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ICYEGERANYO CY'IBYEMEZO BY'INKIKO

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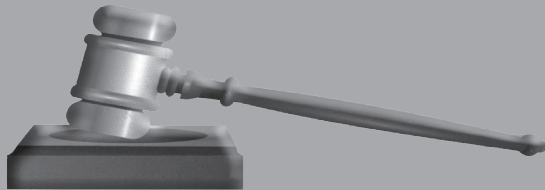
RWANDA LAW REPORTS

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Cyateguwe n'Urukiko rw'Ikirenga

Cyatewe inkunga na
Ambasade y'Ubuholandi & ICF

**ICYEGERANYO CY'IBYEMEZO
BY'INKIKO**

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ABAGIZE KOMITE Y'UBWANDITSI

**ITSINDA RY'ABANYAMATEGEKO BATEGUYE
IMANZA**

BAGABO Faustin

HAKUZIMANA Ildephonse

KABERA Jean Claude

KAGABO U. Stephanie

MUJABI K. Naphtal

MUNYENSANGA Chrysostome

MWIHOREZE Claudine

NTIHEMUKA Emmanuel

SAFARI Gahizi

UWIMANA Gisèle

KOMITE YEMEZA IMANZA

- MUGENZI Louis Marie** : Perezida wa Komite
Umucamanza mu Rukiko
rw'Ikirenga
- Prof. Dr. NGAGI M. Alphonse** : Visi perezida wa Komite
Umwarimu muri
Kaminuza y'u Rwanda
- RUTAZANA Angeline** : Umwanditsi wa Komite
Umugenzuzi w'Inkiko
- BWIZA N. Blanche** : Umucamanza mu Rukiko
Rukuru
- DUSHIMINAMA Claudine** : Umushinjacyaha ku
rwego Rw'Igihugu
- Me GAKUNZI Valery** : Avoka mu Rugaga
rw'Abavoka
- GIRANEZA Clémentine** : Umucamanza mu Rukiko
rw'Ibanze
- HABARUREMA Jean pierre** : Umushinjacyaha ku
Rwego rw'Igihugu
- Cpt. KABERUKA Jean Claude** : Umucamanza mu Rukiko
Rukuru rwa Gisirikare

- KALIWABO Charles** : Perezida w'Urukiko Rukuru
- Me KAYIHURA Didace** : Avoka mu Rugaga rw'Abavoka
- KIBUKA Jean Luc** : Umucamanza mu Rukiko Rukuru rw'Ubucuruzi
- MUREREREHE Saouda** : Umucamanza mu Rukiko Rukuru
- NYIRINKWAYA Immaculée** : Umucamanza mu Rukiko rw'Ikirenga
- RUBANGO K. Epimaque** : Intumwa ya Leta
- RUKUNDAKUVUGA F. Regis** : Umugenzuzi Mukuru w'Inkiko

IRIBURIRO

Basomyi bacu,

Tubifuriye Umwaka mushya muhire wa 2015. Nk’uko mumaze kubimenyera, icyegeranyo cy’ibyemezo by’inkiko gitangazwa n’Urwego rw’Ubucamanza rimwe mu gihembwe, tukaba rero tunejewe no kubagezaho numero ya mbere mu mwaka wa 2015.

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Nk’uko bisanzwe icyegeranyo kiboneka no ku rubuga rwa murandasi rw’urukiko rw’Ikirenga http://www.judiciary.gov.rw/en/case_law/case_law_booklets/

Tuboneyeho kandi gukomeza gushishikariza abantu bose bifashisha amategeko mu kazi kwitabira gukoresha iki cyegeranyo.

Prof. Sam RUGEGE

Perezida w’Urukiko rw’Ikirenga
Perezida w’Inama Nkuru y’Ubucamanza

IBIKUBIYE MURI IKI CYEGERANYO

Iki cyegeranyo gikubiyemo imanza zaciwe n'Urukiko rw'Ikirenga zikoreshwa hakurikijwe inyito ivugwa hasi.

INYITO

Imanza ziri muri iyi volime zikoreshwa muri ubu buryo:

[2015] 1 RLR

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Amategeko mpanabyaha – Impamvu nyoroshyacyaha zemejwe n’Urukiko rubanza – Kuba ibyo uwajuriye asaba yarabihawe mu rwego rwa mbere kandi ntagire icyo anenga ku buryo byakozwe ni impamvu ituma hatabaho guhinduka kw’icyemezo.

UBUSHINJACYAHA v. MWIZERWA.....131

Amategeko y'ubucuruzi – Inyandiko mvunjamafaranga – Chèque de voyage – Ugomba kwishyura chèque de voyage zibwe – Iyo chèque de voyage zibwe ziri mu maboko y'uwaziguze, akamenyesha (opposition) mu gihe cyateganyijwe Banki yazimugurishije (Banque intermédiaire) ko zibwe, zishyurwa na banki yazimugurishije, keretse igaragaje ko ayo mafaranga yohererejwe Banki yakoze ayo masheki (Banque émettrice).

ECOBANK v. INDIA NOVEMBER.....101

Ibarwa ry'inyungu z'ubukererwe – Inyungu zituruka ku gihombo cyatewe no kuba chèques de voyage zitarahise zishyurwa igihe zari zibwe – Zitangira kubarwa nyuma y'amasaha 48 uhereye umunsi yamenyekanishirijeho iyibwa ryazo kugeza ku munsi urubanza ruciriwe.

ECOBANK v. INDIA NOVEMBER.....101

Amategeko y'umurimo – Amasezerano y'akazi – Imiterere y'umurimo w'umukozi w'Ikigo cya Leta wasinye amasezerano y'akazi – Umukozi wa Leta wasinye amasezerano y'akazi agengwa n'itegeko ry'umurimo aho kugengwa na sitati rusange y'abakozi ba leta igihe atagaragaza inyandiko yamushyize muri uwo mwanya (acte de nomination) – Itegeko n° 13/2009 ryo kuwa 27/05/2009 rigenga umurimo mu Rwanda, ingingo ya 2.

MULINDAHABI v. EWSA.....19

Amasezerano y'akazi – Igihe cy'igerageza – Iseswa ry'amasezerano y'akazi mu gihe cy'igeregezwa – Uburenganzira bwo kwisobanura – Gusesa

amasezerano y'akazi y'umukozi uri mu gihe cy'igerageza ntibisaba kumuha integuza ariko iseswa riturutse ku ikosa umukozi atamenyeshejwe ngo aritangire ibisobanuro bitangirwa indishyi – Itegeko Nshinga rya Repuburika y'u Rwanda ryo kuwa 04 Kamena 2003 nk'uko ryujujwe kandi ryahinduwe kugeza ubu, ingingo ya 18.

MULINDAHABI v. EWSA.....19

Indishyi zijyanye no kuzamurwa mu ntera – Nta ndishyi zijyanye no kuzamurwa mu ntera umukozi yahabwa n'ubwo yaba ageze igihe cyo kuzamurwa mu ntera ariko akirukanwa atari yakora igihe gikwiye guhemberwa umushahara mushya.

KALISA v. INSTITUT POLYTECHNIQUE DE BYUMBA (IPB).....83

IMANZA Z'UBUTEGETSI

GAKWAYA v. KAMINUZA Y’U RWANDA

[Rwanda URUKIKO RW’IKIRENGA – RADA 0029/11/CS
(Mukanyundo, P.J., Rugabirwa na Hatangimbabazi, J.) 16
Gicurasi 2014]

Amategeko agenga imiburanishirize y’imanza z’ubutegetsi – Gutakamba – Igihe cyemewe cyu gutanga ikirego nyuma yugutakambira icyemezo cy’umuyobozi – Iyo habayeho gutakamba inshuro irenze imwe, itakamba rya mbere rikozwe niryo riherwaho habarwa igihe cyo gutanga ikirego, kandi ntibiri ngombwa ko utakamba ategereza igisubizo cyeruye cy’umuyobozi kugira ngo abone gutanga ikirego cye, kuko mu gihe adasubijwe hagashira igihe giteganyijwe n’itegeko bifatwa ko ugutakamba kwe kutemewe – Itegeko n° 18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y’imanza z’imbenezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi, ingingo 94 n’iya 339.

Incamake y’ikibazo: Gakwaya yareze Kaminuza y’u Rwanda mu Rukiko Rukuru, urugereko rwa Nyanza asaba ko yasubizwa ku kazi k’ubwarimu yakoraga ndetse agahabwa n’ibyo afitiye uburenganzira byose yavukijwe no kumwirukana mu buryo bunyuranyije n’amategeko hiyongereyeho indishyi zinyuranye.

Kaminuza y’u Rwanda yatanze inzitizi ivuga ko ikirego cya Gakwaya kitakwagirwa kubera ko nyuma y’itakamba yatanze ikirego mu Rukiko akererewe kuko igihe giteganywa n’Itegeko n° 18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y’imanza z’imbenezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi cyari cyararenze; Urukiko Rukuru rwemeza ko ikirego cye kitakwacyirwa.

Gakwaya yajuririye Urukiko rw'Ikirenga avuga ko Urukiko Rukuru rwagombaga kwakira ikirego cye kuko atakererewe kururegera nyuma yo gutakambira Kaminuza y'u Rwanda, kugira ngo Kaminuza y'u Rwanda imusubize ku kazi inamuhembye ibyoye uburenganzira byose birimo imishahara itamuhembye igihe yamwirukanaga hiyongereyeho indishyi zinyuranye.

Incamake y'icyemezo: Iyo habayeho gutakamba inshuro irenze imwe, itakamba rya mbere rikozwe niryo rihuraho habarwa igihe cyo gutanga ikirego, kandi ntibiri ngombwa ko utakamba ategereza igisubizo cyeruye cy'umuyobozi kugira ngo abone gutanga ikirego cye, kuko mu gihe adasubijwe hagashira igihe giteganyijwe n'itegeko bifatwa ko ugutakamba kwe kutemewe; bityo ikirego cy'urega yagitanze akererewe kikaba kidakwiye kwakirwa.

**Ubujurire nta shingiro bufite.
Amagarama y'urubanza aherereye ku wajuriye.**

Amategeko yashingiweho:

Itegeko n° 18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo 94 n'ya 339

Imanza zifashishijwe:

KIST v. Hashakimana, RADA 0001/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 27/04/2012.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Gakwaya Emmanuel yareze Kaminuza y'u Rwanda mu Rukiko Rukuru, Urugereko rwa Nyanza, asaba ko yamusubiza ku kazi k'ubwarimu yakoraga muri iyo Kaminuza ikanamuha n'ibyo afitiye uburenganzira byose yamuvukije igihe yamwirukanaga ku kazi mu buryo bunyuranyije n'amategeko hiyongereyeho n'indishyi zinyuranye.

[2] Iburanisha ry'urubanza ritangiye, uhagarariye Kaminuza y'u Rwanda yatanze inzitizi yo kutakira ikirego cya Gakwaya Emmanuel kubera ko nyuma y'itakamba, yaregeye Urukiko Rukuru igihe cy'amezi atandatu (6) giteganywa n'ingingo ya 339 y'Itegeko n° 18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu cyararenze, urwo Rukiko rwacye urubanza, rwemeza ko ikirego cya Gakwaya Emmanuel kitakiriwe.

[3] Urwo Rukiko rwasobanuye ko Gakwaya Emmanuel yatakambiye Kaminuza y'u Rwanda kuwa 25/09/2008, ntiyamuha igisubizo, ariko ko yaruregeye kuwa 22/09/2010 hashize hafi imyaka ibiri, ko ahubwo yagombaga kururegera bitarenze kuwa 24/05/2009, bityo ko ikirego cye kitagomba kwakirwa. Urwo Rukiko rwasobanuye kandi ko ibaruwa ya Gakwaya Emmanuel yo kuwa 07/06/2010 itafatwa nk'itakamba kuko yanditswemo ko Kaminuza y'u Rwanda igomba kumugezaho imishahara n'indishyi yayisabaga, itabikora akazitabaza ubutabera kugira ngo bumurenge.

[4] Gakwaya Emmanuel yajuririye Urukiko rw'Ikirenga avuga ko Urukiko Rukuru rwagombaga kwakira ikirego cye kuko atakererewe kururegera nyuma y'itakamba kugira ngo Kaminuza y'u Rwanda imusubize ku kazi inamuhe ibyo afitiye uburenganzira byose birimo imishahara itamuhembye igihe yamwirukanaga hiyongereyeho indishyi zinyuranye.

[5] Urubanza rwaburanishijwe mu ruhamwe kuwa 15/04/2014, Gakwaya Emmanuel yunganiwe na Me Mboniyimpaye Elias, naho Kaminuza y'u Rwanda ihagarariwe na Me Ntaganda Félix.

II. IKIBAZO KIRI MU RUBANZA N'ISESENGURWA RYACYO

Kumenya niba Urukiko Rukuru rwaribeshye mu kwemeza ko nyuma yo gutakamba Gakwaya Emmanuel yaruregeye akererewe.

[6] Gakwaya Emmanuel n'umwunganira bavuga ko Urukiko Rukuru rutagombaga kwemeza ko yatakambye kuwa 25/09/2008 kubera ko icyo gihe yari atarabona icyemezo cy'Ubushinjacyaha cyashyinguye dosiye ye by'agateganyo kuko yari agikurikiranyweho n'Ubushinjacyaha icyaha cyo kwihesha impamyabumenyi adakwiriye, ko kandi atagombaga gutakamba icyo gihe kuko iburanisha ry'ikirego cy'ikurikiranacyaha rihagarika iry'ikirego cy'imbonezamubano (Le criminel tient le civil en état), ko ahubwo yabonye icyo cyemezo kuwa 27/05/2010, atakambira Kaminuza y'u Rwanda kuwa 07/06/2010 kubera ko icyo cyemezo cyagaragaje ko atakoze icyaha yari akurikiranyweho.

[7] Umwunganira avuga kandi ko urwo Rukiko rutagombaga gushingira ku ngingo ya 339 y'Itegeko n° 18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsiko ngo rwemeze ko Gakwaya Emmanuel yaruregeye akerekerewe kuko yagombaga kubanza gutakambira Komisiyo y'Abakozi ba Leta iteganywa n'ingingo ya 19 y'Itegeko n° 22/2002 ryo kuwa 09/07/2002 rishyiraho Sitati Rusange igenga Abakozi ba Leta kubera ko Kaminuza y'u Rwanda yihaye ububasha bwo kumufatira igihano cyo kumwirukana ku kazi cyo ku rwego rwa kabiri itabanje kubimenyesha iyo Komisiyo.

[8] Uburanira Kaminuza y'u Rwanda avuga ko nyuma yo gutakamba, Gakwaya Emmanuel yaregeye Urukiko Rukuru azezi atandatu (6) ateganywa n'ingingo ya 339 y'Itegeko n° 18/2004 ryavuzwe haruguru yararenze kuko yamwirukanye ku kazi kuwa 09/05/2007, yandika ayitakambira kuwa 25/09/2008 ntiyabona igisubizo, ariko ko yaregeye urwo Rukiko akerekerewe kuwa 22/09/2010.

[9] Avuga kandi ko ibyo Gakwaya Emmanuel aburanisha by'uko nyuma yo gutakambira Kaminuza y'u Rwanda atagombaga guhita ayirega mu Rukiko Rukuru atari yabona icyemezo cy'Ubushinjacyaha gishyingura dosiye ye by'agateganyo nta shingiro bifite, kuko iburanisha ry'ikirego cy'ikurikiranacyaha ku cyaha cy'inyandiko-mpimbano yari akurikiranyweho ritandukanye n'iburanisha ry'ikirego cy'imihanire y'amakosa yaba yarakoze mu kazi ke (L'action pénale est indépendante de l'action disciplinaire).

UKO URUKIKO RUBIBONA

[10] Ingingo ya 339 y'Itegeko n° 18/2004 ryo kuwa 20/06/2004 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu ryakurikizwaga igihe GAKWAYA Emmanuel yirukanwaga, iteganya ko "Ikirego gisaba gukuraho icyemezo cy'umutegetsu cyakirwa gusa iyo cyerekeye icyemezo cy'umutegetsu cyeruye cyangwa kiteruye. Mbere yo gutanga ikirego, unenga icyemezo cy'umutegetsu agomba kubanza gutakambira umutegetsu wagifashe. Umutegetsu utakambiwe, agomba gusubiza ubwo butakambe mu gihe cy'amezi abiri (2) abarwa uherye umunsi yabuboneyeho. Iyo adasubije, ubutakambe bufatwa ko atabwemeye. Mu gihe uwatakambye atishimiye igisubizo yahawe, afite igihe cy'amezi atandatu (6) cyo kuregera Urukiko gitangira kubarwa kuva ku munsi yabuboneyeho igisubizo, yaba nta gisubizo yabonye, icyo gihe kigatangira kubarwa nyuma y'amezi abiri avugwa mu gika kibanziriza iki".

[11] Naho ingingo ya 94 y'Itegeko rimaze kuvugwa haruguru, ikavuga ko "Impamvu ituma ikirego kitakirwa ni ingingo yose isaba kutakira ikirego cy'umuburanyi hatinjiwe mu iremezo ryacyo nko kurenza igihe cyo kurega".

[12] Ku birebana n'uru rubanza, dosiye igaragaza ko Ubuyobozi bwa Kaminuza y'u Rwanda bwandikiye Gakwaya Emmanuel ibaruwa yo kuwa 09/05/2007 bumumenyesha ko bumwirukanye ku kazi kuko Inama Nyobozi yabwo yateranye kuwa 30/04/2007 yasanze impamyabumenyi ya "Master's n'iya PHD degrees" yakoresheje mu gusaba kuzamurwa mu ntera nta gaciro zifite.

[13] Gakwaya Emmanuel yandikiye ubwo Buyobozi ibaruwa yo kuwa 25/09/2008 asaba ko bwamusubiza uburenganzira bwe bwose burimo imishahara n'ibindi afitiye uburenganzira bwamuvukije igihe bwamwirukanaga kuko urubanza RPA 0160/07/DP/NYA rwaciwe n'Urukiko Rukuru kuwa 02/07/2007, rwagaragaje ko atakoze icyaha cy'inyandiko-mpimbano cyatumye ahagarikwa ku kazi, anasaba ko bwavana cyangwa bwakosora ibyo Inama Nyobozi yabwo yo kuwa 30/04/2007 yamwanditseho mu myanzuro yayo kuko bimuhamya icyaha atakoze.

[14] Gakwaya Emmanuel yandikiye kandi ubwo Buyobozi ibaruwa yo kuwa 07/06/2010, abumenyesha icyemezo cy'Ubushinjacyaha cyo kuwa 27/05/2010 kigaragaza ko dosiye ye yashyinguwe by'agateganyo, anasaba ubwo Buyobozi ko bwamwishyura imishahara ye y'amezi 38 butamuhembye hiyongereyeho n'indishyi, ko nibutabimuha, aziyambaza ubutabera mu gihe cy'iminsi itanu (5) kugira ngo bumurenganure.

[15] Kuwa 22/09/2010, Gakwaya Emmanuel yareze Ubuyobozi bwa Kaminuza y'u Rwanda mu Rukiko Rukuru, Urugereko rwa Nyanza nk'uko bigaragazwa n'inyandiko ye itanga ikirego iri muri dosiye abusaba kumusubiza ku kazi no kumuha indishyi zinyuranye.

[16] Urukiko rurasanga ibaruwa yo kuwa 25/09/2008, Gakwaya Emmanuel yandikiye Ubuyobozi bwa Kaminuza y'u Rwanda ariyo ikwiye gufatwa nk'itakamba kuko aricyo gihe yabwandikiye ibaruwa abusaba ko bwavanaho cyangwa bwakosora icyemezo bwamufatiye cyo kumwirukana ku kazi kugira ngo bukamusubizeho no kumuha n'ibindi byose afitiye uburenganzira yavukijwe igihe bwamwirukanaga.

[17] Urukiko rurasanga ibaruwa yo kuwa 07/06/2010, Gakwaya Emmanuel yandikiye Ubuyobozi bwa Kaminuza y'u Rwanda itafatwa nk'itakamba, ko ahubwo yafatwa nk'iyabumenyeshaga icyemezo cy'Ubushinjacyaha cyo kuwa 27/05/2010 cyashyinguye dosiye ye by'agateganyo, ko kandi yafatwa nk'integuza yabuhaga yuko nibutamwishyura imishahara ye y'amezi 38 butamuhembye n'ibindi afitiye uburenganzira, aziyambaza ubutabera mu gihe cy'iminsi itanu (5) kugira ngo bumurenganure.

[18] Ibyo bihujwe kandi n'ibyemejwe n'Urukiko rw'Ikirenga mu rubanza RADA 0001/11/CS rwaciwe kuwa 27/04/2012¹, aho rwasobanuye ko hatabaho gutakambira umutegetsu wafashe icyemezo inshuro nyinshi, ko ahubwo itakamba rya mbere rikozwe ariryo riharwaho habarwa igihe cyo gutanga ikirego, ko kandi bitari ngombwa ko utakamba ategereza igisubizo cyeruye cy'umuyobozi kugira ngo abone gutanga ikirego cye, kuko mu gihe adasubijwe hagashira amezi (2), bifatwa nk'aho yahakaniwe, akaba afite amezi atandatu (6) kugira ngo aregere urukiko.

[19] Urukiko rurasanga rero kuba Ubuyobozi bwa Kaminuza y'u Rwanda bwarandikiye Gakwaya Emmanuel bumumenyeshaga ko yirukanwe ku kazi kuwa 09/05/2007, akabutakambira kuwa 25/09/2008, bukakira ibaruwa ye ibutakambira kuwa 26/09/2008, ariko ntibumuhe igisubizo, nyamara Gakwaya Emmanuel akaba yarabureze mu Rukiko Rukuru kuwa 22/09/2010, bigaragara ko yabureze muri uru Rukiko igihe cy'amezi atandatu (6) cyateganywaga n'ingingo ya 339 y'Itegeko n° 18/2004 ryo kuwa 20/06/2004 ryavuzwe haruguru

¹KIST v. Hashakimana Anastase RADA 0001/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 27/04/2012,.

cyararenze, kuko umunsi wa nyuma yagombaga kuburega ari kuwa 25/05/2009, bityo ikirego cye kikaba kitagomba kwakirwa hakurikijwe ibiteganywa n'ingingo ya 94 y'Itegeko ryavuzwe haruguru

III. ICYEMEZO CY'URUKIKO

[20] Rwemeje ko ubujurire bwa Gakwaya Emmanuel nta shingiro bufite;

[21] Rwemeje ko imikirize y'urubanza RAD 0016/10/HC/NYA rwaciwe n'Urukiko Rukuru, Urugereko rwa Nyanza, kuwa 15/07/2011 idahindutse;

[22] Rutegetse Gakwaya Emmanuel gutanga amagarama y'uru rubanza angana na 50.500 Frw habariwemo n'ayo yaciwe mu Rukiko Rukuru rw'Ubucuruzi, atayatanga mu gihe cy'iminsi umunani, ayo mafaranga akavanwa mu bye ku ngufu za Leta.

KANAMUGIRE v. UMUJYI WA KIGALI N'UNDI

[Rwanda URUKIKO RW'IKIRENGA – RADA 0001/13/CS
(Mugenzi, P.J., Munyangeri na Gakwaya, J.) 15 Gicurasi 2013]

Amategeko agenga imiburanishirize y'imanza z'ubutegetsi – Kutubahiriza ibyategetswe mu rubanza – Uregwa mu rubanza ruregwamo Urwego rw'ubutegetsi bwa Leta rutangije ibyategetswe n'urubanza – Haregwa umuyobozi warwo kuko, ku bw'amategeko, ariwe uhamagarwa mu Rukiko mu izina ryarwo – Itegeko n° 21/2012 ryo kuwa 14/04/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 31 – Itegeko n° 10/2006 ryo kuwa 3/03/2006 rigena imiterere, imitunganyirize n'imikorere y'umujyi wa Kigali, ingingo ya 73.

Amategeko agenga imiburanishirize y'imanza z'ubutegetsi – Ibihano byo kwanga kubahiriza ibyategetswe mu rubanza – Iyo impamvu zatumye umuyobozi atubahiriza ibihe byo kurangiza ibyategetswe mu rubanza zifite ishingiro, ahabwa igihe ntarengwa cyo kuba yabyubahirije, mbere y'uko hategekwa ibihano – Itegeko n° 21/2012 ryo kuwa 14/04/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 347 n'iya 348.

Incamake y'ikibazo: Kanamugire yaregeye Urukiko rw'Ikirenga asaba ko Umujyi wa Kigali n'Umuyobozi wawo basobanuzwa impamvu urubanza RADA 0046/12/CS rutegeka kumwishyura indishyi z'ibikorwa yimuwemo rutarangizwa kandi gasaba ko bahatirwa kururangiza.

Umujyi wa Kigali uvuga ko gutinda kwishyura byatewe n'imishyikirano itarabashije kurangira vuba hagati y'abo na RSSB yasabwaga kumva ko ariyo igomba kumwishyura kuko ariyo yahawe ubutaka. Naho Umuyobozi wawo yiregura avuga ko atari we wari ukwiye kuregwa kuko adashinzwe gucunga umutungo w'Umujyi wa Kigali no kurangiza imanza, ahubwo bishinzwe Umunyamabanga Nshingwabikorwa akaba riwe ugomba guhamagarwa.

Incamake y'icyemezo: 1. Ku birebana n'ikibazo cyo kurangiza ibyategetswe n'urubanza, ntiharegwa mu Rukiko Umunyamabanga Nshingwabikorwa w'Umujyi wa Kigali ahubwo haregwa umuyobozi wawo kuko, ku bw'amategeko, ariwe uhamagarwa mu Rukiko mu izina ryawo.

2. Iyo impamvu zatumye umuyobozi atubahiriza ibihe byo kurangiza ibyategetswe mu rubanza zifite ishingiro, ahabwa igihe ntarengwa cyo kuba yabyubahirije, mbere y'uko habasha gutegekwa ibihano. Abaregwa batanze impamvu zumvikana zituma hatangwa igihe ntarengwa cy'amezi abiri.

Ikirego gifite ishingiro.

**Abaregwa bategetswe kurangiza urubanza bitarenze kuwa
16/11/2013.**

Amategeko yashingiweho:

Itegeko n° 21/2012 ryo kuwa 14/04/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu, ngingo ya 31, 347 n'ya 348.

Itegeko n° 10/2006 ryo kuwa 3/03/2006 rigena imiterere, imitunganyirize n'imikorere y'umujyi wa Kigali, ingingo ya 73.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Nyuma y'urubanza RAD A 0046/12/CS rwaciwe n'Urukiko rw'Ikirenga ku wa 16/11/2012, rugategeka Umujyi wa Kigali kwishyura Kanamugire Rwaka Laurent amafaranga 86.186.205 y'indishyi ku mutungo yimuwemo, Kanamugire yakomeje gusaba Umujyi wa Kigali ko warangiza urwo rubanza ukamwishyura, ariko ntibishoboke kuko wamusubizaga ko ukigirana imishyikirano n'ikigo RSSB cyahawe ubutaka kugirango kube cyatanga ayo mafaranga.

[2] Kanamugire yaregeye Urukiko rw'Ikirenga asaba ko Umujyi wa Kigali n'Umuyobozi wawo basobanuzwa impamvu urubanza RAD A 0046/12/CS rutarangizwa, urubanza ruburanishwa ku wa 15/10/2013, Kanamugire yunganiwe na Me Mutembe Protais, Umujyi wa Kigali uburanirwa n'Intumwa Nkuru ya Leta yungirije, Me Sebazungu Alphonse, Umuyobozi w'Umujyi wa Kigali, Ndayisaba Fideli aburanirwa na Me Rutabingwa Athanase.

II. IKIBAZO CYASUZUMWE MU IBURANISHA

Kumenya impamvu Umujyi wa Kigali utarangiza urubanza Kanamugire yawutsindiyemo.

[3] Kanamugire avuga ko hashize igihe kirekire asaba Umujyi wa Kigali kumwishyura indishyi z'ibikorwa yimuwemo nk'uko byategetswe n'Urukiko rw'Ikirenga kuwa 16/11/2012, ariko akaba atishyurwa, agasaba rero ko hashingiwe ku ngingo za 347 na 348 z'Itegeko n° 21/2012 ryo kuwa 14/04/2012 ryerekeye imiburanishirize y'imanza z'imbenezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, Urukiko rwasobanuzwa impamvu urwo rubanza rutarangizwa, byaba ngombwa Umujyi wa Kigali n'Umuyobozi wawo bagahatirwa kururangiza.

[4] Uburanira Umujyi wa Kigali avuga ko gutinda kwishyura Kanamugire byatewe n'imishyikirano itarabashije kurangira vuba hagati y'Umujyi wa Kigali na RSSB yasabwaga kwumva ko mu by'ukuri ariyo igomba gutanga amafaranga kuko ariyo yahawe ubutaka bwakuwemo Kanamugire. Yemereye Urukiko ko mu gihe kitarenze amezi abiri ikibazo kizaba cyakemutse Kanamugire akishyurwa.

[5] Uburanira Umuyobozi w'Umujyi wa Kigali avuga ko uwo Muyobozi atari we wari ukwiye kuregwa kuko atafatwa nk'uwanze kwishyura Kanamugire mu gihe adashinzwe gucunga umutungo w'Umujyi wa Kigali no kurangiza imanza, ahubwo bishinzwe Umunyamabanga Nshingwabikorwa, naho uburanira Kanamugire agasubiza ko iyo ngingo idafite ishingiro kuko ikigo gifite ubuzimagatozi gihagararirwa n'umuyobozi wacyo.

[6] Uburanira Umuyobozi w'Umujyi wa Kigali avuga ko igisobanuro atanze haruguru kiramutse kitemewe, nawe asaba ko hatangwa igihe cy'amezi abiri kugira ngo Kanamugire abe yishyuwe.

[7] Urukiko rurasanga, ku kibazo cyo kurangiza ibyategetswe n'urubanza, hataregwa mu Rukiko Umunyamabanga Nshingwabikorwa w'Umujyi wa Kigali nk'uko uburanira Umuyobozi wawo abivuga, ahubwo ari uwo muyobozi, kuko, ku bw'amategeko, ariwe uhamagarwa mu Rukiko mu izina ry'Umujyi, nk'uko biteganywa n'ingingo ya 31 y'Itegeko n° 21/2012 ryavuzwe haruguru, n'ingingo ya 73 y'Itegeko n° 10 ryo kuwa 03/03/2006 rigena imiterere, imitunganyirize n'imikorere y'Umujyi wa Kigali.

[8] Urukiko, rushingiye ku ngingo ya 347 y'itegeko n° 21/2012 ryavuzwe haruguru, rurasanga Umujyi wa Kigali waragombaga kwishyura Kanamugire amafaranga yatsindiye bitarenze amezi atandatu nyuma y'imenyeshwa ry'urubanza, nyamara hakaba hashize umwaka wose atishyuwe.

[9] Ingingo ya 348 y'iryo tegeko iteganya mu gika cyayo cya kabiri, ko iyo impamvu zatumye umuyobozi atubahiriza ibihe byo kurangiza ibyategetswe mu rubanza zifite ishingiro, ahabwa igihe ntarengwa cyo kuba yabyubahirije, mbere y'uko habasha gutegekwa ibihano biteganywa mu gika cya gatatu cy'iyi ngingo, aramutse atubahirije ibihe yahawe.

[10] Urukiko rurasanga, ibisobanuro Umujyi wa Kigali n'Umuyobozi wawo batanga ku mpamvu zo kuba Kanamugire yaratinze kwishyurwa kubera imishyikirano yari igikorwa kuri icyo kibazo kandi Kanamugire akaba yaragiye ayimenyeshwa, bigize impamvu zumvikana zituma hatangwa igihe ntarengwa cy'amezi abiri nk'uko abaregwa babyisabira na Kanamugire akaba abyemera.

III. ICYEMEZO CY'URUKIKO

[11] Rwemeje ko ikirego cya Kanamugire gifite ishingiro;

[12] Rutegetse Umujyi wa Kigali n'Umuyobozi wawo kuba bubahirije, bitarenze kuwa 15/12/2013, ibyategetswe mu rubanza RADA 0046/12/CS rwo ku wa 16/11/2012, bijyanye no kwishyura Kanamugire indishyi yatsindiye.

MULINDAHABI v. EWSA

[Rwanda URUKIKO RW'IKIRENGA – RADA0015/13/CS
(Kanyange, P.J., Mukandamage na Rugabirwa, J.) 08
Ugushyingo, 2013]

Amategeko y'umurimo – Amasezerano y'akazi – Imiterere y'umurimo w'umukozi w'ikigo cya Leta wasinye amasezerano y'akazi – Umukozi wa Leta wasinye amasezerano y'akazi agengwa n'itegeko ry'umurimo aho kugengwa na sitati rusange y'abakozi ba leta igihe atagaragaza inyandiko yamushyize muri uwo mwanya (acte de nomination) – Itegeko n° 13/2009 ryo kuwa 27/05/2009 rigenga umurimo mu Rwanda, ingingo ya 2.

Amategeko y'umurimo – Amasezerano y'akazi – Igihe cy'igerageza – Iseswa ry'amasezerano y'akazi mu gihe cy'igerezewa – Uburenganzira bwo kwisobanura – Gusesa amasezerano y'akazi y'umukozi uri mu gihe cy'igerageza ntibisaba kumuha integuza ariko iseswa riturutse ku ikosa umukozi atamenyeshejwe ngo aritangire ibisobanuro bitangirwa indishyi – Itegeko Nshinga rya Repuburika y'u Rwanda ryo kuwa 04 Kamena 2003 nk'uko ryujujwe kandi ryahinduwe kugeza ubu, ingingo ya 18.

Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka – Umuburanyi agomba kugaragariza Urukiko imirimo yakozwe n'Avoka asabira indishyi.

Incamake y'ikibazo: Mulindahabi yagiranye amasezerano y'akazi na RECO RWASCO (yahindutse EWSA) hakaba hari

hakubiyemo amezi atandatu (6) y'igeragezwa ari nacyo yaje kwirukanwamo.

Yareze EWSA mu Rukiko Rukuru avuga ko yirukanywe mu buryo bunyuranyije n'amategeko anabisabira indishyi zinyuranye. Uru Rukiko rwemeje ko yirukanywe bidakurikije amategeko kuko atamenyeshejwe amakosa yaba yarakoze kugira ngo ayisobanureho nk'uko biteganywa n'itegeko rishyiraho sitati rusange igenga abakozi ba Leta. Rwemeje kandi ko n'ubwo yasinye amasezerano y'igerageza bitahabwa agaciro kuko EWSA ari ikigo cya Leta nk'uko bigaragara mu masezerano akaba agegwa na sitati aho kugegwa n'amategeko y'umurimo, maze runemeza ko agomba guhabwa indishyi z'akababaro z'uko yavukijwe akazi.

Ababuranyi bombi bajuririye icyo cyemezo mu Rukiko rw'Ikirenga, EWSA ivuga ko Urukiko Rukuru rwirengagije ibyo impade zombi zari zumvikanyeho rukavuga ko agengwa na Sitati rusange igenga abakozi ba Leta kandi agengwa n'amasezerano ari byo byatumye EWSA igaragara nk'aho yakoze amakosa, naho Mulindahabi akavuga ko habayeho kwivuguruza mu mikirize y'urubanza ko kandi n'indishyi yahawe ari nke, ntacyo Urukiko rubanza rwazishingiyeho.

Incamake y'icyemezo: 1. Umukozi wa Leta wasinye amasezerano y'akazi agengwa n'itegeko ry'umurimo aho kugengwa na sitati rusange y'abakozi ba leta igihe atagaragaza inyandiko yamushyize mu bakozi ba Leta (acte de nomination).

2. Gusesa amasezerano y'akazi y'umukozi uri mu gihe cy'igerageza ntibisaba kumuha integuza ariko iseswa riturutse ku ikosa umukozi atamenyeshejwe ngo aritangire ibisobanuro ritangirwa indishyi.

3. Iyo umukozi ukiri mu igeragezwa yirukanywe ku mpamvu irimo iy'imikorere, Urukiko ntirwasuzuma ibyerekeye isubizwa mu kazi kwe.
4. Igihe umuburanyi usaba igihembo cy'Avoka atagaragariza Urukiko imirimo yakozwe n'Avoka ntaho rwashingira rumugenera ayo mafaranga.

**Ubujurire bwa EWSA bufite ishingiro kuri bimwe.
Ubujurire bwa Mulindahabi nta shingiro bufite.
Amagarama y'urubanza aherereye ku baburanyi bombi.**

Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo kuwa 04 kamena 2003 nk'uko ryujujwe kandi ryahinduwe kugeza ubu, ingingo ya 18.

Itegeko n° 13/2009 ryo kuwa 27/05/2009 rigenga umurimo mu Rwanda, ingingo ya 2, 19 n'ya 27.

Itegeko n° 45/2011 ryo kuwa 25/11/2011 rigenga amasezerano, ingingo ya 64.

Nta manza zifashishijwe.

Ibitekerezo by'abahanga:

Jean Pélissier, Alain Supiot, Antoine Jeammaud, *Droit du travail*, 2e édition, p.365.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Mulindahabi yakoranye amasezerano y'akazi na RECO RWASCO (yahindutse EWSA) kuwa 17/11/2009, yirukanwa kuwa 13/04/2010, EWSA ikavuga ko yari umukozi ugengwa n'amasezerano ko kandi yirukanwe akiri mu gihe cy'igeragezwa, naho Mulindahabi akavuga ko yahawe akazi mu nzira zateganyijwe na sitati y'abakozi ba Leta, ko rero nawe yagengwaga n'iyi sitati.

[2] Mulindahabi yaregeye Urukiko Rukuru ikirego cyasobanuwe haruguru, mu rubanza rwacye rwemeza ko icyo kirego gifite ishingiro, rutegeka EWSA kumwishyura 6.000.000 Frw z'igihombo yatejwe no kwirukanwa akabura icyo yinjiza, 2.000.000 Frw y'indishyi z'akababaro z'uko yasebye na 200.000 Frw y'ikurikiranarubanza.

[3] Mu gufata icyo cyemezo, Urukiko rwabishingiye ko n'ubwo Mulindahabi yasinye amasezerano ateganya igeragezwa, ayo masezerano atahabwa agaciro kuko EWSA ari ikigo cya Leta, kandi hashingiwe ku ngingo ya 5 n'iya 6 z'itegeko n° 22/2002 ryo kuwa 9/7/2002 rishyiraho sitati igenga abakozi ba Leta no ku miterere y'ikigo cya EWSA, gifite abakozi bashinzwe kukiyobora barimo na Mulindahabi kuko yari "Head of planning and strategy section" nk'uko amasezerano ye y'akazi abigaragaza, akaba rero yari umu "sous statut", aho kuba umu "sous contrat".

[4] Ku birebana n'uburyo yirukanwemo, Urukiko rwasanze hatarubahirijwe ibiteganywa n'ingingo za 90 na 94 z'itegeko n°

22/2002 ryo kuwa 9/7/2002 ryavuzwe haruguru, kuko mbere yo kumwirukana, EWSA itabanje kumumenyesha amakosa yakoze kugira ngo ayisobanureho, cyangwa ngo imugezeho umushinga w'igihano yagombaga kumufatira kugira ngo atange ibisobanuro. Urukiko rwasanze kandi Mulindahabi yaragombaga gusubizwa ku kazi kuko icyemezo kimwirukana cyafashwe mu buryo bunyuranije n'amategeko, ko ariko mu gihe umwanya we wamaze gutangwa kandi nta kigaragaza ko hari undi ujya kureshya nawo muri "organigramme", yahabwa indishyi z'uko yavukijwe akazi aho kuba imishahara avuga ko atahembwe kuko kuva yirukanwa atakoraga.

[5] Rwasobanuye kandi ko Mulindahabi agomba guhabwa indishyi z'akababaro kuko bamuteje urubwa akareganywa, asezererwa ku kazi hashingiwe ku makosa atabanje kugaragazwa ko yakozwe, bikaba byaramuteye akababaro.

