

RWANDA / JUDGMENT

RIZIKI v. MUBIRIGI

RLR V.3-2021

COURT

Supreme Court

DECIDED

29 November 2019

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RS/INJUST/RC00001/2019/SC

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RIZIKI v. MUBIRIGI [Rwanda SUPREME COURT – RS/INJUST/RC00001/2019/SC (Kayitesi Z, P.J, Nyirinkwaya, Cyanzayire, Rukundakuvuga and Hitiyaremye, J.) 29 November 2019] Family law – Divorce – Sharing spouse’s property due to divorce – If spouses married under community property regime divorce, the principle is that, they have to share equally the property whereby they either sell their property and then share the proceed of sale, or share the property in its state or again one of the spouse can pay the other the equivalent of property’s value in money in order to keep it without sharing. In case the spouses fail to reach an agreement on any means of sharing, it is up to the judge to establish the fair sharing procedure for the couple. Facts: This case was initiated before Nyarugunga Primary Court where Riziki Filed a divorce claim on ground of excesses, abuses and seriously insults to her by her husband Mubirigi. He adds that their cohabitation deteriorated, consequently, she prayed the Court to grant divorce and given that they are married under community property regime, it should be ordered the sharing of their properties. The Court granted the divorce and awarded legal custody of children to Riziki whereas Mubirigi remains entitled with the right of visit. With regard to their property, the Court ordered the sharing of the proceeds of sale. The plaintiff was not contented with that decision

and appealed before Nyarugenge Intermediate Court alleging that all grounds she raised were not examined, that some evidence were disregarded, that the Court did not take into account the children's interests while sharing their properties and it did not order the respondent to pay for

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alimony. The Court found her appeal with merit in part and ordered him to pay monthly alimony and to jointly share the cost of their children's education. The plaintiff lodged a second appeal to the High Court but her appeal was not admitted. Then she wrote to the President of High Court requesting to review the case rendered by the Intermediate Court due to injustice. The president of the High Court wrote to the president of Supreme Court requesting its review indicating that it is vitiated with injustice, which the President admitted. . The applicant of review requested to be given the house instead of being sold for the sake of children accommodation because its sale is likely to deprive children of a shelter. She states that, being the one who has custody of the children, she would keep the family house, while Mubiligi will keep other properties whose value is higher than that of the concerned house. Mubirigi argues that, the fact for the Court to have ordered the sharing of the proceeds of sale of their properties does not amount to injustice, because as long as everyone obtained his/her share, she could acquire her own house and that, those children on whom she relies have become mature, and that if other joint properties she stated are more valued than the house, she may keep them all instead and let him with the house only so that he may get a shelter during his retirement period which is close. Held: If spouses married under community property regime divorce, the principle is that, they have to share equally the property whereby they either sell their property and then share the proceed of sale, or share the property in its state or again one of the spouse can pay the other the equivalent of property's value in money in order to keep it without sharing. In case the spouses don't reach an agreement on any means of sharing, it is up to the

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judge to establish the fair sharing procedure for the couple. Thus, as it is clear that Riziki and Mubirigi failed to reach an agreement on how to share their properties, the Court should decide and therefore their properties should be sold in order for them to share equally the proceeds of sale. The claim for review of the judgment due to injustice lacks merit.

Statutes and statutory instrument referred to: Law N° 32/2016 of 28/08/2016 governing persons and family as modified and complemented to date, articles 8 and 242. Cases referred to Murayire v Sindikubwabo, RS/REV/INJUST/CIV 0029/16/CS rendered by the Supreme Court on 01/06/2018

Judgment

I. BRIEF BACKGROUND OF THE CASE

Riziki Nicole legally married Mubirigi Rwamfizi Jean Paul on 03/07/1999 in former Rubavu commune (current Gisenyi sector). they gave birth to 3 children namely Mugisha Daniel, Singiza Prisca and Ntwari Arnold Peace. They share the following properties:

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- a. the plot No UPI1/03/05/04/596 containing a house and its boy's quarters located in Rubirizi cell, Kanombe sector, Kicukiro district.
- b. the plot No UPI 1/03/05/03/4108 located in Karama cell, Kanombe sector in Kicukiro district;
- c. The plot No UPI 1/02/10/04/3037 located Murama cell, Kanyinya sector in Gasabo district;
- d. Movable property construed of a Toyota Corolla RAA 864 N car, and household equipment.

