

RWANDA / JUDGMENT

RWEMA v. RWANDA DEVELOPMENT BOARD (RDB)_212812_kn

RLR V.4-2016

COURT

Supreme Court

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Text**Page 1**

1 RWEMA v. RWANDA DEVELOPMENT BOARD (RDB) [Rwanda – URUKIKO RW’IKIRENGA – RADA0048/13/CS (Mutashya, P.J., Nyirinkwaya na Kayitesi R., J.) 15 Mata 2016] Amategeko agenga imiburanishirize y’imanza z’ubutegetsu – Inzitizi yo kutakira ikirego – Ihame ryo kutongera kuburanisha imanza zabaye itegeko – Kuba ikiburanwa cyari cyaraburanweho mu nkiko zabanje ntacyakongera kuburanishwaho kuko byaba binyuranyije n’ihame ribuza kugaruka ku manza zabaye itegeko. Ubukemurampaka – Inyandiko y’ubutumwa – icyemezo cy’ubukempurampaka nticyafatwa nk’aho cyataye agaciro kuko cyafashwe igihe cyateganyijwe mu nyandiko y’ubutumwa cyarangiye mu gihe muri icyo nyandiko hatateganyizwe icyakorwa igihe ubukemurampaka bwaba burengeje iminsi yo gufatamo icyemezo. Ubukemurampaka – Amasezerano y’ubukemurampaka – Abakoranye amasezerano icyo bemeranyije ko ikibazo bazagirana giturutse cyangwa gishingiye kuri ayo masezerano kizakemurwa n’abakemurampaka cyavuka akaba ari bo bagikemura, bagatanga n’icyemezo ntabwo umwe mu basinye ayo masezerano aregera urukiko. Incamake y’ikibazo: Rwema yagiranye na TERRACOM SARL

amasezerano yo kubacururiza ibicuruzwa birimo na serivisi byayo hirya na hino mu Rwanda. Muri 2007 TERRACOM SARL yaragurishijwe kuri Lap Green networks ariko Rwema ntiyishyurwa amafaranga yari amaze gukorera. Ashingiye ku ngingo ya 5.2.6 y'amasezerano Leta y'u Rwanda yagiranye na "Lap Green networks" yaguze TERRACOM SP SARL iteganya ko imyenda icyo kigo cyari gifite mbere ya tariki 30/6/2007 ari Leta y'u Rwanda iyishyura, yasabye RDB yabarizwagamo ubunyamabanga bushinzwe kwegurira ibigo bya Leta abikorera ku giti cyabo kumwishyura umwenda bari bamurimo ndetse n'indishyi ziwukomokaho ariko barananiranwa. Rwema yareze RDB mu Rukiko Rukuru rw'Ubucuruzi maze rwemeza ko habaho ihwanya ry'imyenda Rwema yari afitanye na RWANDATEL SP SARL. Rwema ntiyishimiye icyo cyemezo maze akijuririra mu Rukiko rw'Ikirenga, narwo rwemeje ko Rwema agomba kwishyura RWANDATEL SP SARL amafaranga 1.871.154Frw, naho RWANDATEL SP SARL itegukwa kwishyura Rwema 2.200.000Frw y'agaciro ka "imprimantes" na "panneaux publicitaires", akanayisubiza EVDOS 3 hamwe na "ordinateur portable" imwe. Rwema yasubirishijemo urwo rubanza ingingo nshya ashingiye ku manza z'inshinjabyaha RP0140/09/TB/NYGE na RPA0406/10/TGI/NYGE, maze Urukiko rw'Ikirenga rutegeka RWANDATEL SARL kumwishyura 8.978.846Frw na 300.000Frw y'igihembo cya Avoka. Nyuma Rwema yiyambaje Urukiko rw'Ubucuruzi ikirego cye nticyakirwa kuko Urukiko rwanzuye ko abanza kwiyambaza ubukemurampaka nk'uko biteganywa mu masezerano bagiranye na RWANDATEL SP SARL, RDB na Rwema bemeraniye gushyiraho ubukemurampaka. Urukiko Nkemurampaka rwafashe umwanzuro ko ikirego cya Rwema kitakiriwe kubera cyamaze gusuzumwa n'Inkiko zisanze ndetse zikanagifataho icyemezo ubu cyabaye Itegeko. Rwema yatanze ikirego mu Rukiko Rukuru maze RDB nayo itanga inzitizi yo kutakira ikirego kubera ko amasezerano ashingiraho, ateganya ko habanza ubukemurampaka, ko kandi niba ikirego cye ari ubujurire ku cyemezo cy'Urukiko Nkemurampaka nabwo budakwiye kwakirwa kuko icyo cyemezo kitajuririrwa nk'uko bikubiye mu masezerano nkemurampaka.

