukiko

rwakuye amakuru y'uko Notaire yibeshye kandi ataragaragaye mu rubanza ngo avuguruzwe iyo nyandikomvaho yakoze, ko kuba ibyo kwibeshya kwe byaravuzwe na bamwe mu baburanyi bitavuze ko habayeho kuregera ko inyandiko ari impimbano, bikaba rero binyuranije n'ingingo ya 13 igika cya mbere y'Itegeko ryerekeye ibimenyetso mu manza n'itangwa ryabyo. [14] Bavuga na none ko bidashoboka ko icyemezo cy'urukiko n°501/99 ari cyo cyahereweho mu igurishwa ry'inzu nk'uko byemejwe n'urukiko, kuko cyavugaga ko cyamunara yagombaga kuba tariki 22/01/2000 saa tanu, ariko ikaba yarabaye kuwa 06/02/2000 saa sita n'igice. Byongeye kandi, ngo itangazo ryo guteza cyamunara rya Notaire ryo kuwa 31/01/2000 ntirashingiye kuri icyo cyemezo nk'uko urukiko rubivuga, kuko rivugwamo inzu iri mu kibanza n° 778 NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI

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36 ICYEGERANYO CY'IBYEMEZO BY'INKIKO ku kimihurura ya Ndagijimana Jean Pierre, nyamara itagaragara muri icyo cyemezo. [15] Ababuranira Nshimyumuremyi bavuga kandi ko mu itangazo rya Notaire urukiko rwashingiyeho, hari hateganyijwe urutonde ry'uburyo inzu zizatezwa cyamunara: inzu iri mu kibanza n° 778 ku Kimihurura ya Ndagijimana yagombaga kugurishwa 10h30', iri mu kibanza n° 118 ku Kicukiro ya Nshimyumuremyi ikagurishwa 11h30' naho indi nzu ye yo mu kibanza n° 345 i Nyarugenge ikagurishwa 12h30'. Urukiko rero ngo ntirwasobanuye impamvu iyo gahunda itakurikijwe n'uburenganzira FINA BANK na Notaire wa Leta bari bafite bwo guhera ku nzu ya nyuma itari no mu ngwate za Banki. [16] Me Karangwa Vincent uburanira FINA BANK avuga ko Nshimyumuremyi yirengagiza uruhererekane rw'ibikorwa byagaragajwe na FINA BANK igihe cy'iburanisha mu Rukiko Rukuru, aho yagaragaje ko habanje kubaho urubanza RC 30039/99 FINA BANK yarezemo Ndagijimana Jean Pierre n'abishingizi be Murekatete Gloria na Nshimyumuremyi bagatsindirwa umwenda wa 55.949.630 Frw, ntibarujuririre maze rukaba itegeko rukarangizwa. [17] Avuga ko nta nenge igaragara mu cyemezo n° 501/99 cyafashwe n'Urukiko rwa Mbere rw'Iremezo rwa Kigali 22/10/1999 bisabwe na FINA BANK kugirango harangizwe urubanza yatsindiye, nk'uko n'abari bahagarariye Nshimyumuremyi babivuze mu rukiko rubanza, ubwo bavugaga ko ntacyo banenga icyo cyemezo, ko ahubwo icyo bashingiraho basaba iseswa rya cyamunara ari uko Notaire wa Leta yagurishije inzu ashingiye ku cyemezo n° 478/99 kitabayeho, batigeze bagaragaza. Asanga rero, niba Nshimyumuremyi yemera icyemezo n° 501/99, akaba atarakijuririje cyangwa se ngo asabe ko kivaho mu gihe giteganyijwe n'amategeko, ubu atahindukira ngo asabe ibinyuranye n'uko kucyemera, ko kandi kwibeshya kwa Notaire mu myandikire ya nimeru y'icyemezo kutaba impamvu yo gutesha agaciro cyamunara y'ubahirije imihango yose iteganywa n'amategeko, agasanga rero ababuburanira

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37 Nshimyumuremyi bakwiye kugaragaza urundi rubanza icyemezo n°478/99 cyari kigamije kurangiza. [18] Me Karangwa avuga kandi ko kuba ababuranira Nshimyumuremyi bavuga ko cyamunara itakurikije gahunda yari iteganyijwe mu itangazo rya cyamunara, ari ukwiringagiza ko icyari kigamijwe ari ukubona ubwishyu bwa FINA BANK bwagombaga guturuka mu mutungo w'abatsinzwe urubanza bose, ko mu gihe Notaire yari afite inyandiko mpesha (titre exécutoire)

igizwe n'urubanza rwagombaga kurangizwa, imihango yose yarakozwe mu buryo bwemewe n'amategeko, nta cyari kumubuza gushakira ubwishyu mu mitungo y'abatsinzwe aho yaba iherereye hose. [19] Avuga na none ko kuvuga ko hari inyandiko zidahuye, kuko inzu yo mu kibanza n° 778 ku Kimihurura iri mu itangazo rya cyamunara ariko itagaragara mu cyemezo n° 501/99 asanga nta ngaruka mu rwego rw'amategeko bifite kuko iyo nzu itagurishijwe, ko kandi icyo cyemezo kivuga amazu agomba kugurishwa kitavuga gahunda y'uko azagurishwa, bikaba kandi bitarashobokaga ko yose agurishwa ku isaha imwe. Asanga rero nta buriganya bwa FINA BANK bwabayeho kuko nta kimenyetso abutangira. [20] Mutabazi Etienne n'abamwunganira bavuga ko ababuranira Nshimyumuremyi biyemerera ko icyemezo n° 478/99 kitigeze kibaho cyangwa se ngo kigaragare. Basobanura ko cyamunara yashingiye ku cyemezo n° 501/99 nk'uko bigaragara mu nyandiko zose zerekeranye nayo, ko ariko mu gukora inyandiko ya cyamunara (acte d'adjudication) habayeho gukora ikosa handikwa "icyemezo n°478/99", ko ariko iyo babisaba hakiri kare agikora akazi ka Notaire yari kubikosora. [21] Ku byerekeye igihe cyamunara yagombaga kubera, bavuga ko yari kuba tariki ya 22/01/2000, habura abaguzi, yimurirwa mu minsi cumi n'itanu, hongera gutangwa amatangazo, ikorwa kuwa 06/02/2000.

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38 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [22] Bavuga na none ko icyemezo n° 501/99 cyo guteza cyamunara kitari gisobanutse neza, kuko kigaragaza ko amazu yose yagombaga kutezwa cyamunara ku isaha imwe ya saa tanu, ibyo rero bikaba bitari gushoboka, icyangombwa kikaba ari uko amazu akigaragaraho yagombaga kugurishwa mu cyamunara. [23] Ku byerekeranye n'amakosa avugwa ko yakozwe na Notaire wateje cyamunara ngo kuko yari azi neza ko inzu itagombaga kugurishwa, Mutabazi n'abamwunganira bavuga ko nta burenganzira yari afite bwo guhindura icyemezo cy'urukiko nk'uko mu rubanza rwajuririwe bisobanuye, icyo Nshimyumuremyi yagombye kuba yarakoze mbere ya byose kwari ukwitabaza inzira yagenwaga n'amategeko igihe icyemezo cyo guteza cyamunara cyafatwaga n'urukiko akagitambamira, akakijuririra cyangwa se agasaba ko gikosorwa ku nenge avuga ko gifite zari zimubangamiye, ko ariko niba avuga ko icyemezo n° 501/99 ntacyo cyari kimutwaye, atagombaga no kukiregera. [24] Ku byerekeranye no kumenya impamvu inzu ya Nshimyumuremyi ariyo yahereweho mu guteza cyamunara, Mutabazi asobanura ko amategeko yakurikizwaga igihe cyamunara yabaga yateganyaga ko iyo hari ibintu byinshi byo guteza cyamunara uwabifatishije (le saisissant) ariwe uhitamo kimwe yabonamo ubwishyu bw'umwenda wose, ko rero amaze gutanga itangazo, FINA BANK ariyo yahisemo ko inzu ya Nshimyumuremyi igurishwa. [25] Me Sebazungu uburanira Leta y'u Rwanda nawe avuga ko icyemezo n° 501/99 ari cyo cyashingiweho na Notaire hatezwa cyamunara inzu ya Nshimyumuremyi, ko kuba mu nyandiko ya cyamunara (acte d'adjudication) havugwamo n° 478/99 ari ikosa ryakorewe mu bwanditsi. Avuga kandi ko kuba inzu yo mu kibanza n°778 Kimihurura itagaragara mu cyemezo n° 501/99, ahubwo ikaboneka mu itangazo rya cyamunara nta kibazo kirimo kuko iyo nzu itagurishijwe, ko ku bijyanye n'itariki yo gutezaho cyamunara igaragara mu cyemezo idahura n'iyi cyabereyeho, asobanura ko habayeho kwimurwa kwa cyamunara, naho ku bijyanye n'amasaha inzu

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39 zagombaga kugurishirizwaho, avuga ko bafashe ko saa sita n'igice ari bwo cyamunara yagombaga kuba irangiye. [26] Asanga kandi ibyerekeranye n'imihango yagombaga gukurikizwa mbere y'uko hafatwa icyemezo cya cyamunara bitararebaga Notaire, ahubwo byararebaga FINA BANK, icyo yari ashinzwe ari ukurangiza ibikubiye muri icyo cyemezo, ibyo akaba ari byo yakoze kubera ko urubanza yasabwe kurangiza ari rwo yarangije. Avuga ko kandi ikibazo cyerekeranye n'imihango ya cyamunara Nshimyumuremyi avuga ko itakurikijwe yagombaga kukibyutsa hakurikijwe ibiteganywa n'ingingo ya 363 y'Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryakurikizwaga icyo gihe, maze akagishyikiriza urukiko rwatanze icyemezo giteza cyamunara. [27] Me Rwagatare uburanira Abazungura ba Rubangura avuga ko abona cyamunara yarashingiye ku cyemezo cy'urukiko n° 501/99 kandi ababuranira Nshimyumuremyi bavuga ko ntacyo kimutwaye, akaba asanga nta n'impamvu yari kuregera icyemezo n° 478/99 kigaragara mu nyandiko ya cyamunara (acte d'adjudication) kuko abona ko ari ikosa ry'imyandikire ryakozwemo. [28] Mutabazi Etienne n'abamwunganira bavuga ko ababuranira Nshimyumuremyi biyemerera ko icyemezo n° 478/99 kitigeze kibaho cyangwa se ngo kigaragare. Basobanura ko cyamunara yashingiye ku cyemezo n° 501/99 nk'uko bigaragara mu nyandiko zose zerekeranye nayo, ko ariko mu gukora inyandiko ya cyamunara (acte d'adjudication) habayeho gukora ikosa handikwa "icyemezo n°478/99", ko ariko iyo babisaba hakiri kare agikora akazi ka Notaire yari kubikosora. [29] Ku byerekeye igihe cyamunara yagombaga kubera, bavuga ko yari kuba tariki ya 22/01/2000, habura abaguzi, yimurirwa mu minsi cumi n'itanu, hongera gutangwa amatangazo, ikorwa kuwa 06/02/2000. NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI

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40 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [30] Bavuga na none ko icyemezo n° 501/99 cyo guteza cyamunara kitari gisobanutse neza, kuko kigaragaza ko amazu yose yagombaga kutezwa cyamunara ku isaha imwe ya saa tanu, ibyo rero bikaba bitari gushoboka, icyangombwa kikaba ari uko amazu akigaragaraho yagombaga kugurishwa mu cyamunara. [31] Ku byerekeranye n'amakosa avugwa ko yakozwe na Notaire wateje cyamunara ngo kuko yari azi neza ko inzu itagombaga kugurishwa, Mutabazi n'abamwunganira bavuga ko nta burenganzira yari afite bwo guhindura icyemezo cy'urukiko nk'uko mu rubanza rwajuririwe bisobanuye, icyo Nshimyumuremyi yagombye kuba yarakoze mbere ya byose kwari ukwitabaza inzira yagenwaga n'amategako igihe icyemezo cyo guteza cyamunara cyafatwaga n'urukiko akagitambamira, akakijuririra cyangwa se agasaba ko gikosorwa ku nenge avuga ko gifite zari zimubangamiye, ko ariko niba avuga ko icyemezo n° 501/99 ntacyo cyari kimutwaye, atagombaga no kukiregera. [32] Ku byerekeranye no kumenya impamvu inzu ya Nshimyumuremyi ariyo yahereweho mu guteza cyamunara, Mutabazi asobanura ko amategako yakurikizwaga igihe cyamunara yabaga yateganyaga ko iyo hari ibintu byinshi byo guteza cyamunara uwabifatishije (le saisissant) ariwe uhitamo kimwe yabonamo ubwishyu bw'umwenda wose, ko rero amaze gutanga itangazo, FINA BANK ariyo yahisemo ko inzu ya Nshimyumuremyi igurishwa. [33] Me Sebazungu uburanira Leta y'u Rwanda nawe avuga ko icyemezo n° 501/99 ari cyo cyashingiweho na Notaire hatezwa

cyamunara inzu ya Nshimyumuremyi, ko kuba mu nyandiko ya cyamunara (acte d'adjudication) havugwamo n° 478/99 ari ikosa ryakorewe mu bwanditsi. Avuga kandi ko kuba inzu yo mu kibanza n° 778 Kimihurura itagaragara mu cyemezo n° 501/99, ahubwo ikaboneka mu itangazo rya cyamunara nta kibazo kirimo kuko iyo nzu itagurishijwe, ko ku bijyanye n'itariki yo gutezaho cyamunara itagaragara mu cyemezo idahura n'iyi cyabereyeho, asobanura ko habayeho kwimurwa kwa cyamunara, naho ku bijyanye n'amasaha inzu

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41 zagombaga kugurishirizwaho, avuga ko bafashe ko saa sita n'igice ari bwo cyamunara yagombaga kuba irangiye. [34] Asanga kandi ibyerekeranye n'imihango yagombaga gukurikizwa mbere y'uko hafatwa icyemezo cya cyamunara bitararebaga Notaire, ahubwo byararebaga FINA BANK, icyo yari ashinzwe ari ukurangiza ibikubiye muri icyo cyemezo, ibyo akaba ari byo yakoze kubera ko urubanza yasabwe kurangiza ari rwo yarangiye. Avuga ko kandi ikibazo cyerekeranye n'imihango ya cyamunara Nshimyumuremyi avuga ko itakurikijwe yagombaga kukibiyutsa hakurikijwe ibiteganywa n'ingingo ya 363 y'Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryakurikizwaga icyo gihe, maze akagishyikiriza urukiko rwatanze icyemezo giteza cyamunara. [35] Me Rwagatare uburanira Abazungura ba Rubangura avuga ko abona cyamunara yarashingiye ku cyemezo cy'urukiko n° 501/99 kandi ababuranira Nshimyumuremyi bavuga ko ntacyo kimutwaye, akaba asanga nta n'impamvu yari kuregera icyemezo n° 478/99 kigaragara mu nyandiko ya cyamunara (acte d'adjudication) kuko abona ko ari ikosa ry'imyandikire ryakozwemo. UKO URUKIKO RUBIBONA [36] Inyandiko zikubiye muri dosiye zigaragaza ko tariki ya 07/01/1994 Ndagijimana Jean Pierre yafashe umwenda wa 25.000.000 Frw muri BACAR ubu yahindutse FINA BANK Ltd yishingirwa n'umugore we Murekatete Gloria na se Nshimyumuremyi Ephron. [37] BACAR ibonye umwenda utishyuwe, yareze uwafashe umwenda n'abishingizi be mu Rukiko rwa Mbere rw'Iremezo rwa Kigali, maze mu rubanza RC 30039/99 rwaciye tariki ya 11/06/1999, rutegeka Ndagijimana, Murekatete na Nshimyumuremyi kwishyura BACAR amafaranga angana na 55.949.630 Frw y'umwenda remezo n'inyungu zawo n'iz'ubukererwe, urubanza rukimara gusomwa, NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI

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42 ICYEGERANYO CY'IBYEMEZO BY'INKIKO batabikora akavanwa mu byabo ku ngufu za Leta Urwo rubanza rwaciye abaregwa bose badahari. [38] Mu ibaruwa yayo yo kuwa 06/10/1999, BACAR yasabye Perezida w'Urukiko rwa Mbere rw'Iremezo rwa Kigali icyemezo cyo guteza cyamunara amazu ari mu kibanza n° 778 ku Kimihurura III ya Ndagijimana Jean Pierre, n° 118 iri ku Kicukiro na n° 345 iri muri Nyarugenge za Nshimyumuremyi Ephron kugira ngo harangizwe urubanza rwavuzwe, ivuga ko inohereje dosiye yose kugira ngo ruyisuzume. [39] Mu gusubiza kuri iyo baruwa, kuwa 22/10/1999 urukiko rwafashe icyemezo n° 501/99 gitegeka ko habaho cyamunara y'amazu n° 118 iri ku Kicukiro na n° 345 iri i Nyarugenge za Nshimyumuremyi Ephron, kimanikwa uwo munsu ku miryanyo y'Urukiko rwa Mbere rw'Iremezo rwa Kigali, Parquet ya Kigali, Komini Kicukiro, Komini Nyarugenge, Umujyi wa Kigali n'Urukiko

rw'Ubujurire rwa Kigali. Nyuma y'itangazo ryo guteza cyamunara ryo kuwa 31/01/2000, cyamunara ntiyakozwe tariki ya 22/01/2000 saa tanu za mu gitondo nk'uko byari biteganyijwe, ahubwoyabaye tariki ya 06/02/2000, nk'uko bigaragazwa n'inyandikomvugo yo guteza cyamunara yakozwe na Notaire, maze inzu yo mu kibanza n° 345 i Nyarugenge igurwa na RUBANGURA Védaste ku mafaranga 95.100.000. [40] Urukiko rurasanga rero, nk'uko byemejwe n'Urukiko Rukuru, icyo cyemezo n° 501/99 aricyo Notaire wa Leta yashingiyeho ateza cyamunara inzu yo mu kibanza n° 345 ya Nshimyumuremyi ikivugwamo. Na none inyandikomvugo yakozwe na Notaire tariki ya 06/02/2000 imbere y'abagabo, umwanditsi, uwaguze n'uhagarariye FINA BANK, ikomekwa kuri "acte d'adjudication", igaragaza ko iyo nzu ariyo yagurishijwe, bityo kuba muri "acte d'adjudication" hagaragaramo ko mu kugurisha inzu hashingiwe ku cyemezo n° 478/99 cy'Urukiko rwa Mbere rw'Iremezo rwa Kigali, ni ikosa ry'inyandikire, ryashoboraga gukosorwa bisabwe n'ubifitemo inyungu wese, cyane cyane ko ibindi biyivugwamo ari ibijyanye n'icyemezo n°501/99.

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43 [41] Urukiko rurasanga kandi kuba icyemezo n° 501/99 ntacyo Nshimyumuremyi akinenga nk'uko abamuburanira babivuga, nta mpamvu yatuma cyamunara yagishingiyeho iseswa. [42] Ku byerekeye izindi nenge Nshimyumuremyi avuga ko zakozwe na Notaire wateje cyamunara, urukiko rurasanga nazo zigamije kugaragaza ko cyamunara itashingiye ku cyemezo n° 501/99, ahubwo yashingiye ku cyemezo kitabayeho, ariko ibyo bikaba nta shingiro bifite kuko harebwe uruhererekane rw'ibyakozwe muri iyo cyamunara, bigaragara ko byose byari bishingiye ku cyemezo n° 501/99 cyafashwe n'urukiko harangizwa urubanza RC 30039/99 rwavuzwe haruguru.

2. Kubyerekeranye n'uko FINA BANK yaba yaragurishije mu buryo bw'uburiganya inzu itari iyayo. [43] Ababuranira Nshimyumuremyi bavuga ko mu rubanza rwajuririwe bagaragaje ko igurisha ry'ikintu cy'undi nta gaciro rigira hakurikijwe ibiteganywa n'ingingo ya 276 y'Itegeko ryo kuwa 30/07/1888 rishyiraho urwunge rw'amategeko y'imbonezamubano, ibyerekeye imirimo nshinganwa cyangwa amasezerano, ariko urukiko ntirwasobanura niba hari isano iri hagati ya FINA BANK n'inzu iri mu kibanza n° 345 i Nyarugenge ya Nshimyumuremyi. Asobanura ko tariki ya 07/01/1994 hasinywa amasezerano y'inguzanyo n'ingwate FINA BANK yemeye gusa inzu zatanzweho ingwate, bivuze rero ko inzu iburanwa yayigurishije nta burenganzira iyifiteho mu buryo bw'uburiganya (mauvaise foi) kuko ariyo yajijishije urukiko isaba cyamunara cyayo izi neza ko atari ingwate yayo. Igitangaje rero ngo ni uko urukiko ntacyo rwabivuzeho, urubanza rukaba rugaragaza ko habayeho kwitiranya "la caution réelle" et "la caution personnelle". [44] Me Karangwa uburanira FINA BANK avuga ko ababuranira Nshimyumuremyi birengagiza ko amasezerano y'inguzanyo yasheshwe, hagacibwa urubanza RC 30039/99 hatsinzwemo abantu batatu mu buryo bungana, aribo Ndagijimana, Nshimyumuremyi na Murekatete, iyo nyandikompesha rero akaba ariyo sano ihari kuko urubanza NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI

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44 ICYEGERANYO CY'IBYEMEZO BY'INKIKO rwagombaga kurangizwa, FINA BANK yatsinze ikishyurwa n'abatsinzwe, ubwishyu bukava mu mitungo yabo. UKO URUKIKO RUBIBONA [45] Urukiko rurasanga inzu iri mu kibanza n° 345 i Nyarugenge ya Nshimyumuremyi yagurishijwe iburanwa muri uru rubanza yaratejwe cyamunara hashingiwe ku cyemezo cy'urukiko nk'uko byasobanuwe haruguru, bisabwe na FINA BANK igira ngo harangizwe urubanza RC 30039/99 ibone ubwishyu, kandi icyo cyemezo ntacyo akinenga. Ntabwo rero ari FINA BANK yibwirije ngo igurishe iyo nzu, ku buryo yaregwa ko yagurishije ikintu cy'undi muntu, kandi yaragurishijwe bitangiwe uruhushya n'urukiko, bityo rero ibyo abamuburanira bavuga ko inzu yagurishijwe itari ingwate yayo, bagombye kuba barabiregeye urukiko rwafashe icyemezo n° 501/99 cyategetse ko itezwa cyamunara nk'uko biteganywa n'ingingo ya 363 y'Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n' z'amahugu n'ubucuruzi ryakurikizwaga icyo cyemezo gifatwa5, basaba ko ivanwa mu nzu zigomba kugurishwa. Kuba rero batarabikoze, ntibabisabira muri uru rubanza kuko icyo cyemezo atari cyo cyaregewe. 3. Ku byerekeran ye n'imihango y' ifatira ry'inzu Nshimyumuremyi avuga ko itubahirije amategeko [46] Ababuranira Nshimyumuremyi bavuga ko urukiko rubanza rwasobanuriwe ko ingingo za 321, 322 na 345 na 346 z'Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryakurikizwaga cyamunara iba zitubahirijwe kuko muri dosiye ya cyamunara nta nyandiko n'imwe ijyanye nacyo igaragaramo, maze mu gusubiza kuri icyo kibazo urukiko ruvuga ko mbere y'uko

5 Iyo ngingo igira iti:'ibiruhaniye byose byerekeya amategeko y'igwatira bibaye mu gihe cy'igwatira bikemurwa n'ibwirizwa rya juji iyo bitagombye gukimurwa n'urubanza." 1 1

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45 icyemezo n° 501/99 gifatwa, Urukiko rwa Mbere rw'Iremezo rwabanje gusuzuma ibigize dosiye byose, kandi atari byo kuko Notaire wagurishije inzu yivugira mu nyandiko ya cyamunara ko yayigurishije ashingiye ku cyemezo n° 478/99 kitabayeho (imaginaire), ko kandi iyo urukiko ruza gusuzuma dosiye koko rwari kubona ko mu rubanza RC 30039/99 FINA BANK yasabaga ko rurangizwa, inzu n° 345 i Nyarugenge itarimo, kuko itari ingwate yayo. [47] Bavuga na none ko urukiko rwavuze ko Nshimyumuremyi ariwe wagombaga gutanga ikimenyetso cy'uko nta nyandiko zishyuzabaye (commandements), mu gihe yari abyukije icyo kibazo, ngo kandi yaramenyeshwe ko inzu ye yagurishijwe abibwiwe na BCR igihe yabazaga iby'umwenda we. Basanga ibimenyetso bikwiye gusabwa FINA Bank yasabye guteza inzu cyamunara. [48] Me Karangwa uburanira FINA BANK avuga ko abona imihango yose isabwa n'itegeko yarubahirijwe mu guteza cyamunara inzu ya Nshimyumuremyi. [49] Me Baragondoza uburanira Mutabazi avuga ko ingingo z'amategeko ababuranira Nshimyumuremyi baburanisha muri uru rubanza bazitabaje impitagihe kuko bagombye kuba barazifashishije mu gihe imihango ya cyamunara yakorwaga nk'uko byateganywaga n'ingingo za 363 na 369 z'Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryakurikizwaga icyo gihe, maze bakaregera urukiko cyangwa umutegetsi watanze uruhushya rwo gufatira inzu. [50] Me Sebazungu uburanira

Leta avuga ko Urukiko rwa Mbere rw'Iremezo rwa Kigali rwafashe icyemezo cyo guteza cyamunara ari uko rumaze gusuzuma ko dosiye yuzuye, ko kandi icyasabiwe guteshwa agaciro atari icyo cyemezo, ko ndetse kuba nyiri umutungo utezwa cyamunara atari ahari ubwabyo bitatesha cyamunara agaciro. NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI

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46 ICYEGERANYO CY'IBYEMEZO BY'INKIKO UKO URUKIKO RUBIBONA [51] Urukiko rurasanga ingingo za 321 na 322 z'Itegeko ryo kuwa 15/07/1964 ryerekeye imiburanishirize y'imanza z'amahugu n'ubucuruzi ryakurikizwaga ababuranira Nshimyumuremyi bashingiraho zirebana n'ifatira ry'ibintu byimukanwa, zikaba zitashingiraho muri uru rubanza. [52] Ku byerekeranye n'itegeko ryishyuzwa Nshimyumuremyi cyangwa rishyizwe aho atuye cyangwa yahisemo ko hitwa iwe (commandement à personne) kimwe n'ibyagombaga

kuba birikubiyemo, nk'uko biteganywa mu ngingo za 345 na 346 z'Itegeko ryo kuwa 15/07/1964 rimaze kuvugwa, abamuburanira bavuga ko ritagaragara muri dosiye ya cyamunara, ngo FINA BANK ikaba ariyo yagombaga kurigaragaza, urukiko rurasanga bene iyi nyandiko ikorwa n'umuhesha w'inkiko mbere y'uko urukiko rufata icyemezo gitegeka ko habaho cyamunara. Mu gihe rero ababuranira Nshimyumuremyi bavuga ko icyemezo n° 501/99 cyategetse ko inzu igurishwa cyamunara ntacyo akinenga kandi ari cyo cyashingiweho inzu ye igurishwa mu cyamunara, akaba atararegeye urukiko rwagifashe ko kivaho kubera ko hari imihango itarubahirijwe nk'uko ingingo zavuzwe haruguru zabiteganyaga, ntaho muri uru rubanza yahera asaba ko cyamunara yashingiye kuri icyo cyemezo iseswa.

4. Ku kibazo cyo kumenya niba Nshimyumuremyi yasubizwa inzu cyangwa agaciro kayo n' amafaranga y' ubukode bwayo . [53] Ababuranira Nshimyumuremyi bavuga ko agomba gusubizwa inzu ye yagurishijwe mu cyamunara ikava mu maboko y'Abazungura ba Rubangura wayiguze, kubera ko Notaire wa Leta yayigurishije mu buryo budakurikije amategeko, itari ifite aho ihuriye n'urubanza RC 30039/99 rwarangizwaga kuko itari mu ngwate za FINA BANK, bitashoboka agahabwa 600.000.000 Frw y'agaciro kayo cyangwa se akagenwa n'umuhanga bibaye ngombwa.

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47 [54] Me Rwagatare uburanira abazungura ba Rubangura avuga ko batagomba gusubiza inzu yaguzwe na Rubangura mu cyamunara kumugaragararo mu buryo bukurikije amategeko, ko kandi nta kosa yakoze ryatuma baryozwa indishyi. [55] Urukiko rurasanga nk'uko byagaragajwe haruguru, cyamunara yabaye y'inzu ya Nshimyumuremyi, ikagurwa na Rubangura nta mpamvu igomba guseswa, bityo iyo nzu ikaba igomba kuguma mu maboko y'abazungura be.

5. Ishingiro ry' indishyi zisabwa na Nshimyumuremyi Indishyi zisabwa FINA BANK [56] Ababuranira Nshimyumuremyi basaba ko FINA BANK imusubiza amafaranga y'ubukode bw'inzu ye yateje cyamunara abazwe guhera tariki ya 06/02/2000 umunsi wa cyamunara kugeza umunsi w'isomwa ry'urubanza ahwanye na 234.680.000 Frw avugwa mu myanzuro

hiyongereyeho ayishyujwe nyuma y'uko ikorwa, kuko ariyo yakoze ibishoboka byose mu buriganya kugirango inzu igurishwe kandi atari ingwate yahawe, aho kugurisha inzu yahaweho ingwate, ikaba yarabikoreye kumwambura inzu ye. [57] Me Karangwa uburanira FINA BANK avuga ko nta ndishyi na nkeya ikwiye gucibwa kuko nta kosa yakoze kuko yarangije urubanza yishyura umwenda wayo, ko itanatanga amafaranga y'ubukode iyo nzu yinjije kugeza ubu kuko itayibyaza umusaruro. [58] Urukiko rurasanga indishyi z'amafaranga y'ubukode bw'inzu zisabwa FINA BANK itagomba kuzitanga kuko yasabye urukiko icyemezo cyo kugurisha mu cyamuna inzu ya Nshimyumuremyi harangizwa urubanza yari yatsindiye umwenda wagombaga kwishyurwa ikagihabwa, nk'uko kandi byakomeje kuvugwa, icyo cyemezo akaba atari cyo cyaregewe. NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI

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48 ICYEGERANYO CY'IBYEMEZO BY'INKIKO Indishyi zisabwa Abazungura ba Rubangura [59] Ababuranira Nshimyumuremyi na none bavugaga ko Abazungura ba Rubangura Védaste bagomba kumuha indishyi z'akababaro zingana na 25.000.000 Frw kuko Rubangura yaguze inzu yarangiza akishyura umwenda wa sosiyete ya Nshimyumuremyi yitwa SOCOFAG muri BCR, kugirango abone ibyangombwa byayo kandi atari ingwate ya FINA BANK, akaba rero ayitunze mu buryo bw'uburiganya. [60] Me Rwagatare uburanira Abazungura ba Rubangura avuga ko Rubangura atariwe wishyuye BCR umwenda wa Nshimyumuremyi kugirango abone ibyangombwa by'inzu, ahubwo BCR ariyo yafatishije mu rukiko amafaranga 1.823.961 Frw Nshimyumuremyi yari ayibereyemo igasaba ko avanwa ku mafaranga ya cyamunara nk'uko bigaragazwa n'icyemezo n°292/ND.E./2000 cyo kuwa 28/07/2000 gifatira by'agateganyo cya Perezida w'Urukiko rwa Mbere rw'Iremezo rwa Kigali. Yongeraho ko kandi uwaguze mu cyamunara hari uburyo itegeko riteganywa abona ibyangombwa, akaba rero yarabihawe n'umwanditsi w'inyandiko mpamo z'ubutaka (conservateur des titres fonciers) mu ibaruwa yamwandikiye tariki ya 17/07/2003, akaba rero atarayikuye muri BCR nk'uko ababuranira Nshimyumuremyi babivugaga. [61] Urukiko rurasanga nta kimenyetso Nshimyumuremyi atanga kivuguruza icyatanzwe n'abazungura ba Rubangura cyavuzwe haruguru kigaragaza ko koko Rubangura ariwe wishyuye umwenda wa sosiyete SOCOFAG ya Nshimyumuremyi yari ifitiye BCR, agamije kubona ibyangombwa by'inzu mu buryo bw'uburiganya. Indishyi zisabwa BCR [62] Ababuranira Nshimyumuremyi basaba ko kandi BCR itanga 25.000.000 Frw y'indishyi kuko yatanze ibyangombwa by'inzu yari ifite itabanje gushishoza kandi ariyo yari ifite ubugwate kuri iyo nzu. [63] Me Batware uburanira BCR avuga ko yamenye iby'igurishwa ry'inzu cyamunara yararangiye, ko rero nta kosa yakoze, icyabaye akaba ari uko BCR ariyo yagombaga kwishyurwa mbere kuko

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49 ariyo yari ifite ubugwate bwa mbere ku nzu, noneho Rubangura agaragaza ko ariwe watsindiye cyamunara asaba ko yahabwa ibyangombwa byayo. Avuga na none ko indishyi Nshimyumuremyi asaba BCR ari ikirego gishya itakwireguraho bwa mbere mu bujirire. [64] Urukiko rusanga indishyi BCR isabwa atari ubwa mbere iziregwa kuko zikubiye mu kirego cyatanzwe mu rukiko

rubanza, gusa zikaba zitari zaragenwe kuko ikirego cya Nshimyumuremyi nta shingiro cyagize. Urukiko rurasanga ariko nta mpamvu BCR yagombaga kwimana icyangombwa cy'inzu (certificat d'enregistrement) yatejwe cyamunara mu gihe yari yishyuye umwenda wayo, bityo ikaba itagomba kubitangira indishyi. Indishyi zisabwa Leta y'u Rwanda na Mutabazi Etienne. [65] Ababuranira Nshimyumuremyi basaba na none ko Leta y'u Rwanda umukoresha wa Notaire Mutabazi nawe, bombi bafatanyaga gutanga 25.000.000 Frw y'indishyi kubera ko yateshutse ku nshingano ze akagurisha inzu itari ingwate ya FINA BANK ashingiye ku cyemezo cyo guteza cyamunara yihimbiye, kitabayeho. [66] Me Sebazungu uburanira Leta avuga ko nta ndishyi Leta igomba gutanga kuko cyamunara yubahirije amategeko kuko icyemezo cyo guteza cyamunara n° 501/99 cyatanze bisabwe na FINA BANK, Notaire agiheraho ateza inzu cyamunara, Leta ikaba itabazwa ikosa ryabaye mu kwandika inyandiko ya cyamunara (acte d'adjudication). [67] Me Baragondoza avuga ko indishyi Mutabazi aburanira asabwa nta shingiro ryazo kuko cyamunara yakozwe mu buryo bukurikije amategeko. [68] Urukiko rurasanga Notaire yarakoresheje cyamunara ashingiye ku cyemezo cy'urukiko kandi, nk'uko byasobanuwe n'urukiko rubanza, nta bubasha yari afite bwo kugihindura, icyo yasabwaga gukora cyo kurangiza urubanza Nshimyumuremyi yatsindiwemo na BACAR umwenda yishingiye akaba yaragikoze nk'uko icyemezo cy'urukiko NSHIMYUMUREMYI v. LETA Y'URWANDA N'ABANDI

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50 ICYEGERANYO CY'IBYEMEZO BY'INKIKO cyari cyabitegetse, akaba rero nta ndishyi agomba kumuha, kimwe na Leta yari umukoresha we.

6. Indishyi zisabwa n'abaregwa [69] Me Rwagatare uburanira Abazungura ba Rubangura asaba ko amafaranga 300.000 Frw yaciwe Nshimyumuremyi y'ikurikiranarubanza n'igihembo cya avoka yakwiyongereye andi 2.000.000, agatanga na 15.000.000 Frw kubera ko yatanze ikirego abuza Rubangura uburenganzira bwo gukoresha inzu yabo uko babishakaga na 15.000.000 yo kumusebya. [70] Me Karangwa uburanira FINA BANK avuga ko Nshimyumuremyi agomba kuyiha 30.000.000 Frw kuko yayishoye mu manza ku maherere, hakubiyemo n'igihembo cya avoka. [71] Me Batware uburanira BCR nawe asaba ko Nshimyumuremyi yayihaye 500.000 Frw yo gukururwa mu bujirire nta mpamvu no gutegura urubanza no kuruburana, yiyongera kuri 300.000 yaciwe mu rukiko rubanza, yose hamwe akaba 8.000.000 Frw. [72] Me Sebazungu we asanga indishyi za 300.000 Frw Nshimyumuremyi yari yaciwe mbere zo guha Leta y'u Rwanda ari zo zikwiye kugumaho. [73] Me baragondoza avuga ko Nshimyumuremyi akwiye guha Mutabazi Etienne indishyi zingana na 500.000 Frw y'igihembo cya avoka n'ikurikiranarubanza kuko yashoye mu manza nta mpamvu. [74] Mu gusubiza ku ndishyi zisabwa n'abaregwa, ababuranira Nshimyumuremyi bavugaga ko nta ndishyi agomba kubaha kubera amakosa buri wese yamukoreye, bigatuma inzu ye itezwa cyamunara, agasaba ahubwo ko bakwiye gufatanyaga kumuha amafaranga y'ikurikiranarubanza n'igihembo cya avoka ahwanye na 10% y'indishyi zose zisabwa.

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51 UKO URUKIKO RUBIBONA [75] Urukiko rurasanga indishyi za 30.000.000 Frw zisabwa n'abazungura ba Rubangura ari ubwa mbere bazisabye mu bujurire bakaba batazihabwa, kuko bibuzwa n'ingingo ya 168CPCCSA, ivuga ko nta birego bishya bitangirwa mu bujurire. Ku birebana n'amafaranga y'ikurikiranarubanza n'igihembo cya avoka, urukiko rurasanga bagenerwa mu bushishozi 300.000 Frw yiyongera kuri 300.000 bagenewe mu rukiko rubanza kuko ayo basaba ari menshi, yose hamwe akaba 600.000 Frw ku nzego zombi. [76] Ku byerekeye indishyi FINA BANK isaba Nshimyumuremyi za 30.000.000 Frw kuko yayishoye mu manza ku maherere, ndetse n'igihembo cya avoka, urukiko rurasanga nta kirugaragariza ko yareze FINA BANK agamije kuyishora mu manza ku maherere, mu gihe yumvaga adasobanukiwe n'uburyo inzu ye yagurishijwe, bityo akaba nta ndishyi agomba kubitangira, ahubwo agomba kuyiha amafaranga yo kuba yarashatse avoka uyiburanira kuko ariyo afite ishingiro, mu bushishozi ikaba igenewe 300.000 Frw yiyongera kuri 300.000 Frw yari yagenewe n'urukiko rubanza, yose hamwe akaba 600.000 Frw. [77] Urukiko rurasanga ku birebana n'indishyi BCR isaba Nshimyumuremyi zingana na 500.000 Frw zo gukururwa mu bujurire nta mpamvu, gutegura urubanza no kuruburana, bwari uburenganzira bwe bwo kujurira mu gihe atishimiye imikirize y'urubanza, ariko kandi kubera ko BCR nayo yashatse uyiburanira, yagenerwa mu bushishozi 300.000 Frw y'igihembo cya avoka yiyongera kuri 300.000 yagewe mu rukiko rubanza, yose hamwe akaba 600.000 Frw. [78] Ku birebana n'ibyo Leta y'u Rwanda isaba ko hagumaho indishyi za 300.000 Frw y'ikurikiranarubanza yagenwe mu rukiko rubanza, urukiko rurasanga byakubahirizwa, naho izisabwa na Mutabazi Etienne akaba ntayo agomba guhabwa kuko atashowe mu rubanza na Nshimyumuremyi, ahubwo yagobokeshejwe mu rubanza na Leta y'u Rwanda.

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52 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [79] Ku byerekeranye n'amafaranga y'ikurikiranarubanza Nshimyumuremyi asaba abaregwa, Urukiko rurasanga atayahabwa kuko ubujurire bwe nta shingiro bufite. III. ICYEMEZO CY' URUKIKO [80] Rwemeje ko ubujurire bwa Nshimyumuremyi Ephron nta shingiro bufite. [81] Rumutegetse kwishyura FINA BANK, BCR n'Abazungura ba Rubangura Védaste 600.000 Frw y'ikurikiranarubanza n'igihembo cya avoka buri wese, no kwishyura Leta y'u Rwanda 300.000 Frw y'ikurikiranarubanza nk'uko yagenwe n'Urukiko Rukuru, yose hamwe akaba 2.100.000 Frw. [82] Rutegetse Nshimyumuremyi Ephron kwishyura amafaranga 82.900 y'amagaram y'urubanza, atayatanga mu gihe cy'iminsi 8, ayo mafaranga agakurwa mu bye ku ngufu za Leta.

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IMANZA MBONEZAMUBANO

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54 MWIZA v. KAYINAMURA [Rwanda URUKIKO RW'IKIRENGA – 2010SC – RCAA 0001/13/CS (Mukanyundo, P.J., Hitiyaremye na Gakwaya, J.) 13 Ukuboza 2013] Amategeko agenga ububasha bw'Inkiko – Ububasha bw'Urukiko rw'Ikirenga – Urukiko rw'Ikirenga rufite ububasha bwo kuburanisha mu rwego rw'ubujurire imanza zaciwe mu rwego rwa kabiri n'Urukiko Rukuru rutabifitiye ububasha – 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 ububasha bw'inkiko z'ubucuruzi – Amasezerano – Amasezerano y'ubukode bw'icyumba cyo gucururizamo akozwe hagati y'abacuruzi afatwa nk'amasezerano y'ubucuruzi – Impaka zivutse muri bene aya masezerano ziburanishwa n'inkiko z'ubucuruzi – Itegeko Ngenga n° 59/2007 ryo kuwa 16/12/2007 rigena imiterere, imikorere n'ububasha by'Inkiko z'ubucuruzi, ingingo ya 3. Incamake y'ikibazo: Kayinamura yareze Mwiza Mutagoma mu Rukiko Rwisumbuye rwa Gasabo, agamije kumwishyura ubukode bw'inzu ye yakoreragamo ubucuruzi, Urukiko rwemeza ko ikirego cye nta shingiro gifite kuko nta bimenyetso yatanze bigaragaza umwenda. Urwo rubanza Kayinamura yarujuririye mu Rukiko Rukuru, Mwiza arutangamo inzitizi y'iburabubasha avuga ko inkiko zisanze zidafite ububasha bwo kuburanisha kuko amasezerano umwenda ukomokaho ari ay'ubucuruzi kandi ikibazo kiburanwa kikaba cyari cyarafashweho icyemezo mbere hose n'inkiko z'ubucuruzi. Urukiko Rukuru mu rubanza rubanziriza urundi rwemeje ko iyo nzitizi nta shingiro ifite kuko amasezerano y'ubukode bw'inzu n'ubwo yaba agamije gukorerwamo ubucuruzi agengwa n'amategeko mbonezamubano, naho ku bijyanye n'iremezo ry'urubanza rumutegeka kwishyura ubukode bw'inzu baburana.

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55 Icyo cyemezo Mwiza Mutagoma yakijuririye mu Rukiko rw'Ikirenga ashingiye ku nzitizi y'iburabubasha bw'inkiko zisanze mu kuburanisha uru rubanza nk'uko yari yayitanze mu Rukiko Rukuru; Kayinamura nawe atanga inzitizi avuga ko Urukiko rw'Ikirenga nta bubasha rufite bwo gusuzuma ubujurire bwa Mwiza kuko ikiburanwa kitagejeje ku gaciro kagenwe n'itegeko kugirango Urukiko rw'Ikirenga ruburanishe urubanza rwaciwe mu rwego rwa kabiri n'Urukiko Rukuru, kandi ikibazo cy'iburabubasha bw'inkiko zisanze kikaba kitarigeze kiburanwaho mu nkiko zibanza. Incamake y'icyemezo: 1. Urukiko rw'Ikirenga rufite ububasha bwo gusuzuma ubujurire bwa Mwiza Mutagoma kuko bushingiye ku mpamvu y'uko urubanza yajuririye rwaciwe n'Urukiko Rukuru rutabifitiye ububasha, kandi iyo nzitizi y'iburabubasha akaba yarayishyikirije urwo Rukiko Rukuru rukayifataho umwanzuro.

2. Kutishyura ubukode bw'icyumba bukomoka ku masezerano yabaye hagati y'abacuruzi kandi n'icyo cyumba kikaba gikorerwamo ibikorwa by'ubucuruzi, ni igikorwa cy'ubucuruzi kubera isano gifitanye n'ibikorwa by'ubucuruzi abagiranye amasezerano basanzwe bakora.
3. Amasezerano y'ubukode bw'icyo cyumba agomba kwitwa ay'ubucuruzi, impaka ziyakomokaho zikaba zigomba kuburanishwa n'inkiko z'ubucuruzi. Ubujurire bufite ishingiro. Urubanza rwajuririwe ruteshejwe agaciro. Amagarama aherera ku regwa. 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 Ngenga n° 59/2007 ryo kuwa 16/12/2007 rigena imiterere, imikorere n'ububasha by'Inkiko z'ubucuruzi, ingingo ya 3. Imanza zifashishijwe: MWIZA v. KAYINAMURA

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56 ICYEGERANYO CY'IBYEMEZO BY'INKIKO Kayinamura v. Mwiza, RCOMA 0028/10/CS rwaciwe kuwa 27/04/2012. Mwiza v. Kayinamura, RCOM 0333/10/HCC rwaciwe kuwa 22/03/2011. Inyandiko z'abahanga François Collart Dutilleul et Philippe Delebecque, Contrats civils et commerciaux, 8e édition, p.334. Urubanza I. IMITERERE Y'URUBANZA [1] Kayinamura Fidèle avuga ko yaguze inzu iherereye mu Murenge wa Kimironko ikunze kwitwa “Medi Motel” n'uwitwa Mbabajimana Jean Bosco mu mwaka wa 2007, ariko akaba yari asanzwe afitanye amasezerano y'ubukode n'abantu bayicururizagamo barimo umwe witwa Mwiza Mutagoma. Bivugwa ko amasezerano yakomeje na nyuma y'aho Kayinamura aguriye inzu ariko we na Mwiza bakaba batarashoboye kumvikana ku ishyirwa mu bikorwa ryayo ku buryo bagiranye imanza nyinshi ziyakomokaho, zimwe Mwiza arega Kayinamura kutubahiriza amasezerano bikamutera igihombo, izindi Kayinamura ariwe umurega, uru rubanza rukaba rwaratangijwe na Kayinamura arega Mwiza Mutagoma ko yanze kumwishyura amafaranga y'ubukode y'amezi 39 ahwanye n'amafaranga 26.300.000 Frw kuko buri kwezi ngo yagombaga kwishyura 700.000 Frw. [2] Urukiko Rwisumbuye rwa Gasabo rwaregewe rwaburanishije urubanza Mwiza Mutagoma adahari, ruca urubanza n° RC 0019/11/TGI/GSBO kuwa 14/10/2011, rwemeza ko ikirego cya Kayinamura nta shingiro gifite kuko nta kimenyetso yigeze agaragaza gihamba umwenda Mwiza Mutagoma yari amubereyemo. [3] Kayinamura Fidèle yajuririye icyo cyemezo mu Rukiko Rukuru, muri urwo rubanza Mwiza Mutagoma arutangamo inzitizi zinyuranye zirimo iy'iburabubasha, indi yo kutakira ikirego hamwe n'iyi guhuza imanza. Ku nzitizi y'iburabubasha yavugaga ko Urukiko Rukuru nta bubasha rufite kuko ikibazo kiburanwa cyari cyarashyikirijwe mbere

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57 hose inkiko z'ubucuruzi, Urukiko Rukuru mu rubanza rubanziriza urundi n° RCA 0388/11/KIG rwaciwe kuwa 06/07/2012, rwemeza ko inzitizi ye nta shingiro ifite, ko amasezerano y'ubukode bw'inzu n'ubwo yaba agamije gukorerwamo ubucuruzi agengwa n'amategeko mbonezamubano, ko adashobora kwitwa ay'ubucuruzi. [4] Ku birebana n'iremezo ry'urubanza, Urukiko Rukuru rwaciye urubanza n° RCA 0388/11/HC/KIG kuwa 9/8/2012, rwemeza ko ikirego rwashyikirijwe na Kayinamura gifite ishingiro kuri bimwe, rwemeza ko urubanza rwajuririwe ruhindutse kuri byose, rutegeka Mwiza Mutagoma kwishyura Kayinamura Fidèle amafaranga yose hamwe angana na 24.830.000 Frw no kuyatangira umusogongero wa Leta uhwanye na 993.200 Frw no kwishyura amagarama ahwanye na 10.050 Frw. [5] Mwiza Mutagoma yajuririye mu Rukiko rw'Ikirenga avuga ko imikirize y'urubanza yaranze no kubogama kutihishira ko kandi Urukiko rwaburanishije ikirego kitari mu bubasha bwarwo, ko icyo umucamanza yashingiyeho akena agaciye k'ubukode kitigeze kigaragazwa, ko hari ibyo yirengagije mu guca urubanza. Ubujurire bwa Mwiza Mutagoma bwakorewe ibanzirizasuzuma, Umwanditsi Mukuru w'Urukiko rw'Ikirenga mu cyemezo N° 0011/12/civ/GCS cyo kuwa 02/11/2012, avuga ko ubu bujurire bwe butari mu bubasha

bw'Urukiko rw'Ikirenga, ariko nyuma y'itakamba ryakozwe na Mwiza Mutagoma, ibanzirizasuzuma ry'iyi dosiye ryashinzwe umucamanza maze yemeza ko ubujurire bwa Mwiza Mutagoma bukwiye kwakirwa bugasuzumwa. [6] Iburanisha ry'urubanza ryabereye mu ruhame kuwa 05/11/2013, Mwiza Mutagoma yunganiwe na Me Mutabazi Innocent naho Kayinamura Fidèle ahagarariwe na Me Ndagijimana Emmanuel, wasabye Urukiko ko mbere y'uko haburanishwa ubujurire bwa Mwiza, rwabanza gusuzuma inzitizi Kayinamura yatanze mu mwanzuro we usubiza irebana n'iburabubasha ry'Urukiko rw'Ikirenga bwo kuburanisha ubujurire bwa Mwiza Mutagoma, Urukiko rurabyemera MWIZA v. KAYINAMURA

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58 ICYEGERANYO CY'IBYEMEZO BY'INKIKO maze iburanisha rikomeza hagibwa impaka ku nzitizi yatanze na Kayinamura Fidèle. II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO Inzitizi yatanze na Kayinamura muri uru rubanza igamije kwerekana ko ubujurire bwa Mwiza Mutagoma butari mu bubasha bw'Urukiko rw'Ikirenga harebwe ingingo y'itegeko yashingiyeho avuga ko Urukiko rw'Ikirenga rufite ububasha bwo kuburanisha ubujurire bwe kuko ngo uretse kuba agaciho ikiburanwa katageze ku mubare w'amafaranga ateganywa n'itegeko, Kayinamura avuga kandi ko n'ibyo Mwiza avuga ko ububasha bw'Urukiko rw'Ikirenga abushingira ku mpamvu ijyanye ni uko inkiko zabanje (Urukiko Rwisumbuye rwa Gasabo n'Urukiko Rukuru) Urubanza N° RCAA 0001/13/CS zacye urubanza rujuririrwa zitabifitiye ububasha nabyo nta shingiro bifite bitewe nuko amasezerano agibwaho impaka ari imbonezamubano. Mu mpamvu zatumye Mwiza Mutagoma ajurira, harimo imwe yerekeranye n'iburabubasha mu gusuzuma inzitizi ya Kayinamura, Urukiko rukaba rwinjira byanze bikunze kuri iyi ngingo y'ubujurire ya Mwiza. Kugira ngo uru Rukiko rwemeze ko ubujurire bwa Mwiza buri cyangwa butari mu bubasha bwarwo ni ngombwa ko hasuzumwa ingingo y'itegeko Mwiza Mutagoma yashingiyeho ububasha bw'Urukiko rw'Ikirenga atanga ubujurire bwe hamwe n'ikibazo cyo kumenya niba Urukiko Rukuru rwari rufite ububasha bwo kuburanisha uru rubanza. Kumenya niba ubujurire bwa Mwiza Mutagoma buri mu bubasha bw'Urukiko rw'Ikirenga. 1. Ku birebana n'ingingo y'itegeko Mwiza Mutagoma yashingiyeho ububasha bw'Urukiko rw'Ikirenga bwo kuburanisha ubujurire bwe.