Riziki Nicole states that their cohabitation became worse, to the extent that Mubirigi Rwamfizi Jean Paul used to mistreat, abuse and seriously insult her, which led her to institute a divorce claim before Nyarugunga Primary Court and was registered on RC 0296/16/TB/NYRGA. The judgment was rendered on 06/07/2017.

The Court decided that Mubirigi Rwamfizi Jean Paul and Riziki Nicole are divorced and awarded the custody of the children to Riziki Nicole while their father maintains the right of visit. It ordered that:

- a. Their immovable property as aforementioned will be sold and the proceeds of sale be shared equally between Riziki Nicole and Mubirigi Rwamfizi Jean Paul;
- b. The movable property comprising a vehicle and household equipment will be sold and the proceeds of sale be shared equally between them.

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Riziki Nicole lodged an appeal against that judgment before Nyarugenge Intermediate Court, basing on the following grounds:

- a. All issues indicated in a divorce claim were not examined;
- b. The Court based on false and contradictory grounds;
- c. The Court disregarded the evidence indicated in judgment RC00447/16/TB/NYRGA which ordered the husband to leave the spouse's house;
- d. The Court neither did hear the testimonies of the children nor it did take into account children's interests in properties sharing;
- e. The Court granted the divorce basing on both parties' faults, and it did not order Mubirigi Rwamfizi Jean Paul to pay any alimony.

The case in appeal was recorded on RCA00110/2017/TGI/NYGE and the judgment rendered on 31/05/2018 whereby the Court found Riziki Nicole' appeal with merit in part and ordered Mubirigi Rwamfizi Jean Paul to keep paying children's monthly alimony amounting to one hundred and twenty thousand (120,000 Frw) and jointly share with Riziki Nicole the responsibility to pay for children's tuition fees.

Riziki Nicole made a second appeal before the High Court but the Court rejected it and on 13/02/2019 she wrote to the president of the High Court requesting him to examine the injustice suffered in the judgment RCA00110/2017/TGI/NYGE. After assessment of Riziki Nicole's request, The President of the

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High Court wrote to the President of Supreme Court requesting him to review the case due injustice.

President of the High Court explained that the injustice resides on:

- a. The fact that in the course of the adjudication of the

judgment

RCA00110/2017/TGI/NYGE, the Court remained silent on the amount of 5,000,000Frw of which Riziki Nicole alleges to be deposited on bank account while it was the subject of debate as part of sharing properties as indicated in hearing minutes dated 01/03/2018;

- b. The fact that the Court did not indicate the amount of tuition fees for children to be paid by each spouse basing on his/her means, which may result in failure of execution of the judgment if parties don't reach an agreement thereto.

On 07/05/2019, the President of Supreme Court took an order number 096/CJ/2019 whereby he instructed to review the case RCA00110/2017/TGI/NYGE which was rendered at last instance by Nyarugenge intermediate Court due to injustice. He ordered to register the case on the cause list and was numbered RS/INJUST/RC 00001/2019/SC. The hearing of the case was scheduled on 11/09/2019.

On 11/09/2019, the hearing was held in public, Riziki Nicole assisted by Counsel Mukandera Clothilde whereas Mubirigi Rwamfizi Jean Paul was assisted by Counsel Subukonoke Emmanuel. Litigants held debates on the issue regarding the sharing of the house built at the plot no UPI1/03/05/04/596 located in Rubirizi cell, Kanombe sector,

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Kicukiro district. Riziki Nicole indicated to the Court that she wishes to keep the concerned house for the sake of the children and in order to be raised in this house. Mubirigi Rwamfizi Jean Paul argues that he should be the one to keep the concerned house so that he gets a shelter during his retirement period which is close. Another main issue debated is the retirement

pension allocated to military personnel going into retirement. Riziki Nicole states that the concerned amount of money was not included among the property destined for sharing whereas Mubirigi Rwamfizi Jean-Paul argues that, this was not part of the claim before the previous Courts.