[6] EWSA yajuririye urwo rubanza mu Rukiko rw'Ikirenga ivuga ko Urukiko rwemeje ko Mulindahabi yagengwaga na sitati y'abakozi ba Leta kandi nyamara yari yarasinye amasezerano na RECO RWASCO (yahindutse EWSA) kuwa 17/11/2009 ko kandi n'ikirego yatanze gishingiye kuri ayo masezerano avuga ko atubahirijwe, bityo akaba nta ndishyi zagombaga gucibwa EWSA kuko nta kosa yakoze.

[7] Mulindahabi nawe yarajuriye avuga ko habayeho kwivuguruza mu mikirize y'urubanza kuko mu mwanya umwe Urukiko rwavuze ko yakagombye gusubizwa ku kazi, mu wundi mwanya ruvuga ko atagasubizwaho kuko umwanya utagihari. Avuga kandi ko Urukiko rwamugeneye indishyi za 6.000.000 Frw ntacyo rushingiyeho ko kandi ari nke, ko n'indishyi z'akababaro hamwe n'amafaranga y'ikurikiranarubanza

yagenewe ari bike cyane. Na none kandi ngo ntacyo Urukiko rwavuze ku mafaranga 200.000 yahaye avoka.

[8] Urubanza rwaburanishijwe mu ruhame kuwa 02/07/2013 no kuwa 01/10/2013, EWSA ihagarariwe na Me Rusanganwa Jean Bosco, Mulindahabi yunganiwe na Me Habiyambere Aphrodis na Me Gasasira J. Claude.

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO.

UBUJURIRE BWA EWSA

Kumenya niba harabayeho kwibeshya mu kwemeza ko Mulindahabi yagengwaga na sitati y'abakozi ba Leta.

[9] Uburanira EWSA avuga ko Urukiko Rukuru rwemeje ko Mulindahabi yasinye amasezerano y'akazi ariko rubirengaho ruhindura ibyo impande zombi zari zumvikanye, rwemeza ko yagengwaga na sitati y'abakozi ba Leta, rubiheraho rwemeza ko EWSA yakoze amakosa mu kumwirukana kandi nyamara haragombaga gukurikizwa ayo masezerano yateganyaga ko umuntu ashobora kwirukanwa nta nteguza, ko no mu kirego Mulindahabi yatanze yashingiye kuri ayo masezerano kuko avuga ko yirukanwe atubahirijwe.

[10] Avuga kandi ko imanza zashingiweho mu ikiza ry'urubanza rwajuririwe zitandukanye n'urubanza rwa Mulindahabi kuko abareze muri izo manza batari mu igeragezwa nka Mulindahabi, n'ikiburanwa mu rubanza rwajuririwe kikaba gitandukanye n'icyaburanwe muri izo manza kuko hasabwaga ivanwaho ry'ibyemezo.

[11] Mulindahabi n’abamwunganira bavuga ko kugira ngo amasezerano ahabwe agaciro ari uko aba akurikije amategeko nk’uko byategenywaga n’ingingo ya 33 CCLIII yakurikizwaga igihe yirukanwaga hamwe n’ingingo ya 64 y’itegeko n° 45/2011 ryo kuwa 25/11/2011 rigenga amasezerano, ko igihe yahabwaga akazi, EWSA yari yaramaze gutanga itangazo ku rubuga rwayo rwa “internet” ivuga ko itanga akazi ikurikije Iteka rya Perezida n° 37/01 ryo kuwa 30/08/2004 ryashyiraga mu bikorwa itegeko n° 22/2002 ryo kuwa 09/07/2002 rishyiraho sitati y’abakozi ba Leta, ko rero abakozi bashyizwe mu kazi mu nzira zateganywaga n’iryo Teka baba bagengwa na sitati y’abakozi ba Leta, ko amasezerano yasinyishijwe binyuranije n’amategeko agomba guteshwa agaciro.

[12] Bavuga kandi ko ikindi kigaragaza ko yagengwaga na sitati y’abakozi ba Leta ari uko yahawe umwanya uteganyijwe muri “cadre organique” kandi ahembwa amafaranga aturuka ku mutungo wa Leta. Ku birebana n’izindi manza zashingiweho, avuga ko ikiburanwa ari kimwe n’icyo mu rubanza rwe kuko kuba yararegeye ko yirukanwe nta mpamvu, bivuga ko yasabaga kvanaho icyemezo kimwirukana.

[13] Bakomeza bavuga ko kuba Mulindahabi yarasinye amasezerano adakurikije amategeko biturutse ku ikosa rya EWSA atabiryozwa, ko kandi kuvuga ko yari mu igeregezwa atari byo, ko ahubwo yari muri “stage”, ko igeragezwa yarivuyemo akinjira muri “Fonction Publique” kuko yatangiye akazi ka Leta mu 1986 kandi igeragezwa rikaba ryaramaraga amezi abiri. Bavuga kandi ko mu mwanzuro wa Mulindahabi utanga ikirego ntaho bigaragara ko yashingiye ku masezerano.

UKO URUKIKO RUBIBONA

[14] Ku birebana n'itegeko rigomba gukurikizwa ku kibazo cya Mulindahabi, dosiye igaragaza ko yabaye umukozi wa RECO-RWASCO (yahindutse EWSA) nyuma yo gutsinda ikizamini nk'uko abivuga, bakorana amasezerano kuwa 17/11/2009 arimo igihe cy'igeragezwa cy'amezi atandatu. Usibye ayo masezerano, nta yindi nyandiko Mulindahabi yagaragaje yaba yaramwinjije mu bakozi ba Leta kugira ngo ibe yashingirwaho hemezwa ko agengwa na sitati igenga abo bakozi.

[15] Kuba yarasinye amasezerano y'akazi na RECO – RWASCO, byumvikanisha ko yagengwaga n'itegeko n° 13/2009 ryo kuwa 27/05/2009 rigenga umurimo hashingiwe ku biteganywa n'ingingo ya kabiri yaryo iteganya ko iryo tegeko rigena imikoranire y'akazi hagati y'abakozi n'abakoresha (...) bishingiye ku masezerano.

[16] Na none kandi, kuba Mulindahabi yarigeze kuba umukozi wa Leta ugengwa na sitati, ntibyashingirwaho ngo hemezwe ko ari muri urwo rwego yinjijye muri EWSA mu gihe atagaragaza inyandiko abishingiraho (acte de nomination), ntanagaragaze uburyo yavuye muri Minisiteri y'abakozi ba Leta usibye kuvuga gusa ko yasabye guhagarika akazi mu gihe kitazwi (mise en disponibilité), kugasubizwaho kandi bikaba byaragombaga gukorwa mu buryo buteganywa n'ingingo ya 64 y'itegeko rishyiraho sitati rusange igenga abakozi ba Leta, akaba atariko byagenze kuri Mulindahabi wasinye amasezerano arimo n'igihe cy'igeragezwa nk'uko byasobanuwe haruguru, kandi mu iperereza ryakozwe n'Urukiko Rukuru muri EWSA,

rwasobanuriwe ko muri icyo kigo harimo n'abandi bakozi bagengengwa n'amasezerano y'umurimo.

[17] Urukiko rurasanga rero mu gusuzuma ikibazo cy'iyirukanwa ku kazi rya Mulindahabi, hagomba gushingirwa ku itegeko ry'umurimo ryavuzwe haruguru aho gushingira kuri sitati igenga abakozi ba Leta nk'uko Urukiko Rukuru rwabyemeje, n'indishyi Mulindahabi yasabye zikaba zigomba kureberwa mu biteganywa n'iryo tegeko.

Kumenya niba hari indishyi Mulindahabi agomba kugenerwa.

[18] Uburanira EWSA avuga ko indishyi yategetswe gutanga zingana na 8.200.000 Frw nta shigiro zifite kuko Urukiko rwazitegetse rubishingiye ku kuba Mulindahabi yarirukanwe mu buryo bunyuranije n'amategeko kandi nyamara nta kosa yakoze mu kumusezerera kuko yashingiye ku masezerano y'akazi y'igeragezwa bari baragiranye.

[19] Na none kandi ngo uburyo izo ndishyi zagenwe ntibusobanutse kuko zagenwe mu bushishozi ntacyo urukiko rushingiyeho mu gihe umushahara yahembwaga uzwi kandi igihombo kigira uko kibarwa, ko mu bisanzwe indishyi nyinshi zitangwa ari umushahara w'amezi atandatu.

[20] Mulindahabi n'abamwunganira bavuga ko ishingiro ry'indishyi yagenewe ari uko yirukanwe mu buryo bunyuranije n'amategeko kuko atamenyeshejwe amakosa yakoze, ibyo bikaba binyuranije n'ingingo ya 18 y'Itegeko Nshinga hamwe n'ingingo za 88, 90, 93 na 94 z'itegeko n° 22/2002 ryo kuwa 09/07/2002 ryavuzwe haruguru, ko izo ndishyi zinashingiye kandi ku kuba mu kumwirukana, EWSA yarakoresheje

amagambo mabi amusebya bimugiraho ingaruka zirimo kubura akazi.

[21] Ku birebana n'uburyo indishyi zagenwe, Mulindahabi nawe avuga ko yabijuririye kuko hagombaga gushingirwa ku mushahara we kugeza umunsi azasubirizwa ku kazi cyangwa kugeza ku myaka yo kujya mu kiruhuko cy'izabukuru.

UKO URUKIKO RUBIBONA

[22] Nk'uko byavuzwe haruguru, amasezerano Mulindahabi yakoranye na RECO RWASCO yateganyijwemo igihe cy'igeragezwa cy'amezi atandatu, akaba yarasheshwe muri icyo gihe cy'igeragezwa kuko ibaruwa iyahagarika yanditswe kuwa 13/04/2010 kandi amasezerano yarasinywe kuwa 17/11/2009.

[23] Ku birebana n'iseswa ry'amasezerano mu gihe cy'igeragezwa, ntacyo itegeko rigenga umurimo ryavuze haruguru ryabiteganyijeho usibye ku birebana n'integuza, aho ingingo ya 27 y'iryo tegeko, iteganya ko nta nteguza ishobora kubaho mu gihe cy'amasezerano y'akazi y'igeragezwa.

[24] Ku birebana n'uburyo ayo masezerano aseswa, abahanga mu mategeko bavuga ko buri ruhande rushobora kuyasesa igihe cyose, ko kandi umukoresha adategetswe gutanga integuza cyangwa ngo atange impamvu nyakuri itumye ayasesa¹,

¹ Le trait essentiel, en même temps que la raison d'être de l'engagement à l'essai, est de conférer à chaque partie, sauf stipulation contraire, la faculté de rompre le contrat à tout moment. L'employeur n'a pas à respecter un préavis, bien entendu, si la convention collective applicable a institué un délai d'avertissement avant que la cessation du travail devienne effective:

byumvikanisha ko nta ndishyi zagombye gutangwa zishingiye kuri iryo seswa. Abo bahanga mu mategeko bavuga ariko ko n'ubwo buri ruhande rufite ubwo burenganzira, bitagomba gukorwa mu buryo bwo guhohoterana, ko umukozi ashobora guhabwa indishyi mu gihe atanze ikimenyetso ko umukoresha yasheshe amasezerano agamije kumwangiriza, ko n'umukoresha ashobora guhabwa indishyi n'umukozi washeshe amasezerano muri ubwo buryo².

[25] Ku birebana n'impamvu yashingiweho mu gusesa ayo masezerano, bisobanuye mu ibaruwa yavuzwe haruguru ko Mulindahabi yadindizaga akazi bigahesha isura mbi ikigo no kuba imyitwarire ye yararanzwe n'amakimbirane hagati ye n'inzego zitandukanye bakorana.

[26] Urukiko rurasanga ku birebana n'impamvu ya mbere ivugwa muri icyo baruwa, ireberwa mu rwego rw'imikorere n'umusaruro w'umukozi, ari nacyo amasezerano y'igeragezwa aba agamije nk'uko biteganywa n'ingingo ya 19 y'itegeko n° 13/2009 ryo kuwa 27/05/2009 rigenga umurimo, ivuga ko muri icyo gihe umukoresha asuzuma cyane cyane imikorere y'umukozi n'umusaruro we, umukozi nawe akagenzura cyane cyane imiterere y'akazi, iy'imibereho, iy'umushahara, iy'ubuzima, icyo kwirinda impanuka n'iy'ubusabane bw'abo bakorana. Abahanga mu mategeko bavuzwe haruguru nabo bavuga ko icyo gihe kiba kigamije gutuma umukoresha amenya

Jean Pélissier, Alain Supiot, Antoine Jeammaud, *Droit du travail*, 2e édition, p.365.

niba umukozi afite ubushobozi n'ubumenyi mu kazi, kigatuma n'umukozi amenya ko akazi yahawe kamunogeye.³

[27] Urukiko rurasanga ariko ku birebana n'impamvu ya kabiri ivugwa muri iyo baruwa, EWSA nayo yemera ko ishingiyeye ku ikosa Mulindahabi ivuga ko yakoze ryo kugonganisha inzego, akaba yaragombaga kurimenyeshwa akaryisobanuraho kuko, n'ubwo itegeko rigenga umurimo ryavuzwe haruguru ritabiteganyaga, ntawe ushobora gufatirwa icyemezo atabanje kwisobanura kubyo aregwa nk'uko Itegeko Nshinga rya Repubulika y'u Rwanda ribiteganyaga mu ngingo yaryo ya 18.

[28] Hashingiye ku bimaze kuvugwa, Urukiko rurasanga kuba EWSA itaramenyeshye iryo kosa Mulindahabi ngo aryisobanureho, agomba kubihirwa indishyi, zikagenwa hashingiye ku mushahara yahembwaga. Nk'uko bigaragara mu masezerano yavuzwe haruguru, hateganyijwe ko Mulindahabi yahembwaga umushahara mbumbe ungana na 650.000 Frw, akaba ariwo washingirwaho kuko hatagaragajwe umushahara yatahanaga (net), bityo akagenerwa indishyi zingana na 1.350.000 Frw zihwanye n'umushahara w'amezi atatu.

2 Le droit de rompre le contrat n'est pas pour autant discrétionnaire. Comme tous les droits, le droit de mettre fin à l'essai est susceptible d'abus. Le salarié peut obtenir des dommages et intérêts s'il rapporte la preuve que l'employeur a agi par malveillance à son égard ou avec une légèreté blâmable. Il arrive aussi- même si cela est plus rare- qu'un employeur obtienne la condamnation d'un salarié pour rupture abusive en cours d'essai. Op.Cit p. 366.

3 (...) Pareille pratique présente pour les deux contractants un intérêt. L'employeur portera un jugement mieux éclairé sur la compétence et l'aptitude professionnelle du salarié à tenir l'emploi; ce dernier vérifiera si la tâche confiée lui convient. Op.Cit p.361.

UBUJURIRE BWA MULINDABAHI

Kumenya niba Mulindahabi agomba gusubizwa ku kazi.

[29] Mulindahabi avuga ko Urukiko Rukuru rwivugurujye kuko mu mwanya umwe rwavuze ko yakagombye gusubizwa mu kazi, mu wundi mwanya ruvuga ko atagasubizwaho kuko umwanya utagihari kandi ntaho rwavanye ko uwo mwanya utagihari kuko bitavuzwe n’abaturanyi, akaba kandi ataryozwa amakosa ya EWSA yimwa uburenganzira bwe bwo gusubizwa ku kazi. Avuga kandi ko kuba umwanya we waratanzwe hashize igihe kirekire nk’uko Urukiko rwabyemeje, binyuranye n’ibyemejwe mu rubanza RAD 0124/07/HC/KIG, aho urukiko rwemeje ko n’iyo umwanya waba waratanzwe hashize imyaka myinshi, iyo hafashwe icyemezo cyo kuvanaho icyo kwirukana umukozi, agomba gusubizwa mu kazi, akaba ari muri ubwo buryo uwitwa Kabera Pierre Claver yasubijwe mu kazi, ko rero na Mulindahabi yagombye kugasubizwaho cyangwa agashakirwa ahandi muri Leta kuko amakosa yo kuba umwanya utagihari ataturutse kuri we.

[30] Uburanira EWSA avuga ko nta buryo urukiko rutari kwivuguruzwa kuko rwafatanyije ibintu bibiri bidashobora guhura, ko kandi Urukiko rutari gutegeka umukoresha gukorana n’umukozi wirukanwe kubera gusuzugura inzego zimukuriye, kumusezerera bikaba byarakozwe mu rwego rwo kurengera inyungu z’ikigo.

UKO URUKIKO RUBIBONA

[31] Urukiko rurasanga mu gihe byagaragajwe haruguru ko Mulindahabi yirukanwe akiri mu igeragezwa ku mpamvu zirimo n’iyerekeye imikorere ku muntu ukiri mu igeragezwa, ntaho

urukiko rwashingira rusuzuma ibyerekeye gusubizwa mu kazi asaba.

Ku birebana n'uburyo indishyi zagenwe.

[32] Mulindahabi avuga ko yagenewe indishyi za 6.000.000 Frw zijya mu mwanya w'ibyo yagombaga kwinjiza kandi ibyo yinjizaga ari umushahara ungana na 650.000 Frw buri kwezi hiyongereyeho amashimwe, ko rero yagombye kubona uwo mushahara kugeza igihe azasubirizwa mu kazi, bitakorwa akawuhabwa kugeza igihe cyo kujya mu kiruhuko cy'iza bukuru. Avuga ko kuba izo ndishyi zigomba gushingira ku mushahara yahembwaga abishingira ku rubanza RADA 006/12/CS rwaciwe n'uru Rukiko.

[33] Avuga ko kandi indishyi za 2.000.000 Frw yagenewe kubera urubwa no kumusebya ari nke cyane harebwe ingaruka byamugizeho kandi bikomeje kumugiraho, bikaba byaratewe n'amagambo mabi yakoreshejwe mu ibaruwa imwirukana ntanahabwe icyemezo cy'akazi, ko byatumye atabona umwanya muri CHUK no muri Rwanda Housing Authority, aho yakoze ibizamini ariko ntahabwe akazi, akaba yagombye kugenerwa indishyi za 20.500.000 Frw hashingiwe ku ngingo ya 258 CCLIII.

[34] Mulindahabi avuga kandi ko 200.000 Frw yagenewe y'ikurikirabarubanza ari macye harebwe ibyo yatanze akurikirana ikibazo cye mu nzego zitandukanye, akaba yagenerwa 1.500.000 Frw yasabye ku rwego rwa mbere hakiyongeraho 500.000 Frw yo ku rwego rw'ubujurire, akanahabwa 2.000.000 Frw y'igihembo cya avoka nk'uko amasezerano bakoranye abigaragaza.

[35] Na none kandi ngo ntacyo urukiko rwavuze kuri 200.000 Frw yahaye avoka kandi yaragaragaje amasezerano bakoranye hamwe n'inymeza bwishyu (reçu) yamuhaye.

[36] Uburanira EWSA avuga ko Mulindahabi atasaba kugenerwa umushahara kuko ari ikiguzi ku muntu uba wakoze, ko kandi EWSA itamubujije ubushobozi bwo kuba yakora akandi kazi.

[37] Ku birebana n'amagambo ari mu ibaruwa imusezerera, avuga ko nta magambo arimo asebanya ko kandi ibyo avuga ko yimwe akazi kubera iyo baruwa yagombye kubitangira ibimenyetso.

[38] Ku birebana n'amafaranga y'ikurikiranarubanza, avuga ko atayasaba EWSA kuko aho yagiye hose ari we bireba kandi bakaba batabona icyari kimujyanyeyo usibye muri Komisiyo y'abakozi ba Leta yanatanze umwanzuro ivuga ko yirukanwe ari mu igeragezwa, akaba anatuye mu Mujyi wa Kigali.

[39] Ku byerekeye amafaranga yishyuye avoka, avuga ko atayagenerwa kuko mu Rukiko Rukuru yariburaniye, naho amasezerano avuga ko yakoranye na avoka muri uru rukiko akaba atareba EWSA, ko kandi amafaranga asaba harimo ugukabya hagereranjwe n'ayo avuga yishyuye ku rwego rwa mbere, ko rero mu gihe yatangwa hakurikizwa uburyo Urukiko rusanze ruyagena.

UKO URUKIKO RUBIBONA

[40] Nk'uko byasobanuwe haruguru, kuba amasezerano Mulindahabi yari afitanye na EWSA yarasheshwe mu gihe

cy'igeragezwa, nta zindi ndishyi yasaba kugenerwa kuko zidafite ishingiro mu rwego rw'amategeko y'umurimo, usibye izasobanuwe haruguru zishingiye ku kuba atarahawe umwanya wo kwisobanura mbere yo gusesa amasezerano y'igeragezwa.

[41] Ku birebana n'amafaranga y'ikurikiranarubanza angana na 1.500.000 Mulindahabi avuga ko yagombye kuba yaragenewe ku rwego rwa mbere mu mwanya wa 200.000 Frw, hamwe na 500.000 Frw ku rwego rw'ubujurire, Urukiko rurasanga yaragenewe 200.000 Frw ku rwego rwa mbere yagenwe mu bushishozi bw'urukiko, akaba atagaragaza mu buryo bw'imibare uburyo ayo mafaranga ari macye, ahubwo nawe ayasaba mu buryo bwa rusange (forfait), bityo akaba ariyo akwiye kugumaho kuko ari mu rugero rukwiye.

[42] Ku birebana na 500.000 Frw y'ikurikiranarubanza n'ay'igihembo cya avoka angana na 2.000.000 Frw asaba ku rwego rw'ubujurire, Urukiko rurasanga mu gihe ubujurire bwe nta shingiro buhawe ahubwo EWSA ikaba ariyo ifite ibyo itsindiye, ayo mafaranga atayagenerwa.

[43] Ku byerekeye amafaranga 200.000 Frw Mulindahabi avuga ko atagenewe ku rwego wa mbere kandi yarayahembye avoka, Urukiko rurasanga nta kirugaragariza imirimo avuga ko yaba yarakozwe na avoka kuko inyandiko za dosiye zigaragaza ko yiburaniye, n'imyanzuro yatanze ikaba igaragaza ko ariwe wayikoreye, rukaba rero ntaho rwashingira rumugenera ayo mafaranga.

III. ICYEMEZO CY'URUKIKO

[44] Rwemeje ko ubujurire bwa EWSA bufite ishingiro kuri bimwe;

[45] Rwemeje ko ubujurire bwa Mulindahabi Fidèle nta shingiro bufite;

[46] Rutegetse EWSA guha Mulindahabi indishyi zingana na 1.350.000 Frw, yiyongera kuri 200.000 Frw y'ikurikiranarubanza yagenewe ku rwego rwa mbere, yose hamwe akaba 1.550.000 Frw;

[47] Rutegetse EWSA na Mulindahabi Fidèle gufatanya gutanga amagarama y'urubanza 27.600 Frw, batayatanga mu gihe cy'iminsi umunani, ayo mafaranga akavanwa mu byabo ku ngufu za Leta.

IMANZA MBONEZAMUBANO

DELTA PETROLEUM LTD v. NSENGIYUMVA N'ABANDI

[Rwanda URUKIKO RW'IKIRENGA – RC 0001/14/CS
(Rugege, P.J., Mugenzi na Munyangeri, J.) 12 Nzeri 2014]

Amategeko agenga imiburanishirize y'imanza z'imbonezamubano – Inzitizi y'iburabubasha – Irangizarubanza – Impaka zishingiye ku irangiza ry'urubanza – Urukiko rufite ububasha bwo kuburanisha ikirego kijyanye n'impaka zivutse mu irangiza ry'urubanza – Urukiko rwaciye urubanza bwa nyuma rugomba kumvikana nk'urukiko rwinjiye mu mizi y'urubanza ku buryo budasubirwaho bityo impaka zivutse mu irangiza ryarwo zikemurwa n'urwo Rukiko kuko ari rwo rwasobanura neza imikirize yarwo mu mizi, hagamijwe kubahiriza ibyarutegetswe – Itegeko n° 21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 195 n'iya 208.

Incamake y'ikibazo: Mu rwego rwo kurangiza urubanza RS/REV/INJUST /CIV 0005/13/CS rwaciye n'Urukiko rw'Ikirenga ruvanaho urubanza RC 0235/12/TGI/NYGE na RCA 0195/13/TGI/NYGE kandi rukemeza urubanza RC 0496/12/TB/NYGE rwaciye n'urukiko rw'Ibanze rwa Nyarugenge kuwa 17/10/2012 Gahongayire yaburanyemo na na Milimo Gaspard, abahesha b'inkiko batandukanye bagiye bandikira DELTA PETROLEUM Ltd bayitegeka gushyikiriza Gahongayire, station ikoreramo iherereye i Nyabugogo mu kibanza n° 5686 no kujya imuha amafaranga y'ubukode bw'inzu iri muri icyo kibanza.

DELTA PETROLEUM Ltd ntiyubahirije ibyo yategetswe maze undi muheshya w'inkiko witwa Nsengiyumva John abisabwe na Gahongayire Winifrida, afunga inzu ya station ikodeshwa na DELTA PETROLEUM, anafatira ibicuruzwa byayo biri muri station ndetse n'ibikoresho byayo. Nyuma yaho Gahongayire Winifrida yandikiye DELTA PETROLEUM ibaruwa y'integuza yo kuza gutwara ibicuruzwa n'ibikoresho byayo byafatiriwe mu kurangiza urubanza, itabikora mbere yo kuwa 16/05/2014 bikagurishwa ndetse DELTA ikazirengera igihombo icyo aricyo cyose.

Ibyo byatumye DELTA PETROLEUM itanga ikirego mu Rukiko rw'Ikirenga isaba ko rwakemura impaka mu kurangiza urubanza RS/REV/INJUST/CIV 0005/13/CS. Iburanisha ritangiye, Me Niyomugabo uburanira umwe mu baregwa witwa Nsengiyumva John yasabye ko hasuzumwa inzitizi y'iburabubasha ry'Urukiko rw'Ikirenga, avuga ko ikirego cy'uru rubanza cyagombaga gushyikirizwa Urukiko rw'Ibanze rwa Nyarugenge kuko DELTA PETROLEUM yareze isaba ko hakemurwa impaka zishingiye ku irangiza ry'urubanza RS/REV/INJ/CIV 0005/13/CS rwaciwe n'Urukiko rw'Ikirenga, yirengagije ko urubanza rurangizwa ari RC 0496/12/TB/NYG rwaciwe mu mizi n'Urukiko rw'Ibanze rwa Nyarugenge. Ababuranira DELTA PETROLEUM, ababuranira Gahongayire, ndetse n'uburanira Milimo Gaspard bavuga ko urwo rubanza rwaciwe bwa nyuma n'Urukiko rw'Ikirenga bityo rukaba arirwo rufite ububasha bwo kuburanisha uru rubanza kuko ngo ntaho Itegeko ryateganyije ko urukiko rwaciye urubanza bwa nyuma rugomba kuba ari urwaruciye mu mizi yarwo. Iyo nzitizi niyo ababuranyi bagiyeho impaka maze Urukiko rwemeza ko ariyo ruzabanza gufataho icyemezo.

Incamake y'icyemezo: Urukiko rwacyiye urubanza bwa nyuma rugomba kumvikana nk'urukiko rwinjiye mu mizi y'urubanza ku buryo budasubirwaho rugakemura ikibazo cyaburanwaga, rukanagira ibyo rutegeka bigomba kubahirizwa mu irangizwa ryarwo, bityo impaka zivutse mu irangiza ry'urubanza zikemurwa n'urukiko rwaruciye bwa nyuma kuko ari rwo rwasobanura neza imikirize yarwo mu mizi, hagamijwe kubahiriza ibyarutegetswe.

Inzitizi y'iburabubasha yazamuwe n'umwe mu baregwa ifite ishingiro.

Urukiko rw'Ikirenga nta bubasha rufite bwo kuburanisha ikirego kijyanye n'impaka zavutse mu irangiza ry'uru rubanza.

Urubanza rwohererejwe Urukiko rw'Ibanze rwa Nyarugenge kugirango abe arirwo ruruburanisha.

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 195 n'ya 208.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Tariki ya 20 Werurwe 2014 Umuhesha w'inkiko wa Minisiteri y'Ubutabera Muhire Constatin yamenyesheje

DELTA PETROLEUM Ltd ko igomba gushyikiriza Gahongayire Winifrida, bitarenze tariki ya 8 Mata 2014, station ikoreramo iherereye Nyabugogo mu kibanza n° 5686, harangizwa urubanza RS/REV/INJUST /CIV 0005/13/CS rwaciwe n'Urukiko rw'Ikirenga ruvanaho urubanza RC 0235/12/TGI/NYGE na RCA 0195/13/TGI/NYGE kandi rukemeza urubanza RC 0496/12/TB/NYGE rwo kuwa 17/10/2012.

[2] Mu ibaruwa yo kuwa 02/04/2014 DELTA PETROLEUM yamenyesheje umuhesha w'inkiko ko ibyo yategetse DELTA PETROLEUM gukora bidateganijwe mu rubanza bityo imusaba gusubira kuri iryo tegeko bitabaye ngombwa kwitabaza inkiko.

[3] Tariki ya 22 Werurwe 2014 Rusanganwa Eugène umuhesha w'inkiko muri Minisiteri y'Ubutabera yahaye DELTA PETROLEUM itegeko ryo kujya ishyikiriza Gahongayire Winifrida amafaranga y'ubukode bw'inzu ikodesha iri mu kibanza n° 5686 Nyabugogo ibyo bigakorwa bitarenze tariki ya 24 Mata 2014.

[4] Tariki 24/04/2014 DELTA PETROLEUM yamenyesheje Umuhesha w'inkiko Rusanganwa Eugène ko mu gushyira mu bikorwa amasezerano y'ubukode bw'inzu ikodeshwa, hishyuwe ubukode bw'imyaka itanu (5). Ibyo bikaba byarakozwe tariki 17/10/2013, bityo ko nta bukode bwo kwishyura buhari.

[5] Tariki ya 12/05/2014 umuhesha w'inkiko witwa Nsengiyumva John, abisabwe na Gahongayire Winifrida, yafunze inzu ya station ikodeshwa na DELTA PETROLEUM afatira ibicuruzwa byayo biri muri station n'ibikoresho byayo.

[6] Uburanira DELTA PETROLEUM Ltd avuga ko ibyo byakozwe nta tegeko abanje kuyiha kandi atayimenyesheje urubanza arangiza urwo arirwo. Akanavuga ko DELTA PETROLEUM yasabye umuhesha w'inkiko kuyigaragariza urubanza arangiza inamusaba *exploit de commandement* yaba yarakoze akabyanga.

[7] Tariki ya 15/05/2014 Gahongayire Winifrida yandikiye DELTA PETROLEUM ibaruwa y'integuza yo kuza gutwara ibicuruzwa n'ibikoresho byayo byafatiriwe mu kurangiza urubanza, ngo DELTA PETROLEUM itabikora mbere ya 16/05/2014 bikagarishwa ndetse DELTA ikazirengera igihombo icyo aricyo cyose.

[8] Ibyo byatumye DELTA PETROLEUM itanga ikirego mu Rukiko rw'Ikirenga isaba ko rwakemura impaka mu kurangiza urubanza RS/REV/INJUST/CIV 0005/13/CS, urubanza ruburanishwa mu ruhamwe ku wa 10/06/2014, DELTA PETROLEUM iburanirwa na Me Gatera Gashabana hamwe na Me Nkurunziza Francois Xavier, Nsengiyumva John aburanirwa na Me Niyomugabo, Gahongayire aburanirwa na Me Niyomugabo Christophe na Me Gahongerwa Goretti, naho Milimo Gaspard aburanirwa na Me Nzirabatinyi Fidèle.

[9] Iburanisha ritangiye, Me Niyomugabo uburanira Nsengiyumva John yasabye ko hasuzumwa inzitizi y'iburabubasha ry'Urukiko rw'Ikirenga, avuga ko ikirego cy'uru rubanza cyagombaga gushyikirizwa Urukiko rw'Ibanze rwa Nyarugenge kuko ari rwo rwaciye bwa nyuma urubanza rwateye impaka mu irangizwa ryarwo, naho ababuranira DELTA PETROLEUM, ababuranira Gahongayire, ndetse n'uburanira Milimo Gaspard bakavuga ko urwo rubanza rwaciye bwa nyuma n'Urukiko rw'Ikirenga. Iyo nzitizi niyo

ababuranyi bagiye ho impaka, Urukiko rwemeza ko ariyo ruzabanza gufataho icyemezo.

II. IKIBAZO KIGIZE URUBANZA N'ISESENGURWA RYACYO

Kumenya urukiko rufite ububasha ku kirego kijyanye n'impaka zavutse mu irangiza ry'urubanza Gahongayire asabira kurangizwa.

[10] Mu nzitizi Me Niyomugabo uburanira Nsengiyumva yatanze, asobanura ko DELTA yareze ishingiyeye ku ngingo ya 208 y'Itegeko ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, asaba ko hakemurwa impaka zishingiyeye ku irangiza ry'urubanza RS/REV/INJ/CIV 0005/13/CS rwaciwe n'Urukiko rw'Ikirenga, yirengagije ko urubanza rurangizwa ari RC 0496/12/TB/NYG nk'uko DELTA PETROLEUM yagiye ibimenyeshwa nko mu itegeko ry'Umuhesha w'inkiko ryashyikirijwe Me Nkurunziza no mu zindi nyandiko.

[11] Asobanura ko n'urubanza RS/REV/INJ/CIV 0005/13/CS rwavuzwe haruguru rwavanyeho izindi manza zabaye, rugumishaho gusa imikirize y'urubanza RC 0496/12/TB/NYG. Avuga ko Urukiko rw'Ikirenga rwemeye ko urubanza RC 0496/12/TB/NYG rwari rwarabaye itegeko, nyamara Urukiko Rwisumbuye rukora amakosa yo kuruca mu mizi, akaba asanga ibyo byose bigaragaza ko urubanza rurangizwa ari urwo rwaciwe n'Urukiko rw'Ibanze, akaba ari narwo rufite ububasha bwo gukemura impaka zavuka mu irangizwa ryarwo.

[12] Avuga ko hari n'inyandiko nyinshi zigaragaza ko urubanza rurangizwa ari rw'Urukiko rw'Ibanze rwa Nyarugenge, zirimo Itegeko ry'umuhesha w'inkiko ryashyikirijwe Me Nkurunziza uburanira DELTA PETROLEUM, bamugaragariza urubanza urwo ari rwo (0496/12/TB/NYG) n'icyemezo cyarwo, hibutswa n'igihe rwabamenyesherejwe.

[13] Anavuga ko muri urwo rubanza icyaregerwaga kwari ugushinganisha imitungo Gahongayire ahuriyeho na Milimo, naho urw'Urukiko rw'Ikirenga rukaba ntacyo rwakemuraga kuri icyo kibazo, rukaba rwarakuyeho gusa urubanza rwaciwe n'Urukiko Rwisumbuye rutubahirije ibihe by'ubujurire.

[14] Uburanira Nsengiyumva anavuga ko abaregwa ubwabo babyiyemerera, kuko mu myanzuro ya Me Nkurunziza hari aho yivugira ko urubanza rwaciwe n'Urukiko rw'Ibanze rwa Nyarugenge ari rwo rurangizwa, ndetse n'inyandiko y'abemeye kurangiza urubanza ku neza (bagiranye amasezerano na Gahongayire) ikaba igaragaza ko urubanza rurangizwa ari 0496/12/TB/NYG.

[15] Me Nzirabatinyi uburanira Milimo avuga ko n'ubwo uwo aburanira ari ku ruhande rw'abitwa abaregwa, asanga inzitizi yabyukijwe n'uburanira Nsengiyumva idafite ishingiro, inyandiko z'abahesha b'inkiko Rusanganwa na Muhire Me Niyomugabo avuga ko zigaragaza urubanza rurangizwa zikaba nta gaciro zahabwa kuko Minisitiri w'Ubutabera wari wabashinze irangiza ry'urubanza yabahagaritse bataratangira kuko Gahongayire yari yagaragaje ko atabafitiye icyizere, naho umuhesha Nsengiyumva akaba atarashingiye ku by'abo ba mbere.

[16] Asobanura ko, hashingiwe ku ngingo ya 208 yavuzwe haruguru, asanga Urukiko rw'Ikirenga ari rwo rufite ububasha kuri uru rubanza kuko ari rwo rwaruciye bwa nyuma, iyo ngingo ikaba itavuga ko kuruca bwa nyuma ari ukuba rwararwinjiye mu mizi, atanga urugero ku manza zaciriwe hanze zisabirwa kurangirizwa mu Rwanda maze inkiko zemeje ko zirangirizwa mu Rwanda (exequatur) akaba ari nazo zifite ububasha bwo gukemura impaka zavuka mu irangizwa ryazo nk'uko biteganywa n'iyo ngingo kandi zitaraziciye mu mizi. Anavuga ko kuba Urukiko rw'Ikirenga rwaraciye urwo rubanza ku mpamvu z'akarengane bisabwe n'Urwego rw'Umuvunyi hakurikijwe ingingo za 79 na 81 z'Itegeko rigenga Urukiko rw'Ikirenga, bigaragaza ko uru rukiko ari rwo rwaruciye bwa nyuma.

[17] Me Nkurunziza na Me Gatera Gashabana baburanira DELTA PETROLIUM bavuga ko kuba Urukiko rw'Ikirenga rwaragize ibyarwo ibyemezo byari byafashwe n'Urukiko rw'Ibanze bisobanuye ko ari Urukiko rw'Ikirenga rwaciye urubanza bwa nyuma, bakaba basanga rero n'umuhesha w'inkiko Nsengiyumva yarahereye ku rubanza rw'Urukiko rw'Ikirenga kuko ari rwo rwaciye urubanza bwa nyuma, rukemeza icyemezo cyari cyafashwe n'Urukiko rw'Ibanze. Bavuga ko ingingo ya 208 yavuzwe haruguru igomba kwumvikana uko yanditse, ntiyongerwemo ibisobanuro byo kuba urubanza rwaraciye “mu mizi” bitayigaragaramo, bakaba basanga ababyukije iriya nzitizi bagamije gusa gutinza urubanza.

[18] Me Gahongerwa uburanira Gahongayire avuga ko ingingo ya 79 y'Itegeko rigenga Urukiko rw'Ikirenga ntaho ihuriye n'ikibazo cy'uru rubanza, akaba asanga Urukiko

rwaciye urubanza bwa nyuma ari urwakemuye ikibazo cyari kirugize, arirwo rw'Ibanze, naho Urukiko rw'Ikirenga rukaba gusa rwarakuyeho akarengane ko kuba Urukiko Rwisumbuye rwarakiriye rukaburanisha urubanza rwari rwarabaye itegeko.

II. UKO URUKIKO RUBIBONA

[19] Dosiye y'uru rubanza igaragaza ko Urukiko rw'Ikirenga, mu rubanza RS/REV/INJ/CIV 0005/13/CS, rwakuyeho urubanza RC 0235/12/TGI/NYGE n'urubanza RCA 0195/13/TGI/NYGE rukemeza ko hagumaho imikirize y'urubanza RC 0495/12/TB/NYGE rwo kuwa 17/10/2012 ku mpamvu z'uko Urukiko Rwisumbuye rwa Nyarugenge rwakiriye rukaburanisha urubanza kandi rwari rwararengeje gihe cy'ubujurire.

[20] Ingingo ya 208 y'itegeko n°21/2012 ryo ku wa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi iteganya ko impaka zishingiye ku irangiza ry'urubanza ryaba riri gukorwa cyangwa ryararangiyeye zikemurwa n'urukiko rwaruciye bwa nyuma cyangwa urwemeje ko urubanza rwo mu mahanga rurangirizwa mu Rwanda.

[21] Urukiko rwaciye urubanza bwa nyuma ruvugwa muri iyo ngingo ya 208 rugomba kumvikana nk'urukiko rwinjiye mu mizi y'urubanza ku buryo budasubirwaho rugakemura ikibazo cyaburanwaga, rukanagira ibyo rutegeka bigomba kubahirizwa mu irangizwa ryarwo, ari nayo mpamvu Umushingamategeko yateganyije, muri iyo ngingo y'itegeko, ko impaka zivutse mu irangiza ry'urubanza zikemurwa n'urukiko rwaruciye bwa nyuma, kuko ari rwo rwasobanura neza imikirize yarwo mu

mizi, hagamijwe kubahiriza ibyarutegetswe, nk'uko ingingo ya 195 y'itegeko n°21/2012 ryo ku wa 14/06/2012 iteganya ko irangiza ry'imanza n'iry'inyandiko rigamije guha uwatsinze ibintu afitiye uburenganzira bwo guhabwa, akabibona ubwabyo cyangwa akabona ingurane.