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59 [7] Me Ndagijimana Emmanuel, uburanira Kayinamura Fidèle avuga ko ikirego cya Mwiza Mutagoma kitagomba kwakirwa mu Rukiko rw'Ikirenga kubera ko kinyuraniye n'ibiteganywa n'ingingo ya 28, igika cya 2, agace kayo ka 7°, y'Itegeko Ngenga n° 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, iyo ngingo ikaba iteganywa ko "Urukiko rw'Ikirenga rufite kandi ububasha bwo kuburanisha mu rwego rw'ubujurire imanza zaciwe ku rwego rwa kabiri n'Urukiko Rukuru..., iyo izo manza zagenwemo n'Urukiko indishyi zingana nibura na miliyoni mironko itanu z'amafaranga y'u Rwanda (50.000.000Frw) cyangwa se zifite agaciho kagenwe n'Umucamanza igihe habaye impaka, kangana nibura n'amafaranga y'u Rwanda 50.000.000Frw", kubera ko mu rubanza rujuririrwa Mwiza Mutagoma yategetswe kwishyura Kayinamura Fidèle indishyi zose hamwe zingana na 24.830.000 Frw, izo ndishyi zikaba

ziri muni y'iziteganywa n'iyi ngingo imaze kuvugwa. [8] Avuga kandi ko Mwiza Mutagoma ashingira ububasha bw'Urukiko rw'Ikirenga bwo kuburanisha ubujurire bwe ku ngingo ya 28, igika cya 2, agace ka 2°, y'Itegeko Ngenga n° 03/2012/OL ryo kuwa 13/06/2012 ryavuzwe haruguru, iteganya ko Urukiko rw'Ikirenga rufite ububasha bwo kuburanisha mu rwego rw'ubujurire, imanza zaciwe mu rwego rw'ubujurire ku rwego rwa kabiri n'Urukiko Rukuru,....., “iyi izo manza zaciwe n'Urukiko rutabifitiye ububasha”, nyamara mu rubanza rujuririrwa, Mwiza Mutagoma atarigeze atanga inzitizi y'iburabubasha ngo abyangirwe, bityo rero umucamanza w'ibanzirizasuzuma akaba ataragombaga kubishingiraho mu kugena ububasha bw'Urukiko mu gihe bitigeze biburanwa mu nkiko zibanza. [9] Me Mutabazi Innocent wunganira Mwiza Mutagoma avuga ko inzitizi yatanze n'uburanira Kayinamuna Fidèle ishingiyeye ku kuvuga ko ubujurire bw'uwo yunganira butari mu bubasha bw'Urukiko rw'Ikirenga kubera ko bunyuranije n'ibiteganywa n'ingingo ya 28, igika cya 2, agace ka 7°, y'Itegeko Ngenga n° 03/2012/OL ryo kuwa 13/06/2012 ryavuzwe haruguru, nta shingiro ifite, kubera ko ubujurire Mwiza Mutagoma yatanze bushingiyeye ku ngingo ya 28, igika cya kabiri, agace ka 2°, y'Itegeko Ngenga n° 03/2012/OL rimaze kuvugwa, MWIZA v. KAYINAMURA

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60 ICYEGERANYO CY'IBYEMEZO BY'INKIKO asobanura ko urubanza rujuririrwa rwaciwe n'Urukiko mbonezamubano aho gucibwa n'Urukiko rw'Ubucuruzi kuko imiterere y'ikiburanwa yari ikibazo cy'ubucuruzi cyagombaga gukemurwa n'Inkiko z'ubucuruzi. [10] Asobanura kandi ko impamvu mu Rukiko Rwisumbuye rwa Gasabo Mwiza Mutagoma atatanze inzitizi y'iburabubasha byatewe nuko urubanza rwaburanishijwe adahari ariko ko aburana mu Rukiko Rukuru rwa Kigali, Mwiza Mutagoma yatanze inzitizi y'iburabubasha maze mu rubanza rubanziriza urundi n° RCA 0388/11/HC/KIG rwaciwe tariki ya 09/08/2011, umucamanza avuga ko nta shingiro ifite nta bisobanuro atanze, ko n'indi nzitizi yari yatanze irebana n'ingufu zihabwa icyaburanwe (autorité de la chose jugée) nayo yanze kuyakira. UKO URUKIKO RUBIBONA [11] Urukiko rurasanga uwunganira Mwiza Mutagoma asobanura mu mwanzuro utanga ubujurire bwe mu Rukiko rw'Ikirenga, ko ashingira ububasha bw'uru Rukiko bwo kuburanisha ubujurire bwe ku ngingo ya 28, igika cya kabiri, agace ka 2°, y'Itegeko Ngenga n° 03/2012/OL ryo kuwa 13/06/2012, aka gace kakabaateganya ko Urukiko rw'Ikirenga rufite ububasha bwo kuburanisha mu rwego rw'ubujurire imanza zaciwe mu rwego rwa kabiri n'Urukiko Rukuru, Urukiko Rukuru rwa Gisirikare cyangwa Urukiko Rukuru rw'Ubucuruzi, iyi izo manza zaciwe n'Urukiko rutabifitiye ububasha, bityo imvugo y'uhagarariye Kayinamuna ikaba nta shingiro ifite. [12] Urukiko rusanga kandi imvugo y'uhagarariye Kayinamuna ko Mwiza Mutagoma atigeze abyutsa inzitizi y'iburabubasha mu Rukiko Rukuru nayo nta shingiro ifite, kuko muri kopi y'imikirize y'urubanza rubanziriza urundi n° RCA 0388/11/KIG rwaciwe kuwa 09/08/2011, ibyanditse mu gika cya kabiri ku rupapuro rwa mbere, bigaragaza ko Mwiza yatanze inzitizi y'iburabubasha kuko umucamanza yagize ati : “Mwiza na Me Mutabazi umuburanira bavugaga ko uru rubanza ruri mu bubasha bw'Inkiko z'ubucuruzi”, ndetse no ku rupapuro rwa 2 kugeza ku rwa 3, bigaragara ko kimwe mu bibazo byasesenguwe n'Urukiko

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61 Rukuru, icya mbere cyerekeranye n'ububasha bw'Urukiko kandi ko ari Mwiza Mutagoma wazamuye icyo kibazo, ko Me Ndagijimana wari uhagarariye Kayinamura yayireguyeho, nyuma Urukiko rwemeza ko "amasezerano y'ubukode bw'inzu n'ubwo yaba agamije gukorerwamo ubucuruzi agengwa n'amategeko mbonezamubano, ko adashobora kwitwa ay'ubucuruzi", yemeza ko inzitizi yatanze na Mwiza Mutagoma nta shingiro ifite.

2. Kumenya niba Urukiko Rukuru (ruburanisha imanza mbonezamubano) rwari rufite ububasha bwo kuburanisha impaka zikomoka ku masezerano y'ubukode bw'inzu ya Kayinamura Fidèle yacururizwagamo na Mwiza Mutagoma. [13] Me Mutabazi Innocent wunganira Mwiza Mutagoma avuga ko Inkiko zabanje zitari zifite ububasha bwo kuburanisha ikirego zashyikirijwe kubera ko kamere (nature) y'ikiburanwa ari ikibazo cy'ubucuruzi cyagombaga gukemurwa n'Inkiko z'ubucuruzi cyane ko n'ababuranyi ari abacuruzi kandi ko nk'uko yabisobanuye haruguru, yatanze inzitizi y'iburabubasha mu Rukiko Rukuru arusobanurira ko ikiburanwa kitari mu bubasha bw'Urukiko Rukuru kuko mbere hose ikibazo cy'amasezerano aburanwa cyari cyarashyikirijwe Inkiko z'ubucuruzi mu rubanza n° RCOM 0333/10/HCC rwaciwe kuwa 22/03/2011 n'Urukiko Rukuru rw'ubucuruzi, no mu rubanza n° RCOMA 0028/10/CS rwaciwe kuwa 27/04/2012 n'Urukiko rw'Ikirenga, ko muri izi nkiko zombi Kayinamura yatanze inzitizi y'iburabubasha, ariko izi nkiko zombi zikaba zaravuze ko arizo zifite ububasha bwo kuburanisha ikirego cya Mwiza Mutagoma, ko rero asanga Kayinamura yaragiye mu nkiko mbonezamubano amaze gutsindwa mu nkiko z'ubucuruzi agamije gusa kunaniza Mwiza. [14] Ku byerekeye ububasha bw'Urukiko Rukuru rwaciye urubanza rujuririrwa, Me Ndagijimana Emmanuel uburanira Kayinamura Fidèle avuga ko Inkiko zabanje zari zifite ububasha bwo kuburanisha uru rubanza kubera ko amasezerano y'ubukode bw'inzu yabaye hagati ya Mwiza Mutagoma na Kayinamura ari amasezerano y'ubukode asanzwe agengwa n'amategeko mbonezamubano, ibibazo biyakomokaho bikaba MWIZA v. KAYINAMURA

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62 ICYEGERANYO CY'IBYEMEZO BY'INKIKO bigomba gukemurwa n'inkiko mbonezamubano. Asobanura ko ikindi cyemeza ko amasezerano yabaye hagati ya Mwiza Mutagoma na Kayinamura ari amasezerano mbonezamubano (contrat civil), ni uko Mwiza Mutagoma atari umucuruzi, akaba ngo atarashoboraga gukora amasezerano y'ubukode bw'ubucuruzi (bail commercial) bitewe nuko yari umusirikare adafite "registre de commerce", bityo rero ibibazo bivutse mu masezerano yagiranye na Kayinamura w'umucuruzi bikaba byaragombaga gukemurwa n'Inkiko z'imbonezamubano nk'uko byagenze. UKO URUKIKO RUBIBONA [15] Urukiko rw'Ikirenga rusanga mu iburanisha ry'urubanza ryabereye mu Rukiko Rukuru kuwa 26/06/2012, Mwiza Mutagoma na Me Mutabazi Innocent umwunganira baratanze inzitizi eshatu harimo n'ijyanye n'iburabubasha bw'Urukiko Rukuru, basobanura ko rudafite ububasha bwo kuburanisha urubanza rwe kubera ko icyo baburana cyasuzumwe n'Urukiko Rukuru rw'Ubucuruzi mu rubanza RCOM 0333/10/HCC, Urukiko rw'Ikirenga narwo rugisuzuma mu rwego rw'ubujurire mu

rubanza n° RCOMA 0028/10/CS. [16] Urukiko rusanga ikiburanwa muri uru rubanza ari impaka zavutse mu masezerano y'ubukode bw'inzu ya Kayinamura Mwiza Mutagoma acururizamo, Kayinamura akaba avuga ko izi mpaka zigomba gukemurwa n'inkiko ziburanisha imanza mbonezamubano kuko ariya masezerano ari ay'imbonezamubano bitewe nuko Mwiza yayakoze ari umusirikare, adafite na "registre de commerce". [17] Mu rubanza RCOMA 0028/10/CS rwaciwe kuwa 27/04/2012 n'Urukiko rw'Ikirenga, mu gika cya [7], uru Rukiko rwemeje ko Mwiza Mutagoma ari umucuruzi kuko yagaragaje ko afite "registre de commerce", bityo rero inzitizi y'iburabubasha bw'inkiko z'ubucuruzi bwo gukemura ikibazo cy'ubwishyu bukomoka ku masezerano y'ubukode Mwiza Mutagoma yagiranye na Kayinamura Fidèle, hashingiwe gusa ko Mwiza ngo yayakoze ari umusirikare udafite

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63 "registre de commerce", ikaba nta shingiro ifite kuko iki kibazo cyakemutse mu rubanza rumaze kuvugwa rwabaye itegeko, ko rero nta gushidikanya ko ikibazo cyo kutishyura ubukode bw'inzu bukomoka ku masezerano yabaye hagati ya Mwiza Mutagoma na Kayinamura Fidèle bombi b'abacuruzi ari igikorwa cy'ubucuruzi kubera isano gifitanye n'ibikorwa by'ubucuruzi basanzwe bakora hashingiwe ku byateganywaga n'ingingo ya 3, agace ka mbere y'Itegeko Ngenga n° 59/2007 ryo kuwa 16/12/2007. [18] Ibi kandi bishimangirwa n'ibivugwa n'abahanga mu mategeko François Collart Dutilleul et Philippe Delebecque basobanura ko ubukode bw'ubucuruzi buvugwa ku mazu acururizwamo, bikorwa n'umucuruzi cyangwa umunyenganda wanditswe mu bitabo by'ubucuruzi cyangwa rwiyezamirimo wanditswe mu bitabo bibarurirwamo abanyabukorikori bakora cyangwa badakora ibikorwa by'ubucuruzi ("le statut des baux commerciaux à vocation s'appliquer aux baux des immeubles ou locaux dans lesquels un fonds est exploité, que ce fonds appartienne soit à un commerçant ou à un industriel immatriculé au registre du commerce, soit à un chef d'entreprise immatriculée au répertoire des métiers accomplissant ou non des actes de commerce")⁶. Ku rubuga rwa interneti, abandi bahanga mu mategeko bavuga ko igikorwa cy'ubucuruzi kigomba kumvikana ko ari ikirebana n'umurimo w'ubucuruzi, umucuruzi akora ku buryo buhoraho mu mwuga we w'ubucuruzi, kandi ko hagomba gutandukanywa igikorwa umucuruzi akora mu mwuga we w'ubucuruzi n'icyo akora mu buzima bwe bwihariye, bakavuga ko nk'iyi umucuruzi aguze inzu y'umuryango aba akoze igikorwa mbonezamubano, ko ariko iyi aguze icyumba cyo gucururizamo, icyo gikorwa cyitwa icy'ubucuruzi, kandi ko n'inkiko zemeje ko amasezerano akozwe n'umucuruzi mu rwego rw'umwuga we aba ari ay'ubucuruzi, ko ndetse n'inshingano zikomoka

6 François Collart Dutilleul et Philippe Delebecque, Contrats civils et commerciaux, 8e édition, p.334. MWIZA v. KAYINAMURA 1 1

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64 ICYEGERANYO CY'IBYEMEZO BY'INKIKO ku makosa mbonezamubano cyangwa ibisa nayo bikoze n'umucuruzi nabyo bifatwa nk'ibikorwa by'ubucuruzi.⁷ [19] Hashingiwe ku bimaze gusobanurwa, Urukiko rurasanga kuba Mwiza Mutagoma yari umucuruzi ufite "regitre de

commerce”, amasezerano y’icyumba yakodeshwaga na Kayinamura Fidèle akagikorera ibikorwa by’ubucuruzi bijyanye n’umwuga we, agomba kwitwa ay’ubucuruzi, impaka ziyakomokaho zikaba zigomba kuburanishwa n’Inkiko z’ubucuruzi, ko rero Inkiko mbonezamubano zaburanishije uru rubanza mu rwego rwa mbere n’urwa kabiri mu bujurire zitabifitiye ububasha, bityo urubanza n° RCA 0388/11/KIG rwaciwe kuwa 06/07/2012 n’Urukiko Rukuru rukaba ruteshejwe agaciro. III. ICYEMEZO CY’URUKIKO [20] Rwemeye kwakira inzitizi yatanze na Kayinamura Fidèle kuko byakozwe mu buryo n’inzira bikurikije amategeko; [21] Rwemeje ko nta shingiro ifite; [22] Rwemeje ko urubanza rwajuririwe ruteshejwe agaciro.

7 <https://www.google.com/search>, cours de droit commercial, Daphnée Principiano, Sont commerçants ceux qui exercent les actes de commerce et en font leur profession habituelle. L’acte doit se rattacher à l’activité commerciale, cela implique une distinction entre la vie professionnelle du commerçant et sa vie privée qui ne sera soumise qu’au droit commercial. Si un commerçant achète une maison pour sa famille: c’est un acte civil, par contre si le même commerçant achète un local, c’est un acte commercial. Ne sont pas commerciaux les achats faits par un commerçant pour son usage particulier. La jurisprudence dit que tous les contrats passés par un commerçant pour les besoins de son commerce sont commerciaux, qu’également toutes les obligations qui peuvent résulter d’un délit ou quasi-délit peuvent être qualifiés d’actes de commerce. 2 2

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65 [23] Rutegetse Kayinamura Fidèle kwishyura amagarama y’ibyakozwe kuri uru rubanza angana na 25.750 Frw, atayishyura mu gihe cy’iminsi umunani (8 jours) uru rubanza rusomwe, ayo mafaranga agakurwa mu byo ku ngufu za Leta. MWIZA v. KAYINAMURA

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66 NDIZIHIWE N’UNDI v. MUDAKEMWA N’ABANDI [Rwanda URUKIKO RW’IKIRENGA- RCAA 0136/11/CS (Rugege, P.J., Mugenzi na Munyangeri N., J.) 14 Gashyantare 2014] Amategeko agenga imiburanishirize y’imanza z’imbonezamubano – Ubujurire – Kureka ikirego cy’ubujurire ku cyemezo cy’ibanzirizasuzuma – Uwajuriye afite uburenganzira bwo kureka ubujurire bwe n’iyo uwarezwe atabyemera – Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y’imanza z’imbonezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegets, ingingo ya 26. Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Indishyi ku gihombo gitewe n’ikirego cy’ubujurire kiretswe n’umuburanyi – Uwarezwe mu bujurire afite uburenganzira ku ndishyi z’ibyo yatanze kubera ubujurire yari yarezwemo n’uwaje kubureka – Itegeko ryo kuwa 30/07/1888 rigenga amasezerano cyangwa imirimo nshinganwa, ingingo ya 258. Incamake y’ikibazo: Ndizihiwe na Nyirabihogo bamaze kubona ko ubujurire bwabo butakiriwe kubera ko umucamanza w’ibanzirizasuzuma mu Rukiko rw’Ikirenga yasanze bwaratanze bukererewe, bujuririye icyo cyemezo ariko nyuma bandikira Urukiko bavuga ko baretse ubwo bujurire. Mudakemwa na bagenzi be baregaga mu bujurire bemera ko kureka ubujurire ari uburenganzira bw’umuburanyi, ariko bakavugaga ko bitababura guhabwa indishyi zishingiye ku

gihombo batewe no gukurikirana urwo rubanza no guhamba Avoka. Incamake y'icyemezo: 1. Nta cyatuma uwatanze ikirego atemererwa kukireka, mu gihe abikoze mu nzira zemewe n'amategeko, kabone n'iyu uwo baburana atabyemera, kuko ari uburenganzira yemererwa n'itegeko.

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2. Indishyi zisabwa n'abaregwa mu bujurire ntizishingiye ku kiburanwa ahubwo zishingiye ku gihombo batewe n'ibyo batanze kubera ubujurire bari barezwemo, uwari wajuriye akaza kubureka. Bakwiriye kuzihabwa bitabaye ngombwa ko bajya gutangiza urundi rubanza kuri izo ndishyi. Abajuriye bemerewe kureka ubujurire. Abaregwa bahawe indishyi z'igihombo cy'avoka n'ikurikiranarubanza. Amagarama y'urubanza aherereye ku bujurire. Amategeko yashingiweho: Itegeko no 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ingingo ya 26. Itegeko ryo kuwa 30/07/1888 rigenga amasezerano cyangwa imirimo nshinganwa, ingingo ya 258. Nta manza zashingiweho. Urubanza I. IMITERERE Y'URUBANZA: [1] Nyuma y'uko Ndizihiwe na Nyirabihogo bujuririyemo mu Rukiko rw'Ikirenga urubanza RCA188/10/HC/MUS rwaciye n'Urukiko Rukuru, haburana izungura ry'umutungo wasizwe na Rusigariye, umucamanza w'ibanzirizasuzuma yemeje, ku wa 11/11/2011, ko ubwo bujurire butakiriye kuko bwatanzwe bukerewe. [2] Ndizihiwe na Nyirabihogo bujuririyemo icyo cyemezo cy'ibanzirizasuzuma, ariko nyuma, mu ibaruwa yabo yo kuwa 04/12/2013, bamenyesha Urukiko ko baretse ubujurire, bashingiye ku ngingo ya 26 y'itegeko no 21/2012 ryo kuwa 14/06/2012 ryerekeye NDIZIHIWE N'UNDI v. MUDAKEMWA N'ABANDI

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68 ICYEGERANYO CY'IBYEMEZO BY'INKIKO imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets. [3] Abaregwa mu bujurire, aribo Mudakemwa, Mukarutura na Nyirasekanabo bo bavuye ko batemera ko abajuriye bareka ikirego, mu gihe nabo bari baratanze ubujurire bukurirye ku bundi kuwa 10/10/2013 basaba indishyi z'igihombo cya avoka n'ikurikirana rubanza. [4] Urubanza rwaburanishijwe mu ruhamye ku wa 14/01/2014, abaregwa mu bujurire bahagarariye na Me Habyarimana Christine naho abaregwa bahagarariye na Me Uwimana Shani. II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO [5] Muri uru rubanza harasuzumwa ikibazo cyo kumenya niba ukureka ikirego kw'abajuriye kwakwemerwa, nyuma habe hanasuzumwa niba ubujurire bukurirye ku bundi bwatanzwe n'uregwa mbere y'uko uwajuriye areka ikirego, bukwakirwa mu gihe ukureka ikirego kwakwemerwa. Ku bijyanye n'iyemerwa ry'ukureka ikirego. [6] Uburanira abajuriye avuye ko bahisemo kureka ikirego bashingiye ku ngingo ya 26 y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, akaba asanga bakwiye kubemererwa nta kindi basabwe, kuko itegeko rivuye ko bitari ngombwa ko uwo baburana abyemera. Uburanira abaregwa nawe yemera ko ukwemererwa kureka ikirego ari uburenganzira

bw'uwagitanze, ariko ko bitabuza abaregwaga kugira indishyi basaba. [7] Ingingo ya 26 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 kureka ikirego ari

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69 ukwiyambura ububasha n'uburenganzira umuntu yari afite bwo gukomeza gukurikirana ikirego cye, ukwemera kw'undi muburanyi kukaba atari ngombwa. [8] Urukiko rurasanga, hashingiwe kuri iyo ngingo y'itegeko, nta cyatuma uwatanze ikirego atemererwa kukireka, mu gihe abikoze mu nzira zemewe n'amategeko, kabone n'iyo uwo baburana atabyemera, kuko ari uburenganzira yemererwa n'itegeko, bityo rero Ndizihiwe na Nyirabihogo bakaba bemerewe kureka ubujurire bwabo. Ku bijyanye n'indishyi zisabwa n'abaregwaga. [9] Me Habyarimana uburanira Ndizihiwe na Nyirabihogo avuga ko ukureka ikirego nk'uko biteganywa n'ingingo ya 26 y'Itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi bitagomba ko undi muburanyi abyemera. [10] Avuga ko n'ubujurire bwuririye ku bundi bwatanzwe n'abo baburana butabuza ko ukureka ikirego kwemerwa, kuko ubwo bujurire ari ubushamikiye ku kirego cy'ibanze, mu gihe rero ba nyiracyo bakiretse ubwo bujurire butaba bugisuzumwe, ndetse ingingo ya 167 y'itegeko rishya ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi ikaba isobanura, mu gika cyayo cya gatatu, ko iyo ubujurire bw'ibanze butakiriwe, ubujurire bubwuririyeho nabwo budashobora kwakirwa. [11] Asobanura ko niba abo baburana bashaka kwishyuza indishyi bifuzaga kwaka, batanga ikirego cy'ibanze bashingiye ku ngingo ya 258 y'Igitabo cya gatatu cy'Urwunge rw'amategeko mbonezamubano bagaragaza ibyo baba barangirijwe ku makosa ya Ndizihiwe na Nyirabihogo. [12] Me Uwimana Shani uburanira Mudakemwa, Mukarutura na Nyiransekanabo baregwaga mu bujurire we avuga ko n'ubwo ingingo ya 26 ivuga ko ukwemera kw'undi muburanyi bitari ngombwa kugira ngo ushaka kureka ikirego abyemererwe n'Urukiko, hadakwiye kwirengagizwa igihombo uwaregwaga aba yaratejwe mu gukurikirana NDIZIHIWE N'UNDI v. MUDAKEMWA N'ABANDI

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70 ICYEGERANYO CY'IBYEMEZO BY'INKIKO urubanza no guhemba avoka, anavuga ko muri uru Rukiko hari imanza zaciwe zikagena indishyi z'igihombo nk'icyo. [13] Asobanura ko abo aburanira bashyizeho avoka abakorera imyanzuro yo kwiregura, bamuhemba 1.000.000 frw, hatabariwemo ibyo batanze ku ikurikiranarubanza, kuko baje ku Rukiko rw'Ikirenga incuro zigera kuri eshatu baturuka ku Gisenyi, ari yo mpamvu basaba ko bakwishyurwa 2.500.000 frw, akubiyemo igihombo cya avoka n'ikurikiranarubanza, cyane ko abaretse ikirego babikoze nyuma y'uko abo baburana batanze imyanzuro yabo. [14] Ku kibazo cyo kuba abaregwaga mu bujurire bashobora gutangiza ikirego kigamije kwaka indishyi z'ibyo batanze mu guhemba avoka no gukurikirana urubanza, Me Uwimana avuga ko byaba ari ukubarushya no kwirengagiza ko bamaze igihe kirekire basiragira. [15] Urukiko rurasanga, hakurikijwe ibisobanuro by'abaregwaga mu bujurire nk'uko byagaragajwe haruguru, indishyi basaba atari izishingiye ku cyaburanwaga, ahubwo ari izijyanye gusa n'ibyo batanze bitewe n'ubujurire bari barezwemo

(costs) bikaba byumvikana ko, hakurikijwe ibiteganywa n'ingingo ya 258 y'Igitabo cya gatatu cy'Urwunge rw'Amategoko Mbenezamubano, byabateje igihombo giturutse kuri icyo kirego cy'ubujurire, bakaba rero bakwiye kwishyurwa ibyo batanze muri urwo rwego, bitabaye ngombwa ko bajya gutangiza urubanza kuri izo ndishyi. [16] Ku bijyanye n'urugero rw'indishyi basaba, Urukiko rurasanga, nta bimenyetso byakwiringirwa bagaragaje byerekana ko amafranga 2.500.000 ari yo batanze koko ku gihembo cya avoka n'ikurikirana rubanza, bakaba rero bagenerwa, mu bushishozi bw'Urukiko, 500.000 frw y'igihembo cya avoka bose, na 200.000 frw buri wese y'ikurikiranarubanza, yose hamwe akaba 1.100.000 frw. III. ICYEMEZO CY'URUKIKO [17] Rwemeye ukureka ubujurire kwa Ndizihiwe na Nyirabihogo;

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71 [18] Rubategetse kwishyura Mudakemwa, Mukarutura na Nyiransekanabo indishyi z'ibyo batanze biturutse kuri ubwo bujurire, zihwanye na 1.100.000 frw, akubiyemo 500.000 frw y'igihembo cya avoka, na 600.000 y'ikurikiranarubanza. [19] Rubategetse kwishyura buri wese icya ½ cy'amagarama y'uru rubanza, ahwanye na 48.250 frw, ni ukuvuga 24.125 frw buri wese. NDIZIHIWE N'UNDI v. MUDAKEMWA N'ABANDI

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IMANZA Z'UBUCURUZI

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73 AMSAR v. IKIGO CY'IGIHUGU GISHINZWE KWINJIZA IMISORO N'AMAHORO (RRA) [Rwanda URUKIKO RW'IKIRENGA – RCOM A 0056/10/CS (Mukanyundo, P.J., Havugiyaremye na Kayitesi R, J.) 05 Kanama 2011] Amategoko y'imisoro – Igenagaciro ry'Umusoro ku nyungu hashingiwe ku ihame ry'ubwigenge bw'isoreshwa – Buri mwaka usoroshwa ukwawo – Itegeko n° 16/2005 ryo ku wa 18/08/2005 rigena imisoro itaziguye ku musaruro, ingingo ya 2(7°). Amategoko y'imisoro – Igenagaciro k'ubwicungure – Ubwicungure ku gikoresho cy'akazi bubarwa iyo cyakoreshejwe mu nyungu zitaziguye z'ibyo cyagenewe – Itegeko n° 8/97 ryo kuwa 26/06/1997 rigena Imisoro itaziguye ku nyungu zinyuranye no ku bihembo nk'uko ryahinduwe kandi ryujujwe kugeza ubu, ingingo ya 10 (2°) ;(5°). Incamake y'ikibazo: Urega yakorewe igenzura ry'umusoro ku nyungu y'umwaka wa 2003, acibwa umusoro nta nteguza ungana na 25.703.169 Rwf, ajuririye komiseri Mukuru, asubizwa ko ubujurire bwe bufite ishingiye kuri bimwe, ku musoro yaciwe agabanyirizwaho 1.372.044 Rwf, hasigara 24.331.125 Frw. Urega yajuririye Urukiko Rukuru rw'ubucuruzi asaba ko rwayikuriraho uwo musoro asanga yaraciwe kandi muri uwo mwaka yaragize igihombo kingana na 31.862.937 Frw. Urukiko Rukuru rw'Ubucuruzi rwemeje ko ikirego cye nta shingiro gifite, ko umusoro wemejwe na Komiseri Mukuru asubiza ku itakamba ry'urega ugumye. Urega yajuririye Urukiko rw'Ikirenga anenga kuba Urukiko Rukuru rw'Ubucuruzi rutarahaye agaciro icyemezo kigaragaza igabanuka ry'umwenda wa 69.583.125 frw yerekeranye na pièces de rechange/spare parts n'imashini zinyuranye, rukanga ko akurwa mu

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74 ICYEGERANYO CY'IBYEMEZO BY'INKIKO nyungu zisoreshwa mu mwaka wa 2003 kandi nyamara urega yararishye ayo mafaranga, rukaba rutaranitaye no kubwicingure (depreciation) bwa "groupe électrogène" yakoreshwaga aho Umuyobozi Mukuru wungirije wa sosiyete yari atuye mu nyungu zisoreshwa. Naho Uregwa akavuga ko ingingo z'ubujurire bw'urega nta nshingiro zifite kubera ko nta mwaka w'umusoro uvangwa n'undi. Ikindi ni uko kubirebana n'ubwicingure (depreciation) bwa "groupe électrogène" yakoreshwaga aho Umuyobozi Mukuru wungirije wa sosiyete yari atuye, avuga ko atavanwa mu nyungu z'isoreshwa kuko ibivanwamo ari ibyashowe mu birengera inyungu z'umurimo ku buryo butaziguye cyangwa mu birebana n'icungwa risanzwe ry'umurimo akaba atariko byagenze. Incamake y'icyemezo:1. Amafaranga angana na 69.583.838 agaragara mu cyemezo kigaragaza igabanuka ry'umwenda cyatanzwe n'urega ntabwo yakurwa mu nyungu z'isoreshwa ry'umwaka wa 2003, kubera yuko yishyuwe nyuma y'uwo mwaka. Bityo ihame ry'ubwigenge bw'igihe cy'isoresha rikaba rigomba kubahirizwa.

2. Kugira ngo ubwicingure (depreciation) bw'icyuma gitanga amashanyarazi "groupe électrogène" buvanwe mu nyungu ni uko kiba cyarakoreshejwe mu nyungu z'umurimo cyagenewe ku buryo butaziguye. Mu gihe ubwicingure butemejwe ntabwo byafatwa nka kimwe mu byasohotse bigendanye n'umurimo kugirango buvanwe mu nyungu zisoreshwa. Ubujurire nta shingiro bufite. Urubanza rwajuririwe ntiruhindutse. Amagarama aherereye ku wajuriye. Amategeko yashingiweho: Itegeko n° 16/2005 ryo kuwa 18/08/2005 rigena imisoro itaziguye ku musaruro, ingingo ya 2(7°).

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75 Itegeko n° 15/2004 ryo kuwa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 35, igika cya gatatu. Itegeko n° 8/97 ryo kuwa 26/06/1997 rigena Imisoro itaziguye ku nyungu zinyuranye no kubihembo nk'uko ryahinduwe kandi ryujijwe kugeza ubu, ingingo ya 10 (2°);(5°). Nta manza zifashishijwe. Urubanza I. IMITERERE Y'URUBANZA MURI MAKE [20] Sosiyete AMSAR BURUNDI SA, succursale du Rwanda, yakorewe igenzura ry'umusoro ku nyungu (Impôt sur les Bénéfices des Sociétés) w'umwaka wa 2003, icibwa umusoro nta nteguza (imposition d'office) ungana na 25.703.169 Frw. AMSAR yajuririye Komiseri Mukuru, ayisubiza ko ubwo bujurire bufite ishingiro kuri bimwe, maze ku musoro yaciwe hagabanywaho 1.372.044 Frw, isigara yishyuzwa umusoro ungana na 24.331.125 Frw. AMSAR ntiyishimiye icyo cyemezo, iregera Urukiko Rukuru rw'Ubucuruza isaba ko rwayikuraho uwo musoro isanga yaraciwe kandi muri uwo mwaka yaragize igihombo kingana na 31.862.937 Frw. [21] Urukiko Rukuru rw'Ubucuruza rwemeje ko ikirego cya AMSAR nta shingiro gifite, ko umusoro wemejwe na Komiseri Mukuru wa Rwanda Revenue Authority asubiza ku itakamba rya AMSAR ugumye. [22] Mu mpamvu rwashingiyeho, Urukiko rwasanze ku byererekeranye n'uko AMSAR yashoreshejwe nta nteguza byarakurikije amategeko, by'umwihariko ingingo ya 19 igika cya mbere n'ya 24 z'itegeko n°08/97 ryo kuwa 26/06/1997 ryagengaga icyo gihe imisoro itaziguye ku nyungu zinyuranye no ku bihembo. Ku birebana n'uko Rwanda Revenue Authority yanze gukura "amortissement du groupe électrogène" mu nyungu zisoreshwa, rwasanze ayo mafaranga AMSAR

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76 ICYEGERANYO CY'IBYEMEZO BY'INKIKO adakwiye gukurwa muri izo nyungu hakurikijwe ibiteganywa n'ingingo ya 10, agace ka 1°, y'itegeko rivuzwe haruguru, naho ku birebana na 69.583.858 Frw avugwa muri note de débit AMSAR yasabaga ko yakurwa mu nyungu zisoreshwa mu mwaka yishyuriwemo, rusanga AMSAR itagaragaza ikimenyetso cy'uko yayasohoye mu mwaka wa 2003, uretse gusa kuba yaremeraga ko hari uwo igomba ayo mafaranga. [23] AMSAR yajuririye urwo rubanza mu Rukiko rw'Ikirenga inenga kuba Urukiko Rukuru rw'Ubucuruzi rutarahaye agaciro note de débit ya 69.583.125 frw yerekeranye na pièces de rechange/spare parts n'imashini zinyuranye, rukanga ko akurwa mu nyungu zisoreshwa mu mwaka wa 2003 kandi nyamara AMSAR yararishye ayo mafaranga SOBIMAC, kandi ko rwanze gukura “amortissement ya groupe électrogène” yakoreshwaga aho Umuyobozi Mukuru wungirije wa sosiyete yari atuye mu nyungu zisoreshwa. Ku ruhande rwayo Rwanda Revenue Authority ivuga ko izo ngingo z'ubujurire nta shingiro zifite. [24] Urubanza rwaburanishijwe kuwa 30/06/201, AMSAR ihagarariwe na Me Munderere Léopold hamwe na Me Mugemana J.M.V, naho Rwanda Revenue Authority ihagarariwe na Me GASANA Raoul A. II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

- a. Kumenya niba 69.583.858 FRW ari kuri note de débit n° 004/2003/MAT yakurwa mu nyungu zisoreshwa mu mwaka wa 2003. [25] Me Munderere Léopold uhagarariye AMSAR avuga ko AMSAR yishyuye ayo mafaranga SOBIMAC, ko ariko kubera ko ariho yari igitangira bitewe n'ibyangombwa byinshi yabanje kuzuza kugira ngo itangire gukorera mu Rwanda, ibishyira mu mwaka wa 2004, kandi ko kubera ko yakoze ihomba ikishyura amafaranga menshi, asanga ayo mafaranga agaragara kuri note de débit yabarwa nk'ayakoreshejwe (dépense) muri 2003.

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77 [26] Me Gasana Raoul A. uhagarariye Rwanda Revenue Authority yibutsa ihame rijyanye na “indépendance des exercices fiscaux”, bishatse kuvuga ko nta mwaka w'umusoro uvangwa n'undi. Asobanura ko amafaranga agaragara kuri iyo note de débit yari atarishyurwa muri 2003, ko ahubwo bigaragara ko hari uwo AMSAR yagombaga kuzayishyura, akaba rero atakurwa mu nyungu zisoreshwa zijyanye n'uwo mwaka hashingiwe ku ngingo ya 10, igika cya kabiri, y'itegeko n° 08/97 ryo kuwa 26/06/1997 ryagengaga imisoro itaziguye ku nyungu zinyuranye no ku bihembo. [27] Ku byerekeranye n'innyemezabuguzi zatanze na AMSAR isaba ko zafatwa nk'ikimenyetso ko ibikoresho bijyanye n'ayo mafaranga byaguzwe bikanishyurwa, asobanura ko zitujuye ibiteganywa n'ingingo ya 35, igika cya gatatu y'itegeko n° 15/2004 ryo kuwa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, by'umwihariko ku birebana na kopi z'inyandiko zidataye icyemezo cy'uko zihuye n'inyandiko y'umwimerere, ko kandi zimwe muri zo zigaragaza ko amafaranga azigaragaraho yishyuwe muri 2005, andi muri 2006, ko rero nta kuntu zaza kugabanya umusoro wo muri 2003. [28] Me Mugemana nawe asobanura ko ayo mafaranga

yishyuwe ibikoresho SOBIMAC yari yaraguze na sosiyete ASTALDI nyuma nayo ibigurisha AMSAR iyigurije amafaranga kugira ngo iyoroherenze mu rwego rw'imikoranire hagati yabo nka sosiyete zifitanye isano. [29] Ingingo ya 10 y'itegeko n°8/97 ryo kuwa 26/06/1997 rishyiraho amategeko agenga imisoro itaziguye ku nyungu zinyuranye no ku bihembo ryakurikizwaga mu mwaka wa 2003 iteganya ko urwunguko rugenwa havanyweho ibyasohotse byose. Isobanura ariko ko kugira ngo amafaranga ajyanye n'ibyo byasohotse, kimwe n'ibindi bitubya umutungo avanwe mu nyungu zisoreshwa hagomba kuba hujujwe ibikurikira : 1° Kuba amafaranga yarashowe mu birengera inyungu z'umurimo ku buryo butaziguye, cyangwa mu birebana n'icungwa risanzwe ry'umurimo; AMSAR v. IKIGO CY'IGIHUGU GISHINZWE KWINJIZA IMISORO N'AMAHORO (RRA)

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78 ICYEGERANYO CY'IBYEMEZO BY'INKIKO 2° Kuba amafaranga yasohotse ajyana n'imirimo idashidikanywa y'akazi kandi ifite gihamya ihagije igaragaza ukuri kw'ibyanditse mu ibaruramari; 3° Kuba byarabaruwe, hakurikijwe amategeko abigenga, mu byatunze umurimo mu mwaka bifatwaho nk'umwenda udashidikanywa mu nyito no mu ngano. [30] Hashingiwe kuri iyi ngingo, cyane cyane mu duce twayo, aka

- (2) n'aka (5), Urukiko rurasanga dépenses zingana na 69.583.858 frw zigaragara muri note de débit yatanze na AMSAR zitakurwa mu nyungu zisoreshwa mu mwaka wa 2003, kuko nk'uko bigaragazwa n'iyi note de débit, ayo mafaranga atishyuwe koko muri 2003, ko ahubwo yishyuwe nyuma. [31] Urukiko rurasanga kandi ibimenyetso bindi AMSAR itanga bigizwe n'inyemezabuguzi, uretse n'uko bitubahiriza ibiteganywa n'ingingo ya 35 igika cya gatatu y'itegeko n° 15/2004 ryo kuwa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, bigaragaza nabyo ahubwo ko amafaranga amwe yishyuwe muri 2005, andi yishyurwa muri 2006, ndetse n'impamvu yishyuwe ikaba ahubwo ari indi, kuko basobanura ko ari “remboursement des frais” aho kuba kwishyura ibyo bikoresho bivugwa, bityo ingingo y'ubujurire ya AMSAR ko amafaranga ari kuri note de débit yakurwa mu nyungu zisoreshwa mu mwaka wa 2003 ikaba nta shingiro.
- b) Kumenya niba amortissement du groupe électrogène yakoreshwaga mu icumbi ry'akazi ry'umuyobozi wungirije wa sosiyete yakurwa mu nyungu zisoreshwa. [32] Kuri iyi ngingo Me Munderere Léopold avuga ko basanga nta mpamvu Rwanda Revenue Authority yari kwemera amortissement ku bintu bimwe ngo iyange ku birebana na groupe électrogène ku mpamvu z'uko ngo atari “dépense professionnelle”. Asobanura ko kubera ikibazo cy'umurimo cyariho mu mwaka wa 2003, uwo muyobozi rimwe yakoreraga akazi mu biro, ubundi agakorera mu rugo, ko hakurikijwe inshingano z'umuyobozi w'urwo rwego amafaranga yatanze kuri iyo

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79 “groupe électrogène” yagombye gushyirwa mu rwego rw'amafaranga yakoreshejwe mu bijyanye n'akazi akavanwa mu nyungu zisoreshwa. [33] Me Gasana Raoul avuga ko ibintu bisobanutse mu ngingo ya 10 y'itegeko n° 8/97 ryo kuwa 26/06/1997 rishyiraho amategeko agenga

imisoro itaziguye ku nyungu zinyuranye no ku bihembo mu gace kayo ka mbere aho ivuga ibyerekeranye n'ibivanwa mu nyungu zisoreshwa (charges déductibles/ deductible expenses from company tax), ikaba igaragaza by'umwihariko ko ibyo bivanwamo ari ibyashowe mu birengera inyungu z'umurimo ku buryo butaziguye (dans l'intérêt direct de l'exploitation). Akomeza avuga ko ikigomba kurebwa ari nacyo Rwanda Revenue Authority yashingiyeho ari ibiba amortis, akaba ariyo mpamvu yemeye amortissement y'ibikoresho bimwe igakuramo "groupe électrogène" yakoreshwaga ku muyobozi mukuru wungirije wa sosiyete kuko ingingo y'itegeko ivuga ibifite "lien direct/direct interest" n'akazi, ko atari ibifite lien "indirect" nk'uko bimeze ku bijyanye na "groupe électrogène" yakoreshwaga mu rugo rw'umuyobozi mukuru wungirije, gutandukanya ibifitanye lien direct n'ibitayifite bikaba byagorana. [34] Ingingo ya 10 y'itegeko n° 8/97 ryo kuwa 26/06/1997 rivuzwe haruguru ryakurikizwaga mu mwaka wa 2003 mu gace kayo ka mbere iteganya ko urwunguko rugenwa havanyweho ibyasohotse byose, ko kugirango amafaranga yerekeranye n'ibyo byasohotse avanwe mu nyungu, agomba kuba yarashowe mu birengera inyungu z'umurimo ku buryo butaziguye, cyangwa mu birebana n'icungwa risanzwe ry'umurimo. [35] Hashingiwe kuri iyi ngingo, Urukiko rurasanga "groupe électrogène" ivugwa, n'ubwo muri rusange yakoreshwaga mu rwego rwo korohereza uwo muyobozi ngo ashobobore gutunganya inshingano ze neza z'akazi, kuba yarakoreshwaga no mu yindi mirimo yo mu rugo ishobora kuba idafite aho ihuriye n'inshingano ze z'akazi bituma isano itaziguye (lien direct) iteganywa n'itegeko ishidikanywaho, bityo amortissement ijyanye nayo ikaba itagomba kuvanwa mu nyungu zisoreshwa. AMSAR v. IKIGO CY'IGIHUGU GISHINZWE KWINJIZA IMISORO N'AMAHORO (RRA)

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80 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [36] Urukiko rurasanga kandi ku ruhande rwa AMSAR abayihagarariye batarashoboye kurugaragariza ibyagenerwaga uwo muyobozi bijyanye no kumworohera akazi birimo by'umwihariko ibyerekeranye n'imikoreshereze ya "groupe électrogène" ivugwa. [37] Hashingiwe ku bimaze kuvugwa, urukiko rurasanga amortissement y'iyi groupe électrogène itafatwa nka dépense professionnelle kugira ngo ivanwe mu nyungu zisoreshwa, bityo ubujurire bwa AMSAR no kuri iyi ngingo bukaba nta shingiro bufite. III ICYEMEZO CY'URUKIKO [38] Rwemeye kwakira ubujurire rwashyikirijwe na AMSAR BURUNDI SA,, succursale du Rwanda kuko bwatanzwe mu buryo bukurikije amategeko, ko ariko nta shingiro bufite; [39] Rwemeje ko urubanza RCOM 0115/09/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruza kuwa 29/04/2010 rudahindutse; [40] Rutegetse AMSAR BURUNDI SA, succursale du Rwanda, gutanga amagarama y'urubanza angana na 23.300Frw, itayatanga mu gihe cy'iminsi umunani akavanwa mu byayo ku ngufu za Leta.

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81 AQUILLA & PRISCILLA v. ENGEN N'UNDI [Rwanda – URUKIKO RW'IKIRENGA - RCOMA 0165/12/CS (Mugenzi P.J, Hatangimbabazi na Munyangeri J.) 13 Ukuboza 2013] Amategeko agenga Abahesha b'Inkiko b'Umwuga – Ububasha bw'umuhesha w'inkiko – Iyo yiyambajwe n'ubutabera cyangwa uwo ari we wese ubifitemo inyungu, yemerewe gukorera inyandiko mvugo ibintu bigaragara – Ntiyakwirukana uwo ari we wese nta cyemezo cy'Urukiko kibimuhera

uburenganzira – Umuhesha w’Inkiko n’uwamutumye bacibwa indishyi nk’ingaruka zo kwirukana umuntu mu buryo budakurikije amategeko – Itegeko N° 31/2001 ryo kuwa 12/06/2001 rishyiraho urugaga rw’Abahesha b’ Inkiko b’Umwuga , ingingo ya 18. Amategeko agenga ibimenyetso – Ikimenyetso cy’amasezerano – Inyandiko ya fotokopi ifite inenge ntiyafatwa nk’ikimenyetso cy’amasezerano mu gihe hatagaragazwa umwimerere wayo. Incamake y’ikibazo: AQUILLA & PRISCILLA yareze ENGEN n’umuhesha w’inkiko w’umwuga Kanyana Bibiane mu Rukiko Rukuru rw’Ubucuruza kuba ENGEN yarishe amasezerano bagiranye y’ubukode bwa station ya lisansi ikayirukana ikanafatira imitungo yayo igizwe n’amafaranga hamwe n’ibikoresho mu buryo budakurikije amategeko, ibifashijwemo n’Umuhesha w’Inkiko Kanyana. Urukiko rwemeje ko nta kimenyetso gifatika kandi kidashidikanywaho cy’amasezerano cyashingirwaho mu kwemeza ko ENGEN yishe amasezerano koko, rwemeza ko umuhesha w’inkiko atubahirije inshingano ze afatanyaga na ENGEN gukura ku ngufu AQUILLA & PRISCILLA muri station, rubatega kumuha indishyi. AQUILLA & PRISCILLA yajuririje Urukiko rw’Ikirenga irusaba kwemeza ko uregwa yishe amasezerano bagiranye no kumutegeka kwishyura indishyi z’akababaro zikomoka ku kuyirukana aho yakoreraga atabihereye ububasha. Ku birebana n’amasezerano ENGEN na Kanyana bavugaga ko ibyo umuhesha w’inkiko yakozwe byari byubahirije

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82 ICYEGERANYO CY’IBYEMEZO BY’INKIKO amategeko, ENGEN ivugaga ko ntayo yishe kuko ayo bari bafitanye yari yararangiye. Incamake y’icyemezo: 1. Umuhesha w’inkiko w’umwuga afite uburenganzira bwo gukora inyandiko mvugo z’imitungo igaragara (constat) iyo yiyambajwe, ariko ntiyakwirukana umuntu ahantu adafite icyemezo cy’urukiko kibimwemerera. Ku bw’iyo mpamvu, ibyo yakozwe afatanyije n’uregwa bikaba binyuraniye n’amategeko, bityo bakaba bagomba kubitangira indishyi.

2. Fotokopi y’amasezerano yanditse ntiyafatwa nk’ikimenyetso cy’amasezerano iyo ifite inenge mu myandikire y’ibiyikubiyemo kandi hatari umwimerere wayo. Ubujurire bufite ishingiro kuri bimwe. Abaregwa bategetswe guha uwajuriye indishyi zo kumwirukana binyuranyije n’amategeko, igihembo cy’Avoka n’amafaranga y’ikurikiranarubanza. ENGEN itegetswe kwishyura uwajuriye indishyi z’imitungo n’ibikoresho bye itamusubije. Ababuranyi bombi bazafatanyaga kwishyura amagarama y’urubanza. Amategeko yashingiweho: Itegeko N° 31/2001 ryo kuwa 12/06/2001, rishyira ho urugaga rw’ abahesha b’inkiko b’umwuga, ingingo ya 18. Nta manza zifashishijwe.

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83 Urubanza IMITERERE Y’URUBANZA [1] Kuwa 18/2/2011, Société AQUILLA AND PRISCILLA (mu magambo magufi turakoreshe AQUILLA), ivugaga ko yagiranye na ENGEN RWANDA Ltd amasezerano y’ubukode bwa Station Engen ahitwa ku Giporoso mu buryo bwo gucuruza “produits petroliers” za ENGEN RWANDA Ltd mu gihe cy’umwaka umwe, nyuma iza kurega ENGEN RWANDA Ltd n’Umuhesha w’inkiko Kanyana Bibiane, mu Rukiko Rukuru rw’Ubucuruza, kuba kuwa 23/07/2011 yarisubije iyo “station” hatabayeho gusesa amasezerano, ko

yabifashijwemo n’Umuhesha w’Inkiko Kanyana Bibiane kandi nta burenganzira bahawe n’Urukiko. Yayireze kandi kuba yarafatiriye umutungo wayo ugizwe n’amafaranga hamwe n’ibikoresho, inasaba ko yahatirwa kuyisubiza amafaranga yishyuwe y’ikirenga, ay’amazi, ay’umuriro, ay’isuku, aya “patente” n’indi misoro y’Akarere. [2] Urukiko Rukuru rw’Ubucuruzi rwemeje ko nta kimenyetso gifatika kandi kidashidikanywaho cy’amasezerano cyashingirwaho mu gusuzuma niba ENGEN RWANDA Ltd yarishe amasezerano yagiranye na AQUILLA, rwemeza ko Umuhesha w’Inkiko w’Umwuga Kanyana Bibiane atubahirije inshingano ze, afatanya na ENGEN RWANDA Ltd gukura ku ngufu AQUILLA muri “station” ENGEN RWANDA Ltd, rutegeka Kanyana guha AQUILLA indishyi za 500.000 Frw na ENGEN RWANDA Ltd igaha Société AQUILLA AND PRISCILLA 500.000 Frw. [3] Société AQUILLA yajuririye Urukiko rw’Ikirenga, ivuga ko Urukiko Rukuru rw’Ubucuruzi rwavuze ko nta mpamvu yo gusuzuma izindi mpamvu zishamikiye ku masezerano ataratangiwe umwimerere, rwirengagije ko ikimenyetso cy’amasezerano y’umwimerere kitabashije kuboneka, kuko cyari kiri mu bintu byasigaranywe na ENGEN RWANDA; ko Urukiko rwirengagije ibindi bimenyetso bigaragaza ko AQUILLA yari ifitanye amasezerano na ENGEN RWANDA Ltd; ko AQUILLA & PRISCILLA v. ENGEN N’UNDI

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84 ICYEGERANYO CY’IBYEMEZO BY’INKIKO Urukiko mu bushishozi bwarwo rwategetse ko ENGEN RWANDA Ltd yishyura AQUILLA 500.000 Frw gusa kandi ikosa bayikoreye rikomeye, no kuba Urukiko Rukuru rw’Ubucuruzi rutarategetse ENGEN RWANDA Ltd n’Umuhesha w’inkiko kwishyura AQUILLA amafaranga y’ikurikiranarubanza n’igihembo cya avoka kandi yarayasabye. [4] Mu mwanzuro wayo w’ubujurire, AQUILLA isaba Urukiko kwemeza ko ENGEN RWANDA Ltd yishe amasezerano bagiranye; kuyitegeka kwishyura indishyi z’akababaro zingana na 5.000.000 zikomoka ku kuyirukana aho yakoreraga itabihereye ububasha ; kwishyura indishyi z’akababaro za miliyoni mirongo itatu (30.000.000 Frw) zishingiye ku iseswa ry’amasezerano ritubahirije amategeko n’amafaranga y’ikurikiranarubanza n’igihembo cy’Avoka angana na miliyoni eshanu (5.000.000 Frw); kuyitegeka gusubiza imitungo ifite agaciro ka 32.636.066 Frw hamwe n’ibikoresho yakomeje gufatira no kwishyura 26.058.200 Frw yishyuwe nk’ikirenga hiyongereyeho inyungu ya 18% (intérêt bancaire) mu mezi 18 akaba angana na 115.177.244 Frw; no kuyisubiza 5.920.724 Frw y’amazi, umuriro n’isuku igihe yari muri “station” ENGEN Remera; ndetse na “patente” na taxe y’Akarere, no kwishyura amafaranga y’ikurikiranarubanza n’igihembo cy’Avoka angana na 5.000.000 Frw. Ibyo byifuzo AQUILLA yagiye ibihindura mu maburanisha anyuranye muri uru Rukiko ivuga ko imibare igenda izamukana n’igihe. [5] Urubanza rwaburanishijwe ku matariki anyuranye, kuwa 25/06/2013, kuwa 24/09/2013 no kuwa 19/11/2013, Société AQUILLA AND PRISCILLA igihe kimwe ihagarariwe na Me Mutungirehe Anastasie, ikindi gihe Me Karega Blaise Pascal agahagararira Société AQUILLA AND PRISCILLA, akamunganira Umuyobozi w’iyo Société Nkwaya Alfred Nkwaya Alfred wari uhibereye, naho Me Buzayire Angèle agahagararira ENGEN RWANDA Ltd akanunganira na Kanyana Bibiane wari uhibereye, ENGEN RWANDA Ltd kandi ikongera guhagarariwa na Me Rutembesa Phocas.