The hearing of the case was closed and the parties were notified about the date of pronouncement which is 18/10/2019. The Court found during the withdraw for deliberation that, before the pronouncement of the judgment it must be informed from Zigama CSS about the deposit on account no 0049633 as savings allocated to military personnel who retires, especially the amount of money deposited on that account since 13/07/2016, date of filing the divorce claim, till 10/05/2019.

Zigama CSS provided with the Court the bank statement indicating that on 26/07/2016 the deposit on account no 0049633 was 5,021,920Frw, while on 25/04/2019 the deposit was 6,741,856Frw. The hearing resumed on 11/11/2019 for the parties to argue on the information provided by Zigama CSS. During the hearing, Riziki Nicole motion to the Court that she dismisses that claim in relation to that amount of money and leaves it for Mubirigi Rwamfizi Jean Paul, consequently, this issue should not be analysed.

The main issue consists of determining whether during the sharing of the properties, the house built at plot no UPI

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1/03/05/04/596 can remain in the custody of Riziki Nicole in order to accommodate the children and in their interests. II. ANALYSIS OF THE LEGAL ISSUE. - Whether during the sharing of the properties, the house built at plot no UPI 1/03/05/04/596 can remain in the custody of Riziki Nicole in order to accommodate the children and in their interests.

With regard to this issue, Riziki Nicole explains the injustice she suffers in the following terms:

- a. The Primary Court had ordered that the common property of Riziki Nicole and Mubirigi Rwamfizi Jean Paul has to be sold while disregarding that all children are still young and need a shelter to live in with a parent in charge of raising them.
- b. The Intermediate Court should have rectified that error and allocate the house to her; thus, it disregarded the provisions of article 3 of the Convention on the Rights of the Child which states that in all actions concerning children, whether undertaken by various institutions or courts of law, the best interests of the child shall be a primary consideration;
- c. The aforementioned article corroborates with article 4 of African Charter On the Rights and Welfare of the Child stating also that in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration. The decision taken by both Courts is also contrary to the

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provisions of article 227 of the Law N° 32/2016 of 28/08/2016 governing persons and family.¹

- d. the fact for the Court to have ordered the sale of properties entails that it will be done through auction. This consists of obstruction to the wellbeing of the children, especially that one of them is already traumatised and is followed by Ndera Hospital. Another one got a heart attack and was operated in Europe for those reasons the Intermediate Court should have reversed the decision of the Primary Court and decide that the house built at plot no UPI1/03/05/04/596, whose value is 36,500,000Frw is allocated to Riziki Nicole's side while Mubirigi Rwamfizi Jean Paul is awarded plots valued at more than 50,000,000Frw and pay the balance;
- e. In her cohabitation with Mubirigi Rwamfizi Jean Paul, she was the victim of severe household violence which led her to file for divorce, but she did not get justice because the Court granted the divorce basing on reciprocal faults and as a result, she was not allocated the house.
- f. The allocation of the house to her is not contrary to the Law because she has the custody of the children who are still young. She states that, though Singiza Prisca is 20 years old but she has got heart illness, the second is aged 17 but has trauma and the one who completed secondary education is still living at home. Thus, if the house they live in is auctioned, the children will become homeless,

¹Where the court orders separate residence, except in case where spouses are married under the regime of separation of property, movable and immovable assets are provisionally shared, after the inventory signed by both parties, in consideration of interest of children and the profession of spouses.

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and this will cause them more trauma than that they suffered after her divorce with Mubirigi Rwamfizi Jean Paul.