[22] Bigaragara rero ko Urukiko rw'Ikirenga rwaciye urubanza RS/REV/INJ/CIV 0005/13/CS rugakemura gusa ikibazo kijyanye n'iyubahirizwa ry'amategeko agenga imiburanishirize y'imanza rutinjiye mu mizi yarwo atari rwo rwasabwa gukiranura impaka zijyanye n'irangizwa ryarwo kandi zishingiye ku mikirize y'urubanza ku cyaburanwe mu mizi, ahubwo urw'Ibanze rwa Nyarugenge n'Urwisumbuye rwa Nyarugenge ari zo zonyine zinjiye mu mizi y'urubanza, hakaza kuguma ho gusa urwaciye n'Urukiko rw'Ibanze nyuma y'uko iz'Urukiko Rwisumbuye zivanyweho, bityo, urubanza ruriho rwaciye bwa nyuma rugomba kurangizwa akaba ari urwo rwaciye n'Urukiko rw'Ibanze rwa Nyarugenge, rufite numero 0495/12/TB/NYGE.

[23] Hashingiwe ku bisobanuro bigaragajwe haruguru, Urukiko rurasanga ikirego rwashyikirijwe na DELTA PETROLIUM kigamije gukemura impaka zavutse mu irangiza ry'urubanza rwabayeho hagati ya Milimo na Gahongayire, ari rwo 0495/12/TB/NYGE, kitari mu bubasha bw'uru Rukiko, ahubwo kiri mu bubasha bw'Urukiko rw'Ibanze rwa Nyarugenge rwaruciye bwa nyuma mu mizi.

III. ICYEMEZO CY'URUKIKO

[24] Rwemeje ko inzitizi y'iburabubasha bw'Urukiko rw'Ikirenga yatanzwe na Me Niyomugabo uburanira Nsengiyumva John ifite ishingiro.

[25] Rwemeje ko Urukiko rw'Ikirenga nta bubasha rufite bwo kuburanisha ikirego kijyanye n'impaka zavutse mu irangiza ry'Urubanza Gahongayire asabira kurangizwa.

[26] Rutegetse ko uru rubanza rwoherezwa mu Rukiko rw'Ibanze rwa Nyarugenge kugirango abe ari rwo ruruburanisha.

DOREBABA

[Rwanda URUKIKO RUKURU – 2013HC – RCA
0051/13/HC/KIG (Hitimana, P.J.) 7 Werurwe 2013]

Amategeko agenga ububasha bw'Inkiko – Ikirego gisaba ko Inyandikompamo yanditswe n'abategetsi bo mu mahanga irangirizwa mu Rwanda –Inyandikompamo y'ishyingirwa – Kopi y'inyandiko z'irangamimerere zisabirwa kwemerwa kurangirizwa mu Rwanda n'impamvu zisabirwa irangizwa zigomba kuba ntaho zinyuranije n'amategeko rusange ndemyagihugu kimwe n'amahame ashingiweho n'amategeko y'u Rwanda kandi zikanaba zigaragaza ko hakurikijwe amategeko y'igihugu zandikiwemo, zujuje ibyangombwa byose bigaragaza ko ari inyandiko mvaho – Itegeko Ngenga n° 51/2008 ryo ku wa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko nk'uko ryahinduwe kandi ryujijwe kugeza ubu, ingingo ya 92 – 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 70.

Incamake y'ikibazo: Urega yatanze ikirego mu Rukiko Rukuru asaba ko inyandiko y'ishyingirwa ryabereye mu gihugu cyahoze cyitwa Zaïre aricyo Repubulika Iharanira Demokarasi ya Kongo y'ubu hagati ye n'umugabo we Ntwari Gatari irangirizwa mu Rwanda. Impamvu ashingiraho abisaba n'uko umugabo we yitabye Imana bityo kwemera ko iyo nyandiko irangirizwa mu Rwanda bikaba byamufasha kubona uburenganzira busesuye

bukomoka ku nshingano z'abashakanye amategeko amwemerera.

Incamake y'icyemezo: Inyandiko yiswe “Extrait du registre des déclarations de Mariage” ikwiye kurangirizwa mu Rwanda kuko impamvu urega ashingiraho abisaba ntaho zinyuranyije n'amategeko rusange ndemyagihugu kimwe n'amahame ashingiweho n'amategeko y'u Rwanda, kandi ikaba inagaragaza ko hakurikijwe amategeko y'igihugu yandikiwemo, yujuje ibyangombwa byose bigaragaza ko ari inyandiko mvaho. .

**Ikirego gifite ishingiro.
Amagarama aherereye ku rega.**

Amategeko yashingiweho:

Itegeko Ngenga n° 51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko nk'uko ryahinduwe kandi ryujujwe kugeza ubu, ingingo ya 92.

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'abashyiranywe, impano n'izungura, ingingo ya 70.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBAZA

[1] Dorebaba Rugomboka yashyikirije uru Rukiko ikirego asaba ko inyandiko y'ishyingirwa hagati ya Dorebaba Rugomboka na Ntwari Gatari yakorewe mu cyahoze ari Zaire ubu yahindutse Repubulika Iharanira Demokarasi ya Congo kuwa 18/07/1987 (Extrait du registre des déclarations de mariage) irangirizwa mu Rwanda.

[2] Ikibazo kigomba gusuzumwa muri uru rubanza ni ukumenya niba hashingiwe kuri iyo ngingo ya 92 y'Itegeko Ngenga n° 51/2008 ryo ku wa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, iyo nyandiko y'ishyingirwa hagati ya Dorebaba Rugomboka na Ntwari Gatari yakorewe mu cyahoze ari Zaire ubu yahindutse Repubulika Iharanira Demokarasi ya Congo kuwa 18/07/1987 (Extrait du registre des déclarations de mariage) ikwiye kwemererwa kurangizwa mu Rwanda.

II. ISESENGURA RY'IKIBAZO KIGIZE URUBANZA

[3] Maître Nkeza S. Clément uhagarariye Dorebaba Rugomboka muri uru rubanza asaba Urukiko kwemeza ko inyandiko yiswe “inyandiko y'ishyingirwa ryabaye hagati ya Dorebaba Rugomboka na Ntwari Gatari ryakorewe mu cyahoze ari Zaire ubu yahindutse Repubulika Iharanira Demokarasi ya Congo kuwa 18/07/1987 (Extrait du registre des déclarations de mariage)” ikwiriye kwemererwa kurangizwa mu Rwanda,

ashingiye ku ngingo ya 92 y'Itegeko Ngenga n° 51/2008 ryo ku wa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, agasobanura ko iyo nyandiko yakozwe igaragaza ko Dorebaba Rugomboka na Ntwari Gatari bashyingiranywe mu buryo bukurikije amategeko yo muri icyo gihugu cya RDC, ariko ubu Ntwari Gatari akaba yaritabye Imana kuwa 06/05/2012, kwemera ko iyo nyandiko irangirizwa mu Rwanda bikaba byafasha Dorebaba Rugomboka kubona uburenganzira busesuye bukomoka ku nshingano z'abashakanye amategeko amwemerera.

[4] Hakurikijwe ibivugwa mu ngingo ya 92 y'Itegeko Ngenga n° 51/2008 ryo ku wa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko nk'uko ryahinduwe kandi ryujijwe kugeza ubu, inyandiko zivugwa muri iyo ngingo zishobora kurangirizwa mu Rwanda ni “inyandikompamo zifite ikigaragaza ko zanditswe n'abategetsi bo mu mahanga” (actes authentiques en forme exécutoire qui ont été dressés par une autorité étrangère).

[5] Ingingo ya 92 y'itegeko ngenga ryavuzwe hejuru inateganya ko inyandikompamo zifite ikigaragaza ko zanditswe n'abategetsi bo mu mahanga zishobora kurangirizwa mu Rwanda n'Urukiko Rukuru, iyo zujuje ibyangombwa bikurikira:

- Iyo impamvu bazisabira irangizwa ntaho zinyuranije n'amategeko rusange ndemyagihugu kimwe n'amahame ashingwiweho n'amategeko y'u Rwanda;
- Iyo hakurikijwe amategeko y'igihugu zandikiweho, zujuje ibyangombwa byose bigaragaza ko ari imvaho.

[6] Urukiko rubona impamvu Dorebaba Rugomboka asabira irangizwa ry'iki cyangombwa, ari ukugira ngo agire uburenganzira nk'uware warashakanye na nyakwigendera

Ntwari Gatari, ubwo burenganzira bukaba bunateganijwe mu ngingo ya 70 y'itegeko ry'u Rwanda rifite n° 22/99 ryo kuwa 12/11/1999 ryuzuzaga igitabo cya mbere cy'urwunge rw'amategeko mbonezamubano kandi rishyiraho igice cya gatanu cyerekeye imicungire y'umutungo w'abashyingiranywe, impano n'izungura, aho riteganyaga mu gace karyo ka mbere ko iyo umwe mu bashyingiranywe apfuye, usigaye asigarana umutungo wose akubahiriza inshingano yo kurera abana no gufasha ababyeyi ba nyakwigendera iyo babikeneye, iyo mpamvu rero bazisabira irangizwa ntaho zinyuranije n'amategeko rusange ndemyagihugu kimwe n'amahame ashingwiyeho n'amategeko y'u Rwanda.

[7] Urukiko runasanga inyandiko y'ishyingirwa hagati ya Dorebaba Rugomboka na Ntwari Gatari yakorewe mu gihugu cyahoze ari Zaïre ubu cyabaye Repubulika Iharanira Demokarasi ya Congo kuwa 18/07/1987 (Extrait du registre des déclarations de mariage) Dorebaba Rugomboka yifuza ko yarangirizwa mu Rwanda, ari inyandiko yandikiwe mu gihugu cya Repubulika Iharanira Demokarasi ya Kongo, yandikwa n'uwitwa Gumba Mwishabongo, Officier de l'état civil uhabwa ububasha bwo kuba uwo mutegetsi n'ingingo ya 76 na 78 y'itegeko ry'umuryango ryo muri icyo gihugu, uyu akaba afite ububasha bw'umwanditsi w'irangamimerere muri icyo gihugu cya RDC, kandi nk'uko ingingo ya 368 y'igitabo cy'amategeko agenga umuryango muri icyo gihugu ibiteganyaga imihango y'ubukwe ishobora gukorerwa mu muryango hakurikijwe umuco, ikanateganyaga ko muri icyo gihe, umwanditsi w'irangamimerere abyandika akanabikorera icyemezo kibigaragaza (le mariage peut être célébré en famille selon les formalités prescrites par les coutumes. Dans ce cas, l'officier de l'état civil enregistre le mariage et dresse l'acte le constatant),

kandi nkuko bigaragazwa n'iyo nyandiko akaba ari umwanditsi w'irangamimerere wayemeje.

[8] Runasanga iyo nyandiko iriho umukono wa Notaire w'Umujyi wa Goma wayemeje kuwa 24/12/2012, ndetse na Ambassade ya Repubulika iharanira Demokarasi ya Kongo iri i Kigali irabyemeza kuwa 31/12/2012.

[9] Rushingiye ku bimaze kugaragazwa hejuru, rusanga inyandiko Dorebaba Rugomboka asabira kwemerwa kurangirizwa mu Rwanda, impamvu azisabira irangizwa ntaho zinyuranije n'amategeko rusange ndemyagihugu kimwe n'amahame ashingiweho n'amategeko y'u Rwanda, kandi zikanaba zigaragaza ko hakurikijwe amategeko y'igihugu zandikiwemo, zujuje ibyangombwa byose bigaragaza ko ari inyandiko mvaho, ari nayo mpamvu byemewe ko iyo nyandiko yiswe "Extrait du registre des déclarations de mariage" ikwiye kurangirizwa mu Rwanda.

III. ICYEMEZO CY'URUKIKO RUKURU

[10] Rwemeje kwakira ikirego cyatanzwe na Dorebaba Rugomboka kuko cyatanzwe mu buryo buhuje n'itegeko, rugisuzumye rusanga gifite ishingiro.

[11] Rwemeje ko icyemezo kigaragaza ishyingiranwa ryabaye hagati ya Dorebaba Rugomboka na Ntwari Gatari ryakorewe mu gihugu cyahoze ari Zaïre ubu cyahindutse Repubulika Iharanira Demokarasi ya Congo kuwa 18/07/1987 (Extrait du registre des déclarations de mariage) kirangirizwa mu Rwanda kuko cyujuje ibyangombwa biteganywa n'amategeko y'u Rwanda.

[12] Rutegetse Dorebaba Rugomboka kwishyura amagarama y'uru rubanza angana n'amafaranga y'u Rwanda ibihumbi 7.000Frw, agomba gukurwa mu yo yatanzeho ingwate arega.

KANZAYIRE v. NYIRABIZIMANA N'UNDI

[Rwanda URUKIKO RW'IKIRENGA – RCAA 0070/12/CS
(Kanyange, P.J., Mukandamage na Munyangeri, J.) 21 Kamena
2013]

Amategeko agenga ububasha bw'Inkiko – Ububasha bw'Urukiko rw'Ikirenga – Inzira z'ubujurire mu Rukiko rw'Ikirenga – Iyakirwa ry'ikirego kigamije gutambamira urubanza – Ihame ry'uko itegeko ritagira inkurikizi ku bikorwa byabaye mbere y'uko rijyaho – Mu gukemura ikibazo cy'iyakirwa ry'ikirego gitambamira urubanza mu gihe itegeko ryakurikizwaga igihe ikirego cyatangwaga ritandukanye n'iririkizwa mu gihe cy'iburanisha, hagomba gukurikizwa iryariho ikirego gitangwa – Izindi nzira zigamije gusaba ko urubanza rwaciwe n'Urukiko rw'Ikirenga rwongera kuburanishwa ntizemewe, uretse iyo gusubirishamo ingingo nshya urubanza rwaciwe burundu yonyine – Itegeko Nshinga rya Repubulika y'u Rwanda ryo kuwa 04/06/2003 nk'uko ryavuguruwe kugeza ubu, ingingo ya 144 – Itegeko Ngenga n° 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga – Itegeko Ngenga n° 01/2004 ryo kuwa 29/01/2004 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 84.

Incamake y'ikibazo: Kanzayire Epiphanie, umugore wa Musoni Ndamage Thadée yatambamiye urubanza rwaciwe n'Urukiko rw'Ikirenga hagati ya Nyirabizimana Zilipa na Musoni Ndamage Thadée avuga ko atarumenye kandi rukaba rubangamiye inyungu ze kuberako imikirize yarwo yemeje ko Nyirabizimana afite uburenganzira busesuye bwo gucunga

imitungo Ndamage Eliab ndetse iyo mitungo ikajya mu mutungo rusange wa Ndamage Eliab na Nyirabizimana.

Nyirabizimana Zilipa yatanze inzitizi yo kutakira ikirego cya Kanzayire Epiphanie avuga ko inzira yo gutambamira urubanza itemewe mu Rukiko rw'Ikirenga ko kandi ariwo murongo uru Rukiko rwafashe kuri iyi ngingo mu rubanza RCOM 0010/09/CS rwa Rusekerampunzi v. Rumanyika rwaciwe kuwa 30/04/2010. Avuga kandi ko n'iyi nzira yaba yemewe, Kanzayire atemerewe gukoresha inzira y'itambama ku rubanza umugabo we Musoni yatsinzwe. Yongeraho ko n'iyi urega yakwitwaza ko yatanze ikirego cye hagikoreshwa Itegeko Ngenza n° 01/2004 ryo kuwa 29/01/2004 ryagenaga imitunganyirize, imikorere n'ububasha by'Urukiko rw'Ikirenga, iyo nzira yo gutambamira urubanza rwaciwe n'Urukiko rw'Ikirenga ntaho yari iteganyijwe.

Kanzayire na Musoni Ndamage Thadée n'ababunganira bo bavuga ko izo nzitizi nta shingiro zifite bagashimangira ko Urukiko rw'Ikirenga ari urukiko rusanzwe (jurisdiction ordinaire) rukaba rugomba gukurikiza imiburanishirize y'izindi nkiko zisanzwe ntirugire inzira y'ubujurire n'imwe rusubiza inyuma kuko narwo ruburanisha imanza mu mizi. Bongeraho ko urubanza rwaciwe n'uru Rukiko uburanira Nyirabizimana asaba ko rwareberwaho, ari rwo rwonyine rwafashe icyemezo ku kibazo kiburanwa, rukaba rero rutafatwa nk'urwatanze umurongo w'Urukiko kuri icyo kibazo.

Incamake y'icyemezo: 1. Ku bijyanye no kumenya itegeko rigomba gukurikizwa mu gukemura ikibazo cy'iyakirwa ry'ikirego gitambamira urubanza ryakurikizwaga igihe ikirego cyatangwaga ritandukanye n'irikurikizwa mu gihe

cy'iburanisha, hagomba gukurikizwa iryariho igihe ikirego cyatangwaga.

2. Izindi nzira zigamije gusaba ko urubanza rwaciwe n'Urukiko rw'Ikirenga rwongera kuburanishwa ntizemewe, uretse iyo gusubirishamo ingingo nshya urubanza rwaciwe burundu yonyine, ikirego cyo gutambamira urubanza rwaciwe n'Urukiko rw'Ikirenga kikaba kitakirwa.

**Ikirego nticyakiriwe.
Amagarama aherereye ku watambamiye urubanza.**

Amategeko yashingiweho:

Itegeko Nshinga rya Repubulika y'u Rwanda ryo kuwa 04/06/2003 nk'uko ryavuguruwe kugeza ubu, ingingo ya 144.

Itegeko Ngenga n° 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga.

Itegeko Ngenga n° 01/2004 ryo kuwa 29/01/2004 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, ingingo ya 84.

Imanza zifashishijwe:

Khalid v. Ahmed n'abandi, RC 0002/09/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 19/03/2010.

Leta y'u Rwanda v. Karangwa, RADA 0001/09/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 17/09/2010.

Kagoyire v. Abdallah n'abandi, RC 0002/05/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 25/10/2007.

Rusekerampunzi v. Rumanyika, RCOM 0010/09/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 30/04/2010.

Rudasumbwa v. Leta y'u Rwanda n'abandi, RADA 0031/12/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 17/05/2013.

Urubanza

I. IMITERERE Y'URUBANZA.

[1] Urukiko rw'Ikirenga rwacyiye urubanza RCAA 0015/09/CS kuwa 29/04/2011 hagati ya Nyirabizimana Zilipa na Musoni Ndamage Thadée rwemeza ko Nyirabizimana afite uburenganzira busesuye bwo gucunga imitungo iri mu bibanza n° 579/Quartier Commercial na 710/Kacyiru kandi iyo mitungo ikajya mu mutungo rusange wa Ndamage Eliab na Nyirabizimana ikiyongera kuyagenwe n'Urukiko Rukuru mu rubanza rwajuririwe, ibyo bibanza bikava ku mazina ya Musoni Ndamage Thadée bikandikwa kuri Nyirabizimana. Rwemeje kandi ko ikibanza n° 711/Kacyiru kigumanwa na Musoni Ndamage Thadée.

[2] Kanzayire Epiphane, umugore wa Musoni Ndamage Thadée yatambamiye urwo rubanza avuga ko atarumenye kandi rubangamiye inyungu ze.

[3] Nyirabizimana Zilipa yatanze inzitizi yo kutakira ikirego cya Kanzayire avuga ko inzira yo gutambamira urubanza itemewe mu Rukiko rw'Ikirenga, ko kandi niyo yaba yemewe, Kanzayire atemerewe gukoresha inzira y'itambama ku rubanza umugabo we Musoni yatsinzwe.

[4] Avuga ko kandi nta bubasha (qualité) Kanzayire afite bwo kurega Nyirabizimana kuko atari mu bazungura ba Ndamage, ko kandi n'igihe yatangiye ikirego kigomba gusuzumwa kuko yari azi urubanza rwaburanwaga n'umugabo we.

[5] Ababuranira Kanzayire na Musoni bo bavuga ko inzitizi zatanzwe na Nyirabizimana nta shingiro zifite.

[6] Urubanza rwaburanishijwe mu ruhamwe kuwa 09/05/2013, Kanzayire Epiphane aburanirwa na Me Rukangira Emmanuel na Me Twiringiyemungu Joseph, Me Basomingera Alberto, Me Kayitare Serge na Me Mhayimana Isaïe baburanira Musoni Ndamage Thaddée, naho Nyirabizimana Zilipa aburanirwa na Me Rwagatare Janvier.

II. IKIBAZO KIGIZE URUBANZA N'ISESENGURA RYACYO

Kumenya niba ikirego cya Kanzayire Epiphane, gitambamira urubanza RCAA 0015/09/CS gishobora kwakirwa.

[7] Rwagatare Janvier uburanira Nyirabizimana avuga ko ikirego cya Kanzayire kidakwiye kwakirwa, kubera ko inzira yo gutambamira urubanza rw'abandi itemewe mu Rukiko rw'Ikirenga.

[8] Asobanura ko, uretse inzira y'ubujurire, iyo gusubirishamo n'iyi gusubirishamo urubanza ingingo nshya zemewe, nta na hamwe inzira yo gutambamira urubanza rw'abandi iteganyijwe mu itegeko ngenga n° 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga nk'uko bigaragara mu ngingo zaryo za 31, 32 na 33.

[9] Uburanira Nyirabizimana avuga ko kandi niyo urega yakwitwaza ko yatanze ikirego cye hagikoreshwa Itegeko

Ngenga n° 01/2004 ryo kuwa 29/01/2004 ryagenaga imitunganyirize, imikorere n'ububasha by'Urukiko rw'Ikirenga, iyo nzira yo gutambamira urubanza rwaciwe n'Urukiko rw'Ikirenga ntaho yagaragaraga muri iryo tegeko ngenga nk'uko byateganywaga n'ingingo ya 84 yaryo, ko kandi Urukiko rw'Ikirenga rwamaze kubifataho icyemezo mu rubanza RCOM 0010/09/CS.

[10] Me Rukangira Emmanuel na Me Twiringiyemungu Joseph baburanira Kanzayire bavuga ko ikirego cye gitambamira urubanza RCAA 0015/09/CS gikwiye kwakirwa kuko harebwe itariki icyo kirego cyatangiweho yo kuwa 26/06/2012, itegeko ngenga n° 03/2012/OL ryo kuwa 13/06/2012 ryavuzwe haruguru ryatangiye gukurikizwa ku itariki ya 09/07/2012 ritareba uru rubanza, ko hagomba gukurikizwa Itegeko Ngenga n° 01/2004 ryo kuwa 29/01/2004 ryavuzwe haruguru kubera ko ingingo yaryo ya 84 itabuzaga abantu batabaye ababuranyi mu rubanza kurutambamira.

[11] Basobanura ko Urukiko rw'Ikirenga nk'urukiko ruburanisha imanza mu mizi (Jurisdiction de fond), rugomba gukurikiza inzira z'imiburanishirize (procédures) zisanzwe zikurikizwa n'izindi nkiko ziburanisha mu mizi, ntirugire inzira n'imwe rusubiza inyuma, maze rukakira ikirego kigamije itambama cy'uwo baburanira.

[12] Bavuga kandi ko urubanza rwaciwe n'uru rukiko uburanira Nyirabizimana asaba ko rwareberwaho, ari rwo rwonyine rwafashe icyemezo ku kibazo kiburanwa, rukaba rero rutafatwa nk'urwatanze umurongo w'urukiko kuri icyo kibazo.

[13] Me Mhayimana uburanira Musoni Ndamage Thaddée avuga ko ingingo ya 144 y'Itegeko Nshinga iha uru rukiko

ububasha bwo kuburanisha uru rubanza. Avuga ko kandi hashingiwe ku ngingo ya 143 y'Itegeko Nshinga, Urukiko rw'Ikirenga ari urukiko rusanze (jurisdiction ordinaire) rukaba rugomba gukurikiza imiburanishirize y'izindi nkiko zisanze kuko narwo ruburanisha imanza mu mizi. Avuga na none ko ingingo ya 8 y'amasezerano mpuzamahanga yerekeranye n'uburenganzira bwa muntu ibuza ivangura, ko rero kuba inzira y'itambama yemewe mu zindi nkiko, nta mpamvu itakwemerwa mu Rukiko rw'Ikirenga.

UKO URUKIKO RUBIBONA

[14] Ku bijyanye no kumenya itegeko rigomba gukurikizwa mu gukemura ikibazo cy'iyakirwa ry'ikirego cya Kanzayire cyagiweho impaka, inyandiko itanga ikirego igaragaza ko cyatanzwe kuwa 11/06/2012 Itegeko Ngenga n° 03/2012/OL ryo kuwa 13/06/2012 ryavuzwe haruguru ritangira gukurikizwa kuwa 09/07/2012, bityo Itegeko Ngenga n° 01/2004 ryo kuwa 29/01/2004 ryakurikizwaga igihe ikirego cyatangwaga akaba ari ryo rigomba gukurikizwa.

[15] Ku birebana n'inzira z'ijurira (voies de recours) ziteganyirijwe imanza zaciwe n'Urukiko rw'Ikirenga, ingingo ya 144 y'Itegeko Nshinga iteganya ko "Urukiko rw'Ikirenga ni rwo rukiko rukuriye izindi mu gihugu. Ibyemezo byarwo ntibijurirwa uretse ibyerekeye imbabazi n'isubirwamo ry'urubanza. Byubahirizwa n'abo bireba bose, zaba inzego za Leta, abayobozi bose b'imirimo ya Leta, aba gisiviri, aba gisirikare, abo mu rwego rw'ubucamanza n'abantu ku giti cyabo".

[16] Ingingo ya 84 nayo y'Itegeko Ngenga n° 01/2004 ryo kuwa 29/01/2004 ryagenaga imitunganyirize, imikorere n'ububasha by'Urukiko rw'Ikirenga igihe ikirego gisuzumwa cyatangwaga yateganyaga ko “Bitabangamiye uburyo buteganyijwe n'amategeko bwo gusubirishamo urubanza rwaciwe burundu, urubanza rwaciwe n'Urukiko rw'Ikirenga ntirushobora kongera kuburanishwa, keretse gusa iyo ari ugukosora imyandikire y'icyo bibeshyeho cyangwa se gusobanura urubanza rwaciwe mu buryo butumvikana cyangwa bushobora kumvikana mu buryo bunyuranye”.

[17] Urukiko rurasanga, harebwe ibiteganywa n'ingingo zimaze kuvugwa haruguru byumvikana neza ko izindi nzira zigamije gusaba ko urubanza rwaciwe n'Urukiko rw'Ikirenga rwongera kuburanishwa zitemewe, uretse iyo gusubirishamo ingingo nshya urubanza rwaciwe burundu yonyine.

[18] Uyu murongo kandi niwo wafashwe n'uru Rukiko mu manza zitandukanye aho rwagaragaje ko inzira yo gutambamira urubanza rwaciwe n'Urukiko rw'Ikirenga itemewe¹ ndetse no mu itegeko ngenga rishya n° 03/2012/OL ryo kuwa 13/06/2012 rigena imiterere, imikorere n'ububasha by'Urukiko rw'Ikirenga, mu birego bishobora gushyikirizwa Urukiko rw'Ikirenga, inzira yo gutambamira urubanza rwaciye n'uru rukiko ntayiteganyijwe.

¹RC 0002/09/CS rwa Khalid Foz v. Ahmed Abdulatif et ctrs rwaciwe kuwa 19/03/2010, RADA 0001/09/CS rwa Leta y'u Rwanda v. Karangwa Eugène rwaciwe kuwa 17/09/2010, RC 0002/05/CS rwa Kagoyire Christine v. Abdallah Sultan et crts rwaciwe kuwa 25/10/2007, RCOM 0010/09/CS rwa Rusekerampunzi v. Rumanyika rwaciwe kuwa 30/04/2010, RADA 0031/12/CS rwa Rudasumbwa Fabrice v. Leta y'u Rwanda, Banki ya Kigali, Nkusi Eugène na Nzirabatinyi Patrick rwaciwe kuwa 17/05/2013.

[19] Hashingiwe ku byasobanuwe haruguru, Urukiko rurasanga ikirego cya Kanzayire Epiphane gitambamira urubanza RCAA 0015/09/CS rwaciwe n'Urukiko rw'Ikirenga kitagomba kwakirwa kuko cyatanzwe mu buryo bunyuranije n'amategeko, bityo akaba atari ngombwa gusuzuma izindi mpamvu zatanzwe.

III. ICYEMEZO CY'URUKIKO

[20] Rwemeje ko ikirego cya Kanzayire Epiphane gitambamira urubanza RCAA 0015/09/CS kitakiriwe.

[21] Rumutegetse gutanga 42.800 frw y'amagarama y'uru rubanza, atayatanga mu gihe cy'iminsi umunani, ayo mafaranga agakurwa mu bye ku ngufu za Leta.

NGANGARE v. MUKANKURANGA

[Rwanda URUKIKO RW'IKIRENGA – RCAA 0022/13/CS
(Mutashya, P.J., Mukamulisa, na Gatete, J.) 25 Nyakanga 2014]

Amategeko agenga umuryango – Ababana batarashakanye mu buryo bukurikije amategeko – Ugutandukana – Igabana ry'umutungo – Ikoreshwa ry'itegeko n° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina ku igabana ry'umutungo w'ababana batarashakanye mu buryo bukurikije amategeko – Ubwumvikane buke hagati y'abashakanye mu buryo budakurikije amategeko ntibusobonuye gutandukana mu gihe bakomeje kubana mu nzu imwe, gufatanya inshingano zo kurera abana no gucunga urugo rwabo – Abashakanye mu buryo budakurikije amategeko bakomeje kubana nyuma y'uko itegeko n° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina risohokeye bagabana hakurikijwe iryo tegeko mu gihe batandukanye – Igabana ry'umutungo w'ababana batarashakanye mu buryo bukurikije amategeko rigamije kurengera uburenganzira ku mutungo wa buri wese muri bo kandi ubwo burenganzira bushingira ku kuba hari umutungo bafitanye cyangwa bafatanyije gushaka – Itegeko n° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, ingingo ya 39 n'ya 41.

Amategeko agenga imiburanishirize y'imanza mbonezamubano – Indishyi – Gushorwa mu manza – Kuba hari ibyo uregwa yatakaje mu manza agomba kubiharerwa indishyi zigenwe mu bushishozi bw'Urukiko.

Incamake y'ikibazo: Ngagare na Mukankuranga babanye badasezeranye imbere y'amategeko ariko bari barabanye bakurikije umuco w'i Bugande kuko ariho babaniye mbere y'uko bimukira mu Rwanda. Nyuma habayeho ubwumvikane buke hagati yabo bituma Mukankuranga atanga ikirego mu Rukiko Rwisumbuye rwa Gasabo asaba ko bagabana imitungo bahahanye. Urukiko rwemeje ko bagabana imitungo batunze buri wese agatwara kimwe cya kabiri cyawo kandi akagumana imitungo yimukanwa atunze; rutegeka Ngangare kumuha igihembo cy'avoka n'ikurikiranarubanza.

Ngangare yajuririye Urukiko Rukuru maze rwemeza ko ubujurire bwe nta shingiro bufite; yongeye na none kujuririra Urukiko rw'Ikirenga avuga ko Urukiko rwashingiye ku itegeko n° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina kandi ryaratangiyeye gukurikizwa atakibana na Mukankuranga, bityo imitungo yaguze nyuma y'umwaka wa 2000 itagombaga kugabanywa kuko bari batakibana. Yongeraho ko n'iyi iryo tegeko ryaba ariryo ryari gukurikizwa, ingingo yaryo ya 39 itashingirwaho kuko ireba igabana ry'umutungo ku babana batarashakanye mu buryo bukurikije amategeko mu gihe hari umwe muri bo ugiye gushyingirwa.

Mukankuranga we avugako batigeze bareka kubana kuko bakomeje kubana mu nzu imwe, bafatanya kurera abana no gucunga urugo rwabo bityo akavuga ko ari yo mpamvu ingingo ya 39 y'Itegeko n° 59/2008 ryo kuwa 10/09/2008 ryavuzwe haruguru ariryo rikwiye gukoreshwa.

Incamake y'icyemezo: 1. Ubwumvikane buke hagati y'ababana batarashakanye mu buryo bukurikije amategeko ntibusobonuye

gutandukana mu gihe bakomeje kubana mu nzu imwe, gufatanywa inshingano zo kurera abana no gucunga urugo rwabo.

2. Ababana batarashakanye mu buryo bukurikije amategeko bakomeje kubana nyuma y'uko itegeko n° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina risohokaye bagabana imitungo bafatanyije gushaka hakurikijwe iryo tegeko mu gihe batandukanye.

3. Igabana ry'umutungo w'ababana batarashakanye mu buryo bukurikije amategeko, rigamije kurengera uburenganzira ku mutungo wa buri wese mu bari basanzwe babana nk'umugore n'umugabo kandi ubwo burenganzira bushingira ku kuba hari umutungo bafatanyije gushaka.

4. Kuba har'ibyo uregwa yatakaje mu manza agomba kubiharerwa indishyi zigenwe mu bushishozi bw'urukiko.

**Ubujurire nta shingiro bufite.
Amagarama y'urubanza aherereye k'urega.**

Amategeko yashingiweho:

Itegeko n° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina, ingingo ya 39 n'ya 41.

Imanza zifashishijwe:

Mutebi v. Mukagasaza, RCAA0143/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 15/03/2013.

Gatera v. Kabalisa, RS/Inconst/Pen.0003/10/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 07/01/2011.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Ngangare John na Mukankuranga Grace babanye batarasezeranye imbere y'amategeko kuva muri 1984 bakiba mu gihugu cya Uganda, bakaba barabyaranye abana bane. Nyuma habaye ubwumvikane buke hagati yabo bituma Mukankuranga Grace atanga ikirego mu Rukiko Rwisumbuye rwa Gasabo avuga ko nubwo batasezeranye, babanaga bakurikije umuco wa Uganda kuko Ngangare yamusabye akanamukwa, anasaba ko bagabana imitungo yose bahahanye.

[2] Mu guca urubanza, urukiko rwemeje ko bagabana imitungo igizwe n'ikibanza n°41 kirimo amazu atatu (inzu ifite ibyumba bitanu, inzu itarasakarwa n'inzu yuzuye isigaje amasuku) zihereye aho batuye, isambu iri mu mudugudu wa Karama, Akagari ka Musave, Umurenge wa Bumbogo, Akarere ka Gasabo n'inzu n'isambu basize Uganda, buri wese agatwara kimwe cya kabiri cy'imitungo, buri wese akagumana imitungo yimukanwa atunze, runategeka Ngangare guha Mukankuranga 300,000 Frws y'ikurikiranarubanza n'igihembo cya Avoka.

[3] Ngangare John yajuririye Urukiko Rukuru rwemeza ko ubujurire bwe nta shingiro bufite, ruvuga ko imikirize y'urubanza rwajuririwe idahindutse.

[4] Ngangare John ntiyishimiye na none imikirize y'urubanza maze ajuririra Urukiko rw'Ikirenga agaragaza ibyo anenga mu rubanza rwaciwe, Mukankuranga nawe agenda abisubizaho.

[5] Urubanza rwaburanishijwe mu ruhame kuwa 17/06/2014, Ngangare John aburanirwa na Me Ntigurirwa François na Me Umupfasoni Blandine, naho Mukankuranga Grace yuganiye na Me Mukamana Elisabeth.

II. ISESENGURA RY'IBIBAZO BIGIZE URUBANZA

a) Kumenya niba Ngangare na Mukankuranga bararetse kubana mbere y'uko Itegeko n° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina rijyaho, ku buryo ritashingirwaho muri uru rubanza.

[6] Me Umupfasoni Blandine uburanira Ngangare John, avuga ko umucamanza yavugiye Mukankuranga Grace ibyo atavuze ubwo yemezaga ko kuva mu mwaka wa 2000 bakomeje kubana nubwo bari bafite ubwumvikane buke, nyamara Mukankuranga ubwe yariyemereye ko kuva muri uwo mwaka wa 2000 batongeye kubana nk'umugore n'umugabo.

[7] Akomeza avuga ko ingingo ya 41 y'Itegeko n° 59/2008 ryo kuwa 10/09/2008 ryavuzwe, iteganya ko rizatangira gukoreshwa kuva risohotse, ko rero ubwo ryasohotse muri 2008 Ngangare na Mukankuranga bata kibana, ridakwiye gukoreshwa, kandi ko n'imitungo Ngangare yaguze nyuma ya 2000 itagomba kubaganywa hashingiwe kuri iryo tegeko kuko yayibonye bata kibana.

[8] Avuga kandi ko amasezerano y'akazi Mukankuranga yakoranye na SWA Rwanda yo muri 2010 ashaka kugaragaza ko yakoraga, yayakoze bata kibana, kuko yatangiye kugira

amafaranga kuri konti mu mwaka wa 2000, ari nawo batandukanyemo.

[9] Mukankuranga avuga ko yabanye na Ngangare muri Uganda kuva mu mwaka wa 1984 bombi barangije kwiga, muri 1994 barahunguka baza mu Rwanda, bafatanya gushaka imitungo bari kumwe ariko ko yasabye Ngangare ko basezerana undi akabyanga yemera gusa abana babyaranye.

[10] Anavuga ko batigeze batandukana kuko n'ubu babana mu nzu imwe, uretse gusa ko batakiryamana. Yongeyeho ko no ku munsu w'iburanisha ry'urubanza muri uru Rukiko bombi baje bavuye muri iyo nzu babanamo ndetse ko abaturanyi babo bazi ko babana bakaba banafitanye abana bane babyaranye, ko bakora umuganda hamwe bagasangira igikoni, umukozi, umuzamu n'inzu, ko Urukiko ruramutse rukeneye kureba ko ibyo avuga ari ukuri rwabaza abo baturanyi.

[11] Yakomeje avuga ko mu mwaka wa 2008 yishyuye umuriro w'amafaranga 1.000.000 Frw kandi bose bawukoresha, akibaza niba Ngangare abifata nko kumuguriza. Anavuga ko kuva mbere abana na Ngagare yakoraga n'ubu akaba agikora, ndetse ko ibyo babonye byose bafatanyije kubishaka kandi ko ibintu byose babikorera hamwe.

[12] Me Mukamana Elisabeth umwunganira avuga ko umucamanza atigeze avugira Mukankuranga ibyo atavuze kuko yavuze ko kuba baratangiye kutumvikana mu 2000 bidasobanura ko batakomeje kubana nk'umugabo n'umugore, ari yo mpamvu Itegeko n° 59/2008 ryo kuwa 10/09/2008 ribareba.

UKO URUKIKO RUBIBONA

[13] Itegeko n° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina ryatangajwe mu Igazeti ya Leta n° 14 yo kuwa 06/07/2009, ritangira gukurikizwa kuva ku muni ryatangarijweho nk'uko ingingo yaryo ya 41 ibivuga.

[14] Urukiko rusanga mu iburanisha Mukankuranga yarasobanuye ko yabanye na Ngangare nk'umugabo n'umugore nta kibazo bafitanye kugeza mu mwaka wa 2000 ari bwo hatangiye kuba ubwumvikane buke hagati yabo, ubwo bwumvikane buke bukaba bwarakomeje kugeza n'ubu, ariko ko n'ubwo batari babanye neza, bakomeje gutura mu nzu imwe nk'umugabo n'umugore, banafitanye abana babyaranye kandi bakomeza gufatanya kubarera ndetse no gufatanya gucunga urugo rwabo. Ibyo Mukankuranga yavuze Ngangare akaba atarigeze abinyomoza.

[15] Mu rubanza n° RCAA0143/11/CS rwaciwe n'uru Rukiko kuwa 15/03/2013 haburana Mutebi Hamisi alias Fungamani na Mukagasaza Amina, aho Mutebi Hamisi yaburanaga avuga ko Itegeko n° 59/2008 ryo kuwa 10/09/2008 ryamaze kuvugwa ryasohotse baratandukanye, uru Rukiko rwemeje ko nta shingiro bifite, kuko inyandiko ziri muri dosiye zigaragaza ko kugeza muri 2010, Mutebi na Mukagasaza bari bakibana n'ubwo babanaga nabi.