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85 II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO. Kumenya niba ENGEN n'Umuhesha w'inkiko Kanyana barirukanye AQUILLA kuri "station" mu buryo bunyuranije n'amategeko. [6] Uburanira AQUILLA avuga ko kuri iki kibazo, zimwe mu ndishyi basaba zishingiye ku kuba kuwa 26/07/2011 Umuhesha w'inkiko Kanyana yakoze inyandikomvugo y'uko ibintu byose abifatiriye, ikaba yarasabaga indishyi ko yahohotewe n'imikorere y'uwo muhesha w'Urukiko kuko ibyo yakoze, yabikoze nta cyemezo cy'urukiko yarangizaga, ikaba yarifuzaga ko Kanyana yakwishyura indishyi zingana na 5.000.000 Frw kuko yamwirukanye kuri "station" atabyemerewe, Urukiko rubanza rukaba rutaragize icyo rubivugaho, rukaba rwaramutegetse gutanga indishyi za 500.000 Frw mu buryo budasobanutse. [7] Uburanira ENGEN RWANDA Ltd akanunganira Kanyana, na Kanyana ubwe bavuga ko indishyi za 500.000 ENGEN RWANDA Ltd na Kanyana baciwe nta shingiro zifite kuko ibyo Kanyana yakoze bifite amategeko abigenga, ko nta tegeko yishe, kuko nta muntu yirukanye, ahubwo ko yaje kuri "station", akahasanga abantu banyuranye, n'ibiro bifunguye, agasaba comptable gufungura umutamebwa (coffre fort), ibintu byarimo akabishyira mu maboko ya ENGEN, akabikorera "PV de constat" Nkwaya Jules yanze gusinyira, ibyo bintu kandi ENGEN ikaba yarakomeje kubicungira kuri iyo "station", Nkwaya akaza kubisubizwa n'Umuhesha w'inkiko Kagame waje gukora "PV de remise" yabyo. [8] Bakomeza bavuga ko ariya mafranga 500.000Frw yayaciriwe ubusa kuko nta kosa Umuhesha w'inkiko Kanyana yakoze, mu gihe icyabaye ari "constat de l'abandon de la station" yakozwe n'umuyobozi w'AQUILLA, akaba rero atarigeze amwirukana nk'uko AQUILLA ibiburanisha, ko kandi muri icyo gihe nta "titre exécutoire" AQUILLA & PRISCILLA v. ENGEN N'UNDI

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86 ICYEGERANYO CY'IBYEMEZO BY'INKIKO iba ikenewe, ku bw'iyi mpamvu, bakaba basanga n'ariya 500.000 Frw AQUILLA yagenewe akwiye kuvaho. UKO URUKIKO RUBIBONA [9] Itegeko ryo kuwa 12/06/2001 rishyiraho urugaga rw'abahashe b'inkiko b'umwuga riteganywa inshingano zabo mu ngingo ya 18, agace kayo ka nyuma kakavugaga ko abahashe b'inkiko bemerewe gukorera inyandiko mvugo ibintu bigaragara (constatations purement matérielles) iyo babisabwe n'ubutabera, cyangwa babisabwe n'uwariwe wese ubifitemo inyungu. [10] Hasesenguwe ibiteganywa n'ingingo imaze kuvugwa, Urukiko rurasanga Kanyana, nk'umuhesha w'urukiko w'umwuga, abisabwe na ENGEN RWANDA Ltd, yari afite uburenganzira bwo kujya gukora "constat" yasabwe n'icyo kigo nk'uko abivugaga. [11] Urukiko rurasanga ariko mu nyandiko yise "reprise de la gestion de la station Engen Remera", Kanyana yerekana ko AQUILLA ivanywe muri iyo Station kubera kutubahiriza amasezerano yagiranye na ENGEN RWANDA Ltd, iyi sosiyete ikaba ifashe icyemezo cyo gusubirana burundu "station" yayo. Ibi rero bigaragaza neza ko AQUILLA yirukanywe mu by'ukuri muri iyo "station", bikaba byarabaye nta cyemezo cy'urukiko bishingiyeho, kandi mu gika cya gatatu cy'ingingo ya 18 yavuzwe haruguru, hateganywamo ko abahashe b'inkiko b'umwuga bemerewe kwirukana abantu ahantu bitegetswe n'Urukiko (expulsions ordonnées par un tribunal). [12] Urukiko rurasanga rero mu gihe ibyabaye kuri AQUILLA ari ukwirukanwa, umuhesha w'urukiko w'umwuga atarashoboraga kubikora nta

cyemezo cy'urukiko kibimuhera uburenganzira, ku bw'iyi mpamvu, ibyo yakoze afatanije na ENGEN, bikaba binyuraniye n'amategeko, bakaba bagomba kubatangira indishyi. [13] AQUILLA mu bujurire bwayo, ivuga ko ku rwego rwa mbere yasabaga Kanyana kuyiha 5.000.000 Frw y'indishyi kubera ibyo yakoze

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87 atabihereye uruhusa n'Urukiko, ariko Urukiko rubanza rukaba rutaragize icyo ruyavugaho. [14] Urukiko rurasanga nk'uko byavuzwe haruguru, ENGEN RWANDA Ltd na Kanyana bagomba guha AQUILLA indishyi isaba kubera urugomo yagiriwe yirukanwa kuri Station nta cyemezo cy'Urukiko, ariko ikaba ikwiye kugenerwa izo ndishyi mu bushishozi bw'Urukiko ku rugero rwa 2.000.000 Frw zatangwa na Kanyana na ENGEN RWANDA Ltd bafatanije, kuko 5.000.000 Frw isaba akabije kuba menshi. Kumenya niba hari amasezerano yaba yarabaye hagati ya AQUILLA na ENGEN atangira kuwa 18/02/2011 akarangira kuwa 18/02/2012, n'indishyi zijyanye no kutayubahiriza. [15] Uburanira AQUILLA avuga ko impamvu yabateye kujurira ari uko Urukiko rubanza rwavuze ko nta masezerano yari ahari hagati yayo na ENGEN RWANDA Ltd, ahera kuwa 18/02/2011 yagombaga kurangira kuwa 18/02/2012, ngo kubera ko nta mwimerere wayo wagaragajwe, nyamara wari ufitwe na ENGEN RWANDA Ltd kuko yawufashe igihe yazaga kuyirukana kuri Station yayo ifatanije n'Umuhesha w'inkiko Kanyana Bibiane. [16] Akomeza avuga ko mu gihe uwo mwimerere wari ubuze, rutari kuvuga ko nta masezerano ahari, ahubwo rwashoboraga no gushingira ku bindi bimenyetso bigaragaza amasezerano yari afitanye na ENGEN RWANDA Ltd, muri ibyo hakaba hari: Inyandiko mvugo y'umuhesha w'inkiko Kanyana aho avuga ko ENGEN RWANDA Ltd yisubije Station yayo bitewe n'uko AQUILLA itubahiriza inshingano ziteganywa n'amasezerano; Impapuro zigaragaza ko habayeho kwandikirana ku mpande zombi; Bons de commandes ziriho cachet ya ENGEN; Factures chèques zishyuriweho produits ENGEN yahaye AQUILLA. AQUILLA & PRISCILLA v. ENGEN N'UNDI

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88 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [17] Uburanira AQUILLA avuga ko ayo masezerano rwose yari ahari ku buryo n'Umuhesha w'inkiko Kagame Alexis yabikoreye "PV de constat", avuga ko Kanyana atagaragaje umwimerere w'ayo masezerano mu byo yakoreye "constat". [18] Uburanira AQUILLA avuga ko ashingiye ko habaye amasezerano, AQUILLA yasabaga mu Rukiko Rukuru amafaranga 30.000.000 y'indishyi zishingiye ku iseswa ry'amasezerano ritubahirije amategeko ariko urwo Rukiko ntirwagira icyo ruyavugaho, maze rwirengagiza uburemere bw'ikosa ENGEN RWANDA Ltd n'Umuhesha w'Inkiko Kanyana bakoreye AQUILLA, rubatega kwishyura indishyi nkeya, akaba yifuza ko izo ndishyi AQUILLA yazigenerwa, ndetse ikanagenerwa n'indishyi za 47.412.000 Frw y'igihombo yatejwe nyuma y'amezi 12, kibazwe kuri 3.951.000 Frw yagombaga kunguka buri kwezi. [19] Uburanira ENGEN RWANDA Ltd avuga ko ubujurire bwa AQUILLA nta shingiro bufite kuri iyo ngingo, kuko icyo ENGEN RWANDA Ltd yakoze ari ugusubirana "station" yayo AQUILLA yari yaranze kuvamo, kandi amasezerano bari baragiranye yo kuwa 18/02/2010 yari yararangiye, iby'ayo masezerano yandi AQUILLA ivuga akaba ari amahimbano nk'uko Urukiko rubanza rwabisobanuye rumaze kubona ko ari na

“photocopie” bagiye bahinduramo amatariki y’igihe yakorewe, ku buryo batanze n’ikirego kiregera ko ayo masezerano ari amahimbano. [20] Akomeza avuga ko ubwo indishyi basaba ari izishingiye kuri ayo masezerano, nta zikwiye gutangwa mu gihe nyine nta masezerano ahari kuko ntacyo zishingiyeho, n’imibare yavuzwe haruguru ikaba ishingiyeye ku masezerano y’impimbano. Arangiza avuga ko nta kuntu Urukiko rubanza rwari kujya gucukumbura ibindi bimenyetso bishingiye ku kuntu kitari ukuri.

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89 UKO URUKIKO RUBIBONA [21] Urukiko rurasanga nk’uko byavuzwe n’Urukiko Rukuru rw’Ubucuruzi, photocopie y’inyandiko y’amasezerano AQUILLA yerekana, ENGEN ikaba itayemera, igaragaza inenge zinyuranye, zirimo:

- kuba ku rupapuro rwa nyuma, bigaragara ko itariki ayo masezerano yasinyweho yarahinduwe, aho hejuru bigaragara ko umukono wanditse “18è fevrier 2011” atari umwe n’uwanditse “18ème fevrier 2011” wanditse hasi;
- kuba “fevrier” yo muri photocopie y’inyandiko y’amasezerano AQUILLA yerekana yanditse mu cyapa, bikaba bitandukanye n’umukono wakoreshejwe muri “18è fevrier 2011” yanditse hejuru;
- kuba bigaragara ko iyo “fevrier” yanditse mu cyapa hari ikindi cyasibwe cyayisimbuye;
- kuba bigaragara ko rimwe (1) ya nyuma yo muri “2011”, hari ikintu cyasibwe kikayisimbura; [22] Urukiko rurasanga iza nenge, ziyongereye ku kuba inyandiko AQUILLA yerekana ari “photocopie”, zituma rutakwemeza ko hari amasezerano yasinywe hagati ya AQUILLA na ENGEN RWANDA Ltd atangira kuwa 18/02/2011 akarangira kuwa 18/02/2012, cyane cyane ko kugeza ubu itarashobora kugaragaza umwimerere (original) wayo. [23] Urukiko rurasanga iby’uko uwo mwimerere waba warasigaranywe na ENGEN mu bintu yafatiriye nk’uko bivugwa na AQUILLA nta shingiro bifite, kuko haba mu nyandiko mvugo yakozwe n’umuhesha w’inkiko Kanyana, haba mu nyandiko mvugo yakozwe n’umuhesha w’inkiko Kagame, haba mu ibaruwa AQUILLA yandikiye “CID” isaba ibikoresho byayo, nta na hamwe AQUILLA igaragaza ikibazo cy’umwimerere w’ayo masezerano. AQUILLA & PRISCILLA v. ENGEN N’UNDI

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90 ICYEGERANYO CY’IBYEMEZO BY’INKIKO [24] Hashingiye kuri ibyo bisobanuro, Urukiko rurasanga ntaho rwahera rwemeza ko amasezerano amaze kuvugwa yabayeho, bityo n’indishyi ziyashingiyeho zingana na 30.000.000 Frw AQUILLA isaba cyangwa iz’igihombo yatejwe mu mezi 12 zingana na 47.412.000 Frw zikaba nta shingiro zifite. [25] Urukiko rurasanga ahubwo nk’uko byasobanuwe na ENGEN mu miburanire yayo mu Rukiko Rukuru rw’Ubucuruzi, n’ubwo kuwa 18/03/2011 yandikiye AQUILLA iyimenyesha ko amasezerano bari bafitanye yari yararangiye, hakaba nta masezerano yanditse byari bishingiyeho, bigaragara ko yakomeje gukorana nayo, kuko ENGEN yakomeje kuyiha “produits” zayo zo gucuruza, itegereje imishyikirano yo

kuzavugurura amasezerano bari bafitanye yari yararangiye kuwa 18/02/2011. Kuba ENGEN yaraje rero nyuma kuvana AQUILLA kuri Station yayo mu buryo bunyuranije n'amategeko, ni byo byatumye uru Rukiko ruyibihera indishyi zavuzwe haruguru zijyanye n'urugomo yagiriwe zingana na 2.000.000 Frw zatangwa na Kanyana na ENGEN RWANDA Ltd, bafatanyije, rukaba rusanga izo ndishyi zihagije. Ku bijyanye n'indishyi za 32.870.517 Frw ahwanye n'imitungo n'ibikoresho bya AQUILLA byakomeje gufatirwa na ENGEN RWANDA Ltd. [26] Uburanira AQUILLA avuga ko mu kwirukanwa kuri Station yakoreragaho, hari imitungo n'ibikoresho bihwaye na 32.870.517 Frw ENGEN RWANDA Ltd yakomeje gufatira nk'uko bigaragazwa na PV yakozwe n'Umuhesha w'inkiko Kagame Alexis igaragaza ibyabuze n'ibyabonetse, icyo bashaka kugaragaza kikaba ari uko mu Rukiko Rukuru rw' Ubucuruzi, iki kibazo k'ibintu byabuze cyavuzwe, ENGEN ntiyagira icyo ibivugaho, nyamara urubanza rumaze gucibwa yanga kubisubiza. [27] Akomeza avuga ko muri ibyo bintu ENGEN RWANDA Ltd yakomeje gufatira harimo ibikoresho byaguzwe na AQUILLA nk'uko bivugwa mu ngingo ya 8 y'amasezerano, ko uretse inyubako na "pompes", ibindi byose byari ibya AQUILLA.

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91 [28] Uburanira ENGEN RWANDA Ltd avuga ko ubujurire bwa AQUILLA nta shingiro bufitte kuri iyo ngingo, kuko icyo ENGEN RWANDA Ltd yakozwe ari ugusubirana "station" yayo AQUILLA yari yaranze kuvamo, ko n'ibikoresho byafatiriwe bimwe byari ibya ENGEN birimo za "Equipements" za "classeurs", ndetse na "Stock" ya "Produits petroliers" AQUILLA ikaba yaragombaga kuyikoraho ari uko yishyuye kuko yari umukozi ufite uko akorana na ENGEN, ko rero ibyo AQUILLA yashubijwe n'umuhesha w'inkiko KAGAME ari byo byari ibyayo, naho ibyo itashubijwe bikaba byari ibya ENGEN. [29] Ku bijyanye na "Produits petroliers" zimaze kuvugwa, uburanira ENGEN RWANDA Ltd avuga ko mu masezerano bari baragiranye na AQUILLA mu ngingo yayo ya cumi, agace ka kane, hateganiyemo ko AQUILLA iramutse itishyuye, ENGEN yahita yiyishyura; ko rero kubera ko AQUILLA yari irimo ENGEN amafaranga agera 12.550. 515 Frw, ikaza gutanga sheki itariho amafaranga (cheque non certifié), byatumye biyishyura bahereye kuri "essence" yahasanze ifite agaciro ka 903 000 Frw, bahereye no kuri "bons" bahasanze bakazigurisha, ko ariko ibyo bitashoboye kugabanya umwenda AQUILLA ikibabereyemo. [30] Kubijyanye n'amafaranga yatwawe mu mutamenwa (coffre fort) agaragazwa na za "chequiers, nombre de billets, bordereaux, bons de commande" zivugwa na AQUILLA, uburanira ENGEN RWANDA Ltd avuga ko AQUILLA itigeze igaragaza umubare w'amafaranga yari muri uwo mutamenwa, akaba asanga hakwiye gukurikizwa ibyo umuhesha w'inkiko Kagame yabonye. UKO URUKIKO RUBIBONA [31] Urukiko rurasanga uburanira ENGEN RWANDA Ltd yarabanje kuvuga mu iburanisha ry'uru rubanza ko ibintu yafatiriye byari ibyayo, kuko byari biri kuri Station AQUILLA yakoreragaho nk'umukozi wa ENGEN, nyuma aza guhindura imvugo avuga ko itabakoreraga, ibyo bikumvikanisha rero ko ubwo AQUILLA AQUILLA & PRISCILLA v. ENGEN N'UNDI

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92 ICYEGERANYO CY'IBYEMEZO BY'INKIKO itakoreraga ENGEN, hari ibintu byayo byafatiriwe na ENGEN yakagombye gusubizwa. [32] Urukiko rurasanga muri ibyo bintu bya AQUILLA, ENGEN yafatiriye, nk'uko bigaragara mu nyandikomvugo (proces verbal de constat) yakozwe n'umuhesha w'inkiko Kagame, hagaragaramo ibintu bitahawe AQUILLA, birimo: Essence ingana na 264 l iri muri cuve ya 1 AQUILLA ivuga ko ifite agaciro ka 270.000 Frw; Gasoil ingana na 900 l AQUILLA ivuga ko ifite agaciro ka 922.500 Frw; Kerosene iri muri cuve ya 3 ingana na 34.600 l AQUILLA ivuga ko ifite agaciro ka 24.739.100 Frw; amafaranga 1.885.450 yari muri coffre fort, n'andi 277.650 Frw; amafaranga 159.000 yishyuye na Millenium kuwa 21/07/2011; bons zakoreshejwe zingana na 970.000 Frw; AQUILLA ikaba ivuga mu mwanzuro wayo yashyirikiye Urukiko ko ibintu byose byafatiriwe bifite agaciro ka 32.870.517 Frw. [33] Urukiko rurasanga mu gihe bigaragara ko hari ibintu bimaze kuvugwa AQUILLA itashubijwe, kandi ENGEN RWANDA Ltd ikaba itagaragaza ko ibyo bintu yafatiriye ari ibyayo, nta mpamvu yo kutabisubiza nyirabyo ari we AQUILLA, bityo rero ubwo ENGEN RWANDA Ltd itigeze ivuguruzwa agaciro k'ibyo bintu kangana na 32.870.517 Frw kavugwa na AQUILLA, uru Rukiko rugomba kwemeza ko ako gaciro ari ko gahwanye n'imitungo n'ibikoresho bya AQUILLA kagomba kwishyurwa na ENGEN. Ku bijyanye n'amafaranga ENGEN yishyuye nk'ikirenga (26.058.200 Frw hiyongereyeho inyungu ya banki ya 18% buri kwezi, angana na 115.177.244); ay'amazi, umuriro n'isuku, ipatanti n'imisoro y'Akarere. [34] Uburanira AQUILLA avuga ko igomba guhabwa na ENGEN RWANDA Ltd 26.058.200 Frw yishyuye nk'ikirenga kuri "carburant" yahawe, ngo icyo kirenga kikaba cyaragaragajwe n'abagenzuzi, hiyongereyeho inyungu ya banki ya 18% buri kwezi, mu mezi 18 akaba angana na 115.177.244 Frw, ikanahabwa amafaranga y'amazi, ay'umuriro, ay'isuku na 233.333 Frw ahwanye n'ipatanti n'imisoro y'Akarere yishyuye.

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93 [35] Uburanira ENGEN RWANDA Ltd avuga ko ibyo AQUILLA ivuga nta shingiro bifite kuko itabitangira ibimenyetso. [36] Urukiko rurasanga amafaranga yishyuye nk'ikirenga 26.058.200 Frw AQUILLA isaba ivuga ko yagaragajwe n'abagenzuzi, iterekana isano ryaba riri hagati y'icyo kirenga no kuba yarirukanwe kuri Station mu buryo bunyuranije n'amategako, bityo rukaba ntaho rwahera ruyayigenera. [37] Urukiko rurasanga n'andi mafaranga AQUILLA isaba y'amazi, ay'umuriro, ay'isuku, ipatanti n'imisoro bigaragara ko ajyanye na "charges d'exploitation", bikaba bitumvikana ukuntu ENGEN RWANDA Ltd igomba kuyishyurira izo "charges d'exploitation", by'umwihariko izijyanye n'amasharanyarazi, amazi na "gaz" ku nyubako ikoreramo, mu gihe ingingo ya 11.28. y'amasezerano AQUILLA ishingiraho muri uru rubanza igaragaza ko ari yo igomba kuzishyura, byongeye kandi nk'uko byari bimaze kuvugwa haruguru, ikaba iterekana isano ryaba riri hagati y'ayo mafaranga no kuba yarirukanwe kuri Station mu buryo bunyuranije n'amategako, bityo rukaba ntaho rwahera ruyayigenera. Ku bijyanye n'amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka asabwa muri uru rubanza [38] AQUILLA mu bujirire bwayo, ivuga ko ku rwego rwa mbere yasabaga 5.000.000 Frw y'ikurikiranarubanza n'igihembo cy'avoka asabwa Kanyana afataniye na ENGEN, ariko Urukiko rubanza rukaba rutaragize icyo ruyavugaho, ikaba yifuza rero ko yayagenerwa nk'uko yari yayasabye, naho uburanira ENGEN

RWANDA Ltd akanunganira Kanyana, ndetse na Kanyana ubwe, bakavuga ko ahubwo indishyi za 500.000 ENGEN RWANDA Ltd na Kanyana baciwe n'Urukiko Rukuru nta shingiro zifite, ko bayaciriwe ubusa kuko nta kosa

8 Iyo ngingo ya ya 11.2 ivuga itya: "Le concessionnaire doit....payer sans délai.....toutes les factures de consommation d'électricité, eau et gaz dans ou sur les Locaux". AQUILLA & PRISCILLA v. ENGEN N'UNDI 1 1

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94 ICYEGERANYO CY'IBYEMEZO BY'INKIKO Umuhesha w'inkiko Kanyana yakoze, bakaba basanga akwiye kuvaho, ahubwo AQUILLA ikaba ariyo ikwiye guha ENGEN RWANDA Ltd na Kanyana 5.000.000 Frw buri wese yo kubashora mu manza. [39] Urukiko rurasanga mu gihe bigaragara nk'uko byavuzwe hejuru, ko AQUILLA yirukanwe kuri Station ya Engen bitewe n'urugomo yakorewe, ikagomba gufata Avoka wo kuyikurikiranira urubanza kugeza muri uru Rukiko, nta mpamvu ENGEN na Kanyana Bibiane bayikoreye urwo rugomo batakwishyura amafaranga y'igihembo cy'avoka, ndetse n'ay'ikurikirana rubanza, ariko ikayagenerwa mu bushishozi bw'Urukiko kuko 5.000.000 Frw isaba akabije kuba menshi, ikaba rero yagenerwa 800.000 Frw y'ikurikiranarubanza n'igihembo cy'avoka ku nzego zombi yaburaniyemo, agomba gutangwa na ENGEN RWANDA Ltd ifatanyije na Kanyana Bibiane. III. ICYEMEZO CY'URUKIKO [40] Rwemeje ko ubujurire bwa Société AQUILLA AND PRISCILLA bufite ishingiro kuri bimwe; [41] Rwemeje ko nta masezerano Société AQUILLA AND PRISCILLA yari ifitanye na ENGEN RWANDA Ltd ahera kuwa 18/02/2011 kugeza kuwa 18/02/2012 kuko nta bimenyetso AQUILLA iyatangira; [42] Rutegetse Kanyana na ENGEN RWANDA Ltd guha Société AQUILLA AND PRISCILLA 2.000.000 Frw y'indishyi zijyanye n'urugomo yagiriwe yirukanwa kuri Station nta cyemezo cy'Urukiko; [43] Rutegetse ENGEN RWANDA Ltd guha Société AQUILLA AND PRISCILLA 32.870.517 Frw ahwanye n'imitungo n'ibikoresho ENGEN RWANDA Ltd itashubije Société AQUILLA AND PRISCILLA;

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95 95 [44] Rutegetse ENGEN na Kanyana gufatanya guha Société AQUILLA AND PRISCILLA 800.000 Frw y'igihembo cy'avoka n'ikurikirana rubanza ku nzego zombi yaburaniyemo; [45] Rutegetse ENGEN na Kanyana gufatanya gutanga $\frac{1}{2}$ cy'amagarama y'uru rubanza angana na 31.450 Frw, ni ukuvuga 15.725 Frw, Société AQUILLA AND PRISCILLA nayo igatanga $\frac{1}{2}$ cy'amagarama kingana na 15.725 Frw. AQUILLA & PRISCILLA v. ENGEN N'UNDI

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96 ECOBANK v. KAJANGWE [Rwanda URUKIKO RW'IKIRENGA – RCOMA 0152/11/CS (Kayitesi, P.J., Mukandamage na Kanyange, J.) 10 Mutarama 2014] Amategeko y'ubucuruzi – Iyishyurwa ry'imyenda itanzwe na banki – Ibarwa ry'umwenda remezo n'inyungu ku myenda yatanze mu bihe bitandukanye nyuma igahuzwa – Itangwa ry'ibimenyetso mu manza z'ubucuruzi – Ugomba gutanga ibimenyetso – Urega agomba kugaragaza ibimenyetso by'ibyo aregera, iyo abibuze

uwarezwe aratsinda – Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y’imanza z’imbenezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegets, ingingo ya 9. Amategeko agenga imiburanishirize y’imanza z’ubucuruzi – Ikirego kigamije kwiregura – Ikirego kitakiriwe mu rwego rwa mbere, iyo kijuririwe ntigifatwa nk’aho gitanzwe bwa mbere mu rwego rw’ubujurire – Ikirego kigamije kwiregura nticyakirwa iyo gitanzwe nyuma y’iburanisha ry’ibanze – Itegeko n° 45/2007 ryo kuwa 11/09/2007 rihindura kandi ryuzuzanya itegeko n°18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y’imanza z’imbenezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegets, ingingo ya 351 nonies. Incamake y’ikibazo: ECOBANK yareze Kajangwe mu Rukiko Rukuru rw’Ubucuruzi imwishyura inguzanyo yamuhaye ingana na 78.500.000 Frw biza kugera ku mwenda ECOBANK ivuga ko akomoka kuguhuza imyenda ungana na 136.898.167 F ubariwemo umwenda remezo n’inyungu zawo, nyuma kandi ECOBANK yaje kumumenyesha ko ayibereyemo umwenda ungana 234.442.167 Frw. Kajangwe yasobanuye ko yamaze kwishyura umwenda ungana na 150.000.000 frw yagurishijwe Hotel Burundi Palace anasaba gusonerwa 88.000.000 Frw ko rero hasigaye kwishyura inyungu, akaba atumva ukuntu Ecobank yakongera kumurega umwenda remezo n’inyungu zawo. Ecobank nk’umunyamwuga ntiyabashije kugaragaza uburyo yahujwe imyenda ya

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97 Kajangwe ayibereyemo, kugira ngo hanamenyekane inkomoko, ingano n’uburyo imyenda yahujwe yagombaga kwishyurwa. Mu iburanisha kandi Kajangwe yatanze ikirego kigamije kwiregura gisaba indishyi z’igihombo yatewe no kwishyura umwenda utari ngombwa, indishyi z’akababaro, iz’imbenezamusaruro, iz’impozamarira n’izo kudahabwa inguzanyo zose zingana na 2.000.000.000 frw, Urukiko Rukuru rw’Ubucuruzi rwemeje ko habayeho amasezerano hagati ya ECOBANK na Kajangwe yo guhuza imyenda yari ayibereyemo kandi ko hari amabaruwa bank yamwandikiye agaragaza ko yari yamaze kwishyura umwenda remezo hasigaye inyungu maze ruvuga ko ECOBANK itabashije kugaragaza umwenda iregera. Ku kijyanye n’ikirego cya Kajangwe, Urukiko Rukuru rwanze kucyakira kuko cyatanze gikereye nyuma y’iburanisha ry’ibanze. ECOBANK yajuririye Urukiko rw’Ikirenga ivuga ko Urukiko Rukuru rw’ubucuruzi rwemeje ko itsinzwe no kutagaragaza ibimenyetso by’umwenda nyakuri kandi yaragaragaje amasezerano yashyizweho umukono n’impande zombi. Kajangwe yakomeje gushimangira ko ECOBANK itazi neza umwenda ayibereyemo nk’uko bigaragara mu kwivuguruza yagiye igaragaza mu kubara amafaranga ayirimo. Kajangwe nawe yatanze ubujurire bwuririye kubundi avuga ko Urukiko Rukuru rw’Ubucuruzi rwanze kwakira ikirego cye cyo kwiregura kigamije gusaba indishyi ku mpamvu zidafite ishingiro, agasaba ko Urukiko rw’Ikirenga ko rwacyakira. Kuri iki kibazo ECOBANK yo ikavuga ko ari ikirego gishya atangiye mu rwego rw’ubujurire kuko iby’indishyi asaba bitigeze biburanwaho mu rwego rwa mbere, bityo ko budakwiye kwakirwa. Incamake y’icyemezo: 1. Urega agomba kugaragaza ibimenyetso by’ibyo aregera. Iyo abibuze uwarezwe aratsinda. ECOBANK, n’ubwo ishingira ku masezerano yo kuwa 05/07/2005 yerekeranye no guhuza imyenda, ntigaragaza neza imyenda yahujwe iyo ariyo n’ingano ya buri mwenda kugira ngo haboneke umwenda remezo uwajuriye yaregeye n’uburyo wari kuzishyurwa. Ibivugwa ahubwo muri ayo masezerano ECOBANK v. KAJANGWE

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98 ICYEGERANYO CY'IBYEMEZO BY'INKIKO byumvikanisha ko yari ay'umwenda mushya uwarezwe yagombaga guhabwa amaze gutanga “étude de faisabilité” n'ingwate yasabwaga, akaba rero adakwiye gufatwa nk'ikimenyetso cy'umwenda ukomoka ku myenda ibiri uwajuriye avuga ko yahujwe.

2. Ikirego kigamije kwiregura gitanzwe nyuma y'iburanisha ry'ibanze nticyakirwe, iyo kijuririrwe mu bujurire bwuririye ku bundi, ntigifatwa nk'igitanzwe bwa mbere mu rwego rw'ubujurire, kikaba kigomba kwakirwa kigasuzumwa. Ikirego kigamije kwiregura gitanzwe nyuma y'iburanisha ry'ibanze nticyakirwa, bityo ubujurire bwuririye ku bundi bwatanzwe na Kajangwe bukaba nta shingiro bufite kuko Urukiko Rukuru rw'Ubucuruzi nta kosa rwakoze mu kwanga kwakira ikirego cye. Ubujurire nta shingiro bufite. Ubujurire bwuririye ku bundi 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 9 Itegeko n° 45/2007 ryo kuwa 11/09/2007 rihindura kandi ryuzuza itegeko n°18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 351 nonies. Nta manza zifashishijwe.

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99 Urubanza I.IMITERERE Y'URUBANZA [1] ECOBANK yareze Kajangwe Callixte mu Rukiko Rukuru rw'Ubucuruzi imwishyura umwenda remezo wa 136.898.167 Frw n'inyungu zawo, ukubiye mu maseserano yo guhuza imyenda ivuga ko bagiranye tariki ya 05/07/2005, bakumvikana ko uzishyurwamu mezi 96 ku nyungu ya 15%, ariko Kajangwe we akavuga ko atari amasezerano ahuriza hamwe imyenda, ahubwo wari umushinga w'amasezerano yo kugura imodoka zikora ubwikorezi mpuzamahanga, iyo nguzanyo ikaba itarigeze itangwa kuko habuze ingwate. [2] Urukiko rwemeje ko habayeho amasezerano hagati ya ECOBANK na Kajangwe, ko ariko atari ay'inguzanyo nshya, ahubwo umwenda uyavugwamo wa 136.898.167 Frw wari igiteranyo cy'imyenda itandukanye Kajangwe yari abereyemo iyo Banki, kugirango ahabwe ingengabihe imwe yo kwishyura, awishyurire no kuri konti imwe nk'uko yari yabisabye. [3] Ku kibazo cyo kumenya niba Kajangwe yarishyuye uwo mwenda, urukiko rwasanze hari amabaruwa Banki yamwandikiye agaragaza ko yari yaramaze kwishyura umwenda remezo hasigaye inyungu, bikaba bitumvikana ukuntu iregera umwenda remezo n'inyungu zawo, maze ruvuga ko itabashije kugaragaza ibimenyetso by'umwenda iregera. Urukiko na none rwanze kwakira ikirego cyo kwiregura cya Kajangwe kigamije gusaba indishyi kuko cyatanzwe gikerewe nyuma y'iburanisha ry'ibanze. [4] ECOBANK yujuriye mu Rukiko rw'Ikirenga ivuga ko urukiko rwemeje ko itsinzwe no kubura ibimenyetso by'umwenda kandi yagaragaje amasezerano yashyizweho umukono n'impande zombi, ayo masezerano akaba ari itegeko ku bayagiranye, igasaba rero ko Kajangwe yayishyura 136.898.167 Frw yemeye ko ayibereyemo kubera ECOBANK v. KAJANGWE

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100 ICYEGERANYO CY'IBYEMEZO BY'INKIKO ko itakimukurikiranyeho inyungu zayo kuko yashyizwe muri cyiciro cya 5 (classe 5) na Banki Nkuru y'Igihugu kuko yananiwe kwishyura. [5] Mu bujuriye bwuririye ku bundi, Kajangwe avuga ko Urukiko Rukuru rw'Ubucuruzi rwanze kwakira ikirego cye cyo kwiregura kigamije gusaba indishyi ku mpamvu zidafite ishingiro, agasaba ko uru rukiko rwacyakira, maze ECOBANK ikamuha indishyi zose hamwe zingana na 2.000.000.000 Frw zikubiyemo iz'imbonezamusaruro ku gihombo yatewe no kugurisha hoteli ye "Burundi Palace", igihombo yatewe no kudahabwa inguzanyo yo kugura "bus" 2 nk'uko byari biteganyijwe mu mushinga, igihombo yatewe no kwishyura umwenda utari ngombwa kubera ko umwenda we wavanzwe n'uwa sosiyete CBS, indishyi z'akababaro n'amafaranga y'ikurikiranarubanza n'igihembo cya avoka. [6] Iburanisha ry'urubanza ryabereye mu ruhamye tariki ya 23/07/2013, kuwa 24/09/2013 no kuwa 17/12/2013, ECOBANK iburanirwa na Me Kayitare Serge, naho Kajangwe Callixte yunganiwe na Me Shumbusho Philbert, Me Niyondora Nsengiyumva na Me Musore Gakunzi Valery. II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

- a. Kumenya niba hari ibimenyetso by'umwenda Kajangwe abereyemo ECOBANK byirengagijwe n'urukiko. [7] Me Kayitare uburanira ECOBANK avuga ko urukiko rwemeje ko itsinzwe kubera ko itagaragaje ikimenyetso nyakuri cy'umwenda Kajangwe ayibereyemo, nyamara itanga ikirego yarasabaga kwishyurwa 136.898.167 Frw hiyongereyeho n'inyungu, ayo mafaranga akaba agaragazwa n'amasezerano y'umwenda yasinyweho n'impande zombi kuwa 05/07/2005 yashyikirijwe urukiko. Kuba rero ngo ayo masezerano yarasinywe mu buryo bwemewe n'amategeko, agomba guhabwa agaciro.

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101 [8] Me Kayitare asobanura ko tariki ya 24/01/1997, Kajangwe yasabye inguzanyo ya 78.500.000 Frw yo kumufasha kwishyura umwenda yari abereyemo "Banque Commerciale du Burundi" na "Société Burundaise de Financement", akayihabwa, ko na none tariki ya 09/10/1997 yagiranye imishyikirano na BCDI ayisaba ko ihuriza hamwe imyenda "société" ye CBS (Compagnie de bons Services) yari ibereyemo BCDI akaba ariwe uzayishyura binyuze kuri konti ye yari asanganywe muri iyo banki, arabyemererwa nk'uko bigaragara muri "notification de reprise des engagements CBS" yo kuwa 10/10/1997 aho yabonye kandi akemera (lu et approuvé) ko iyo myenda yahujwe yanganaga na 94.672.680 Frw. [9] Me Kayitare avuga kandi ko muri "note" yandikiwe Umuyobozi Mukuru wa BCDI kuwa 06/07/2001, mu bitabo bya banki byagaragaraga ko Kajangwe ayibereyemo umwenda remezo wa 234.442.167 Frw n'inyungu zingana na 88.638.580 Frw bibazwe kuwa kuwa 17/06/1999 kugeza uwo munsu. [10] Me Kayitare akomeza asobanura ko tariki ya 06/08/2001 Kajangwe yandikiye BCDI ayemerera kugurisha Hôtel Burundi Palace yari afite i Burundi kugirango agabanye uwo mwenda, akaba muri iyo baruwa atarigeze ahakana ingano yawo kandi yari yarawumenyeshejwe nk'uko abiyemerera mu gika cya mbere cyayo, ahubwo akaba yarashimiye banki ko yemeye kumukuriraho inyungu za 88.000.000 Frw. [11] Nyuma y'aho iyo Hôtel igurishirijwe tariki ya 30/07/2003, Kajangwe na none ngo yagiranye amasezerano

y'ubwumvikane na BCDI (acte transactionnel), impande zombi zumvikana ko asigayemo umwenda wa 91.318.226 Frw, uzishyurwa mu myaka 10 ku nyungu za 15%, akajya yishyura 1.473.281 Frw buri kwezi, ko kandi ayo masezerano asimbuye andi mamenyekanisha yose (diverses notifications) ndetse n'ubundi bwumvikane bwose bwaba bwabaye mbere. ECOBANK v. KAJANGWE

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102 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [12] Me Kayitare avuga na none ko tariki ya 21/07/2003, Kajangwe yongeye gusaba “découvert” ya 20.000.000 Frw ayihabwa kuwa 14/08/2003 nk'uko bigaragara kuri “contrat d'octroi du découvert temporaire de 20.000.000 Frw” yabonye kandi yemeye akayishyiraho umukono. [13] Tariki ya 24/06/2005, Kajangwe ngo yongeye kwandikira BCDI ayigezaho uburyo yumva bwamufasha kwishyura umwenda ayifitiye, yongera gusaba guhuza imyenda yavuzwe haruguru kugira ngo azayishyure mu myaka 8, mu ngwate yatanze hakaba harimo n'imigabane yari afite muri BCDI igera kuri 3.655. BCDI ngo yarabimwemereye mu ibaruwa yamwandikiye tariki ya 29/06/2005, imumenyesha ko nyuma yo guhuza imyenda, isanze umwenda remezo ugeze kuri 136.898.167 Frw, uwo mwenda Kajangwe ngo ntiyawuhakanye, ahubwo ku itariki ya 05/07/2005 yashyize umukono ku masezerano awemeza, hakaba hari hakubiyemo n'uburyo azagenda awishyura. Kuri iyo tariki na none Kajangwe ngo yahaye BCDI uburenganzira bwo kumugurishiriza imigabane ye kugirango yishyure umwenda ayibereyemo wa 136.898.167 Frw. [14] Me Kayitare avuga rero ko bitumvikana ukuntu Kajangwe yahakana izo nguzanyo zahujwe abyisabiye, ko ndetse nta n'impamvu atanga yatumye ashya umukono we ku masezerano atagaragarije Banki ko uwo mwenda atariwo. [15] Avuga ko kuba ECOBANK yarigeze kumubwira kera ko ayibereyemo umwenda wa 594.317.302 Frw yasanze ari amakosa irabikosora imusaba n'imbabazi imubwira ko ari ukwibeshya ko ahubwo umwenda ari 153.483.397 Frw, ko ariko ECOBANK yasanze KAJANGWE ari muri “classe 5”, atakomeza kubarirwa inyungu nk'uko Urukiko Rukuru rw'Ubucuruzi rwabyemeje mu rundi rubanza aho rwavuze ko umuntu uri mu rwego nk'urwo, iyo watinze kumurega, utamusaba n'inyungu. [16] Mu kwiregura kwe, Kajangwe avuga ko yatangiye gukorana na BCDI kuwa 22/01/1997 imuha inguzanyo ya 78.500.000 Frw

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103 ayatangira ingwate zari zisanze zifitwe na Banque Commerciale du Burundi kuko yari imaze kumwishyurira umwenda yari afite muri iyo banki, igitangaje akaba ari uko BCDI yandikishije izo ngwate kugira ngo zishyure umwenda wa 185.000.000 Frw kandi atari ukuri. [17] Ku byerekeranye no kuba yaremeye kwishyura imyenda ya sosiyete CBS, Kajangwe avuga ko atari ukuri kubera ko byari gushoboka ari uko impande zose zibyemera, ni ukuvuga Banki iberewemo umwenda, CBS ihawe umwenda na Kajangwe wemeye kwishyura. Asanga rero ibyo uhagarariye banki avuga nta gaciro byahabwa mu rwego rw'amategeko, akavuga ko atanemera imishyikirano ivugwa ko yagiranye na banki mbere yo gushyira umukono ku nyandiko yemera kwishyurira CBS iyo myenda ingana na 94.672.680 Frw. Byongeye kandi ngo ntabwo ECOBANK yigeze igaragaza ko CBS yananiwe kwishyura ngo ibihereho isaba Kajangwe kuyishyurira. [18] Kajangwe avuga ko

bitumvikana ukuntu tariki ya 10/10/1997 yari kwemera kwishyura imyenda ya CBS mu gihe nawe yari yananiwe kwishyura umwenda we ECOBANK yamwihanangirizaga imusaba kwishyura, kubera ko kuwa 30/07/1997 yamubwiye ko ayibereyemo 8.599.805 Frw, kuwa 23/09/1997 ikamumenyesha ko ayirimo 185.249.177 Frw n'ibirarane bya 11.052.101 Frw atazi inkomoko zayo. [19] Asanga rero ari uburiganya ECOBANK yamukoreye ifata 94.672.680 Frw + 78.500.000 Frw + 11.052.101 Frw = 184.224.781 “arrondi à 185.000.000 Frw”, akaba atekereza ko yabikoze kugira ngo ibone uburyo ihamana ingwate ze kubera ko zarutaga kure umwenda yahawe wa 78.500.000 Frw. [20] Kajangwe avuga kandi ko ECOBANK yagize ukwivuguruza gukomeye kuko mu bihe bitandukanye yagiye imumenyesha umwenda ivuga ko yishyura umwenda remezo cyangwa inyungu zawo cyangwa byombi icyarimwe mu buryo bukurikira:

- Tariki ya 05/07/2005 ECOBANK yavugaga 136.898.167 ariyo yaregeye; ECOBANK v. KAJANGWE

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- Kuwa 18/01/2007 ECOBANK yavuze umwenda wa 594.317.302 agizwe n'umwenda remezo n'inyungu;
- Kuwa ya 26/01/2007, mu gusaba imbabazi, ECOBANK yavuze ko umwenda ari 153.483.397 agizwe n'inyungu gusa, nyamara ku mugereka w'ibaruwa hagaragazwa ko umwenda wa CBS ungana na 165.000.000 Frw utareba Kajangwe uhuzwa na 78.500.000 Frw ye, yose hamwe akaba 243.500.000 Frw yarangije kwishyura kimwe n'inyungu za miliyoni 45.9, bikaba bitagaragara kuri konti ye n° 01093-01-92 aho yaherewe inguzanyo ya 243.500.000 ivugwa ko yarangije kwishyura n'aho asigaye 153.483.397 (solde) imwishyura akomoka.
- Tariki ya 27/04/2007 ECOBANK yavuze ko ayifitiye umwenda ungana na 192.017.960 Frw agizwe n'umwenda remezo n'inyungu.
- Kuwa 15/09/2010 ivuga ko umwenda ungana na 425.923.843 Frw harimo uw'iremezo n'inyungu, itagaragaza inkomoko yawo. [21] Ku bijyanye n'inyandiko yandikiwe umuyobozi wa BCDI kuwa 06/07/2001 ECOBANK ishingiraho ivuga ko ayibereyemo umwenda wa 234.442.167 Frw n'inyungu za 88.638.580 zibazwe kuwa kuwa 17/06/1999 kugeza kuwa 06/07/2001, Kajangwe avuga ko atayizi kuko ari “correspondance interne” ya Banki. Avuga ko ahubwo yamenyeshejwe mu magambo ko umwenda wose kugeza kuwa 31/12/2001 ari 233.379.354 Frw nk'uko anagaragara kuri “historique de compte”, uretse ko nayo yaje kugaragara ko nta kuri kurimo, akaba ari nawo washingiweho hagarurishwa “Hôtel Burundi Palace”. [22] Ku byerekeranye n'uko yamenyeshejwe uwo mwenda wa 234.442.167 Frw ngo ntawuhakane, avuga ko ECOBANK idashaka kubwiza ukuri urukiko, kuko ariyo yabanje kugaragaza impungenge ku myishyurire ye, imuha iminsi 30 ngo abe yarangije kwishyura, imubwira ko yamaze kubona umuguzi ugura “Hôtel Burundi Palace” witwa BARCO TRADING SA ku giciro cya 150.000.000 Frw. Mu gusubiza ku ibaruwa ya ECOBANK, Kajangwe avuga ko yemeye ko igurishwa kuri icyo giciro n'ubwo “expertise” yayo yari

299.361.000 Frw, maze agasonerwa 88.000.000 Frw, ariko ntibyakorwa. Asanga

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105 rero ntacyo ECOBANK yagombye kuba imwishyurwa uherye tariki ya 30/04/2002, ahubwo yari kumusubiza 4.620.646 Frw. [23] Ku byerekeranye n'amasezerano yo kuwa 05/07/2005 ECOBANK ivuga ko ari ikimenyetso Urukiko Rukuru rw'Ubucuruzi rwirengagije, Kajangwe avuga ko atari arebana n'imyenda yahujwe, ko ahubwo yari amasezerano yerekeye inguzanyo ku mushinga wo kugura "Bus" zitwara abantu ku muhanda mpuzamahanga Kigali-Kampala, akaba yari yasabye inguzanyo ya 143.000.000 Frw agaragara muri "étude de faisabilité financière" yahaye ECOBANK, yo kwishyurwa mu myaka 8 ku nyungu za 15% ku mwaka. Avuga ko kubera ko Banki yamusabye uruhare rwe kandi nta mafaranga yari afite, yayisabye kuyamutangira yose, maze bagirana amasezerano yo kumugurishiriza imigabane 4.000 ye muri iyo Banki ku mafaranga 150.000.000 Frw, ECOBANK ikiyishyura 80.000.000 Frw nk'uruhare rwe atanze, nayo ikamuha 70.000.000 Frw kugira ngo azashobore kugura ubwishingizi bwa "Bus" no kuzirihira imisoro n'ibindi kugira ngo uwo mushinga ushyirwe mu bikorwa. [24] Akomeza avuga ko ECOBANK itubahirije ayo masezerano ku mpamvu y'uko yabuze ugura imigabane 4.000, hagurwa gusa 1.334 ku mafaranga 53.360.000 Frw imwemerera ko imuha 50.000.000 Frw nka "crédit de caisse" ibindi akimenya. Avuga ko birangiye ECOBANK yamwandikishije ibaruwa yo kuwa 24/06/2005 imutegeka ibyo agomba kuyiha nk'ingwate, ko kandi agomba kwemera ko iyo "crédit de caisse" imwemerereye ifatanywa na "crédit amortissable" yari asanganywe kugira ngo BNR itazabona ko ahawe indi nguzanyo kandi yari muri "classe 5" kubera kutishyura, bigatuma ECOBANK ibihanirwa. [25] Kajangwe avuga na none ko ECOBANK yamusubije tariki ya 29/06/2005 ku byo yari yasabye, umwihariko akaba ari uko yavugaga ko yarangiye guteranya izo nguzanyo n'ubwo idasobanura izo arizo cyangwa uko byakozwe, igiteranyo kikaba 136.898.167 Frw. Ikindi ngo cyerekana nta shiti ko harimo inguzanyo nshya ngo nuko muri iyo baruwa Banki yivugira ko mbere y'uko ubwo bwumvikane bushyirwa mu bikorwa bizabanzirizwa n'uko ariha ibirarane by'ukwezi kwa 3, 4, 5 ECOBANK v. KAJANGWE

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106 ICYEGERANYO CY'IBYEMEZO BY'INKIKO n'ukwa 6/2005 bingana na 5.893.124 Frw, byerekana ko rero bitari uguhuza inguzanyo za kera, akibaza n'impamvu ECOBANK yahereye ku birarane byo mu kwezi kwa 3 batangira umushinga wa "Bus", ibindi ikabyihorera, akaba atumva n'icyatumaga bamuha "délai de grâce" y'amezi 2 niba harahuzwaga imyenda y'inguzanyo za kera. [26] Ikindi ngo kigaragaza ko ayo masezerano yari ay'inguzanyo nshya, igamije kumufasha gushyira mu bikorwa umushinga wo kugura "Bus" 2 zitwara abagenzi ECOBANK yari yashyikirijwe ikanawemera, zagombaga kuba imwe mu ngwate y'uwo mwenda, ni uko :

- ECOBANK itabasha kugaragaza imyenda yahujwe ikangana na 136.898.167 Frw, ndetse n'amasezerano ubwayo ntabivuga.

- Amasezerano ubwayo yitwa ay'inguzanyo, azatangira gushyirwa mu bikorwa tariki ya 30/07/2005, ingingo yayo ya 2 ikavuga ko inyungu zizatangira kubarwa nyuma y'ukwezi kumwe amafaranga amaze gushyirwa kuri konti ya Kajangwe.
- Ingingo ya 4 y'amasezerano ikavuga ko Banki igomba kwandika mu bitabo byayo umunsi amafaranga yatanzwe (décaissement ou déblocage de fonds), ingingo ya 8 ikavuga ko mu gihe inguzanyo itanzwe Kajangwe nawe azatanga ingwate zivugwa muri iyo ngingo. [27] Kajangwe asanga rero ECOBANK idashobora kwishyura umwenda itigeze imuha kuko kuwa 16/12/2005 yaje gusesa ayo masezerano, ahinduka 153.483.397 Frw, akibaza impamvu atariwo mubare aregwa ahubwo akaregwa 136.898.167 Frw. UKO URUKIKO RUBIBONA [28] Ingingo ya 9 y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi, iteganya ko "urega agomba kugaragaza ibimenyetso by'ibyo aregera. Iyo abibuze, uwarezwe aratsinda".

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107 [29] Isesengura ry'amasezerano yabaye tariki ya 05/07/2005 hagati ya ECOBANK na Kajangwe, rigaragaza ko ayo masezerano yari ay'umwenda ungana na 136.868.167 Frw ahawe nka "découvert amortissable" azishyura mu gihe cy'amezi 96 n'inyungu zawo za 15 %, kuwa tariki ya 30/07/2005 (ingingo ya 1 n'ya 2), hakanavugwamo ko impamvu yayo ari "consolidation", ko inyungu zizatangira kubarwa haherewe ku itariki amafaranga azaba yayahawe, ko Kajangwe azahabwa ingengabihe y'uburyo bwo kwishyura (plan de remboursement) nayo igize igice cy'amasezerano (ingingo ya 3), ko mu ngwate zitanzwe harimo "nantissement des bus, procurement de la vente des bus" na "procurement de la vente des actions restant après la vente de 1334 titres", ko kandi mu nyandiko agomba gushyikiriza banki harimo na "étude de faisabilité du projet d'exploitation des bus". [30] Urukiko rurasanga aya masezerano, n'ubwo yanditsemo ko impamvu yayo ari uguhuza imyenda (consolidation), atagaragaza mu buryo busobanutse bw'imibare, imyenda ya Kajangwe yahujwe iyo ariyo n'uko yanganaga, kugirango haboneke umwenda remezo (capital) wa 136.868.167 Frw, n'uburyo wari kuzishyurwa, mu gihe Kajangwe yemera ko yari afite umwenda yishyuraga wa 91.318.226 Frw. ECOBANK na none ntigaragaza "plan de remboursement" yamukoreye ivugwa muri ayo masezerano, uretse ko nta n'ikigaragaza ko ayo mafaranga Kajangwe yayahawe (décaissement) nk'uko bivugwa muri ayo masezerano. [31] Urukiko rurasanga ahubwo, ibivugwa muri ayo masezerano byumvikanisha ko yari ay'umwenda mushya Kajangwe yagombaga guhabwa y'umushinga wo kugura bus 2, amaze gutanga "étude de faisabilité" n'ingwate yasabwaga harimo n'izo modoka, akaba rero adakwiye gufatwa nk'ikimenyetso cy'umwenda ukomoka ku myenda ibiri ECOBANK ivuga ko yahuje. [32] Ku byerekeranye n'uko ECOBANK ivuga ko Kajangwe ari we wasabye ko imyenda ye ihuzwa, bigakorwa akabimenyeshwa akanabyemera, ubu akaba abihakana, urukiko rurasanga icyari kumara impaka ari uko ECOBANK, nk'umunyamwuga, yari gushyikiriza uru ECOBANK v. KAJANGWE

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108 ICYEGERANYO CY'IBYEMEZO BY'INKIKO rukiko, nk'uko rwanabisabye ariko ntibikorwe, uburyo yabaze imyenda ya Kajangwe, maze ikayihuriza hamwe mbere yo gusinya amasezerano yavuzwe, kugira ngo hamenyekane inkomoko, n'ingano y'imyenda yahujwe igize umwenda aregwa, n'uburyo wagombaga kwishyurwa (plan de remboursement). [33] Byongeye kandi bigaragara ko nyuma yo gusinya ayo masezerano, ECOBANK yagiye imenyeshya Kajangwe umwenda mu buryo butandukanye kugeza ubwo tariki ya 26/01/2007, yamwandikiye ibaruwa RMU/GUD/002/01-07 imumenyesha ko, imaze gusuzuma neza imibare, isanga umwenda ayifitiye ari 153.483.397 Frw nk'uko biri ku mugereka w'ibaruwa, bamusaba imbabazi ko mbere bari bakoze amakosa yo kumubarira nabi, banamubwira ko agomba kurangiza kwishyura bitarenze tariki ya 30/01/2007. [34] Harebwe umugereka w'iyo baruwa, banki yemezaga ko Kajangwe yamaze kwishyura 243.500.000 Frw y'umwenda remezo n'inyungu zingana na 45,9 millions, asigaye 153.483.397 Frw akaba agizwe 100% n'inyungu. Na none tariki ya 27/04/2007 yabwiwe ko umwenda ari 192.017.960 Frw, kuwa 15/09/2010 yishyuzwa 425.923.843 Frw, bikaba bitumvikana uburyo nyuma yaje kuregwa gusa umwenda remezo ungana na 136.868.167 Frw, mu gihe nayo yemeraga ko igisigaye yishyuzwa ari inyungu gusa. [35] Urukiko rurasanga rero nk'uko n'Urukiko Rukuru rw'Ubucuruzi rwabibonye, nta bimenyetso ECOBANK itanga by'umwenda wahujwe iregera, bityo ubujurire bwayo nta shingiro bufite.