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2 Urwo rukiko rwemeje ko ubujurire bwa Rwema bujyanye n'umwanzuro wa burundu wafashwe n'Urukiko Nkemurampaka butakiriwe. Rwema yajuririye icyo cyemezo mu Rukiko rw' Ikirenga avuga ko Urukiko Rukuru rwahuje amasezerano abiri adafite aho ahuriye kuko amasezerano ya mbere yagiranye na Rwandatel, yari ayo kumucururiza umuriro wa cash power ariyo yakomotseho urubanza baburanye rukarangira, naho urubanza aburana ubu akaba ari urushingiyeye ku masezerano ya kabiri yo ku wa 04/1/2006 aho yabacururizaga amakarita na telefoni. Yongeraho ko n'ubwo inyandiko itanga ubutumwa yagiranye na RDB yahaga Urukiko Nkemurampaka ububasha bwo kuzaburanisha mu rwego rwa mbere n'urwa nyuma impaka zizavuka hagati yabo bombi yayisinye atarebye, akaza gusanga imurenganya, ariko ko atabarwa n'ingingo ya III yayo mu gace ka 7, ivuga ko igihe kinini ntarengwa cy'imiburanishirize y'Inteko Nkemurampaka kitazarenza iminsi mirongo itatu (30) uhereye ku ishyirwa ry'umukono ku nyandiko y'ubutumwa nyamara umwanzuro wayo ukaba warafashwe icyo gihe cyararangiyeye bityo uwo mwazuro ukaba nta gaciro ufite. RDB yiregura ivuga ko ubujurire butakwagirwa kubera ko imanza zabanje zaburanishijwe ku masezerano yo kuwa 04 Mutarama 2006, ndetse ko n'ubwo mu nyandiko itanga ubutumwa Rwema yagiranye na RDB, bumvikanye ko umwanzuro uzafatwa mu

minsi 30, ariko ko nta cyateganyijwe igihe bitakubahirizwa ikindi kandi ko iyo ngingo y'iminsi 30 atariyo yatesha agaciro ihame ry'uko ababuranyi aribo bihitiramo ubukemurampaka n'uko bagena uburyo ibyemezo bizafatwa. Incamake y'icyemezo: 1. Kuba ikiburanwa cyari cyaraburanweho mu nkiko zabanje nticyakongera kuburanishwaho kuko byaba binyuranyije n'ihame ribuza kugaruka ku manza zabaye itegeko.

2. Kuba umuburanyi haribyo avuga ko yasinyiye atabibonye ntibihabwa agaciro igihe atagaragaza ko yayisinyishijwe ku ngufu cyangwa ku gahato, cyangwa se ngo agaragaze ko hari izindi mbaraga zakoreshejwe kugira asinye.
3. Abakoranye amasezerano iyo bemeranyije ko ikibazo bazagirana giturutse cyangwa gishingiye kuri ayo masezerano kizakemurwa n'abakemurampaka cyavuka akaba ari bo bagicyemura, bagatanga n'icyemezo ntabwo barengaho ngo umwe mubayagiranye aregere Urukiko.
4. Icyemezo cy'ubukempurampaka nticyafatwa nk'aho cyataye agaciro kuko cyafashwe igihe cyateganyizwe mu nyandiko y'ubutumwa cyarangiye mu gihe muri iyo nyandiko hatateganyijwe icyakorwa igihe ubukemurampaka bwaba burengeje iminsi yo gufatamo icyemezo. Ikirego nta shingiro gifite. Amagarama y'urubanza aherereye ku wajuriye. Amategeko yashingiweho: Iteka rya Minisitiri No16/012 ryo kuwa 15/05/2012 rishyiraho amabwiriza y'ubukemurampaka y'Ikigo Mpuzamahanga cy'Ubukemurampaka cya Kigali, ingingo ya 29. Nta manza zifashishijwe.