[16] Ku bijyanye n'uru rubanza, Urukiko rurasanga kuba hagati ya Ngangare na Mukankuranga harabaye ubwumvikane buke kuva mu mwaka wa 2000 bidasobanura ko batakomeje kubana nk'umugore n'umugabo nk'uko byasobanuwe mu

rubanza rumaze kuvugwa, kubera ko Ngangare atabashije kugaragaza ko yaretse kubana na Mukankuranga muri 2000 ku buryo Itegeko n° 59/2008 ryo kuwa 10/09/2008 ryavuzwe ritamureba; ingingo y'ubujurire bwe ikaba rero nta shingiro ifite.

b) Kumenya niba Urukiko rwarakoresheje nabi ingingo ya 39 y'Itegeko n° 59/2008 ryo kuwa 10/09/2008 rikumira kandi rihana ihohoterwa iryo ari ryo ryose rishingiye ku gitsina.

[17] Me Umupfasoni Blandine avuga ko n'iyo Urukiko rwaramuka rubonye ko kugeza ubu Mukankuranga na Ngangare bakibana nk'umugabo n'umugore, ingingo ya 39 y'itegeko ryavuzwe haruguru atari yo igomba gushingirwaho ngo bagabane umutungo, kubera ko iyo ngingo iteganya ko usabwa kubanza kugabana imitungo ari uba ugiye gushyingirwa, kugira ngo mugenzi we cyangwa bagenzi be babanaga mu buryo butemewe n'amategeko babanze bahabwe uruhare rwabo mbere yuko uwo wundi ajya gushyingirwa.

[18] Akomeza avuga ko Mukankuranga Grace atigeze agaragariza urukiko ko Ngangare agiye gushaka undi mugore, ndetse ko iyo Ngangare aza kuba ari we ushaka gushyingirwa, niwe wari gutanga ikirego asaba ko babanza kugabana imitungo.

[19] Me Mukamana Elisabeth avuga ko ingingo ya 39 y'Itegeko yavuzwe yashyizweho hagamijwe guca akarengane kugira ngo umutungo abantu bashakanye batarasezeranye hatagira umwe uwiharira. Anavuga ko Ngangare na Mukankuranga bamaze imyaka mirongo itatu babanye, n'ubu bakaba bakibana n'ubwo hari inshingano zimwe batubahiriza

nk'abashakanye, kandi ko nabyo byatewe n'ubwumvikane buke bwabaye hagati yabo, ariko ko bitavuze ko baretse kubana nk'umugore n'umugabo.

[20] Akomeza avuga ko atumva uburyo nyuma y'iyo myaka yose Ngangare amaranye na Mukankuranga yasaba icyemezo cy'uko ari ingaragu, ahubwo ko kuba yaragishatse bigaragaza ko yashakaga uburyo bwo kwiharira umutungo.

[21] Yasobanuye ko urubanza rwa Gatera John na Kabalisa Teddy rwaciwe n'uru Rukiko kuwa 07/01/2011 rwasubije ibibazo byose ababuranira Ngangare bibaza ku bijyanye n'ingingo ya 39 y'Itegeko n° 59/2008 ryo kuwa 10/09/2008 ryavuzwe haruguru.

UKO URUKIKO RUBIBONA

[22] Ingingo ya 39 y'Itegeko n° 59/2008 ryo kuwa 10/09/2008 ryavuzwe haruguru ivuga ko: "ababanaga nk'umugore n'umugabo batarashyingiranywe mu buryo buteganywa n'amategeko, bashyingirwa hakurikije ihame ry'ubushyingiranwe bw'umugabo umwe n'umugore umwe. Mu gihe umwe mu barebwa n'ibivugwa mu gika kibanziriza iki, yabanaga n'abagore cyangwa n'abagabo benshi, abanza kugabana ku buryo bungana na buri wese mu bo babanaga, umutungo bari bafitanye cyangwa bahahanye mbere y'uko ashyingirwa".

[23] Mu rubanza RS/Inconst/Pen.0003/10/CS rwaciwe kuwa 07/01/2011 ku kirego cyatanzwe na Gatera Johnson na Kabalisa Teddy basaba ko ingingo ya 39 y'Itegeko n° 59/2008 ryo kuwa 10/09/2008 ryavuzwe inyuranyije n'Itegeko Nshinga, uru

Rukiko rwasobanuye ko igihe ababanaga nk'umugabo n'umugore batarashyingiranywe bahagaritse kubana, kugira ngo bagabane umutungo bagomba kuba bari bawufitanye cyangwa barawushakanye; Urukiko rukaba rwaranasobanuye ko kugira uburenganzira ku mutungo bidashingiye gusa ku mpamvu y'uko abantu babanye nk'umugabo n'umugore batarashyingiranywe, ahubwo ko bigomba kuba bigaragara ko hari umutungo bafitanye cyangwa bafatanyije gushaka.

[24] Urukiko rusanga rero nk'uko uru Rukiko rwabisobanuye mu rubanza rumaze kuvugwa, ikigamijwe mu ngingo ya 39 y'Itegeko n° 59/2008 ryo kuwa 10/09/2008 ryavuzwe, yanashingiweho n'Urukiko Rukuru, ari ukurengera uburenganzira ku mutungo bwa buri wese mu bari basanzwe babana nk'umugabo n'umugore ariko batarashyingiranywe, kubera uruhare yagize mu guteza imbere urugo yabanagamo na mugenzi we, ari yo mpamvu umutungo bahahanye cyangwa bari bafatanyije bagomba kubanza kuwugabana mu gihe umwe yifuzaga gushyingiranwa n'undi utari we, kuko bitabaye ibyo, umwe muri bo cyane cyane ugiye gushyingiranwa n'undi, yakungukira ku bintu yahahanye cyangwa yari asangiye n'uwo babanaga.

[25] Hakurikijwe ibisobanuro byatanzwe, Urukiko rurasanga rero nta kosa Urukiko Rukuru rwakoze rushingira ku ngingo ya 39 y'Itegeko n° 59/2008 ryo kuwa 10/09/2008 ryavuzwe maze rugashimangira ibyemejwe n'Urukiko Rwisumbuye rwa Gasabo ko Ngangare John na Mukankuranga Grace bagomba kugabana imitungo yabo nk'uko yavuzwe haruguru.

c) Kumenya niba Mukankuranga Grace akwiye indishyi asaba

[26] Me Mukamana Elisabeth uburanira Mukankuranga Grace yatanze ubujurire bwuririye ku bundi asaba ko amafaranga 500.000 uwo aburanira yagenewe mu rubanza rwajuririwe y'ikurikiranarubanza n'igihembo cya avoka yiyongera akagera kuri 1.000.000 Frw yari yasabye ku rwego rubanza cyane cyane ko Ngangare akomeje kumurushya akomeza imanza.

[27] Me Ntigurirwa François wunganira Ngangare John avuga ko ari bo bareze basaba ko Urukiko rwakira ubujurire bwabo kandi rugakuraho urubanza rwajuririwe, ko rero mu gihe urubanza rwaba ruvuyeho n'ubujurire bwuririye ku bundi bwatanzwe na Mukankuranga ntacyo bwaba bushingiyeho. Yongeraho ariko ko mu gihe Urukiko rwaba rudahaye agaciro ubujurire bwa Ngangare, rwagena indishyi mu bushishozi bwarwo.

[28] Urukiko rurasanga mu rubanza rwajuririwe, Mukankuranga Grace yari yagenewe 500.000 Frw y'ikurikiranarubanza n'igihembo cya avoka, ayo mafaranga akaba akwiye kwiyongera kubera ko biboneka ko Ngangare John akomeje imanza zatumye hari ibyo Mukankuranga yongera gutanga kuri uru rubanza, akaba agenewe 500.000 Frw kuri uru rwego agenwe mu bushishozi bw'Urukiko.

III. ICYEMEZO CY'URUKIKO RW'IKIRENGA

[29] Rwemeje ko ubujurire bwa Ngangare John nta shingiro bufite;

[30] Rwemeje ko imikirize y'urubanza RCA 0163/12/HC/KIG rwaciwe n'Urukiko Rukuru i Kigali kuwa 19/07/2013 idahindutse usibye ku bijyanye n'amafaranga y'ikurikiranarubanza n'igihembo cya avoka ahawe Mukankuranga Grace kuri uru rwego;

[31] Rutegetse Ngangare John guha Mukankuranga Grace 500.000 Frw y'ikurikirana rubanza n'igihembo cya Avoka yiyongera kuri 500.000 Frw yagenewe mu rubanza rwajuririwe;

[32] Rutegetse Ngangare John gutanga amagarama y'urubanza angana na 29.800 Frw.

URUBANZA RW'UMURIMO

KALISA v. INSTITUT POLYTECHNIQUE DE BYUMBA (IPB)

[Rwanda URUKIKO RW'IKIRENGA – RSOCAA 0061/12/CS (Mutashya, P.J., Rugabirwa na Gakwaya, J.) 02 Gicurasi 2014]

Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Indishyi – Igikorwa cyo kumenyeshya izindi nzego ikosa umukozi yirukaniwe kandi ataryisobanuyeho gifatwa nko kumuharabika – Ikosa ryose rikorewe umuntu arikorewe n'undi rikamugiraho ingaruka, uwo wariteje agomba kuzirengera – Itegeko ryo kuwa 30/07/1888 rigenga ibyerekeye imirimo nshinganwa cyangwa amasezerano, ingingo ya 258.

Amategeko y'umurimo – Indishyi zijyanye no kuzamurwa mu ntera – Nta ndishyi zijyanye no kuzamurwa mu ntera umukozi yahabwa n'ubwo yaba ageze igihe cyo kuzamurwa mu ntera ariko akirukanwa atari yakora igihe gikwiye guhemberwa umushahara mushya.

Amategeko y'imiburanishirize y'imanza z'imbonezamubano – Inshingano y'urega yo kugaragaza ibimenyetso – Urega ntiyahabwa indishyi z'uko umuryango we wahungabanye kubera iyirukanwa rye mu gihe atabitangiye ibimenyetso.

Amategeko y'imiburanishirize y'imanza z'imbonezamubano – Kutakirwa kw'ikirego gishya mu rwego rw'ubujurire – Ikirego kitaburanyweho mu rwego rubanza ntigisuzumwa bwa mbere ku rwego rw'ubujurire.

Incamake y'ikibazo: Kalisa yagiranye amasezerano y'umurimo na Institut Polytechnique de Byumba (IPB) yo

kuyikorera nk' umwarimu. Nyuma IPB yamwandikiye ibaruwa imumenyesha ko isheshe amazerano bari bafitanye kubera amakosa anyuranye harimo n'ubusinzi.

Kalisa ntiyanyuzwe n'icyo cyemezo aregera umugenzuzi w'umurimo mu Karere ka Gicumbi ariko impande zombi ntizumvikana bituma aregera Urukiko Rwisumbuye rwa Gicumbi avuga ko yirukanwe mu buryo bunyuranyije n'amategeko, abisabira n'indishyi. Uru rukiko rwemeje ko ikirego cye gifite ishingiro rutegeka IPB kubimuhera indishyi. Kalisa ntiyishimiye icyo cyemezo ajuririra Urukiko Rukuru avuga ko atahawe indishyi z'uko yasebejwe na IPB, akaba kandi atarahawe integuza, amafaranga yo kuzamurwa mu ntera hamwe n'ayo yakoresheje mu ikurikiranarubanza naho IPB itanga ubujurire bwuririye kubundi ivuga ko umushahara wabariweho integuza atariwo. Urwo Rukiko rwemeje ko ubujurire bufite ishingiro kuri bimwe kandi rwemeza n'umushahara mushya ukwiye kubarirwaho indishyi.

Kalisa yajuririye Urukiko rw'Ikirenga avuga ko Urukiko Rukuru rwirengagije kumuha indishyi zijyanye n'uko yasebejwe na IPB, no kuba umuryango we warahungabanyijwe n'iyirukanwa rye hamwe n'uko atahawe amafaranga yo kuzamurwa mu ntera kandi yari abyemerewe, akaba abisabira n'indishyi zingana n'igihe cyari gisigaye ngo aje mu kiruhuko cy'izabukuru. Kuri izo ngingo IPB ivuga ko ubujurire bwe nta shingiro bufite kuko ibyamukorewe ntaho bitaniye n'ibikororwa undi mukozi wese wirukanywe.

Incamake y'icyemezo: 1. Igikorwa cyo kumenyesha izindi nzego ikosa umukozi yirukaniwe kandi ataryisobanuyeho gifatwa nko kumuharabika uwagikoze akabitangira indishyi.

2. Nta ndishyi ziyanye no kuzamurwa mu ntera umukozi yahabwa n'ubwo yaba ageze igihe cyo kuzamurwa mu ntera ariko akirukanwa atari yakora igihe gikwiye guhemberwa umushahara mushya.
3. Urega ntiyahabwa indishyi z'uko umuryango we wahungabanye kubera iyirukanwa rye mu gihe atabitangiye ibimenyetso.
4. Kuba ikibazo kitarigeze kiburanwaho mu Nkiko zibanza ntiyasuzumwa bwa mbere mu rwego rw'Ubujurire.
5. Iyo hari ibyo umuburanyi yatakaje akurikirana urubanza abiharerwa amafaranga y'ikurikiranarubanza naho ku bijyanye n'igihembo cy'avoka, umuburanyi atavuze ingano yacyo ntaho Urukiko rwahera rukigena.

**Ubujurire bufite ishingiro kuri bimwe.
Institut Polytechnique de Byumba igomba guha uwajuriye
indishyi.
Amagarama y'urubanza aherereye ku regwa.**

Amategeko yashingiweho:

Itegeko ryo kuwa 30/07/1888 rigenga amasezerano cyangwa imirimo nshinganwa, ingingo ya 258.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Kuwa 11/09/2006, IPB¹ yagiranye amasezerano y'umurimo na Kalisa Alphonse yo kuyikorera nk'umwarimu, kuwa 19/09/2009 ubuyobozi bwa IPB bwamwandikiye ibaruwa bumumenyeha ko busheshe amasezerano y'akazi bari bafitanye kubera amakosa anyuranye yagaragajwe muri iyo baruwa isesa amasezerano.

[2] Kalisa Alphonse ntiyanyuzwe n'icyemezo cyo gusesa amasezerano cyafashwe na IPB yiyambaza umuyobozi w'umurimo mu Karere ka Gicumbi nyuma y'uko impande zombi zidashoboye kumvikana. Kalisa Alphonse yaregeye Urukiko Rwisumbuye rwa Gicumbi avuga ko yirukanywe mu buryo bunyuranyije n'amategeko anabisabira indishyi zinyuranye. Urukiko Rwisumbuye rwa Gicumbi rwafashe icyemezo ko ikirego cye gifite ishingiro' ko yirukanywe mu buryo bunyuranyije n'amategeko kubera ko amategeko agenga kumenyekanisha iyirukanwa kubera ikosa rikomeye atubahirijwe, rutegeka IPB guha Kalisa Alphonse indishyi zingana na 1.837.768 Frw zikubiyemo indishyi zo kwirukanwa mu buryo bunyuranyije n'amategeko, imperekeza, amafranga y'ikiruhuko cy'umwaka wa 2009 atafashe, ay'ikurikiranarubanza n'igihembo cy'avoka.

[3] Kalisa Alphonse yajuriye mu Rukiko Rukuru avuga ko atagenewe amafaranga yo kuba yarasebejwe na IPB kubera ko yamwandikiye ibaruwa ikayimenyeshya Ubuyobozi bw'amashuri

¹ Institut Polytechnique de Byumba.

Makuru yigenga ahuriye muri CRIPES² na ARIPES³, kuba atarahawe integuza, kuba atarahawe amafaranga ajyanye no kuzamurwa mu ntera hakurijwe grade académique no kuba atarahawe amafaranga yakoresheje mu ikurikirana ry'urubanza. IPB nayo yatanze ubujurire bwuririye ku bwa Kalisa Alphonse isaba ko umushahara wabariweho integuza ari umushahara mbumbe wa 409.402 Frw kandi hari hakwiye kubarirwa ku mushahara wa 306.607 Frw uhwanyane n'umushahara fatizo (salaire de base).

[4] Urukiko Rukuru rwaciye urubanza rwemeza ko ubujurire bwa Kalisa Alphonse bufite ishingiro kuri bimwe, rutegeka ko umushahara mpuzandengo ushingirwaho mu kubara ibyo Kalisa Alphonse agomba guhabwa ari 306.607 Frw aho kuba 409.442 Frw nk'uko Urukiko Rwisumbuye rwa Gicumbi rwabyemeje, rutegeka IPB guha KALISA Alphonse amafaranga 2.007.880 Frw abazwe mu buryo bukurikira:

Integuza ingana na 306.607 Frw;

Indishyi ziyanye no kwirukanwa mu buryo bunyuranyije n'amategeko zingana na 919.821 Frw;

Imperekeza ingana na 306.607 Frw;

Amafaranga y'ikiruhuko atafashe angana na 334.845 Frw;

Amafaranga y'ikurikiranarubanza n'igihembo cy'avoka angana na 700.000 Frw.

[5] Ku byerekeye kuba yarasebejwe na IPB nk'umukoresha we, Urukiko Rukuru rwasanze nta shingiro bifite kubera ko kuba IPB yaramenyeshije ubuyobozi bw'Amashuri makuru yigenga byari mu rwego rwo kubahiriza amasezerano yagiranye n'andi mashuri makuru ahuriye mu ishyirahamwe rimwe rya

²Conseil des Recteurs des Instituts Privés d'Enseignement Supérieur.

³Association Rwandaise des Instituts Privés d'Enseignement Supérieur.

ARIPES⁹, ko kandi atahabwa indishyi z'uko yatotejwe bikamutera ihungabana kubera ko yarezwe ibitari byo.

[6] Ku bijyanye n'indishyi yasabaga zijyanye no kuba atarabashije kwishyura umwenda yafashe muri BCR Ltd kandi yarasinyiwe na IPB ikaza kumwirukana, Urukiko rwasanze izo ndishyi atazihabwa kubera ko amasezerano yagiranye na BCR Ltd amureba we wenyine na BCR Ltd, ko ntaho ahuriye na IPB ikaba rero itayaryozwa.

[7] Kalisa Alphonse yongeye kujuririra urubanza mu Rukiko rw'Ikirenga avuga ko umucamanza yanze kumuha indishyi zijyanye no guharabikwa yirengagije ko ibaruwa imusezerera yarimo iharabika ikaba kandi yaramenyeshajwe amashuri makuru ahuriye mu ishyirahamwe ryitwa ARIPES, kuba atarahawe amafaranga y'indishyi z'akababaro zijyanye no kuba umuryango we warahungabanye kubera iyirukanwa rye, kuba Urukiko ntacyo rwavuze ku kuba atarahawe amafaranga ajyanye n'izamurwa mu ntera nyamara yari abyemerewe hakurikijwe amategeko ngengamikorere ya IPB, akaba asaba n'indishyi zingana n'igihe cyari gisigaye ngo ajye mu kiruhuko cy'izabukuru.

[8] Kuri izo ngingo, IPB ikavuga ko impamvu z'ubujurire za Kalisa Alphonse nta shingiro zifite kubera ko ibyakorewe Kalisa Alphonse ntaho bitaniye n'ibikorera umwarimu wese wirukanywe.

[9] Iburanisha ry’urubanza ryabaye ku wa 18/03/2014 mu ruhame Kalisa Alphonse Makala yitabye aburanirwa na Me Nkundabarashi Moise naho IPB iburanirwa na Me Marie Louise Ndengeyingoma.

II. IBIBAZO BIGIZE URUBANZA N’ISESENGURA RYABYO

Kumenya niba, kuba IPB yaramenyeshije abanyamuryango ba ARIPESES impamvu y’iyirukanwa rya Kalisa Alphonse, hari amakosa yaba yarakoze ku buryo yabitangira indishyi.

[10] Kalisa Alphonse avuga ko IPB yakozwe amakosa yo kumenyeshya amashuri ahuriye muri ARIPESES iyirukanwa rye n’impamvu yaryo kubera ko binyuranyije n’amategeko agenga iseswa ry’amasezerano kubera ko iri sesa rireba abayagiranye, ko kuba ibi bigo byaragiranye amasezerano yo guhanahana amakuru ya “programme académique” we bitamureba kuko atari muri izo gahunda, ko kuba iri yirukanwa ryaramenyeshijwe ibi bigo, byatumye ntaho yabona akazi cyane cyane mu rwego rw’uburezi.

[11] Me Nkundabarashi uburanira Kalisa Alphonse avuga ko kuba IPB yaramenyeshije amashuri makuru yose ko yirukanwe kubera ubusinzi ari igisebo gikomeye, IPB ikaba yarakoze ibi nyamara mu mwaka wabanje yari yamukoreye isuzumamikorere ikemeza ko ari umukozi mwiza, kuvuga ko byakozwe mu rwego rwo guhanahana amakuru ataribyoye kuko amakuru agomba gutangwa atari nk’aya yatanzwe ku iyirukanwa rya Kalisa Alphonse, asaba ko yahabwa indishyi zingana na 10.000.000 Frw.

[12] Me Ndengeyingoma Louise uburanira IPB avuga ko ibyo kumenyesha amashuri yose ahuriye muri ARIPES amakuru y'iyirukanwa ry'umukozi, ari ibintu bisanzwe bikorerwa abakozi bose, ko IPB itagomba guhishira impamvu y'ubusinzi kandi ariyo yatumye yirukanwa, ko kandi mu mategeko ngengamikorere Kalisa Alphonse yasinye mu ngingo yayo ya 11, ikijyanye n'ubusinzi ari ikosa rikomeye rituma umukozi ahita yirukanwa, ko icyabayeho atari ukumusebya ahubwo ari ugutanga amakuru ku iyirukanwa rye, akaba yarirukanywe kubera amakosa akomeye, ayo makosa akaba yaragombaga gushyirwa mu ibaruwa imwirukana.

[13] Akomeza avuga ko mu masezerano amashuri makuru yigenga yagiranye, harimo ibijyanye no guhanahana amakuru mu gihe abakozi birukanywe, kuvuga ko abagomba gukorerwa ibyo ari abari muri Programme académique, nta shingiro bifite kuko abakozi bose ariko bigenda, kuba yarirukanywe kubera ubusinzi bikaba bitari guhishirwa kugira ngo atazajya no kwanduza ahandi, ko rero IPB itabimuhera indishyi asaba.

UKO URUKIKO RUBIBONA

[14] Urukiko rurasanga mu nyandiko mvugo y'inama yabaye kuwa 15/10/2008 y'abagize inama y'ubutegetsi y'Ihuriro ry'Amashuri makuru yigenga mu Rwanda ku byerekeranye no guhanahana amakuru, baremeranije nk'uko bigaragara mu mwanzuro w'iyi nama, ko bagomba guhanahana amakuru yose

arebana n'ibyo bigo ariko bakirinda gutanga amakuru ashobora gutera urujijo muri rubanda⁴ .

[15] Urukiko rurasanga mu mabaruwa yose Kalisa Alphonse yagiye yandikirwa asabwa kwisobanura nta n'imwe yigeze yandikirwa havugwamo ko yaba yaraje ku kazi yasinze⁵ , ibyo gusinda bikaba byaravugiwe gusa mu nama yabaye ku wa 19/09/2009 ari nayo hafatiwe icyemezo cyo gusesa amasezerano.

[16] Kuba mu mpamvu IPB yatanze yirukana Kalisa Alphonse yarashyizemo n'ubusinzi nyamara atarigeze yisobanura kuri iri kosa, ndetse iyo baruwa ikamenyeshwa Amashuri makuru yose yigenga yo mu Rwanda ko Kalisa Alphonse yirukanywe kubera ubusinzi, Urukiko rurasanga icyo gikorwa ari iharabika rishobora kumutesha agaciro bikamuvutsa amahirwe yo kubona akazi ahandi cyane cyane mu rwego rw'uburezi, IPB ikaba ikwiye kubiryoza hashingiwe ku ngingo ya 258 y'igitabo cya gatatu cy'urwunge rw'amategeko mbonezamubano⁶ ivuga ko ikosa ryose rikorewe umuntu arikorewe n'undi rikamugiraho ingaruka, uwo wariteje agomba kuzirengera.

⁴ Eviter les informations qui peuvent confondre le public et échanger les informations concernant leurs institutions sur les différents programmes, reba inyandiko iri muri dosiye kuri Cote ya 45-47 mu nyandiko zigize urubanza.

⁵ Reba ibaruwa yandikiwe ku wa 04/12/2008 aho yasabwaga kuba atarahuje ibijyanye n'amanota y'abanyeshuri, no kutitabira inama zijyanye no gutegura gahunda (Cote ya 41), ibaruwa yo ku wa 06/08/2009 aho yandikiwe asabwa gutanga ibisobanuro ku kuba atarakoze gahunda y'icyumweru cyo kuwa 10/08/2009 kugera ku wa 16/08/2009 (Cote ya 23).

⁶ “Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute de qui il est arrivé à le réparer”.

[17] Urukiko rurasanga rero kubera amakosa IPB yakoreye Kalisa Alphonse nkuko byasobanuwe, igomba kubimuhera indishyi zigenwe mu bushishozi bw'Urukiko kubera ko 10.000.000 Frw asaba ari ikirenga, akaba agenewe 2.000.000 Frw.

Kumenya niba Kalisa Alphonse akwiye guhabwa indishyi zo kuba atarazamuwe mu ntera.

[18] Kalisa Alphonse avuga ko atahawe amafaranga ajyanye n'izamura mu ntera nyamara yarakorewe isuzumamikorere hakomezwa ko ari umukozi mwiza ndetse umuyobozi akemera ko azamura mu ntera amaze gutanga ibyangombwa bikenewe ko kandi ibyo byangombwa yabitanze, kuba atarazamuwe bikaba ari uburangare bw'abayobozi be.

[19] Me Nkundabarashi wunganira Kalisa Alphonse avuga ko uwo yunganira yakorewe isuzumamikorere kuwa 06/01/2009, ubuyobozi bwa IPB bwemeza ko ari umukozi mwiza ukwiye kuzamura mu ntera, ariko ko yaje kwirukanwa nyuma y'amezi icyenda (9) amaze gukorerwa iryo suzumamikorere, akaba atarigeze azamura mu ntera nk'uko byari byifujwe n'abayobozi be, ko rero kuba Vice Recteur yaremeje ko azamura mu ntera nyuma yo gutanga ibyangombwa byose bikenewe ku ntera yagombaga gushyirwaho, ibyo byangombwa Kalisa akaba yarabitanze ariko ntibikorwe, ari amakosa ya IPB akaba atagomba kuzira uburangare bw'ubuyobozi bukuru bwa IPB.

[20] Akomeza avuga ko kuba nta baruwa cyangwa icyemezo cyafashwe kimuzamura mu ntera akaba atabizira kuko atariwe wagombaga kwizamura, kuba yaranditse asaba uburenganzira bwe agatanga n'ibyangombwa bikenewe, iyo ubuyobozi bubona

ko atagomba kuzamurwa mu ntera bwari kumusubiza bukamubwira impamvu butamuzamuye, ko rero mu gihe atasubijwe bifatwa nk'aho byemewe, akaba abisabira indishyi zingana na 12.640.786 Frw ahwanye n'ikinyuranyo hagati y'umushahara yahembwaga n'umushahara mushya yari kuzajya ahembwa iyo azamuka mu ntera izo ndishyi akazisaba ashingiye ku ngingo ya 81 y'itegeko n° 13/2009 ryo kuwa 27/05/2009 rigenga umurimo mu Rwanda ivuga ko “iyo amasezerano y'akazi arangiye, umukozi ahabwa umushahara we akirangira, agahabwa n'andi mafaranga afitiye uburenganzira ahabwa n'ayo masezerano”.

[21] Me Ndengeyingoma Louise uburanira IPB avuga ko Kalisa Alphonse atigeze azamurwa mu ntera nk'uko abivuga, ko iyo hamaze gukorwa isuzumamikorere hakurikiraho icyemezo cyo kuzamura umuntu mu ntera, icyo cyemezo kikaba kitarigeze kibaho, bityo ko atagomba gusaba amafaranga yo kuzamurwa mu ntera kandi azi neza ko iyo ntera atigeze ayizamurwaho.

UKO URUKIKO RUBIBONA

[22] Ingingo ya 1.6.2.3 y'itegeko ngengamikorere ya IPB iteganya ko “Est candidat au grade de Chargé de Cours associé(CCA), le détenteur d'un diplôme de Doctorat. Il peut être également nommé à ce grade le détenteur d'une maîtrise justifiant d'une expérience de trois ans dans le grade d'assistant”. Isesengura ry'iyi ngingo ryumvikanisha ko kugira ngo umwarimu w'umufasha azamurwe ku ntera y'umwarimu ushinze kunganira mu by'amasomo (Chargé des Cours Associé), ku bw'ibanze agomba kuba afite impamyabumenyi y'ikirenga (Doctorat), ashobora kandi kuzamurwa kuri iyo ntera

mu gihe afite imyabumenyi ihanitse (Maîtrise) n'uburambe ku kazi bw'imyaka itatu yigisha nk'umufasha (Assistant).

[23] Inyandiko zigize urubanza zigaragaza ko Kalisa Alphonse yatangiye akazi nk'umwarimu w'umufasha kuwa 11/09/2006, akaba kandi afite impamyabumenyi ihanitse (Maîtrise) nk'uko byagaragajwe mu iburanisha ry'uru rubanza n'uburanira IPB akaba atabihakana, Kalisa akaba yarirukanywe kuwa 19/09/2009 bigaragara ko yirukanywe yaramaze kuzuza ibisabwa kugira ngo ashobore kuzamurwa mu ntera.

[24] Urukiko rurasanga n'ubwo kuzamurwa mu ntera ku mwarimu uri mu rwego rumwe na Kalisa Alphonse kandi wujuje ibisabwa atari itegeko ukurikije amategeko ngengamikorere ya IPB, kuba umuyobozi wa IPB yashobora gufata icyemezo kizamura mu ntera cyangwa se ntagifate bigomba gusobanurirwa impamvu muri icyo cyemezo kandi bikamenyeshwa nyir'ukugifatirwa.

[25] Urukiko rurasanga nyamara mu nyandiko zigize urubanza, nta nahamwe hagaragara impamvu Kalisa Alphonse atazamuwe mu ntera mu gihe abayobozi be bari batanze ibitekerezo by'uko yazamurwa mu ntera (avis favorable) ya Chargé des Cours Associé nk'uko Kalisa Alphonse yabitangiye ikimenyetso mu iburanisha n'uburanira IPB akaba atarashoboye kuvuguruza iyo nyandiko⁷.

[26] Urukiko rurasanga ariko, nubwo yari yahawe "avis favorable" kuwa 06/01/2009, imyaka itatu (3) yasabwaga kuba

⁷ Fiche d'évaluation déposée par Kalisa Alphonse dans l'audience du 18/03/2014, signé par l'administration de l'IPB le 06/01/2009.

yujuje kugirango abe yazamurwa mu ntera yagombaga kuzura kuwa 11/09/2009, yirukanwa kuwa 19/09/2009 harenzeho iminsi icyenda (9) gusa, Urukiko rukaba rusanga nta ndishyi rwamugenera zishingiye ku kinyuranyo hagati y'umushahara yahembwaga n'umushahara mushya, kuko atigeze awukorera kandi kugirango uhembwe ni uko uba wakoze, bityo indishyi asaba zo kuba atarazamuwe mu ntera zikaba nta shingiro zifite.

Kumenya niba yahabwa indishyi kubera ko kumuharabika byamuteye ihungabana we n'umuryango we

[27] Kalisa Alphonse avuga ko kumuharabika bandikira ibigo byose bikuru by'amashuri bavuga ko ari umusinzi, byahungabanyije umuryango we wose kuko ariwe wawuhahiraga, akaba abisabira indishyi.

[28] Kuri izo ndishyi asaba, uhagarariye IPB avuga ko ntazo yahabwa kuko nta muntu numwe wo mu muryango we yerekana waba waragiye kwivuriza mu kigo gishinzwe kwakira abahungabanye, cyangwa se ngo yerekane uwaba waragiye mu bitaro kubera izo mpamvu.

[29] Urukiko rurasanga indishyi asaba z'uko umuryango we wahungabanye ntazo yagenerwa kuko nta bimenyetso yabigaragarije.

Ku byerekeye indishyi zingana n'igihe cyari gisigaye ngo Kalisa Alphonse ajye mu kiruhuko cy'izabukuru.

[30] Kuri icyo kibazo, Kalisa Alphonse avuga ko, ashingiye ku ngingo ya 1.15.4. y'amategeko agenga IPB, umwarimu ajya mu kiruhuko cy'izabukuru afite imyaka 70, akaba yarirukanywe asigaje 19 ngo ayikwize, bihwanye n'amezi 202, akaba asaba

indishyi zingana na 306.607 Frw (umushahara wa buri kwezi)x 202=61.934.614 Frw.

[31] Urukiko rurasanga haba mu Rukiko Rwisumbuye rwa Gicumbi, haba no mu Rukiko Rukuru, iki kibazo ntaho kigeze kiburanwaho, kikaba kitasuzumirwa bwa mbere mu Rukiko rw'Ikirenga.

[32] Kalisa Alphonse arasaba 140.000 Frw y'ikurikiranarubanza, akubiyemo amafaranga y'ingendo yakoze, amagarama yagiye atanga mu kuburana uru rubanza kugeza mu Rukiko rw'Ikirenga nk'uko yabigaragaje mu myanzuro ye, akanasaba kandi n'amafaranga y'igihembo cya avoka ahereye ku masezerano yanditse yagiranye n'umuburanira.

[33] Uburanira IPB avuga ko amafaranga y'ikurikiranarubanza ntayo yahabwa kuko nta bimenyetso ayatangira, naho ay'igihembo cya avoka, avuga ko Kalisa Alphonse yerekanye amasezerano yanditse yagiranye n'umwunganira, akaba asanga aribo ubwabo bagomba kuyubahiriza nkuko bayagiranye.

[34] Urukiko rurasanga hari ibyo Kalisa Alphonse yatakaje akurikirana uru rubanza, bityo 140.000 Frw y'ikurikiranarubanza asaba, akaba ayakwiye nkuko yayasabye kandi akaba ari mu rugero.

[35] Ku byerekeranye n'amafaranga y'igihembo cya avoka, Urukiko rurasanga uretse kubivuga mu myanzuro ye ko ayasaba ariko ntavuga ingano yayo ngo Urukiko rugire aho ruhera ruyamugenera.

III. ICYEMEZO CY'URUKIKO

[36] Rwemeje ko ubujurire bwa Kalisa Alphonse bufite ishingiro kuri bimwe;

[37] Rutegetse Institut Polytechnique de Byumba guha Kalisa Alphonse 2.000.000 Frw y'indishyi z'uko yaharabitswe, 2.007.880 Frw yemejwe n'Urukiko Rukuru, na 140.000 Frw y'ikurikiranarubanza, yose hamwe akaba ari amafaranga 4.147.880 Frw;

[38] Rutegetse Institut Polytechnique de Byumba gutanga amagarama y'urubanza angana na 34.250Frw.

IMANZA Z'UBUCURUZI

ECOBANK v. INDIA NOVEMBER

[Rwanda URUKIKO RW'IKIRENGA – RCOMA 0005/10/CS
(Mutashya, P.J., Havugiyaremye na Rugabirwa, J.)10 Kamena
2010]

Amategeko y'ubucuruzi – Inyandiko mvunjamafaranga – Chèque de voyage – Ugomba kwishyura chèque de voyage zibwe – Iyo chèque de voyage zibwe ziri mu maboko y'uwaziguze, akamenyesha (opposition) mu gihe cyateganyijwe Banki yazimugurishije (Banque intermédiaire) ko zibwe, zishyurwa na banki yazimugurishije, keretse igaragaje ko ayo mafaranga yohererejwe Banki yakoze ayo masheki (Banque émettrice).

Amategeko y'ubucuruzi – Ibarwa ry'inyungu z'ubukererwe – Inyungu zituruka ku gihombo cyatewe no kuba chèques de voyage zitarahise zishyurwa igihe zari zibwe – Zitangira kubarwa nyuma y'amasaha 48 uherye umunsi yamenyekanishirijeho iyibwa ryazo kugeza ku munsi urubanza ruciriwe.

Incamake y'ikibazo: ECOBANK SA yagurishije INDIA NOVEMBER ihagarariwe na Isidore Ndabarasa, chèque de voyage zihwanye n'amadolari 8.000 USD. ECOBANK yabikuje ayo mafaranga kuri konti INDIA NOVEMBER yari ifite muri iyo banki. Izo sheki zaje kwibwa zifitwe na Isidore Ndabarasa uhagarariye INDIA NOVEMBER, amenyesha ECOBANK nayo imenyeshya CITICORP yazikoze ko izo sheki zibwe. INDIA NOVEMBER yagiye yandikira ECOBANK iyisaba kuyisubiza ayo mafaranga ariko ikanga kuyatanga ivuga ko uwazikoze ariwe CITICORP ariyo igomba kwishyura ayo

mafaranga kubera ko ari nayo yayoherejwe. CITICORP ivuga ko itayasubiza kuko INDIA NOVEMBER yajyanye ayo masheki itabanje kuyasinyira imbere y'umukozi wa banki wayiyagurishije.

INDIA NOVEMBER yareze ECOBANK mu Rukiko Rukuru rw'Ubucuruzi, rutegeka ECOBANK guha INDIA NOVEMBER 8.000 USD yari yaguze izo chèques de voyage, ay'inyungu zayo, ay'indishyi z'akababaro, ay'ikurikiranarubanza n'igihembo cy'Avoka.

ECOBANK yajuririye mu Rukiko rw'Ikirenga, ivuga ko umucamanza wa mbere yayitegetse guha INDIA NOVEMBER amafaranga menshi atagaragaje uruhare rwayo mu ibura ry'izo sheki. Yongera kuvuga ko itagomba kuryozwa amakosa ya CITICORP kuko Isidore Ndabarasa atasinyiye izo sheki imbere y'umukozi wayo. INDIA NOVEMBER yo ivuga ko ECOBANK igomba kwishyura 8.000 USD hamwe n'indishyi zayo kuko itagaragaje ko yohereje CITICORP amadolari yagurishije izo sheki.

Incamake y'icyemezo: 1. Iyo uwaguze cheque de voyage azibwe akabimenyasha ku gihe banki yazimugurishije, nayo ntigaragaze ko hari amafaranga yaba yarishyuye banki yazikoze azikomokaho, banki yazimugurishije (Banque intermediaire) niyo igomba kumwishyura, kabone n'ubwo haba hari sheki zaba zarishyuwe mbere y'imenyekanisha kuko we aba yarakoze ibimureba.

2. Mu gihe cheque de voyage yibwe, uwayiguze akabimenyasha Banki yayimugurishije ku gihe, agomba kwishyurwa na banki yayimugurishije mu gihe cy'amasaha 48 abarwa guhera ku muni w'imenyekanisha, itabikora ikabintangira indishyi

z'ubukererwe zibarwa uhereye nyuma y'amasaha 48 imenyekanisha rikozwe kugeza ku munsu w'icibwa ry'urubanza.

**Ubujurire bufite ishingiro kuri bimwe.
Ubujurire bwuririye ku bundi bufite ishingiro.
Imikirize y'urubanza ihindutse kuri bimwe.
Amagarama y'urubanza aherereye ku wareze.**

Nta tegeko ryashingiweho.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] ECOBANK SA (ex-BCDI) yagurishije Isidore NDABARASA wari uhagarariye INDIA NOVEMBER "Chèques de Voyage" (Travellers Cheques) za CITICORP zihwanye n'amadorari y'amanyamerika 8.000, ECOBANK iyabikuzaga kuri konti INDIA NOVEMBER yari ifite muri iyo Banki.

[2] Nk'uko bivugwa n'abaturanyi bombi, ayo ma "Chèques de Voyage" yibwe afitwe na Isidore NDABARASA, ariko azikorera "opposition" kuwa 19/06/2001, ECOBANK inabimenyesha CITICORP kuwa 20/06/2001, iyi nayo ngo ibimenyesha andi ma Banki kugira ngo atazishyura. Kuwa 17/06/2001, "Chase Forex Bureau" yo muri Kenya, yari yazishyuyemo 2.000 USD abajura bayahavunjishirije.