- b. Kumenya niba ikirego kigamije kwiregura cyatanzwe na Kajangwe mu Rukiko Rukuru rw'Ubucuruzi cyaragombaga kwakirwa, niba kandi ubujurire bwe bwuririye ku bundi bwakwakirwa. [36] Me Kayitare uhagarariye ECOBANK avuga ko ubujurire bwa Kajangwe bwuririye ku bundi budakwiye kwakirwa ngo busuzumwe kubera ko ari ikirego gishya atangiye mu rwego rw'ubujurire kuko iby'indishyi asaba bitigeze biburanwaho mu rwego rwa mbere, bikaba

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109 kandi ntaho bihuriye n'ikirego ECOBANK yatanze kigamije kwishyura umwenda ukomoka ku masezerano yo kuwa 05/07/2005, nta n'aho bihuriye no kuba Kajangwe mbere y'ayo masezerano yari yaratse inguzanyo ntayihabwe, bikaba rero byaratanzwe mu buryo bunyuranije n'ingingo za 167 na 168 y'Itegeko ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi. Asanga niba Kajangwe ashaka kubiregera yabitangira ikirego ukwabyo. [37] Kajangwe n'abamwunganira bavuga ko ikirego kigamije kwiregura yatanze mu Rukiko Rukuru rw'Ubucuruzi rwanze kucyakira ku mpamvu zidafite ishingiro, akaba rero atari gishya. [38] Ku byerekeranye n'isano icyo kirego gifitanye n'icyo ECOBANK yareze Kajangwe, bavuga ko kigamije kugaragaza ko umwenda aregwa bivugwa ko ari uwasigaye nyuma yo kumugurishiriza Hôtel ari uburiganya yakorewe kuko yishyujwe umwenda urenze uwo yahawe, bakabisabira indishyi zingana na 2.000.000.000 Frw zikubiyemo indishyi mbonezamusaruro, indishyi z'akababaro, amafaranga y'ikurikiranarubanza n'igihembo cya avoka mu buryo bukurikira :

- Indishyi mbonezamusaruro za 949.922.632 Frw y'igihombo yatewe n'igurishwa rya "Hôtel Burundi Palace";
- Indishyi za 508.278.816 Frw z'igihombo yatewe no kuba ECOBANK itaramuhaye inguzanyo yamwemerereye yo kugura "Bus 2" nk'uko byari biteganyijwe mu mushinga yayihaye hakabamo 143.464.457 Frw y'inguzanyo yagombaga kubona;
- 88.136.699 Frw ya "acompte versé + intérêts" za 15 %;
- Amafaranga 157.319.287 Frw y'igihombo yatewe no kwishyura umwenda utari ngombwa wa 91.318.226 Frw;
- Indishyi mpozamarira ku muryango we zingana na 420.000.000 Frw kubera ko ECOBANK yamushyize mu kato k'abadashobora gukorana na Banki zose zo mu Rwanda (classe 5) kuva mu 1998 byatumye adashobora kugira icyo yimarira n'umuryango we, ikanamurega imubeshyera ko ayifitiye umwenda wa 594.317.302 imbere ECOBANK v. KAJANGWE

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110 ICYEGERANYO CY'IBYEMEZO BY'INKIKO y'Umukuru w'Igihugu n'abashoramari bagenzi be bikamutera igisebo n'ipfunwe.

- Amafaranga 20.000.000 Frw y'igihombo cya Avoka. UKO URUKIKO RUBIBONA [39] Ku byerekeranye n'uko ikirego kigamije kwiregura cya Kajangwe cyaba ari gishya gitangiwe bwa mbere mu bujirire, Urukiko rurasanga atari ukuri kuko urukiko rubanza rwagisuzumye rugasanga kidakwiriye kwakirwa kuko cyatanze gikereye, bityo ubujirire bwuririye ku bundi yatanze bukaba bugomba kwakirwa bugasuzumwa. [40] Ku birebana no gutanga ikirego kiregera kwiregura, ingingo ya 351 nonies, igika cya mbere y'Itegeko n° 45/2007 ryo kuwa 11/09/2007 rihindura kandi ryuzuza itegeko n° 18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, iteganya ko "ikirego kiregera kwiregura no kurega uwishingiye bikorwa mu buryo bwanditse mbere yo kurangiza iburanisha ry'ibanze". [41] Ku byerekeranye no kumenya niba urukiko rubanza rwaragombaga kwakira ikirego cyo kwiregura cya Kajangwe, inyandiko ziri mu dosiye zigaragaza ko iburanisha ry'ibanze mu Rukiko Rukuru rw'Ubucuruzi ryatangiye tariki ya 14/04/2010, abaturanyi baritaba ariko nta myanzuro uregwa ari we Kajangwe yatanze, iburanishwa ryimurirwa tariki ya 23/06/2010, uwo munsu Me Muhozi Paulin wamuburaniraga asaba itariki yo kuburanisha urubanza mu mizi akazaba yatanze n'imyanzuro izubiza iya ECOBANK. Iburanisha ry'ibanze ryarashojwe, hemezwa ko urubanza ruzaburanishwa mu mizi tariki ya 1/9/2010. [42] Bigaragara ko mu mwanzuro wakiriwe mu iburanisha ryabaye tariki ya 9/3/2011 aribwo hagaragaye bwa mbere ikirego kiregera

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111 kwiregura cya Kajangwe, bityo kuba kitarakiriwe bikaba bifite ishingiro kuko cyatanze mu buryo bunyuranyije n'ingingo yavuzwe haruguru. [43] Hashingiwe ku byasobanuwe byose, Urukiko rurasanga, usibye impamvu zashingiweho zitandikanye n'izo mu rubanza rwajuririwe ku birebana n'ubujurire bwa ECOBANK, nta gihindutse ku cyemezo cyafashwe n'Urukiko Rukuru rw'Ubucuruzi. III. ICYEMEZO CY'URUKIKO [44] Rwemeje ko ubujurire bwa ECOBANK nta shingiro bufite. [45] Rwemeje kwakira ubujurire bwa Kajangwe Callixte bubwuriyeho. [46] Rwemeje ko ubwo bujurire bwuririye ku bundi nta shingiro bufite. [47] Rutegetse ECOBANK kwishyura amafaranga 40.800 Frw y'amagarama y'urubanza mu gihe cy'iminsi umunani (8), itayatanga, ayo mafaranga agakurwa mu byayo ku ngufu za Leta.

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112 FINA BANK v. MUTEMBO [Rwanda URUKIKO RW'IKIRENGA – 2014 SC – RCOMA 0147/11/CS (Kayitesi, P.J., Mukandamanga na Rugabirwa, J.) 24 Mutarama 2014] Amategeko agenga imitungo – Guhererekanya umutungo utimukanwa – Indishyi zituruka kugutanga impapuro z'inzu yaguzwe mu gihe habayeho ubukererwe mu kuzitanga – Kudahabwa ibyangombwa by'umutungo utimukanwa nyuma y'ubugure ubwabyo ni impamvu yo kuryozwa indishyi ku wabitindanye kabone n'ubwo yaba yarashyikirije uwo mutungo uwawuguze – Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 258. Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Inyungu zituruka ku kutabasha gukoresha mu buryo busesuye icyaguzwe – Uwaguze inzu akayihabwa ariko ntahabwe ibyangombwa byayo ntiyagenerwa inyungu zibariwe ku gaciro k'inzu yitwaje ko atahawe ibyangombwa byayo kandi nyamara ayituyemo. Incamake y'ikibazo: Kuwa 27/09/2007, FINA BANK yagurishije mu cyamunara Mutembo inzu iri mu kibanza no 91 iherereye i Musanze mu Ntara y'Amajyaruguru. Mukumuha ibyemezo by'inzu, yamuhaye "Certificat d'enregistrement" y'inzu iri mu kibanza no 25; Mutembo aza kumenya ko yahawe ibyangombwa bitari iby'inzu yaguze mu cyamunara ari uko asabye "mutation" kugira ngo ahabwe "certificat d'enregistrement" nshya yanditse mu mazina ye. Mutembo yabimenyesheje FINA BANK yemera ikosa imwizeza ko izabikosora ariko kuyibona bikomeza gutinda. Mutembo nyuma yo kwandikira no kwihanangiriza FINA BANK yatanze ikirego mu Rukiko Rukuru rw'Ubucuruzi avuga ko yahabwa indishyi z'igihe kinini FINA BANK yamaze itamuha ibyangombwa by'inzu yamugurishije, naho FINA BANK yo ikavuga ko nta ruhare yagize mu kuba Mutembo yaramaze igihe kinini adahawe ibyangombwa by'inzu yaguze. Urukiko Rukuru rw'Ubucuruzi rwemeza

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113 FINA BANK v. MUTEMBO ko ikirego cya Mutembo gifite ishingiro kuko FINA BANK yabaye nyirabayazana mu kumutinda kubona "certificat d'enregistrement" y'inzu yaguze ruyitegeka no kubitangira indishyi. FINA BANK yajuririye Urukiko rw'Ikirenga ivuga ko Urukiko Rukuru rw'Ubucuruzi rwayiciye indishyi rwirengagije ibisobanuro yaruhaye bigaragaza ko nta ruhare

yagize mu gutuma Mutembo atinda guhabwa icyangombwa cy'inzu yaguze; naho Mutembo we akavuga ko ubujurire bwa FINA BANK ntashingiro bwahabwa kuko banki yakomeje kumutanza kubona ibyangombwa kandi ibizi neza ko ibyo yamuhaye ataribyo. Muri urwo rubanza kandi Mutembo yasabye inyungu z'uko atabashije kubyaza umusaruro inzu yaguze akazibara ashingira ku gaciro kayo nyamara kandi yarahise ayijyamo akimara kuyigura; naho FINA BANK ikavuga ko itayatanga kuko ikirego cy'inyungu yatanze kitashyikirijwe ubwanditsi bw'Urukiko ndetse ko n'inzu yahise ayihabwa, ko rero ibyo asaba byaba ari icyo bita "enrichissement sans cause".

Incamake y'icyemezo: 1. Kuba uregwa yaramaze imyaka hafi itanu atarahabwa impapuro z'inzu yaguze yavukijwe uburenganzira bwo kuyikoresha mu buryo bwisanzuye nko kuyitangaho ingwate cyangwa kuyigurisha n'ibindi..., akaba rero agomba kubiharerwa indishyi zingana na 5.000.000frw kubera ko uwajuriye yatinze kumuha icyangombwa cy'inzu bituma atayikoresha mu buryo bwuzuye.

2. Kubyerekeye inyungu zasabwe n'warezwe mu bujurire ashingiye kuba atarahawe ibyangombwa by'inzu nk'utarayihawe, urukiko rwasanze atazihabwa kuko iyo nzu yayishyikirijwe akayituramo. Ubujurire nta shingiro bufite. Ubujurire bwuririye ku bundi nta shingiro bufite. Amagarama aherereye ku wajuriye.

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114 ICYEGERANYO CY'IBYEMEZO BY'INKIKO Amategeko yashingiweho: Itegeko ryo kuwa 30/07/1888 ryerekeye imirimo nshinganwa cyangwa amasezerano, ingingo ya 258. Nta manza zifashishijwe. Urubanza I. IMITERERE Y'URUBANZA [1] Kuwa 27/09/2006 Mutembo Senyana Kavos yaguze na FINA BANK muri cyamunara inzu iri mu kibanza no 91 i Musanze mu Ntara y'Amajyaruguru y'uwitwa Zigiranyirazo Protais wari uyibereyemo umwenda. Igiye kumuha ibyemezo by'inzu yamuhaye "certificat d'enregistrement" y'inzu iri mu kibanza no 25 [nayo ya Zigiranyirazo Protais] aho kumuha iy'inzu yaguze iri mu kibanza no 91, bimenyekana ari uko Mutembo asabye "mutation" kugira ngo ahabwe "certificat d'enregistrement" nshya yanditse ku mazina ye. Mutembo yaje kumenya ko ibyangombwa by'inzu ye byari bfitwe na BRD yari yarabihawe ingwate na Zigiranyirazo Protais igihe yishyingiraga umwenda wafashwe na SOBOLIRWA, abimenyesha FINA BNK yemera ikosa imwizeza ko izarikosora, agashobora kubona "certificat d'enregistrement" y'inzu ye imwanditseho, ariko kuyibona bikomeza gutinda. [2] Nyuma yo kwandikira FINA BANK no kuyihanangiriza, Mutembo Senyana Kavos yaregeye Urukiko Rukuru rw'Ubucuruzi asaba ibikubiye mu kirego nk'uko byasobanuwe hejuru, FINA BANK yo ikavuga ko ntacyo yari gukurikiranwaho kuko nta ruhare yagize mu kuba Mutembo yaramaze igihe kinini adahawe ibyangombwa by'inzu yaguze. Urukiko rwemeje ko ikirego cye gifite ishingiro kuri bimwe, rutegeka FINA BANK kumwishyura 5.000.000 Frw y'indishyi z'uko yabaye

nyirabayazana wo kumutanza kubona "certificat d'enregistrement" y'inzu yaguze, kumuha indishyi zingana na 1.000.000 Frw y'ikurikiranarubanza n'igihembo cya avoka, yose

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115 hamwe akaba 6.000.000 Frw no kwishyura 9.700 Frw y' amagarama y'urubanza. [3] FINA BANK yajuririye Urukiko rw'Ikirenga ivuga ko Urukiko Rukuru rwayemeje ikosa ryo kuba yarahaye Mutembo Senyana Kavos "certificat d'enregistrement" itari iy'inzu yaguze yo mu kibanza n° 91 i Musanze aribyo byabaye intandaro yo kuba "mutation de propriété" yarafashe igihe kinini, no kuyitegeka kubatangira indishyi zigeze kuri 6.000.000 Frw, rwirengagije ibisobanuro yaruhaye bigaragaza ko nta ruhare yagize mu gutuma Mutembo atinda guhabwa icyangombwa cy'inzu yaguze. Dosiye yakorewe ibanzirizasuzuma, umucamanza wabishinzwe yemeza ko ubujurire bwakiriwe, urubanza ruburanishwa kuwa 24/12/2013, FINA BANK iburanirwa na Me Rusanganwa Jean Bosco, naho Mutembo Senyana aburanirwa na Me Toy Nzamwita. II. ISESENGURA RY'IBIBAZO BIGIZE URU RUBANZA

1. Kumenya niba hari uruhare FINA BANK yagize mu gutinda gutanga ibyangombwa by'inzu yaguzwe muri cyamunara na Mutembo Senyana Kavos. [4] Uburanira FINA BANK avuga ko Urukiko rubanza rwarenze ku bisobanuro batanze bagaragaza ko nta kosa cyangwa uburangare FINA BANK yagize cyangwa kwica amasezerano mu gutuma Mutembo adahabwa impapuro mpamo z'inzu baguze iri mu kibanza n° 91. Asobanura ko icyo FINA BANK yemera ari uko yabanje guha Mutembo Senyana Kavos "certificat d'enregistrement" itari iy'inzu yaguze no kuba iyo nzu yari yaratanzweho ingwate muri BRD na Zigiranyirazo igihe yishingiraga umwenda wa SOBOLIRWA, ariko ko ibyo byombi FINA BANK yabimenye nyuma ya cyamunara ubwo Mutembo yayigaragarizaga ko yibeshye ikamuha "certificat

9 "Certificat d'enregistrement" y'inzu iri mu kibanza n° 25 i Musanze mu Ntara y'Amajyaruguru. FINA BANK v. MUTEMBO 1 1

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116 ICYEGERANYO CY'IBYEMEZO BY'INKIKO d'enregistrement" y'indi nzu iri mu kibanza n° 25, akayisaba iy'inzu ye iri mu kibanza n° 91. Uburanira FINA BANK avugako rero asanga nta kosa ryayibarwaho. [5] Avuga ko ahubwo ikosa ryabaye ryatewe n'imyitwarire ya Mutembo Senyana Kavos wamaze kubona inzu (transfert matériel de propriété) akicecekeraga, muri 2010 nyuma y'imyaka itatu akaba aribwo yatangiye gusaba ibyangombwa byayo, ko iyo yihutira kubisaba cyamunara ikimara kuba muri 2006, ikibazo kiba cyaramenyekanye kigakemurwa hakiri kare, ariko ko aho FINA BANK ibimenyeye yihutiye gukemura ikibazo kugira ngo "mutation" ishobore gukorwa. [6] Akomeza avuga ko ndetse iryo kosa rikomoka no ku myitwarire y'izindi nzego zabigizemo uruhare, ko Umubitsi w'impapuro mpamo z'ubutaka yavuze ko ryari ryarabaye igihe hatangwaga ibyangombwa by'icyo kibanza cyagiye gihabwa numero zitandukanye, 25, 92, na 91 kandi ibyo nta ruhare FINA BANK yabigizemo, ko atariyo yaryozwa amakosa yabaye kuko inzu yatejwe cyamunara ari iyo yahawe mu bugwate kandi ikaba ariyo yagurishijwe, ko na none icyo gihe "Notaire" ariwe wakoze "acte d'adjudication publique" kuwa 27/09/2006 yagaragayemo amakosa, iyo nzu iri mu kibanza no 91 igurishwa, yitwa ko iri mu kibanza n° 25. [7] Uburanira Mutembo avuga ko ubujurire bwa FINA BANK nta shingiro ryabwo, kuko no mu Rukiko rubanza yemeye ikosa ryo kuba yaratanze "certificat d'enregistrement" idahuye n'inzu yagurishije, ko

yajyaga ibandikira yisegura, bigaragara ko hari amakosa yemeraga, ariko inzira zo kubikosora ziza kuruhanya, ko kuba yikuraho iryo kosa ikarishyira ku zindi nzego zishinzwe gutanga ibyangombwa by'amazu atari byo, kuko icyabaye ari ubushishozi buke bwatumye haba kudahuza amazu n'ibyemezo biyaranga, FINA BANK ikaba yaragombaga kugira imikorere myiza yo kugenzura inzu yarigiye guteza cyamunara n'ibyemezo by'ubutaka biyiranga. [8] Avuga kandi ko kuvuga ko ikosa ryatewe na Mutembo watinze gusaba icyemezo cy'inzu ye, nyuma y'imyaka itatu muri 2010 atari

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117 ukuri, kuko yagisabye cyamunara ikimara kuba kuwa 27/9/2006 agahabwa ikitaricyo, aribwo umugore wa Mutembo yatangiye kwandikirana na FINA BANK muri 2008 ayisaba icyemezo nyakuri cy'inzu baguze, ko kuva n'icyo gihe bitewe n'imikorere mibi yayo, byafashe imyaka 6 imwizeza buri gihe ko igiye gukemura ikibazo, Mutembo Senyana Kavos aza kugihabwa muri 2012 urubanza rwaratangiye, ko ibyo byose bigaragazwa n'inyandiko zisanzwe n'iz'ubutumwa bugufi (Emails) yashyikirije Urukiko. Uburanira Mutembo Senyana Kavos yanzura avuga ko ubujurire bwa FINA BANK nta shingiro ifite kuko ikibazo yateje ari ugatanga ibyangombwa by'inzu bitari byo, ko ubusanzwe ntawe uteza cyamunara inzu adafitiye ibyangombwa biyiranga. UKO URUKIKO RUBIBONA [9] Ingingo ya 258 CC LIII ivuga ko "igikorwa cyose cy'umuntu cyangirije undi gisaba nyiri ukugikora kubitangira indishyi". [10] Inyandiko ziri muri dosiye zigaragaza ko inzu FINA BANK yarifiteho ingwate yari iy'uwitwa Zigiranyirazo Protais iri mu kibanza n° 91, ko kandi yari yaranatanzweho ingwate muri BRD, ari nayo yari ifite ibyangombwa byayo igihe yatezwaga cyamunara kuwa 27/09/2006, ikagurwa na Mutembo Senyana Kavos, ariko aza guhabwa "certificat d'enregistrement" itariyo, kuko yahawe iy'inzu iri mu kibanza n° 25 i Musanze nayo ya Zigiranyirazo Protais. Bigaragara kandi kuri 13, ko iyi nzu nayo yatejwe cyamunara, igurwa n'uwitwa Mbanda Laurent na Madamu we Chantal Mbanda kuwa 04/08/2009 mu kurangiza urubanza n° 81 rwaciye n'Urukiko Gacaca rwa Rwiri kuwa 14/02/2008. Bigaragara na none muri dosiye ko Umubitsi w'inyandiko mpamo z'ubutaka yamenye iki kibazo igihe Mutembo Senyana Kavos yamusabaga ko hakorwa "mutation" kugira ngo ahabwe "certificat d'enregistrement" nshya.

10 Ibaruwa No 1882 16.03/NLC/0214Umubitsi Wungirije w'Impapuro mpamo z'ubutaka yandikiye Umuyobozi Mukuru wa FINA BANK yerekeye gusaba icyemezo cya Cyamunara, ivugwamo ikibanza n° 25 cyaguzwe na Bwana Mbanda Laurent. FINA BANK v. MUTEMBO 2 2

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118 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [11] Urukiko rusanga rero FINA BANK yaragize uburangare n'imicungiremibi y'ingwate z'amazu yahawe bituma yitiranya ibyemezo byayo igiheyabihaga abayaguze, hashingiwe kubigaragara mu ibaruwa y'Umubitsi Wungirije w'Impapuro mpamo z'Ubutaka yandikiye Umuyobozi Mukuru wa FINA BANK S.A amusaba gukosoza icyemezo cya cyamunara (acte d'adjudication) yakozwe kuwa 27/05/2009 na Noteri wa Leta, amusaba kandi ko nibirangira, azamugezaho umwimerere w'Impapuro mpamo z'ubutaka

numero R.XII Folio 182 zose zanditse kuri Zigiranyirazo Protain'icyemezo cya RDB gihanagura imyenda kuri ibyo bibanza kugirango bashyire mu bikorwa icyifuzo cya buri muntu. [12] Urukiko rusanga na none nkuko amabaruwa asanzwe n'ubutumwa bugufi biri muri dosiye abigaragaza Mutembo Senyana Kavos ataratinze gusaba icyangombwa cy'inzu kuko yatangiye kwandikirana na FINA BANK mu kwezi kwa mbere kwa 2008, cyamunara yarabaye kuwa 27/09/2006, ni ukuvuga nyuma y'imyaka 2. Kuba rero FINA BANK ivuga ko ikosa ryo kuba Mutembo Senyana Kavos yaratinze gukorerwa "mutation" ariwe ryaryozwa bikaba atari byo, kuko icyabaye ikosa ari uko FINA BANK yamuhaye icyangombwa cy'inzu kitari cyo kubera ubushishozi buke bwayo, kuko mu busanzwe yagombye kuba yaragenzuye inzu igurishwa muri cyamunara, aho iherereye n'ibyangombwa byayo. [13] Urukiko rusanga na none, naho ikibazo cy'inyandiko n'ibyemezo by'amazu kigaragariye, ntabwo FINA BANK yakoranye ubuhanga n'umwete kugira ngo ibyagombaga gukosorwa bikorwe mu gihe gito gishoboka kubera ko nkuko inzandiko ziri muri dosiye (correspondance) yandikiranye na Mutembo Senyana Kavos ndetse n'Umubitsi w'Impapurompamo z'Ubutaka zibigaragaza, imishyikirano ku mugaragaro yatangiye mu kwa mbere 2008, guhera icyo gihe byafashe imyaka ine (4) kugira ngo Mutembo Senyana Kavos abone "Certificat d'enregistrement" ku mazinaye muri 2012, urubanza rwaratangiye nyuma yo kwihanangirizwa (mise endemeure) birenze inshuro imwe.

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119 [14] Hashingiwe ku bimaze kuvugwa, Urukiko rurasanga FINA BANK yaragize uruhare mu gutuma Mutembo Senyana Kavos atinda guhabwa ibyangombwa by'inzu yaguze bituma atayikoresha mu buryo bwisanzuye, bityo ikaba rero igomba kubiryoza hakurikijwe ibiteganywa n'ingingo ya 258 CC LIII yavuzwe haruguru.

2. Ku byerekeye n'indishyi zisabwa [15] Uburanira Mutembo Senyana Kavos avuga ko kuba yarimwe uburenganzira ku nzu ye mu gihe kirenga imyaka itanu (5) ngo abe yarayitanzeho ingwate kugira ngo ahabwe inguzanyo, byamuteje akababaro, akaba asanga uru Rukiko rukwiye kwemeza indishyi zose hamwe yagenewe n'urukiko rubanza zingana na 6.000.000 Frw yahawe. Avuga kandi ko FINA BANK yategekwe kwishyura Mutembo Senyana Kavos amafaranga y'igihembo angana na 10% y'amafaranga yose igomba kumwishyura. [16] Avuga kandi ko yuririye ku bujirire bwatanze na FINA BANK, asaba na none inyungu za 18% ku kiguzi cy'inzu cya 31.410.000 Frw kubera inyungu we n'umugore we bavukijwe kuko bashoye imari yabo mu kugura inzu itigeze ibungukira mu gihe cy'imyaka itanu, ko izo nyungu zabarwa ku kiguzi cy'inzu guhera kuwa 13/11/2006, umunsi FINA BANK yemeje ko yakiriye ayo mafaranga kugeza ku munsi w'icibwa ry'urubanza zibazwe mu buryo bukurikira: $31.410.000 \text{ Frw} \times 18\% \times 65 \text{ (mois)} = 30.624.750 \text{ Frw}$. [17] Uburanira FINA BANK avuga ko ikirego cya Mutembo Senyana Kavos cyuririye ku bujirire bwatanze na FINA BANK kigamije gusaba inyungu kubera igihombo yatejwe no kutabyaza inzu ye inyungu kitashyikirijwe Ubwanditsi bw'Urukiko, ko ariko kandi nta gihombo Mutembo Senyana Kavos yagize kuko inzu yahise ayihabwa, ko rero ibyo asaba byaba ari icyo bita "enrichissement sans cause". Asanga ko nta ndishyi FINA BANK yari gucibwa, ko ahubwo igomba guhabwa indishyi zingana na 1.000.000 Frw y'ikurikiranarubanza n'igihembo cya

avoka. FINA BANK v. MUTEMBO

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120 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [18] Ku byerekeye indishyi zingana na 1.000.000 Frw y'ikurikiranarubanza n'igihembo cya avoka zisabwa na FINA BANK, uburanira Mutembo Senyana Kavos avuga ko ntaho zashingira mu gihe bigaragara ko ariyo iri mu makosa. UKO URUKIKO RUBIBONA [19] Ku byerekeye indishyi zisabwa, Urukiko rusanga nkuko byasobanuwe haruguru, kuba Mutembo Senyana Kavos yaramaze igihe kinini atarahabwa ibyangombwa by'inzu, byaratewe n'amakosa ya FINA BANK yagize imikorere mibi, ibura ubushishozi bituma itanga icyemezo cy'inzu kitaricyo, n'igihe ibimenyeye, ntiyagaragaza ubushake n'umwete wo kubikosora mu buryo bwihuse ngo Mutembo Senyana Kavos ahabwe icyemezo cy'inzu ye. [20] Urukiko rusanga rero Mutembo Senyana Kavos yarahise ahabwa inzuye akimara kwishyura kuwa 13/11/2006, kuba yaramaze imyaka hafi itanu atarahabwa Impapuro mpamo zayo, yabujijwe uburenganzira bwokuyikoresha mu buryo bwisanzuye nko kuyitangaho ingwate cyangwa kuyigurisha n'ibindi..., akaba rero agombaga kubiharerwa indishyi nkuko Urukiko rubanza rwabyemeje. [21] Ku birebana n'ingano y'indishyi Mutembo Senyana Kavos akwiye guhabwa, Urukiko rurasanga 5.000.000 Frw yahawe kubera ko FINA BANK yatinze kumuha icyangombwa cy'inzu bituma atayikoresha mu buryo bwuzuye, ari mu kigero gikwiye akaba ariyo agomba kugumaho. [22] Ku byerekeranye n'inyungu zingana 30.624.750 Frw Mutembo Senyana Kavos asaba kubera ko atashoboye kubyaza inyungu inzu ye, rusanga atazihabwa kuko inzu yaguze yayihawe, akaba rero atagomba kubarira inyungu ku giciro yishyuye. [23] Ku byerekeye amafaranga y'igihembo cya avoka, Urukiko rusanga Mutembo Senyana Kavos adakwiye gushingira ayo mafaranga

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121 ku gaciro k'ikiburanwa kuko binyuranyije n'ibiteganywa n'ingingo 11 ya 62 n'ya 63 z'Itegeko N° 83/2013 ryo kuwa 11/09/2013 rishyiraho Urugaga rw'Abavoka mu Rwanda, rikanagena imitunganyirize n'imikorere byarwo, ariko kandi indishyi za 1.000.000 Frw y'ikurikiranarubanza n'igihembo cya avoka yagenwe n'Urukiko rubanza ziri mu rugero rukwiye ku nzego zombi yaburaniyemo. [24] Ku birebana n'indishyi z'ikurikiranarubanza n'igihembo cy'avoka FINA BANK isaba, Urukiko rurasanga itazihabwa kubera ko ntacyo itsindiye muri uru rubanza. III. ICYEMEZO CY'URUKIKO [25] Rwemeje ko ubujurire bwatanzwe na FINA BANK nta shingiro bufite; [26] Rwemeje ko ubujurire bwatanzwe na Mutembo Senyana Kavos bwuririye ku bwa FINA BANK nta shingiro bufite; [27] Rwemeje ko imikirize y'urubanza N° R.COM 0109/11/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi kuwa 02/02/2012 idahindutse;

11 Ingingo ya 62 : Igena n'itangazwa ry'ibihembo mbonera by'Abavoka Inama y'Urugaga igena ibihembo mbonera by'Abavoka mu bushishozi bukwiye uwo mwuga. Birabujijwe gushyiraho ibihembo ushingiyeye ku buryo urubanza ruzakizwa kuko Umwavoka ashinzwe gukoresha ubushishozi bwe. Umwavoka ntashobora kubirengaho nta ruhushya rw'Umukuru w'Urugaga. Ibihembo mbonera by'Abavoka bitangazwa mu Igazeti ya Leta ya Repubulika y'u Rwanda

n'Umukuru w'Urugaga. Ingingo ya 63: Kwishyura igihembo cy'Umwavoka cyishyurwa hakurikijwe igihembo cyumvikanyweho n'Avoka n'uwo aburanira hitawe ku biteganywa n'ibihembo mbonera by'Abavoka. Impaka zijyanye n'ubwishyu zimenyeshwa Umukuru w'Urugaga kugira ngo yumvikanishe impande zombi. FINA BANK v. MUTEMBO 3 3

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122 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [28] Rutegetse FINA BANK gutanga amagarama y'urubanza angana na 24.300 Frw, itayatanga mu gihe cy'iminsi 8, akazakurwa mu byayo ku ngufu za Leta.

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123 NDIGELA v. ATA [Rwanda URUKIKO RW'IKIRENGA – RCOMA 0054/10/CS (Mugenzi, P.J., Mukamulisa na Rugabirwa, J.) 18 Werurwe 2011] Amategeko agenga imiburanishirize y'Imanza z'imbonezamubano – Ingwate itangwa n'umunyamahanga urega – Nta Sosiyeti yo mu bihugu bigize umuryango wa Afurika y'Iburasirazuba yasabwa ingwate itangwa n'abanyamahanga kuko amategeko ayifata nk'isosiyeti yo mu Rwanda – Itegeko n° 14/2010 ryo kuwa 07/05/2010 rihindura kandi ryuzuza itegeko n° 07/2009 ryo kuwa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi, ingingo ya 12 – Itegeko no 18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y'Imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi nk'uko ryahinduwe kugeza ubu, ingingo ya 81. Amategeko y'ubwikorezi – Amasezerano – Itandukaniro hagati y'amasezerano y'ubwikorezi n'ay'ubukode bw'imodoka – Iyo rwiyezamezimirimo atariwe ugenzura imodoka yatanzeho ubukode, amasezerano yitwa ay'ubukode bw'imodoka – Iyo imodoka yakodeshejwe itanganywe n'umushoferi agakomeza kugengwa na nyiri modoka, amasezerano yitwa ay'ubwikorezi. Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Indishyi – Ikurikirana ry'indishyi zikomoka ku byangijwe – Uregera indishyi ashobora guhitamo kuryoza abakoresha ibikorwa byangijwe n'abakozi babo mu gihe bakoraga imirimo babashinze aho kuzishingira ku ikurikiranacyaha – Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 260. Incamake y'ikibazo: ATA yagiranye na NDIGELA&CO amasezerano yo kuyitwarira mu modoka ibiribwa ibivana Isaka ibijyana i Goma (RDC). ATA yareze NDIGELA &CO mu Rukiko Rukuru rw'Ubucuruzi ivuga ko itubahirije ayo masezerano y'ubwikorezi bagiranye, kuko imodoka zatwaye ibyo biribwa zigeze i Gisenyi, abashoferi bazo bagurisha ibigori bari batwaye. Urukiko Rukuru

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124 ICYEGERANYO CY'IBYEMEZO BY'INKIKO rw'Ubucuruzi rwemeje ko ikirego cya ATA gifite ishingiye, rutegeka NDIGELA &CO kuyishyura amafaranga ahwanye n'ibigori byagurishijwe hiyongereyeho avansi yari yahawe ndetse n'amafaranga y'igihembo cya Avoka. NDIGELA&CO yajuririye urwo rubanza mu Rukiko rw'Ikirenga ivuga ko ikirego cya ATA kitagombaga kwakirwa idatanze ingwate y'amagarama isabwa umunyamahanga urega, ikanavuga ko itari ikwiriye kuryozwa amakosa y'abashoferi bagurishije ibyo bari batwaye, ko ahubwo aribo bakwiye

kwishyura kuko bahamwe n'icyaha mu rubanza nshinjabyaha ndetse bakaba banemera kwishyura. Kuri izi ngingo, ATA yo ivuga ko amasosiyete yo mu bihugu bigize umuryango wa Afurika y'Iburasirazuba afatwa nk'amasosiyete yo mu Rwanda bityo ko nta ngwate isabwa abanyamahanga yagombaga gutanga. Ivuga kandi ko NDIGELA &CO ariyo igomba gutanga indishyi kuko abashoferi bayo aribo barigishije ibyo bari bikoreye kandi ko ariyo yari ifite inshingano zo kubigeza aho bumvikanye. Incamake y'icyemezo:1. Kuba ATA ari sosiyeti yo mu gihugu kigize umuryango wa Afurika y'Iburasirazuba kandi amategeko y'u Rwanda akaba ayifata nk'isosiyeti nyarwanda, ntigomba kubanza gutanga ingwate y'amagarama isabwa umunyamahanga mbere yo kurega.

2. Iyo nyiri modoka yakodeshejwe atariwe uyigenzura, ayo masezerano yitwa ay'ubukode bw'imodoka naho iyo rwiyezamirimo atanzeho imodoka ubukode akaba arinawe utanga umushoferi kandi agakomeza kumugenzura, ayo masezerano yitwa ay'ubwikorezi. Bityo amasezerano NDIGELA &CO yagiranye na ATA ni ay'ubwikorezi kuko itagaragaza mu masezerano bagiranye ahateganyijwe ko ATA izishakira abashoferi kandi ikaba itagaragaza ko abashoferi banyereje ibiribwa bari batwaye batari abayo. Kubera iyo mpamvu NDIGELA agomba kuryozwa kuba atarabashije gushyitsa ibyo yikoreye aho byagombaga kugera, kuko byari inshingano ze.
3. Abakoresha baryozwa ibyangijwe n'abakozi babo, iyo bakora imirimo babashinze. Nta cyabuza ATA amahitamo yo kuryoza indishyi

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125 NDIGELA &CO nk'umukoresha w'abashoferi bamwangirije aho kuzishingira ku ikurikiranacyaha. Ubujurire nta shingiro bufite. Ubujurire bwuririye ku bundi bufite ishingiro. NDIGELA&CO itegegetswe kwishyura ATA amafaranga yindishyi, indishyi zo gusiragizwa mu manza n'igihembo cy'Avoka. Amagarama aherereye ku wajuriye. Amategeko yashingiweho: Itegeko n° 14/2010 ryo kuwa 07/05/2010 rihindura kandi ryuzuzwa itegeko n° 07/2009 ryo kuwa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi, ingingo ya 12. Itegeko no 18/2004 ryo ku wa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi nk'uko ryahinduwe kugeza ubu, ingingo ya 81. Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 260. Inyandiko z'abahanga zifashishijwe: François COLLART DUTILLEUL et Philippe DELEBECQUE, Contrats civils et commerciaux, 7e édition, Paris, Dalloz, 2004, p. 698. Urubanza I. IMITERERE Y'URUBANZA [1] Sosiyete ALLIED TRANSPORT AGENT (ATA) yatsindiye isoko rya "WORLD Food Programme" (WFP) rihwanye na \$ US 65.000.00 ryerekeranye no gutwara ibiribwa ibivana muri Tanzania ibijyana kuri Goma (RDC). Bitewe nuko ATA nta modoka yari ifite, yagiranye amasezerano y'ubwikorezi na Sosiyete NDIGELA & Co yo kuvana ibigori Isaka ibijyana i Goma, ikodesha amakamyo 2 ya NDIGELA kuri \$ US 11.000.00, iyiha avance ya \$ US 5.000.00. NDIGELA v. ATA

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126 ICYEGERANYO CY'IBYEMEZO BY'INKIKO [2] ATA ivuga ko izo modoka zigeze i Gisenyi abashoferi bazo bagurishije ibigori bari batwaye, bituma irega NDIGELA kuba itarubahirije amasezerano bagiranye y'ubwikorezi maze bikayitera igihombo. [3] Urukiko Rukuru rw'Ubucuruzi rumaze kwemeza ko ikirego cya ATA gifite ishingiro, rwategetse NDIGELA kwiwishyura \$US 32,214.10 yakaswe na WFP ahwanye na toni 61 z'ibigori abashoferi bayo bagurishije, hakiyongeraho \$US 5.000.00 ahwanye na avance NDIGELA yari yahawe ndetse na \$US 1000.00 y'igihembo cya Avoka. [4] Mu bujurire mu Rukiko rw'Ikirenga, uburanira NDIGELA avuga ko Ikirego cya ATA kitagombaga kwakirwa idatanze ingwate y'amagarama isabwa abanyamahanga barega, akanavuga ko NDIGELA itari ikwiye kuryozwa amakosa y'abashoferi bagurishije ibyo bari batwaye kandi ari ATA yabihereye akazi hakurikijwe amasezerano y'ubwikorezi ATA yagiranye na NDIGELA, ikindi kandi abagize uruhare mu irigiswa ry'ibigori byabuze banabyiyemerera abakaba ari bo bakwiye kwishyura kuko bahamwe n'icyaha mu rubanza nshinjabyaha rwabaciriwe, ndetse hakaba hari n'inyandiko basinye bemera kwishyura. [5] Urubanza rwaburanishijwe mu ruhame ku wa 17/02/2011, NDIGELA & Co ihagarariwe na Me GUMISIRIZA Hilary, naho ALLIED TRANSPORT AGENT ihagarariwe na Me NDUTIYE Yussuf. II. ISESENGURA RY'IBIBAZO BIGIZE URUBANZA Ku byerekeye ingwate NDIGELA ivuga ko ATA yagombaga gutanga nk'umunyamahanga urega. [6] NDIGELA ivuga ko Urukiko Rukuru rutagombaga kwakira ikirego cya ATA idatanze ingwate isabwa abanyamahanga kuko ari sosiyete y'inyamahanga.

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127 [7] Nk'uko uburanira ATA abivuga kandi bikaba byaranasobanuwe n'Urukiko Rukuru rw'Ubucuruzi, ingingo ya 81 y'Itegeko no 18/2004 ryo ku wa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi nk'uko ryahinduwe kugeza ubu, iteganya ko, iyo bisabwe n'uregwa, umunyamahanga wese urega agomba gutanga amafaranga y'ingwate, uretse igihe haba hariho amasezerano ibihugu by'amahanga byaba byaragiranye n'u Rwanda asonera abaturage babyo ingwate. [8] NDIGELA yasobanuriwe ko, usibye n'amasezerano nk'ayo avugwa muri iyo ngingo y'itegeko, hari itegeko nyirizina, n° 14/2010 ryo kuwa 07/05/2010 rihindura kandi ryuzuza itegeko n° 07/2009 ryo kuwa 27/04/2009 ryerekeye amasosiyete y'ubucuruzi riteganya, mu ngingo yaryo ya 12 ko amasosiyete yo mu bihugu bigize umuryango wa Afurika y'Iburasirazuba afatwa nk'amasosiyete yo mu Rwanda. Ubujurire rero bwa NDIGELA idahakana ko Sosiyete ATA yo muri Tanzaniya, kimwe mu bihugu bigize uwo muryango irebwa n'iryo tegeko, nta shingiro bufite. Ku kibazo cyo kumenya niba amasezerano yabaye hagati ya NDIGELA na ATA ari ay'ubwikorezi cyangwa ay'ubukode gusa bw'imodoka. [9] NDIGELA ivuga ko Urukiko Rukuru rw'Ubucuruzi rwirengagije amasezerano yagiranye na ATA yo guha ATA imodoka maze ikishakira abashoferi yagombaga no kwiwishyurira, bityo rero, NDIGELA ikemeza ko itaryozwa ingaruka z'amasezerano y'ubwikorezi kandi ntayo yagiranye na ATA. [10] Kuri iyi ngingo, ATA isubiza ko ibyo NDIGELA ivuga byo kuba barasezeranye ko ATA izishakira abashoferi atari ukuri, igahamya ko amasezerano bagiranye ari ay'ubwikorezi NDIGELA yagombaga gukora, ikoresheje imodoka n'abashoferi bayo. [11] Mu

nyandiko y'amasezerano NDIGELA yakoranye na ATA, nta na hamwe hateganyijwe ko ATA izishakira abashoferi nk'uko NDIGELA ibivuga, ikaba itarigeze igaragaza aho ibikura. Urukiko NDIGELA v. ATA

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128 ICYEGERANYO CY'IBYEMEZO BY'INKIKO rurasanga, mu gihe NDIGELA itagaragaza ko abashoferi banyereje imizigo batari abayo nk'uko ibivuga, bigomba kwemezwa ko bari abayo, inabafiteho ububasha, amasezerano yagiranye na ATA akaba rero agomba kwitwa amasezerano y'ubwikorezi, aho kuba ay'ubukode bw'imodoka. [12] Iki gisobanuro kandi gihura n'ibyemezwa n'abanditsi b'abahanga mu mategeko, aho basobanura ko iyo rwiyezamazirimo atariwe ugenzura imodoka yatanze, aba adakwiye kwitwa umwikorezi, ahubwo aba ari uwakodesheje gusa iyo modoka, ibyo bikaba bitandukanye n'igihe imodoka y'ubwikorezi yaba yakodesheje igatanganwa n'umushoferi, kuko aha ariho amasezerano noneho yitwa ay'ubwikorezi, mu gihe umushoferi akomeje kugengwa n'uwatanze imodoka¹² [13] Kuba amasezerano NDIGELA yagiranye na ATA ari ay'ubwikorezi nk'uko bisobanuwe haruguru, bituma umwikorezi NDIGELA agomba kuryozwa kuba atarabashije gushyitsa ibyo yikoreye aho byagombaga kugera, kuko byari inshingano ze (obligation de resultat) hakurikijwe ibiteganywa n'ingingo ya 16 n'ya 18 z'Itegeko ryo kuwa 19 mutarama 1920 ryerekeye intumwa mu bucuruzi n'abikorezi¹³

12Lorsque l'entrepreneur n'a pas la maîtrise du déplacement du véhicule qu'il fournit, il ne mérite pas la qualité de transporteur : il est un simple bailleur ou plus exactement un frèteur engagé dans un contrat d'affrètement avec un chauffeur. Cependant, si l'engin de transport est loué avec son conducteur, les solutions sont différentes : le contrat doit être requalifié de location en transport, dès l'instant que le conducteur est resté sous les ordres du prétendu bailleur", François COLLART DUTILLEUL et Philippe DELEBECQUE, Contrats civils et commerciaux, 7^e édition, Paris, Dalloz, 2004, p.698. 13Iyo ngingo ya 16 igateganya ko « Uretse impamvu zitunguranye cyangwa ntarengwa, umwikorezi yishingira isohoza ry'abantu cyangwa ibintu mu gihe cyasezeranywe, iyo nta gihe cyasezeranywe abikora akurikije uko bikorwa mu karere ...», naho iya 18 igateganya ko umwikorezi aryozwa ibyangiritse cyangwa ibyatakaye cyangwa ndetse n'impanuka zaba kubo atwaye mu gihe aterekana ko ukwangirika, 1 1 2 2

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129 Ku kibazo cy'uko ATA itakurikiranye ubwishyu ku bashoferi barigishije ibintu, ndetse n'abo babigurishijeho kandi baragaragaye. [14] NDIGELA ivuga ko n'iyi byafatwa ko abashoferi barigishije ibintu bari abayo, atari yo yakwishyuzwa ibyo barigishije kandi biboneka ko ari bo babikoze kuko icyaha ari gatozi, ndetse n'abahishe ibyo bintu bakaba barabihaniwe mu rubanza nshinjabyaha banemera kwishyura. [15] Kuri icyo kibazo, ATA isubiza ko NDIGELA ariyo igomba gutanga indishyi kuko abashoferi barigishije ibyo bari bikoreye bari abayo, kandi ikaba yari ifite inshingano zo kugeza ibiribwa ahari hateganyijwe, naho kuba yarahisemo gukurikira indishyi ishingiyeye ku masezerano aho gushingira ku ikurikiranacyaha, ATA ivuga ko ari amahitamo ihabwa n'amategeko. [16] Urukiko rurasanga NDIGELA itaburanisha ihame ry'uko

uburyozwacyaha ari gatozi ku wagikoze, mu gihe ntawigeze ayikurikiranaho icyaha cyakozwe n'abandi, ahubwo uburyozwe kuri yo buturutse ku bikorwa by'abashoferi bayo bukaba bwashingira ku ngingo ya 260 y'igitabo cya gatatu cy'urwunge rw'amategako mbonezamubano iteganya uburyozwe bw'umukoresha ku bikorwa by'umukozi we14, no ku buryozwe bushingiye kuri kamere y' masezerano y'ubwikorezi nk'uko yasobanuwe haruguru. [17] Naho kuvuga ko ATA yabuze gukurikirana ubwishyu ku banyereje ibintu kandi babyemera, iyo nayo si ingingo yakuraho

ugutakara cyangwa impanuka zaturutse ku yindi mpamvu itamuturutseho kandi idashobora kumushinjwa ». 14Iyo ngingo iteganya ko umuntu ataryozwa gusa ibyangiritse kubera ibikorwa bye bwite, ahubwo anaryozwa ibyangijwe n'ibikorwa by'abo yishingiye cyangwa by'ibintu ashinzwe kurinda, ikanasobanura ko ba shebuja n'abakoresha baryozwa ibyangijwe n'abakozi babo, iyo bakora imirimo babashinze. NDIGELA v. ATA 3 3

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130 ICYEGERANYO CY'IBYEMEZO BY'INKIKO 130 uburyozwa bwishyu ku mwikorezi wari ufite inshingano zo kugeza ibintu aho yiyemeje, kuko ATA wagombaga kubigerezwa aho bumvikanye yari afite amahitamo yo kuba yakurikirana indishyi ahereye ku masezerano y'ubwikorezi yagiranye na NDIGELA, cyangwa se akaba yazikurikirana mu nzira yo kuziregera ku banyerejeje ibintu byabuze. Ntaho rero NDIGELA yashingira ivuga ko ATA yagombaga byanze bikunze gukurikirana indishyi mu rubanza rw'inshinjabyaha cyangwa se iruhereyeho. Ku byerekeye indishyi ATA isaba mu bujurire bwuririye ku bundi. [18] ATA irasaba indishyi zihwanye na 500.000 frw y'igihembo cya Avoka, na 1.000.000 frw yo gusiragizwa mu nkiko, NDIGELA yo igasubiza ko izo ndishyi ntacyo zishingiyeho. [19] Urukiko rurasanga koko byarabaye ngombwa ko ATA ishyiraho avoka uyiburanira muri ubu bujurire bwa NDIGELA, ikaba ikwiye kubiharerwa indishyi, ariko kuko izo isaba ari ikirenga, ikaba yagenerwa, mu bushishozi bw'Urukiko 300.000 frw y'igihembo cya avoka yiyongera ku yo yari yagenewe mbere. [20] Harebwe kandi ingingo z'ubujurire bwa NDIGELA muri uru Rukiko n'isesengurwa ryazo nk'uko ryagaragajwe haruguru, bigaragara ko nta mpamvu zishyitse zagombaga gutuma NDIGELA ijuririra urubanza yatsindiwe mu Rukiko Rukuru rw'ubucuruzi, bityo rero indishyi ATA isaba zo kuba yarasiragijwe mu nkiko zikaba zifite ishingiro, ariko ikaba yagenerwa 300.000 frw mu bushishozi bw'Urukiko, kuko ayo isaba ari ikirenga. III. ICYEMEZO CY'URUKIKO [21] Rwemeye kwakira ubujurire bwa NDIGELA & Co n'ubwa ALLIED TRANSPORT AGENT (ATA) bubwuririyeho kuko bwaje mu buryo n'inzira bikurikije amategako;

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131 [22] Rwemeje ko ubujurire bwa NDIGELA & Co nta shingiro bufite; ko ubwa TRANSPORT AGENT bufite ishingiro ; [23] Rutegetse NDIGELA & Co kwishyura ATA indishyi zihwanye n'amadolari ya Amerika 38.214,10 yaciwe n'Urukiko Rukuru rw'Ubucuruzi, hiyongereyeho 600.000 frw iciwe muri uru Rukiko, itayatanga mu gihe cy'iminsi 15, agakurwa mu byayo ku ngufu za Leta. [24] Ruyitegetse kwishyura umusogongerwa wa Leta, uhwanye na 4% y'igiteranyo

cy'indishyi zose iciwe, atayatanga mu gihe cy'iminsi 15, agakurwa mu byayo ku ngufu za Leta. [25] Ruyitegetse kwishyura amagarama y'urubanza ahanye na 32.400 frw, itayatanga mu gihe cy'iminsi umunani, agakurwa mu byayo ku ngufu za Leta. NDIGELA v. ATA

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IMANZA NSHINJABYAHA

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133 UBUSHINJACYAHA v. UWAMURENGEYE [Rwanda URUKIKO RW'IKIRENGA – 2014SC – RPAA 0110/10/CS (Kayitesi Zainabo, P.J., Mukanyundo na Gakwaya, J.) 31 Mutarama 2014] Amategeko mpanabyaha – Ubwicamubyeyi – Gukubita no gukomeretsa umubyeyi mu cyico bikamuviramo urupfu bigaragaza umugambi wo gukora icyaha cy'ubwicanyi – Itegeko-Teka no 21/77 ryo kuwa 18/08/1977 rishyiraho Igitabo cy'Amategeko Ahana, ingingo ya 314. Amategeko agenga imiburanishirize y'imanza nshinjabyaha – Guhindura inyito y'icyaha – Uburenganzira n'inshingano by'umucamanza bwo guhindura inyito y'icyaha mu Rukiko rw'ubujurire kubera iburabubasha – Urukiko rufite ububasha bwo kuburanisha urwo rubanza nyuma yo guteshwa agaciro – Urubanza rutangirira mu Rukiko rufite ububasha ku rwego rwa mbere – Itegeko no 30/2013 ryo ku wa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 190, igika cya 2. Incamake y'ikibazo: Uwajuriye yakurikiranyweho icyaha cyo gukubita no gukomeretsa nyina bikamuviramo gupfa imbere y'Urukiko Rwisumbuye rwa Rusizi rwamuhamije icyaha rumuhanisha igifungo cy'imyaka icumi (10) n'ihazabu y'amafaranga ibihumbi ijana (100.000 frw).Yajuririye Urukiko Rukuru, Urugereko rwa Rusizi maze mu iburanisha, Ubushinjacyaha busaba ko Urukiko rwahindura inyito y'icyaha, uregwa agakurikiranwaho ubwica-mubyeyi, asaba ko Urukiko rwemeza ko urubanza rwaciwe n'Urukiko Rwisumbuye ruvuyeho, iburanisha rigatangirira bwa mbere mu Rukiko Rukuru kubera ko ari rwo rufite ububasha. Urukiko Rukuru rwasanze ubujurire nta shingiro bufite naho ku cyifuzo cy'ubushinjacyaha, rwavuze ko butari bwajuriye kandi guhindura inyito y'icyaha bishobora kugira ingaruka yo kongera igihano maze rwemeza ko icyifuzo cy'ubushinjacyaha kitakiriwe. Ubushinjacyaha bwajuririye

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134 ICYEGERANYO CY'IBYEMEZO BY'INKIKO icyo cyemezo mu Rukiko rw'Ikirenga bugaragaza ko icyaha cyakozwe ari ubwicamubyeyi aho kuba gukubita no gukomeretsa kikaba kigomba kuburanishwa ku rwego rwa mbere mu Rukiko Rukuru mu gihe Uwamurengeye Venant we aburana ahakana ko atigeze agira umugambi wo kwica umubyeyi we. Incamake y'icyemezo: 1. Kuba inyandiko ya muganga n'abatangabuhamya bemeza ko nyakwigendera yazize igice cy'urubaho yakubiswe mu mutwe bigaragaza ubushake bwo gukora icyaha cy'ubwicanyi.