- g. She concludes by stating that, another ground of injustice is that the Court disregarded the evidence of property valuation report indicating that the value of the house built at plot UPI:1/03/05/04/596 amounts to 36,523,640Frw, while that of the plot UPI: 1/03/05/03/4108 is 46,426,000Frw and another plot whose UPI: 1/10/04/3037 is valued at 5,096,000Frw; thus, if the interests of the children are taken into consideration, Mubirigi Rwamfizi Jean Paul should have been given those plots valued at 51,522,000Frw which is much higher than the value of the house, then she would remain with the house within which she will raise the children.

Counsel Mukandera Clothilde who assist her states that article 245 of the Law governing persons and family in Rwanda was disregarded and that if the spouse's house is sold, the children will remain without shelter and their interests ignored. She argues that based on that article, she finds that Riziki Nicole being the one who looks after the children, she should keep that household house while Mubiligi Rwamfizi Jean Paul would keep other properties whose value is higher than that of the house which Riziki Nicole requests to be allocated.

Mubirigi Rwamfizi Jean Paul states in his rebuttal to Riziki Nicole's grounds that:

- a. The fact for the Court to have ordered the sale of their co-owned properties does not constitute an injustice, because it is in compliance with the provision of article 8

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of the Law n° 27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions², as well as the writings of Law scholars, indicate that the entire properties to be shared in case of divorce consists of the assets existing on the day of the divorce and liabilities towards other persons (....La masse à partager se compose des biens existants au jour du divorce, sur base de l'inventaire, tout en déterminant le passif commun; Alain Duelz, Le droit du divorce, 3 éd., Bruxelles, De Boeck & Larcier, 2002).

- b. Children have already grown, because Singiza Prisca is 21 years old, Ntwari Peace Arnold is 18 and both completed secondary education and are waiting to register at University. The third one Mugisha Daniel is 15 years old and is about to complete O level "Tronc commun", thus he finds that the decision taken by both Courts (Nyarugunga Primary Court and Nyarugenge Intermediate Court) of selling out community properties and sharing the proceed of sale equally complies with the law. He states that in case of sharing, each will get his/her part and may buy a house, and children will live wherever they choose to be especially that they have grown;
- c. The properties he shares with Riziki Nicole are not only immovable properties (a house and two plots of land) but they share also movable properties (household equipment and a vehicle) as mentioned in the decision of Nyarugunga Primary Court, he does not thus understand

² Where dissolution of community of property regime occurs following divorce or change in the type of matrimonial regime, those whose marriage was under the community of property regime, share equally or according to any other agreed-upon method the assets and liabilities of the community.

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why Riziki Nicole emphasizes only on immovable property, mostly the house;

- d. If Riziki Nicole finds the two shared plots have more value than the house, he prays the Supreme Court to order Riziki Nicole to keep those plots, as well as the vehicle and the house equipment while he will be allocated the house so that none of them may lose. He states that he is aged 47, and remain only with 3 years to retire, he needs thus a shelter;
- e. The statement of Riziki Nicole that she is victim of domestic violence is not true rather she intends to instigate emotions because she seeks the house, if he behaved so, he would have been punished by Gasabo intermediate Court as it was prosecuted. He explains that he is the one who bought the house under litigation from the loan granted by Zigama CSS, but that loan has been reimbursed as he got a chance to go for a mission abroad.
- f. The argument that if the house is sold it will traumatize the children, is false because children are healthy as even Singizwa who went through heart operation is fine to date, though Riziki Nicole sent him in Canada without informing him;
- g. Though he does not agree with the property valuation report made by Riziki Nicole, for reaching a compromise, he will give her 50% of the value of the house, all house equipment and the vehicle, and then share the remaining plots, and he will also raise the children because he is capable of doing it especially that they are mature. He states that he does not understand why she refuses to sell and share the proceed of sale, whereas if they sell out,

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they can get much money, enough for her to buy another house better than what they own.