[3] INDIA NOVEMBER yagiye yandikira ECOBANK iyisaba kuyisubiza 8.000 USD yabikuje kuri konti yayo. ECOBANK ikavuga ko ari CITICORP igomba kuyisubiza ayo madorari kuko ariyo nyiri ayo masheki no kuba ariyo yohererejwe ayo madorari. CITICORP ikavuga ko itayasubiza ngo kuko Isidore NDABARASA yajyanye ayo masheki atabanje kuyasinyira imbere y'umukozi wa ECOBANK wayamugurishije.

[4] INDIA NOVEMBER yareze ECOBANK mu Rukiko Rukuru rw'Ubucuruzi, urubanza rwacibwa kuwa 20/11/2009, Urukiko rutegeka ECOBANK guha INDIA NOVEMBER 8.000 USD yaguze “Chèques de Voyage”, 8.960 USD y'inyungu zayo z'imyaka umunani, 5.000 USD y'indishyi z'akababaro, 5.000 USD y'ikurikiranarubanza na 500.000 Frw y'igihembo cy'Avoka, inategukwa gutanga 634.688 Frw y'umusogongerwa wa Leta.

[5] Urubanza rwaburanishijwe mu mizi mu ruhame bwa nyuma kuwa 25/04/2011, ECOBANK ihagarariwe na Me RWAGATARE Janvier, naho INDIA NOVEMBER ihagarariwe na NKURIKIYE Salvator yunganiwe na Me SHEMA GAKUBA Charles na Me RWAJAYIJA John.

II. IKIBAZO KIRI MU RUBANZA N'ISESENGURWA RYACYO:

Iyo “Chèques de Voyage” zibwe n'iyihe Banki hagati ya Banki yagurishije ayo masheki na Banki yayakoze igomba kwishyura umukiriya wayaguze.

[6] Uburanira ECOBANK avuga ko yagurishije INDIA NOVEMBER ihagarariwe na Isidore NDABARASA “Chèques de Voyage” zihwanye na 8.000 USD, anavuga ko INDIA NOVEMBER yayimenesheje ko ayo masheki yibwe (opposition) kuwa 19/06/2001, nayo ibimenesha CITICORP kuwa 20/06/2001.

[7] Avuga ko umucamanza wa mbere yayitegetse guha INDIA NOVEMBER amafaranga menshi atagaragaje uruhare rwayo mu ibura rya “Travellers Cheques” cyangwa mu kudasubiza INDIA NOVEMBER amafaranga yayo. Avuga kandi ko ECOBANK itagomba kuryozwa amakosa ya CITICORP yanze gusubiza INDIA NOVEMBER amafaranga yayo nk’uko bigaragarira mu ibaruwa yayo yo kuwa 26/03/2002, ngo kuko Isidore Ndabarasa atayasinyiye imbere y’umukozi wa ECOBANK wayamugurishije.

[8] Ababuranira INDIA NOVEMBER bavuga ko Isidore Ndabarasa yaguze “Chèques de Voyage” muri ECOBANK kuwa 01/06/2001 zihwanye na 8.000 USD. Bavuga ko zimaze kwibwa kuwa 16/06/2001, yazikoreye “opposition” anabimenesha ECOBANK kuwa 19/06/2001, ko ariko kuwa 17/06/2001, abajura bari bayishyurwemo 2000 USD na “Chase Forex Bureau” yo muri Kenya. Basabye ko 8.000 USD yakwishyurwa na ECOBANK hakiyongeraho n’indishyi zayo ngo kuko itagaragaje ko yoherereje CITICORP amadorari yagurishije ayo masheki.

[9] Igihe Urukiko rwihereraga kugira ngo ruce urubanza burundu, rwasanze ari ngombwa ko rwifashisha impuguke mu mikoreshereze y’ama “Chèques de Voyage” kugira ngo igire ibyo irusobanurira, maze rushyiraho Bwana Gakwaya Dominiko.

[10] Nyuma yo kurahira ko avugisha ukuri, avuga mu ncamake ko iyo umukiriya aguze “Chèques de Voyage”, Banki yazimugurishije (Banque intermédiaire) igakura amafaranga kuri konti ye, hanyuma zikibwa, umukiriya agomba kwihutira kubimenyesha iyo Banki (opposition). Avuga ko iyo umukiriya yarangaye akabikora akererewe, ahomba kuko aba yarahawe amakuru yose yazamufasha igihe yazibwe.

[11] Akomeza avuga ko iyo umukiriya akoze “opposition” hakiri kare, Banki yamugurishije “Chèques de Voyage” niyo igomba kuyamwishyura, kabone n’ubwo hari amashaki yishyuye mbere ya “opposition”, kuko we aba yarakoze ibimureba, keretse iyo banki yayamugurishije igaragaje ko yohereje amafaranga kuri Banki yakoze ayo masheki (Banque émettrice).

[12] Urukiko rurasanga umuhanga mu mikoreshereze ya “Chèques de Voyage” wavuzwe haruguru yasobanuriye uru Rukiko ko iyo izo “chèques” zibwe, umukiriya akazikorera “opposition” kuri Banki yazimugurishije (Banque intermédiaire) hakiri kare, ari iyi Banki igomba kumwishyura amafaranga yahawe, keretse igaragaje ko ayo mafaranga yoherejwe Banki yakoze ayo masheki (Banque émettrice).

[13] Muri uru rubanza, Urukiko rurasanga ababuranyi bombi bemeranywa ko Isidore Ndabarasa, wari uhagarariye INDIA NOVEMBER, yaguze “Chèques de Voyage” (Travellers Cheques) za CITICORP muri ECOBANK SA (ex-BCDI) zifite agaciro ka 8.000 USD, kandi ko ECOBANK yabikuje amafaranga ahwanyeye nayo kuri konti ya INDIA NOVEMBER yari muri iyo Banki.

[14] Urukiko rurasanga kandi ababuranyi bombi bemeranywa ko ayo masheki yibwe, kandi ko Isidore Ndabarasa yayakoreye “opposition” mu gihe cya vuba, kuko yabimenyesheje ECOBANK kuwa 19/06/2001, nyuma y’iminsi itatu ayo masheki yibwe, ECOBANK nayo ibimenyesha CITICORP kuwa 20/06/2001, inayishyikiriza numero za “chèques de Voyage” zibwe.

[15] Urukiko rurasanga rushingiye ku bisobanuro byatanzwe n’impuguke kandi narwo rusanga bifite ishingiro, kuba INDIA NOVEMBER yaribwe “Chèques de Voyage”, ikazikorera “opposition” mu gihe cya vuba, nyamara ECOBANK ikaba itagaragaza ko ayo mafaranga yayohereje CITICORP, ntinagaragaze aho CITICORP yasinyiye ko iyakiriye, kandi ntinagaragaze ko hari amafaranga CITICORP yaba yarishyuye akomoka kuri izo “Chèques de Voyage” zibwe, ECOBANK niyo igomba gusubiza INDIA NOVEMBER 8.000 USD ahwanye na “Chèques de Voyage” zibwe.

[16] Urukiko rurasanga kandi ayo mafaranga agomba kwiyongeraho inyungu z’ubukererwe, amafaranga y’ikurikiranarubanza hamwe n’ay’igihembo cy’Avoka nk’uko byemejwe n’Urukiko rubanza, ariko uru Rukiko rukaba rugomba gusubira mu mibare ruyagena, kuko hamwe rwagenye amafaranga y’ikirenga, ahandi rushingira ku mibare itariyo. Inyungu z’ubukererwe zikaba zigomba kubarwa kugeza ku munsu urubanza ruciriwe nk’uko INDIA NOVEMBER yabisabye mu bujurire bwayo bwuririye ku bundi, uru Rukiko rusanga bufite ishingiro.

[17] Ku byerekeye inyungu z’ubukererwe, Urukiko rusanga kuba INDIA NOVEMBER yarakoze “opposition” mu gihe gikwiye, nyamara ECOBANK yayibona kuwa 19/06/2001,

igakomeza kugundira 8.000 USD kugeza igihe yaregewe mu Rukiko Rukuru rw'Ubucuruzi, kandi yaragombaga guhita iyishyura nk'uko imikoreshereze ya “Chèques de Voyage” ibisaba, cyane ko INDIA NOVEMBER nk'umucuruzi yagombaga kuyabyaza umusaruro, bigaragara ko yayiteje igihombo, bityo ikaba igomba kubitangira inyungu z'ubukererwe zibariwe kuri 14 % ku mwaka nk'uko Urukiko rubanza rwabyemeje.

[18] Ku byerekeranye no kwishyura, abahanga mu mikoreshereze ya “Chèques de Voyage” bavuga ko iyo umukiriya yibwe “Chèques de Voyage” akanakora “opposition” mu gihe gikwiye, agomba kuba yishyuwe mu gihe kitarenze amasaha 48¹ abazwe guhera ku muni yakoreyeho “opposition”. Urukiko rusanga ECOBANK yarabonye “opposition” kuwa 19/06/2001, bityo hakurikijwe ibyo bisobanuro, ECOBANK igomba kwishyura INDIA NOVEMBER inyungu z'ubukererwe zibazwe guhera kuwa 21/06/2001, kugeza ku muni w'icibwa ry'urubanza kuwa 10/06/2011, bityo izo nyungu zikaba zibazwe mu buryo bukurikira:

$$= \underline{8.000 \text{ USD} \times 14 \times 3.589 \text{ iminsi}} = 11.165 \text{ USD.}$$

$$100 \times 360$$

[19] Ku bijyanye n'indishyi z'akababaro, Urukiko rubanza rwageneye INDIA NOVEMBER 5.000 USD y'indishyi z'akababaro. Urukiko rusanga INDIA NOVEMBER itari

¹ En cas de perte ou de vol de chèques de voyage, ... en général, le remboursement est effectué sous 48h” in <http://www.alertes-meteo.com/astuce/chèque-voyage.htm>

guhabwa inyungu z'ubukererwe hamwe n'indishyi z'akababaro, kuko igihe ECOBANK yamaranye amafaranga yayo, yayaboneye inyungu z'ubukererwe, bityo amadorari 5.000 y'indishyi z'akababaro yagenewe n'Urukiko rubanza akaba agomba kuvanwaho.

[20] Ku byerekeye amafaranga y'ikurikiranarubanza n'ay'igihembo cy'Avoka, mu rwego rwa mbere INDIA NOVEMBER yari yagenewe 5.000 USD y'ikurikiranarubanza na 500.000 Frw y'igihembo cy'Avoka. Urukiko rusanga bigaragara koko ko hari amafaranga INDIA NOVEMBER yatanze ikurikirana uru rubanza haba mu ngendo, ifunguro n'ibindi, ndetse hari n'Abavoka bayiburaniye mu nzego zombi. Bityo Urukiko rusanga mu bushishozi bwarwo ECOBANK igomba guha INDIA NOVEMBER 2.000 USD y'ikurikiranarubanza n'ay'igihembo cy'Avoka kuko 5.000 USD na 500.000 Frw yagenewe n'Urukiko rubanza ari ikirenga.

[21] Urukiko rurasanga rero amafaranga ECOBANK igomba guha INDIA NOVEMBER ari 8.000 USD yaguze "Chèques de Voyage", 11.165 USD y'inyungu z'ubukererwe na 2.000 USD y'ikurikiranarubanza n'ay'igihembo cy'Avoka, yose hamwe akaba ari 21.165 USD.

III. ICYEMEZO CY'URUKIKO

[22] Rwemeye kwakira ubujurire bwa ECOBANK n'ubujurire bwa INDIA NOVEMBER bwuririye ku bwayo kuko bwatanzwe mu buryo n'inzira bikurikije amategeko;

[23] Rwemeje ko ubujurire bwa ECOBANK bufite ishingiro kuri bimwe, ko ubujurire bwa INDIA NOVEMBER bwuririye ku bwayo bufite ishingiro;

[24] Rutegetse ECOBANK guha INDIA NOVEMBER 8.000 USD yabikuje kuri konti yayo igura “Chèques de Voyage”, 11.165 USD y'inyungu z'ubukererwe na 2.000 USD y'ikurikiranarubanza n'ay'igihembo cy'Avoka, yose hamwe akaba ari 21.165 USD, ikanayatangira n'umusogongerwa wa Leta wa 4% ungana na 846 USD, itayatanga mu gihe cy'iminsi umunani, agakurwa mu byayo ku ngufu za Leta;

[25] Ruvuze ko imikirize y'urubanza RCOM 0066/09/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi kuwa 20/11/2009 ihindutse kuri bimwe;

[26] Ruyitegetse gutanga amagarama y'urubanza angana na 40.900 Frw, abariwemo n'ayo yaciwe mu rwego rwa mbere, itayatanga mu gihe cy'iminsi umunani, agakurwa mu byayo ku ngufu za Leta.

KZ NOIR (R) Ltd v. KUBWIMANA N’UNDI

[Rwanda URUKIKO RUKURU RW’UBUCURUZI – RCOMA
0232/14/HCC (Kadigwa, P.J.) 12 Kamena 2014]

Amategeko agenga ubukemurampaka mu bibazo by’ubucuruzi – Ububasha bwo kuburanisha ibirego byihutirwa birebana n’ubukemurampaka – Umwe mu biyambaje ubukemurampaka ashobora gusaba urukiko, mbere cyangwa hagati mu gikorwa cy’ubukemurampaka, gufata icyemezo cy’agateganyo – Itegeko n° 005/2008 ryo kuwa 14/02/2008 ryerekeye ubukemurampaka n’ubwunzi mu bibazo by’ubucuruzi, ingingo ya 3 n’iya 10.

Amategeko agenga imiburanishirize y’imanza z’ubucuruzi – Igenwa ry’ikiburanwa – Ikiburanwa kigenwa n’ibisabwa na buri muburanyi – Mu isuzuma ry’iyakirwa ry’ikirego, Urukiko ntirugarukira ku bikubiye ku nteruro y’ikiregerwa gusa ahubwo rwita ku bikubiye mu myanzuro no ku miburanire y’ababuranyi – Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y’imanza z’imbenezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi, ingingo ya 4.

Amategeko agenga imiburanishirize y’imanza z’ubucuruzi – Kutaburanisha bundi bushya urubanza rwateshejwe agaciro n’Urukiko rwajuririwe – Iyo Urukiko rutesheje agaciro urubanza rwajuririwe ntiruruburanisha mu mizi ahubwo ruburanishwa n’urukiko rubifite ububasha ku rwego rwa mbere mu gihe ba nyiri ugutanga ikirego bagishaka kugikomeza – Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y’imanza z’imbenezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi, ingingo ya 172.

Incamake y'ikibazo: KZ NOIR (R) Ltd yagiranye na Kubwimana Chrysologue afatanyije Kubwimana Philippe amasezerano arimo ingingo ivuga ko impaka zayavukamo zazashyikirizwa ubukemurampaka. Impande zombi ntizumvikanye bituma ziyambaza Ubukemurampaka, ariko mu gihe hatarafatwa icyemezo, KZ NOIR (R) Ltd itanze ikirego cyihutirwa mu Rukiko rw'Ubucuruzi rwa Musanze isaba ko hafatwa ibyemezo by'agateganyo maze urwo Rukiko rwemeza ko kitakiriwe kuko nta kirego cy'iremezo gishamikiyeho cyatanzwe muri urwo Rukiko.

KZ NOIR (R) Ltd yajuririye mu Rukiko Rukuru rw'ubucuruzi ivuga ko ikirego cyayo cyagombaga kwakirwa kigasuzumwa kuko ikirego cy'iremezo kiri mu bukemurampaka kandi amategeko akaba abyemera.

Mu bujuriye Kubwimana Chrysologue na Kubwimana Philippe bavuga ko ibyemezo by'agateganyo biri mu bubasha bw'Inteko y'abakemurampaka; bityo akaba ariyo igomba kuburanisha iki kirego.

Incamake y'icyemezo: 1. Umwe mu biyambaje ubukemurampaka ashobora gusaba urukiko, mbere cyangwa hagati mu gikorwa cy'ubukemurampaka, gufata icyemezo cy'agateganyo kandi urukiko rukaba rwagitanga mu gihe bitanyuranyije n'amasezerano y'ubukemurampaka, bityo Urukiko rw'Ubucuruzi rwa Musanze rukaba rwaragombaga kwakira ikirego rwashyikirijwe.

2. Ikiburanwa kigenwa n'ibisabwa na buri muburanyi. Mu gihe ibisobanuro by'ikirego bigaragara mu myanzuro ndetse no mu miburanire y'abarega bigaragara neza ko icyo ababuranyi baregeye ari ugusaba urukiko gufata ibyemezo by'agateganyo, interuro y'imyanzuro ubwayo siyo ihabwa agaciro.

3. Urukiko rutesheje agaciro urubanza rwajuririwe ntiruruburanisha bundi bushya mu mizi yarwo; ruba rugomba kwakirwa n'urukiko rwaruburanishije ku rwego rwa mbere rukaburanishwa mu mizi mu gihe abatanze ikirego bashaka kugikomeza. Urubanza rwajuririwe rukaba rugomba kuburanishwa n'urukiko rw'Ubucuruzi rwa Musanze.

Ubujurire bufite ishingiho.

Urubanza rwajuririwe ruteshejwe agaciro mu ngingo zarwo zose.

Amagarama aherereye ku baregwa.

Amategeko yashingiweho:

Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ingingo ya 4 n'ya 172

Itegeko n° 005/2008 ryo kuwa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi, ingingo ya 11 n'ya 23.

Nta manza zifashishijwe.

Urubanza

I. UKO IKIBAZO GITEYE MU NCAMAKE

[1] Mu ikubitiro ababuranyi bombi bagiranye amasezerano arimo ingingo ivuga ko impaka zayavukamo zazashyikirizwa abakemurampaka (arbitrage). Mu rubanza R.COM 0144/TC/MUS rwaciwe n'Urukiko rw'Ubucuruzi rwa Musanze

kuwa 21/04/2014 urega yatanze ikirego cyihurirwa asaba ibyavuzwe haruguru mu kiregerwa, urukiko rwanga kucyakira rushingiye ko nta kirego cy'iremezo cyakibanjirije rushingira icyemezo cyarwo ku ngingo ya 316 CPCCSA.

[2] Abarega ntibanyuzwe n'icyo cyemezo kuko bumvaga kuba ikirego cy'iremezo kiri mu bukemurampaka bihagije, ko kandi n'amategeko yerekeye ubukemurampaka abyemera. Batangaho urugero ingingo ya 11 n'ya 23 z'Itegeko n° 005/2008 ryo kuwa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi.

[3] Ikibazo kigomba gusuzumwa muri uru rubanza ni ukumenya niba ibirego byihutirwa bishingiye ku kirego cy'iremezo cyashyikirijwe abakemurampaka bishobora gufatwa n'inkiko ubusanzwe zifite ububasha bwo kuburanisha bene ibyo birego.

II ISESENGURA RY'IKIBAZO KIGOMBA GUSUZUMWA MURI URU RUBANZA

[4] Urukiko rwacye uru rubanza ku rwego rwa mbere rwafashe ko ikirego rwashyikirijwe ari ikirego cyihutirwa ubusanzwe kiburanishwa hakurikijwe imiburanishirize yihariye ya bene ibyo birego iteganywa n'tegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi iz'umurimo n'iz'ubutegetsi.

[5] Abarega bo baburanye bagaragaza ko ikirego batanze kigamije gusaba urukiko gufata ibyemezo by'agateganyo bivugwa mu ngingo ya 11 n'ya 23 z'Itegeko n° 005/2008 ryo kuwa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu

bibazo by'ubucuruzi, nubwo mu nteruro y'imyanzuro yabo bagaragaje ko baregera urukiko mu buryo bw'inyandiko itanze ikirego cyihutirwa.

[6] Uru Rukiko rubona urukiko rwaciye uru rubanza ku rwego rwa mbere rwarahagaze gusa ku nteruro y'imyanzuro yatanzwe n'abaregaga yerekana ko batanze ikirego cyihutirwa (référé) rwirengagiza ibyari bikubiye mu mwanzuro no mu miburanire yabo, yagaragazaga ko baruregeye barusaba gufata ibyemezo by'agateganyo bivugwa mu ngingo ya 11 n'ya 23 z'Itegeko n° 005/2008 ryo kuwa 14/02/2008.

[7] Kuba urukiko rwaciye uru rubanza ku rwego rwa mbere rwaribanze gusa ku nteruro y'imyanzuro y'abaregaga yagaragazaga ko batanze ikirego cyihutirwa, rukirengagiza ibyari bikubiye mu myanzuro no mu miburanire yabo, uru Rukiko rubona binyuraniye n'ingingo ya 4 y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 CPCCSA iteganya ko "Ikiburanwa kigenwa n'ibisabwa na buri muburanyi. Ibisabwa bigaragazwa n'inyandiko itangiza ikirego n'imyanzuro yo kwiregura".

[8] Uru Rukiko rubona interuro y'imyanzuro ubwayo atariyo yahabwa agaciro mu gihe ibisobanuro by'ikirego bigaragara mu myanzuro ndetse no mu miburanire y'abaregaga byarabonekaga neza ko icyo baregeye ari ugusaba urukiko gufata ibyemezo by'agateganyo, biteganywa n'Itegeko n° 005/2008 ryo kuwa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi.

[9] Kuba ingingo ya 3 n'ya 10 z'Itegeko n° 005/2008 ryo kuwa 14/02/2008 rivuzwe haruguru, iteganya ko urukiko ruvugwa muri iryo tegeko ari "urukiko rubifitiye ububasha mu bucamanza bw'u Rwanda", uru Rukiko rusanga urukiko

rwaciye uru rubanza ku rwego rwa mbere rwaragombaga kwakira ikirego rwaregewe nk'uko biteganywa n'ingingo ya 11 y'iryo tegeko iteye itya: “Umwe mu biyambaje ubukemurampaka ashobora gusaba urukiko, mbere cyangwa hagati mu gikorwa cy'ubukemurampaka, icyemezo cy'agateganyo kandi urukiko rukaba rwagitanga. Ibyo kandi ntibishobora kuba binyuranyije n'amasezerano y'ubukemurampaka”.

[10] Ibyo Me Buhuru Célestin uburanira abaregwa mu bujurire avuga ko ibyemezo by'agateganyo biri mu bubasha bw'Inteko y'abakemurampaka, uru Rukiko rubona nta shingiro bifite kuko, hakurikijwe ingingo ya 19 y'Itegeko n° 005/2008 ryo kuwa 14/02/2008 rivuzwe haruguru iyo nteko ifata bene ibyo byemezo ari uko ibisabwe n'umwe mu biyambaje ubukemurampaka.

[11] Rushingiye ku bimaze kuvugwa byose, uru Rukiko rubona icyemezo cyafashwe mu rubanza rwajuririwe R.COM 0144/TC/MUS rwaciwe n'Urukiko rw'Ubucuruzi rwa Musanze kuwa 21/04/2014 kigomba guteshwa agaciro.

[12] Rushingiye kandi ku ngingo ya 172 iteganya ko “Urukiko rutesheje agaciro urubanza rwajuririwe rutaruburanisha bundi bushya mu mizi yarwo”, uru Rukiko rusanga ikirego cyatanzwe n'urega mu bujurire, kigomba kwakirwa n'urukiko rwakiburanishije ku rwego rwa mbere kikaburanishwa mu mizi, ba nyiri kugitanga babaye bagishaka kugikomeza.

III. ICYEMEZO CY'URUKIKO

[13] Urukiko Rukuru rw'Ubucuruzi :

[14] Rwemeje kwakira ubujurire bwatanzwe na KZ NOIR (R) Ltd ko kandi bufite ishingiro;

[15] Rwemeje ko ikirego KZ NOIR (R) Ltd cyagombaga kwakirwa n'urukiko rwaciye uru rubanza ku rwego rwa mbere;

[16] Rutegetse ko imikirize y'urubanza rwajuririwe R.COM 0144/TC/MUS rwaciwe n'Urukiko rw'Ubucuruzi rwa Musanze kuwa 21/04/2014 iteshwa agaciro mu ngingo zayo zose;

[17] Rutegetse Chrysologue Kubwimana na Philippe Kubwimana gufatanya gutanga amagarama y'uru rubanza.

SETRAPCO Ltd v. BARBARA A. STIEFEL FOUNDATION

[Rwanda URUKIKO RW'IKIRENGA – RCOMA 0153/12/CS
(Kayitesi R., P.J., Rugabirwa na Mukandamage, J.) 04 Mata
2014]

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Kutagira ububasha k'uregwa – Inzitizi yo kutagira ububasha k'uregwa ni indemyagihugu, aho urubanza rwaba rugeze hose irakirwa kandi igasuzumwa – Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, Ingingo ya 142.

Amategeko agenga imiburanishirize y'imanza z'ubucuruzi – Kurega ikigo, sosiyete, n'imiryango bitari ibya Leta bifite ubuzima gatozi – Ikirego nticyakirwa iyo harezwe sosiyete, ikigo cyangwa umuryango bihagarariwe n'utabifitiye ububasha – Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegets, ingingo ya 31, agace ka 5°.

Incamake y'ikibazo: SETRAPCO Ltd yagiranye amasezerano na BARBARA A. STIEFEL FOUNDATION yo kubaka inzu yo gucumbikiramo abanyeshuri. Iyo nzu yagombaga kubakwa mu gihe cy'iminsi 180 ku giciro kingana na 129.670.559 Frw. Kubera kutumvikana, SETRAPCO Ltd yaregeye Urukiko Rukuru rw'Ubucuruzi isaba kwishyurwa 29.908.359 Frw yari asigaye ku mirimo yakozwe hakiyongeraho indishyi zinyuranye kuko yarangije kubaka. Mu iburanisha Barbara A. Stiefel

Foundation yatanze inzitizi yo kutakira ikirego cya SETRAPCO Ltd ivuga ko amasezerano ishingiraho isaba indishyi yasheshwe n'urubanza RCOM 0210/11/HCC rwaciwe 29/11/2011. Urukiko rwemeje ko ikirego cya SETRAPCO Ltd kitakiriwe kuko itasaba indishyi ishingiye ku masezerano yasheshwe n'urubanza rwavuzwe.

SETRAPCO Ltd yajuririye Urukiko rw'Ikirenga ariko iburanisha ritangiye Barbara A. Stiefel Foundation itanga inzitizi yo kutakira ikirego cya SETRAPCO Ltd kuko yayireze ihagarariwe na Rwamuranga Steven na Penny Enseley, nyamara badafite ububasha bwo kuyihagararira mu nkiko, ko ahubwo bufitwe na Barbara A. Stiefel.

SETRAPCO Ltd yo ivuga ko iyo nzitizi nta shingiro ifite kubera ko Barbara A. Stiefel Foundation itayitanze mu myanzuro yayo yo kwiregura no mu gihe cy'inama ntegura rubanza.

Incamake y'icyemezo: 1. Impamvu ituma ikirego kitakirwa ishobora kubyutswa n'umuburanyi cyangwa n'Urukiko rubyibwirije iyo ari indemyagihugu.

2. Ikirego nticyakirwa iyo ibigo, sosiyete, n'imiryango bitari ibya Leta bifite ubuzimagatozi birezwe bihagarariwe n'utabifitiye ububasha. Ikirego cya SETRAPCO Ltd ntikigomba kwakirwa kuko yareze Barbara A. Stiefel Foundation ihagarariwe na Penny Ensley na Stephen Rwamurangwa kandi nta bubasha bafite bwo kuyihagararira mu Nkiko.

Inzitizi yo kutagira ububasha k'uregwa ifite ishingiro.

Ubururire ntibwakiriwe.

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 31 agace ka 5 n'ya 142.

Nta manza zifashishijwe.**Inyandiko z'abahanga zifashishijwe:**

S. Guinchard, *Droit et Pratique de la Procédure Civile*, 5 ème Edition, Dalloz, Paris, 2006-2007, p. 22.

Urubanza**I. IMITERERE Y'URUBANZA**

[1] Kuwa 19/08/2010, BARBARA A. STIEFEL FOUNDATION ihagarariwe na Barbara A. Stiefel na SETRAPCO Ltd bagiranye amasezerano y'ubwubatsi bw'inzu yo gucumbikiramo abanyeshuri ba « Kayonza Modern Secondary School » iri mu Karere ka Kayonza, mu Ntara y'Iburasirazuba, bumvikana ko iyo mirimo izakorwa mu gihe cy'iminsi 180 ku giciro kingana na 129.670.559 Frw.

[2] Nyuma yaho, SETRAPCO Ltd yareze BARBARA A. STIEFEL FOUNDATION mu Rukiko Rukuru rw'Ubucuruzi kuri n° RCOM 0291/11/HCC, isaba ko yayishyura 29.908.359 Frw asigaye yiyongereyeho indishyi zinyuranye kuko yarangije kubaka inyubako yavuzwe haruguru.

[3] Igihe cy'iburanisha ry'urubanza mu Rukiko Rukuru rw'Ubucuruzi, uburanira BARBARA A. STIEFEL

FOUNDATION yatanze inzitizi yo kutakira ikirego cya SETRAPCO Ltd kubera ko amasezerano yo kuwa 19/08/2010 ishingiraho isaba indishyi yasheshwe n'urubanza RCOM 0210/11/HCC rwaciwe n'urwo Rukiko kuwa 29/11/2011, Urukiko rwemeza ko ikirego cya SETRAPCO Ltd kitakiriwe kuko itakongera gusaba indishyi zishingiye ku masezerano yasheshwe n'urubanza RCOM 0210/11/HCC yajuririye mu Rukiko rw'Ikirenga.

[4] SETRAPCO Ltd yajuririye urwo rubanza mu Rukiko rw'Ikirenga kuri n° RCOMA 0153/12/CS, ruhuzwa n'urubanza RCOMA 0010/12/CS kuko zifitanye isano.

[5] Kuwa 31/01/2014, Urukiko rw'Ikirenga rwaciye urubanza RCOMA 0010/12/CS - RCOMA 0153/12/CS, rutegeka ko imikirize y'urubanza RCOM 0210/11/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi kuwa 29/11/2011 ivanyweho kubera ko Barbara A. Stiefel yaregeye iseswa ry'amasezerano yavuzwe haruguru ku giti cye, nyamara yaragombaga kuyaregera ahagarariye Barbara A. Stiefel Foundation, rutegeka kandi ko iburanisha ry'urubanza RCOMA 0153/12/CS hagati ya BARBARA A. STIEFEL FOUNDATION na SETRAPCO Ltd rizakomeza kuwa 18/03/2014.

[6] Kuri uwo muni, urubanza rwaburanishijwe mu ruhamwe SETRAPCO Ltd ihagarariwe na Ritaranga Didas, Umuyobozi Mukuru wayo, yunganiwe na Me Ngirumpetse JMV, naho BARBARA A. STIEFEL FOUNDATION ihagarariwe na Me Niyondora Nsengiyumva.

[7] Iburanisha ry'urubanza ritangiye, uburanira BARBARA A. STIEFEL FOUNDATION yatanze inzitizi zigamije kutakira

ubujurire bwa SETRAPCO Ltd kubera ko yareze BARBARA A. STIEFEL FOUNDATION ihagarariwe na Rwamurangwa Steven na Penny Enseley, nyamara badafite ububasha bwo kuyihagararira mu nkiko, ko ahubwo bufitwe na Barbara A. Stiefel, ko kandi SETRAPCO Ltd yahise iyirega mu Rukiko Rukuru rw'Ubucuruzi, nyamara ingingo ya 13 y'amasezerano bagiranye iteganya ko mu gihe batumvikanye mu ishyirwa mu bikorwa ryayo, impande zombi zizabanza kwiyambaza abahuza, bananirwa kubumvikanisha akaba aribwo utishimye ashobora kuregera Urukiko rubifitiye ububasha.

[8] Ku birebana n'urubanza mu mizi, SETRAPCO Ltd isaba ko BARBARA A. STIEFEL FOUNDATION yayishyura 29.908.359 Frw asigaye akiyongeraho indishyi n'inyungu zinyuranye kuko yarangije kubaka ishuri ryavuzwe haruguru, byaba ngombwa, akishyurwa n'Akarere ka Kayonza kuko ariko karikoresha. BARBARA A. STIEFEL FOUNDATION yo ikavuga ko itakwishyura SETRAPCO Ltd izo ndishyi kuko itubahirije amasezerano bagiranye, ko ahubwo ariyo ikwiye kuyiha indishyi yasabiye mu bujurire bwayo bwuririye ku bundi nk'uko zisobanuye mu mwanzuro yatanze.

II. IKIBAZO KIRI MU RUBANZA N'ISESENGURA RYACYO:

Inzitizi yo kutakira ubujurire bwa SETRAPCO Ltd kuko yareze abo itagombaga kurega (défaut de qualité des défendeurs).

[9] Uburanira BARBARA A. STIEFEL FOUNDATION avuga ko ubujurire bwa SETRAPCO Ltd butakwakirwa kuko yareze BARBARA A. STIEFEL FOUNDATION mu izina rya

Rwamurangwa Steven na Penny Ensley nk'uko bigaragazwa n'imyanzuro yatanze mu rwego rwa mbere, nyamara badafite ububasha bwo kuyihagararira mu Rukiko, ko ahubwo yagombaga kurega BARBARA A. STIEFEL FOUNDATION ihagarariwe na Barbara A. Stiefel kuko ariwe ufite ububasha bwo kuyihagararira nk'uko byemejwe n'Urukiko rw'Ikirenga mu rubanza n° RCOMA 0010/12/CS - RCOMA 0153/12/CS rwaciwe kuwa 31/01/2014, ko rero ubujurire bwayo butujuje ibisabwa n'ingingo ya 2 y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, kugira ngo bwakirwe.

[10] Avuga kandi ko kuba SETRAPCO Ltd yarareze BARBARA A. STIEFEL FOUNDATION mu izina ry'abatayihagarariye mu buryo bwemewe n'amategeko, byatumye ihamagazwa mu buryo bunyuranyije n'ingingo ya 31, agace ka 5° y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryavuzwe haruguru, iteganya ko imiryango itegamiye kuri Leta ifite ubuzima gatozi ihamagazwa mu izina ry'abayihagarariye.

[11] Asobanura ko BARBARA A. STIEFEL FOUNDATION yari yaratanze iyo nzitizi mu Rukiko Rukuru rw'Ubucuruzi, ariko ko rutayisuzumye kubera ko rutakiriye ikirego cya SETRAPCO Ltd kubera ko rwasanze itaragombaga kongera kururegera amasezerano yasheshwe n'urubanza RCOM 0210/11/HCC, ko rero uru Rukiko rwasuzuma iyi nzitizi, rukemeza ko ifite ishingiro.

[12] Uburanira SETRAPCO Ltd avuga ko iyo nzitizi nta shingiro ifite kubera ko BARBARA A. STIEFEL FOUNDATION itayitanzwe mu myanzuro yayo yo kwiregura yo

kuwa 15/03/2013 no mu nama ntegurarubanza yo kuwa 28/03/2013.

[13] Avuga kandi ko SETRAPCO Ltd yareze BARBARA A. STIEFEL FOUNDATION mu buryo bwemewe n'amategeko kubera ko Rwamurangwa Steven na Penny Ensley basinye ku masezerano y'ubwubatsi yo kuwa 19/08/2010, ko kandi Barbara A. Stiefel yabahaye ububasha bwo guhagararira BARBARA A. STIEFEL FOUNDATION hashingiwe ku ibaruwa ye yo kuwa 19/08/2010.

UKO URUKIKO RUBIBONA

Ku birebana n'iyakirwa ry'inzitizi

[14] Ingingo ya 142 y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu, iteganya ko "Impamvu ituma ikirego kitakirwa ishobora kubyutswa n'umuburanyi cyangwa n'urukiko rubyibwirije. Impamvu zituma ikirego kitakirwa zigaragazwa n'urukiko rubyibwirije iyo ari indemyagihugu, nko kurenza igihe cyo kujurira cyangwa kutagira ububasha, ubushobozi cyangwa inyungu byo kurega".

[15] N'ubwo iyi nzitizi y'iburabubasha bw'uregwa itasuzumwe mu rwego rwa mbere, Urukiko rurasanga ari ndemyagihugu ikaba igomba gusuzumwa aho urubanza rwaba rugeze hose, bityo ikaba igomba kwakirwa igasuzumwa.

Ku birebana n'ishingiro ry'inzitizi.

[16] Ingingo ya 31, agace ka 5° y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu, iteganya ko “abahagarariye ibigo, sosiyete, n'imiryango bitari ibya Leta bifite ubuzima gatozi bitumirwa mu izina ry'abayihagarariye”.

[17] Abahanga mu mategeko barimo Serge Guinchard bavuga ko kugira ngo “ikirego cyakirwe ari uko urega n'uregwa bagomba kuba bafite ububasha (qualité), ko mu gihe batabufite, ikirego kitakirwa”¹ .

[18] Inyandiko itanga ikirego yo kuwa 28/11/2011 mu Rukiko Rukuru rw'Ubucuruzi, igaragaza ko SETRAPCO Ltd “yareze Barbara A. Stiefel Foundation, mu izina ry'abayihagarariye mu buryo bwemewe n'amategeko, aribo Penny Ensley na Stephen Rwamurangwa”, isaba ko yayiha 29.908.359 Frw asigaye itayishyuye nyuma yo kurangiza imirimo y'ubwubatsi yavuzwe haruguru, ikayihira n'indishyi zinyuranye.

[19] Urukiko rurasanga ibimenyetso biri muri dosiye birimo amasezerano y'ubwubatsi yo kuwa 19/08/2010, yabaye hagati ya BARBARA A. STIEFEL FOUNDATION na SETRAPCO Ltd, ibaruwa yo kuwa 16/08/2011, Barbara A. Stiefel yandikiye

¹ “La qualité est une condition d'existence de l'action, exigée tant en demandant qu'en défense. Le défaut de qualité donne lieu à une fin de non-recevoir”, par SERGE GUINCHARD, *Droit et Pratique de la Procédure Civile*, 5^{ème} Edition, Dalloz, Paris, 2006-2007, p. 22.

SETRAPCO Ltd ayisaba ko yakwakira 4.385.495 Frw ahwanye n'imirimo yakoze iteganyije muri ayo masezerano, ibaruwa yo kuwa 26/07/2011, Barbara A. Stiefel yandikiye Ritararanga Didas, Umuyobozi wa SETRAPCO Ltd, amumenyesha ko hari imirimo bari barasezeranye yakozwe, ariko ko hari n'itarakozwe, ko azareba uko yakwishyura iyakozwe, hamwe n'ibaruwa yo kuwa 23/08/2011, Barbara A. Stiefel yandikiye SETRAPCO Ltd iyimenyesha ko kuba yaranze kwakira 4.385.495 Frw yateganyaga kuzayishyura bizatuma bakorana inama kugira ngo bakemure icyo kibazo mu bwumvikane, ko nikinanirana, aribwo SETRAPCO Ltd ishobora kuzaregera Urukiko nk'uko biteganyijwe mu masezerano bagiranye, bigaragaza ko Barbara A. Stiefel ariwe uhagarariye BARBARA A. STIEFEL FOUNDATION mu Rwanda kuko yagiye asinya nk'uyihagarariye mu bikorwa byayo.

[20] Urukiko rurasanga ibyo SETRAPCO Ltd ivuga ko Penny Ensley na Stephen Rwamurangwa bahawe ububasha na Barbara A. Stiefel bwo guhagararira BARBARA A. STIEFEL FOUNDATION mu Nkiko nta shingiro bifite, kuko inyandiko yo kuwa 19/08/2010 igaragaza ko Barbara A. Stiefel yabahaye inshingano zo kwemeza ko imirimo yakozwe n'inyemezabuguzi (factures) zijyanye nayo mbere y'uko ayishyura.

[21] Hashingiwe ku mategeko n'ibisobanuro bimaze gutangwa, Urukiko rurasanga ubujurire bwa SETRAPCO Ltd butagomba kwakirwa kuko yareze BARBARA A. STIEFEL FOUNDATION ihagarariwe na Penny Ensley na Stephen Rwamurangwa, kandi nta bubasha bafite bwo kuyihagararira mu Nkiko.