2. Guhindura inyito y'icyaha ni uburenganzira ndetse n'inshingano by'umucamanza bityo uregwa agomba gukurikiranwaho icyaha cy'ubwica-mubyeyi bityo imanza zaciwe mbere zikavanwaho kuko zaburanishijwe n'inkiko zidafite ububasha hakurikijwe inyito y'icyaha.
3. Hashingiwe ku ifasi icyaha cyakorewemo, Urukiko Rwisumbuye rwa Rusizi ni rwo rufite ububasha bwo kuburanisha Uwamurengeye Venant ku cyaha cy'ubwicamubyeyi ku rwego rwa mbere. Ubujurire bw'Ubushinjacyaha bufite ishingiro. Inyito y'icyaha cyakozwe n'uregwa ni ubwicamubyeyi aho kuba gukubita no gukomeretsa byaviriyemo nyina gupfa. Imanza zaciwe mbere zivuyeho. Urubanza ku cyaha cy'ubwica-mubyeyi ruzatangirira ku rwego rwa mbere mu Rukiko Rwisumbuye rwa Rusizi. Amagarama aherereye ku isanduku ya Leta. Amategeko yashingiweho: Itegeko-Ngenga no 02/2013/OL ryo kuwa 16/06/2013 rihindura kandi ryuzuza Itegeko-Ngenga no 51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko nk'uko ryahinduwe kandi ryujijwe kugeza ubu, ingingo ya 10. Itegeko no 30/2013 ryo kuwa 24/05/2013 ryerekeye imiburanishirize y'imanza z'inshinjabyaha, ingingo ya 190, igika cya 2.

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135 Itegeko-Teka no 21/77 ryo kuwa 18/08/1977 rishyiraho Igitabo cy'Amategeko Ahana, ingingo ya 314. Ibyemezo by'inkiko byifashishijwe: Ubushinjacyaha v. Nyawera Célestin, RPAA 0033/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 14/09/2012, igika cya 6. Ubushinjacyaha v. Caporal Ngabonziza, RPAA 0117/07/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 17/11/2010, igika cya 18. Urubanza I. IMITERERE Y'URUBANZA [1] Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Rusizi, Uwamurengeye Vénant akurikiranweho icyaha cyo gukubita no gukomeretsa Nyina umubyara bikamuviramo urupfu. Urukiko rwasanze icyaha kimuhama rumuhanisha igifungo cy'imyaka 10 n'ihazabu ya 100.000 Frw. [2] Uwamurengeye ntiyishimiye imikirize y'urubanza ajuririra Urukiko Rukuru, Urugereko rwa Rusizi. Mu gihe cy'iburanisha, Ubushinjacyaha bwavuze ko impamvu z'ubujurire za Uwamurengeye nta shingiro zifite, kandi ko Urukiko rukwiye guhindura inyito y'icyaha, uregwa agakurikiranwaho icyaha cy'ubwica-mubyeyi kubera ko yari asanzwe afitiye Nyina inzika amuziza ko yamuroze kandi ko yamuhondaguye urubaho mu cyico, bityo Urukiko rukemeza ko Urubanza rw'Urukiko Rwisumbuye ruvuyeho, iburanisha rigatangirira bwa mbere mu Rukiko Rukuru kubera ko ari rwo rufite ububasha bwo kuburanisha ubwica-mubyeyi ku rwego rwa mbere. [3] Ku bujurire bwa Uwamurengeye Vénant, Urukiko rwasanze ibyo uwajuriye anenga imikirize y'urubanza rwa mbere nta shingiro bifite nuko rwemeza ko nta gihindutse ku rubanza rwajuririye. Naho ku cyifuzo cy'Ubushinjacyaha, Urukiko rwasanze Ubushinjacyaha butari UBUSHINJACYAHA v. UWAMURENGEYE

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136 ICYEGERANYO CY'IBYEMEZO BY'INKIKO bwajuriye kandi ko guhindura inyito y'icyaha bishobora kugira ingaruka zo kwongera igihano, nuko rushingiye ku ngingo ya 174 y'Itegeko No 13/2004 ryo kuwa 17/05/2004 ryerekeye imiburanishirize y'imanza z'inshinjabyaha rwemeza ko icyifuzo cy'Ubushinjacyaha kitakiriwe. [4] Ubushinjacyaha bwajuririye iki cyemezo mu Rukiko

rw'Ikirenga. Iburanisha ryabaye kuwa 23/12/2013, Uwamurengeye Vénant ahari kandi yunganiwe na Me Umulisa Alice naho Ubushinjacyaha buhagarariwe na Ntawangundi Béatrice. II. IKIBAZO KIGIZE URUBANZA N'ISESENGURA RYACYO Kumenya niba inyito y'icyaha UWAMURENGEYE Venant akurikiranyweho ikwiye guhinduka n'ingaruka zabyo. [5] Uhagarariye Ubushinjacyaha avuga ko, mu Rukiko Rwisumbuye, Uwamurengeye Vénant yakurikiranyweho icyaha cyo gukubita no gukomeretsa Nyina umubyara bikamuviramo urupfu, nyamara hari ibimenyetso bigaragaza ko mbere y'uko yica Nyina, yari amufitiye inzika y'uko yamuroze, ko yamukubise igice cy'urubaho inshuro ebyiri mu mutwe kandi mu cyico, ibi byose bikaba bigaragaza umugambi yari afite wo kumwica, ko icyaha cyakozwe ari ubwica- mubyeyi aho kuba gukubita no gukomeretsa, kikaba kiri mu bubasha bw'Urukiko Rukuru. [6] Ubushinjacyaha buvuga kandi ko niyo hataza kugira ubisaba, byari inshingano y'Umucamanza kwibwiriza no kwemeza ko urubanza rutangirira mu Rukiko Rukuru hashingiwe ku ngingo ya 89 y'Itegeko- Ngenga no 51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, bityo Urukiko rw'Ikirenga rukaba rukwiye gutegeka ko uru rubanza rutangirira mu Rukiko Rukuru, Urugereko rwa Rusizi. Uhagarariye Ubushinjacyaha yongeraho ko cyakora adatsimbaraye kuri iyi ngingo y'ubujurire, ahubwo ko Urukiko

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137 rw'Ikirenga rwabifataho icyemezo mu bushishozi bwarwo, ko rusanze uregwa nta mugambi yari afite wo kwica Nyina nta kibazo Ubushinjacyaha bubifiteho. [7] Uwamurengeye avuga ko nta mugambi yigeze agira wo kwica Nyina, ko muri dosiye harimo ibimenyetso bikubiyemo imvugo ya Se n'iz'abavandimwe be zigaragaza ko mu myaka 25 yabanye n'ababyeyi be ntacyo yigeze apfa na Nyina, ko ibyo yavuze ko Nyina yamuroze akanaroga abavandimwe be atazi aho yabivanaga kuko ariwe wishyikiraga kuri Nyina kurusha abandi bana bavukana, ko nawe atazi uko byamugendekeye kugira ngo akubite Nyina bimuviremo gupfa, ariyo mpamvu avuga ko atari muzima icyo gihe kuko atari azi ibyo akora. Yongeraho ko iby'Ubushinjacyaha buvuga ko yaba yari afitiye nyina inzika y'uko yari yaramuroze nta shingiro bikwiye guhabwa cyane cyane ko bishingira ku mvugo ye mu Bugenzacyaha aho yabajijwe nyuma y'icyumweru ari mu Bitaro ahabwa imiti isinziriza kubera uburwayi bwo mu mutwe yari arwaye. Asobanura kandi ko, n'ubwo avuga ko yari arwaye indwara yo mu mutwe, na Se akaba yaramuvuzaga iyo ndwara ku witwa André, atabifitiye inyandiko ya muganga kubera ko abavandimwe be bari kubimufashamo bose bamwanze, kuva aho nyina apfiriye. Ku bijyanye no kuba yarahondaguye Nyina mu cyico, avuga ko yemera ko yamukubise igice cy'urubaho inshuro imwe gusa mu mutwe ariko ko abisabira imbabazi, akaba asaba Urukiko ko yarekurwa akajya kwiyunga n'umuryango we. [8] Me Umulisa wunganira Uwamurengeye avuga ko hari ibimenyetso bigaragaza ko Uwamurengeye yari afite ikibazo cy'imyitwarire mu gihe yakoraga icyaha, nko kuba yari amaze iminsi ashaka gusenya inzu y'ababyeyi be, kujunjama, kujugunya ibintu mu musarane no kurwana, ko no kugira ngo afatwe, Polisi yakoresheje imbaraga nyinshi ndetse bakanamutera imiti isinziriza yitwa "Phenergan". Yongeraho ko ibi byose bavuga bitagamije kugaragaza ko nta buryozwacyaha buhari ahubwo ko ari ibimenyetso by'uko Uwamurengeye atigeze acura umugambi wo kwica Nyina nk'uko Ubushinjacyaha bubivuga. Me Umulisa avuga kandi ko uregwa atakubise Nyina ngo ahite

apfa kuko yaguye mu nzira bamujyana kwa UBUSHINJACYAHA v. UWAMURENGEYE

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138 ICYEGERANYO CY'IBYEMEZO BY'INKIKO muganga, ko ibyo rero bititwa ubwica-mubyeyi, bityo akaba asanga inyito y'icyaha idakwiye guhinduka. [9] Ingingo ya 314 y'Itegeko-Teka no 21/77 ryo kuwa 18/08/1977 rishyiraho Igitabo cy'Amategeko Ahana cyakoreshwaga icyo gihe, iteganya ko: "Byitwa ubwica-mubyeyi, ubwicanyi bugiriwe Se cyangwa Nyina... ". [10] Naho ingingo ya 321 y'Itegeko-Teka no 21/77 ryo kuwa 18/08/1977 ryavuzwe haruguru ikavuga ko: "Iyo gukubita cyangwa gukomeretsa ku bushake ariko nta gitekerezo cyo kwica kiriho byateye urupfu, nyiri icyaha azahanishwa igifungo kuva ku myaka itanu kugeza kw'icumi n'ihazabu itarenga ibihumbi icumi. Azahanishwa igifungo kuva ku myaka icumi kugeza kuri cumi n'itanu iyo yakoze urwo rugomo yabigambiriye cyangwa yabanje kujya mu gico". [11] Urukiko rurasanga n'ubwo Uwamurengeye Vénant avuga ko yica Nyina atari yabigambiriye kuko yabikoze arwaye indwara yo mu mutwe, akaba nta nicyo yapfaga na Nyina, abavandimwe be na se bakavuga ko yajunjamaga, naho umwunganira akavuga ko akora icyaha yari afite imyifatire idasanzwe nko gushaka kurwana no gusenya inzu y'ababyeyi be; ntaho rwahera ruvuga ko igihe yakoraga icyaha yararwaye mu mutwe kuko nta bimenyetso bagaragarije Urukiko byemeza ko Uwamurengeye yari afite uburwayi bwo mu mutwe ubwo yakoraga icyaha. [12] Urukiko rurasanga rero, hashingiwe kuri dosiye y'urubanza, Uwamurengeye Vénant yarakubise nyina Nyirabazungu Thérésie ikibaho mu mutwe aramukomeretsa bikomeye apfa ageze kwa muganga mu Bitaro bya Bushenge (cote 1), ibi bikaba bishimangirwa n'imvugo ya Hagenimana Fabien na Nyirabwimana Théopiste, abavandimwe ba Uwamurengeye, bemeza ko uregwa yakubise Nyina igice cy'urubaho mu mutwe akamukomeretsa akaza kugwa mu nzira bamujyanye ku Bitaro, Inyandiko ya Muganga (Expertise Médico-Légale) nayo ikaba ivuga ko Nyirabazungu Thérésie yazize igice cy'urubaho yakubiswe ku mutwe (cote 10), bityo akaba nta gushidikanya guhari ko icyateye

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139 urupfu rwa Nyirabazungu Thérésie ari igice cy'urubaho yakubiswe mu mutwe n'umuhungu we Uwamurengeye Vénant, kandi kuba yarakubise Nyirabazungu igice cy'urubaho mu mutwe (mu cyico) bikaba bigaragaza ubushake bwo gukora icyaha cy'ubwicanyi. [13] Ku byerekeye inyito y'icyaha, nk'uko byemejwe n'uru Rukiko mu urubanza hagati y'Ubushinjacyaha na Nyawera Célestin¹⁵, ndetse n'urubanza hagati y'Ubushinjacyaha na Caporal Ngabonziza¹⁶, guhindura inyito y'icyaha ku mucamanza ni uburenganzira ndetse n'inshingano bye. Urukiko rurasanga rero hashingiwe ku bisobanuro bimaze gutangwa haruguru, no ku ngingo ya 314 y'Itegeko-Teka no 21/77 ryo kuwa 18/08/1977 ryavuzwe haruguru ryakurikizwaga icyaha gikorwa, Uwamurengeye Vénant akwiye gukurikiranwaho icyaha cy'ubwica-mubyeyi ; bityo urubanza RP.0149/08/TGI/RSZ rwaciwe n'Urukiko Rwisumubuye rwa Rusizi kuwa 19/02/2009 ndetse n'urubanza RPA 0151/09/HC/RSZ rwaciwe mu bujirire n'Urukiko Rukuru, Urugereko rwa Rusizi zikaba zikwiye kuvaho, kuko zaburanishijwe n'Inkiko zitabifiye ububasha hakurikijwe inyito y'icyaha. [14] Kubirebana n'urubanza k'ubwica-mubyeyi, Urukiko rurasanga, hashingiwe ku ngingo ya 190, igika cya 2 y'Itegeko No 30/2013 ryo kuwa 24/05/2013 ryerekeye imiburanishirize

y’imanza z’inshinjabyaha, ivuga ko: “Urukiko rutesheje agaciro urubanza rwajuririwe rutaruburanisha bundi bushya mu mizi yarwo. Ababuranyi bashobora ariko kongera kuregera bundi bushya urukiko rwo ku rwego rwa mbere mu gihe bishoboka gukosora amakosa aba yakozwe; urwo rubanza rukwiye gutangirira mu Rukiko rubifitiye ububasha.

15Ubushinjacyaha v. Nyawera Célestin, RPAA 0033/11/CS rwaciwe n’Urukiko rw’Ikirenga kuwa 14/09/2012, igika cya 6. 16Ubushinjacyaha v. Caporal Ngabonziza, RPAA 0117/07/CS rwaciwe n’Urukiko rw’Ikirenga kuwa 17/11/2010, igika cya 18.

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140 ICYEGERANYO CY’IBYEMEZO BY’INKIKO [15] Urukiko rurasanga rero, hashingiwe ku ngingo ya 10 y’Itegeko- Ngenga no 02/2013/OL ryo kuwa 16/06/2013 rihindura kandi ryuzuza Itegeko- Ngenga no 51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n’ububasha by’inkiko nk’uko ryahinduwe kandi ryujwe kugeza ubu ndetse no ku ifasi icyaha cyakorewemo, Urukiko Rwisumbuye rwa Rusizi ari rwo rufite ububasha bwo kuburanisha Uwamurengeye Vénant ku cyaha cy’ubwica-mubyeyi ku rwego rwa mbere. III. ICYEMEZO CY’URUKIKO [16] Rwemeje ko ubujurire bw’Ubushinjacyaha bufite ishingiro. [17] Rwemeje ko inyito y’icyaha cyakozwe na Uwamurengeye Vénant ari ubwica-mubyeyi aho kuba gukubita no gukomeretsa byaviriyemo nyina gupfa. [18] Rutegetse ko urubanza RP.0149/08/TGI/RSZ rwaciwe n’Urukiko Rwisumbuye rwa Rusizi kuwa 19/02/2009 ndetse n’urubanza RPA 0151/09/HC/RSZ rwaciwe n’Urukiko Rukuru, Urugereko rwa Rusizi zivuyeho. [19] Rutegetse ko urubanza ku cyaha cy’ubwica-mubyeyi Uwamurengeye Venant akurikiranweho n’Ubushinjacyaha rutangirira ku rwego rwa mbere mu Rukiko Rwisumbuye rwa Rusizi. [20] Rutegetse ko amagarama y’urubanza aherera ku Isanduku ya Leta.

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vi RWANDA LAW REPORTS

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vii PREFACE Dear Readers, After nine years (9) of publication of judicial decisions, the administration of the Supreme Court has found that it is necessary to reform and improve its preparation with the intention of facilitating the users, providing the guidelines to be used to deciding on legal issues similar to those examined in reported cases and increasing the quality of judgments in general. It is in that perspective that a team of lawyers (Law Reporters) has been put in place. They prepare the judgments to be published; reflecting in summary the catchwords, facts and holdings of the judgment. This represents a general picture of the case without necessarily reading the entire judgment. In addition to this, the reported judgments are translated in English with the intention of disseminating the decided cases of Rwandan Courts globally. Before publication, the judgments are examined and approved by the Multi-institutional Committee composed of Judges and other legal experts representing other various institutions in relation to the judicial profession. In this first number of Rwanda Law Reports, we shall find one (1) case relating to the request of repealing provisions of law which are inconsistent with the Constitution, one (1) case relating to electoral laws, two (2) civil cases, one (1) criminal case, five (5) commercial cases and two (2) administrative cases. As usual, the law reports are available on the website of the Supreme Court, <http://www.judiciary.gov.rw-jurisprudence-recueil>.

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viii RWANDA LAW REPORTS We take this opportunity to once again encourage all legal practitioners to use these law reports. Prof. Sam RUGEGE Chief Justice of Rwanda President of the High Council of Judiciary

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ix SCOPE OF THE REPORTS These reports cover cases decided in the Supreme Court listed under the heading of "Citation" below. CITATION Those who shall use cases from this report in their writings, can cite it in the following way: [V.1-2014] RLR Prepared by the Supreme Court Funded by Dutch Embassy & ICF

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xvii SUBJECT INDEX considering the way it was used, its implication and the time short messages were sent – Law no 27/2010 of 19/06/2010 relating to elections as amended and complemented to date, articles 29 bis, 30. Re RWAMUCYO (PETITION FOR NULLIFICATION OF ELECTIONS),11 Evidence Law – Evidence of contracts – The photocopy bearing a defect cannot be taken as an evidence of the contract in case its original copy is not revealed. AQUILLA & PRISCILLA v. ENGEN ET AL,79 The plaintiff has the burden to prove with sufficient evidence, in case of failure, he/she loses the case. Re RWAMUCYO (PETITION FOR NULLIFICATION OF ELECTIONS) ,11 Law determining the jurisdiction of courts – Jurisdiction of the Supreme Court – The Supreme Court has appellate jurisdiction over cases heard and decided in second instance by the High Court without jurisdiction – Organic Law n° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28. MWIZA v. KAYINAMURA ,53 Law determining the jurisdiction of commercial courts – Contracts – The lease contract of a room between traders for commercial purpose is considered as commercial contract – Disputes arising from such a contract are heard by commercial courts – Organic Law n° 59/2007 of 16/12/2007 determining the organization, functioning and jurisdiction of Commercial Courts, article 3. MWIZA v. KAYINAMURA53 Law governing professional Court Bailiff – The competence of the professional court bailiff – If requested by the justice or any

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xix SUBJECT INDEX independently – Law n°16/2005 of 18/08/2005 2005 on direct taxes on income, article 2(7°). AMSAR v. RWANDA REVENUE AUTHORITY,.....71 Transport law – Contracts – Difference between carriage contract and lease contract of the vehicle – It is considered as lease contract of vehicle when the owner is not the one who remains in control of the vehicle after lease – If the vehicle was leased with his driver and the latter continues to be under control of the owner of the car, it is considered as carriage contract. NDIGELA v. ATA, 119

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PETITIONS REQUESTING THE REPEAL OF UNCONSTITUTIONAL LAWS

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1 Re MUHOZA (PETITION FOR THE REPEAL OF A LEGAL PROVISION INCONSISTENT WITH THE CONSTITUTION) [Rwanda SUPREME COURT –RS/INCONST/CIV 0001/13/CS (Kayitesi, P.J., Mutashya, Mukanyundo, Kayitesi R., Hatangimbabazi, Kanyange, Mukandamage, Rugabirwa and Munyangeri, J.) October 25, 2013] Constitutional law – Unconstitutional legal provisions – Petition aiming at repealing paragraph 2 of article 176 of the Law no 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure – When one of the spouses is a party to the case regarding their co-owned property, he/she represents his/her partner – Denying the right to third party opposition to the spouse of the person who has been party to the case regarding their co-owned property is not to deprive him/her from the right to property provided for by the Constitution – The Constitution of the Republic of Rwanda of June 4, 2003 as amended to date

art.29 – Law no 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 176. Facts: Karekezi Augustin, the husband of Muhoza Consolée, filed a case in the Intermediate Court of Gasabo, alleging that his piece of land was unlawfully occupied and lost the case. Umuhiza Consolée filed a third party opposition against that case but requested the court to stay the proceedings so that she may first file a case to the Supreme Court requesting paragraph 2 of article 176 of the law no 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure to be repealed because it is inconsistent with article 29 of the Constitution. In the claim filed to the Supreme Court, she explained that article 176 paragraph 1 of the Law no 21/2012 of 14/06/2012 stipulates that persons who are allowed to make a third party opposition are those who have an

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2 RWANDA LAW REPORTS interest in it but paragraph two of this article provides that the provisions of paragraph one shall not apply to the spouse of either party or their children when the subject matter is family property. This article is inconsistent with article 29 of the Rwandan Constitution which provides that every person has a right to private property, whether personal or owned in association with others. Therefore this article deprives the plaintiff's constitutional right to her husband's land. Held: Paragraph 2 of article 176 of the law no 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure is not inconsistent with article 29 of the Constitution because when one of the spouses is a party to the case when the subject matter is the property he/she co-owns with his/her partner, he/she is representing him or her that he/she cannot file for third party opposition since it would be contradictory to the purpose of that remedy. Petition without merit. With costs to the petitioner. Statutes and statutory instruments referred to: Constitution of the Republic of Rwanda of June 4, 2003 as amended to date, article 29. Law no21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 176. Organic law no08/2005 of 14/07/2005 determining the use and management of land in Rwanda, article 35-36. No case referred to. Doctrine referred to: Droit et Pratique de la procédure civile, Sous la direction de Serge Guichard, Dalloz, cinquième édition 2006, p.1158, 1163.

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3 Re MUHOZA

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Muhoza Consolée's husband, Karekezi Augustin filed a case against Irambona Alphonse in Primary Court arguing that Irambona unlawfully occupied his piece of land. The Primary Court ruled that Irambona Alphonse must give back the piece of land to Karekezi Augustin. Irambona appealed to Gasabo Intermediate Court which overturned the appealed judgment, because there had been sharing of that piece of land and each party must retain what it had before. [2] Muhoza Consolée filed a third party opposition on the case her

husband lost in Gasabo Intermediate Court. However she requested the Court to stay the proceedings to allow her to file a petition in the Supreme Court, requesting that article 176(2) of the Law no 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure be repealed. [3] Nizeyimana Léopold, Muhoza's counsel filed a petition to the Supreme Court in place of Muhoza Consolée requesting that article 176(2) of law no21/2012 of 14/06/2012 mentioned above be repealed because it is inconsistent with the Rwandan Constitution as well as articles 35 and 36 of the Organic Law no 08/2005 of 14/07/2005 determining the use and management of land in Rwanda. [4] Muhoza Consolée's petition was examined in the hearing of 31st July 2013; represented by Nizeyimana Léopold, the counsel and the Ministry of Justice was requested to give the opinions, being represented by the State Attorney, Rubango Epimaque. [5] Nizeyimana, the counsel, was given time and recalled that he filed the petition in the name of Muhoza Consolée. He also stated that he made a self deprivation on a part of his claim which concerns articles 35 and 36 of organic law no 08/2005 of 14/07/2005 determining the use and management of land in Rwanda because that law was abrogated.

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4 RWANDA LAW REPORTS Thus paragraph 2 of article 176 of the law no21/2012 of 14/06/2012 is the sole issue for examination and the Court should limit its examination accordingly. [6] Rubango Epimaque, the State Attorney also presented the opinion of the Ministry of Justice regarding Muhoza Consolée's petition. Concerning the admissibility of the claim and the jurisdiction of the Court: [7] The documents contained in the case file indicate the subject matter, filing date, and the signature of Nizeyimana who filed the claim in the name of Muhoza Consolée. They indicate also the grounds of the petition and the deposit of the court fees paid by Muhoza Consolée. The petitioner also submitted a copy of the official gazette of 16/07/2012 which contains articles of the law she requests to be repealed, so the requirement for article 54 of organic law no 003/2012 of 13/06 /2012 determining organization, functioning and jurisdiction of the Supreme Court was fulfilled. [8] Muhoza Consollée has an interest in this case because article she requests to be repealed is prejudicial her because it prevents her from filing a third party opposition against the case her husband lost, while the subject matter is family land to which she has right. [9] Concerning the jurisdiction of the Supreme Court, article 53 of organic law no 03/2012 of the Law mentioned above stipulates that "The Supreme Court shall have jurisdiction over petitions seeking to declare laws or treaties unconstitutional and it also hears petitions regarding the partial or complete repeal of Organic Law, Ordinary Law, or a Decree Law on account of non conformity with the Constitution". Therefore, the petition filed by Muhoza Consolée is in its jurisdiction.

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5 Re MUHOZA II. ANALYSIS OF THE LEGAL ISSUE

1. Whether article 176 (2) of Law no 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure is inconsistent with article 29 of the Constitution: [10] Nizeyimana Léopold, the counsel argues that article 176(1) of the Law no 21/2012 of 14/06/2012 stated above stipulates that any person who was not party to a case but who has an interest in it may make a third party application to set aside a judgment which is prejudicial to his/her rights and if neither he/she nor the person he/she represents were called at the trial, but the second paragraph of this article does not give the right to the spouse of defendant to file a third party opposition; this is inconsistent with article 29 of the Constitution which provides that “every person has a right to private property, whether personal or owned in association with others.” [11] He explains that an article of the Law cannot deprive Muhoza Consolée’s constitutional right because she has the right on the piece of land that her husband alienated without her consent. But article 176 paragraph 2 deprives her of the right to sue for her property in the Court because her spouse lost the case. [12] Additionally, the family cannot be compared to a commercial company as the State Attorney adduces since it has no legal personality. Furthermore, since Karekezi pleaded and lost the case without the knowledge of his spouse, she must have another means to sue for the property to which she has right. [13] Rubango Epimaque, the State Attorney states that paragraph 2 of article 176 of the Law no 21/2012 of 14/06/2012 mentioned above is not inconsistent with article 29 of the Constitution because the property Muhoza Consolée claims is not her personal property but rather the family property which she co-owns with others. When the family has a representative and he pleaded in the family interest, it’s not inconsistent with the Constitution.

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6 RWANDA LAW REPORTS [14] He argues that article which is requested to be repealed gives the right to sue for the family property in court, but it provides that if it is sued for by the one who has the right to do it, it is not necessary that the other family members one at a time may also sue for it because it was previously sued by the one who represented the family interest. He makes a comparison to the commercial company which has many shareholders and one legal representative. After the lawsuit which concerns the company’s interest, takes place each one of the shareholders is precluded from filing a case on the previously litigated matter concerning their general interest. [15] He explains that the paragraph of article which is requested to be repealed was put into place so that lawsuits could come to an end, because it is not understandable how the judgement would be final when each family member has to wait for the ruling to file his/her claim again which can provoke the first case to be reheard. A case pleaded in the family interest is for all family members and also obligates all members to follow it and the right to plead it in a manner to which they all consent. THE VIEW OF THE COURT. [16] The article 29 of the constitution provides that “every person has a right to private property, whether personal or owned an association with others”, but the article 176 of Law no21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure provides that “Any person who was not a party to a case but who has an interest in it may make a third party application to set

aside a judgment which is prejudicial to his/her rights and if neither he/she nor the person he/she represents were called at the trial.” The second paragraph provides that “The provision of the Paragraph one of this article shall not apply to the spouse of either party or their children when the subject matter is the family property”.

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7 Re MUHOZA [17] In regards to matrimonial property, article 17(2) law no22/99 of 12/11/1999 completing code of family law book I and also instituting the part five concerning the management of matrimonial property, donation and succession provided that “In case of marriage under the regime of community of property and that of limited community of acquests, the spouses shall choose who, among themselves, shall be responsible for the management of the common patrimony. They are also equally entitled to monitor and represent. [18] Article mentioned above bestows spouses the right to know how they can manage their common property and to choose who will be responsible for that property whether the wife or the husband. That article confers also the equal capacity to manage that property, implying that either the wife or the husband can enjoy that right in family interest, without obtaining consent from his/her spouse when they are legally married. [19] That article implies that when the spouses opt for the regime of common property or limited community of acquests, that property is for the husband and the wife which is brought into the community to meet the expenses of the family. That is to say the husband and wife cannot claim a special right on the property because it is indivisible. [20] Therefore, if one of the spouses can sue for the property which he/she shares with another which is meant to meet the family expenses, it should be understandable that he/she sued representing the one with whom they share it with, to the extent that the one who did not get involved in the case cannot be regarded as a person who did not sue or be sued as mentioned in paragraph 1 of article 176 of the law no21/2012 of 14/06/2012 stated above. [21] All that has been stated above concurs with the opinions of the law scholar Serge Guinchard pursuant to the provisions of article 1421 of the French family law which also stipulates that the wife and the husband have equal right on the management of matrimonial property.

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8 RWANDA LAW REPORTS He states that a third party opposition filed by one of the spouses is inadmissible regardless of whether it is the husband or wife¹. [22] Therefore, one of the spouses being represented in the lawsuit concerning matrimonial property, cannot alter and file a third party opposition because it is contrary to the role of that remedy as stipulated in paragraph one of article which is requested to be repealed concurs with what the scholars in law also wrote showing that extraordinary appeal is meant for those who were not a party to the case, either him/herself or represented². [23] Basing on all the given explanations, the Court finds paragraph 2 of article 176 of the Law no 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure is not inconsistent with article 29 of the Constitution. III. THE DECISION OF THE COURT [24] Admits the petition of Muhoza Consolée since it was filed in conformity with the law; [25] Decides that the petition is without merit. [26] Decides that article

176 (2) of the Law no 21/2012 of 14/06/2012 relating to civil commercial, labour and administrative

1 Chacun des époux administre les biens communs de telle sorte que la tierce opposition de l'époux non partie au procès est irrecevable, sans qu'il y'ait plus aujourd'hui à observer s'il s'agit du mari ou de la femme: Droit et Pratique de la procédure civile, Sous la direction de Serge Guichard, Dalloz, cinquième édition 2006, p.1163 2 S'agissant d'une voie de recours exceptionnelle destinée uniquement à protéger ceux, qui sans avoir été appelés au procès, peuvent pâtir de son résultat, l'accès doit être réservé aux personnes, qui n'ont effectivement pas été parties, soit directement ou par représentation au débat judiciaire: Droit et Pratique de la procédure civile, Op Cit, p.1158

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9 Re MUHOZA procedure is not inconsistent with article 29 of the Rwandan Constitution of 04/06/2003 as amended to date. [27] Orders Muhoza Consolée to pay the court fees amounting to 16,200 Rwf. If she fails to do so within eight days that amount will be deducted from her assets through Government coercion.

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CASE RELATED TO ELECTIONS

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11 Re RWAMUCYO (PETITION FOR NULLIFICATION OF ELECTIONS) [Rwanda SUPREME COURT – RS/SPEC/0001/13/CS (Rugege, P.J., Kayitesi Zainabo, Mugenzi, Mutashya, Mukanyundo, Kayitesi Rusera, Hatangimbabazi, Kanyange, and Mukandamage, J.) September 26, 2013] Electoral law – Procedures for filing petitions with regard to disputes raised in parliamentary elections – Hierarchy of norms – The instructions which are inconsistent with Organic Law or Law – Courts apply the instructions or regulations when they are consistent with the Constitution and other laws – No conditional petition before the electoral commission in case it is not provided for by other laws – The Constitution of the Republic of Rwanda of June 4, 2003 as amended to date article. 141 paragraph 3 – Organic law no 03/2012/0L of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, articles 65, 66, 67 and 68. Right to electoral campaign – Grounds for nullifying elections – Use of short message service in electoral campaign is not itself forbidden – The fault is committed, considering the way it was used, its implication and the time short messages were sent – Law no 27/2010 of 19/06/2010 relating to elections as amended and complemented to date, articles 29bis, 30. Evidence Law – The plaintiff has the burden to prove with sufficient evidence, in case of failure, he/she loses the case. Facts: On 18th September, 2013 the National Electoral Commission held elections for the position of Member of Parliament representing disabled persons. Only two candidates competed for the position and Rwamucyo was dissatisfied with the results of the elections. He argues that his opponent used his position as the Chairman of the National

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12 RWANDA LAW REPORTS Council of Persons with Disabilities for his own interests and that he used the Executive Secretary of the National Council of Persons with Disabilities to campaign for him. He alleged that there were short messages that he sent to the Electoral College and money that he gave to the latter to vote for him. For all these grounds, Rwamucyo filed a petition to the Supreme Court requesting for the election results to be nullified and be held again. In his submissions, the winning candidate states that the petition was filed contrary to the procedure established by article 82 of the National Electoral Commission instructions which stipulates that disputes arising during the campaign process should be taken first to the National Electoral Commission before being filed in the competent courts. Thus, he requests the Court to dismiss the petition. Held: 1. The admissibility of the petition should not be based on the National Electoral Commission instructions n° 03/2013 of 23/07/2013 governing legislative elections, chamber of deputies, because it is contrary to the Organic Law no 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court and the Law n° 27/2010 of 19/06/2010 relating to elections as amended and complemented to date since there is no provision under those laws providing such a petition be submitted to the National Electoral Commission before being filed to the courts. Article 141 of the Constitution provides that the courts apply the regulations or instructions when they are not contrary to the Constitution and other laws. Therefore, this Organic Law should be the applicable law.

2. The petitioner did not produce any evidence that the winning candidate had used his power in his own interests and that there is money given to the Electoral College to be elected. The applicant is the one who has the burden of proof, when he fails, he loses the case. Therefore the elections cannot be nullified. Petition without merit. Elections not nullified.

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13 Re RWAMUCYO Statutes and statutory instruments referred to: Constitution of the Republic of Rwanda of June 4, 2003 as amended to date articles 93, 141 and 145(5). Organic Law no 03/2012/OL of 13/06/2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court, articles.67, 71-79. The Law n° 27/2010 of 19/06/2010 relating to elections as amended and complemented to date, articles 29bis, 30. National Electoral Commission instructions n° 03/2013 of 23/07/2013 governing Legislative Elections, chamber of deputies, articles 80, 82. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] On 18th September, 2013, the National Electoral Commission held elections for the seat of Deputy Representative of Disabled Persons³. Some of the candidates who campaigned for the seat are Rusiha Gastone and Rwamucyo Gisaza Séverin. On Election Day, the National Electoral Commission temporarily announced that Rusiha Gastone had won that seat of Deputy Representative of Disabled Persons. On 20th September, 2013, Rwamucyo Gisaza Séverin filed a petition to the Supreme Court contesting the election results

held on 18th September, 2013 for the seat of the Deputy Representative of Disabled Persons, and requested for nullification of the election's results for it to be held again. [2] Pursuant to article 66 of the Organic Law no 03/2012/OL of 13th June, 2012 determining the organization, functioning and jurisdiction of

3 See article 76 (4) of constitutional law “.....The Chamber of Deputies shall be composed of eighty (80) members who shall include the following... one (1) member elected by the Federation of the Associations of the Disabled Persons”. 1 1

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14 RWANDA LAW REPORTS the Supreme Court on Monday 23rd September, 2013, the Supreme Court President wrote to the Minister, who has election in his attribution and to the President of National Electoral Commission, informing them that the Supreme Court has received a petition from Rwamucyo Gisaza Séverin requesting that the election held on 18th September, 2013 for the seat of Deputy Representative for Disabled Persons be nullified and held again. The following day, the National Electoral Commission and Rusiha Gastone were summoned to the Supreme Court registry and were given the submissions including the petition filed by Rwamucyo Gisaza Séverin; they were requested to make remarks about it in a written form. [3] On 25th September, 2013, the Supreme Court received the submissions from the State attorney, Rubango Epimaque, demonstrating the views of the National Electoral Commission on the petition filed by Rwamucyo Gisaza Séverin. The Supreme Court also received the submissions from Rusiha Gastone demonstrating his stance on the petition. [4] The hearing was scheduled on 25th September, 2013, at 3 p.m. As article 71 of the Organic Law no 03/2012/OL of 13th June 2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court provides, the case was heard in public, and the Court tried the case based on the document only. The judgment was delivered on 26th September, 2013. II. ANALYSIS OF THE LEGAL ISSUE. A) Whether the petition filed by Rwamucyo Gisaza Séverin must be rejected because he did not refer it first to the National Electoral Commission. [5] In his written submissions to the Supreme Court, Rwamucyo Gisaza Séverin argues that he filed the petition to the Court based on article 145 of the Constitution which gives the competence to the

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15 Re RWAMUCYO Supreme Court to adjudicate on cases related to the elections of Members of Parliament. [6] In his defence submissions, on the petition filed by Rwamucyo Gisaza Séverin, Rusiha Gastone requests the Court to dismiss the petition because the one who filed it, did not first refer it to the National Electoral Commission as provided for by article 82 of the National Electoral Commission instructions n° 03/2013 of 23rd July 2013 regulating election of the parliament, Chamber of Deputies. THE VIEW OF THE COURT [7] Article 145, 5o of the Constitution stipulates that the Supreme Court has special hearing for election petitions to referendum, and presidential and legislative elections. This article of the Constitution shows that the Supreme Court has jurisdiction to hear elections cases for members of parliament, and it is

complimented by other laws that explain in details how to file the petition, those entitled to file it, and how it is tried by the Supreme Court. [8] Article 82 of the National Electoral Commission instructions n° 03/2013 of 23rd July, 2013 governing legislative elections, chamber of deputies, stipulates that if a dispute arises during the campaign process, candidates should take the matter to the National Electoral Commission and if the matter is not resolved, then the candidate should refer the case to the competent courts of law. [9] Even if article 82 of the National Electoral Commission instructions provides that disputes arising during campaigning should be taken firstly to the commission before referring it to the competent courts, the Organic Law no 03/2012/OL of 13/06/2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court, does not stipulate that the election dispute should be taken to the National Electoral Commission before taking it to the Supreme Court.

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16 RWANDA LAW REPORTS [10] Article 67 of that Law stipulates that in the event of a dispute relating to the registration of candidates for election to the office of President of the Republic or to Members of Parliament, the fairness of such elections or the conduct of presidential, parliamentary or referendum elections, those who have the right as mentioned in article 664 of this Organic Law may, within forty-eight (48) hours from the time the list of candidates or provisional election results are published, petition the Supreme Court seeking to strike the decision as prejudicial to their interest or may seek nullification of the election results. This article shows that the Supreme Court has the jurisdiction to try the petitions regarding election disputes, and to regulate the procedures for filling this petition. This article of Organic Law does not stipulate that before filing a petition to the appropriate court, it should be referred to the National Electoral Commission. [11] Apart from the Organic Law determining the Organization, Functioning and Jurisdiction of the Supreme Court, also the Law no 27/2010 of 19th June 2010 relating to elections as amended and complemented to date, from articles 71 to 79, determines the applicable modalities for the case regarding, referendum, presidential, and legislative elections. This Organic Law does not state that the petitions in these cases must first be submitted to the National Electoral Commission before being filed to the Court. [12] Article 93 of the Constitution of the Republic of Rwanda of June 4, 2003 as amended to date, determines the modalities for how the laws are voted and their hierarchy. In the last paragraph of that article, the Ordinary or the Organic law may not contradict the Constitution, nor may an Ordinary Law or Decree-Law contradict an Organic Law, nor may a Decree or other regulations contradict an Ordinary Law. This article also completed by article 141, paragraph 3, stipulates that Courts

4 The article 66 stipulates, “The right to petition the Supreme Court shall be limited to citizens, candidates, political organizations or the National Electoral Commission.....” 2 2

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17 Re RWAMUCYO may apply orders and regulations only where they are not inconsistent with the Constitution and other Laws. The Supreme Court basing their view on these articles, finds that the admissibility of the petition submitted by Rwamucyo Gisaza Séverin must be based upon the Organic Law no 03/2012/OL of 13/06/2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court, instead of being based on article 80 of the National Electoral Commission instructions n° 03/2013 of 23/07/2013 governing Legislative Elections, chamber of deputies. [13] Rwamucyo Gisaza Séverin submitted the petition before the expiration of the 48 hours time limit outlined in article 67 of Organic Law no 03/2012/OL of 13/06/2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court because he submitted it on 20th September, 2013. It was not necessary to refer the petition to the National Electoral Commission first. The Supreme Court finds that he filed the petition through the proper procedures provided by the law; therefore the petition he filed should be admitted. B) Whether there are grounds for nullifying the elections held on 18th September, 2013, for the position of Deputy Representative for disabled persons. [14] Rwamucyo Gisaza Séverin who filed the petition, requests that the election results for the seat of Deputy Representative of isabled persons, held on 18th September, 2013, be nullified because the candidate announced as the provisional winner of that seat, Rusiha Gastone, won by using his leadership position for his own interests, by giving out briefings “instruction” and also through excessive corruption. [15] Rwamucyo Gisaza Séverin states that Rusiha Gastone used his current position as the Chairman of the National Council of Persons with Disabilities for his own interests and that he also used Ndayisaba Emmanuel, the Executive Secretary of the National Council of Persons with Disabilities to campaign for him. Rwamucyo Gisaza Séverin continues arguing that Ndayisaba Emmanuel called the coordinators of the National Council of Persons with Disabilities for the North

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18 RWANDA LAW REPORTS province, the South province and Kigali city, and told them that they must support and campaign for Rusiha Gastone. [16] He continues stating that there are short message services (sms) sent by those coordinators requesting the Electoral College to vote for Rusiha Gastone, and that this occasion was characterised by corruption manifested by a cheque given to Sekamonyo Venuste amounting to 500,000 Rwf, given to the Electoral College using MTN mobile money and TIGO Cash. [17] The State attorney, Rubango Epimaque, representing the National Electoral Commission, argued that Rwamucyo Gisaza Séverin did not produce evidence for his allegations. Furthermore, he feels that the campaigning process for the candidates with disabilities went smoothly. There was no action occuring contrary to article 80 of the National Electoral Commission instructions. Moreover the Commission received any petition in that regard. [18] Rusiha Gastone states that Rwamucyo Gisaza Séverin has never demonstrated that Ndayisaba Emmanuel was engaged in acts contrary to the law while campaigning for him. Furthermore, sms are not prohibited as a means of communication by the Law for campaigning. Rusiha Gastone adds that he did not request Ndayisaba Emmanuel to campaign for him.

Concerning the cheque, Rusiha Gastone states that he did not give it to those who voted for him and also the applicant did not produce evidence establishing this. [19] Rusiha Gastone argues also that he did not use his position of the Chairman of the National Council of Persons with Disabilities because when the election was held, he had temporarily suspended his duties for that position. THE VIEW OF THE COURT [20] Rwamucyo Gisaza Séverin states that the modalities used by Rusiha Gastone in campaigning violated the law. Article 80 of the

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19 Re RWAMUCYO National Electoral Commission instructions stipulates how the electoral campaigns process for the candidates with disabilities should be executed, and the Law no 27/2010 of 19/06/2010 relating to elections as amended and complemented to date, in article 30 demonstrates the specific prohibitions during electoral campaigns. [21] Article 80 of the National Electoral Commission instructions n° 03/2013 of 23/07/2013 governing legislative elections, Chamber of Deputies states that “the candidates on post of deputy with disabilities campaign on polling day before members of Electoral College, they are gathered together on National level at the place determined by National Electoral Commission. But before the polling day, the candidate who wishes may plan his/her special program of electoral campaigns before the member of Electoral College, he/she informs it in written form the District leadership of where he/she wishes to conduct electoral campaigns at least twenty four hours (24) before his/her electoral campaign. The branch of the National Electoral Commission at District level of where he/she wishes to campaign must get the copy for it to attend the electoral campaign”. This article clearly demonstrates the modalities for how the candidate on post of deputy with disabilities should carry out the electoral campaigns. Rwamucyo Gisaza Séverin argues that it was not done as this article provides because there were electoral campaigns and campaigning for Rusiha Gastone before the gathering of the Electoral College on national level at a place determined by the National Electoral Commission. [22] The Court cannot rely on the statement made by Rwamucyo Gisaza Séverin that Ndayisaba Emmanuel, the Executive Secretary of the National Council of Persons with Disabilities called the coordinators of the National Council of Persons with Disabilities from the North Province, the South Province and Kigali City, before the gathering of the electoral college, and requested them to vote for Rusiha Gastone and to sensitize others to vote for him, to decide whether or not the electoral campaigns for Rusiha Gastone began before the time stipulated in article 80 of instructions in preceding paragraph, because

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20 RWANDA LAW REPORTS except his statements, he did not produce any evidence to the Court, to prove that those things happened. [23] Concerning the fact that Rusiha Gastone used the position he held for his own interests as the Chairman of the National Council of Persons with Disabilities and that he campaigned before the gathering of members of the Electoral College on the national level, as determined by the National Electoral Commission, the Court finds that apart from statements, no single evidence produced by Gisaza Séverin demonstrating the reliability of his statements. Moreover, on 22nd August, 2013, Rusiha Gastone wrote to Vice

President of the National Council of Persons with Disabilities, informing him that he had decided to temporarily suspend his duties as President of that council. [24] Concerning Rwamucyo Gisaza Séverin's argument that there were short messages services (sms) sent to the Electoral College, it must be analyzed basing on the provisions of the Law. Article 29 bis of the Law n° 27/2010 of 19/06/2010 relating to elections as amended and complemented to date stipulates that "in all elections, the candidate has the right of posting the campaigning posters and any other campaigning materials". Article 30 of this law also stipulates that "during the electoral campaign, it is prohibited to influence or attempt to influence voter's choice through the following: illegal use of State property, wherever it is; abuse or defamation in any manner whatsoever another candidate; and based on any other kind of discrimination and division". [25] The court finds that, basing on the provisions of articles mentioned in the preceding paragraph, to use short message service (sms) during electoral campaigns and to campaign are not prohibited. However, the issue may be the modalities of how short message service (sms) were used, the message they convey and the time when they were sent. Concerning this case, the short message service (sms) produced by Rwamucyo Gisaza as the evidence, was not clear. They were sent to him after the elections were held, and were neither meant to campaign Rusiha Gastone nor sensitize people to vote him. They do not even demonstrate that Rusiha Gastone was voted by force, and who played

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21 Re RWAMUCYO the role. They solely demonstrate the meaningless messages such as "it's unfeasible", "they want us to lobby for your uncle RG, but we have abstained we are waiting for the ones from the click", "he has as a weapon to storm away if not voted", "this is the source", "Sorry, for what they did for us". [26] Regarding the corruption that may have occurred through the cheque in the amount 500,000 Rwf that Rwamucyo Gisaza Séverin argues to have been given to Sekamonyo Venuste to be given to a member of the Electoral College; the cheque was not produced to the Court. Except the above information, Rwamucyo Gisaza Séverin does not submit any further information about the cheque, such as the Bank that was used to withdraw the money, the amount on the cheque, its number, the name of the sender, nor any other evidence that it was or would be given to a member of the Electoral College. All of those would have served the Court to analyse the evidence he produces. [27] The court finds that neither the use of the position someone holds in his/her own interest nor the cheque in the amount of 500,000 Rwf Rwamucyo Gisaza Séverin argues that was meant for the Electoral College, the defendant does not produce any evidence. As for his request for the Court to investigate for him, the Court finds that the information he submitted is not sufficient to facilitate it to know who sent the money, to whom it was sent and the reason why it was sent. Furthermore, the applicant has the burden to produce the evidence to the Court. When he/she does not do so, he/she loses the case. III. THE DECISION OF THE COURT [28] Admits to receive the petition filed by Gisaza Séverin. [29] Decides that the petition is without merit. [30] Decides that elections held on 18th September, 2013 for the seat of Deputy Representative of the persons with disabilities in parliament are not nullified.

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ADMINISTRATIVE CASES

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23 BUGIRIMFURA v. KIGALI CITY ET AL [Rwanda SUPREME COURT – R.Ad.A.0033/11/CS (Mutashya, P.J., Mukanyundo and Kayitesi, J.) September 11, 2013] Administrative procedure – Admissibility of the action for annulment of administrative decision – Before filing a claim, the aggrieved party who is against the administrative decision shall be required to first lodge an informal appeal to the author of the decision or the immediate superior authority before the expiry of the time limit for filing the case to the Court – The Law of 23/02/1963 establishing the Supreme Court, article 106 paragraph 6. Facts: Bugirimfura Alfred states that he owned a plot of land in Gatenga Sector, Kicukiro District and was unlawfully dispossessed it by Kigali city which gave it to Fariyara John. On 4th November 1999, he lodged an informal appeal to the administration of Kigali City and was not given a response. Therefore, on 30th March, 2002, he filed a claim to the First Instance Court of Kigali. After judicial reform, that case was heard by the High Court on the first instance because it was the one which has jurisdiction to hear, and decided that the case is inadmissible on the ground that he filed the claim too late after his informal appeal. Bugirimfura appealed to the Supreme Court arguing that the judge of the High Court erred and upheld that the case was initiated in 2002, therefore decided that the claim was filed in delay while it is wrong. Held: The fact that the aggrieved party who is against the decision has lodged an informal appeal to Kigali City on 4th November, 1999 of which a period of two months elapsed without being communicated a response implies that the appealed decision remains valid. Therefore, filing the case to the Court on April 30, 2002, meaning after three months provided for by the law during which he should have filed the case is a ground for inadmissibility of his claim because he lodged too late.

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24 RWANDA LAW REPORTS Appeal dismissed. Court fees to the appellant. Statutes and statutory instruments referred to: Law no18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, article 339. Law of 23/02/1963 establishing the Supreme Court, article 106. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Bugirimfura Alfred asserts that he had a plot of land in Gatenga sector, Kicukiro District and it was unlawfully dispossessed of him by Kigali city and allocated it to Fariyara John. Bugirimfura filed a complaint to the Intermediate Court of Nyarugenge; the Court declared itself without jurisdiction and referred the case to the High Court. [2] Before the High Court heard the case on merit, it asked Bugirimfura if he had made an

informal appeal to the authority which took the decision to dispossess him of the land, and he replied that he informally appealed to the authority on 4th November, 1999, he did not get a response, and begun to sue to Courts in 2001. The Court decided on the objection and dismissed Bugirimfura Alfred's claim because he did not follow the procedure of lodging an informal appeal. [3] The Court found that, although Bugirimfura lodged an informal appeal before 2004, prior to the coming into force of the law which provided for six months, for those who are not contented to file a complaint to the Court and how they are counted, he did nothing after it came into force, to the extent that he filed a claim after seven years (7), while the law provides for six months (6) only.