Counsel Sebukonoke Emmanuel who assists Mubirigi Rwamfizi Jean Paul states that the case under review does not entail injustice, because it relied on the Law. He argues that if spouses divorce, they share equally the community properties and have the obligation to raise their children depending on their means, and that the Law did not provide that children will prevail over property sharing. DETERMINATION OF THE COURT

Article 242 of the Law N° 32/2016 of 28/08/2016 governing persons and family provides that the divorce entails the dissolution of marriage and matrimonial regime of spouses. The property is shared according to the law governing matrimonial regimes. In addition, article 8 paragraph one of the Law N° 27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions provides that “Where dissolution of community of property regime occurs following divorce or change in the type of matrimonial regime, those whose marriage was under the community of property regime, share equally or according to any other agreed-upon method the assets and liabilities of the community. However, the court may order that the value of damages caused by either spouse be deducted from his/her share”.

The interpretation of these provisions suggests that if spouses married under community property divorce, the principle is that, they have to share equally the property. The Law did not provide for the procedure of sharing, whether they have to sell

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their property and then share the proceed of sale, or share the property in its state without any sale or again one of the spouses can pay the other the equivalence of the property in money and keep it without sharing. If the spouses don't reach an agreement, the judge in his/her discretion establishes the fair and equitable sharing between spouses.

As far as this case is concerned, the Court finds that parties had in community properties the following:

- a. A house which has a boy's quarter built at plot no UPI:1/03/05/04/596, located in Kanombe sector, Kicukiro district;
- b. A plot no UPI:1/03/05/03/4108 located in Kanombe sector, Kicukiro District;
- c. A plot no UPI:1/02/10/04/3037 located in Kinyinya district, Gasabo district;
- d. Various movable property and Toyota Corolla RAA864 car.

Riziki Nicole states that she is willing to give up other plots, and remain with the plot within which a house is built in which she will raise the children, whereas Mubirigi Rwamfizi Jean Paul argues that, he is not willing to give up that house especially that he needs it the most, and that he is ready to raise the children because they are mature. The Court finds therefore that since the spouses failed to reach an agreement, it has to decide discretionally.

The Court finds, as ruled by Primary and Intermediate Courts, the fair and indisputable decision likely to put an end to recurrent court proceedings consists of selling the community

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property of Riziki Nicole and Mubirigi Rwamfizi Jean Paul and share equally the proceeds of the sale, while each of them fulfilling parental obligations towards their children.

The Court finds without merit the arguments of Riziki Nicole that, if the house is auctioned it will instigate traumatism consequences on children because they consist of hypothetical thoughts, the Court finds also that, nothing prevents the spouse to buy another house after the sharing of the proceeds of sale and the children cannot be deprived of a shelter.

The Court finds also that, the sale of the spouses' property and sharing of the proceeds of sale corroborates the decision in the case RS/REV/INJUST/CIV 0029/16/CS rendered by the Supreme Court on 01/06/2018 where parties were Murayire Marie vs. Sindikubwabo Louis.

The Court finds then consequently that, basing on motivations above, and on article 242 of the Law n° 32/2016 of 28/08/2016 governing persons and family and article 8 paragraph 1 of the Law n° 27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions, the community property of Riziki Nicole and Mubirigi Rwamfizi Jean Paul have to be sold and share equally the proceeds of sale, as it was decided by previous Courts. III. DECISION OF THE COURT

Admits Riziki Nicole's claim for review due to injustice of the judgment RCA00110/2017/TGI/NYGE rendered by Nyarugenge Intermediate Court on 31/05/2018;

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Finds the

judgment

RCA00110/2017/TGI/NYGE rendered by Nyarugenge Intermediate Court on 31/05/2018 without injustice;

Upholds the

ruling

of the

judgment

RCA 00110/2017/TGI/NYGE rendered by Nyarugenge Intermediate on 31/05/2018;

Decides that the plot UPI:1/03/05/04/596 within which a house and a boys' quarter are built, have to be sold too, whereby Riziki Nicole and Mubiligi Rwamfizi Jean Paul have to share equally the proceeds of sale.

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