III. ICYEMEZO CY'URUKIKO

[22] Rwemeje kwakira inzitizi y'iburabubasha bw'abaregwa yatanzwe na Barbara A. Stiefel Foundation;

[23] Rwemeje ko iyo nzitizi ifite ishingiro;

[24] Rwemeje ko ubujurire bwatanzwe na SETRAPCO Ltd ku rubanza RCOM 0291/11/HCC butakiriwe;

[25] Rutegetse SETRAPCO Ltd gutanga amagarama y'uru rubanza angana na 35.250 Frw, itayatanga mu gihe cy'iminsi umunani, ayo mafaranga agakurwa mu byayo ku ngufu za Leta.

IMANZA NSHINJABYAHA

UBUSHINJACYAHA v. MWIZERWA

[Rwanda URUKIKO RUKURU – RPA 0921/13/HC/KIG
(Bukuba P.J) 07 Werurwe 2014.]

Amategeko agenga imiburanyishirize y’imanza nshinjabyaha – igihe fatizo cyo kujurira – Mu gihe isomwa ry’urubanza ryimuwe ariko umuburanyi ntamenyeshwe italiki ryimuriweho, igihe fatizo cyo kubara igihe yajuririye kiba icyo yamenyesherejweho imyanzuro y’urubanza aho kuba italiki rwasomeweho – Itegeko N° 30/2013 ryo kuwa 24/5/2013 ryerekeye imiburanyishirize y’imanza z’inshinjabyaha, ingingo ya 176 n’iya 177.

Amategeko mpanabyaha – Impamvu nyoroshyacyaha zemejwe n’Urukiko rubanza – Kuba ibyo uwajuriye asaba yarabihawe mu rwego rwa mbere kandi ntagire icyo anenga ku buryo byakozwe ni impamvu ituma hatabaho guhinduka kw’icyemezo.

Incamake y’ikibazo: Mwizerwa yakurikiranyweho icyaha cyo kunyereza umutungo wa Leta n’icyo gukora no gukoresha inyandiko mpimbano mu Rukiko Rwisumbuye rwa Nyarugenge ku rwego rwa mbere. Mu rubanza rwaciwe ku wa 10/1/2012 yahamwe n’ibyaha maze ahanishwa igifungo cy’imyaka ine. Nyuma yo kutishimira icyo cyemezo yajuririye Urukiko Rukuru ku wa 06/08/2012.

Mu iburanisha, Ubushinjacyaha kwasabye ko ubujurire bwa Mwizerwa butakwirwa kuko bwatanzwe nyuma y’ibihe ntarengwa ariko Mwizerwa we akavuga ko umunsi yari gusomerwaho yaje ntiyasomerwa ndetse ntiyanabwirwa undi munsi ruzasomerwaho maze aza kumenya umunsi

rwasomeweho ubwo yahabwaga kopi yarwo ayizaniwe kuri gereza. Yakomeje avuga ko kandi anenga kuba yarahawe ibihano bikomeye kandi yaraburanye yemera icyaha ndetse ari n'ubwa mbere yari akoze icyaha no kuba atarageze ku mugambi wo gukora icyaha bityo agasaba kugabanyirizwa ibihano.

Incamake y'icyemezo: 1. Iyo umunsi urubanza rwagombaga gusomerwaho atari wo rwasomeweho ndetse hakaba nta nyandiko mvugo igaragara muri dosiye igaragaza icyakozwe uwo munsi mu mwanya wo kurusoma ntihanagaragare niba uwajuriye yari ahari ngo amenye umunsi isomwa ryimuriweho, kandi hakaba nta n'ikindi kigaragaza igihe yamenyesherejwe iyo mikirize. Kubera iyi mpamvu, itariki fatizo Urukiko ruheraho rubara iminsi ntarengwa yo kujurira n'iyo uregwa avuga ko yamenyesherejweho imirikirize y'urubanza. Kuba uregwa yamenyesherejwe imikirize y'urubanza 18/07/2012 akajurira kuwa 6/8/2012 bigaragara ko igihe cy'ukwezi giteganywa n'itegeko cyari kitararenga, kubera iyo mpamvu icyifuzo cy'Ubushinjacyaha cyo kutakira iki kirego kubera ko ibihe byo kujurira byaba byararangiyeye ntigihawe ishingiro.

2. Kuba ibyo uwajuriye yasabye byarahawe agaciro n'Urukiko rubanza kandi ntihanengwe uburyo byakozwemo ni impamvu ituma hatabaho guhindura icyemezo mu rukiko rujuririrwa.

**Ubujurire burakiriwe ariko nta shingiro bufite.
Urubanza rujuririrwa ntiruhindutse.**

Amategeko yashingiweho:

Itegeko 30/2013 ryo kuwa 24/5/2013 ryerekeye imiburanishirize y'imanza nshinjabyaha, ingingo ya 176 n'iya 177.

Nta rubanza rwifashishijwe.

URUBANZA

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko Rwisumbuye rwa Nyarugenge, Ubushinjacyaha burega Mwizerwa Etienne, icyaha cyo kunyereza umutungo wa Leta, n'icyo gukora no gukoresha inyandiko mpimbano, ku rwego rwa mbere urwo Rukiko rwemeza mu rubanza rwaciwe ku wa 10/1/2012, ko ibyo byaha bimuhama, ahanishwa igihano cy'igifungo cy'imyaka ine, Mwizerwa Etienne ntiyishinye icyo cyemezo, akijuririra kuwa 06/08/2012.

[2] Umunsi wo kuburana ku rwego rw'ubujurire, Ubushinjacyaha bwavuze ko busanga Mwizerwa Etienne yarajuriye nyuma y'ibihe ntarengwa byo kujurira biteganijwe n'itegeko, asaba ko ikirego cye cy'ubujurire kitakwakirwa, Mwizerwa Etienne akavuga ko umunsi yari yabwiwe kuzasomerwaho yaje ntasomerwe ndetse ntabwirwe undi munsi ruzasomerwaho, akaba yaramenye umunsi rwasomeweho ubwo yahabwaga kopi yarwo ayizaniwe kuri Gereza.

[3] Mwizerwa Etienne yanasobanuye ko anenga kuba yarahawe ibihano bikakaye kandi yaraburanye yemera icyaha, ndetse ari n'ubwa mbere yari akoze icyaha, akaba ataranageze no ku mugambi we wo gukora icyaha, agasaba kugabanyirizwa ibihano, ngo kuko yumva n'imyaka itatu amaze afunze

yaramaze kugororoka, akaba asaba kugabanyirizwa igihano agasubira mu muryango nyarwanda.

[4] Ubushinjacyaha buvuga ko busanga iyo mpamvu y'ubujurire atari yo, ngo kuko yarezwe ibyaha bibiri, asabirwa igihano cy'igifungo cy'imyaka 16, ariko urukiko rumuhanisha igifungo cy'imyaka 4 gusa, bityo bukaba busanga icyemezo kijuririrwa kidakwiye guhindurwa.

[5] Ibibazo bigomba gusubizwa muri uru rubanza bijyanye no kumenya niba Mwizerwa Etienne yarajuriye nyuma y'ibihe biteganijwe n'amategeko, ku buryo ubujurire bwe butakwakirwa nk'uko Ubushinjacyaha buburana bubivuga, no kumenya niba akwiye kugabanyizwa ibihano ku rwego rw'ubujurire.

II. ISESENGURA RY'IBIBAZO BIGIZE URUBANZA

A. Ku kijyanye n'ibihe ntarengwa byo kujurira

[6] Urubanza Mwizerwa Etienne ajuririra, rwaciwe ku wa 10/1//2012, nk'uko kopi y'urwo rubanza igaragara kuri cote ya 51 ibigaragaza, akaba yararujuririye kuwa 06/08/2012, aha akaba ari naho Ubushinjacyaha bwashingiye buvuga ko yajuriye nyuma y'ibihe ntarengwa biteganijwe n'itegeko, ariko Mwizerwa Etienne we akaba asobanura ko yajuriye mu bihe biteganijwe n'itegeko, ngo kuko yajuriye nyuma yo kubona kopi y'urubanza n'aho ubundi akaba yari yaragiye gusomerwa ku itariki yari yarahawe, agasanga Umucamanza wamuburanishije yarwaye, ntamenyeshwe umunsi iryo somwa ryimuriweho, akaza kuzanirwa kopi kuri gereza kuwa 18/7/2012, ari naho yahereye ajurira kuwa 6/8/2012.

[7] Urukiko rukaba rusanga ingingo ya 176 y’itegeko numero 30/2013 ryo kuwa 24/5/2013 ryerekeye imiburanishirize y’imanza nshinjabyaha, iteganya ko: “kujurira bigomba gukorwa mu gihe kitarengeje ukwezi kumwe(1) uhereye ku itariki urubanza rwaciriweho ku muburanyi wari uhari cyangwa ahagarariwe igihe urubanza rwacibwaga”, naho ingingo ya 177 y’iryo tegeko ikaba iteganya mu gika cyayo cya 5 ko : “iyo ujuriye afunze, ubujurire bwe ashobora kubukorera muri gereza mu nyandiko yandikira umwanditsi w’Urukiko abinyujije ku muyobozi wa Gereza. Uyu muyobozi ashya umukono kuri urwo rwandiko agaragaza itariki arushyirijweho ari nayo ifatwaho umunsi w’ijurira. Yihutira koherereza ubwo bujurire urukiko rugomba kububuranisha”.

[8] Rusanga ibaruwa y’ubujurire ya Mwizerwa Etienne, Ubuyobozi bwa Gereza bwarayishyizeho umukono kuwa 6/8/2012, kandi nk’uko byavuzwe hejuru urubanza yajuririraga rwarasomwe tariki ya 10/1/2012, uko bigaragara uhereye kuri ayomatariki, igihe ntarengwa cy’ukwezi kikaba cyaba cyararenze, gusa bikaba bigaragara ko iburanisha ry’uru rubanza ku rwego rwa mbere ryo kuwa 9/11/11, ryafashe icyemezo cyo kuzasoma uru rubanza tariki ya 8/12/11 nk’uko icyo cyemezo kigaragara muri dosiye kuri cote ya 45 kibigaragaza, uwo muni ariko akaba atari wo rwasomweho ndetse hakaba nta nyandiko mvugo igaragara muri dosiye igaragaza icyakozwe uwo muni mu mwanya wo kurusoma, kandi iyo nyandiko mvugo ari yo yagaragariza Urukiko niba uwajuriye yari ahari ngo amenye umunsi isomwa ryimuriweho, ndetse rukaba runasanga nta n’ikindi kigaragaza igihe yamenyesherejwe iyo mikirize, uwajuriye we akaba mu ibaruwa ye y’ubujurire avuga ko yamenyesherejwe iyo mikirize kuwa 18/7/2012, iyo tariki akaba ari yo y’ifatizo Urukiko

ruheryeho rubara iminsi ntarengwa yo kujurire, bityo kuva kuri iyo tariki kugeza kuwa 6/8/2012 bikaba bigaragara ko igihe cy'ukwezi giteganywa n'itegeko cyari kitararanga, ari nayo mpamvu ikifuzo cy'Ubushinjacyaha cyo kutakira iki kirego kubera ibihe byo kujurira byaba byararangiyeye kidahawe ishingiro.

B. Ku kijyanye no kugabanyirizwa ibihano.

[9] Mwizerwa Etienne yanasobanuye ko anenga kuba yarahawe ibihano bikakaye kandi yaraburanye yemera icyaha, ndetse ari n'ubwa mbere yari akoze icyaha, akaba ataranageze no ku mugambi we wo gukora icyaha, agasaba kugabanyirizwa ibihano, ngo kuko yumva n'imyaka itatu amaze afunze yamaze kugororoka, akaba asaba kugabanyirizwa igihano agasubira mu muryango nyarwanda.

[10] Ubushinjacyaha buvuga ko busanga iyo mpamvu y'ubujurire atari yo, ngo kuko yarezwe ibyaha bibiri, asabirwa igihano cy'igifungo cy'imyaka 16, ariko urukiko rumuhanisha igifungo cy'imyaka 4 gusa, bityo bakaba basanga icyemezo kijuririrwa kitahindurwa.

[11] Uru Rukiko rukaba rusanga ku rwego rwa mbere, nyuma yo gusesengura rugasanga ibyaha Mwizerwa Etienne yarezwe, ari icyo kunyereza umutungo wa Leta n'icyo gukora no gukoresha inyandiko mpimbano, bigize impurirane y'imbonezamugambi, yateganywaga mu ngingo ya 93 y'igitabo cya 1 cy'amategeko ahana ibyaha mu Rwanda cyakoreshwaga icyo gihe uru rubanza rucibwa, rwarafashe icyemezo cyo kumuhanisha igihano cyari giteganijwe mu ngingo ya 220 y'icyo gitabo, kuko rwasanze aricyo kiremereye, ariko runasesenguye imiburanire ya Mwizerwa Etienne, waburanye

yemera icyaha, ari ubwa mbere yari akoze icyaha, rubishingiraho nk'impamvu nyoroshya cyaha, rumugabanyiriza ibihano, rushingiye ku rwego rw'amategeko ku byateganywaga mu ngingo ya 83 y'icyo gitabo.

[12] Kubera ibimaze gusobanurwa hejuru, rusanga ibyo Mwizerwa Etienne asaba yarabigenewe ku rwego rwa mbere, kandi akaba ntacyo yagaragaje anenga uburyo byakozwemo kuri urwo rwego, ari nayo mpamvu icyo cyemezo kidahindutse.

III. ICYEMEZO CY'URUKIKO RUKURU

[13] Urukiko rwemeye kwakira ubujurire bwatanzwe na Mwizerwa Etienne, ariko rubusuzumye rusanga nta shingiro bufite.

[14] Rwemeje ko urubanza rujuririrwa rudahindutse.

UBUSHINJACYAHA v. NSHIMIYIMANA

[Rwanda URUKIKO RW'IKIRENGA – RPAA0034/10/CS
(Mutashya, P.J., Kanyange na Hitiyaremye, J.) 08 Ugushyingo
2013]

Amategeko agenga imiburanishirize y'imanza nshinjabyaha – Ibimenyetso bidashidikanywaho – Iyo nta bimenyetso bidashidikanywaho bihamya ko ushinjwa ariwe yakoze icyaha ashinjwa bituma agirwa umwere – Itegeko n°13/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabya, ingingo ya 165.

Amategeko agenga ibimenyetso – Ubuhamya – Kuba abatangabuhamya bavuga mu buryo butandukanye ibintu bemeza ko baboneye igihe kimwe, ntibyashingirwaho ngo hemezwe nta shiti ko uregwa ahamwa n'icyaha aregwa – Itegeko n° 15/2004 ryo ku wa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 62 n'ya 65.

Incamake y'ikibazo: Nshimiyimana Samuel yashinjwe icyaha cyo gusambanya umwana ufite umwaka umwe n' igice. Mu kumushinja icyaha, Ubushinjacyaha bushingira ku mvugo z' abatangabuhamya, no ku cyemezo cya muganga cyemeza ko ku mwinjiriro w'igitsina hatukuraga bikabije. Urukiko Rwisumbuye rwa Muhanga rwamuhamije icyaha, rumukatira igifungo cy'imyaka cumi n' itanu n' ihazabu y' amafaranga y' amanyarwanda ibihumbi ijana (100.000 Frw). Uregwa yajuririye icyo cyemezo mu Rukiko Rukuru, urugereko rwa Nyanza, narwo ruhamishaho urubanza rwajuririwe.

Nshimiyimana Samuel yajuririye Urukiko rw'Ikirenga, avuga ko Urukiko rubanza rwamuhamije icyaha rushingiye ku mvugo z'abatangabuhamya bemeza ko yiriranwe n'umwana kandi bataramubonye akora icyaha, no kuri raporo ya muganga yemeza ko umwana yangijwe koko, ariko ikaba idashobora kwemeza ko uregwa ari we wamwangije.

Uhagarariye Ubushinjacyaha avuga ko ku bijyanye n'abatangabuhamya, Urukiko rwashingiye ku mvugo zabo kuko bavuze ibintu uko babizi, naho ku birebana na raporo ya muganga, avuga ko nta gushidikanya kuyirimo, kuko yerekanye ibyo yabonye ku gitsina cy'umwana, ko kandi raporo ya muganga atari yo yonyine Urukiko rwashingiyeho.

Incamake y'icyemezo: 1. Kuba abatangabuhamya bavuga mu buryo butandukanye ibintu bemeza ko babonye igihe kimwe, ntibyashingirwaho ngo hemezwe nta shiti ko uregwa ahamwa n'icyaha aregwa, cyane cyane ko batanavuga ko bamubonye akora icyaha cyangwa se ngo babe barabyumvanye abamubonye. Urukiko nirwo rwonyine rupima ko imikirize y'abatangabuhamya ihuye n'ikiburanwa, ifite ingingo zikiranuye kandi ikaba ikwiye kwemerwa cyangwa guhakanwa.

2. Mu manza nshinjabyaha, gushidikanya birengera ushinjwa. Mu gihe mu rubanza nshinjabyaha nta kimenyetso kidashidikanywaho cyerekana ko ushinjwa yakoze icyaha, agirwa umwere.

Ubujurire bufite ishingiro.

**Ushinjwa agizwe umwere akaba agomba guhita arekurwa.
Amagarama aherereye ku isanduku ya Leta.**

Amategeko yashingiweho:

Itegeko N°13/2013 ryo kuwa 24/5/2013 ryerekeye imiburanishirize y'ianza z'inshinjabya, ingingo ya 165.

Itegeko n° 15/2004 ryo kuwa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ingingo ya 62, 65 na 98.

Nta manza zifashishijwe.**Inyandiko z'abahanga:**

H. Bosly et D. Vandermeersch, *Droit de la procédure pénale*, 4^e édition, p. 1316, § 5

Urubanza**I. IMITERERE Y'URUBANZA**

[1] Ku itariki ya 20/5/2003 umwana w'umukobwa w'umwaka umwe n'igice witwa N.B yagiye kwa Gatete aho Nshimiyimana Samuel yakoreraga, nyuma nyina aza kumushakayo Nshimiyimana Samuel aza amuteruye asinzira aramumuha aramuheka. U.F ari we nyina w'umwana, avuga ko ku mugoroba yagiye kumwuhagira akoze ku gitsina umwana avuza induru, ngo arebye abonaho udusebe ndetse ngo n'amasohoro yari akirimo. Ubwo yahise akeka ko yasambanyijwe na Nshimiyimana Samuel maze ajya kuri polisi gutanga ikirego, iperereza rirakorwa Ubushinjacyaha bushyikiriza dosiye Urukiko Rwisumbuye rwa Muhanga.

[2] Urukiko Rwisumbuye rwa Muhanga rwahamije uregwa icyaha maze ku itariki ya 3/10/2008 rumukatira igifungo

cy'imyaka cumi n'itanu (15) n'ihazabu y'amafaranga y'amanyarwanda ibihumbi ijana (100.000 rwf).

[3] Mu gufata iki cyemezo, Urukiko rwashingiye ku kuba uregwa yariyemereye ko uwo muni yiriranywe n'umwana, ibi bikaba byaremejwe n'abatangabuhamya, no ku cyemezo cya muganga cyagaragazaga ko umwana yangijwe mu myanya ndangagitsina ye.

[4] Uregwa ntiyishimiye imikirize y'urubanza arujuririra mu Rukiko Rukuru, Urugereko rwa Nyanza, na rwo ruhamishaho urubanza rwajuririwe. Mu gufata iki cyemezo, Urukiko rwashingiye ku batangabuhamya bari baratanzwe n'Ubushinjacyaha, no kuri raporo ya muganga igaragaza ko umwana yangijwe mu myanya ndangagitsina ye.

[5] Nshimiyimana Samuel yajuririye mu Rukiko rw'Ikirenga avuga ko Urukiko Rukuru rwamurenganyije rukamuhamya icyaha rushingiye ku mvugo z'abatangabuhamya bemeza ko yiriranwe n'umwana kandi bataramubonye akora icyaha, no kuri raporo ya muganga yemeza ko umwana yangijwe koko, ariko ikaba idashobora kwemeza ko uregwa ari we wamwangije.

[6] Iburanisha ry'urubanza ryabaye mu ruhame ku itariki ya 9/10/2013 ababuranyi bose bahari, Nshimiyimana Samuel uregwa yunganiwe na Me Mukwende M. Olivier, na ho Ubushinjacyaha buhagarariwe na Ntawangundi Béatrice, Umushinjacyaha ku Rwego rw'Igihugu.

II. IKIBAZO KIGIZE URUBANZA N’ISESENGURA RYACYO

Kureba niba ibimenyetso byashingiweho n’Urukiko Rukuru byari bihagije mu buryo budashidikanywaho kugira ngo Nshimiyimana Samuel ahamwe n’icyaha aregwa.

[7] Nshimiyimana Samuel avuga ko impamvu zatumye ajurira ari uko Urukiko rwamuhamije icyaha rushingiye ku mvugo z’abamushinja, umubyeyi w’umwana n’umukobwa we, nabo kandi bakaba batavuga ko bamubonye asambanya umwana, uretse kuvuga gusa ngo bamubonye amusohokanye. Akomeza avuga ko mu bandi batangabuhamya babajijwe nta n’umwe umushinja uretse kuvuga ibyo babwiwe na nyina w’umwana. Avuga ko U.F amubeshyera kubera amakimbirane yari afitanye n’umukoresha we. Avuga kandi ko yari afite inyungu zo kumubeshyera ngo kubera ko yamugurizaga ku mafaranga yabaga yarengaje ku yo nyirabuja yabaga yamutumye ku twenda yamucururizaga akamwishyura nabi, ndetse rimwe na rimwe bakabipfa.

[8] Ku birebana na raporo ya muganga, Nshimiyimana avuga ko iyo raporo igaragaza ko igitsina cy’umwana cyari kibyimbye, akibaza niba kubyimba kw’igitsina cy’umwana gushobora guterwa no gusambanywa gusa, cyane cyane ko na muganga ashidikanya niba harabeyeho “viol”. Avuga ko kuba muganga yaragaragaje ko ku gitsina cye hari hatonyotse, bivuze ko yari yababaye cyane, bityo akaba yari gutaka Gatete babanaga akaba yari kubyumva kuko yari aryamye.

[9] Me Mukwende wunganira Nshimiyimana avuga ko yibaza impamvu yatumye U.F yarabonye umwana we yangijwe

ntiyihutire kumutwara kwa muganga agategereza iminsi ibiri (2).

[10] Uhagarariye Ubushinjacyaha avuga ko ku bijyanye n'abatangabuhamya, Urukiko rwashingiye ku mvugo zabo kuko bavuze ibintu uko babizi. Akomeza avuga ko hashingiwe ku ngingo ya 65 y'Itegeko n° 15/2004 ryo ku wa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, urukiko ari rwo rupima ko imikirize y'abatangabuhamya ikwiye kwemerwa cyangwa guhakanwa.

[11] Uhagarariye Ubushinjacyaha avuga ko ku birebana na raporo ya muganga, nta gushidikanya kuyirimo, kuko muganga yerekanye ibyo yabonye ku gitsina cy'umwana, ko kandi raporo ya muganga atari yo yonyine Urukiko rwashingiyeho.

UKO URUKIKO RUBIBONA

[12] Mu guhamya Nshimiyimana Samuel icyaha, Urukiko Rukuru rwashingiye ku mvugo z'abatangabuhamya. Abo batangabuhamya akaba ari nyina w'umwana bivugwa ko yasambanyijwe, na U.G, uyu akaba ari umukobwa w'urega. Urukiko rwashingiye kandi kuri raporo ya muganga yavugaga ko igitsina cy'umwana cyagaragazaga ibimenyetso byo gusambanywa ku ngufu.

[13] Ku byerekeranye n'ibimenyetso bishingiye ku batangabuhamya, ingingo ya 62 y'itegeko n° 15/2004 ryo ku wa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo iteganya ko Ubuhamya ari ibivugwa mu rukiko bivuzwe n'umuntu wabibonye cyangwa wabyumvise ubwe ku byerekeye ikiburanwa. Ingingo ya 65 y'iryo tegeko ivuga kandi ko

Urukiko ari rwo rwonyine rupima ko imikirize y'abatangabuhamya ihuye n'ikiburanwa, ifite ingingo zikiranuye kandi ikaba ikwiye kwemerwa cyangwa guhakanwa. Ntirwitsitsa ku mubare w'abatangabuhamya. Rwita cyane cyane ku bumenyi bwabo bw'ibyabaye, no ku buryo babivuga uko byagenze ntacyo bihimbira.

[14] Ku birebana n'uru rubanza, urukiko rurasanga mu batangabuhamya babajijwe, abashinja Nshimiyimana Samuel ari U.F, umubyeyi w'umwana bivugwa ko yasambanyijwe, avuga ko ku munsu ibyo biba mu gihe cya nimugoroba, yabajije aho umwana we ari bamubwira ko ari kumwe na Nshimiyimana Samuel yisubirira mu nzu. Akomeza avuga ko nyuma yahamagaye Samuel ngo amuzane, amusohokana amuteruye asinzira. Ngo nyuma yaje kumukarabya akoze ku gitsina umwana avuza induru, arebye abona hariho udusebe n'amasohoro, ngo ahita ajya kubyereka kwa shebuja wa Samuel ari we Gatete. Undi wabajijwe ni U.G, uyu akaba ari umukobwa w' U.F, we uvuga ko bashatse umwana hose bakamubura, nyina ngo atangiye kumutuka babona Samuel amusohokanye kwa Gatete amuteruye. Akomeza avuga ko ku mugoroba ari bwo nyina yabonye ko umwana we nyangiritse ubwo yamwuhagiraga akajya kubibwira kwa nyirabuja wa Samuel. Ibi ariko bikaba bitandukanye n'ibyo nyina avuga ko yahamagaye Samuel ngo amuzane (kuko yari azi neza ko ari ho ari).

[15] Urukiko rukaba rusanga ibyatangajwe n'abo batangabuhamya, bavuga mu buryo butandukanye ibintu bemeza ko babonye igihe kimwe, rutabishingiraho ngo rwemeze nta shiti ko Nshimiyimana Samuel ahamwa n'icyaha aregwa cyane cyane ko batanavuga ko bamubonye akora icyaha cyangwa se ngo babe barabyumvanye abamubonye,

binakubitiyeho ko na Gatete, shebuja wa Nshimiyimana, avuga ko yari yahiriwe, ariko akaba atarabonye amwangiza.

[16] Urukiko rurasanga kandi, kuba Gatete n'umugore we Uwizeye mu buhama bwabo bavuga ko U.F yaje iwabo mu gitondo avuga ko umwana we yahohotewe n'umukozi wabo, U.F mu ibazwa rye akavuga ko yagiyeyo muri uwo mugoroba akimara kubona ko umwana we yangijwe, uko kudahuza ku gihe U.F avuga yamenyekanishirijeho iyangizwa ry'umwana we, bitera gushidikanya ku cyangije umwana.

[17] Ku birebana na raporo ya muganga, iragaragaza ko ku mwinjiriro w'igitsina hatukuraga bikabije (*rougeur exagérée de la vulve autour de l'orifice vaginal*). Urukiko rukaba rusanga uko kuba haraturaga bitavuga ko uriya mwana yari yangijwe bishingiye ku gitsina (*violence sexuelle*) byanze bikunze kandi ko byari byakozwe na Nshimiyimana, cyane cyane ko iyo aza guhohotera uyu mwana mu buryo bukabije nk'ubugaragazwa na muganga, umwana yari kurira umubyeyi we akamwumva dore ko icyo gihe yari mu nzu iri mu gipangu kimwe n'icyo uwo mwana yari arimo, ndetse na Gatete akaba yari kubyumva kuko uwo munsu avuga ko yiriwe mu rugo.

[18] Kubera iyi mpamvu, rushingiye ku ngingo ya 98 y'itegeko n° 15/2004 ryo ku wa 12/6/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo, ivuga ko Urukiko rudakurikiza byanze bikunze ibitekerezo by'abahanga mu gihe binyuranye n'imyumvire y'abacamanza, Urukiko rukaba rusanga rutashingira kuri iyo raporo ngo rwemeze ko ibimenyetso muganga yasanze ku gitsina cy'umwana byatewe na Nshimiyimana Samuel.

[19] Urukiko rurasanga kandi hari ugushidikanya mu kumenya niba uko gutukura kw'igitsina N.B yari akumaranye iminsi ibiri (2) koko, dore ko umubyeyi we avuga ko icyaha cyakozwe ku wa 20/5/2003, ariko nyamara agatwara umwana kwa muganga ku itariki ya 22/5/2003 ari na bwo raporo yakozwe. Urukiko rukibaza nanone impamvu uwo mubyeyi yamaranye umwana we icyo gihe cyose kandi yarabonaga ameze nabi ntamutwara kwa muganga.

[20] Ingingo ya 165 y'itegeko N°13/2013 ryo ku wa 24/5/2013 ryerekeye imiburanishirize y'imanza z'inshinjabya ivuga ko gushidikanya birengera ushinjwa, igakomeza igira iti: "Iyo urubanza rwakurikiranywe mu buryo bwose, nti hagire ibimenyetso nyakuri biboneka byemeza nta shiti abacamanza ko ushinjwa yakoze icyaha koko, bagomba kwemeza ko atsinze". Ku birebana n'uru rubanza, Urukiko rurasanga hashingiwe ku myiregurire ya Nshimiyimana Samuel, ibimenyetso byose byatanzwe muri uru rubanza bitera gushidikanya, bityo akaba agomba kugirwa umwere.

[21] Abahanga mu mategeko yerekeye imiburanishirize y'imanza z'inshinjabyaha na bo bavuga ko nta muntu ugomba kwemezwa ko ahamwe n'icyaha nyuma y'urubanza atari uko ubushinjacyaha bugaragaje ibimenyetso bidatera ugushidikanya uko ari ko kose (Une personne ne peut être déclarée coupable au terme du procès que si l'accusation a apporté la preuve au-delà de tout doute raisonnable de la culpabilité de l'accusé)¹ .

¹ Henry Bosly et Damien Vandermeersch, *Droit de la procédure pénale*, 4^e édition, p. 1316, §5.

III. ICYEMEZO CY'URUKIKO.

[22] Rwemeje ko ubujurire bwa Nshimiyimana Samuel bufite ishingiro.

[23] Rwemeje ko Nshimiyimana Samuel ahanaguweho icyaha kubera gushidikanya.

[24] Rwemeje ko imikirize y'urubanza RPA 0219/08/HC/NYA rwaciwe n'Urukiko Rukuru, Urugereko rwa Nyanza, ihindutse muri byose.

[25] Rutegetse ko Nshimiyimana Samuel ahita arekurwa urubanza rukimara gusomwa.

[26] Ruvuze ko amagarama y'urubanza aherera ku isanduku ya Leta.

**RWANDA LAW
REPORTS**

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LAW REPORTING TEAM

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PREFACE

Dear Readers,

We take this opportunity to wish you a happy new year of 2015. As you have become accustomed, the Rwandan Judiciary publishes the Law Report once a trimester, and it is in this context that we release the first volume in 2015.

We reiterate our thanks to our readers who regularly provide us with their ideas, appreciate the law reports and suggest some areas of improvement. Indeed, we still encourage readers' comments with regard to the current, previous, and future volumes. This will allow us to publish greatly improved and appreciated law reports so that they can continue to assist those who meet with legal issues covered in the reports in their professional work or daily activities.

In this volume of Rwanda Law Reports, you will find four (4) commercial cases, three (3) administrative cases, four (4) civil cases, one (1) labour case and two (2) criminal cases.

As usual, the law reports are available on the website of the judiciary http://www.judiciary.gov.rw/en/case_law/case_law_booklets/

We take this opportunity to once again encourage all legal practitioners and others who regularly deal with the law in their work to use these law reports.

Prof. Sam RUGEGE

President of the Supreme Court
President of the High Council of Judiciary

SCOPE OF THE REPORTS

These reports cover cases decided in the Supreme Court listed under the heading of “Citation” below.

CITATION

The Reports in this volume are cited thus:

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GAKWAYA v. UNIVERSITY OF RWANDA

[Rwanda SUPREME COURT – RADA 0029/11/CS
(Mukanyundo, P.J., Rugabirwa and Hatangimbabazi, J.) May
16, 2014]

Administrative procedure – Administrative appeal – The provided time limit for filing a claim after lodging an administrative appeal – In case an administrative appeal has been lodged several times, only the first one shall be considered for computation of time limit for filing a claim in the court and it is not a requirement for the plaintiff to receive an express response from the administrator in order to file the claim, because if he/she does not get a response within the time limit provided for by the law, it is considered as request not granted – Law n^o 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, articles 94 and 339

Facts: Gakwaya sued the University of Rwanda before the High Court, chamber of Nyanza requesting to be reinstated to his former job as lecturer and be bestowed all he is entitled to which were deprived from him when he was unlawfully dismissed in addition to various damages.

The University of Rwanda raised the objection of inadmissibility on the ground that he delayed to file the claim after the lodging of the administrative appeal because the time limit provided for by the Law had expired. Therefore, the High Court held that his claim is inadmissible.

Gakwaya appealed to the Supreme Court arguing that the High Court should have admitted his claim because there was no delay in filing the claim after lodging an administrative appeal to the University of Rwanda, in order to be reinstated and given his entitlements including the salaries which were not paid to him at his dismissal in addition to various damages.

Held: In case an administrative appeal has been lodged several times, only the first one shall be considered for computation of time limits for filing a claim in the court and it is not a requirement for the plaintiff to receive an express response from the administrator in order to file the claim. If he/she does not get a response within the time limit provided for by the law, it is considered as request not granted.

**Appeal without merit.
Appealed judgment sustained.
Court fees to the appellant.**

Statutes and statutory instruments referred to:

Law n^o 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure, articles 94 and 339.

Cases referred to:

KIST v. Hashakimana, RADA 0001/11/CS rendered by Supreme Court on 27 April 2012.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Gakwaya Emmanuel sued the National University of Rwanda to the High Court, Chamber of Nyanza, requesting it to reinstate him as a lecturer at that University and bestows him with the entitlement he was deprived of when it dismissed him unlawfully in addition to various damages.

[2] At the beginning of the hearing, the Counsel for University of Rwanda raised an objection of inadmissibility of the claim of Gakwaya Emmanuel on the ground that after the administrative appeal, he lodged a case to the High Court after the expiration of the period of 6 months provided for by article 339 of the Law n^o 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure. The Court rejected the claim of Gakwaya Emmanuel.

[3] The Court explained that Gakwaya Emmanuel made an administrative appeal to the University of Rwanda on 25 September 2008 and it did not reply him and he instituted a claim on 22 September 2010 after almost two years while he should have instituted it not later than 24 May 2009, therefore his claim must not be admitted. The Court motivated further that the letter of Gakwaya Emmanuel dated 7 June 2010 could be considered as an administrative appeal because it states that the University of Rwanda must pay him salaries and damages he requested from it, failure to do so, he will seek justice.

[4] In order for the University of Rwanda to reinstate him and give him all entitlements including the salaries which were

not paid to him at his dismissal in addition to various damages, Gakwaya Emmanuel appealed to the Supreme Court arguing that the High Court should have admitted his claim because he did not delay to file it after the administrative appeal.

[5] The hearing was conducted in public on 15 April 2014, Gakwaya Emmanuel assisted by Counsel Mbonyimpaye Elias, whereas the University of Rwanda was represented by Counsel Ntaganda Félix.

II. ANALYSIS OF THE LEGAL ISSUES

Whether the High Court erred in deciding that after the administrative appeal Gakwaya Emmanuel delayed to sue to the Court.

[6] Gakwaya Emmanuel and his counsel argue that the High Court should not have decided that he lodged the administrative appeal on 25 September 2008 because by then he had not yet got the prosecution's decision which provisionally closed his file, because he was still being prosecuted for fraudulently acquiring a the academic degree and also he did not have to lodge the administrative appeal because the Criminal proceeding stays civil proceeding. Rather, he got that decision on 27 May 2010 and lodged the administrative appeal to the University of Rwanda on 7 June 2010 because that decision demonstrated that he did not commit the crime for which he was being prosecuted.

[7] His counsel argues also that the Court should not have relied on article 339 of the Law n^o 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure and hold that Gakwaya Emmanuel delayed to sue,

because he had to first appeal to the Public Service Commission as provided for by article 19 of the Law n° 22/2002 of 09/07/2002 instituting General Statutes for Public Service because the University of Rwanda usurped the power and dismissed him while it is the sanction of second category which was taken without prior notification to that commission.

[8] The counsel for the University of Rwanda states that after the administrative appeal, Gakwaya Emmanuel sued in the High Court after the expiration of the six months period provided by article 339 of Law n° 18/2004 mentioned above, because it dismissed him on 09 May 2007 and lodged the administrative appeal on 25 September 2008 and he did not get a response, but he delayed to file a claim because he filed it on 22 September 2010.

[9] He also adduces that the arguments of Gakwaya Emmanuel that, after lodging the administrative appeal to the University of Rwanda he could not immediately sue before getting a prosecution decision closing the file has no merit because the criminal proceeding on the use of a counterfeit he was prosecuted for is different from the disciplinary action for the faults he might have committed (The criminal action is independent from the disciplinary action).

THE VIEW OF THE COURT

[10] Article 339 of the Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure which was in force at the time Gakwaya Emmanuel was dismissed stipulates that the action for annulment is admissible only against an explicit or implicit decision of an

administrative authority. Before bringing an action for annulment, he who attacks the administrative decision must previously have made an administrative appeal to the authority which took the decision. The authority shall be required to respond within two (2) months of its receipt. If it's not replied the request is regarded to be rejected. In case the applicant is not satisfied with the decision, he/she has a period of six (6) months to file a claim which runs from the date when he/she received the response, and if there is no response, such a period shall start running after one (2) month mentioned in the preceding paragraph.

[11] And for article 94 of law mentioned above, stipulates that “the reason for the inadmissibility of a claim is any argument requesting for inadmissibility of a claim without being considered on merit such as expiry of the prescribed period to file a claim”.

[12] Regarding this case, the case file demonstrates that on 09 May 2007 the administration of University of Rwanda wrote a letter to Gakwaya Emmanuel notifying him that he has been dismissed because the board meeting which took place on 30 April 2007 realized that the degrees of Master's and that one of PHD he submitted while requesting for a promotion were forged.

[13] On 25 September 2008, Gakwaya Emmanuel wrote to the administration requesting to be bestowed with all his entitlements including salary he was deprived of at his dismissal, because the Judgment RPA 0160/07/DP/NYA rendered by the High Court on 02/07/2007 declared that he did not commit the crime of forgery which led to his dismissal, and he requested the administration to omit or review the meeting

minutes of its board of directors held on 30 April 2007 mentioned about him because it convicts him of the crime he did not commit.

[14] On 7 June 2010, Gakwaya Emmanuel informed that administration in writing the prosecution decision of 27 May 2010 demonstrating that his file was provisionally closed, therefore requested that administration to pay him his salary of 38 months which it did not remunerate him in addition to damages, and failure to do so within five days, he will resort to court of justice.

[15] On 22 September 2010, Gakwaya Emmanuel sued the administration of University of Rwanda to the High Court, Chamber of Nyanza as demonstrated by his document instituting the proceedings contained in the file and requested it to reinstate him on the post and pay him various damages.

[16] The Court finds that the letter dated 25 September 2008, which Gakwaya Emmanuel wrote to the University of Rwanda is the one which should be considered as the one through which an administrative appeal was made, because it is at that very date he wrote to it requesting to omit or review its decision of his dismissal, so that it reinstates and pay him all other benefits he is entitled to which he was deprived of.

[17] The Court finds that the letter dated 7 June 2010 which Gakwaya Emmanuel wrote to the administration of the University of Rwanda cannot be considered as an administrative appeal, rather it should be regarded as information of the prosecution's decision of 27 May 2010 which closed his file provisionally to the University of Rwanda, and should also be considered as a notice that if it does not pay him his salary of 38

months and other benefits, he will resort to court of justice within five days.