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25 BUGIRIMFURA v. KIGALI CITY ET AL [4] Bugirimfura Alfred appealed against the case to the Supreme Court, submitting that, the grounds for his appeal rely on the fact that the judge erred in holding that the case was filed in 2007, while it was filed in 2002, and that error led the judge to rule that he delayed filing the claim, while it is not the case. [5] The hearing was scheduled on 2nd July, 2013, on that day all parties were present, Bugirimfura Alfred was represented by Hakizimana Aloys, the Counsel, and the heirs of Fariyara John were represented by Manirahari Nouredine, the Counsel while Kigali City was represented by Rubango Epimaque, the State Attorney. [6] The issue to be examined in this case is to determine whether Bugirimfura respected the time limit for filing a claim in Courts after the informal appeal. II. ANALYSIS OF THE LEGAL ISSUE [7] While explaining his appeal, Bugirimfura Alfred and his counsel, argued that the judge did not fully analyze the documents contained in the case file, because if he had fully analyzed them, he would have found that he did not file the claim in the Intermediate Court of Nyarugenge in 2007 as he states, but he initiated the lawsuit in the First Instance Court of Kigali on 30th March 2002 and the case was registered under RC 37.938/02. He further explains that the case lasted for four years without being heard, to the extent that the judicial reform happened before its trial and it was given another case number RADA 0016/07/NYGE. [8] They further argued that due to the judge error on the time the case was filed, this lead him to rule that the time limit of six months (6) for the case to be filed after lodging an informal appeal to the authority which took a decision as provided for by article 339 of the Law no 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, was not respected.

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26 RWANDA LAW REPORTS [9] They also submitted that because of that error, the judge held that from 4th November, 1999, when he lodged an informal appeal (Bugirimfura Alfred) to the Prefect of Kigali City Prefecture to 2007 when he filed the claim in the Intermediate Court of Nyarugenge, the above mentioned six months had elapsed. They submitted that, this law should not have been relied on, because it came into force after the case was filed. [10] The Counsel, Manirahari Nouredine representing the heirs of Fariyara John submitted that Bugirimfura should have initiated a new process because the first one had ceased as he filed the claim in 2001 and abandoned the case, and then everything returned to its usual status. Therefore, he should have

lodged an informal appeal as the High Court held. [11] The State Attorney, Rubango Epimaque representing Kigali city pleaded that both parties agree that the informal appeal took place in 1999, and that, if considering what Bugirimfura says that the lawsuit was initiated in the “Tribunal de canton” in 2001, and it continued in 2002 and even in 2007, the case must have been filed when the time limit had elapsed, starting from 4th November, 1999 when he states he lodged the informal appeal, because basing on either the Law of 23/02/1963 governing the Supreme Court which was into force before 2004 or the Law no 18/2004 of 20/06/2004 which regulated the Civil, Commercial, Labour and Administrative Procedure, both laws stipulate for the informal appeal, the only difference being the duration of the time the claim had to be filed, computed from the time of informal appeal; therefore, the ruling of the High Court, that the time limit for filing a case after the informal appeal was not respected, should be sustained. THE VIEW OF THE COURT [12] The documents in the case file demonstrate that on 4th November 1999, Bugirimfura Alfred wrote to the Prefect of Kigali City

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27 BUGIRIMFURA v. KIGALI CITY ET AL Prefecture, informally appealing to him and requesting to get a redress and his right on the plot of land situated in Kanengwa cell, Gatenga sector, he was dispossessed by Kigali City Prefecture be restituted. In his submissions, Bugirimfura Alfred pleaded that the Prefect of Kigali City prefecture never replied to him, the reason why he filed a claim in the “tribunal de canton” of Nyamirambo on 24th April, 2001. [13] Article 106 paragraph 6 of the Law of 23/02/1963 which regulated the Supreme Court at the time Bugirimfura Alfred lodged an informal appeal, stipulated that before appealing to the Administrative Court, the prejudiced person ought to first lodge an informal appeal to those who prejudiced them or to their superior in order to get redress, and it should have been done before the time limit of appealing to the administrative Court has elapsed. [14] In its paragraph 7, it states that if the authority that has the capacity, to which the informal appeal has been lodged to, does not respond within two months, it is deemed as he/she rejected the informal appeal. Paragraph 8 of that article states that, the computation of the period of three months in the course of which the plaintiff should file a claim in the Court, begins when the prejudiced party receives a response rejecting his informal appeal, and it delays for long, that period begins at the end of the two months provided for by this article. [15] Basing on that article, the Court finds that Bugirimfura lodged an informal appeal on 4th November, 1999, and on 24th April 2004 he filed a complaint in the “Tribunal de canton” of Nyamirambo, after almost a year and a half exceeding three months provided for by the law for him to have filed a claim, that is to say, even if he did not abandon the case as he did, the case and the process would have ceased. [16] According to the Court, what Bugirimfura Alfred argues that he filed the claim in the First Instance Court of Kigali on 30th March, 2001 basing on the informal appeal he lodged on 4th November, 1999, cannot serve him, because he would have delayed to file a claim, since as stated above, the three months which the law provided for him to have

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28 RWANDA LAW REPORTS filed a claim in the Court after the expiry of two months without a response from the authority, had already elapsed. [17] For those reasons, the Court is of the view that, as the judge of the High Court considered it, the claim which Bugirimfura Alfred filed in the First Instance Court of Kigali on 30th March 2002 which was registered under RC 37.938/02 and tried at the first level by the High Court due to the judicial reform, was filed when the time limit had already elapsed, therefore, it should be dismissed. [18] The Court is of the view that, although the judge of the High Court also had ruled that the claim should be dismissed, he should not have relied on the Law n° 18/2004 of 20/06/2004 which related to the civil, commercial, labour and administrative procedure, because it had not yet come into force but instead, he should have applied the Law of 23/06/1963 governing the Supreme Court, which was into force at the time Bugirimfura Alfred lodged the informal appeal. III. THE COURT DECISION [19] Adjudicates that the appeal of Bugirimfura Alfred has no merit; [20] Orders him to pay the court fees amounting to 37,500 Rwf.

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29 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL [Rwanda SUPREME COURT – RADA0032/11/CS (Kanyange, P.J., Mukandamage and Rugabirwa, J.) September 6, 2013] Administrative Law – Petition for cancellation of a public auction – The value of the claim requesting for the cancellation of the public auction due to the typographical error of the Court order number in the auction deed – The error on the number of the order is considered as an error that can be corrected – There is no ground of cancelling the public auction in case the plaintiff does not criticize the court order on which it was based. Contracts or obligations law – Damages originating from the claim requesting for cancellation of the public auction – Procedural expenses and Counsel fees –The plaintiff cannot be awarded the damages requested in case the public auction was not cancelled but the respondents have rights on procedural and advocate fees. Facts: On 7th January, 1994 Ndagijimana Jean Pierre got a loan from BACAR which changed to be FINA BANK; his wife Murekatete and Nshimyumuremyi contracted as his sureties. Ndagijimana did not manage to pay the loan and BACAR filed a case in the Court of First Instance of Kigali which ordered Ndagijimana, Murekatete and Nshimyumuremyi to pay the loan and if not done accordingly, this would be taken from their properties forcibly. BACAR requested the President of the Court of first Instance of Kigali an order of the public auction of three houses including that of Nshimyumuremyi that was on plot no 345 in Nyarugenge and the Court issued a court order no 501/99 ordering the public auction of those three houses including that of Nshimyumuremyi abovementioned that was bought by Rubangura Vedaste.

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30 RWANDA LAW REPORTS Nshimyumuremyi filed a case against the State of Rwanda, Mutabazi Etienne (State Notary), FINA BANK, BCR and the heirs of Rubangura in the High Court requesting for the cancellation of the public auction of his house carried out by the State notary on 6th

February, 2000, so that he might either get back his house or its value, adding the rent fees and damages. He stated that the public auction was illegally carried out since the government notary carried it out basing on the order no 478/99 mentioned in the auction deed which had never existed. The respondents argued that the public auction was legally carried out and that it cannot be cancelled. The Court ruled that the case of Nshimyumuremyi had no merit since the public auction was carried out basing on the court order no 501/99 of the First Instance Court. Nshimyumuremyi appealed to the Supreme Court alleging that the Commercial High Court ruled without motives that his house was auctioned pursuant to the court order no 501/99 which is not true, rather it was pursuant to the court order no 478/99 which never existed but appeared in auction deed which has never been contradicted by the person who drafted it. Held: 1. In case the public auction was carried out basing on the court order no 501/99 and the plaintiff does not criticize it while it has been realised that no 478/99 is the one found in the auction deed, this is considered as an error which can be corrected by any interested party, especially that the content of that auction deed is what is provided in the order no 501/99. Therefore, there is no reason of cancelling the public auction based on that order and that is why the auctioned house shall remain the property of the heirs of the person who bought it.

2. When the public auction is not cancelled, the damages requested by the plaintiff have no merit.
3. The respondents are entitled to procedural and advocate fees while the plaintiff is not because the public auction was not cancelled. Appeal has no merit. Appellant ordered to pay to respondents the damages,

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31 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL procedural expenses and counsel fees. With the costs to the appellant. Statutes and statutory instruments referred to: Law n° 21/2012 of 14/06/2012 relating to Civil, Commercial, labour and Administrative Procedure, article 168. Law of 30/07/1888 relating to contracts or obligations, article 276. Law of 15/07/1964 of Civil and Commercial disputes procedure, articles 321, 322, 345, 346, 363, 369. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Nshimyumuremyi Ephron filed a case in the High Court requesting for the annulment of the public auction of his house, which is on plot no 345, located in commercial zone of Nyarugenge, which was carried out on 6th February, 2000 by the State notary, in the execution of the judgment RC 30039/99, on the request of FINA BANK and was bought by Rubangura Vedaste, which he claims that it was illegally carried out. [2] In filing the case, Nshimyumuremyi's counsels argued that the court order no 501/99 of the First Instance Court of Kigali ordering that the house be sold at public auction was adjudicated by the bench of three judges instead of the president of the Court, they added that the court order mentions that house while it was not mortgaged in favor of FINA BANK, and that even the notary sold it at public auction knowing that it was not a mortgage for the bank. They request that the State

indemnises him for the errors committed by its employees.

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32 RWANDA LAW REPORTS [3] Another ground considered as the basis of the counsels of Nshimyumuremyi for the request of annulment of the public auction, is that the court order no 501/99 mentions Nshimyumuremyi Ephron instead of Ndagijimana Jean Pierre who had a loan for FINA BANK. They also plead that the bank requested for the house to be sold well knowing that it was not its mortgage and even its owner has no loan for the bank, it even did not follow what is provided for by the provisions of the law relating to Civil and commercial disputes procedure which was in force at that time relating to the auction of the immovable property, therefore requesting that FINA BANK should pay him damages for that. [4] In the case of Nshimyumuremyi, he also requested that the heirs of Rubangura Védaste who bought the house hands it back to him because he bought it unlawfully, and if impossible they compensate him with its value, and BCR pays him damages for having handed over the title deed of the house while it was mortgaged in its favor for another loan. [5] During the hearing, the Counsels for Nshimyumuremyi pleaded that they no longer base on the errors in the court order no 501/99 as a ground for the annulment of the public auction, rather on the ground that the State notary in conducting the public auction of that house relied on the court order n o 478/99 mentioned in the auction deed which did not exist (imaginaire). [6] The High Court ruled that the claim of Nshimyumuremyi has no merit, because it found that the public auction was carried out pursuant to the court order no 501/99 delivered by the First Instance Court of Kigali and he does not challenge it, especially because he did neither request it to be changed nor annuled, therefore it was not the court order no 478/99 which was relied on because nothing demonstrates its existence. [7] Regarding the procedure provided for by the law to be followed prior t o the public auction , the Court ruled that it cannot be separated

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33 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL from the mentioned court order no 501/99, and that for the court to order the public auction to be carried out, it had to first examine whether what is provided for by the law were complied with; held that he did not produce any evidence that it was not complied with, and he even did not sue to the court when the seizure of the house was carried out as it was recognized to him by article 363 of the law relating to civil and commercial disputes procedure, which was into force at the time in order to request the compliance with the law. [8] The Court found that, he knew the house was not supposed to be sold as stated by the plaintiff, and held that the State notary did not have authority and duty to alter the court order to either change or remove anything, even if he did not commit any error, and no evidence was produced to prove that there was a collaboration against him between the notary and the judges who took the decision or even with FINA BANK. [9] In its discretion, the court awarded 300,000 Rwf to each of the defendants for compensation, procedural cost and counsel fees. [10] Nshimyumuremyi appealed to the Supreme Court asserting that the court adjudicated without motivation that his house was auctioned pursuant to the court order no

501/99 which is false, yet it was done pursuant to the court order no 478/99 which never existed found in the auction deed which was not disclaimed by its author, so therefore he could not have appealed against a decision which had never existed and that he had not seen. He argues, in addition, that the public auction which was carried out should be nullified and given back his house or compensated with its value, plus its rent because it was conducted illegally under fraudulent maneuver of FINA BANK, Notary and BCR, and all those defendants should indemnise him. [11] Every defendant pleads that there was no error committed in carrying out the public auction of Nshimyumuremyi's house, to the extent that they should pay damages, and that the public auction was lawful, therefore should remain valid, he should not be awarded

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34 RWANDA LAW REPORTS damages, instead he should pay them in return for dragging them in lawsuits without a due cause and the counsel fees. [12] The case was heard in public on 9th April 2013 and 2nd July 2013, The Counsels, Munderere Léopold, Buhuru Pierre Celestin and Ntampuhwe Juvens representing Nshimyumuremyi, FINA BANK represented by the Counsel, Karangwa Vincent, BCR represented by the Counsel, Batware Jean Claude, the State represented by the Attorney Sebazungu Alphonse, Mutabazi Etienne represented by the Counsels, Baragondoza Jean Damascène and Nzaramba Janvier while the heirs of Rubangura Védaste were represented by the Counsel Rwagatare Janvier. II. ANALYSIS OF LEGAL ISSUES

1. Whether the High Court erred in adjudicating that the house on plot no345, situated in the commercial zone of Nyarugenge, Kigali City, was sold in the public auction pursuant to the court order no 501/99 of the First Instance Court of Kigali [13] The counsels for Nshimyumuremyi argue that the High Court adjudicated that his house on plot no 345 situated in the commercial zone of Nyarugenge in Kigali City was auctioned by the State Notary, Mutabazi Etienne based on the court order no 501/99 while it is not true, because according to the auction deed drafted by the notary, proves that it was based on the court order no 478/99 which had never existed. Therefore, they do not understand where the Court got the information that the notary was mistaken while he was not present during the court proceedings to contradict the authentic deed he made. They added that the fact for some of the parties to have stated that he was mistaken does not imply that there has been sueing for forgery; therefore, it contravenes the provisions of article 13 paragraph 1 of the law relating to evidence and its production. [14] They also argue that it is impossible that the court order no 501/99 has been the basis for the auctioning of the house as held by the

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35 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL Court, because it stated that the public auction should have been carried out on 22nd January, 2000, at 11:00AM, but was carried out at 12:30PM on 6th February 2000. In addition to that, the announcement of public auction by the notary issued on 31st January 2000, did not rely on that order as held by the Court, because it mentions the house of Ndagijimana Jean Pierre, on plot no 778 situated in Kimihurura, whereas it

is not found in that order. [15] The counsels for Nshimyumuremyi also plead that it was provided in the notary's announcement, on which the court based, a list detailing how houses would be auctioned the house belonging to Ndagijimana, situated on plot no 778 in Kimihurura and which had to be auctioned at a half past ten (10h30), the one for Nshimyumuremyi on plot no 118 situated in Kicukiro had to be auctioned at a half past eleven (11:30), and his other house on plot no 345 situated in Nyarugenge had to be auctioned at 12:30. Therefore, the court did not explain, why that schedule was not followed and also explain the right that FINA BANK and the State notary had, for them to begin with the last house on the list, which was not even among the securities of the Bank. [16] Karangwa Vincent, the Counsel for FINA BANK argues that Nshimyumuremyi is disregarding the series of activities presented by FINA BANK during the hearing in the High Court, where it exhibited that at first, there was a case RC 30039/99 in which FINA BANK sued Ndagijimana Jean Pierre and his sureties Murekatete Gloria and Nshimyumuremyi and lost the case for the loan of 55,949,630 Rwf, against which they did not appeal and therefore it became final and executed. [17] He states that there is no irregularity in the court order no 501/99 issued by the First Instance Court of Kigali on 22nd October, 1999, on the request of FINA BANK for the judgment it won to be executed as those who were representing Nshimyumuremyi stated in the previous Court, when they said that they have nothing to criticize that decision, but instead their ground for requesting the annulment of the public

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36 RWANDA LAW REPORTS auction is that the State notary auctioned the house pursuant to the court order no 478/99 which never existed and exhibited. He finds that, if Nshimyumuremyi acknowledges the court order no 501/99, and did not appeal against it or request for its annulment in the period provided for by the law he cannot alter and request the contrary to that acknowledgement. The fact that, the notary was mistaken in typing the number of the document is not a ground for annulment of the public auction which was in accordance with all the procedures provided for by the law. He finds therefore that the counsels for Nshimyumuremyi should present another judgment which the court order no 478/99 intended to execute. [18] The Counsel, Karangwa states again that the fact that Nshimyumuremyi's counsels argue that the public auction did not follow the schedule which was provided in its advertisement, is considered as disregarding that what was projected for, is the disbursement to FINA BANK which had to be obtained from the assets of all those who lost the case. In case the notary had the judgment with enforcement order which had to be executed, all procedures being done in conformity with the law; nothing would prevent him from looking for the disbursement from the assets of those who lost the case, wherever they were. [19] He also adduces that, alleging there are differing documents, because the house on plot no 778 located in Kimihurura which is in the advertisement of the public auction but does not appear in the order no 501/99; finds that there is no legal consequences as that house was not auctioned, and that order indicates the houses to be auctioned and not the program on how they will be auctioned, and so it was impossible to auction all of them at the same hour. He therefore finds that there was no deceit by FINA BANK as he does not provide any evidence over it. [20] Mutabazi Etienne and his counsel adduce that

the counsels for Nshimyumuremyi acknowledge themselves that the court order no 478/99 never existed nor came into sight. They explain that the public auction based on court order no 501/99 as is evident in all documents thereon, but that in writing the deed of auction, a mistake was made and

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37 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL it was written “Order no 478/99”, however if they had requested for it earlier, when he was still working as a notary he would have corrected it. [21] Concerning the date when the public auction was supposed to be carried out, they state that it should have been conducted on 22nd January, 2000, but did not get the bidders and postponed it in fifteen days, and was readvertised, and took place on 6th February 2000. [22] They also argue that the court order no 501/99 for the public auction was not very clear, because it shows that all houses were supposed to be auctioned at the same time, 11:00 AM, which was impossible; the important thing being that the houses which were on it had to be auctioned. [23] Concerning the faults alleged to have been committed by the notary who carried out the public auction because he knew well that the house was not supposed to be auctioned, Mutabazi and his counsels adduce that he had no authority to alter the decision as it is explained in the appealed judgment. What Nshimyumuremyi should have done first would be to use the procedure provided for by the law at the time the court order was made and file a third party opposition, an appeal or requests it to be rectified on the irregularities he argues it had which prejudiced him, but that if he alleges that the court order no 501/99 did not prejudice him, he should not have sued it. [24] Regarding the reason why the house of Nshimyumuremyi was first sold at the public auction, Mutabazi explains that the law which was into force at the time of public auction provided that whenever there are many assets to be auctioned, the distrainer is the one who chooses the asset from which he can get full payment, so after making the advertisement, FINA BANK chose the house of Nshimyumuremyi to be auctioned. [25] Sebazungu, the State attorney of Rwanda states also that the court order no 501/99 was the one relied on by the notary in

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38 RWANDA LAW REPORTS auctioning the house of Nshimyumuremyi, therefore, the fact that in the deed of auction it is mentoned the no 478/99, was a mistake made in the registry. He also states that for the house on plot no 778 Kimihurura which is not in the court order no 501/99 but appears in the advertisement of the auction, there is no problem because it was not auctioned while concerning the date for auctioning which is in the court order but different from the one on which it was carried out, he explains that there was the postponement of the auction, and concerning the hours on which the houses were supposed to be auctioned, he states that they presumed that the auctioning should have been closed at 12:30 PM. [26] Again, he finds that, regarding the procedures to be followed before delivering the court order for the public auction, it did not concern the notary but instead, FINA BANK. His duty was to execute what was included in the court order, and that is what he did, because the judgment he was reqsted to execute is the one he executed. On the problem concerning the procedures of the auction that

Nshimyumuremyi claims that they were not followed, he would have raised it in accordance with article 363 of the Law of 15th July, 1964 relating to the civil and commercial disputes procedure which was into force at the time, and file it to the court which delivered the order for public auction. [27] Rwagatare, the counsel for the heirs of Rubangura states that he notices the auction has relied on the court order no 501/99 and the counsels for Nshimyumuremyi assert that it does not prejudice him, so he finds no reason why he would have sued against the court order no 478/99 which appear in the deed of auction because he realizes that it is a typographical error which was made. [28] Mutabazi Etienne and his counsel adduce that the counsels for Nshimyumuremyi acknowledge themselves that the court order no 478/99 never existed or seen. They explain that the public auction was based on the court order no 501/99 as is evident in all documents concerning it. Nevertheless, in drafting the deed of auction, a mistake was made and “court order no 478/99” was mentioned, but if they had

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39 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL requested for it earlier, when he was still working as a notary he would have corrected them. [29] Concerning the date when the public auction was supposed to take place, they state that it should have been held on 22nd January, 2000, they did not get the buyers and postponed it in fifteen days, they readvertised it, and it was conducted on 6th February 2000. [30] They also argue that the court order no 501/99 for the public auction was not very clear, because it shows that all houses were supposed to be auctioned at the same time, at 11:00 AM, which was impossible; the important thing being that the houses which were mentioned in that order had to be auctioned. [31] Concerning the faults alleged to have been committed by the notary who carried out the public auction since he knew well that the house was not to be auctioned, Mutabazi and his counsels adduce that he had no authority to alter the decision of the court as it was explained in the appealed judgement. What Nshimyumuremyi should have done first would be to use the procedure provided for by the law at the time the decision was made and file a third party opposition, appeal or request it to be corrected on the defects he argues they prejudiced him, but if he alleges that order no 501/99 did not prejudice him, he should not have sued against it. [32] Regarding the reason why the house of Nshimyumuremyi was the first to be auctioned, Mutabazi explains that the law which was into force at the time of public auction provided that wherever there are many properties to be auctioned, the distrainer is the one who chooses the asset from which he can get full payment, so after making the announcement it was FINA BANK which chose the house of Nshimyumuremyi to be auctioned. [33] Sebazungu, the State attorney of Rwanda also states that the court order no 501/99 was the one based on by the notary in auctioning the house of Nshimyumuremyi. The order no 478/99 being mentioned in

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40 RWANDA LAW REPORTS the deeds of auction was a mistake made in the registry. He also states that it is not an issue for the house on plot no 501/99 not being in the court order no 501/99 but in the advertisement of the auction, because it was not auctioned. Concerning the date for

auctioning which is in the court order not being the same as the one on which it was carried out, he explains that there was postponement of the auction. Concerning the hours on which the houses were supposed to be auctioned, he states that they opted that the auctioning would be closed at 12:30 PM. [34] Furthermore, he notes that regarding the procedure which had to be followed before making a court for the public auction does not concern the notary but FINA BANK, his duty was to execute what was included in the court order, and that's what he did, because the judgment he was requested to execute is the one he executed. On the problem concerning the procedure of the auction Nshimyumuremyi claims that they were not followed, he would have raised it in accordance to article 363 of the Law of 15/07/1964 regarding the procedure of civil and commercial disputes procedure which was in force at the time, and file it to the court which rendered the decision for public auction. [35] Rwagatare the counsel for the heirs of Rubangura adduces that as he notices that the auction relied on the court order no 501/99 and the counsels for Nshimyumuremyi assert that it is not inconveniencing him, so he finds no reason why he sued against the court order no 478/99 which appear on the deeds of auction because its typographical error which was made THE VIEW OF THE COURT [36] The documents in the case file show that on 7th January 1994 Ndagijimana Jean Pierre got a loan of 25,000,000Rwf from BACAR now known as FINA BANK Ltd has as guarantors his wife Murekatete Gloria and his father Nshimyumuremyi Ephron.

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41 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL [37] After realizing that the loan was not reimbursed BACAR sued the borrower and his guarantors in the First Instance Court of Kigali. Consequently, in the judgment RC 30039/99 rendered on 11/06/1999, the court ordered Ndagijimana, Murekatete and Nshimyumuremyi to pay to BACAR the amount of 55,949,630 Rwf of the principal loan, its interests and late payment interest, as soon as the judgement has been delivered and failure to do so that amount be deducted from their properties by the coercive of the state. That case was rendered in the default of all respondent. [38] In its letter dated 6th October, 1999, BACAR requested the president of the First Instance Court of Kigali for the order to sell at public auction the houses on the following plots: no 778 at Kimihurura III of Ndagijimana Jean Pierre, no 118 at Kicukiro and no 345 at Nyarugenge of Nshimyumuremyi Ephron so that the said judgment can be executed, it also states that it sent the whole document to be examined. [39] In response to that letter, the Court made an order no 501/99 for the auctioning of the houses no 118 at Kicukiro and no 345 at Nyarugenge of Nshimyumuremyi Ephron, and it was affixed on the entrance of the First Instance Court of Kigali, at the prosecution of Kigali, at Kicukiro Commune, at Nyarugenge Commune, at Kigali City and at the appellate Court of Kigali. After its advertisement of 31st January, 2000, the public auction did not take place on 22nd January, 2000 at 11:30 AM as expected but on 6th February, 2000, as seen in the statement of the auction drafted by the notary, hence the house on plot no 345 at Nyarugenge was brought by Rubangura at the price of 95,100,000Rwf. [40] The Court is of the view that, as decided by the High Court, the notary relied on the decision no 501/99 to auction the house in the plot no 345 of Nshimyumuremyi, which is referred in it. Again the statement of the auction made by the Notary

in the presence of the witnesses, the secretary and the representative of FINA bank and attached to the deeds of auction it shows that is the house which was auctioned, thus, on the

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42 RWANDA LAW REPORTS deeds of auction indicating that in auctioning the house it was the decision no 478/88 of the Primary Instance Court which was relied on is a typographical error, which could be corrected on the request of any interested person, further more others referred to in it, were coincide with the decision no 501/99. [41] Again, the Court finds that as Nshimyumuremyi has nothing to criticize on the court order no 501/99 as asserted by his counsel, there is no reason for the annulment of the auction which was based on that order. [42] Regarding other irregularities, that Nshimyumuremyi claims to have been committed by the notary who carried out the public auction, the Court is of the view that their purpose also was to demonstrate that the public auction was not based on the court order no 501/99, rather on the order which did not exist, but those are groundless because considering a sequency of activities in the public auction, it is obvious that all were based on the court order no 501/99 delivered by the Court for the execution of the judgment RC 30039/99 mentioned above.

2. Whether FINA BANK may have fraudulently sold the house which does not belong to it. [43] The counsels for Nshimyumuremyi argue that in the appealed judgment they demonstrated that selling another person's property is null according to article 276 of the law of 30/07/1888 relating to contracts or obligations, but the Court did not explain if there is a link between FINA BANK and the house of Nshimyumuremyi on plot no 345 at Nyarugenge. He explains that on 7th January, 1994 when they signed the loan contract and its mortgage, FINA BANK accepted only the houses which were given as a mortgage, implying that it sold the house in litigation fraudulently (in bad faith) for it misled the Court requesting for its public auction well knowing that it was not its mortgage. He added that what is astonishing is that the Court did not make any remark on it, and the judgment illustrates that there was mistaking real security for personal security.

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43 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL [44] Karangwa, the counsel for FINA BANK argues that the counsel for Nshimyumuremyi are disregarding that the loan contract was annulled by the judgment RC 30039/99 in which three persons who are Ndagijimana, Nshimyumuremyi and Murekatete lost the case equally. Therefore, that enforcement order is the only link for the judgment which should be executed in order for FINA BANK which won the case to be paid from the assets of the losers. THE VIEW OF THE COURT [45] The Court finds that the sold house of Nshimyumuremyi on plot no 345 at Nyarugenge which is in litigation in this case was auctioned pursuant to the court order as explained above, under the application by the FINA BANK in order to get paid from the enforce the judgment RC 30039/99 and he does not criticize it. Therefore it is not FINA BANK which decided to sell the house for it to be sued for having sold another person's property, while it was sold under the court order. Therefore, his counsels who

claimed that the sold house was not its mortgage, should have filed a case against it to the Court that delivered the court order no 501/99 which ordered to auction it, as provided for by article 363 of the Law of 15/07/1964 relating to civil and commercial disputes procedure which was in force at the time that court order was delivered⁵, requesting that the house be removed among those houses that were to be sold. For as much as they did not do it, they cannot request for it in this case, because that court order was not attacked.

3. Regarding the procedures for the seizure of the house that Nshimyumuremyi alleges they were not in compliance with the law. [46] The counsels for Nshimyumuremyi argue that it was explained to the previous Court that articles 321, 322, 345 and 346 of the law of

⁵ This article provides that "All the litigations relating to the laws of securities are settled by the judge's order, if they are not necessarily settled by the judgement". 1 1

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44 RWANDA LAW REPORTS 15/07/1964 relating to civil and commercial disputes procedure which was in force at the time the public auction was conducted were not complied with, because in the file of the public auction there is no single document relating to it, then in response to that issue the Court asserted that before the court order no 501/99 was delivered, the First Instance Court examined first all the documents contained in the case file, which is not true, because the notary who sold the house, states in the the auction deed that he sold it relying on the court order no 478/99 which did not exist (imaginaire), and that if the Court had really examined the file it would have noticed that in the judgment RC 30039/99 of which FINA BANK was requesting to be executed, the house no 345 located at Nyarugenge did not appear, because it was not its mortgage. [47] They argue also that the Court held that it was Nshimyumuremyi who was supposed to submit evidence that there was no order to pay when he raised that issue, and that he was informed by BCR that his house was sold when he inquired about his loan. They find that it is FINA BANK which should submit evidences for it requested the auction. [48] Karangwa, the counsel for FINA BANK states that all the procedures which are required by the law for the auctioning of Nshimyumuremyi's house were complied with. [49] Baragondoza, the counsel for Mutabazi states that articles of laws invoked by the counsels for Nshimyumuremyi in their pleadings is a waste of time because they should have invoked them when the public auction procedures were performed as they were provided for in articles of 363 and 369 of the law of 15/07/1964 relating to civil and commercial disputes procedure which was into force at that time for them to file a claim to the court or to the authority who ordered the seizure the house. [50] Sebazungu, the State attorney argues that the First Instance Court of Kigali ordered the auction after examining that the file was

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45 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL complete, and also that what was requested to be invalidated is not that court order, and that even the absence of the owner of the property which was auctioned cannot itself invalidate the public auction. THE VIEW OF THE

COURT [51] The court finds that articles of 321 and 322 of the law of 15/07/1964 relating to Civil and Commercial disputes Procedure which was into force in regard to the seizure of the movable property, on which the counsels for Nshimyumuremyi rely cannot be considered in this case. [52] Regarding the order and its content ordering Nshimyumuremyi to pay or notified at his residence or where he elected to be his home (commandement à personne) as provided for by articles 345 and 346 of the law of 15/07/1964 mentioned; his counsel state that it does not appear in the file of the public auction, and it was FINA BANK which was supposed to exhibit it; the Court finds that such a document is made by the Court bailiff, before the Court delivers a court order to carry out the public auction. In as so much as the counsels for Nshimyumuremyi state that he does not criticize the court order no 501/99 on which the auctioning of the house relied, and did not file a case to the Court which delivered for its annulment for not complying with the procedures provided for by the above mentioned articles, there is no way he can request for the annulment of the public auction which relied on it in this case.

4. Whether Nshimyumuremyi should get back the house or its pecuniary value and be paid its rent. [53] The counsel for Nshimyumuremyi argue that he should get back his house which was sold at the public auction from the heirs of Rubangura who bought it, because the State notary auctioned it contrary to the law while it was not the subject matter of the judgment RC 300039/99 which was being executed because it was not among the

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46 RWANDA LAW REPORTS mortgages of FINA BANK, if not possible he be given 600,000,000 Rwf of its pecuniary value or be valued by the expert if necessary. [54] Rwagatare, the Counsel for the heirs of Rubangura states that they should not give back the house bought by Rubangura at the public auction which was carried out in conformity with the law, and also he did no fault which makes them reliable to pay damages. [55] The Court finds as demonstrated above, that there is no reason for annulment of the public auction at which Nshimyumuremyi's house, was bought by Rubangura. Therefore that house should remain the property of his heirs.

5. The grounds for damages requested by Nshimyumuremyi. Damages demanded from FINA BANK [56] The counsels for Nshimyumuremyi request that FINA BANK restitutes him the money got from the rent of his house which was auctioned, computed from the day of the auction which is 6th February 2000 up to the day of the judgment, delivery amounting to 234,680,000 Rwf which is mentioned in the submissions in addition with that they got paid after the submissions, because it's the one which did everything possible fraudulently so that the house can be auctioned, while it was not its mortgage instead of auctioning those it was given as mortgages, and it did it in order to dispossess him of his house. [57] Karangwa, the Counsel for FINA BANK argued that it should not be charged of any little damages because it did not commit any fault, for it executed the judgment to get paid the loan it granted, and that, it cannot pay the rent it got until then because it does not exploit it. [58] The Court finds that FINA BANK should not pay the damages for the house rent, because it requested for the court order to auction the house of Nshimyumuremyi in execution of the judgment it

had won

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47 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL which involved the loan that had to be paid and was given it, and as it was repeatedly said, that court court is not the one attacked. Damages claimed from the heirs of Rubangura. [59] The Counsels for Nshimyumuremyi argue in addition that the heirs of Rubangura Védaste have to give him moral damages amounting to 25,000,000 Rwf because Rubangura bought the house and after, he paid the loan in BCR for the company owned by Nshimyumuremyi which is known as SOCOFAG, in order to get its documents while it is not a mortgage of FINA BANK, therefore he owns it fraudulently. [60] Rwagatare, the Counsel for the heirs of Rubangura states that Rubangura is not the one who paid the loan to BCR for Nshimyumuremyi in order to get the document of the house, instead it is BCR which requested the seizure of 1,823,961 Rwf from the Court which Nshimyumuremyi owed it, and requested to be deducted from the proceeds of the public auction as it is clear in the court order no 292/ND.E./2000 of 28/07/2000 for provisional seizure issued by the president of the First Instance Court of Kigali. And he adds that, there exists legal modalities which provide how a buyer in the public auction gets the title, therefore it was given to him by the Registrar of Land Titles in the letter he wrote to him on 17th July, 2003. Therefore, he did not get it from BCR as the counsels for Nshimyumuremyi alleges. [61] The court finds that there is no evidence submitted by Nshimyumuremyi contradicting the one submitted by the heirs of Rubangura as mentioned above, which proves indeed that it is Rubangura who paid the loan owed to BCR by Nshimyumuremyi's company known as SOCOFAG it, with the intention of getting fraudulently the land title for the house Damages claimed from BCR [62] The counsels for Nshimyumuremyi are also requesting BCR to pay 25,000,000 Rwf for damages because it gave out the title of the

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48 RWANDA LAW REPORTS house it had without first analyzing while it was the one which had that house as a mortgagee. [63] Batware, the counsel for BCR states that it came to know about the auctioning of the house when the public auction was over, therefore it did not commit any fault, what happened was that BCR had to be paid first because it had the preferential right over the mortgage, and Rubangura demonstrated that he was the successful bidder and requested to be given its title. He states in addition that, the damages claimed by Nshimyumuremyi from BCR constitute a new claim on which it cannot submit its defense for the first time in appeal. [64] The court finds that it is not the first time BCR was requested to pay damages because they were the subject matter of the claim filed in the previous Court, but they have not been awarded because the case of Nshimyumuremyi was without merit. The Court is however of the view that there is no reason why BCR should deny handing over the title of the house (title deed) which was auctioned while it was paid its debt, therefore it should not pay related damages. The damages claimed from the State of Rwanda and Mutabazi Etienne [65] The counsels for Nshimyumuremyi request in addition that the state of Rwanda, the employer of Notary Mutabazi and himself jointly pay 25,000,000 Rwf of damages because he breached his obligations and sold a house which was

not a mortgage of FINA BANK relying on an inexistant court order he forged. [66] Sebazungu, the State attorney argues that the state should not pay damages because the public auction was in accordance with the law and that the court order no 501/99 was issued on the request of FINA BANK, and the notary relied upon it to auction the house, therefore the State cannot be accountable for the mistake made while drafting auction deed.

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49 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL [67] Baragondoza, the counsel, asserts that the damages claimed from Mutabazi are groundless because the public auction rried out in accordance with the law. [68] The Court finds that the notary carried out the public auction relying on the court orderand as it was explained by the previous Court, he did not have the authority to modify it. he did what he was requested which was toexecute the judgement Nshimyumuremi lost in favor of BACAR in relation to the credit he guaranted in accordance with the ruling of the the court order, therefore he should not pay him any damages, the same to the State which was his employer.

6. The damages requested by respondents. [69] Rwagatare, the counsel for the heirs of Rubangura request that the amount of 300,000 Rwf for the procedural expenses and Counsel fees charged to Nshimyumuremyi should be increased by 2,000,000 Rwf more, and pays in addition 15,000,000 Rwf because he filed a case preventing Rubangura from fully enjoying their house and 15,000,000Rwf for defamation. [70] Karangwa, the counsel for FINA BANK states that Nshimyumuremyi should pay it 30,000,000 Rwf for dragging it in lawsuits, the Counsel's fees inclusive. [71] Batware, the counsel for BCR also requests that Nshimyumuremyi pays it 500,000 Rwf for dragging it in appeal, for case preparation and its pleading in addition to 3,00,000 Rwf which was awarded in the previous Court, altogether amounting to 8,000,000 Rwf. [72] Sebazungu, the State attorney considers that 300,000 Rwf for damages previously charged to Nshimyumuremyi to be paid to the state of Rwanda should be sustained. [73] Baragondoza argues that Nshimyumuremyi should pay Mutabazi Etienne the damages equivalent to 500,000 Rwf of the

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50 RWANDA LAW REPORTS Counsel fees and the procedural expenses because he was dragged in lawsuits. [74] In response to the damages requested by the respondents, the counsels for Nshimyumuremyi argue that he should not pay them damages because of the mistakes every one did for him, which led his house to be auctioned, but instead, he requests that they should jointly pay him damages for procedural expenses and Counsel fees equivalent to 10% of all the requested damages. THE VIEW OF THE COURT [75] The Court finds 30,000,000Rwf of damages requested by the heirs of Rubangura cannot be awarded to them since they were requested for the first time in the appeal, as it is prohibited by article 168 of CCLAP stipulating that no new claim may be lodged at the appeal level. Regarding the procedural expenses and the Counsel fees, the Court in its discretion, finds that they should be awarded 300,000 Rwf, in addition to the

300,000 Rwf they were awarded in the previous Court because what they are requesting for is excessive, all of them totalling 600,000Rwf on both level. [76] Regarding the damages of 30,000,000Rwf claimed by FINA BANK from Nshimyumuremyi due to the fact that he dragged it in lawsuits and the Counsel fees, the Court finds that there is no evidence that he sued FINA BANK with the intention of dragging it in lawsuits, since he did not understand the way his house was auctioned, thus he should not pay damages for it; instead, he should pay it the Counsel fees for it hired the Counsel, therefore the Court in its discretion, awards 300,000 Rwf in addition to 300,000 Rwf awarded by the previous Court, the total being 600,000Rwf. [77] Regarding the damages claimed by BCR from Nshimyumuremyi equivalent to 500,000Rwf for dragging it in the lawsuit for no reason, case preparation and its pleadings, the court finds that it was his right to appeal when he is not contented with the

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51 NSHIMYUMUREMYI v. THE STATE OF RWANDA ET AL judgment, but because BCR also hired a counsel to plead for it, in its analysis it is awarded 300,000Rwf of the Counsel fees in addition to 300,000 Rwf which was awarded in the previous Court, the total being 600,000 Rwf. [78] Regarding what the state of Rwanda is requesting to sustain the procedural expense of 300,000 Rwf awarded in the previous Court, the Court finds that they should be respected, and the ones requested by Mutabazi Etienne should not be awarded to him because he was not dragged in the lawsuit by Nshimyumuremyi, but he was forced to intervene on the request of the State of Rwanda. [79] Regarding the request of Nshimyumuremyi to order the respondents to bear procedural expences, the Court finds that they should not be awarded to him because his appeal is without merit. III. THE DECISION OF THE COURT. [80] Decides that Nshimyumuremyi Ephron's appeal is without merit; [81] Orders him to pay FINA BANK, BCR and the heirs of Rubangura Védaste 600.000 Rwf to each one of them, for procedural expenses and Counsel fees and to pay 300,000 Rwf to the State of Rwanda for procedural expenses and counsel fees as they were awarded by the High Court, all amounting to 2,000,000 Rwf; [82] Orders Nshimyumuremyi Ephron to pay the court fees of 82,900Rwf, and once not paid within 8 days, they shall be deducted from his property on government coercion.

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CIVIL CASES

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53 MWIZA v. KAYINAMURA [Rwanda SUPREME COURT – RCAA 0001/13/CS (Mukanyundo, P.J., Hitiyaremye and Gakwaya, J.) December 13, 2013] Law determining the jurisdiction of courts – Jurisdiction of the Supreme Court – The Supreme Court has appellate jurisdiction over cases heard and decided in second instance by the High Court without jurisdiction – Organic Law n° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28. Law determining the jurisdiction of commercial courts – Contracts –

The lease contract of a room between traders for commercial purpose is considered as commercial contract – Disputes arising from such a contract are heard by commercial courts – Organic Law n° 59/2007 of 16/12/2007 determining the organization, functioning and jurisdiction of Commercial Courts, article 3. Facts: Kayinamura sued Mwiza Mutagoma in the Intermediate Court of Gasabo with the objective to get the payment of rent for his compartment used for commercial activities. The Court decided that the case was without merit due to the lack of evidence of the existence of the unpaid rent. Kayinamura appealed against that judgment to the High Court and Mwiza raised the objection of lack of jurisdiction, asserting that the contract upon which the due rent is based is of commercial nature and that the subject matter of the suit was already decided by Commercial Courts. The High Court, in its interlocutory judgment, decided that this objection was inadmissible since the lease contract of a house, even for commercial use, is governed by civil law. Accordingly, on the merit of the case, the High Court ordered the respondent to pay the rent in dispute.

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54 RWANDA LAW REPORTS Mwiza Mutagoma appealed to the Supreme Court based on the objection of lack of jurisdiction of ordinary courts to hear this case as he had raised it in the High Court. Kayinamura in return raised an objection of lack of jurisdiction arguing that the Supreme Court lacks jurisdiction to hear the appeal of Mwiza because the subject matter's value is below the minimum specified by the law in order for the Supreme Court to hear the case tried on second instance by the High Court, and that the issue of lack of jurisdiction by ordinary courts has not been the subject of hearing in first instance courts. Held: 1. The Supreme Court has jurisdiction to hear the appeal of Mwiza Mutagoma because it relies on the ground that the appealed case was tried by the High Court without jurisdiction while he raised that objection of lack of jurisdiction in the High Court and it decided on it.

2. The payment default of a compartment rent originating from the contract entered into between traders and that compartment being used for commercial activities, constitutes a commercial act due to the rapport that exists between such act and commercial activities habitually exercised by contracting parties.
3. The lease contract of that room should be considered as a commercial lease and disputes thereto should therefore be heard by commercial courts. Appeal granted. Appealed judgment quashed. Costs to the respondent. 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. Cases referred to: Kayinamura v. Mwiza, RCOMA 0028/10/CS rendered on 27 April 2012.

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55 MWIZA v. KAYINAMURA Mwiza v. Kayinamura, RCOM 0333/10/HCC rendered on 22 March 2011. Authors cited: François Collart Dutilleul et Philippe Delebecque, Contrats civils et commerciaux, 8e édition, p.334.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Kayinamura Fidèle states he bought a house situated at Kimironko Sector known as “Medi Motel” from Mbabajimana Jean Bosco in 2007, but the latter concluded lease contract with individuals who used the house for business, including Mwiza Mutagoma. The contracts remained valid even after Kayinamura purchased the house but he and Mwiza did not manage to agree on its execution which resulted in much litigation. In some cases, Mwiza sued Kayinamura for breach of contract and in others, Kayinamura sued Mwiza. The case at hand was initiated by Kayinamura against Mwiza alleging that Mwiza defaulted in payment of the rent for 39 months equivalent to 26,300,000 Rwf as he ought to pay 700,000 Rwf a month. [2] The Intermediate Court of Gasabo, the seized court heard the case in Mwiza Mutagoma’s default. It delivered the judgment RC0019/ 11/TGI/ GSBO on 14 October 2011. It held that the claim filed by Kayinamura lacks merit because he did not produce any evidence to prove the existence of the debt that Mwiza Mutagoma owed him. [3] Kayinamura Fidèle appealed against the decision to the High Court and in that hearing Mwiza Mutagoma raised different objections including lack of jurisdiction, inadmissibility of a claim and connexity. Concerning the objection of lack of jurisdiction, Mwiza stated that the High Court was incompetent because the claim was submitted to the Commercial Courts before. In its interlocutory judgment RCA

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56 RWANDA LAW REPORTS 0388/11/KIG rendered on 6th July 2012, the High Court, decided that Mwiza’s objection was inadmissible because even if the lease contract of a house relates to commercial activity, it is regulated by civil law. Thus it cannot be considered as commercial. [4] Concerning the merit of the case, the High Court rendered judgment RCA 0388/11/HC/KIG on 9th August 2012 and ruled that the claim filed by Kayinamura had merit on some grounds. The High Court also quashed the appealed judgment and ordered Mwiza Mutagoma to pay Kayinamura Fidèle an amount of money equivalent to 24,830,000 Rwf, the payment of 993,200 Rwf related pro-rated fees, and court fees equivalent to 10,050 Rwf. [5] Mwiza Mutagoma appealed to the Supreme Court, claiming that the trial of the case was characterized by manifest impartiality, the case did not fall under the High Court’s jurisdiction, the motive upon which the judge based his determination of the rental rate was not figured out, and the judge disregarded some facts in deciding the case. The appeal launched by Mwiza Mutagoma has been screened and the Chief Registrar of the Supreme Court, in the order n° 0011/12/civ/GCS, held that his appeal is not within the jurisdiction of the Supreme Court. However after Mwiza’s complaint, the screening of this file was commissioned to a judge who concluded that the appeal deserved to be admitted and examined. [6] The hearing of the case was conducted in public on 5th November, 2013 Mwiza

Mutagoma represented by Mutabazi Innocent, the Counsel, and Kayinamura Fidèle represented by Ndagijimana Emmanuel, the Counsel, who requested that before the hearing of the appeal of Mwiza, the court should examine objections raised by Kayinamura in his defense submissions relating to the lack of jurisdiction of the Supreme Court over the appeal of Mwiza Mutagoma. The Court consented and the hearing continued with the debate on the objection raised by Kayinamura Fidèle.

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57 MWIZA v. KAYINAMURA II. ANALYSIS OF LEGAL ISSUES The objection raised by Kayinamura intend to demonstrate that the appeal filed by Mwiza Mutagoma is not within the jurisdiction of the Supreme Court in light of the provision of the law he referred to by stating that the Supreme Court is incompetent to hear the appeal he filed because the value of the subject matter did not attain the minimum amount of money required by the law. Kayinamura further declares that the statements made by Mwiza that the Supreme Court has jurisdiction basing on the lack of jurisdiction of the previous courts which rendered the appealed judgment (Intermediate Court of Gasabo and the High Court decided the case RCAA 0001/13/CS) lacks merit because the contract in dispute is civil. Among the grounds of appeal filed by Mwiza, there is one which is related to the lack of jurisdiction in examining the objection raised by Kayinamura; therefore, the Court must examine, at any cost, this ground of appeal filed by Mwiza. For the Court to decide whether or not appeal filed by Mwiza is in its jurisdiction, it is of paramount importance to examine the provisions of the law upon which Mwiza has relied to justify Supreme Court jurisdiction in filing the appeal. The issue of knowing whether the High Court was competent to hear the case should be examined as well. Whether or not the appeal filed by Mwiza Mutagoma falls into the jurisdiction of the Supreme Court:

1. Concerning the provisions of the law to which Mwiza Mutagoma referred to justify the jurisdiction of the Supreme Court to hear appeal he filed. [7] Ndagijimana Emmanuel, Counsel for Kayinamura Fidèle, states that the appeal filed by Mwiza Mutagoma should not be admissible in the Supreme Court because it is inconsistent with the provisions of article 28 paragraph 2, point 7° of the Organic Law n° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court. That article stipulates that “the Supreme Court

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58 RWANDA LAW REPORTS shall also have appellate jurisdiction over cases heard and decided in the second instance by the High Court, (...) if such cases involve a judgment yielding an award of damages of at least fifty million Rwandan francs (Rwf 50,000,000), or when the value of the case, as determined by the judge in case of a dispute, is at least fifty million Rwandan francs (Rwf 50,000,000).” since in the case Mwiza Mutagoma was ordered to pay Kayinamura 24,830,000 Rwf in cumulative damages , the latter are below the damages provided for in the above mentioned article . [8] Counsel for Kayinamura states again that Mwiza Mutagoma bases the jurisdiction of

the Supreme Court to hear his appeal on article 28 paragraph 2 point 2° of the Organic Law n° 03/2012/OL of 13/06/2012 (...) stated above which provides that the Supreme Court shall have appellate jurisdiction over cases heard and decided in the second instance by the High Court (...) if such cases “are decided by a court that does not have jurisdiction.”; while Mwiza Mutagoma had never raised an objection of lack of jurisdiction and be overruled, therefore, the judge in charge of screening would not have relied on that in determination of the jurisdiction of the Court while it had not been debated in previous courts. [9] Mutabazi Innocent, Counsel for Mwiza Mutagoma, states that the objection raised by Counsel for Kayinamura Fidèle which is based on stating that the appeal filed by his client does not fall in the jurisdiction of the Supreme Court because it is inconsistent with the provisions of article 28 paragraph 2 point 2° of the Organic Law n° 03/2012/OL of 13/06/2012 (...) as stated above, is not substantiated because the appeal submitted by Mwiza Mutagoma relies on article 28 paragraph 2 point 2° of the Organic Law n° 03/2012/OL of 13/06/2012 (...). He pleads that the appealed judgment has been decided by civil court instead of commercial court because the nature of the subject matter was commercial that should be heard by commercial courts. [10] The Counsel for Mwiza explains that Mwiza Mutagoma did not raise the objection of lack of jurisdiction before the Intermediate Court

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59 MWIZA v. KAYINAMURA of Gasabo because the case was heard in his default while pleading before the High Court in Kigali; Mwiza Mutagoma raised the objection of lack of jurisdiction. As a result, in the interlocutory judgment RCA 0388/11/HC/KIG rendered on 9th August 2011, the judge, without motivation, affirmed that the objection of lack of jurisdiction was inadmissible. Another submitted objection relating to powers of a decided case (*autorité de la chose jugée*) was rejected as well. THE VIEW OF THE COURT [11] The Court finds that Counsel for Mwiza explains in his appeal submissions before the Supreme Court that he based his claim for the jurisdiction of this Court on article 28 paragraph 2 point 2° of the Organic Law n° 03/2012/OL of 13/06/2012, providing that the Supreme Court shall also have appellate jurisdiction over cases heard and decided in the second instance by the High Court, the Commercial High Court or by the Military High Court if such cases were decided by a court that did not have jurisdiction. Therefore, the statements of counsel for Kayinamura are unsubstantiated. [12] The Court finds again that the allegation by Counsel for Kayinamura that Mwiza Mutagoma did not raise the objection of lack of jurisdiction before the High Court is also baseless because the copy of the interlocutory judgment RCA 0388/11/KIG rendered on 9th August, 2011 and the writings on the first page, paragraph 2 demonstrate that Mwiza raised the objection of lack of jurisdiction as evidenced by the following statement by the judge that: “Mwiza and Mutabazi, his Counsel declare that this case falls into the jurisdiction of Commercial Courts”. Additionally from page 2 to 3, it is obvious that, among the issues analysed by the High Court, the first one concerned the jurisdiction of the Court and it is Mwiza Mutagoma who raised the issue. Ndagijimana, Counsel for Kayinamura at the time, presented his defense thereon and the Court decided subsequently that the contract of lease of a house even when it is for commercial use is regulated by civil

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60 RWANDA LAW REPORTS law and thus it cannot be considered as commercial," and then pleaded that the objection raised by Mwiza Mutagoma was groundless.

2. Whether the High Court (sitting in civil cases) has jurisdiction to hear disputes arising from the contract of lease of Kayinamura Fidèle's house used for commercial purposes by Mwiza Mutagoma: [13] Mutabazi Innocent, Counsel for Mwiza Mutagoma, declares that previous Courts had no jurisdiction to hear the case submitted to them because the nature of the subject matter is commercial which ought to have been tried by Commercial Courts especially that both parties are traders. In addition to this, as he explained above, he raised an objection of lack of jurisdiction before the High Court contending that the subject matter was not within the jurisdiction of the High Court, because previously the litigious contract was submitted to commercial courts in the case RCOM 0333/10/HCC rendered on 22 March 2011 by the Commercial High Court and in the case RCOMA 0028/10/CS rendered on 27 April 2012 by the Supreme Court whereby, in both courts, Kayinamura raised the objection for lack of jurisdiction but those courts decided that they had jurisdiction to hear the case. Therefore, he realises that Kayinamura seized civil Courts after losing in Commercial Courts with the sole objective of frustrating Mwiza. [14] Concerning the jurisdiction of the High Court which tried the appealed case, Ndagijimana Emmanuel, Counsel for Kayinamura Fidèle, declares that previous Courts had jurisdiction to hear this case since the contract of lease for the house concluded between Mwiza Mutagoma and Kayinamura is a contract normally regulated by civil law that issues arising from it should be tried by Civil Courts. Furthermore, he argues that another fact evidencing the civil nature of contract concluded between Mwiza Mutagoma and Kayinamura is that Mwiza Mutagoma is not a trader and would not conclude a commercial lease contract (commercial lease) because he is a soldier without business registration, the contract is a civil contract. Hence, issues arising from the contract would be tried by civil Courts as it was done.