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3 Urubanza I. IMITERERE Y'URUBANZA [1] Iki kirego gikomoka ku masezerano ya Dealership Rwema Muhamahoro Pascal yagiranye na TERRACOM SARL nka "Service Provider" ku itariki ya 04/01/2006 kugirango abacururize ibicuruzwa birimo na serivisi, amatelefoni agendanwa n'amakarita yayo, amakarita ya telefoni zitagendanwa n'amakarita yayo na serivisi za Internet hirya no hino mu Rwanda. [2] TERRACOM yaje kugurishwa mu mwaka wa 2007 ariko Rwema Muhamahoro Pascal ntiyishyurwa amafaranga yari amaze gukorera, aza gushingira ku ngingo ya 5.2.6 y'amasezerano Leta y'u Rwanda yagiranye na "Lap Green networks" yari yaguze TERRACOM SP SARL iteganya ko imyenda icyo kigo cyari gifite mbere ya tariki 30/6/2007 ari Leta y'u Rwanda iyishyura, asaba RDB yabarizwagamo ubunyamabanga bushinzwe kwegurira ibigo bya Leta abikorera ku giti cyabo kumwishyura amafaranga bari bamugezemo ndetse n'indishyi ziwukomokaho birananirana, aho yaje kwitabaza inkiko maze Urukiko Rukuru rw'Ubucuruzi mu rubanza RCOM0358/08/HCC rwemeza ko habaho ihwanya myenda Rwema Muhamahoro Pascal yari afitanye na RWANDATEL SP SARL. [3] Rwema Muhamahoro Pascal ntiyanyuzwe n'icyo cyemezo akijuririra mu Rukiko rw'Ikirenga, rwemeza mu rubanza RCOMA0021/09/CS ko Rwema Muhamahoro Pascal agomba kwishyura RWANDATEL SP SARL miliyoni imwe n'ibihumbi magana inani na mirongo irindwi na kimwe n'ijana na mirongo itanu n'ane (1.871.154Frw), rutegeka RWANDATEL SP SARL kwishyura Rwema Muhamahoro Pascal miliyoni ebyiri n'ibihumbi magana abiri (2.200.000Frw) y'agaciro ka "imprimantes" na "panneaux publicitaires", ikanamusubiza EVDOS 3 hamwe na "ordinateur portable" imwe. [4] Rwema Muhamahoro Pascal

yasubirishijemo urwo rubanza ingingo nshya ashingiye kumanza z'inshinjabyaha RP0140/09/TB/NYGE na RPA0406/10/TGI/NYGE, maze ku wa 15/3/2013 Urukiko rw'Ikirenga mu rubanza RS/REV/RCOM0011/11/CS, rutegeka RWANDATEL SARL kumwishyura 8.978.846 Frw na 300.000Frw y'igihembo cya Avoka. [5] Nyuma y'uko urwo rubanza ruciwe, Rwema Muhamahoro Pascal yiyambaje Urukiko rw'Ubucuruzi ikirego cye nticyakirwa kuko Urukiko rwavuze ko abanza kwiya mbaza ubukemurampaka nk'uko biteganywa mu masezerano bagiranye na RWANDATEL SP SARL. [6] RDB na Rwema Muhamahoro Pascal bemeraniye gushyiraho ubukemurampaka. Urukiko Nkemurampaka rwafashe umwanzuro ku wa 4/12/2012, ruvuga ko ikirego cyatanze na Rwema Muhamahoro Pascal kitakiriwe kubera ko cyamaze gusuzumwa n'Inkiko zisanzwe ndetse zikanagifataho icyemezo ubu cyabaye Itegeko. [7] Rwema Muhamahoro Pascal yatanze ikirego mu Rukiko Rukuru, uhagarariye Leta nawe atanga inzitizi z'uko ikirego cyatanze na Rwema Muhamahoro Pascal kitakwagirwa kubera ko amasezerano ashingiraho, ateganya ko habanza ubukemurampaka, ko kandi niba ikirego cye ari ubujurire ku cyemezo cy'Urukiko Nkemurampaka nabwo budakwiye kwakirwa kuko icyo cyemezo kitajuririrwa nk'uko bikubiye mu masezerano nkemurampaka. Ko ruramutse rusanze cyakwagirwa, rwavuga ko nta shingiro gifite kubera ko nk'uko byemejwe n'Urukiko Nkemurampaka ikirego yatanze cyamaze gufatwaho icyemezo