[18] This position is in conformity with the ruling of the Supreme Court in the judgment RADA 0001/11/CS rendered on 27 April 2012¹, whereby it motivated that several administrative appeals to the same administrator do not exist, rather the computation of the time limit for filing a claim runs from the time the first administrative appeal was lodged, and it is not a requirement for the plaintiff to wait an express response from the administrator in order to file the claim, because if s/he does not get a response within two (2) months, the request is considered not granted and he has six months to file a case to the Court.

[19] The Court finds that the fact for the administration of University of Rwanda to have informed Gakwaya Emmanuel in writing, that he was dismissed on 9 May 2007 and lodged an administrative appeal on 25 May 2008 which was received on 26 September 2008 without the response while Gakwaya Emmanuel sued it to High Court on 22 September 2010; it is noticeable that he sued it in this Court after six months period provided for by article 339 of the Law no18/2004 of 20/06/2004 mentioned above had expired because the last day he had to sue should be 25 May 2009. Therefore, his claim must not be admitted pursuant to the provision of article 94 of the Law mentioned above as it was decided by the High Court.

¹ *KIST v. Hashakimana*, RADA 0001/11/CS rendered by the Supreme Court on 27 April 2012.

III. THE DECISION OF THE COURT

[20] Decides that the appeal of Gakwaya Emmanuel is rejected;

[21] Decides that the rulings of the Judgment RAD 0016/10/HC/NYA rendered by the High Court, Chamber of Nyanza, on 15 July 2011 is sustained;

[22] Orders Gakwaya Emmanuel to pay the Court fees amounting to 50,500Rwf including fees charged in Commercial High Court, failure to do so within the period of eight days, that amount will be deducted from his assets through government coercion.

KANAMUGIRE v. KIGALI CITY ET AL

[Rwanda SUPREME COURT – RADA 0001/13/CS (Mugenzi, P.J., Munyangeri and Gakwaya, J.) 15 May 2013]

Administrative procedure – Failure to execute the Court decision – Penalty – The person to be sued in the case lodged against an administrative institution which failed to execute the court’s decision – The administrative authority is the one to be sued in the Court, since, by virtue of the law, he/she is the person to be summoned in the name of the institution – Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 31 – Law n° 10 N° 10/2006 of 03/03/2006 determining the structure, organization and functioning of the City of Kigali, article 73.

Administrative procedure – Penalty for non compliance with the court’s decision – If the reasons for non compliance with the court’s decision are valid, the administrative authority may, depending on circumstances, be given an extended time limit within which to execute the judgment, before the penalty is imposed – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 31, 347 and 348.

Facts: Kanamugire file the case to the Supreme Court requesting that Kigali City and its Mayor be summoned to provide the reasons why the Judgment RADA 0046/12/CS which ordered his expropriation compensation is not executed and requests the court to force them to execute it.

Kigali City adduces that the delay to pay him was due to the prolonged negotiation between it and RSSB with the purpose of convincing the latter to undertake the obligation of paying him because it is the one which was allocated the land. As for the Mayor, he argued that he should not have been summoned, for he is not the budget manager of Kigali City or the responsible to execute the Court decisions. Instead, it is the duty of the executive secretary and accordingly, he is the one to be summoned.

Held: 1. The administrative authority is the one to be sued in the Court, since, by virtue of the law, he/she is the person to be summoned in the name of the institution.

2. If the reasons for non compliance with the court's decision are valid, the administrative authority may, depending on circumstances, be given an extended time limit within which to execute the judgment, before the penalty is imposed.

**The claim has merit.
The defendants are ordered to execute the judgment not
later than 15 December 2013.**

Statutes and statutory instruments referred to:

Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure 31, 347 and 348.

Law no 10 N° 10/2006 of 03/03/2006 determining the structure, organization and functioning of the City of Kigali, article 73.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Pursuant to the Judgment RAD A 0046/12/CS rendered by the supreme court on 16/11/ 2012, ordering Kigali City to compensate Kanamugire Rwaka Laurent the sum of 86.186.205 Rwf for the expropriated property, Kanamugire continuously requested Kigali City to execute the judgment but in vain, for the reason that it was still negotiating with RSSB which was allocated the land to pay that amount.

[2] Kanamugire sued to the Supreme Court requesting to summon Kigali City and its mayor so as to explain the reason why the Judgment RADA 0046/12/CS is not executed. The hearing was held on 15 October 2013, Kanamugire assisted by Counsel Mutembe Protais, Kigali City represented by the Deputy Attorney General, Sezabungu Alphonse and the Mayor of Kigali city, Ndayisaba Fidèle represented by Counsel Rutabingwa Athanase.

II. ANALYSIS OF THE LEGAL ISSUE

Determine the reason why Kigali City does not execute the judgment which it lost in favour of Kanamugire.

[3] Kanamugire states that it has now been a long time since he begun requesting Kigali City to compensate him for his expropriated property as it was ordered by the Supreme Court on 16 November 2012 but in vain. Therefore, pursuant to article 347 and 348 of the law n° 21/2012 of 14/ 04/2012 relating to the civil, commercial, labour and administrative procedure, the

court should summon them to justify the reason why the judgment is not being executed, if necessary to order Kigali city and its mayor to execute it forcibly.

[4] The counsel for Kigali City adduces that the delay in the payment of Kanamugire was due to the prolonged negotiation between Kigali City and RSSB which had to understand that it is the one to pay because the expropriated land of Kanamugire was allocated to it. He acknowledged before the court that within two months the issue shall be solved and Kanamugire will get paid.

[5] The Counsel for the Mayor of Kigali City argues that it is not the mayor to be summoned for not paying Kanamugire because he should not be considered as having denied paying Kanamugire as long as he is not the budget manager of Kigali City or in charge of the execution of the judgments; rather, the Executive Secretary is the one in charge of that. The Counsel for Kanamugire rebutted this ground as baseless because the institution with the legal personality is represented by its administrator.

[6] The Counsel for the mayor of Kigali City further states that if the explanations he submitted are not admitted, he requests for a period of two months for Kanamugire to be paid.

[7] The court finds that on the issue of executing the judgment, it is not the Executive Secretary of Kigali City who should be summoned as alleged by the counsel for the Mayor of Kigali City, rather, it is the Mayor, because the law provides that it is the mayor who is summoned before the court on behalf of Kigali City, as provided for by article 31 of the law n^o 21/2012 mentioned above, and article 73 of the law n^o 10 of 3/

3/2006 determining the structure, organization and functioning of the City of Kigali.

[8] Pursuant to article 347 of the law n° 21/2012 stated above, the Court finds that Kigali City had to pay Kanamugire within 6 months after the delivery of the judgment, but a year has elapsed without being paid.

[9] Article 348 of that Law provides in its second paragraph, that if the reasons are valid, the administrative authority may, depending on circumstances, be given an extended time limit within which to execute the judgment, before providing other punishments stated in the third paragraph of the same law, in case he fail to perform within a given period.

[10] The court finds that the Kigali City and its Mayor's reasons for the delay of Kanamugire's payment due to the negotiations which were still going on and the fact that Kanamugire was also continuously being informed about its progress constitutes a justified reason which leads the Court to give an extended time limit of 2 months as requested by the defendants and admitted by Kanamugire.

III. THE DECISION OF THE COURT

[11] Decides that the claim of Kanamugire has merit;

[12] Orders Kigali City and its Mayor to execute the Judgment RADA 0046/12/CS rendered on 16 November 2012 concerning the compensation awarded to Kanamugire not later than 15 December 2013.

MULINDAHABI v. EWSA

[Rwanda SUPREME COURT – SC2013 – RADA0015/13/CS
(Kanyange, P.J., Mukandamage and Rugabirwa, J.) November
08, 2013]

Labour Law – Employment contract – The employment status of the public institution employee who is under an employment contract – The employee who is under the employment contract is governed by the labour law instead of being governed by general statutes for Rwanda public service in case he/she does not demonstrate the instrument of appointment – Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 2.

Labour law – Employment contract – Probation period – The right to defence – Termination of the employment contract under probation period – The termination of an employment contract for the employee under the probation period does not require to give him/her the notice but damages are awarded in case the employee was not informed about the fault which led to the termination of the contract so that she/he can defend her/himself against it – Constitution of the Republic of Rwanda of June 4, 2003 as amended to date, article. 18.

Facts: Mulindahabi entered into an employment contract with EWSA, former RECO RWASCO which included a clause of six month probation period, during which he was dismissed.

Mulindahabi sued EWSA in the High Court arguing that he was unlawfully dismissed and requested for various damages. The Court ruled that he was unlawfully dismissed since he was not notified about the faults committed in order to present hi

defence against those allegations as provided for by the General Statute for public service. It also held that even though he concluded a contract under probation, he is governed by the General Statute rather than Labour Law because EWSA is a public institution as specified in the contract, thus it decided that he should be awarded damages for the unlawful dismissal. Both parties appealed to the Supreme Court, EWSA adducing that the court disregarded the agreement between the two parties when it held that Mulindahabi was governed by the General Statutes for public service whereas he was governed by the contract, which led to the perception that EWSA faulted. Mulindahabi argues that there was a contradiction in the rulings of the case and also the damages he was awarded were insufficient and the previous Court did not provide any motivation for that.

Held: 1. The employee who is under the employment contract is governed by the labour law instead of being governed by the general statutes for Rwanda public service in case he/she does not demonstrate the instrument of appointment.

2. The termination of an employment contract for the employee under the probation period does not require to be given the notice but damages are awarded in case the employee was not informed about the fault which led to the termination of the contract so that she/he can defend her/himself against it

3. When an employee under probation period is dismissed on the grounds of work performance; the Court cannot examine the issue regarding his/her reinstatement.

4. The party claiming for the counsel fees should demonstrate to the Court the tasks performed by the Counsel.

**EWSA's appeal has merit in part.
Murindahabi's appeal is without merit.
Court fees to both parties.**

Statutes and statutory instruments referred to:

The Constitution of the Republic of Rwanda of June 4, 2003 as amended to date, article 18.

Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, article 19, 27.

Law n° 45/2011 of 25/11/2011 governing Contracts, article 64.

No case referred to.

Doctrine:

Jean Pélissier, et al, *Droit du travail*, 2^e édition, p.365.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Mulindahabi entered into an employment contract with RECO RWASCO (now EWSA) on 17 November, 2009 and was dismissed on 13 April, 2013, EWSA claims that he was an employee governed by the contract and he was dismissed during the probation period while Mulindahabi claims that he was recruited through the procedure provided for by the General Statute for public service, therefore he was governed by that Statute.

[2] Mulindahabi filed a claim mentioned above in the High Court and in its decision, it was held that the claim has merit and ordered EWSA to pay to him 6,000,000 Rwf for the pecuniary loss he incurred due to the dismissal, 2,000,000 Rwf in damages for defamation and 200,000 Rwf for the procedural fees.

[3] The Court's adjudication relied on the fact that even though Mulindahabi concluded an employment contract which provides for the probation period, it should not be considered because EWSA is a government institution, and revisiting article 5 and 6 of the law n° 22/2002 Instituting the General statute for Rwanda public service and considering the organizational structure of EWSA which has the staff in charge of its administration, including Mulindahabi who was the head of planning and strategy section as mentioned in the contract; he was governed by the Statutes rather than the contract.

[4] Concerning his dismissal, the Court found that it was not in conformity with article 90 and 94 of the law n° 22/2002 instituting the Statute mentioned above, because prior to his dismissal, EWSA did not notify him of his faults so that he could defend himself against it or to serve him with the draft of the proposed sanctions so that he provides the explanations. The court found that Mulindahabi should have been reinstated on his post because he was dismissed unlawfully, but as his post had already been assigned to another employee and there is nothing to demonstrate that there is another similar post which is almost on the same level in the organizational structure; he should be paid damages for the loss of his post instead of paying him the salary arrears for the months he claims because he was not working by then.

[5] It also explained that Mulindahabi should be awarded damages for the embarrassment caused by the injustice of unlawful dismissal basing on the faults which were not revealed before that they were committed, thus causing moral prejudice.

[6] EWSA appealed the judgment to the Supreme Court arguing that the High Court ruled that Mulindahabi was governed by the statute of public service, when moreover he had entered into a contract with RECO RWASCO (EWSA) on 17 November, 2009, that even the claim he initiated relied on that contract he alleges that it was not performed, therefore EWSA should not be charged any damages since it did not commit any fault.

[7] Mulindahabi also filed an appeal alleging that there were contradictions in the ruling of the case, because the Court held that he should have been reinstated and on the other hand that he cannot be reinstated because the post is no longer vacant. He also stated that the Court awarded him 6,000,000 Rwf of damages without any basis and that they are less, and that the damages and procedural fees he was allocated are also less. Furthermore the Court remained silent on 200,000Rwf he paid the Counsel.

[8] The hearing was conducted in public on 02 July, 2013 and on 01 January, 2013, EWSA represented by Rusanganwa Jean Bosco, the Counsel and Mulindahabi represented by Counsels Habiyambere Aphrodis and Gasasira J. Claude.

II. ANALYSIS OF THE LEGAL ISSUE

APPEAL OF EWSA

Whether the Court erred in ruling that Mulindahabi was governed by the General statute for public service.

[9] The Counsel for EWSA state that the High Court held that Mulindahabi entered into an employment contract but disregarded the agreement of both parties and held that he was governed by the general statute for public service. Thus, basing on that, it held that EWSA erred in dismissing him while the contract which should have been relied on stipulates that an employee can be dismissed without notice, and in addition of that, even the claim lodged by Mulindahabi is based on that contract because he alleges it has been violated.

[10] He further states that the cases referred to in the ruling of the appealed judgment are irrelevant to this case of Mulindahabi because the plaintiffs in those cases were not on probation period like Mulindahabi, and the subject matter is different from the subject matter in those cases because the petition was about annulment of the administrative act.

[11] Mulindahabi and his counsels plead that in order for the contract to be valid it should be in conformity with the law as provided for by article 33 of CCB.III which was in force during his dismissal and article 64 of the Law n° 45/2011 of 25/11/2011 regulating the contracts, that even when he was recruited, EWSA had already released a job announcement on its website mentioning that it recruits employees in accordance with the presidential order n° 37/01 implementing the Law n° 22/2002 of 09/07/2002 on general statute for public service, therefore

employees recruited through the procedure provided for by that presidential decree are governed by the general statute for public service, and that the contract he signed which is contrary to the law should be invalidated.

[12] They state in addition that the other element proving that he was subject to the general statute for public service, is that he was appointed to the post which is provided for in the organisational structure and was paid the salary from the public treasury. Regarding other cases relied on; he states that the subject matter is relevant to case because the fact that he claimed that he was unfairly dismissed implies that he requested for the annulment of the decision which dismissed him.

[13] They continue declaring that Mulindahabi would not be held accountable for concluding an unlawful contract due to the EWSA's faults, and asserting that he was on probation is wrong; rather, he was on internship because he completed the probation and joined the public service as he became a civil servant in 1986 and the probation period lasted for two months. They also state that in the claim submissions of Mulindahabi, nowhere is mentioned that he relied on the contract.

THE VIEW OF THE COURT

[14] Concerning the law which should be applicable in the case of Mulindahabi, the case file indicates that he became an employee of RECO-RWASCO (now EWSA) employee after passing the interview as he adduces, and on 17 November, 2009, they concluded a contract which includes a clause of six month probation period. Apart from that contract there is no other instrument that Mulindahabi presented which confirms

him as public servant, so that it can be based on to approve that he was governed by the General Statute for Public Service.

[15] The fact that he concluded an employment contract with RECO –RWASCO, implies that he was governed by the law n° 13/2009 of 27/05/2009 regulating labour, pursuant to its article 2 which provides that this law regulates labour relations between workers and employers (...) as per contract.

[16] Additionally, the fact that Mulindahabi used to be a civil servant governed the General Statute, cannot be relied upon to approve that it is the same context he was appointed to EWSA while he does not produce the instrument he bases on (Appointment order), and he does not even prove how he left the civil service apart from claiming that he requested for leave of absence for non-specified period,` reinstatement should have been done in accordance with article 64 of the Law establishing the General statute of public service, which was not the case for Mulindahabi who concluded a contract which includes a clause of probation period as specified above, and in the investigation carried out by the High Court at EWSA, the explanations given to the Court were that there are other employees who are under employment contract in the Institution.

[17] Therefore the Court finds that, in examining the issue of Mulindahabi's dismissal, the labour law which is stated above should be applied rather than the general statute for public service as decided by the high Court, and the damages requested by Mulindahabi should be analysed pursuant to the provisions of that law.

2. Whether Mulindahali should be awarded damages.

[18] The counsel for EWSA pleads that the damages it was ordered to pay to Mulindahabi amounting to 8,200,000 Rwf are groundless, because the Court ordered them basing on the fact that Mulindahabi was unfairly dismissed, while it did not err by dismissing him because it based its decision on the probation contract they entered into.

[19] Furthermore, even the way those damages were awarded is not clear because they were awarded under the discretion of the court without any basis while his salary was well known and there is a procedure for evaluating the loss and that, usually the highest damages awarded are six months' salary.

[20] Mulindahabi and his counsels plead that the ground of the damages he was awarded is that he was unlawfully dismissed because he was not notified of the faults he allegedly committed, and that is inconsistent with article 18 of the Constitution together with articles 88, 90, 93 and 94 of the Law n° 22/2002 mentioned above, and that they also rely on the fact that by dismissing him EWSA used defamatory statements which affected him including the failure to find a job.

[21] Concerning the awarding of damages, Mulindahabi argues that he appealed it because it should have been based on his salary until his re-instatement or until his retirement.

THE VIEW OF COURT

[22] As already stated above, the contract concluded between Mulindahabi and RECO RWASCO provided for the probation

period of six months, and it was terminated within that period, because the termination letter dates 13 April, 2010 and the contract was signed on 17 November, 2009.

[23] Regarding the termination of the contract during the probation period, the law regulating labour which is stated above is silent on that issue, apart from the notice, whereby article 27 of that law provides that there is no notice in case the employment contract is terminated during the probation period.

[24] Concerning the termination of that contract, law Scholars state that each party can terminate it at any time, and the employer is not under obligation to give the dismissal notice or to give a genuine reason for its termination¹, meaning that there are no damages awarded for that termination. These scholars further explain that though each party has such a right, it should not be exercised in such a way that is prejudicial to each other, thus the employee can be awarded damages, if he presents the evidence that the employer terminated the contract with the purpose of causing prejudice to him and also the employer can be awarded damages by the employee who terminates the contract with the same cause².

¹ Le trait essentiel, en même temps que la raison d'être de l'engagement à l'essai, est de conférer à chaque partie, sauf stipulation contraire, la faculté de rompre le contrat à tout moment. L'employeur n'a pas à respecter un préavis sauf, bien entendu, si la convention collective applicable a institué un délai d'avertissement avant que la cessation du travail devienne effective: Jean Péliissier, Alain Supiot, Antoine Jeammaud, *Droit du travail*, 2e édition, p.365.

² Le droit de rompre le contrat n'est pas pour autant discrétionnaire. Comme tous les droits, le droit de mettre fin à l'essai est susceptible d'abus. Le salarié peut obtenir des dommages et intérêts s'il rapporte la preuve que l'employeur a agi par malveillance à son égard ou avec une légèreté

[25] With regard to the ground for the termination of the contract, it was explained in the letter mentioned above that Mulindahabi used to hinder smooth running of the work which was tarnishing the image of the institution and he was characterized by conflict with other departments of the institution.

[26] The court is of the view that for the main reason cited in the letter, it is considered in the context of the performance of the employee and which is the purpose of the probation as stipulated in article 19 of the law n^o 13/2009 of 27/05/2009 regulating labour, which states that in that period the employer examines the quality of the worker's services and output while the worker looks at the conditions of work, living, pay, health and security at work as well as the social climate among the institution workers. The law scholars stated above explain that this period is intended for the employer to evaluate the ability and capacity of the employee and the employee to find out if the employment is appropriate for him/her³.

[27] But regarding the second issue in the letter, the court notes that even EWSA accepts that pursuant to the fault committed by Mulindahabi of spreading the conflict between the departments, he should have been notified about it and he defended himself against it, even though the law regulating

blâmable. Il arrive aussi même si cela est plus rare- qu'un employeur obtienne la condamnation d'un salarié pour rupture abusive en cours d'essai, *Op.Cit.*, p.366.

³ (...) Pareille pratique présente pour les deux contractants un intérêt. L'employeur portera un jugement mieux éclairé sur la compétence et l'aptitude professionnelle du salarié à tenir l'emploi; ce dernier vérifiera si la tâche confiée lui convient, *Op.Cit.* p.361.

labour does not provide for it, but no decision can be made against someone without him/her getting a hearing as provided by the Constitution of Rwanda in its article 18.

[28] Basing on the submissions above, the Court finds that EWSA having not informed Mulindahabi the fault he was accused, so that he can present his defence against it, it must pay him damages for it, computed on the on the salary he was remunerated. As it is evident in the above mentioned contract, it stipulates that Mulindahabi's gross salary was 650,000Rwf and it is the one to be based on because his net salary was not demonstrated, therefore he be awarded 1,350,000 Rwf of damages equivalent to three months salary.

THE APPEAL OF MULINDAHABI

Whether Mulindahabi should be reinstated.

[29] Mulindahabi argues that the Court contradicted itself because on one hand, it held that he should have been reinstated and on the other hand, he cannot be reinstated because the post is no longer vacant without reliable information about it because it was not stated by the parties. He adds that he cannot be liable for EWSA's faults by depriving him of his right to be reinstated. He further states that, the motivation of the Court according to which his post was allocated to others a long time ago is inconsistent with the motivation of Judgement RADA 0124/07/HC/KIG in which the Court held that, when a decision nullifying the dismissal of an employee is made, no matter how many years have elapsed after that post was allocated to other employee; he/ she must be reinstated and it is in this regard that Kabera Pierre Claver was reinstated. Therefore, Mulindahabi should also be reinstated or be instated to another post within

the public service, because it is not his fault that the post is no longer vacant.

[30] The counsel for EWSA argues that there is no way the Court could not have contradicted itself because it joined two things which can not fit together, and that the Court could not order the employer to work with an employee who was dismissed for disrespecting his superiors, his dismissal was done to protect the interests of the institution.

THE VIEW OF THE COURT

[31] The Court is of the view that, there is no ground for examining the issue regarding his request of reinstatement since it has been demonstrated above that Mulindahabi was dismissed when he was still under probation for the grounds including the performance of the employee under probation;

2. Regarding how the damages were awarded.

[32] Mulidahabi argues that he was awarded 6,000,000 Rwf for what could have been earned while his real income was 650,000 Rwf every month in addition to the bonus. Therefore, he should be paid that salary until the time of reinstatement, and if not so, he be paid that salary until his retirement. He states that the ground for the salary being the basis for computation of damages is the Judgment RADA 006/12/CS which was rendered by this Court.

[33] He also states that 2,000,000 Rwf awarded to him for damages for defamation and disgracing him is too little taking into account the consequences they had on him since then and now. Defamation was caused by disgracing words contained in

the dismissal letter, and he was not given a work certificate. Consequently, he should be awarded 20,500,000 Rwf of damages pursuant to article 258 CCB.III due to the fact that he was not employed in CHUK and in the Rwanda Housing Authority where he did a job interview but was not recruited.

[34] Mulindahabi states also that the amount of 200,000 Rwf he was awarded for procedural expenses is less in comparison to case follow up expenses on different levels. Therefore, he should be awarded 1,500,000 Rwf he requested at the first instance level in addition to 500,000Rwf he requested at the appeal level and be awarded 2,000,000Rwf for counsel fees as demonstrated by the contract they concluded.

[35] He further states that the court did not adjudicate on the amount of 200,000 Rwf he paid to his counsel while he demonstrated the contract they entered into and a receipt given to him by the counsel.

[36] The counsel for EWSA argues that Mulindahabi should not request to be awarded the salary because it is the compensation of the performed work, and that EWSA did not prevent him from performing another job.

[37] Regarding the statements in the dismissal letter, he argues that there are no defaming words used and that his claim that he was denied a job because of that letter should be substantiated by evidences.

[38] Concerning the procedural expenses, he disputes that he should not request them from EWSA for he is liable of all his legal actions and administrative appeals because they don't value why he made them, save the claim to Public Service

Commission, which even submitted that he was dismissed during the probation period. Indeed, he even resides within Kigali City.

[39] Concerning the paid counsel fees, he states that they should not be awarded to him because in the High Court, he appeared himself before the court and the contract he alleges to have concluded with the Counsel in this Court does not engage EWSA, and that he exaggerates even on the amount he is requesting for if considering the counsel fee amount he states he paid at the first instance level. Therefore, in case they are awarded, the usual procedure used by the Court to determine them should be followed.

THE VIEW OF COURT

[40] As explained above, apart from damages motivated above relying on the fact that he was not given the opportunity to defence before termination of the probation employment contract, there are no other damages he could request for as they are groundless in the context of labour law because the contract Mulindahabi concluded with EWSA was terminated in the course of the probation period.

[41] Regarding the procedural expenses amounting to 1,500,000 Rwf which Mulindahabi claims that he should have been awarded at the first instance level instead of 200,000 Rwf in addition to 500,000Rwf at the appeal level; the Court finds that he was awarded 200,000 Rwf at the discretion of the Court at the first instance level, and he does not demonstrate how it is less through calculations, and he even requested them in a

general way too. Hence, the amount of 200,000 Rwf should be sustained for it is in range.

[42] Concerning the 500,000 Rwf of procedural expenses and counsel fees amounting to 2,000,000 Rwf he requests at the appellate level, the Court finds that, since his appeal is without merit, yet EWSA is the one that wins on some claims, they should not be awarded to him.

[43] Regarding the amount of 200,000 Rwf Mulindahabi claims that he was not awarded at the first instance level while he paid it to the Counsel, the Court finds that there is no evidence of the duties accomplished by that Counsel because the documents of the case file and his submissions show that he drafted them and pleaded for himself. Therefore, it finds no ground to award them to him.

THE DECISION OF COURT

[44] Decides that the appeal of EWSA has merit in some parts;

[45] Decides that the appeal of Mulindahabi Fidèle is without merit;

[46] Orders EWSA to pay Mulindahabi an amount of 1,350,000 Rwf of damages in addition to 200,000 Rwf of procedural expenses he was awarded in the first instance level, the total being of 1,550,000Rwf.

[47] Orders EWSA and Mulindahabi Fidèle to jointly pay the court fees of 27,600 Rwf, failure to do it within eight days, that money shall be sought from their assets by Government coercion.

CIVIL CASES

DELTA PETROLEUM LTD v. NSENGIYUMVA ET AL

[Rwanda SUPREME COURT – RC0001/14/CS (Rugege, P.J.,
Mugenzi and Munyangeri, J.) September 12, 2014]

Civil procedure – Objection of lack of jurisdiction – Execution of judgment – Dispute arising from the execution of the judgment – Competent Court to hear the action concerning disputes arising from the execution of judgment – The Court which rendered the final judgment should be perceived as the court which tried definitely the case in merits, therefore disputes arising from its execution shall be heard by that Court because it is in good position to interpret the trial in merits for the execution of its ruling – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, social and administrative procedure, articles 195 and 208.

Facts: In order to execute the judgment RS/REV/INJUST /CIV 0005/13/CS rendered by the Supreme Court quashing the judgments RC 0235/12/TGI/NYGE and RCA 0195/13/TGI/NYGE but upholding the judgment RC 0496/12/TB/NYGE rendered by the Primary Court of Nyarugenge on 17 October 2012 in which Gahongayire sued Milimo Gaspard, several court bailiffs notified DELTA PETROLEUM Ltd in written form, ordering it to hand over the petrol station, located at Nyabugogo on plot n° 5686 it occupied to Gahongayire and to pay her the rent of the house on that plot.

DELTA PETROLEUM Ltd did not execute those orders, therefore another Court Bailiff known as Nsengiyumva John

closed the doors of the petrol station house let by DELTA PETROLEUM and seized its wares and equipments upon Gahongayire Winifrida request. Afterwards, Gahongayire Winifrida sent a notice to DELTA PETROLEUM informing it to take its wares and equipments which were seized during the execution of the judgment, and failure to do so before 16 May 2014, they would be auctioned and DELTA PETROLEUM would bear any incurred loss.

This incident induced DELTA PETROLEUM to file the case before the Supreme Court requesting it to settle the disputes arisen from the execution of judgment RS/REV/INJUST/CIV 0005/13/CS. At the beginning of the hearing, Niyomugabo, the counsel for Nsengiyumva John, one of the defendants, requested the examination of the objection of lack of jurisdiction of the Supreme Court, arguing that this claim should have been filed to the Primary Court of Nyarugenge because DELTA PETROLEUM filed its case requesting the settlement of disputes regarding the execution of the judgment RS/REV/INJ/CIV 0005/13/CS delivered by the Supreme Court, disregarding that the judgment to be executed is RC 0496/12/TB/NYG tried in merits by the Primary Court of Nyarugenge. The counsels for DELTA PETROLEUM, counsels for Ghongayire and counsel for Milimo Gaspard state that this final judgment was delivered by the Supreme Court, therefore it has jurisdiction to hear it because the Law does not provide that the court which rendered the final judgment should be the one which tried it in merits. It is this objection that was debated upon by the litigants and the court resolved to first deliberate on it.

Held: The Court which rendered the final judgment should be perceived as the court which addressed the subject matter of the case in merits and tried it definitely; therefore disputes arising from its execution shall be brought to that Court because it is in good position to interpret the trial in merits for the execution of its ruling.

The objection of lack of jurisdiction raised by one of the litigants has merit.

The Supreme Court lacks jurisdiction to hear the case regarding disputes arose from the execution of this judgment.

The case is transferred to the Primary Court of Nyarugenge which shall try it.

Statutes and statutory instruments referred to:

Law n° 21/2012 of 14/06/2012 relating to civil, commercial, social and administrative procedure, articles 195 and 208.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 20 March 2014, the Court Baillif from the Ministry of Justice Muhire Constantin notified DELTA PETROLEUM Ltd to hand the petrol station located at Nyabugogo on plot n° 5686, to Gahongayire not later than 8 April 2014, for execution of the judgment RS/REV/INJUST /CIV 0005/13/CS delivered

by the Supreme Court which quashed the judgments RC 0235/12/TGI/NYGE and RCA 0195/13/TGI/NYGE but upholding the judgment RC 0496/12/TB/NYGE of 17 October 2012.

[2] Through a letter dated 2 April 2014, DELTA PETROLEUM informed the Court Bailiff that what he ordered DELTA PETROLEUM to execute is not provided in the judgment, therefore requested him to withdraw that order without being necessary to file the case to the court.

[3] On 22 March 2014, Rusanganwa Eugène the Court Bailiff in the Ministry of Justice ordered DELTA PETROLEUM to regularly pay the rent of the house located at Nyabugogo on plot n° 5686 to Gahongayire Winifrida not later than 24 April 2014.

[4] On 24 April 2014, DELTA PETROLEUM informed the Court Bailiff Rusanganwa Eugène that in the course of the performance of the lease contract of the house, it was paid a rent corresponding to five years (5). This was done on 17 October 2013, therefore there is no longer a due rent.

[5] On 12 May 2014, the Court Bailiff named Nsengiyumva John closed down the petrol station house rented by DELTA PETROLEUM and confiscated its wares and equipments upon the request of Gahongayire Winifrida.

[6] The counsel for DELTA PETROLEUM Ltd states that this was enforced without being served with an order and did not inform it about the judgment he was executing. He adds that DELTA PETROLEUM asked the court bailiff to present the

judgment which was to be executed and a writ of an order to pay he drafted but he dinied.

[7] On 15 May 2014 Gahongayire Winifrida sent a notice letter to DELTA PETROLEUM informing it to take back its wares and equipments which were confiscated in the course of the execution of judgment not later 16 May 2014, default of which they will be auctioned and DELTA will bear any incurred loss.

[8] This induced DELTA PETROLEUM to file a case in the Supreme Court requesting it to hear the dispute arisen from the execution of the judgment RS/REV/INJUST/CIV 0005/13/CS . The hearing was conducted in public on 10 June 2014, DELTA PETROLEUM represented by the Counsel Gatera Gashabana and Counsel Nkurunziza François Xavier, Nsengiyummva John represented by Counsel Niyomugabo, Gahongayire was represented by Counsel Niyomugabo Christophe and Counsel Gahongerwa Goretti, while Milimo Gaspard was represented by Counsel Nzirabatinyi Fidèle.

[9] At the beginning of the hearing, Counsel Niyomugabo who represents Nsengiyumva John requested that the objection of lack of jurisdiction of the Supreme Court be examined, arguing that the claim in this case should have been filed to the Primary Court of Nyarugenge because it is the one which delivered a final judgment whose execution disputes arose. On the contrary, Counsels for DELTA PETROLEUM, Counsels for Gahongayire and Counsel for Milimo Gaspard state that the final judgment was rendered by the Supreme Court. It is this objection that was debated by litigants and the Court resolved to first deliberate on it.

II. LEGAL ISSUE AND ITS ANALYSIS

Deliberation on the competent court to hear the case relating to disputes arising from the execution of the judgment for which Gahongayire requested enforcement.

[10] Concerning the objection raised by Counsel Niyomugabo for Nsengiyumva, he states that DELTA filed the case in compliance with article 208 of the Law of 14 June 2012 relating to civil, commercial, social and administrative procedure requesting the settlement of disputes arisen from the execution of the judgment RS/REV/INJ/CIV 0005/13/CS delivered by the Supreme Court, disregarding that the judgment which was being executed is RC 0496/12/TB/NYG as DELTA has been notified, for instance in the writ order of the Court Bailiff handed to Counsel Nkurunziza and in other documents.

[11] He states that even the RS/REV/INJ/CIV 0005/13/CS stated above quashed prior judgments and upheld the ruling of the judgment RC 0496/12/TB/NYG. He adds that the Supreme Court held that the judgment RC 0496/12/TB/NYG became final but the Intermediate Court erred in law and tried it in merits. Therefore, he finds that according to all these facts, the judgment which is being executed is the one rendered by the Primary Court, which also has jurisdiction to hear disputes likely to arise from its execution.

[12] Furthermore, he states that there are many documents which include Court bailiff order handed to Nkurunziza, counsel for DELTA PETROLEUM, in which the judgment and its ruling were specified (0496/12/TB/NYG) and the reminder of its notification made, indicate that the judgment in execution process is the one rendered by Nyarugenge Primary Court.

[13] He further argues that the subject matter in that case was the attachment of common assets of Gahongayire and Milimo while the case before the Supreme Court did not address that issue as it quashed only the judgment rendered by the Intermediate Court which was filed beyond prescribed time limit for lodging an appeal.

[14] The counsel for Nsengiyumva states that even the defendants admit it themselves because in the submissions of counsel Nkurunziza, he mentions somewhere that the judgment in execution process is the one rendered by Nyarugenge Primary Court, and the instrument made by those who consented to voluntary execution of the judgment (they concluded a transaction with Gahingayire) indicates that the judgment in execution is 0496/12/TB/NYG.

[15] Nzirabatinyi, Counsel for Milimo states that even if his client is on the side of the so-called defendants, he finds however that the objection raised by the counsel for Nsengiyumva is groundless, the writs released by court bailiffs Rusanganwa and Muhire of which Counsel Niyomugabo states that they indicate the judgment which is being executed should not be considered because the Minister of Justice who commissioned them for the execution of the judgment stopped them before they start since Gahingayire raised that she had no trust in them. He states in addition that the court bailiff Nsengiyumva did not rely on the previous acts of those bailiffs.

[16] He explains that, pursuant to article 208 stated above, finds that the Supreme Court is the one competent over this case since it rendered the final judgment as that provision does not provide that rendering it in last resort refers to trying it in its merits. He provides instances of judgments rendered by foreign

courts of which application is made to be enforceable in Rwanda and the courts which ordered their enforcement (exequatur) remain competent to hear and try potential cases relating to their execution as provided for by this article although they did not try them in merits. He states in addition that the fact for the Supreme Court to have rendered that judgment due to injustice upon application by the organ of Ombdsman in compliance with article 79 and 81 of the Organic Law relating to the Supreme Court demonstrates that it was rendered by this court in last resort.

[17] Nkurunziza and Gatera Gashabana, counsels for DELTA PETROLEUM state that the fact for the Supreme Court to have accomodated the ruling of the Primary Court entails that it is the Supreme Court which rendered the final judgment. They finds therefore that even the court bailiff Nsengiyumva, relied on the Supreme Court judgment because it rendered the judgment in the last resort whereby it upheld the ruling of the Primary Court. They state that the provision of article 208 should be understood litteraly without adding explanations consisting of the fact that the judgment has been rendered in “merits”, which is not mentioned. They argue that those who raised that objection intend only the delay of the case.

[18] Gahongerwa, Counsel for Gahongayire states that article 79 of the Organic Law on the Supreme Court does not relate with the issue in this case , therefore finds that the court which delivered this judgment in the last resort is the one which decided on its legal issue and this is the Primary Court. The Supreme Court only redressed the injustice caused by the fact that the Intermediate Court to have admitted and heard the case which had become final.

II. THE VIEW OF THE COURT

[19] The case file indicates that the Supreme Court in the judgment RS/REV/INJ/CIV 0005/13/CS, quashed the judgments RC 0235/12/TGI/NYGE and RCA 0195/13/TGI/NYGE and confirmed the rulings of judgment RC 0495/12/TB/NYGE rendered on 17 October 2012 on the ground that the Intermediate Court of Nyarugenge admitted and heard the case while the time limit for appeal elapsed.

[20] Article 208 of the Law n°21/2012 of 14 June 2012 relating to civil, commercial, social and administrative procedure provides that disputes regarding the execution of judgement, whether pending or completed, shall be brought before the court that rendered the final judgment or that made a foreign judgement enforceable in Rwanda.

[21] The court which rendered the final judgment mentioned in that provision of 208 should be perceived as the court which examined the case definitely in its merits, decided on its subject matter and made some orders which should be executed, the reason why even the legislator provided in this provision of the law that disputes regarding the execution of judgement, whether pending or completed, shall be brought before the court that rendered the final judgment, because it is in good position to interpret its ruling in merits for its enforcement as stipulated in article 195 of the Law n° 21/2012 of 14/06/2012 that the execution of judgments and acts are intended to provide their beneficiary with the privileges of his/her right, either in kind or the equivalent.

[22] It is therefore clear that the Supreme Court delivered the judgment RS/REV/INJ/CIV 0005/13/CS and resolved only the issue relating to the compliance with the rules of procedure without examining it in merits, should not be requested to settle disputes regarding its execution while they are based on the ruling of the case in merits. Instead, the Primary Court of Nyarugenge and Intermediate Court of Nyarugenge heard it in merits but was upheld the decision of the Primary Court after the invalidation of the judgment of the Intermediate Court of Nyarugenge, therefore the existing final judgment which should be executed is 0495/12/TB/NYGE rendered by the Primary Court of Nyarugenge.

[23] Based on the motivation mentioned above, the Court finds that the claim filed by DELTA PETROLEUM for the hearing of disputes arisen from the execution of the judgment between Milimo and Gahongayire, which is 0495/12/TB/NYGE, is not in its jurisdiction, rather, it is in the jurisdiction of the Primary Court of Nyarugenge which delivered the final judgment on merits.

III. DECISION OF THE COURT

[24] Sustains the objection of lack of jurisdiction of the Supreme Court raised by Niyomugabo, Counsel for Nsengiyumva John;

[25] Decides that the Supreme Court has no jurisdiction to hear the claim relating to disputes arisen from the execution of judgment of which Gahongayire seeks enforcement.

[26] Orders this case to be transferred to and heard by the Primary Court of Nyarugenge.

RE DOREBABA

[Rwanda HIGH COURT – 2013HC – RCA 0051/13/HC/KIG
(Hitimana, P.J.) March 7, 2013]

Law determining the jurisdiction of courts – Exequatur–Marriage certificate – Extracts of civil status certificates requested to be enforced in Rwanda and the reasons of its enforcement, should not be contrary to public order as well as legal tenets of Rwandan positive laws and in accordance with the laws of the country in which they were written, have all necessary evidence to prove their authenticity – Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts as amended and complemented to date, article 92 – Law n° 22/99 of 12 November 1999 supplementing Book One of the Civil Code and instituting Part Five regarding Matrimonial Regimes, Liberalities and Successions, article 70.