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61 MWIZA v. KAYINAMURA THE VIEW OF THE COURT [15] Regarding the hearing before the High Court held on 26th June, 2012, the Supreme Court finds that Mwiza Mutagoma and his Counsel, Mutabazi Innocent, raised three objections including lack of jurisdiction by the High Court explaining that it had no jurisdiction over his case because the subject matter was tried by the Commercial High Court in the case RCOM 0333/10/HCC, and the Supreme Court tried it on appeal level in the case RCOMA 0028/10/CS. [16] The Court finds that the subject matter of the case concerns disputes emanating from the lease contract for Kayinamura's house in which Mwiza Mutagoma carries out his business. Kayinamura alleges that these disputes had to be heard by Civil Courts because the contract is civil since Mwiza Mutagoma concluded it when he was a soldier without a business registration. [17] In the judgment RCOMA 0028/10/CS paragraph [7] decided by the Supreme Court on 27th April 2012, this Court decided that Mwiza Mutagoma is a trader because he proved he possesses a business registration; therefore the objection of lack of

jurisdiction of Commercial Courts to hear the issue of payment arising from the lease contract based solely on the fact that Mwiza concluded it when he was a soldier without a business registration is groundless. Thus, there is no doubt that the issue of default of rent payment arising from the contract between traders, Mwiza and Kayinamura, is a commercial act due to the relationship between the contract and commercial activities exercised pursuant to the provisions of article 3, paragraph 1 of the Organic Law n° 59/2007 of 16/12/2007. [18] This decision is supported by law scholars, François Collart Dutilleul and Philippe Delebecque, who explain that a commercial lease envisaged for buildings used for trade may be concluded by individual traders, manufacturers registered in the business registry, or an entrepreneur registered in the directory of crafts whether or not they exercise commercial activities. (“le statut des baux commerciaux à

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62 RWANDA LAW REPORTS vocation s'appliquer aux baux des immeubles ou locaux dans lesquels un fonds est exploité, que ce fonds apparaisse soit à un commerçant ou à un industriel immatriculé au registre du commerce, soit à un chef d'entreprise immatriculée au répertoire des métiers accomplissant ou non des actes de commerce”).⁶ On the web site, other law scholars state that a commercial act must relate to commercial activities which a trader exercises permanently in his or her profession. There must be a differentiation between activity a trader exercises in his profession and that exercised in his/ her private life. They add that, for example when a trader purchases a family house, he or she performs a civil act but if he or she buys an apartment for business purpose, that act is qualified commercial and even Courts so ruled that contracts concluded by a trader as part of his or her profession are considered commercial, and obligations arising from civil torts or related acts done by a trader are also considered commercial acts.⁷ [19] Pursuant to the previous holdings, the Court finds that the contract is a commercial contract and all disputes arising from it must be heard by Commercial Courts because Mwiza was a trader with business registration and he used the leased room for business relating to his profession. Therefore Civil Courts which tried this case at the first and second instance in appeal lacked jurisdiction. Consequently,

⁶ François Collart Dutilleul et Philippe Delebecque, Contrats civils et commerciaux, 8e édition, p.334. ⁷ <https://www.google.com/search>, cours de droit commercial, Daphnée Principiano, Sont commerçants ceux qui exercent les actes de commerce et en font leur profession habituelle. L'acte doit se rattacher à l'activité commerciale, cela implique une distinction entre la vie professionnelle du commerçant et sa vie privée qui ne sera soumise qu'au droit commercial. Si un commerçant achète une maison pour sa famille: c'est un acte civil, par contre si le même commerçant achète un local, c'est un acte commercial. Ne sont pas commerciaux les achats faits par un commerçant pour son usage particulier. La jurisprudence dit que tous les contrats passés par un commerçant pour les besoins de son commerce sont commerciaux, qu'également toutes les obligations qui peuvent résulter d'un délit ou quasi-délit peuvent être qualifiés d'actes de commerce. 1 2 2 1

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63 MWIZA v. KAYINAMURA judgment RCA 0388/11/KIG rendered on 6th July, 2012 by the High Court is quashed. III.DECISION OF THE COURT [20] Decides to hear the objection raised by Kayinamura Fidèle since its submission complies with the rules of procedure. [21] Decides that the objection is not valid; [22] Decides that the appealed judgment is quashed. [23] Orders Kayinamura Fidèle to pay the costs of this reference amounting to 25,750 Rwf, the default of which, in a period of eight days (8 jours) from the delivery of this judgment, that amount of money will be deducted from his assets through government coercion.

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64 NDIZIHIWE ET AL v. MUDAKEMWA ET AL [Rwanda SUPREME COURT – RCAA 0136/11/CS (Rugege, P.J., Mugenzi and Munyangeri N., J.) February 14, 2014] Civil procedure – Appeal – Self deprivation of the right to appeal on screening decision – The appellant has the right of self deprivation of his lodged appeal even when the respondent does not accept it – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 26. Contracts or obligations law – Damages on the loss incurred due to self deprivation of an appeal by the appellant – The respondent has the right to compensation of costs incurred due to the appeal lodged against him but self deprived of by the appellant later – Law of 30/07/1888 relating to contracts or obligations, article 258. Facts: After realizing that their appeal in the Supreme Court was dismissed because of the delay to file it. Ndizihiwe and Nyirabihogo appealed against the decision, but later wrote and declared that they opted to deprive themselves of the right to that appeal action. Mudakemwa and other respondents recognize that self deprivation of the right to appeal action is the right of the litigant, but argue that this is not likely to prevent them from being awarded damages resulting from the loss incurred from reference and counsel fees. Held: 1. Nothing is likely to prevent the plaintiff from depriving him/herself of the right to action when s/he acts according to the rules of procedure, even when the respondent rebuts it, because it is a right recognized to him/her by the law.

2. Damages requested by the respondents in cross appeal are not related to the subject matter of the case, rather, are only related to the costs incurred due to the appeal action deprived of by the appellants, in which

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NDIZIHIWE ET AL v. MUDAKEMWA ET AL 65 they were sued. They deserve to be awarded them without necessarily initiating a new claim for those damages. Appellants allowed the deprivation of the right to appeal. Respondents are awarded counsel fees and reference fees. Court fees to be paid by appellants. Statutes referred to: Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 26. Law of 30/07/1888 relating to contracts or obligations, article 258. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] After Ndizihiwe and Nyirabihogo appealed to the Supreme Court against the Judgment RCA188/10/HC/MUS rendered by the High Court, the subject matter of the case being the succession of the assets left by Rusigariye, the Judge in charge of case screening decided, on 11th November, 2011, that the appeal was dismissed since it had been submitted too late. [2] Ndizihiwe and Nyirabihogo appealed against that screening decision, but later, in their letter dated on 4th December, 2013, they informed the Court that they deprive themselves of the appeal, based on article 26 of Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure. [3] The respondents who are Mudakemwa, Mukarutura and Nyiransekanabo, disputed that they reject the appellant's move to deprive themselves of the action, because they had already submitted a

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66 RWANDA LAW REPORTS cross appeal on 10th October, 2013 requesting the compensation for counsel and procedural fees. [4] The hearing was conducted in public on 14th January, 2014; the appellants were represented by Habyarimana Christine, the Counsel. The respondents were represented by Uwimana Shani, the Counsel. II. ANALYSIS OF LEGAL ISSUES [5] In this case, it is to be analyzed whether the deprivation of the right by the appellants is likely to be admitted. Next, it will be examined whether or not the cross appeal submitted by the respondent, before the appellant decide to deprive himself of the right to action, is likely to be admitted in case the appellant's self deprivation of the right of action is granted. Concerning the admission of the deprivation of the right to action [6] The Counsel for the appellants, states that they opted for self deprivation of the right to action based on article 26 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure. He notes that their request must be granted without any other requirements because the law specifically states that the acceptance of another party is not a requirement The Counsel for the respondents acknowledges that the admission of the self deprivation of the right to action is the right of the applicant, but argues that it does not prevent the respondents from requesting for damages. [7] Article 26 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that self deprivation of the right to action is a self denial of one's capacity to plead and make a follow up of the claim, and further stipulates that acceptance by the other party is not necessary. [8] The Court finds that based on those provisions of the law, nothing is likely to prevent the petitioner from being allowed self

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67 NDIZIHIWE ET AL v. MUDAKEMWA ET AL deprivation of the right to action when she/he acts according to the rules of procedure, even when the respondent rejects it. Instead, it remains a right recognized to them by the law. Therefore, Ndizihiwe and Nyirabihogo are allowed to deprive themselves of their appeal. Concerning compensation requested by the respondents [9] Habyarimana, the Counsel for Ndizihiwe and Nyirabihogo, declares that self deprivation of the

right to action, as stipulated in article 26 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure does not require the acceptance of the other party. [10] She states that even the cross appeal filed by the respondents cannot prevent the approval of self deprivation of the right to action because such a cross appeal is accessory to the main claim. When the holders deprive themselves of the right, the cross appeal attached to the claim is not to be examined. Furthermore, article 167 of the new law relating to the civil, commercial, labour and administrative procedure stipulates in paragraph three, that if the principal appeal was not received, then the cross appeal may not be received either. [11] She explains that if the respondents want to petition for the damages they intended to request, they would have to initiate a principal claim relying on article 258 Civil Code book III, and demonstrate the actual loss incurred due to the faults committed by Ndizihiwe and Nyirabihogo. [12] Uwimana Shani, the Counsel for the respondents, Mudakemwa, Mukarutura and Nyiransekanabo states that even if article 26 provides that the acceptance of the other party is unnecessary in order for the party seeking to deprive him/herself of the right to action is authorized to do so by the Court, the loss that the respondent incurred from the follow up of the case and paying the Counsel must not be disregarded. She also states that in this Court there are case laws determining compensation for such a loss.

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68 RWANDA LAW REPORTS [13] She explains that her clients engaged a legal advocate to draft for them defense submissions and they paid her 1,000,000 Rwf excluding the procedural expenses. They also came to Supreme Court three times from Gisenyi, which is the reason why they request to be paid 2,500,000 Rwf which includes procedural and counsel fees especially that the appellants deprived themselves of the right to action after the respondents had already submitted their defence submissions. [14] Concerning the issue that the respondents should initiate another claim to request for the compensation for the amount paid to the counsel and procedural costs, Uwimana, the Counsel declares that this would be obstructive for her clients and it would be disregarding the long period of time they spent on the case. [15] The Court finds that, considering the explanations provided by respondents as mentioned above, the damages sought are not related to the subject matter of the case, instead, they are related to their expenditures due to the appeal of the case in which they were sued. Therefore, it is obvious that pursuant to article 258 of the civil code book III respondents have incurred the loss occasioned by that appeal. As a result, respondents deserve to be refunded with the expenditures in that context without being required to initiate a new claim for those damages. [16] Regarding the quantum of the damages they request, the Court finds no convincing evidence submitted to justify 2,500,000 Rwf as the actual amount paid for counsel and procedural fees. Therefore, they must be awarded, in the discretion of the Court, 500,000 Rwf for counsel fees for all of them and 200,000 Rwf each for procedural fees amounting to 1,100,000 Rwf. III. DECISION OF THE COURT [17] Admits the self deprivation of the right to appeal by Ndizihiwe and Nyirabihogo.

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69 NDIZIHIWE ET AL v. MUDAKEMWA ET AL [18]

Orders

them to pay Mudakemwa, Mukarutura and Nyiransekanabo compensation for the amount paid due to the appeal, amounting to 1,100,000 Rwf, including 500,000 Rwf for the counsel fees and 600,000 Rwf of procedural fees. [19] Orders each of them to pay ½ of court fees amounting to 48,250 Rwfs, meaning 24,125 Rwf each.

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COMMERCIAL CASES

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71 AMSAR v. RWANDA REVENUE AUTHORITY [Rwanda SUPREME COURT–RCOM A 0056/10/CS (Mukanyundo, P.J., Havugiyaremye and Kayitesi R, J.) August 5, 2011] Tax Law – determination of Corporate Income Tax based on the principle of independence of taxation – Each year is taxed independently – Law n°16/2005 of 18/08/2005 2005 on direct taxes on income, article 2(7°). Tax Law – Determination of depreciation – The depreciation of a working tool is computed when it was used on direct purpose of what it was meant for – Law n° 8/97 of 26/6/1997 on Code of Direct Taxes on Different Profits and Professional Income, as modified and complemented to date, article 10 (2°) ;(5°). Facts: The Appellant was assessed on corporate Income tax of the year 2003 and was imposed the tax of 25,703,169 Rwf resulting from an assessment procedure without notice. He made appeal to the Commissioner General and it was held that his appeal has merit in part and the tax of 1,372,044 Rwf was reduced, then, the remaining was 24,331,125 Rwf. AMSAR filed a case to the Commercial High Court requesting the exemption of the tax it was imposed, since during that fiscal year he had incurred a loss equal to 31,862,937 Rwf. The Commercial High Court ruled that the claim is without merit; therefore the tax fixed by Commissioner General in response to the appellant's administrative complaints is maintained. AMSAR appealed to the Supreme Court objecting that the Commercial High Court did not consider the debit note of 69,583,125 Rwf related to spare parts and various machines, and refused its deduction from the taxable profits of the year 2003 while it had paid that money. The court refused to deduct the depreciation of the “generator” which was used

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72 RWANDA LAW REPORTS where Deputy Director General of the company resided from taxable business profit. The RRA alleges that the AMSAR's grounds of appeal are without merit, because no fiscal year shall be mixed with another. Concerning the depreciation of the power generator that was used at the residence of the Deputy Director General of the company, cannot be deducted from taxable business profit, because the deductible expenses should have been used for direct purpose of, and in the normal course of the business; which never happened. Held: 1.

The sum of 69,583,838 Rwandan Francs which appears on debit note, provided by the appellant cannot be deducted from taxable business profit of the fiscal year 2003, because it was paid after that period. Therefore, the principle of the independence of financial year shall be respected.

2. In order to deduct the depreciation of the power generator from the taxable profit, the power generator should have been used for the direct purpose of, and in the normal course of the business. If the depreciation of that power generator cannot be considered as expenses related to the business for being deducted from taxable profits. Appeal without merit. Appealed case remains valid. Court fees to the appellant. Statutory instruments referred to: Law n°16/2005 of 18/08/2005 on direct taxes on income, article 2(7°). Law n° 15/2004 of 12/6/2004 relating to evidence and its production, article 35, paragraph 3. Law n° 8/97 of 26/6/1997 on Code of Direct Taxes on Different Profits and Professional Income as modified and complemented to date, article 10(2°) ;(5).

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73 AMSAR v. RWANDA REVENUE AUTHORITY No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] AMSAR BURUNDI SA Company, Rwanda branch office, was assessed on corporate Income tax (Impôt sur les Bénéfices des Sociétés) of fiscal year 2003 and was subject to pay tax of 25,703,169 Rwf resulting from an assessment procedure without notice (imposition d'office). AMSAR made appeal to the Commissioner General and it was held that his appeal has merit in part, the tax of 1,372,044Rwf imposed was reduced and the remaining amount to pay was 24,331,125 Rwf. Unsatisfied with the decision, AMSAR filed a case to Commercial High Court requesting the exemption of the tax it considers was imposed while in that fiscal year it had incurred a loss amounting to 31,862,937 Rwf. [2] The Commercial High Court ruled that AMSAR's claim is without merit, that the tax fixed by Commissioner General of Rwanda Revenue Authority in response to AMSAR's administrative complaints is maintained. [3] Among the grounds relied on, the court found that, concerning the fact that AMSAR had been imposed through the assessment procedure without notice, , was in accordance with the law, especially the article 19 paragraph 1 and article 24 of the Law n° 8/97 of 26/6/1997 on Code of Direct Taxes on Different Profits and Professional Income. Concerning the fact that Rwanda Revenue Authority refused to deduct the depreciation expenses of the power generator from taxable profits, the Court found that those expenses should not be deducted from the profits considering the provisions of article 10, paragraph 1 of the Law stated above. Regarding 69,583,858 Rwf mentioned in the debit note that AMSAR requested to be deducted from taxable profits of the fiscal year it was paid, the Court finds that

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74 RWANDA LAW REPORTS AMSAR does not produce any evidence that the expenses were spent in the year 2003, despite it recognized it owed money to someone. [4] AMSAR appealed against the ruling to the Supreme Court objecting that the court did not consider the debit note of 69,583,125 Rwf related to spare parts and various machines, which it rejected to be deducted from the taxable profits of the year 2003 while AMSAR had paid that money to SOBIMAC, and that the court rejected the depreciation of the power generator which was used at the residence Deputy Director General of the company to be deducted from taxable business profit. According to Rwanda Revenue Authority, those grounds of appeal are baseless. [5] The case was heard on 30/06/2011, AMSAR represented by Counsels Munderere Léopold and Mugemana J.M.V while Rwanda Revenue Authority was represented by State attorney, Gasana Raoul A. II. ANALYSIS OF LEGAL ISSUES

- a. Whether 69,583,858 Rwf on the debit note n° 004/2003/MAT should be deducted from the taxable profits of the year 2003 . [6] The Counsel, Munderere Léopold who represents AMSAR alleges that it paid that money to SOBIMAC, but it postponed its payment in 2004 due to the fact that it was at its very beginning because of many formalities it was required to fulfill in order to start operating in Rwanda .and basing on the losses it incurred, he found that the money appearing on debit note should be recorded as having been spent in 2003. [7] The State Attorney, Gasana Raoul A. who represents Rwanda Revenue Authority recalls the time period independence principle which means that no fiscal year should be mixed with another. He explains that the money which appears on the debit note had not been paid in 2003, it is obvious that AMSAR was supposed to pay to someone, that is why it should not be deducted from taxable profits for

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75 AMSAR v. RWANDA REVENUE AUTHORITY that year based on article 10 paragraph 2 of the Law n° 8/97 of 26/6/1997 that regulated the Code of Direct Taxes on Different Profits and Professional income. [8] Concerning invoices issued by AMSAR which it requests to be considered as evidence that the materials related to that money had been purchased and paid. he explains that they do not comply with the provisions of article 35 paragraph three of the Law n° 15/2004 of 12/6/2004, especially with regard to the uncertified copies, and that some of them indicates that the money therein was paid in 2005, other in 2006; therefore, they cannot reduce the tax of 2003. [9] The Counsel, Mugemana also explains that this money was paid for materials that SOBIMAC had bought from ASTALDI company, and afterwards, it sold them to AMSAR by lending it money in order to facilitate it for their smooth collaboration as related companies [10] Article 10 of the Law n° 8/97 of 26/06/1997 establishing the code of Direct Taxes on Different Profits and Professional Income, that was in force in 2003 provides that the profits is established after subtracting all expenses. It specifies that for the money relating to those expenses and others that decrease assets to be deducted from taxable profits, the following conditions shall be fulfilled: 1° The money was used for the direct purpose of, or in the normal course of the

business; 2° The money spent correspond to services decidedly of the business and has sufficient evidence showing the veracity of what is written in the books of accounts. 5° Have been recorded in compliance with governing laws, expenses paid for the purpose of services in the year are considered as an indisputable debt in description and in quantity. [11] Basing on that article and especially in its point (2) and (5), the Court finds that expenses of 69,583,858 Rwf noted on the debit note, provided by AMSAR cannot be deducted on taxable profits in year

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76 RWANDA LAW REPORTS 2003, as indicated by that debit note, that money was not really paid in 2003, but was paid later. [12] The court again finds that other evidences produced by AMSAR including invoice, apart from not complying with the provision of article 35, paragraph 3 of the Law n° 15/2004 of 12/6/2004 relating to evidence and its production, they also indicate that a portion of the money was paid in 2005 while the other was paid in 2006. Furthermore, the payment was made for another reason, since it was for reimbursement of the fees (remboursement des frais) instead of paying those materials, hence the ground of appeal of AMSAR requesting the money on debit note be deducted from taxable profits earned in 2003 is baseless.

- b) Whether the depreciation of the power generator which was used in the residence of the Depute Director General can be deducted from taxable profits. [13] On this issue Counsel Munderere find that there is no way ,Rwanda Revenue Authority would have accepted depreciation for some products and refuses for the generator on the grounds that it is not “business expense” he explains the problem of electricity experienced in 2003 some time the deputy director general use to work in his office and also sometimes at his residence, Thus due the responsibilities of a person of that level, the money incurred for that generator has to be considered as expense on the same level with others expenses incurred in relation to the business and therefore be deducted from taxable profits [14] The Counsel, Gasana Raoul alleges that the provision of first point of article 10 of the Law n° 8/97 of 26/6/1997 on Code of Direct Taxes on Different Profits and Professional Income, is clear, where it explains the scope of deductible expenses, and determines in particular that the charges deducted are those incurred for the direct purpose of the business. He adds on that what should be considered, as held by Rwanda Revenue Authority is depreciable equipment, the reason why, it admitted the depreciation of some equipments and rejected that of the

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77 AMSAR v. RWANDA REVENUE AUTHORITY power generator which was used by the Deputy Director General of the company since the provision of the law states about equipments which have direct and not indirect relation to profits as it is the case of power generator which was used at the residence of the Deputy Director General, because separation direct interests and those that have not may be difficult. [15] the first point of article 10 of the law n° 8/97 of 26/06/1997 stated above, which was into force in 2003, provides that the profits are established after

deducting all expenses, thus for the amount of expenses to be deducted from profits, it should have been used for the direct purpose of, or in the normal course of the business. [16] Based on this article, the court finds that the power generator referred to, although it was generally used to facilitate the Deputy Director General to fulfill its job obligations; the fact that it was also used for other domestic activities which may not be related to its job obligations, this brings about doubt on the direct connection (lien direct) provided for by the law, therefore, the depreciation for that power generator cannot be deducted from taxable profits. [17] The court finds that on the part of AMSAR, its representatives failed to show what were allocated to its Deputy Director General as facilities in connection to its job including the use of the power generator in particular. [18] Basing on what has been said above; the court finds that the depreciation of the power generator cannot be considered as expenses related to the business to be deducted from taxable profits. Therefore, the appeal of AMSAR even on this ground is without merit. III. DECISION OF THE COURT [19] Decides to admit the appeal of the branch of AMSAR BURUNDI SA, in Rwanda, for it was legally introduced, but finds it without merit.

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78 RWANDA LAW REPORTS [20] Rules that the case RCOM 0115/09/HCC rendered by Commercial High Court on 29/04/2010 is sustained; [21] Orders the branch of AMSAR BURUNDI SA in Rwanda, to pay court fees amounting to 23,300 Rwf, failure to do so within eight days it will be deducted from its assets through government coercion.

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79 AQUILLA & PRISCILLA v. ENGEN ET AL [Rwanda SUPREME COURT – RCOMA 0165/12/CS (Mugenzi, P.J., Hatangimbabazi and Munyangeri, J.) December 13, 2013] Law governing professional Court Bailiff – The competence of the professional court bailiff – If requested by the justice or any other person having the interest, is authorized to note and make a certification report but he/she cannot expel any person without the court decision authorizing her/him to do so – The Court Bailiff and the principal pay damages resulting from unlawfully expelling person – Law no 31/2001 of 12/06/2001 establishing the Professional Court Bailiff, article 18. Evidence Law – Evidence of contracts – The photocopy bearing a defect cannot be taken as an evidence of the contract in case its original copy is not revealed. Facts: AQUILLA & PRISCILLA filed a case against ENGEN and the court bailiff in the Commercial High Court for having breached the lease contract of a petrol station they have signed. This breach is based on the fact that ENGEN has illegally expelled it and seized the property made up of money and its properties through the court bailiff Kanyana Bibiane. The Court decided that there is no reasonable and unequivocal evidence to be considered as the basis of the contract likely to indicate that ENGEN has really breached the contract, and decided that the court bailiff did not honour her duties when together with ENGEN expelled AQUILLA & PRISCILLA from the petrol station, and ordered them to pay it damages. AQUILLA & PRISCILLA appealed to the Supreme Court requesting to decide that ENGEN has breached the contract and to order it to pay moral damages resulting from expelling AQUILLA & PRISCILLA from its working place without the court decision. ENGEN and Kanyana

argue that what the court bailiff has done was lawful, and

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80 RWANDA LAW REPORTS ENGEN argues in addition that there was no breach of the contract since the contract they have signed was terminated. Held: 1. The professional Court bailiff has the right to make certification report if he/she is requested but he/she cannot expel a person without the court decision. Therefore, the fact that ENGEN and the court bailiff expelled AQUILLA & PRISCILLA without a court decision is unlawful. For that reason, they should pay damages.

2. The photocopy of written contract cannot be considered as its evidence if it contains defects in its content while there is no original document. Appeal has merit in part. Respondents have to pay damages resulting from unlawful expulsion of the plaintiff, advocate fees and procedural fees. ENGEN has to pay the plaintiff, damages of the seized properties. All parties shall jointly pay court fees. Statutes and statutory instruments referred to: Law no 31/2001 of 12/06/2001 establishing the bar of Professional Court Bailiffs, article 18. No Case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] AQUILLA AND PRISCILLA company (in summary we will use AQUILLA), states that on 18th February, 2011, it entered into a lease contract of petrol station with ENGEN RWANDA Ltd located at Giporoso in order to run a petroleum products business of ENGEN RWANDA Ltd for one (1) year. After that, AQUILLA filed a case

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81 AQUILLA & PRISCILLA v. ENGEN ET AL against ENGEN RWANDA Ltd and the professional court bailiff, Kanyana Bibiane in the Commercial High Court alleging that it repossessed the station on 23 July 2011 assisted by the professional court bailiff, Kanyana Bibiane while the contract was not terminated and without prior court order. AQUILLA alleges in addition that ENGEN unlawfully seized its property, consisting of money and equipment, and requested the court to compel ENGEN to pay back the money paid in excess to ENGEN, for water, power, cleaning, business license taxes (patente) and other taxes imposed by the district. [2] The Commercial High Court ruled that there is no reasonable and unequivocal evidence to prove that ENGEN RWANDA Ltd breached the contract it signed with AQUILLA, but confirmed that Kanyana Bibiane, the professional court bailiff acted unlawfully when jointly with ENGEN RWANDA Ltd, expelled AQUILLA from the ENGEN RWANDA petrol station. It ordered Kanyana to pay AQUILLA civil damages equal to 500,000 Rwf and ENGEN RWANDA Ltd to pay 500,000 Rwf to AQUILLA AND PRISCILLA. [3] AQUILLA appealed against that decision to the Supreme Court, alleging that the Commercial High Court decided not to examine other relevant grounds related to the contract for which the original document was not produced, disregarding that it was not presented to the court since it was part of the assets confiscated by ENGEN RWANDA. AQUILLA claims the court disregarded other evidences proving that it concluded a binding contract with ENGEN RWANDA

Ltd; therefore, the court in its discretion, ordered it to pay AQUILLA 500.000 Rwf only while the fault committed was grave, and that the Commercial High Court did not consider ordering ENGEN RWANDA Ltd and the court bailiff to pay AQUILLA procedural and advocate fees while they were requested. [4] In its appeal submissions, AQUILLA requested the Court to confirm that ENGEN RWANDA Ltd breached the contract, and order it to pay moral damages equal to 5,000,000 Rwf resulting from the act of expelling it from the working place without court order, 30,000,000

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82 RWANDA LAW REPORTS Rwf for unlawful termination of the contract, 5,000,000 Rwf of procedural and advocate fees ; hand back all seized assets valued at 32,636,066 Rwf, pay 26,058,200 Rwf of extra bills paid including interest of 18% of 18 months amounting to 115,177,244 Rwf; pay 5,920,724 Rwf for water, power and cleaning bills spent when it occupied ENGEN petrol station at Remera and business license and other district taxes. All these requests were amended by AQUILLA in various hearings by this court stating that the amounts vary with time. [5] The hearing was held on various dates: 25th June, 2013, 24th September, 2013 and 19th November, 2013, AQUILLA AND PRISCILLA was assisted during the first session by Mutungirehe Anastasie, the Counsel, and by Karega Blaise Pascal, the counsel, who was also assisting the director of that company, Nkwaya Alfred during the remaining sessions while ENGEN was represented by the consels Rutembesa Phocas and Buzayire Angele who also assisted Kanyana Bibiane. II. ANALYSIS OF LEGAL ISSUES Whether ENGEN and Kanyana unlawfully expelled AQUILLA from the petrol station. [6] Regarding this issue, the counsel for AQUILLA argues that the part of the damages they requested are based on the fact that on 26th July, 2011 the court bailiff Kanyana drafted the seizure report of all equipments and requested 5,000,000 Rwf of damages based on unlawful expulsion from the petrol station. The previous court did not consider these grounds and ordered the court bailiff to pay 500.000 Rwf. [7] The counsel representing ENGEN RWANDA Ltd and assisting Kanyana argues the damages of 500,000 Rwf to be paid by ENGEN RWANDA Ltd and Kanyana are groundless because the court bailiff's actions were provided for by the law since she came to the station, found many people there, asked the accountant to open the safe box

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83 AQUILLA & PRISCILLA v. ENGEN ET AL (coffre fort), and handed all equipments and money to ENGEN. Additionally, the bailiff drafted a certification report(PV de constat) but Nkwaya Jules refused to sign it and ENGEN continued to keep these equipments at the station and NKWAYA received the equipments from the bailiff who drafted the hand off statement(PV de remise. [8] They continued arguing that damages of 500,000 Rwf are groundless because Kanyana did not violate the law while what occurred was the statement of petrol station abandonment drafted by AQUILLA director. This implies that they didn't expel it them from the station as pleaded by AQUILLA, and that in such a case the enforcement order is not necessary; for that reason, they find that even the damages of 500,000 Rwf awarded to it should be set aside. THE VIEW OF THE COURT [9] The law of 12/06/2001, regulating the bar of professional court bailiffs provides in its

article 18, in its last point that court bailiffs are allowed to execute a certification report called a (constatations purement matérielles) when requested by the court, or by any person interested. [10] In the analysis of the provisions of the article mentioned above, the court finds that the court bailiff KANYANA, upon the request of ENGEN RWANDA Ltd, was entitled to execute the certification report (PV de constat) as requested by that company as she states. [11] However the court finds that in the document called the repossession of the management of Engen petrol station Remera “reprise de la gestion de la station Engen Remera”, Kanyana indicates that AQUILLA was removed from the station due to the breach of the contract concluded with ENGEN RWANDA Ltd, and this company decided to permanently repossess its station. This clearly demonstrates that AQUILLA was actually expelled from the petrol station without a court order, while article 18 paragraph 3, stated above provides that

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84 RWANDA LAW REPORTS court bailiffs are only allowed to expel individuals from a place upon the court's order (expulsions ordonnées par un tribunal). [12] The Court finds that while what happened to AQUILLA was expulsion, the professional court bailiff could not have done it without a court order. For that reason, what she did together with ENGEN are unlawful, thus they have to pay damages. [13] In its appeal, AQUILLA states that on the first instance requested for 5,000,000 Rwf in damages from Kanyana for what she did without the court order, however the court was silent on it. [14] As mentioned above, the court finds that ENGEN RWANDA Ltd and KANYANA, both must pay AQUILLA damages for their unlawful act of expelling it from the petrol station without a court order. However, in the discretion of the court, it deserves to be awarded 2,000,000 Rwf in damages, for 5,000,000 Rwf it requested is excessive. Whether there was a contract between AQUILLA and ENGEN valid from 18th February, 2011 to 18/02/2012 and damages for its breach. [15] The counsel for AQUILLA states that their ground of appeal is based on the fact that the previous court held that there was no contract between it and ENGEN RWANDA Ltd, valid from 18th February 2011 to 18th February 2012, because its original copy was not produced, while it was in the possession of ENGEN RWANDA Ltd, for it took it when it expelled AQUILLA from the petrol station together with the professional court bailiff Kanyana Bibiane. [16]

[16] He continues adducing that the lack of original copy of the contract should not be the basis of the court to rule that there was no existence of the contract but rather it should have considered other evidences proving the existence of the contract with ENGEN RWANDA Ltd, such as:

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85 AQUILLA & PRISCILLA v. ENGEN ET AL The certification report (PV de constat) drafted by the professional court bailiff Kanyana where she states that ENGEN RWANDA Ltd has repossessed the petrol station because AQUILLA failed to fulfil the obligations in the contract; -Documents demonstrating that there was correspondence between both parties; -Purchase order bearing the

official stamp of ENGEN; -Bills on which petroleum products were cleared issued by ENGEN to AQUILLA [17] The counsel for AQUILLA states that the contract existed; that even the court bailiff Kagame Alexis reported it in the certification report, that Kanyana did not demonstrate the original copy of that contract. [18] The counsel for AQUILLA argues that basing on the existence of the contract, in the Commercial High Court, AQUILLA requested for 30,000,000 Rwf of damages based on the unlawful termination of the contract, but the court remained silent on it. He added that the court disregarded the gravity of the fault that ENGEN RWANDA Ltd and the professional Court bailiff committed against AQUILLA, but it ordered them to pay little damages thus he requests those damages to be awarded to AQUILLA, and also be awarded 47,412,000 Rwf in damages resulting from the loss it incurred after 12 months computed on 3,951,000 Rwf it had to accrue of monthly interests. [19] The counsel for ENGEN RWANDA Ltd argues that the appeal for AQUILLA has no merit because the act performed by ENGEN RWANDA Ltd was to repossess its petrol station which AQUILLA had refused to vacate, while the contract they concluded on 18 February 2010 had expired. Concerning the other contract invoked by AQUILLA; are forged as explained by the previous court after noticing

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86 RWANDA LAW REPORTS that even the dates of its conclusion on the photocopy were altered, they even filed a case for forgery. [20] He continues adducing that the requested damages should not be awarded because they are based on that contract, which never existed; even the amounts mentioned above are based on the forged contract. He concludes by stating that the previous court could not presume other evidences based on a false fact. THE VIEW OF THE COURT [21] The court finds as held by the Commercial High Court that the photocopy of the instrumentum (contract) which AQUILLA produces, refuted by ENGEN, contains various defects, including:

- The fact that on the last page it is evident that the date of the conclusion of the contract was altered, whereby on top of the page the handwriting in "18è Fevrier 2011" is not the same as in "18ème Fevrier 2011" written at the bottom of the page. - For the word "Fevrier" in photocopy of the instrumentum (contract) produced by AQUILLA is capitalized, which differs from the handwriting in "18è Fevrier 2011" written on top.
- It is evident that where "Fevrier" is written in capital letters there are letters which were erased.
- It is evident that the last figure of 2011 was erased and replaced by (1). [22] The Court finds that those defects in addition to the fact that the document AQUILLA produces is a photocopy, it leads the court to hold that there was no contract, valid from 18th February 2011 up to 18 February 2012 entered into between AQUILLA and ENGEN RWANDA Ltd, especially that it has not been able to produce its original copy.

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87 AQUILLA & PRISCILLA v. ENGEN ET AL [23] The Court finds the statement that the original copy was retained by ENGEN among the equipments it seized as alleged by AQUILLA has no merit, for neither in the certification report drafted by the court bailiff Kanyana, certification report drafted by Court bailiff Kagame nor in the letter it wrote to CID requesting for its equipments, AQUILLA doesn't not raise the issue of the original copy of that contract. [24] Basing on those explanations, the court finds that there is no basis to decide that the stated contract existed, hence the damages equal to 30,000,000 Rwf which are based on it, or 47,412,000 Rwf resulting from the loss it incurred within 12 months requested by AQUILLA has no merit. [25] The Court finds as explained by ENGEN in its pleadings in the Commercial High Court, even if on 18th March, 2011 it wrote to AQUILLA notifying it of the expiration of the contract between them, they continued to work together although there was no written contract, because ENGEN continued supplying it with its products, waiting for the renewal of the contract which had expired on 18 February 2011. The fact that ENGEN unlawfully expelled AQUILLA from the petrol station convinced the court to award AQUILLA 2,000,000Rwf in damages for unlawful acts committed against it which will be jointly paid by Kanyana and ENGEN RWANDA Ltd, and this court finds those damages are fair. Regarding the 32,870,517Rwf in damages equivalent to assets and equipments of AQUILLA which continued to be seized by ENGEN RWANDA Ltd. [26] The Counsel for AQUILLA argues that when it was expelled from the petrol station, there were assets and equipments equivalent to 32,870,517 Rwf ENGEN RWANDA Ltd which remained confiscated as it is evidenced by the certification report drafted by Court bailiff Kagame Alexis which indicates those which were missing and those which were found. Their intent is to demonstrate that the issue of the missing assets was raised in the Commercial High Court but ENGEN

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88 RWANDA LAW REPORTS did not respond on that. However after the judgment was rendered, ENGEN refused to hand them back. [27] He continues stating that the seized assets includes equipments purchased by AQUILLA as stipulated by article 8 of the contract, that apart from the buildings and petrol pumps all other assets belonged to AQUILLA. [28] The Counsel for ENGEN RWANDA Ltd states that the ground of appeal of AQUILLA has no merit, because what ENGEN RWANDA Ltd did was to repossess its petrol station which AQUILLA had refused to vacate, and some of the seized asset belonged to ENGEN including, the office files, and the petroleum products stock, He added that AQUILLA should have used it after paying because it had a procedure of working with ENGEN, hence what the court bailiff Kagame Alex handed back to AQUILLA are what belonged to it , and what was not given back to it belonged to ENGEN. [29] Regarding the petroleum products, the Counsel for ENGEN RWANDA Ltd state that article 10 point 4 of the contract they had concluded provides that in case AQUILLA fails to pay, ENGEN will repay itself from AQUILLA's assets, consequently since AQUILLA owed ENGEN about 12,550,515 Rwf and it issued a bouncing check, it lead it to get payment beginning with gasoline valued at 903,000 Rwf and the "bons" they found there, but again the debt was not cleared. [30] Regarding the money taken from the safe box evidenced by checks, note of bill, bankslips,

purchase order stated by AQUILLA, the Counsel for ENGEN RWANDA Ltd states that AQUILLA did not demonstrate the amount which was in that safe box, thus he finds that what the court bailiff Kagame noted should be followed. AQUILLA THE VIEW OF THE COURT [31] The court finds, in the course of the hearing the counsel for ENGEN RWANDA Ltd first stated that the assets it seized belonged to

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89 AQUILLA & PRISCILLA v. ENGEN ET AL it, because they were at the petrol station, where AQUILLA worked as an employee of ENGEN, later he recanted that it was not its employee I it implies that as AQUILLA was not an employee of ENGEN, there are assets seized by ENGEN that should be restituted to it. [32] The court finds that among the assets of AQUILLA seized by ENGEN, as demonstrated by the certification report (proces verbal de constat) excuted by the court bailiff Kagame, there are some assets which were not restituted to AQUILLA which include: Gasoline equivalent to 264 ltrs in the tank stating that it is valued at 270,000 Rwf and Gasoil equivalent to 900 Ltrs which AQUILLA states that its valued at 922,500 Rwf, Kerosene which is in the 3rd tank 34,600 Ltrs which AQUILLA states that its valued at 24,739,100Rwf, the money in the safe box amounting to 1,885,450 Rwf, and other 277,650 Rwf, 159,000 paid by Millenium on 21st July 2011; “bons” which were used equivalent to 970,000 Rwf: AQUILLA in its submissions states that all the seized assets have the value of 32,870,517 Rwf. [33] The court finds that since there are assets which were not restituted to AQUILLA, while ENGEN RWANDA Ltd failed to prove that they belonged to it, there is no reason as to why they should not be restituted to their owner, AQUILLA. Therefore since ENGEN RWANDA Ltd did not contradict 32,870,517 Rwf as the value of those assets, the Court must hold that value is the one equivalent to the assets of AQUILLA which have to be paid by ENGEN. Regarding the excessive amount paid to ENGEN (26,058,200Rwf in addition to the bank interest of 18% per month, equivalent to 115,177,244Rwf); water bills, electricity and cleaning, business licence and taxes imposed by the district. [34] The Counsel for AQUILLA states that it should be paid 26,058,200 Rwf by ENGEN RWANDA Ltd which it was paid in excess for fuel, and that excessive amount was demonstrated by auditors, in addition to the bank interest of 18% per month for 18 months equivalent to 115,177,244 Rwf, and be reimbursed the money for water, electricity

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90 RWANDA LAW REPORTS and for cleaning and 233,333 Rwf equivalent to the business license and the taxes imposed by the District it paid. [35] The Counsel for ENGEN RWANDA Ltd states that the statements made by AQUILLA are without merit, because it produces no evidence. [36] The court finds that the money paid in excess 26,058,200Rwf requested by AQUILLA arguing that it was demonstrated by the auditors, it does not demonstrate the link between that excessive money and the unlawful expulsion. Therefore it has no basis for awarding it. [37] The court finds that the other money requested by AQUILLA for water, electricity and cleaning, business licence and tax imposed by the District its evident that they are operating expenses especially those concerning electricity, water and gas on the building it works from, and according to article 11.28

of the contract which AQUILLA relies on in this case demonstrates that it is the one which is supposed to pay those bills, further more as it has been stated above it does not establish the link between that money and its unlawful expulsion from the petrol station, hence the court cannot award them to it. Regarding the procedural and counsel fees requested in this case. [38] In its appeal, AQUILLA requested to be awarded 5,000,000 Rwf for procedural and counsel fees which should be jointly paid by Kanyana and ENGEN, as requested at the first instance level, but the court was silent on it, therefore, it prays to be awarded them as it had requested before. However, the counsel for ENGEN RWANDA Ltd and assisting Kanyana state that the 500,000Rwf in damages they were ordered to pay by the Commercial High Court has no merit, because the court bailiff did not commit any fault, He requests the court should be set aside, and order AQUILLA to pay 5,000,000 Rwf to ENGEN

8 Article 11.2 states that: “Le concessionnaire doit....payer sans délai.....toutes les factures de consommation d’électricité, eau et gaz dans ou sur les Locaux” 1 1

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91 AQUILLA & PRISCILLA v. ENGEN ET AL RWANDA Ltd and Kanyana each because of dragging them in lawsuits. [39] The court finds that as explained above, AQUILLA was unlawfully expelled from the petrol station of ENGEN because of unlawful acts committed against it; it lead it to engage a counsel to follow up on its case up to this court. Therefore there is no reason why ENGEN and Kanyana Bibiane who committed those unlawful acts against it, should not pay the counsel and procedural fees. However, it should determined in the discretion of the court, since 5,000,000 Rwf it requests is excessive therefore it should be awarded 800,000 Rwf for the procedural and counsel fees on both levels, which should be paid by ENGEN RWANDA Ltd together with Kanyana Bibiane. III. THE DECISION OF THE COURT [40] Decides that the appeal of AQUILLA AND PRISCILLA has merit in part; [41] Decides that there was no contract concluded between AQUILLA-PRISCILLA and ENGEN RWANDA Ltd valid from 18/02/2011 up to 18/02/2012, for there is no evidences produced by AQUILLA; [42] Orders Kanyana and ENGEN RWANDA Ltd to pay to AQUILLA AND PRISCILLA 2,000,000 Rwf in civil damages for unlawful acts by expelling it from the petrol station without court order [43] Orders ENGEN RWANDA Ltd to pay AQUILLA AND PRISCILLA 32,870,517 Rwf equivalent to the value of the assets and the equipments ENGEN RWANDA Ltd did not restitute to AQUILLA AND PRISCILLA. [44] Orders ENGEN and Kanyana to pay to AQUILLA AND PRISCILLA 800,000 Rwf for court fees and Advocate fees;

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92 RWANDA LAW REPORTS [45] Orders ENGEN and Kanyana to jointly pay ½ of court fees in this case (31,450), which is equal to 15,725, and AQUILLA to pay ½ another 15,725 Rwf.

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93 ECOBANK v. KAJANGWE [Rwanda SUPREME COURT – RCOMA 0152/11/CS (Kayitesi, P.J., Mukandamage and Kanyange, J.) January 10, 2014] Commercial Law – Payment of loans given by bank – Computation of principal loan and interests for loans given in different period and consolidated afterward – Production of evidence in commercial cases – The burden to prove – Every plaintiff must prove a claim, failure of which the defendant wins the case – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 9. Commercial procedure – Counterclaim – The claim which was not admissible in first instance cannot be considered as filed for the first time at appeal level – A counterclaim cannot be admissible if it is filed after preliminary hearing – Law n° 45/2007 of 11/09/2007 modifying and completing the Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, article 351. nonies. Facts: Ecobank filed a case against Kajangwe before the Commercial High Court requesting him to pay the loan of 78,500,000 Rwf which amounted to the loan of 136,898,167 Rwf as a result of loan consolidation as alleged by ECOBANK, principal loan and interests all inclusive . Thereafter, ECOBANK notified him that he owes it the debt of 234,442,167 Rwf. Kajangwe explained that he had already paid the debt of 150,000,000 Rwf which was acquired from the selling of the Hotel Burundi Palace and requested to be exonerated of 88,000,000 Rwf; thus it remains to pay the interests and he does not understand how ECOBANK can sue him again for payment of the principal debt and its interests. ECOBANK, as a professional, did not manage to demonstrate how it it computed and merged the loans Kajangwe so as to establish their source, quantum and how merged loans should be paid.

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94 RWANDA LAW REPORTS During the hearing, Kajangwe filed a counterclaim requesting the damages related to the loss incurred resulting from the payment of unnecessary debt, moral damages, compensation and those related the denial of the credit which all amount to 2,000,000,000 Rwf. The Commercial High Court ruled that there was the contract of consolidation of loans between ECOBANK and Kajangwe and there were some letters that the bank wrote to Kajangwe that he had already paid the principle debt but remaining with the interests. It concluded that ECOBANK did not manage to produce evidence for the debt it alleges. Concerning the counterclaim filed by Kajangwe, the Court ruled that it cannot be admissible stating that it was filed too late after the preliminary hearing. ECOBANK appealed to the Supreme Court stating that the Commercial High Court ruled that its loss of the case was caused by lack of evidence of the real debt despite the production of instrumentum (contract) signed by both parties. Kajangwe insists again that ECOBANK does not know the exact debt as it was demonstrated by the contradiction in computation of the money he owes it. Kajangwe in return filed a cross appeal stating that the Commercial High Court rejected his counterclaim for damages upon unsubstantiated reasons. He requested the Supreme Court to hear the case. On this issue, ECOBANK states that it is a new claim filed at appeal level and therefore cannot be admissible because damages he requests were not discussed in first instance. Held: 1. Every plaintiff must prove a claim, failure of which the defendant wins the case. Although ECOBANK relies on the

contract dated 5th July, 2005 related to the consolidation of the debts, it does not show exactly the consolidated debts and the quantum of each one so as to get the principal debt the appellant alleges and its way of repayment. Rather, the stipulations of the contract implies that it construed for a new loan that the defendant would receive after delivering the required feasibility study and the required securities; therefore the instrumentum (contract) cannot be considered as evidence of the debt arising from the

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95 ECOBANK v. KAJANGWE consolidation of the two debts the appellant states that they were consolidated.

2. The counterclaim which was not admissible in first instance cannot be considered as filed for the first time at appeal level. It must be admissible and examined. The counterclaim filed after the preliminary hearing cannot be admissible, therefore, the cross appeal filed by Kajangwe has no merit since the Commercial High Court committed no mistake in deciding that inadmissible. Appeal without merit. Cross appeal without 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 9. Law n° 45/2007 of 11/09/2007 modifying and completing the Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, article 351 nonies. No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] ECOBANK filed a case against Kajangwe Callixte in the Commercial High Court requesting him to pay 136,898,167 Rwf of the principal loan and its interests in accordance with their debt consolidation contract they concluded on 5th July, 2005 in which both parties agreed the debt would be paid in 96 months on interest rate of 15%. But Kajangwe himself stated that it was not a contract for debt consolidation but rather a project of the contract to buy an international

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96 RWANDA LAW REPORTS transporation motor vehicle and that the credit was never granted because there was a lack of securities [2] The Court held that there was a contract between ECOBANK and Kajangwe but it did not relate to the the new loan; rather the debt therein amounting to 136,698,167 Rwf pertained to the totality of different debts that Kajangwe owed the bank so as to get a reimbursement schedule and pay the loan on a unique account as he had requested it. [3] On the issue of whether Kajangwe paid that loan, the Court found that there were letters written to him by the bank which show that he paid the principal loan remaining to pay the interest. Thus, it is not understandable how ECOBANK sued for the principal loan and its interest. The Court held that Ecobank did not produce evidence of the debts it alleges. The Court did not also admit the counterclaim filed by Kajangwe for damages because of its delay in its

filing after the preliminary hearing. [4] ECOBANK appealed to the Supreme Court, stating that the Court held that it has lost the case due to lack of evidence ,justifying the debt, while it produced the instrumentum (contract) signed by both parties and which is bidding between the contracting parties. It requests that Kajangwe pay 136.898.167 Rwf that he accepted he was indebted to the bank ,since the bank exonerated the interests for as he was ranked to the 5th level by The National Bank of Rwanda for failure to pay. [5] In cross appeal, Kajangwe stated that the Commercial High Court rejected his counterclaim for damages on groundless motives. He requests the Court to admit and examine his counterclaim for ECOBANK to pay him damages equal to 2,000,000,000 Rwf to compensate him for the loss incurred as a result of selling his hotel “Burundi Palace”, the loss resulting from not being granted a loan to buy 2 buses as it was provided in the project, the loss incurred because

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97 ECOBANK v. KAJANGWE of paying undue debt since his debt was merged with that of company CBS, moral damages, procedural and advocates fees. [6] The hearing was held in public on 23th July, 2013 and 17th December, 2013 ECOBANK was represented by Kayitare Serge, the Counsel while Kajangwe Callixte was assisted by Shumbusho Philbert, Niyondora Nsengiyumva and Musore Gakunzi Valery, the Counsel II. ANALYSIS OF LEGAL ISSUES A. Whether or not the Court disregarded evidence that Kajangwe owed a debt to ECOBANK. [7] Kayitare, the Counsel for ECOBANK, states that the Court ruled that it lost the case because it did not produce the concrete evidence of the debt that Kajangwe owed it while in filing the claim, ECOBANK requested to be paid 136.898.167 Rwfs including the interests. This money is evidenced by the loan contract signed by both parties on 5th July 2005 as it was submitted to the Court. Therefore, since the contract was made in accordance with the law, it should be considered. [8] Kayitare, the Counsel, explained that Kajangwe requested for a loan amounting to 78,500,000 Rwf on 24th January 1997 to enable him to pay the loan he owed to Banque Commerciale du Burundi and “Société Burundaise de Financement. The loan was granted and on 9th October, 1997, Kajangwe made an agreement with BCDI to merge the debts that his company, CBS (Compagnie de Bon Service), owed BCDI, and he was the one to pay it himself through his initial account in that bank, which was granted as proven in the notice of transfer of commitment CBS “notification de reprise des engagements CBS” dated 10th October, 1997 where he read and approved (lu et approuvé) that the merged debts were equivalent to 94,672,680 Rwf. [9] Kayitare states again that in a note dated 6th July, 2001 addressed to the Managing Director of BCDI, the bank records revealed

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98 RWANDA LAW REPORTS that Kajangwe had a principal debt for the bank equivalent to 234,442,167 Rwf and interests equivalent to 88,638,580 Rwf calculated from 17th June, 1999 to that day. [10] Kayitare, the counsel continues explaining that on 6th August, 2001 Kajangwe wrote to BCDI consenting to sell the Hôtel Burundi Palace which he owned in Burundi in order to reduce that credit. He further states that Kajangwe did not deny its quantum in that letter (the debt) while he had been notified as he acknowledged that in its first paragraph; he rather thanked the

bank for having accepted to exonerate him of the interests amounting to 88,000,000 Rwf. [11] After selling the Hôtel on 30th July 2003 Kajangwe made another transaction with BCDI (acte transactionnel). Both parties agreed that Kajangwe remained with the debt equal to 91,318,226 Rwf to be paid in 10 years on an interest rate of 15%, he would pay 1,473,281 Rwf per month, and that the contract replaced various other notifications and other transactions previously made. [12] Kayitare, the Counsel states that Kajangwe again requested for the temporary overdraft “découvert” equal to 20,000,000 Rwf on 21st July, 2003 and received it on 14th August, 2003 as demonstrated by the temporary overdraft contract equal to 20,000,000 Rwf “contrat d’octroi du découvert temporaire de 20,000,000 Rwf” which he received and approved. [13] On 24th June 2005, Kajangwe wrote again to BCDI submitting the payment plan of the loan and requesting to consolidate the above mentioned debt so that he could pay the debt in 8 years. Among the securities provided by Kajangwe, there is included about 3,655 shares he owned in BCDI. BCDI accepted his request in the letter it wrote to him dated on 29th June, 2005 notifying him that after consolidating the debts, the principal debt was up to 136,898,167 Rwf. Kajangwe did not deny the debt but rather approved the contract and the included reimbursement plan on 5th July 2005. Additionally, on that date,

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99 ECOBANK v. KAJANGWE Kajangwe gave the attorney of BCDI, the power to sell his shares so that his debt equal to 136,898,167 Rwf could be paid. [14] Kayitare, the Counsel, states that it is not understandable how Kajangwe can deny those consolidated loans upon his request and he is unable to provide a reason which led him to sign the contract without indicating to the bank that the debt was not real. [15] He contends that ECOBANK once mistakenly notified him that he owes a debt equal to 594,317,302 Rwf, it noted that it had committed an error and it rectified it, and apologized, telling him that it was an error and that the real debt was 153,483,397 Rwf. However, ECOBANK found that Kajangwe was in class five and thus it cannot continue computing interests for him pursuant to the judgment of the Commercial High Court which ruled that if a person is in such a class and that the aggrieved party delayed to file a claim against him, he cannot be requested to pay interests. [16] In his defense, Kajangwe states that he started cooperating with BCDI on 22nd January, 1997, it granted him a loan equal to 78,500,000 Rwf and he provided guarantees which were already in the possession of Banque Commerciale du Burundi, because BCDI had already paid his debt he owed to that bank. Astonishingly, BCDI erroneously registered the securities to secure the loan equal to 185,000,000 Rwf. [17] Concerning the fact that he agreed to pay the debts he had for CBS company, Kajangwe states that it was not true because it would only be possible if all parties agreed on that; that’s to say the transferee bank, CBS that got the loan and Kajangwe who agreed to pay. He finds that allegations of the representative of the bank are of no value as far as the law is concerned. He also denies the negotiations alleged that he held with the bank before signing the document consenting to pay for CBS those debts equal to 94,672,680 Rwf. In addition, ECOBANK did not demonstrate that CBS defaulted in payment that it bases on that to request Kajangwe to pay on its behalf.