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4 n'inkiko. (Exception de l'autorité de la chose jugée). Urukiko Rukuru rwemeje ko ubujurire bwa Rwema Muhamahoro Pascal bw'umwanzuro wa burundu (definitive award) bwafashwe n'Urukiko Nkemurampaka ku wa 04/12/2012 hagati ya Rwema Muhamahoro Pascal na RDB butakiriwe. [8] Nyuma y'aho Urukiko Rukuru rufatiye icyo cyemezo, Rwema Muhamahoro Pascal yakijuririyemo mu Rukiko rw'Ikirenga ku wa 29/6/2013, iburanisha rishyirwa ku wa 02/2/2016 ariko urubanza ntirwaburanishwa kuko muri icyo nteko harimo umucamanza waciye urubanza rwo gusubirishamo ingingo nshya, rwimurirwa ku wa 15/3/2016 kugira ngo inteko ihinduke. [9] Kuri uwo munsu urubanza rwaraburanishijwe, Rwema Muhamahoro Pascal yunganiye na Me Tuyishimire Jean Paul, RDB ihagarariye na Me Kayigi Léon. II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO Kumanya niba ubujurire bwa Rwema Muhamahoro Pascal ku cyemezo cy'ubukemurampaka bwaragombaga kwakirwa mu Rukiko Rukuru. [10] Rwema Muhamahoro Pascal avugaga ko Urukiko Rukuru rwahuye amasezerano abiri adafite aho ahuriye bituma ruvuga ko ayo ku wa 04/1/2006 yarangije gufatwaho icyemezo mu manza zaciye, kandi amasezerano ya mbere yagiranye na Rwandatel, yari ayo kumucururiza umuriro wa cash power arirwo rubanza baburanye rukarangira, ko urubanza aburana ubu ari urushingiyemo ku masezerano ya kabiri yo ku wa 04/1/2006 aho yabacururizaga amakarita na telefoni. [11] Avugaga ko nanone urukiko rwanze kwakira ikirego cye rushingiyemo ku ngingo ya VI y'inyandiko itanga ubutumwa yagiranye na RDB yahaga Urukiko Nkemurampaka ububasha bwo kuzaburanisha mu rwego rwa mbere n'urwa nyuma impaka zizavuka hagati yabo bombi, kandi icyo nyandiko yarayisinye atarebye akaba asanga imurenganya, ariko ko atabarwa n'ingingo ya III y'icyo nyandiko y'ubutumwa mu gace ka 7, ahanditse ko Inteko Nkemurampaka ishobora kuzaza urubanza by'agateganyo cyangwa bya burundu, kandi ko uko byagenda kose igihe kinini ntarengwa cy'imiburanishirize ntikizarenza

iminsi mirongo itatu (30) uhareye ku ishyirwaho ry'umukono ku nyandiko y'ubutumwa. [12] Akomeza avuga ko hakurikijwe ibivugwa muri iyi ngingo, ububasha bw'abakemurampaka bwarangiye ku wa 17/08/2012 kuko inyandiko y'ubutumwa yashyizweho umukono n'abo ireba bese ku wa 18/07/2012, ko nyuma y'iyi tariki, ibyakozwe byose n'urubanza baciye nta gaciro bifite, bivuze ko n'umwanzuro Urukiko Nkemurampaka rwafashe nta gaciro wahabwa kuko rwawufashe ku wa 4/12/2012 ububasha bw'abakemurampaka bwararangiye. [13] Me Tuyishimire Jean Paul avuga ko abunganira RDB batagaragaza urubanza rwaburanywe ngo bagire icyo baruvugaho. Avuga ko urukiko rwazasuzuma niba iriya minsi 30 yararenze koko uwo yunganira akaba yarenganurwa. [14] Me Kayigi avuga ko ubujurire butakwagirwa kuko imanza zabanje zaburanishije kuri ayo masezerano yo kuwa 04/1/2006. Avuga ko mu nyandiko itanga ubutumwa Rwema Muhamahoro Pascal yagiranye na RDB, banditse ko urubanza ruzaburanishwa mu minsi 30, ariko ko nta cyateganyijwe igihe urubanza rwaba rudaciwe muri iyo minsi 30. Avuga kandi ko iyo ngingo y'iminsi 30 atari yo yatesha agaciro ihame ry'uko ababuranyi aribo bihitiramo ubukemurampaka, n'uko bagena uburyo ibyemezo bizafatwa.

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5 UKO URUKIKO RUBIBONA [15] Ku byerekeye amasezerano yo ku wa 04/01/2006, Urukiko rurasanga hari urubanza RCOM0358/08/HCC aho Rwema Muhamahoro Pascal yaregeraga amasezerano yagiranye na Rwandatel yo kumucururiza cash power, muri urwo rubanza Rwandatel ikaba yatanze ikirego cyuririye ku kindi isaba nayo kwishyurwa na Rwema Muhamahoro Pascal amafaranga angana na 37.173.008Frw akomoka ku masezerano bagiranye ku wa 04/1/2006 yo kubacururiza amakarita, Urukiko rwaciye urubanza rwemeza ihwanyamwenda. [16] Urukiko rurasanga ayo masezerano yo ku wa 04/1/2006 Rwema Muhamahoro Pascal aburanisha, nkuko bimaze kuvugwa inkiko zarayashingiyeho ziyaciraho urubanza, kongera kuyagarura nanone mu bukemurampaka cyangwa mu nkiko ngo zongere ziyaburanisheho, kwaba ari ukunyuranya n'ihame ry'uko nta kugaruka ku manza zabaye itegeko, bityo ubujurire bwe kuri iyi ngingo nta shingiro bufite. [17] Ku byerekeye ibivugwa mu nyandiko y'ubutumwa yakozwe hagati ya Rwema Muhamahoro Pascal na RDB, Urukiko rurasanga ingingo yayo ya VI ivuga ko Urukiko Nkemurampaka rufite inshingano yo kuzaburanisha mu rwego rwa mbere n'urwa nyuma ibikubiye mu kiburanwa. [18] Urukiko rurasanga ubukemurampaka buri mu rwego rw'amasezerano abantu bagirana bagamije kurangiza ibibazo byabo mu buryo bwihuse batagombye kubinyuza mu nkiko, ayo masezerano akaba agomba kubahirizwa n'impane zombi nk'amasezerano yose abantu bagirana. [19] Urukiko rurasanga ibyo Rwema Muhamahoro Pascal avuga ko ingingo ya VI y'iyi nyandiko ivuga ko Urukiko Nkemurampaka rufite inshingano yo kuzaburanisha mu rwego rwa mbere n'urwa nyuma ibikubiye mu kiburanwa yagobetswemo nyuma asinya atarebye, ibyo bitahabwa ishingiro kuko atagaragaza ko yayisinyishijwe ku ngufu cyangwa ku gahato, cyangwa se ngo agaragaze ko hari izindi mbaraga zakoreshejwe kugirango ayisinye ku buryo yata agaciro kayo, akaba atanagaragaza uburyo iyo nyandiko yagobetswemo nyuma. [20] Urukiko rurasanga kuba Rwema Muhamahoro Pascal yaremeye iyo nyandiko y'ubutumwa (acte de mission) akayishyiraho umukono, agomba kubahiriza ibiyikubiyemo dore ko ariyo igenga ababuranyi nkuko biteganywa n'ingingo ya 29

y'Iteka rya Minisitiri No16/012 ryo kuwa 15/05/2012 rishyiraho amabwiriza y'ubukemurampaka y'Ikigo Mpuzamahanga cy'Ubukemurampaka cya Kigali iteganya ko: "Urukiko rw'ubukemurampaka rukora rushingiye ku nyandiko cyangwa impande zose zihari kandi rugendeye ku nyandiko rumaze kubona, inyandiko igaragaza ubutumwa ruhawe [....]". [21] Urukiko rurasanga kuba Rwema Muhamahoro Pascal yararenze ku biteganywa n'inyandiko y'ubutumwa akajuririra umwanzuro wa nyuma w'Urukiko Nkemurampaka kandi warafashwe ku rwego rwa mbere n'urwa nyuma nkuko inyandiko y'ubutumwa (acte de mission) ubwe yisinyiye ibiteganywa, yanyuranyije nayo kandi ariyo igenga ababuranyi nkuko byasobanuwe, bityo ubujurire bwe kuri iyo ngingo bukaba nta shingiro bufite. [22] Ku byerekeye ibyo Rwema Muhamahoro Pascal avuga ko kuba Urukiko Nkemurampaka rwarafashe icyemezo iminsi 30 iteganyijwe mu ngingo ya III y'inyandiko y'ubutumwa yararenze ko uwo mwanzuro nta gaciro wahabwa, Urukiko rurasanga ibyo nta shingiro bifite kuko muri iyo nyandiko itanga ubutumwa, ntacyo bateganyije mu gihe ubukemurampaka burengeje iyo minsi 30 mu guca urubanza, nta naho bateganyije ko icyo

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6 gihe icyo cyemezo cy'ubukemurampaka gihita gita agaciro, bityo ibyo bikaba bidakuraho ko icyo cyemezo cyafashwe mu rwego rwa mbere n'urwa nyuma. III. ICYEMEZO CY'URUKIKO [23] Rwemeje ko ikirego cya Rwema Muhamahoro Pascal nta shingiro gifite; [24] Rwemeje ko imikirize y'urubanza RAD0091/12/HC/KIG rwaciwe n'Urukiko Rukuru i Kigali idahindutse kuri byose, ikaba igumye; [25] Rutegetse Rwema Muhamahoro kwishyura amagarama y'urubanza.

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