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100 RWANDA LAW REPORTS [18] Kajangwe states that it is not comprehensible how he would accept to pay the debts of CBS on 10th October, 1997 while he had also failed to pay the debt that ECOBANK noticed him about, because on 30th July, 1997 it informed him that he owed it 8,599,805 Rwf, on 23rd September 1997 it informed him that he owed it 185,249,177 Rwf and the arrears of 11,052,101 Rwf of which he does not know their origin. [19] He finds ECOBANK, acted fraudulently by adding 94,672,680 Rwf + 78,500,000 Rwf + 11,052,101 Rwf = 184,224,781 “rounded to 185,000,000 Rwf”. He thinks ECOBANK did so in order to retain his guarantees for more than 78,500,000 Rwf of loan he was granted. [20] Kajangwe further states that ECOBANK seriously contradicted itself because at various intervals it notified him of the debt, the principal debt or interests or both at once as follows.

- 5th July 2005 ECOBANK claimed that it sued for 136,898,167 Rwf
- On 18th January 2007 ECOBANK declared the debt of 594,317,302 Rwf, principal debt and interests inclusive
- On 26th January 2007, in its apology, ECOBANK stated the debt was 153,483,397 Rwf for interests only. But on the annex of the letter, it is indicated that the debt of CBS was 165,000,000 Rwf, which does not concern Kajangwe, but consolidated with his debt of 78,500,000 Rwf, all together amounting to 243,500,000 Rwf which Kajangwe had already paid with the interests of 45.9 million. From this perspective, what is not indicated on his account n° 01093-01-92, is how he was given the loan of 243,500,000 Rwf considered to have been paid and the source of 153,483,397 Rwf, the balance that the bank is claiming from him.
- On 27th April, 2014 ECOBANK stated that he owes it 192, 017,960 Rwf composed of the debt and their interests.

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- On 15th September, 2010, ECOBANK stated that the debt was 425,923,843 Rwf including the principal debt and interests for which it did not provide a source. [21] Regarding the letter written to the Managing Director of BCDI, on 7th June, 2001 upon which ECOBANK bases its payment request for 234,44,2,167 Rwf and interests of 88,683,580 Rwf calculated from 17th June, 1999 to 6th July, 2001, Kajangwe contends that he does not recognize it because it was internal correspondence of the bank. Rather, he claims that he was verbally notified that the total debt as from 31st December, 2001 was 233,379,354 Rwf according to his account historical statement even though the latter does not meet the reality. This debt notification motivated him to sell Hôtel Burundi Palace. [22] Concerning the notification of the 234,442,167 Rwf as debt which Kajangwe did not disapprove, the latter states that ECOBANK does not want to reveal the truth to the Court because it was the bank which manifested a worry of his payment by giving him a deadline of 30 to finish the payment. The notification

informed Kajangwe that ECOBANK had got a buyer named BARCO TRADING SA for Hotel Burundi Palace at 150,000,000 Rwf. In replying to the letter written by Ecobank, Kajangwe states that he accepted to sell the Hotel Burundi Palace at that price even if its valuation was 299,361,000 Rwf so that he could be exempted from 88,000,000 Rwf but it was not done. He finds that ECOBANK could claim nothing from him since 30th April, 2012 but instead, it should pay him 4,620,646 Rwf. [23] Concerning the contract dated 5th May, 2005, ECOBANK states that it is evidence was disregarded by the Commercial High Court. Kajangwe states that it does not concern the consolidated debts but rather the contract concerned the project of loan to buy two buses for transporting passengers on the Kigali-Kampala international road. He requested the loan amounting to 143,000,000 Rwf which is in financial feasibility study “étude de faisabilité financière” as given to ECOBANK to be paid within 8 years with a 15% interest rate per year. He says that the bank demanded him to pay his contribution while he

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102 RWANDA LAW REPORTS had no money so he requested the bank to pay the whole totality. The bank made a contract with Kajangwe to sell his 4,000 shares in the bank amounting to 150,000,000 Rwf. ECOBANK retained 80,000,000 Rwf of his shares and gave him 70,000,000 Rwf in return to allow him to get insurance and pay taxes for the buses so the project could be implemented. [24] He stated again that ECOBANK did not execute the contract because he failed to get a buyer for 4,000 shares; instead it only bought 1,334 shares for 53,360,000 Rwf and ECOBANK consented to grant Kajangwe 50,000,000 Rwf as an overdraft “crédit de caisse”, and leave him the responsibility for the rest. At the end, he states that ECOBANK made him write a letter on 24th June, 2005 ordering what he must give to it as security, and so must accept an overdraft which is considered the secure loan he had before in order to prevent the National Bank of Rwanda from discovering and punishing ECOBANK because it granted another loan while he was ranked in class 5 because of default of payment. [25] Kajangwe states again that ECOBANK replied to his request on 29th June, 2005 with the specificity that it had finished computing the loans which came to the amount of 136,898,167 Rwf even though it does not explain the loans or how they were computed. Another reliable evidence of a new loan is that the bank's letter states that the loan contract becomes effective after the payment of arrears of months 3, 4, 5 and 6/2005 worth 5,893,124 Rwf before execution of the transaction. Therefore, it indicates that it was not merging the former loans Kajangwe does not understand the reason why ECOBANK began with the arrears of March when beginning the project of the Buses and he does not understand why they gave him a grace period of 2 months, if there were consolidation of the former loans. [26] He added that another proof that the contract was a new loan that intended to facilitate Kajangwe implement his project to buy two buses for the transportation of passengers, which should have been one of the mortgages, is indicated by the following:

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- ECOBANK cannot prove the consolidated loan worth 136,898,167 Rwf or that the contract does not provide it.
- The contract itself is a loan contract whose execution will start on 30th July, 2005. The second article of the contract provides that the interest shall be calculated one month after the money will have been deposited on Kajangwe's bank account.
- Article 4 of the contract provides that the bank must record in its books the date on which the money have been deposited (décaissement ou déblocage de fonds). Article 8 provides that in case the loan is granted, Kajangwe will pledge collateral stated in that article. [27] Therefore, Kajangwe finds that ECOBANK cannot compel him to pay the loan that it did not grant because it terminated the contract on 16th December, 2005 and the loan became 153,483,397 Rwf which makes him to wonder the reason why it is not the subject of the litigation against him, but rather 136,898,167 Rwf. THE VIEW OF THE COURT [28] Article 9 of the Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure provides that every plaintiff must prove a claim failure of which the defendant wins the case. [29] The analysis of the contract dated on 5th July, 2005 entered into between ECOBANK and Kajangwe demonstrates that it was a debt equivalent to 136,868,167 Rwf granted as secure loan to be paid in 96 months with interests' rate of 15% effective from 30th July, 2005 (articles 1 and 2). In the contract, it is stated that its purpose is the consolidation of debts that the interests shall be calculated from the day the amount is released, Kajangwe would get the payment schedule, which is also a part of the contract as well (article 3), that the collateral includes, the pledge of the bus, power of attorney sale of the buses and the power of attorney of the sale of remaining shares after the sale of

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104 RWANDA LAW REPORTS 1334 shares. The documents Kajangwe must submit to the bank include the feasibility study of the buses exploitation project. "étude de faisabilité du projet d'exploitation des bus". [30] The Court finds that even if the purpose of this contract was consolidation of debts, it does not clearly indicate the amount of the consolidated debts that Kajangwe has and their quantum in order to obtain the principal debt totaling 136,868,167 Rwf or its mode of its payment while accepted that he had the debt totaling 91,318,226 Rwf which was under payment, ECOBANK does not even show the payment schedule it drafted for him as cited in the contract. Additionally, there is no evidence proving that ECOBANK delivered the provisions of the repayment plan to Kajangwe. [31] Rather, the Court finds that the provisions of the contract imply a new loan that would have been granted to Kajangwe for the the project of purchase of 2 buses after the delivery of the feasibility study and collateral security required including those 2 buses. Thus, the contract should not be considered as an evidence of the debts originating from the consolidation of the two loans ECOBANK alleges to have been consolidated. [32] Regarding

the statements made by ECOBANK that it is Kajangwe who requested the consolidation of his debts, which was done, notified to him and accepted it, but which he denies now, the Court finds that ECOBANK, as a professional, should have provided the court, as it requested but in vain, with the information on how it computed the consolidated debts of Kajangwe before the conclusion of the contract in order to figure out the source and the quantum of the consolidated debts and how it would be repaid. [33] In addition, it is clear that after the signing of that contract, ECOBANK kept on notifying Kajangwe of the debt in various ways until 1st January, 2007 when it wrote to him the letter RMU/GUD/002/01-07 notifying him that after computing and verifying his debt, it amounted to 153,483,397 Rwf as it is annexed to the letter.

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105 ECOBANK v. KAJANGWE The letter apologized that some errors occurred in the prior computations and notified him that he had to clear his debt not later than 30th January, 2007. [34] After the consideration of the annex to the letter, the bank confirmed that Kajangwe already paid 243,500,000 Rwf of the principal debt and their interests amounting to 45,900,000 Rwf with the balance of 153,483,397 Rwf composed of 100% and interests. Furthermore, on 27th April, 2007, he was informed that the debt was 192,017,960 Rwf and on 15th September, 2010 he was requested to pay 425,923,843 Rwf. It is not clear how the case was filed against him for the principal debt of 136,868,167 Rwf while the bank itself agreed that the rest he was required to pay was only the interest. [35] The Court finds, as decided by the Commercial High Court, that ECOBANK does not produce evidence for its claim of the consolidated debts. Thus, appeal of Kajangwe has no merit. B. Whether counterclaim filed by Kajangwe in Commercial High Court had to be admissible and whether cross appeal he filed [in this Court] can be admitted. [36] Kayitare, the Counsel for ECOBANK, states that Kajangwe's cross appeal should not be admitted or examined because it is a new claim filed on appellate level. Since his request for damages was not debated in the first instance, it has no link with the case filed by ECOBANK requesting payment of the debt originating from the contract dated July 5, 2005. Further the cross appeal has nothing to do with the fact that, prior to the conclusion of the first contract; Kajangwe had requested the loan which was not granted. Furthermore, it was submitted contrary to articles 167 and 168 of the Law relating to the civil, commercial, labour and administrative procedure. He finds that if Kajangwe intends to be awarded damages, he should file a separate claim.

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106 RWANDA LAW REPORTS [37] Kajangwe and his Counsels state that his counterclaim before the Commercial High Court was rejected upon unsubstantiated reasons and therefore is not a new claim. [38] Regarding the link between this claim and the claim filed by ECOBANK against Kajangwe, they state that its purpose is to prove that the debt he is sued for, of which they claim that it remained after the sale of his Hotel was fraud against Kajangwe since he was compelled to pay a debt exceeding the one he was given. Kajangwe's counsel requests damages worth 2,000,000,000 Rwf including Compensatory and procedural costs as well as advocate fees as follows:

- Compensation amounting to 949,922,632 Rwfs for losses resulting from the sale of Hôtel Burundi Palace;
- Damages of 508,278,816 Rwf for losses resulting from ECOBANK's refusal to grant the loan for the project of purchase of 2 buses as provided in the submitted project including 143,464,457 Rwf for the loan he would have been granted.
- 88,136,699 Rwf of the deposit paid plus interests of 15%;
- 157,319,287 Rwf for the losses resulting from undue payment of the debt amounting to 91,318,226Rwf.
- Moral damages for his family amounting to 420,000,000 Rwf because ECOBANK put him in quarantine as someone who cannot work with all banks in Rwanda (class 5) from 1998 which paralyzed all their activities (him and his family), and it ridiculized him before the President of Republic and his fellow investors that he had the debt for it [bank] totaling 594,317,302 Rwf which causes him humiliation and discredit.
- 20,000,000 Rwf for advocate fees. THE VIEW OF THE COURT [39] In regards to whether Kajangwe's counterclaim is newly filed for the first time before the appellate level, the Court finds it

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107 ECOBANK v. KAJANGWE unsubstantiated because the previous Court examined it and found it inadmissible because it was filed too late. Therefore, the cross appeal he filed must be admitted and examined. [40] Concerning the filing of the counterclaim, article 351 nonies paragraph 1 of the Law n° 45/2007 of 11/09/2007 modifying and complementing Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, provides that a counterclaim and claim proceedings against a guarantor shall be instituted in writing before the conclusion of the preliminary hearing. [41] In consideration of whether the previous Court should have admitted the counterclaim filed by Kajangwe, the documents in case file show the preliminary hearing before the Commercial High Court started on 14th April, 2010, the parties were present, but no submissions were made by Kajangwe, the respondent. The hearing was postponed on 23rd June, 2010. Muhozi Paulin, Kajangwe's Counsel, requested the date of the hearing and would have handed over the submissions in response to ECOBANK's ones. The preliminary hearing was closed and it was decided that the case will be heard on 9th January, 2010. [42] It is clear that from the submissions received in the course of the hearing conducted on 9th September, 2011, that is when the counterclaim filed by Kajangwe was noticed for the first time. Thus, its dismissal has merit since it was filed contrary to article stated above. [43] Basing on the previous explanations, the Court finds that, apart from the motivation ground of motivation which differ from those of the appealed case there is no change on the verdict delivered by the Commerical High Court. III. THE DECISION OF THE COURT [44] Decides that the appeal filed by ECOBANK is without merit. [45] Decides to admit the cross appeal of Kajangwe.

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108 RWANDA LAW REPORTS [46] Decides that the cross appeal is without merit. [47] Orders ECOBANK to pay 40.800 Rwf for Court fees in 8 days. In case of default, that amount will be drawn from its properties by the government coercion

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109 FINA BANK v. MUTEMBO [Rwanda SUPREME COURT – RCOMA 0147/11/CS (Kayitesi, P.J., Mukandamage and Rugabirwa, J.) January 24, 2014] Property law – The transfer of immovable property – Damages resulting from delay in delivering the title deed of a sold house. – The fact of not delivering the land title after the purchase constitutes itself the ground for damages against someone who caused its delay even though he/she might have given the property to the purchaser – Law of 30/07/1888 relating to contracts or obligations, article 258. Contracts or obligations law – Interests resulting from not fully enjoying the purchased thing – The house purchaser against whom the land title issuance was denied cannot be granted interests computed basing on the value of the house under the pretext that the land title was not issued while he/she was in its possession. Facts: On 27th September 2007, FINA BANK sold to Mutembo, at a public auction, a house located on plot no 91, Musanze District in the Northern Province. In delivering him the documents of the house, Mutembo was given the land title of the house which is in the plot no

25. Mutembo knew that he was given the document of the house he has not purchased in public auction when he was requesting the transfer for the new land title to be registered in his name. Mutembo notified FINA BANK which accepted the fault and assured him that it would be corrected for the land title to be registered under his name. However, the correction delayed. After warning FINA BANK in writing, Mutembo filed a case before the Commercial High Court requesting damages for the delay in receiving the house's land title while FINA BANK states that it played no role in long time elapsed without delivering the land title of the purchased house to Mutembo. The Commercial High Court decided that his claim had merit because FINA BANK was responsible for the

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110 RWANDA LAW REPORTS defendant's delay to receive the land title of the purchased house, and ordered it to pay damages. FINA BANK appealed to the Supreme Court stating that the Commercial High Court ordered it to pay damages disregarding the explanations it provided proving that it played no role in delaying the delivery of the land title of the purchased house to Mutembo while Mutembo states that the appeal of FINA BANK has no merit because the it delayed him getting the land title while it was aware that it gave him wrong one. In that judgment, Mutembo requested interests arising from the fact that he did not exploit the house he purchased; while FINA BANK states that it cannot pay them because the claim of interest was not submitted to the Court registrar and that he was immediately given the house. He added that his request constitutes an unjust enrichment. Held: 1. The fact for the defendant to spend almost five

years without having the land title of the purchased house, is an infringement of his right to full enjoyment on it like mortgaging or selling, etc... Therefore he must be awarded damages amounting to 5,000,000 Rwf because the appellant delayed to give him the land title thereby it deprived him from its full enjoyment.

2. The house purchaser to whom the land title was not delivered cannot be awarded interests computed basing on the value of the house pretending that it was not issued while he/she was in possession of the house. Appeal lacks merit. Cross appeal without merit. Court fees to the appellant. Statutes and statutory instruments referred to: Law of 30/07/1888 relating to contracts or obligations, article 258.

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111 FINA BANK v. MUTEMBO No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] On 27th September, 2006 Mutembo Senyana Kavos purchased a house at a public auction, located in plot no 91, Musanze District in the Northern Province from FINA BANK. The house belonged to Zigiranyirazo Protais who had a loan of FINA BANK. While delivering the documents of the house to him, FINA BANK gave him the land title of the house in plot no 25 [which also belongs to Zigiranyirazo Protais] instead of giving him the one of the purchased house in plot no 91. It was known when Mutembo requested the transfer to obtain the new land title registered under his name. He was informed that the house documents were held by BRD as a mortgage given by Zigiranyirazo Protais to guarantee the loan taken by SOBOLIRWA. Mutembo notified FINA BANK which accepted the fault and assured him that it would be corrected so that the land be registered under his name. However, it delayed. [2] After warning FINA BANK in writing, Mutembo Senyana Kavos filed a case before the Commercial High Court requesting the previously mentioned in the subject matter of the claim. FINA BANK stated there is no reason to be sued because it did not play any role in the delay to hand the documents of the purchased house to Mutembo. The Court decided that his claim has merit in part and ordered FINA BANK to pay him 5,000,000 Rwf of damages because it was responsible for delaying him to get the land title of the house he bought. Additionally the Court awarded him damages equal to 1,000,000 Rwf for procedural and advocate fees, amounting to 6,000,000 Rwf and ordered him to pay 9,700 Rwf of the Court fees. [3] FINA BANK appealed to the Supreme Court stating that the Commercial High Court erred in finding him at fault of handing to

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112 RWANDA LAW REPORTS Mutembo Senyana Kavos the land title which is not of the house in plot n° 91 he purchased, located at Musanze⁹, the basis for the delayed transfer of the property and ordering it to pay 6,000,000 Rwf in damages disregarding its submissions showing that the bank was not responsible for the delay of the delivery of Mutembo purchased land title. The case was screened and the appointed judge for this purpose decided that the appeal was admitted. The

hearing was held on 24th December, 2013, FINA BANK represented by Counsel Rusanganwa Jean Bosco and Mutembo represented by Toy Nzamwita, the Counsel II. ANALYSIS OF LEGAL ISSUES

1. Whether or not FINA BANK played a role in delaying the delivery of the land title of the house purchased at a public auction by MUTEMBO Senyana Kavos. [4] Counsel for FINA BANK states that the first instance Court disregarded the provided arguments proving that FINA BANK was not at fault, neglected or breached the contract for MUTEMBO not to get the land title of the house he purchased on plot n° 91. He explains that FINA BANK accepts to have delivered a title deed which was not of the house he purchased and that the house was given by Zigiranyirazo to secure the loan taken by SOBOLIRWA. However, all these were discovered by Mutembo Senyana Kavos the land title of the house which he did not buy and that the house was given as gurrantee in BRD by Zigiranyirazo, while he was guarantor of debt of SOBOLIRWA, but FINA BANK discovered all these after the public auction when Mutembo revealed to it that it made mistake in delivering the land title of another house which is on plot n° 25, requesting the correct title for his house on plot n° 91. The counsel for FINA BANK argues that no fault should be imputed to it.

9 The land title of the house which locates at Musanze, Northern Province on plot n° 25. 1 1

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113 FINA BANK v. MUTEMBO [5] He stated rather that the fault committed was due to Mutembo Senyana Kavos's attitude who kept silent after the material transfer of the property. He added that he waited for three years after the transaction before claiming his documents in 2010, and had he addressed the issue just after the public auction in 2006, it could have been summarily resolved with little inconvenience to either party. However, once FINA BANK was informed of the mistake, it made every effort to correct it in order to complete the transfer. [6] He continued stating that the mistake was caused by the attitude of other institutions that played a role in the transaction, that the registrar of the land titles stated that the mistake occurred when he was first given the land documents which were listed under the following different numbers: 25, 92, and 91. Therefore, FINA BANK did not play any role and cannot be held liable for the mistakes committed because the house that was sold, was given to it as a security, and at that time the notary established the auction deed on 27th September, 2006 which contained errors, the house on plot n° 91 was mistakenly sold instead of the house on plot n° 25. [7] The Counsel for Mutembo argues that FINA BANK's appeal has no merit because even in first instance Court, it accepted the fault of delivering the land title which does not match with the house it sold. He added that FINA BANK used to apologize in writting, which implies it recognized its own faults but the procedure to correct them become complicated. The fact for FINA BANK to disclaim its responsibility and imputes it onto other parties in charge of delivering land titles is wrong, since what happened is carelessness. In matching the houses with their land titles and FINA BANK should implement better practices of controlling the houses and corresponding land titles it plans to sell at a public auction. [8] He refutes the argument that Mutembo is at fault because he delayed to apply for the land title of his house until three years after the transaction in 2010. He argues Mutembo applied

for the land title right after the public auction on 27th September, 2006 when he was given

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114 RWANDA LAW REPORTS wrong title. Then Mutembo's wife wrote to FINA BANK in 2008 applying for the real title of the house they bought. However due to FINA BANK's bad service, it delayed six years by daily promising him it would resolve the problem. Mutembo Senyana Kavos finally received the land title in 2012 when the judgment had commenced. The aforementioned events are proven by writings and short messages (E- mails) he submitted to the Court. Counsel for Mutembo Senyana Kavos concluded by stating that FINA BANK's appeal has no merit because it is a well-recognized expectation that houses sold at public auction will be accompanied by the correct documentation and therefore it is at fault for giving the wrong title for the house. THE VIEW OF THE COURT [9] Article 258 of Civil Code Book III provides that any act of man that causes damage to another obliges the one by whose fault it happened to repair. [10] The documents in the case file prove that the house FINA BANK had as security was on plot n° 91 under the name Zigiranyirazo Protais and that was given to BRD as mortgage, that possessed its title when it was being auctioned on 27th September, 2006 and bought by Mutembo Senyana Kavos. Unfortunately, Mutembo was given the wrong land title –he received the title to plot n° 25 at Musanze which also belongs to Zigiranyirazo Protais–, In addition, it is clear that on page 13, the house¹⁰ was auctioned and bought by the named Mbanda Laurent and his wife Chantal Mbanda on 4th August, 2009 in the execution of judgment n° 81 rendered by Rukiri Gacaca Court on 14th February, 2008. It is also clear from the case file that the registrar of land titles was aware of the problem when Mutembo Senyana Kavos requested the transfer in order to get the new title deed.

10 Letter no 1882 16.03/NLC/0214 that the deputy curator of land titles wrote to the Managing Director of FINA BANK requesting the auction deed of plot n° 25 bought by Mr Mbanda Laurent. 2

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115 FINA BANK v. MUTEMBO [11] The Court finds that FINA BANK committed negligence and mismanagement of the mortgaged house which caused the confusion over the titles by distributing wrong titles to their buyers basing on the content of the Deputy Registrar of Land Titles' letter to the Managing Director of FINA BANK S.A, he requesting a rectification of an auction deed of 27th May, 2009 completed by the Public Notary and stated that if rectified, he would give him the original copy of the land title number R.XII Folio 182, all registered under the name of Zigiranyirazo Protais and the clearance deed of RDB on those plots so as to honour the wish of everyone. [12] The Court finds also that the letters and short messages in file indicate that Mutembo Senyana Kavos did not delay requesting the land title because he started exchanging correspondence with FINA BANK in January 2008 while the public auction took place on 27th September, 2006 which means he began inquiring about the title two years later. The fact that FINA BANK argues that Mutembo should be liable for the fault of delaying to find the transfer is

wrong because, in reality, FINA BANK was at fault since it gave the wrong title deed due to its own failure to verify the location and corresponding title of the house sold at the public auction. [13] Apart from the document problem, the Court finds FINA BANK did not operate skilfully or with adequate diligence to rectify the errors so that the land title could be given to Mutembo. As it is shown by the correspondence in the case file, the dialogue between Mutembo Senyana Kavos and the Registrar of Land Titles started openly in January 2008 and from that time it took four years for Mutembo Senyana Kavos to receive the land title under his name even though the judgment started after putting FINA BANK on notice more than once. [14] Pursuant to the aforementioned statements, the Court finds that FINA BANK played a role in delaying Mutembo Senyana Kavos's receipt of his land title for the house he bought which prevented him from enjoying it without intrusion. Therefore FINA BANK must be

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116 RWANDA LAW REPORTS held liable as provided by article 258 Civil Code Book III mentioned above.

2. Concerning the requested damages [15] The Counsel for Mutembo Senyana Kavos argues that since he has been deprived of rights to his house to mortgage and benefit from the loan for more than five years, FINA BANK owes him the damages decided by the previous Court equalling 6,000,000 Rwfs. He states also that FINA BANK should be ordered to pay Mutembo Senyana Kavos advocate's fees equalling 10% of all money the bank must pay. [16] He states that his cross appeal for the 18% of interest of the house price equalling 31,410,000 Rwf to compensate him and his wife's loss for their investment which did not generate income for five years should be granted and the damages should be calculated from the price of the house starting from 13th November, 2006, the date FINA BANK confirmed receipt of the money up to the date of the pronounced judgment calculated as follows: $31,410,000 \text{ Rwf} \times 18\% \times 65 \text{ (Months): } 12 = 30,624,750 \text{ Rwf}$. [17] The Counsel for FINA BANK states that the cross-appeal of Mutembo Senyana Kavos requesting the interests for loss of income from his house was not transmitted to the Court Registry office. Additionally, Mutembo Senyana Kavos did not experience any loss because the house was transmitted to him and what he requests is unjust enrichment. He finds that FINA BANK owes no damages but rather is entitled to damages equalling 1,000,000 Rwf for procedural and advocate fees. [18] Concerning the damages of 1,000,000 Rwf requested by FINA BANK for the procedural and advocate fees, the Counsel for Mutembo Senyana Kavos states they have no merit as it is clear that it is the one at fault.

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117 FINA BANK v. MUTEMBO 117 THE VIEW OF THE COURT [19] Concerning the requested damages, the Court finds that as it was explained above, the fact that Mutembo Senyana Kavos was deprived of his land title for a substantial length of time, the deprivation resulted from the fault of FINA BANK which, due to bad service, carelessly delivered the wrong land title, and even

after being aware of the mistake, had no will or courage to quickly rectify it so that Mutembo would be given the right land title. [20] The Court finds that Mutembo Senyana Kavos immediately received his house upon payment on 13th November, 2006. The fact that he waited close to five years without receiving his land title which prevented him from mortgaging or selling it, entitles him to damages ordered by the previous Court. [21] Concerning the quantum of damages to which Mutembo Senyana Kavos was entitled, the Court finds the 5,000,000 Rwf he received due to FINA BANK's delay in delivering the title deed of the house for full enjoyment is reasonable and must remain. [22] Concerning the interests of 30,624,750 Rwf Mutembo Senyana Kavos requested for loss of income from his house, the court finds he cannot be granted them because he was given the house he bought and therefore cannot calculate interests on the price he paid. [23] Concerning advocate's fees, the Court finds the amount requested by Mutembo Senyana Kavos cannot be based on the value of subject matter of claim because it is contrary to articles 11 62, and 63 of

11 Article 62: The Council of the Bar Association shall fix the scale of fees for Advocates according to the profession and with due diligence. An Advocate shall not fix fees on the basis of the decision of the court because the Advocate has to use all possible means but not to ensure result from the trial. An Advocate shall not make any exception to this principle unless he/she is authorized to do so by the President of the Bar Association. 3 3

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118 RWANDA LAW REPORTS the law n° 83/2013 of 11/09/2013 establishing the Bar Association in Rwanda and determining its organization and functioning. However, the damages of 1,000,000 Rwf for procedural and advocate's fees determined by the previous Court are reasonable in both instances. [24] Concerning the procedural and advocate's fees requested by FINA BANK, the Court finds they cannot be granted because it did not win this case. III. THE DECISION OF THE COURT [25] Decides that the appeal of FINA BANK has no merit; [26] Decides that the cross appeal of Mutembo Senyana Kavos against FINA BANK has no merit; [27] Decides that the judgement n° R.COM 0109/11/HCC rendered by the Commercial High Court on 2nd February, 2012 is sustained [28] Orders FINA BANK to pay 24.300 Rwf of the Court fees in eight days. In case of default of payment, the funds will be drawn from its properties by the government force.

The scale of fees for Advocates shall be published in the Official Gazette of the Republic of Rwanda by the President of the Bar Association. Article 63: The Advocate's fees shall be paid in accordance with the fees mutually agreed upon by the Advocate and his/her client taking into consideration the rate of fees for the Advocates. Disagreements concerning the payment of fees shall be referred to the President of the Bar Association for mediation.

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119 NDIGELA v. ATA [Rwanda SUPREME COURT – RCOMA 0054/10/CS (Mugenzi, P.J., Mukamulisa and Rugabirwa, J.) 18 March 2011] Civil procedure – Security deposits furnished by a foreigner – No East African Community company can be requested to pay security deposits furnished by

foreigners because it is considered on the same level as Rwandan companies by the law – Law n° 14/2010 of 07/05/2010 amending and completing Law n° 07/2009 of 27/04/2009 relating to companies, article 12 – Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure as amended to date, article 81. Transport law – Contracts – Difference between carriage contract and lease contract of the vehicle – It is considered as lease contract of vehicle when the owner is not the one who remains in control of the vehicle after lease – If the vehicle was leased with his driver and the latter continues to be under control of the owner of the car, it is considered as carriage contract. Contracts or obligations Law – Damages – Compensation request for the loss incurred – Applicant for damages may alternate to request the Court to hold civilly liable the employers for the damages resulting from their employees when they were executing the duties they assigned to them instead of requesting them basing on criminal liability – Law of 30/07/1888 relating to contracts or obligations, article 260. Facts: ATA entered into a carriage contract with NDIGELA & Co related to the transportation of goods from Isaka to Goma (RDC). ATA sued NDIGELA & Co before the Commercial High Court stating that it breached their carriage contract because when the vehicles arrived at Gisenyi, their drivers sold the maize they were transporting. The Commercial High Court decided that the claim of ATA has merit and ordered to NDIGELA & Co to pay the money equivalent to the stolen

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120 RWANDA LAW REPORTS maize along with the advance payment given to NDIGELA & Co and advocate fees. NDIGELA & Co appealed to the Supreme Court arguing that ATA's claim would have been inadmissible unless it paid security court fees furnished by foreigners who file a case in Court and states that it should not be liable for the fault committed by drivers who sold the goods they were transporting but rather they are the ones who must pay because they have been convicted and accepted to pay. On these points, ATA replies that the East African Community companies are considered as Rwandan companies. Thus, no security deposits furnished by foreigner should be paid. In addition, it states that NDIGELA & Co is the one that must pay damages because the drivers who stole the goods were its employees and that it had an obligation to deliver the goods to the convened destination. Held: 1. The fact that ATA is a company from a member state of the East African Community and that Rwandan laws consider it as the Rwandan company, it must not prior pay security deposits furnished by foreigner to file a claim in Court.

2. When the owner of the leased car is not in its control, it is the lease contract of a vehicle, while in case the businessman gives in rent his car and provides a driver who remains under his supervision; that is carriage contract. Therefore the contract between NDIGELA & CO and ATA is of carriage because it does not show where the contract provides that ATA will seek its own drivers and it does not show that the drivers who stole goods they were transporting were not its employees. For that reason, NDIGELA & CO is liable for the drivers' failure to deliver the carried goods because it was within its duty.

3. Employers are liable for damages caused by their servants in the function they have employed. Nothing can prevent ATA the alternative to request the Court to hold NDIGELA & CO civilly liable as employer of the drivers who caused him prejudice instead of basing on criminal liability.

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121 NDIGELA v. ATA Appeal lacks merit. Cross appeal has merit. NDIGELA&CO ordered to pay to ATA various damages. Court fees to the appellant. Statutes and statutory instruments referred to: Law n° 14/2010 of 07/05/2010 amending and completing Law n°07/2009 of 27/04/2009 relating to companies, article 12. Law n°18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure as amended to date, article 81. Law of 30/07/1888 relating to contracts or obligations, article 260. Authors Cited: François COLLART DUTILLEUL et Philippe DELEBECQUE, Contrats civils et commerciaux, 7e édition, Paris, Dalloz, 2004, p. 698.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] Company ALLIED TRANSPORT AGENT (ATA) was successful bidder of a tender of “World Food Programme” (WFP) of 65,000.00 USD related to carriage of goods from Tanzania to Goma (RDC). As ATA did not own vehicles, it entered into a carriage contract with a company called NDIGELA & Co to carry maize from Isaka to Goma. It rented two trucks from NDIGELA for 11,000.00 USD, with an advance payment of 5,000.00 USD. [2] ATA states that when the vehicles had arrived at Gisenyi, the drivers sold the carried maize. This led ATA to file a claim against NDIGELA for breach of their carriage contract which caused a loss. [3] After deciding that ATA’s claim had merit, the Commercial High Court, ordered NDIGELA to pay 32,214.10 USD deducted by

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122 RWANDA LAW REPORTS WFP equal to 61 tons of maize sold by his drivers, plus 5,000.00 USD of the advance payment NDIGELA was given as well as 1,000.00 for advocate fees. [4] In appeal before the Supreme Court, Counsel for NDIGELA states that ATA’s claim is inadmissible for failure to pay the security deposits furnished by foreigners who file claims. He/She also declares that NDIGELA should not be liable for the fault committed by its drivers who sold the carried goods because they were recruited by ATA pursuant to the carriage contract held between ATA and NDIGELA. In addition, the persons who sold the maize accept that they should pay for the loss themselves because they are found guilty in their criminal case and they signed a document admitting to pay. [5] The judgment was held in public on February 17, 2011. NDIGELA & Co was represented by the Counsel, Gumisiriza Hilary, and ALLIED TRANSPORT AGENT was represented by the Counsel, Ndutiye Yussuf. II. ANALYSIS OF LEGAL ISSUES Regarding NDIGELA’s claim that ATA should have deposited security as a foreigner plaintiff [6] NDIGELA states that the Commercial High Court should not have admitted ATA’s claim since it is a foreigner company and did not deposit the security required for foreigners. [7] As stated by the counsel for ATA and

explained by the Commercial High Court, article 81 of law no 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure as amended to date, provides that if the defendant so requires, any foreigner who files a case to Court must deposit an amount of security, unless there are agreements by which foreign States entered with Rwanda exempting their nationals from depositing such a security.

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123 NDIGELA v. ATA [8] NDIGELA explains that, besides the contract's legal provision, there is the Law n° 14/2010 of 07/05/2010 amending and completing the Law n° 07/2009 of 27/04/2009 relating to companies which provides in article 12 that companies originating from East African Community member States are considered on the same level as Rwandan companies by the Law. Therefore, NDIGELA's appeal is without merit, since it does not contest that ATA, a Tanzanian company falls under this law. Whether the contract between NDIGELA and ATA was a carriage contract or a rent of vehicle contract. [9] NDIGELA argues that the Commercial High Court disregarded the contract it concluded with ATA to provide it with vehicles for which ATA would personally recruit drivers. Thus NDIGELA confirms it should not be liable for consequences of the carriage contract it did not conclude with it. [10] On this point, ATA responds that NDIGELA's argument that they agreed ATA would recruit the drivers is false. ATA confirms they made carriage contract that NDIGELA was required to perform with its own vehicles and drivers. [11] In the contract between NDIGELA and ATA, there is no provision stating that ATA is responsible to recruit drivers itself as claimed by NDIGELA and the latter failed to prove this argument. The Court finds that since NDIGELA failed to prove that the drivers who stole the goods were not its employees, it is confirmed they were. NDIGELA had authority over them since this was a carriage contract rather than a vehicle rent contract. [12] This explanation is in accord with the confirmation from the law scholars, where they explain that when a businessman has no power over the provided vehicle, he should not be called a carrier but rather a lesser of that vehicle. This is different from the case when the cargo

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124 RWANDA LAW REPORTS vehicle is leased with its driver under control of the lessor, since it is in this instance that the agreement is considered that of carriage.¹² [13] The fact that the contract concluded by NDIGELA with ATA is of carriage, as explained above, indicates that the carrier NDIGELA shall be liable for failure to deliver the goods to their destination because it was its duty as provided for by article 16 and 18 of the law of January 19, 1920 related to commercial agents and carriers¹³. Whether or not ATA did not seek of refund from the drivers who diverted the goods and their purchasers who were identified. [14] NDIGELA says that even if the drivers who stole the goods were its employees, it should not be held liable because the responsible persons are known and the criminal responsibility is personal, and the receiver of stolen goods were criminally punished and accepted to pay. [15] On that issue, ATA claims that NDIGELA should indemnify it because the drivers who stole the goods were its employees and that it had an obligation to deliver the goods to their destination, while on the issue of seeking the payment of

damages basing on the contract rather than on a criminal case, ATA states that it is an option recognised to it by the law.

12 Lorsque l'entrepreneur n'a pas la maîtrise du déplacement du véhicule qu'il fournit, il ne mérite pas la qualité de transporteur : il est un simple bailleur ou plus exactement un fréteur engagé dans un contrat d'affrètement avec un chauffeur. Cependant, si l'engin de transport est loué avec son conducteur, les solutions sont différentes : le contrat doit être requalifié de location en transport, dès l'instant que le conducteur est resté sous les ordres du prétendu bailleur", François COLLART DUTILLEUL et Philippe DELEBECQUE, Contrats civils et commerciaux, 7e édition, Paris, Dalloz, 2004, p. 698. 13 The article 16 provides that « Except case of will of God and force majeure, the carrier is responsible for the persons or goods as agreed, when there is not limited period he shall respect the norm of the area... », while article 18 provides that the carrier is liable for the damaged or the lost or the accident shall occur to its persons transported when it didn't justify that the damage, the lost or accident was for external reason which it shall be prosecuted". 1 2 1 2

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125 NDIGELA v. ATA [16] The Court finds that NDIGELA shall not rely on the principle of personal criminal liability while it was not prosecuted for the offense committed by third parties, rather, the its liability resulting from the acts of its drivers should rely on article 260 of the civil code Book III which provides for the civil liability of the employer resulting from the acts of his employee, and from the nature of the carriage contract as mentioned above. to the acts committed by his employees¹⁴. [17] On the claim that ATA failed to seek the compensation from the convicted who admit it, is not also the ground which can exonerate the liability on payment of damages to the carrier who had the duty to deliver goods to their destination, since ATA which should receive goods at the agreed destination, had the option to seek the payment of damages based on the carriage contract entered into with NDIGELA, or to file a civil case against the offenders. Therefore, NDIGELA is not in position to raise that ATA should have necessarily sought the payment of damages based on criminal case. Concerning damages requested by ATA in cross appeal [18] ATA requests for 500,000 Rwf of advocate fees and 1,000,000 Rwf for procedural fees. NDIGELA responds that these damages have no legal basis. [19] The Court finds that it was necessary for ATA to hire a lawyer in the appeal lodged by NDIGELA; therefore shall be awarded damages, but because the damage request is excessively high, it shall be awarded 300,000 Rwf, determined in the discretion of the Court, for advocate fees in addition to the previous award. [20] Considering NDIGELA's grounds of appeal to this Court and their analysis as mentioned above, there is no consistent reason which would motivate it to lodge an appeal against the case it lost before the

14 That article provides that the person is not responsible for damages caused by his own acts but rather is responsible for damages caused by his servants in the function they have employed. 3 3

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126 RWANDA LAW REPORTS Commercial High Court. Therefore, the damages requested by ATA for being taken to court without reason have merit, but under the discretion of the Court, it is awarded 300,000 Rwf since the damage requested was excessively high. III. THE DECISION OF THE COURT [21] Admits to hear the appeal of NDIGELA & Co and the cross appeal of ALLIED TRANSPORT AGENT (ATA) because they were properly filed. [22] Rules that NDIGELA & Co's appeal lacks merit and that TRANSPORT AGENT's appeal has merit. [23] Orders NDIGELA & Co to pay ATA damages in the amount of 38.214,10 USD as decided by the Commercial High Court plus 600,000 Rwf ordered in this Court, the payment default of which, within 15 days, shall be deducted from their assets by government coercion. [24] Orders NDIGELA & Co to pay prorated fees of 4% for the total damages, the payment default of which, within 15 days, shall be deducted from their assets by government coercion. [25] Orders NDIGELA & Co to pay 32,400 Rwf of Court fees, the payment default of which, within 15 days, shall be deducted from their assets by government coercion.

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CRIMINAL CASE

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128 PROSECUTION v. UWAMURENGEYE [Rwanda SUPREME COURT- RPAA 0110/10/CS (Kayitesi Zainabo, P.J., Mukanyundo and Gakwaya, J.) January 31, 2014] Criminal Law – Parricide – Battery and bodily injuries to a parent in the deadly part resulting into death proves the intent to commit the offense of murder – Decree Law no21/77 of 18 August, 1977 instituting the penal code, article 314 – Organic Law no 02/2013/OL of 16/06/2013 modifying and complementing Organic Law n° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts as modified and complemented to date, article 10. Criminal Procedure – Reclassification of the offense – The right and duty of the judge to reclassify an offence in the appellate court – The competent court to try that case after nullification – The case starts in the competent court to try that offense in the first instance – Law no13/2004 of 17/05/2004 relating to the Code of Criminal Procedure, article 35. Facts: The defendant was charged with battery and bodily injuries against his mother which resulted in her death before the Intermediate Court of Rusizi that found him guilty, sentenced him to 10 years of imprisonment and fined him with 100.000 Rfw. He appealed to the High Court, Rusizi Chamber. During the trial, the Prosecution requested the Court to reclassify the offence to parricide, nullify the judgment rendered by the Intermediate Court, and order that the trial starts at first instance in the High Court since it is the competent court. The High Court found that the appeal of the defendant lacked merit and rejected the prosecution's request stating that the prosecution did not appeal and that reclassifying the offence would result in an increase of the penalty. The prosecution appealed to the Supreme Court indicating that the committed offense is parricide instead of battery and bodily

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PROSECUTION v. UWAMURENGEYE 129 injuries and that the competent court is the High Court while Uwamurengeye denied to have had an intent to kill his mother. Held: 1.The fact that the medical report and the witnesses assert that the deceased died due to the injuries she sustained when she was beaten with a plank proves that there was an intent to murder

2. The reclassification of an offence is a right and duty of the judge. Therefore, the defendant must be prosecuted for parricide and the previous judgments must be nullified since they have been tried by incompetent courts, so that the case starts in the competent court.
3. Considering territorial jurisdiction, the Intermediate Court of Rusizi has jurisdiction to try the defendant for parricide at first instance. The appeal is granted. The qualification of the offence is parricide. Previous judgments are nullified; The case of parricide will commence in the Intermediate Court of Rusizi, With costs to the Public treasury. Statutes and statutory instruments referred to: Organic Law no 02/2013/OL of 16/06/2013 modifying and complementing Organic Law n° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts as modified and complemented to date, article 10; Law no 30/2013 of 24/5/2013 relating to the code of criminal procedure, article 190, par.2 Decree Law no21/77 of 18 August, 1977 instituting the book of penal code, article 314. Cases referred to: Prosecution v. Nyawera Celestin, RPAA 0033/11/CS, tried by the Supreme Court on 14th September, 2012

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130 RWANDA LAW REPORTS Prosecution v. Corporal Ngabonziza, RPAA 0117/07/CS, tried by the Supreme Court on 17th November, 2010.

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] This case commenced in the Intermediate Court of Rusizi, Uwamurengeye Venant being charged with battery and bodily injuries against his mother which resulted into her death. The Court found him guilty, sentenced him to ten (10) years of imprisonment and a fine of 100.000 Rwf. [2] Unsatisfied with the decision, Uwamurengeye appealed to the High Court, Rusizi Chamber. During the trial, the Prosecution argued that Uwamurengeye's grounds of appeal are not valid. The Court should have reclassified the offence to parricide because the accused held a grudge against his mother basing on that she attempted to poison him. As a result, he beat her multiple times on the head with plank. The court should have nullified the judgment of the Intermediate Court of Rusizi so that the accused could be tried on parricide in the High Court which has jurisdiction. [3] Regarding on the appeal of Uwamurengeye, the Court found that the grounds of appeal for the first judgment were not valid and ruled that the judgment should be sustained. Relating to the prosecution's request, the Court found that the prosecution had not appealed and that the reclassification of the offence would result in the increase of penalties. Therefore, per article 174 of Law no13/2004 of 17/05/2013 of

the Code of Criminal Procedure, the court rejected the prosecution's request. [4] The prosecution appealed against the judgment to the Supreme Court. The trial was held on 23rd December, 2013. Uwamurengeye

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131 PROSECUTION v. UWAMURENGEYE Venant was present and assisted by Umulisa Alice, the counsel, while the prosecution was represented by Ntawangundi Beatrice. II. ANALYSIS OF THE LEGAL ISSUE Whether the offence of which Uwamurengeye Venant was charged should be reclassified and its impacts [5] The representative of the prosecution argued that in the High Court, Uwamurengeye Venant was charged with battery and bodily injuries against his mother which resulted into her death. However, there is evidence that prior to killing his mother, he held a grudge against her because she attempted to poison him. In addition to this, he beat her twice on the deadly part of the head with a plank. These instances prove that he intended to kill her and that the offence committed is parricide and not battery and bodily injuries. The High Court has jurisdiction [6] The Prosecution also stated that even if they had not requested for the reclassification of the offence, it was the duty of the Judge on his own initiative to rule that the case should start in the High Court based on article 89 of the Organic Law n° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts. Therefore, the Supreme Court must rule that the case starts in the High Court, Rusizi Chamber. The representative of the Prosecution added that he is not stuck on this ground of appeal and that it is the Supreme Court's discretion to make a decision on this issue and that in case it finds that the accused had no intention to kill his mother, the Prosecution would have no objection. [7] Uwamurengeye stated that he never had the intent to kill his mother and that the case file contains evidence including statements by his father and siblings which indicate that he did not have a sour relationship with his mother in twenty five years he lived with his parents. He argues that he does not know what happened when he stated that his mother poisoned him and his siblings. Since he was closer to his

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132 RWANDA LAW REPORTS mother in comparison to his siblings, and that he does not really know what caused him to beat her in a manner that resulted in her death. He states that he must have been insane during that period since he was not aware of what he was doing. He added that the statements of the Prosecution that he had a grudge against his mother because she poisoned him were groundless. Particularly, because it was based on the statements he made to judicial police when he was interrogated, after one week being in hospital where he was given sedative drugs due to mental defects that he suffered. He again explained that even if he is insane, and his father used to take him for treatment to the named André, he had no medical report since his siblings who should help him have hated him since the death of their mother. Concerning the issue of beating his mother on a deadly part of her head, he conceded for having beaten her with a plank on the head, but stated that he seeks forgiveness, and requests the court to release him so that he can go to reconcile with his family. [8] Umulisa, Uwamurengeye's Counsel, stated that

there is evidence that proves that Uwamurengeye had a behavioral problem when he committed the offence. For instance, he intended to destroy his parent's house, suffered from mutism, threw things in the toilet, fought, and when the police arrested him, they had to use a lot of force and injected him "Phenergan", a sedative drug. The counsel added that they do not intend to exclude Uwamurengeye from the criminal liability, but rather to prove that he never intended to kill his mother. Umulisa added that his mother did not immediately die after being beaten, but died on the way to hospital. Therefore, this cannot be classified as parricide. THE VIEW OF THE COURT [9] Article 314 of Decree Law no 21/77 of 18/08/1977 instituting the Penal Code, which was in effect at the time the offence was committed, provides that "It's qualified as parricide, the murder committed against his father or mother...".

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133 PROSECUTION v. UWAMURENGEYE [10] Whereas, article 321 of Decree Law no 21/77 of 18/08/1977 provides that "If intentional assault and battery without an intent of killing has caused death, the accused will be sentenced to five(5) to ten(10) years of imprisonment and a fine less than ten thousands. He will be sentenced to ten (10) up to fifteen years of imprisonment in case he committed that with premeditation or ambush". [11] The Court finds that, even if Uwamurengeye states that he killed his mother without intent because of his mental illness and that he had no conflicts with her, the fact that his siblings and his father asserted that he had a strange silence while his counsel stated that he committed that offence when he had exceptional behaviours such as: hitting others and destroying the house of his parents; it cannot have a basis in ruling that he committed the offence when he was insane, since they did not provide evidence proving that Uwamurengeye had mental illness when he committed that offence [12] The Court therefore finds that, based on the case file, Uwamurengeye Venant beat his mother Nyirabazungu Theresie with a plank on the head and she died as a result of these grave injuries upon her arrival at Bushenge Hospital (par.1), This is emphasized by the statements made by Hagenimana Fabien and Nyirabwimana Theopiste, his siblings asserting that the accused beat his mother with a plank on head which caused her injuries resulting in her death on the way to hospital. The medical report also confirms that Nyirabazungu Theresie died due to the plank she had undergone on the head (par.10). Therefore, there is no doubt that the cause of death of Nyirabazungu Theresie was the plank that she was beaten by her son Uwamurengeye Venant. Furthermore, the act of beating Nyirabazungu with the plank on a deadly part of her head proves his intention of committing the offence of murder. [13] Concerning the qualification of the offence, as it has been ruled by this Court in the case between the Prosecution and Nyawera .

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134 RWANDA LAW REPORTS Celestin¹⁵, and in the case between the Prosecution and corporal Ngabonziza¹⁶, reclassification of the offence is the right and duty of the Judge. The Court therefore finds that based upon the above explanations in article 314 of the Decree Law no 21/77 of 18/08/1977, also mentioned above, which was in force when the offence was committed, Uwamurengeye Venant must be charged with the offence of parricide. Therefore, the judgment

RP.0149/08/TGI/RSZ tried by the Intermediate Court of Rusizi on 19th February, 2009 and the judgment RPA 0151/09/HC/RSZ tried by the High Court, Rusizi Chamber, in appellate court, are nullified because these courts had no jurisdiction considering the qualification of the offence. [14] Concerning the case of parricide, the Court finds that basing on article 190, paragraph 2 of the Law 30/2013 of 24/05/2013 relating to the Code of Criminal Procedure, which provides that “The Court nullifying the decision subjected to appeal shall not retry the case on its merits. However, parties may again seize the court of first instance of the case if it is possible to correct mistakes made before”; this case must start in the competent Court. [15] Basing on article 10 of Organic Law no 02/2013/OL of 16/06/2013 which modifies and complements Organic Law n° 51/2008 of 09/09/2008 which determines the Organization, Functioning and Jurisdiction of Courts as modified and complemented to date and the territory where the offense was committed, the Court finds that the Intermediate Court of Rusizi has jurisdiction to try Uwamurengeye Venant on parricide at first instance. III. THE ORDER OF THE COURT [16] Rules that the prosecution’s appeal has merit.

15 Prosecution v. Nyawera Celestin, RPAA0033/11/CS, par. 6 tried by the Supreme Court on 14th September, 2012 16 Prosecution v. Corporal Ngabonziza, RPAA 00117/07/CS, par. 18, tried by the Supreme Court on 17th November, 2010. 1 2 1 2

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135 PROSECUTION v. UWAMURENGEYE [17] Rules that the offence Uwamurengeye Venant committed should be classified as parricide rather than assault and battery resulting into death. [18] Orders that judgment RP.0149/08/TGI/RSZ rendered by the Intermediate Court of Rusizi on 19th February 2009 and judgment RPA 0151/09/HC/RSZ rendered by the High Court, Rusizi Chamber are nullified. [19] Orders that Uwamurengeye Venant’s trial for the offence of parricide, as charged by the prosecution, should commence in the Intermediate Court of Rusizi. [20] Rules that the court fees be allocated to the public purse.

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