Facts: The applicant filed a petition in the High Court requesting the certificate of marriage between her and her spouse named Ntwari Gatari celebrated in former Zaïre, the current Democratic Republic of Congo to be enforced in Rwanda. The grounds for her request rely on the fact that her husband was deceased therefore enforce it in Rwanda would benefit her of the rights vested with spouses by the Law.

Held: The authentic deed known as “register statement abstract of marriage” should be enforced in Rwanda, because the reasons of enforcement relied on by the applicant are not be contrary to public order as well as legal tenets of Rwandan

positive laws and in accordance with the laws of the country in which it was written, has all necessary evidence to prove its authenticity.

**Petition has merit.
Costs to the applicant.**

Statutes and statutory instruments referred to:

Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts as amended and complemented to date, article 92.

Law n° 22/99 of 12 November 1999 supplementing Book One of the Civil Code and instituting Part Five regarding Matrimonial Regimes, Liberalities and Successions, article 70.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Dorebaba Rugomboka filed a petition in this Court requesting that, marriage certificate between Dorebaba Rugomboka and Ntwari Gatari written on 18/07/1987 in former Zaïre, the current Republic Democratic of Congo, be enforced in Rwanda.

[2] The legal issue to be examined in this case is to determine whether, pursuant to article 92 of the Organic Law n° 51/2008 of 09/09/2008 determining the organisation,

functioning and jurisdiction of Courts, that register statements abstract of marriage between Dorebaba Rugomboka and Ntwari Gatari written in the Democratic Republic of Congo, former Zaïre on 18/07/1987 deserves to be enforced in Rwanda;

II. ANALYSIS OF LEGAL ISSUE

[3] Nkeza S. Clément, the counsel for Dorebaba Rugomboka in this case, requests the Court to order that the act termed as “extract of marriage certificate” between Dorebaba Rugomboka and Ntwari Gatari celebrated in the Democratic Republic of Congo, former Zaïre on 18/07/1987 should be enforced in Rwanda, pursuant to article 92 of Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts. He further explains that the established document indicates that Dorebaba Rugomboka and Ntwari Gatari were married in accordance with the laws of DRC, but that Gatari died on 06 May 2012; and the approval of enforcement of the document in Rwanda would facilitate Dorebaba Rugomboka to freely enjoy the rights resulting from marriage contract as by the law.

[4] Pursuant to the provision of article 92 of Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts as modified and complemented to date, the documents stated in this article that can be enforced in Rwanda are “authentic deeds which have proof to have been written by foreign authorities”.

[5] Article 92 of the stated Organic Law stipulates in addition that authentic deeds which have proof to have been

written by foreign authorities can be enforced in Rwanda by the High Court, if they fulfil the following conditions :

- if the reasons for seeking the execution of the authentic deeds are not contrary to public order as well as legal tenets of Rwandan Public laws;
- if according to the Country in which they were written, they have all necessary evidence to prove their authenticity.

[6] The Court finds that the reason for the petition of Dorebaba Rugomboka requesting the enforcement of this document, is to allow her to enjoy the right as a spouse of the late Ntwari Gatari, that right being provided for by article 70 of the Rwandan Law n° 22/99 of 12 November 1999 supplementing Book One of the Civil Code and instituting Part Five regarding Matrimonial Regimes, Liberalities and Successions which reads in its paragraph one that if one of the spouses dies, the remaining spouse holds entire assets and respects the duty of raising children and assisting the parents of the deceased if need be, and therefore this reason of enforcement is not in contradiction with public order as well as legal tenets of Rwandan Public laws.

[7] The Court in addition finds that, the Extract from the register of declarations of marriage between Dorebaba Rugomboka and Ntwari Gatari done in the Democratic Republic of Congo, former Zaïre on 18/07/1987 that Dorebaba Rugomboka requests to be executed in Rwanda, is an act established in the Democratic republic of Congo by Gumba Mwishabongo, the civil status Officer appointed as such by article 76 and 78 of family law of this country, and having the quality of civil status registrar in DRC and that in accordance

with the provision of article 368 of its civil code, the marriage may be celebrated in accordance with the family formalities prescribed by the customs. In this case, the civil status registrar shall register the marriage and draws up the related act; and as evidenced by this document, it is the civil status officer who authenticated it;

[8] Furthermore it finds that the document bears the signature of the Notary for the city of Goma who certified it on 24 December 2012, and the Embassy of the Democratic Republic of Congo in Kigali certified it on 31 December 2012 as well;

[9] Pursuant to the aforementioned assertions, it finds that the deed which Rugomboka Dorebaba is requesting to be enforced in Rwanda and the reasons thereto are not in contradiction with public order as well as legal tenets of Rwandan positive laws and in accordance with the laws of the country in which they were written, have all necessary requirements to prove their authenticity, the reason why it is ordered that the deed termed as “register statement abstract of marriage” deserves to be enforced in Rwanda.

III. THE DECISION OF THE HIGH COURT

[10] Admits the petition of Dorebaba Rugomboka because it was filed in accordance with the rules of procedure, and finds it with merit;

[11] Rules that the deed evidencing the marriage union between Dorebaba Rugomboka and Ntwari Gatari celebrated in the Democratic Republic of Congo, former Zaïre on 18/07/1987

(Extract of register of marriage) be enforced in Rwanda because it fulfils all requirements of the Rwandan laws;

[12] Orders Dorebaba Rugomboka to pay the court fees equivalent to 7,000 Rwf deducted from deposited fees at the time of filing the petition.

KANZAYIRE v. NYIRABIZIMANA ET AL

[Rwanda SUPREME COURT – RCAA 0070/12/CS (Kanyange, P.J., Mukandamage and Munyangeri, J.) June 21, 2013]

Law determining jurisdiction of courts – Jurisdiction of the Supreme Court – Remedies in the Supreme Court – Admissibility of a third party opposition claim – The principle of non-retroactivity of the law – The law applicable to the issue of the admissibility of the third party opposition claim filed under the rule of a repealed law but of which the hearing is conducted under the rule of a new law; should be the one into force at the date of its initiation – Supreme court judgments are not subject to remedies, except that of revision of final judgment – The Constitution of the Republic of Rwanda of June 2003 as amended to date, article 144 – Organic Law n° 03/2012/OL of 13/06/2012 determining the organisation, functioning and competence of the Supreme Court – Organic Law n° 01/2004 of 29/01/2004 determining the organisation, functioning and competence of the Supreme Court, article 84.

Facts: Kanzayire Epiphanie, Musoni Ndamage Thadée's spouse initiated a third party opposition against a Supreme Court judgment between Nyirabizimana Zilipa and Musoni Ndamage Thadée of which she was not aware, arguing that its ruling entitled Nyirabizimana with the right to manage the assets of Musoni Eliab which should also be transferred into the common property of Ndamage Eliab and Nyirabizimana.

Nyirabizimana Zilipa raised an objection of inadmissibility of the claim of Kanzayire Epiphanie arguing that the third party opposition remedy is barred before the Supreme Court and that

it has been its position on such issue in the Judgment RCOM 0010/09/CS of *Rusekerampunzi v. Rumanyika* delivered on 30/04/2010. She further states that even if it was to be admitted, Kanzayire would not be allowed to file a third party opposition against a judgment her spouse Musoni has lost. He adds that even if the plaintiff relies on the fact that she lodged the claim under the rule of the Organic Law n° 01/2004 of 29/01/2004 determining the organisation, functioning and competence of the Supreme Court, the third party opposition against a judgment delivered by the Supreme Court was provided nowhere.

Kanzayire and Musoni Ndamage Thadée and their counsels state in turn that those objections lack merit and they emphasize that the Supreme Court is an ordinary court which should abide by ordinary court proceedings without setting aside any kind of remedy since it hears cases in merits as well. They state in addition that the judgment rendered by this court which the counsel for Nyirabizimana requests to be considered, is the sole judgment in which it was decided on the issue in litigation, and therefore should not be considered as a court precedent on that issue.

Held: 1. Concerning the law which should be applied in order to decide on the issue of the admissibility of the third party opposition filed under the rule of a repealed law but of which the hearing is conducted under the rule of a new law; there should be applied the law that was into force at the date of its initiation.

2. With the sole exception of the revision of final judgment, other remedies against the judgment of the Supreme Court are

inadmissible; therefore the third party opposition claim against the Supreme Court judgment is rejected.

**Third party opposition rejected.
Court fees to the plaintiff.**

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of June 2003 as amended to date, article 144.

Organic Law n° 03/2012/OL of 13/06/2012 determining the organisation, functioning and competence of the Supreme Court.

Organic Law n° 01/2004 of 29/01/2004 determining the organisation, functioning and competence of the Supreme Court, article 84

Cases referred to:

Khalid v. Ahmed et al., RC 0002/09/CS delivered by the Supreme Court on 19/03/2010.

State of Rwanda v. Karangwa, RADA 0001/09/CS delivered by the Supreme Court on 17/09/2010.

Kagoyire v. Abdallah et al., RC 0002/05/CS delivered by the Supreme Court on 25/10/2007.

Rusekerampunzi v. Rumanyika, RCOM 0010/09/CS delivered by the Supreme Court on 30/04/2010.

Rudasumbwa v. State of Rwanda et al., RADA 0031/12/CS delivered by the Supreme Court on 17/05/2013.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 29 April 2011, The Supreme Court delivered the Judgment RCAA 0015/09/CS between Nyirabizimana Zilipa and Musoni Ndamage Thadée whereby it decided that Nyirabizimana is entitled to the right to manage the assets on plots n° 579/Quartier Commercial and n° 710/Kacyiru and those assets be transferred to common property of Ndamage Eliab and Nyirabizimana, in addition to what has been decided by the High Court in the appealed judgment. Those plots had to be deregistered from Musoni Ndamage Thadée and recorded in the names of Nyirabizimana. It also held that the plot n° 711/Kacyiru remains the ownership of Musoni Ndamage Thadée.

[2] Kanzayire Epiphanie, the spouse of Musoni Ndamage Thadée filed a third party opposition against the judgment arguing that she was not aware of it while it is prejudicing her interests.

[3] Nyirabizimana Zilipa raised the objection of inadmissibility of Kanzayire's claim, stating that the third party opposition remedy is not admissible in the Supreme Court, and that even if it were admitted, Kanzayire is not allowed to file a third party opposition against a judgment her husband lost.

[4] She also states that Kanzayire is not qualified to sue Nyirabizimana because she is not among the heirs of Ndamage, and that the issue of time limit for filing the claim should be

examined since she was aware of the case in which her husband was a party.

[5] Counsels for Kanzayire and Musoni argue that the objections raised by Nyirabizimana are groundless.

[6] The hearing was held in public on 09 May 2013, Kanzayire Epiphane represented by the counsels Rukangira Emmanuel and Twiringiyemungu Joseph; the Counsels Basomingera Alberto, Kayitare Serge and Mhayimana Isaïe representing Musoni Ndamage Thadee while Nyirabizimana Zilipa was represented by Counsel Rwagatare Janvier.

II. ANALYSIS OF LEGAL ISSUE

Whether the third party opposition claim of Kanzayire Epiphane against the judgment RCAA 0015/09/CS can be admitted.

[7] Rwagatare Janvier, the Counsel for Nyirabizimana states that the claim of Kanzayire should not be admitted because the third party opposition remedy is not allowed before the Supreme Court.

[8] He explains that apart from the appeal, opposition and review which are permissible, the third party opposition is not provided for by the Organic Law 03/2012/OL of 13/06/2012 determining the organisation, functioning and competence of the Supreme Court as evidenced by its articles 31, 32 na 33.

[9] The Counsel for Nyirabizimana furthermore argues that even if the plaintiff relies on the fact that her claim was filed under the application of the former Organic Law n° 01/2004 of

29/01/2004 determining the organisation, functioning and competence of the Supreme Court, such remedy of third party opposition against the judgment of the Supreme Court was not provided for by that Organic Law as mentioned in its article 84; and that the Supreme Court has already made a precedent on that issue through the Judgment RCOM 0010/09/CS.

[10] Counsel Rukangira Emmanuel and Counsel Twiringiyemungu Joseph for Kanzayire, state that her third party opposition claim against the judgment RCAA 0015/09/CS deserves to be admitted because based on the date of its initiation on 26 June 2012, the aforementioned Organic Law 03/2012/OL of 13/06/2012 which entered into force on 9 July 2012 cannot be applied to this case, since there should be applied the Organic Law n° 01/2004 of 29/01/2004 mentioned above because its article 84 did not prevent third parties to a case to file a third party opposition.

[11] They explain that, the Supreme Court as an ordinary court which tries cases on merits should apply ordinary civil procedure which is usually applied by ordinary courts without setting aside any kind of remedy, therefore admits the claim of their client.

[12] They add that the case law delivered by this Court upon which the counsel for Nyirabizimana requests to be relied on, is the sole judgment on which the issue in litigation was decided upon, therefore it should not be considered as a court precedent thereon.

[13] Mhayimana, the counsel for Musoni Ndamage Thaddée states that article 144 of the Constitution bestows this Court with the jurisdiction to hear this case. Again he states that

pursuant to article 143 of the Constitution, the Supreme Court is an ordinary Court which should apply ordinary procedure applied by other ordinary courts because it also hears case on merits. He adds that article 8 of the Universal Declaration of human rights prohibits discrimination; therefore the fact that the third party opposition remedy is possible in other Courts, there is no basis to reject it in the Supreme Court.

THE VIEW OF THE COURT

[14] Concerning the Law that should be applied in order to resolve the debated issue of admissibility for the claim of Kanzayire, the notice of claim indicates that the claim was filed on 11 June 2012 while the Organic Law n° 03/2012/OL of 13/06/2012 mentioned above entered into force on 9 July 2012. Therefore, the applicable law has to be the Organic Law n° 01/2004 of 29/01/2004 which was into force when the claim was filed.

[15] Concerning the remedies for judgments rendered by the Supreme Court; article 144 of the Constitution provides that “The Supreme Court is the highest court in the country. The decisions of the Supreme Court are not be subject to appeal save in terms of petitions for the exercise of the prerogative of mercy or revision of a judicial decision. Its decisions are binding on all parties concerned whether such are organs of the State, public officials, civilians, military, judicial officers or private individuals”.

[16] Article 84 of the Organic Law n° 01/2004 of 29/01/2014 determining the organization, functioning and jurisdiction of the Supreme Court which was into force at the time of initiation of

the claim in examination provided that “Without prejudice to the procedures established by law for review of judgments against which no further appeal is possible, cases decided by the Supreme Court shall not be retried save only for the purpose of rectifying an error apparent on the record or clarifying a decision which is ambiguous or susceptible to divergent interpretations”.

[17] The Court finds that, considering the provision of the aforementioned articles, it is understandable that all other remedies intending the re-adjudication of the judgment rendered by the Supreme Court are prohibited save only the revision of a final decision.

[18] This has been the position adopted by this Court in various judgments whereby it indicated that the third party opposition against a judgment delivered by the Supreme Court is not allowed and indeed in accordance with Organic Law n° 03/2012/OL of 13/06/2012 determining the organisation, functioning and jurisdiction of the Supreme Court, among the claims likely to be filed in the Supreme Court, the third party opposition against the decision rendered by the Supreme Court is not provided for.

[19] Pursuant to the aforementioned motivation, the Court finds that the third party opposition lodged by Kanzayire Epiphanie against the judgment RCAA 0015/09/CS delivered by the Supreme Court must not be admitted because it was filed contrary to the law. Therefore, it is not necessary to examine other raised issues.

III. THE DECISION OF THE COURT

[20] Rejects the third party opposition lodged by KANZAYIRE Epiphane against the judgment RCAA 0015/09/CS.

[21] Order him to pay 42,800 Rwf of court fees, the default of which within 8 days, that amount shall be deducted from his asset through government coercion.

NGANGARE v. MUKANKURANGA

[Rwanda SUPREME COURT – RCAA 0022/13/CS (Mutashya, P.J., Mukamulisa and Gatete, J.) July 25, 2014]

Family law – Concubinage – Separation of partners – Assets sharing – Application of the law n°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence on sharing of concubines' assets – Disputes between concubines do not imply a separation in case they live in the same house, share the responsibility to raise the children and take care of their family – The concubines who remained in cohabitation after the publication of the Law n°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence share their property in accordance with that Law once they decide to break the concubinage – The sharing of the property for the concubines is meant to protect everyone's right on the property and that right relies on the existence of their co-owned property – Law n°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, article 39.

Civil procedure – Damages – Dragging into lawsuits – The existence of procedural expenses by the respondent must be repaired and damages awarded in accordance with Court's discretion.

Fact: Ngangare and Mukankuranga lived in concubinage but under Ugandan custom where they lived before they moved to Rwanda. Later, some conflicts arose from their relationship which led Mukankuranga to file a claim in Intermediate Court of Gasabo requesting the sharing of the assets they jointly acquired. The court decided that they share the assets and

apportioned a half of those assets to each one. It also decided that everyone shall retain the movable assets in his or her possession and ordered Ngangare to pay the counsel fees and procedural cost to Mukankuranga.

Ngangare appealed to the High Court which decided his appeal to be without merit. He appealed again to the Supreme Court stating that the court relied on the Law n°59/2008 of 10/09/2008 on prevention and punishment of gender - based violence while it entered into force after he separated with Mukankuranga, therefore assets he acquired after the year 2000 should not be shared since they no longer lived together. He further argue that even if that law was to be applied, its article 39 would not be relied on since it relates to the sharing of assets of concubines of whom one of them intends to get married.

Mukankuranga states that they have never separated because they continued living in a shared house, jointly raise their children and manage their household, the reason why the provision of article 39 of the Law n°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence should be applicable.

Held: 1. Disputes between concubines do not imply a separation in case they continued living in a shared house, shared the responsibility to raise their children and manage their household.

2. Concubines who remained in cohabitation after the publication of the Law n°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence share their jointly acquired property in accordance with that Law once they decide to break the concubinage.

3. The sharing of the property for the concubines is meant to protect everyone's right on the property and that right relies on the existence of their co-owned property.
4. Procedural expenses suffered by the respondent are repaired and compensations are awarded in accordance with Court's discretion.

**Appeal without merit.
Court fees to the appellant.**

Statutes and statutory instruments referred to:

Law n°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, articles 39 and 41.

Cases referred to:

Mutebi v. Mukagasaza, RCAA0143/11/CS rendered by the Supreme Court on 15 March 2013.

Gatera v. Kabalisa, RS/Inconst/Pen.0003/10/CS rendered by the Supreme Court on 07 January 2011.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Since 1984, Ngangare John and Mukankuranga Grace cohabited out of civil marriage in Uganda and bore four children. Later, conflicts arose in their relationship and this led Mukankuranga Grace to file a claim in Intermediate Court of Gasabo requesting the sharing of all properties they jointly acquired on the ground that even though they did not celebrate a

civil marriage, but they cohabited under Ugandan custom because Ngangare introduced and paid the dowry.

[2] The Court decided that they share equitably the assets comprising of three houses on plot n° 41 (five roomed house, the house which is not yet roofed and another one which is complete but pending finishing) located at their residence area, a plot of land which is located in Kagarama Village, Musave Cell, Bumbogo Sector, Gasabo District and another house they left in Uganda, and everyone retains the movable assets in his or her possession. The Court ordered Ngangare to pay 300,000Rwf of procedural and counsel fees to Mukankuranga.

[3] Ngangare John appealed to the High Court which decided that his appeal has no merit and sustained the judgment.

[4] Again, Ngangare John was not satisfied with the ruling and appealed to the Supreme Court demonstrating the grounds of appeal against the rendered judgment, and Mukankuranga rebutted on them.

[5] The hearing was held in public on 17 June 2014, Ngangare John represented by Counsel Ntigurirwa François and Counsel Umupfasoni Blandine whereas Mukankuranga Grace was assisted by Counsel Mukamana Elisabeth.

II. ANALYSIS OF THE LEGAL ISSUES

a) Whether Ngangare and Mukankuranga dissolved their concubinage before the coming into force of the Law n°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, in order to know whether or not it could be applied to this case.

[6] Umupfasoni Blandine, the Counsel for Ngangare John states that the judge interpreted erroneously the statement of Mukankuranga Grace by confirming that since 2000, they continued to cohabit even though they had conflicts while Mukankuranga admitted that, since the year 2000 they no longer cohabited as a wife and husband.

[7] Furthermore, she argues that article 41 of the Law n°59/2008 of 10/09/2008 previously mentioned, provides that it shall come into force on the date of its publication, therefore it should not be applicable to this case since it was published in 2008 when Ngangare and Mukankuranga were not living together. She argues in addition that the assets which Ngangare acquired after the year 2000 should not be apportioned between them basing on that law because he acquired them when they were no longer in cohabitation.

[8] She argues in addition that the employment contract which Mukankuranga entered into with SWA Rwanda in 2010, intending to demonstrate that she was employed was concluded when they were no longer in cohabitation because she started saving money on her account in the year 2000 in the course of which they broke the concubinage.

[9] Mukankuranga states that she cohabited with Ngangare in Uganda since 1984 at the end of their studies. In 1994, they returned in Rwanda from exile, and jointly acquired the assets. Mukankuranga further states that she requested him to get married in accordance with the law but he refused and recognized only the children they bore.

[10] She states in addition that they have never broken because they still live in the same home, except they no longer

cohabit. She adds that even on the day of the hearing they came from that home in which they live. Indeed, their neighbors know that they cohabit and bore four children, perform the community work in the same area, share the same kitchen, house maid, watchman, and that if the Court would like to verify the reliability of her statements, it can ask those neighbors.

[11] She continued arguing that in 2008 she paid the electricity bill of 1,000,000Rwf which they both consumed, and wonders if Ngangare perceives it as a loan. She states that she was employed during the whole period of concubinage with Ngangare up to now and that all assets they own were jointly acquired and they perform all activities together.

[12] Her counsel Mukamana Elisabeth states that the judge did not override the statement of Mukankuranga because she declared that the fact that their conflicts have arisen in 2000 does not imply that they did not continue to cohabit as husband and wife, the reason why the law n° 59/2008 of 10/09/2008 is applicable to them.

THE VIEW OF THE COURT

[13] The law n°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence was published in official gazette n° 14 of 06/07/2009 and come into force from the date of its publication as stipulated by its article 41.

[14] The Court finds that during the hearing, Mukankuranga explained that she cohabited with Ngangare as a husband and a wife without any problem between them until the year 2000, when some conflicts emerged and continued up to now but even

though they were not in a good relationship, they continued living in the same house as wife and husband, with their children whom they jointly continued to raise and manage their household. All these statement of Mukankuranga were not contradicted by Ngangare.

[15] In the Judgment RCAA0143/11/CS, Mutebi Hamisi alias Fungamani versus Mukagasaza Aminarendered by this Court on 15 March 2013, rejected the arguments of Mutebi Hamisi according to which the Law n°59/2008 of 10/09/2008 mentioned above was published after their break up was rejected, because the documents in the file indicate that Mutebi and Mukagasaza cohabited up to 2010 even if they were in bad relationship.

[16] Concerning this case, the Court is of the view that the existence of conflicts between Ngangare and Mukankuranga since the year 2000 does not imply they did not continue their cohabitation as wife and husband as explained in the aforementioned judgment, since Ngangare was not able to prove that he stopped cohabiting with Mukankuranga in the year 2000, such that the mentioned Law n° 59/2008 of 10/09/2008 would not be applicable to him, therefore his ground of appeal is without merit.

b) Whether the Court misapplied article 39 of the law n°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence.

[17] Umupfasoni Blandine, the Counsel for Ngangare states that even if the Court finds that Mukankuranga and Ngangare still cohabit as wife and husband, article 39 of the law mentioned above should not be relied on for the sharing of the

assets because that article provides that the person who is required to share the assets at first, is the one who is going to get married so that his/her partner or partners in concubine relationship get their share before that person gets married.

[18] She continues arguing that Mukankuranga Grace did not demonstrate to the Court that Ngangare is going to get married to another wife, and in addition, if it was Ngangare who intended to get married, he should be the one to file a claim requesting that they first share the assets.

[19] Mukamana Elisabeth, the Counsel for Mukankuranga argues that article 39 of the mentioned law was adopted with the purpose of preventing injustice, such that no one could withhold the property acquired by both concubines. She states in addition that Ngangare and Mukankuranga spent thirty years in concubinage until now even if there are some obligations they are not fulfilling as a married couple and this resulted from the conflicts between them, but it does not imply they discontinued living as husband and wife.

[20] She continues adducing that she does not perceive how after all those years during which Ngangare lived with Mukankuranga, he could request for the certificate of celibacy; rather, its request implies that he intended to withhold the property.

[21] She explained that the judgment in the case of Gatera John versus Kabalisa Teddy rendered by this Court on 07 January 2011 addressed all the issues raised by the Counsels for Ngangare in relation to article 39 of the law n°59/2008 of 10/09/2008 mentioned above.

THE VIEW OF THE COURT

[22] Article 39 law n°59/2008 of 10/09/2008 mentioned above provides that “those people entertaining unlawful marriages shall be married in accordance with the monogamous principle. If a person concerned with the provision of previous paragraph of this article was living with many husbands/wives, he shall first of all share the commonly owned belongings with those husbands/wives equally”.

[23] As far as the Judgment RS/Inconst/Pen.0003/10/CS rendered on 07 January 2011 on the petition filed by Gatera Johnson and Kabalisa Teddy requesting the repeal of article 39 of the Law n°59/2008 of 10/09/2008 mentioned above for inconsistency with the Constitution, this Court held that in order to share the assets when spouses who entertain unlawful marriages break, the assets must be jointly owned or acquired. The Court held in addition that, having the right to a property does not rely only on the cohabitation of concubines but it must be evident that there exists a property they jointly own or acquired.

[24] Therefore the Court finds that as explained in the judgment mentioned above, the purpose of the aforementioned article 39 of Law n°59/2008 of 10/09/2008 which was relied on by the High Court, is to protect the right on the property for each one of those partners in concubinage because of the contribution he or she made to promote their common household, the reason why in case one of them wishes to get married to a different partner, the property they jointly acquired should be shared first, since if not so, one of them especially the partner who is going to get married with a different person,

could benefit from the assets he/she jointly acquired with the other partner.

[25] Basing on the aforementioned reasons, the Court finds that the High Court did not error in law by relying on article 39 of Law n°59/2008 of 10/09/2008 and upholding the position of the Intermediate Court of Gasabo according to which Ngangare John and Mukankuranga Grace must share their assets as mentioned above.

c) Whether Mukankuranga Grace should be awarded the requested damages.

[26] Mukamana Elisabeth, the Counsel for Mukankuranga Grace rose a cross appeal requesting that the amount of 500,000Rwf which her client was awarded in the appealed judgment for procedural costs and counsel fees, be increased to the amount of 1,000,000Rwf which she requested in the previous instance especially because Ngangare has continued dragging her into unnecessary lawsuits.

[27] Ntigurirwa François, the Counsel for Ngangare John states that they initiated a claim requesting the Court to admit their appeal and quash the appealed judgment, therefore if the judgment is quashed, the cross appeal filed by Mukankuranga will have no basis. He adds that if the Court finds the appeal of Ngangare without merit, it could award damages at its discretion.

[28] The Court finds that in the appealed judgment Mukankuranga Grace was awarded 500,000Rwf for the procedural costs and counsel fees, and that amount should be increased of 500,000Rwf on this level, awarded at court's

discretion because it is obvious that Ngangare John dragged Mukankuranga into lawsuits which increased expenses she incurred on this case. ,.

III.THE DECISION OF THE COURT

[29] Decides that the appeal of Ngangare John is without merit;

[30] Decides that the ruling of the Judgment RCA 0163/12/HC/KIG rendered by the High Court on 19 July 2013 is sustained except in regards to the amount of procedural costs and counsel fees granted to Mukankuranga Grace at this level;

[31] Orders Ngangare John to pay 500,000Rwf to Mukankuranga Grace of the procedural cost and counsel fees in addition to 500,000Rwf she was awarded by the appealed judgment;

[32] Orders Ngangare John to pay the Court fees amounting to 29,800Rwf.

LABOUR CASE

KALISA v. INSTITUT POLYTECHNIQUE DE BYUMBA (IPB)

[Rwanda SUPREME COURT – RSOCAA 0061/12/CS
(Mutashya, P.J., Rugabirwa and Gakwaya, J.) May 02, 2014]

Contract or obligations law – Damages – The act of informing other institutions the fault committed by an employee which leads to his or her dismissal while he was not given a hearing to refute it, is considered as defamation of character – Any act of man, which causes damage to another obliges him by whose fault it happened to repair it – Law of 30/07/1888 relating to contracts or obligation, article 258.

Labour law – Damages resulting from failure to promotion – Even when an employee has reached the time of promotion, damages are not awarded to him/her for failure to be promoted if s/he was dismissed before working for a necessary period to be remunerated a new salary.

Civil procedure – Burden of proof – The plaintiff could not be given the damages because his family was traumatized due to his dismissal since he did not produce the evidence thereto.

Civil procedure – Inadmissibility of a new claim at appellate level – A claim which was not debated upon before the first instance level cannot be examined for the first time at the appellate level.

Facts: Kalisa Alphonse entered into an employment contract with Institut Polytechnique de Byumba (IPB) to perform for it the duties of a lecturer. Latter IPB wrote a letter to him,

informing him that they have terminated the employment contract they had with him because of various faults including the one of drunkenness.

Kalisa Alphonse was not satisfied with that decision and he approached the labour inspector in Gicumbi District but both parties did not come to an agreement which led him to file a case in the Intermediate Court of Gicumbi arguing that he was unlawfully dismissed, therefore he should be given damages for it, that Court decided that his claim has merit and consequently it ordered IPB to give him damages for it. Kalisa was not contented with the decision and appealed in the High Court arguing that he was not awarded the damages for being defamed by IPB, and also he was not awarded the notice allowance, the money increment on promotion and procedural expenses.

IPB filed cross appeal stating that the salary base on which the notice allowance was calculated on was not the one which should have been based on, The Court decided that the appeal has merit in parts and also pronounced itself on the salary which deserves to be based on, in the calculation of the damages.

Kalisa appealed to the Supreme Court arguing that the High Court did not award him the damages for defamation caused by IPB, those of trauma which his family members went through as a result of his dismissal and the increment on promotion moreover he was entitled to it, therefore requests damages equal to the salary of the remaining period until his retirement. On those grounds IPB states that his appeal has no merit because what happened on him are not different from what happens to any other dismissed employee.

Held: 1. The act of informing other institutions the fault committed by an employee which leads to his or her dismissal

while he was not given a hearing to refute it, is considered as defamation of character, the offender pays damages for it

2. Even when an employee has reached the time of promotion, damages are not awarded to him/her for failure to be promoted if s/he was dismissed before working for a necessary period to be remunerated a new salary.

3. The plaintiff should not be awarded the damages for his family being traumatized due to his dismissal since he did not produce the evidence for it.

4. A claim which was not debated upon before the first instance level cannot be examined for the first time at the appellate level.

5. If there are expenses incurred by the party who won the case, he is awarded procedural costs. Concerning the counsel fees, the court cannot award them to the party who does not precise its sum.

**Appeal has merit in part.
Institut Polytechnique de Byumba should pay damages to
the appellant.
Cost to the respondent.**

Statutes and statutory instruments referred to:

Law of 30/07/1888 relating to contracts or obligations, article 258.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 11 September 2006, IPB¹ entered into an employment contract with Kalisa Alphonse to perform the duties of a lecturer, on 19 September 2009 the administration of IPB wrote a letter informing him that they had terminated the employment contract they had concluded with him because of various faults demonstrated in that letter.

[2] Unsatisfied with the decision terminating the contract concluded with IPB, Kalisa Alphonse referred the case to the labor inspector of Gicumbi District. After both parties failed to make an agreement, Kalisa Alphonse filed a claim to the Intermediate Court of Gicumbi stating that he was unlawfully dismissed and consequently requested various damages. The Intermediate Court of Gicumbi decided that his claim has merit and confirmed that he was unlawfully dismissed because the provisions relating to the dismissal notice for gross negligence were not respected. Therefore, it ordered IPB to pay Kalisa Alphonse the damages amounting to 1,837,768Rwf covering damages for unlawful dismissal, dismissal compensation, compensation for the annual leave of 2009 he did not enjoy, procedural costs and the counsel fees..

[3] Kalisa Alphonse appealed to the High Court stating that he was not awarded damages for defamation by IPB because it wrote to him a letter and addressed a copy to the administration

¹ Institut Polytechnique de Byumba.

of private institutes of Higher Education affiliated in CRIPES² and ARIPES³, for not being given the notice, for not being paid promotion accruals relating to academic grade and for not being paid for procedural costs. IPB filed a cross appeal to that of Kalisa Alphonse requesting that the salary which was based on for computation of the notice allowance is gross salaries of 409,402Rwf while it should be based on the salary of 306,607Rwf which is the net salary.

[4] The High Court rendered the judgment and decided that the appeal of Kalisa Alphonse has merit in parts; ordered that the average salary which is relied on for computing what Kalisa Alphonse should be paid is 306,607Rwf instead of 409,442Rwf which was decided by the Intermediate Court. It ordered IPB to pay 2,007,880Rwf to Kalisa Alphonse computed in the following way:

- Notice allowance amounting to 306,607Rwf;
- Damages for unlawful dismissal amounting to 919,821Rwf;
- Dismissal compensation amounting to 306,607Rwf;
- Compensation for leave he did not enjoy amounting to 334,845Rwf;
- Procedural costs and the counsel fees amounting to 700,000Rwf.

[5] Concerning the fact of being defamed by IPB as his employer, the High Court found it without merit because the fact that IPB informed the administration of the private institutes of Higher Education was in the context of implementing the memorandum entered with other institutions

² Conseil des Recteurs des Instituts Privés d'Enseignement Supérieur

³ Association Rwandaise des Instituts Privés d'Enseignement Supérieur

of Higher Education which are in the same association of ARIPEs and indeed, he should not be awarded damage for the fact of being subjected to harassment through false allegations which resulted into trauma.

[6] Concerning the damages he was requesting regarding his failure to pay the loan he received from BCR Ltd and approved by IPB, which subsequently dismissed him; the Court found that those damages could not be awarded because the contract he concluded with BCR Ltd engages himself alone and BCR Ltd, and does not engage IPB., Therefore it cannot be held liable.

[7] Kalisa Alphonse appealed against the judgment again to the Supreme Court arguing that the Judge refused to award him the damages relating to defamation disregarding that the dismissal letter contained defamatory statements against him and was copied to the Institutions of Higher Education affiliated with the association called ARIPEs. He stated in addition that he was not paid moral damages for his family traumatized because of his dismissal; that the Court did not decide on the fact that he was not awarded compensation for promotion accretions while he deserved it pursuant to internal rules of IPB. He also requested for damages for the remaining period for him to retire.

[8] On those grounds, IPB argues that the grounds for appeal of Kalisa Alphonse are without merit because what was done for Kalisa Alphonse is not different from what is done for any other dismissed lecturer.

[9] The hearing was held in public on 18 March 2014; Kalisa Alphonse Makala appeared and assisted by Counsel

Nkundabarashi Moise whereas IPB was represented by Counsel Marie Louise Ndengeyingoma.

II. ANALYSIS OF LEGAL ISSUES

1. Whether IPB committed a fault in notifying the members of ARIPEs the ground for Kalisa Alphonse's dismissal to the extent that it should be charged damages

[10] Kalisa Alphonse states that IPB committed the fault of informing the institutions affiliated with ARIPEs of his dismissal and its ground because it is contrary to the rules relating to termination of the contract since the termination engages the contracting parties. Therefore he is not concerned by the fact that those institutions have concluded the memorandum on academic program information sharing among them, because he is not involved; thus, this dismissal being informed to those institutions prevented him to get a job anywhere especially in education sector.

[11] Nkundabarashi, the counsel for Kalisa Alphonse argues that the fact for IPB to have notified all higher learning institutions that he was dismissed due to drunkenness is serious defamation which IPB did while in the previous year it evaluated his performance and confirmed that he is a good employee. Thus, stating that it was done in the context of information sharing is not true because the information which should be disseminated is not as such as the one relating to Kalisa Alphonse dismissal. Therefore, he requests to be paid the damage amounting to 10,000,000Rwf.

[12] Ndengeyingoma Louise, the counsel for IPB argues that the fact of notifying all institutions affiliated with ARIPEs

about the dismissal of an employee is normal and commonly done for all employees as IPB must not cover up the drunkenness related fault which is the cause of his dismissal. Additionally, in article 11 of the internal rules Kalisa Alphonse signed, drunkenness is a gross negligence which causes immediate dismissal of the employee; furthermore, the event was not defamation, it is rather the information sharing on his dismissal. Therefore, he was dismissed because of gross negligence, and this had to be included in his dismissal letter.

[13] He continues arguing that in the memorandum the private institutions of Higher Education concluded, the dissemination of information about the employees dismissal is included, therefore adducing that it is done for those who are involved in the academic program is without merit because that is common to all employees, and the fact to have been dismissed due to drunkenness should not be covered up for fear of being imitated by others. Therefore, IPB could not pay him correlative damages he requests for.

THE VIEW OF THE COURT

[14] The Court finds that in the minutes of the meeting of the board of directors members of the association of the private institutions of Higher Education in Rwanda held on 15 October 2008 regarding the sharing of information, they agreed as demonstrated in the minute of the session, that they should share

all the information regarding those institutions but avoid disseminating likely ambiguous information to the population⁴.

[15] The Court finds that in all letters wrote to Kalisa Alphonse requesting him for explanations; none mentioned that he came to work while drunk⁵, and drunkenness was raised only in the meeting which took place on 19 September 2009 and a decision was made to terminate the contract.

[16] The fact that the drunkenness was included among the grounds IPB produced for dismissal of Kalisa Alphonse while he did not defend himself on this fault, and that letter circulated among all private institution of Higher Education in Rwanda that Kalisa Alphonse was dismissed due to drunkenness; the Court finds that this act is a defamation likely to dishonor and consequently deprive him of the opportunity to get another job elsewhere especially in education sector. Therefore, IPB should be held liable pursuant to article 258 of the civil code book III⁶ which stipulates that “any act of man, which causes damage to another obliges him by whose fault it happened to repair it”.

⁴ Avoid information that can confuse the public and share information about their institutions on the various programs, verify the document in file on page of 45-47.

⁵ Verify the letter he was written on 04 December whereby he was requested to did not link what concerning the marks of the students and to not participate in the meeting of preparing a schedule (page 41); the letter of 06 August 2009 whereby he was written for providing the explanation due to not perform the week schedule of 10 August up to 16 August 2009 (page 23).

⁶ Any act of man that causes damage to another obliges the person by whose fault it happened to repair.

[17] The Court finds therefore that due to the faults which IPB committed against Kalisa Alphonse as explained, it should pay him 2,000,000Rwf in damages awarded in the Court's discretion since 10, 000,000Rwf he requests for is excessive.

2. Whether Kalisa Alphonse should be granted damages for not being promoted.

[18] Kalisa Alphonse states that he was not allocated the promotion accrument while, a performance evaluation was conducted and it was confirmed that he is a good employee and also the administrator suggested his promotion after the submission of the required documents. Hence it is the negligence of administrators who did not promote him after submitting the required documents.

[19] Nkundabarashi, the counsel for Kalisa Alphonse argues that his client's performance was evaluated on 6 January 2009, and the administration of IPB confirmed that he is a good employee who deserves a promotion, but instead he was dismissed nine (9) months after that performance evaluation, thus he was never promoted as it was recommended by his superiors. Therefore, the Vice Rector having confirmed his promotion to that grade after submitting all the necessary documents while Kalisa submitted those documents in vain, thus those are faults of IPB whose superior administration negligence should not affect him.

[20] He further argues that he cannot be a victim because there is no letter or an order promoting him, because he was not the one who would have promoted himself. He added that if the administration thought that he could not be promoted after having submitted the necessary documents, it would have

responded to his request, informing him the reasons why he was not promoted, therefore the lack of the feedback is considered as a tacit approval for which he is requesting for damages amounting to 12,640,786Rwf, which is the equivalence of the balance between his previous salary and the one he would have been remunerated if he had been promoted and those damages are based on article 81 of Law n° 13/2009 of 27/05/2009 regulating labor in Rwanda which stipulates that “Upon expiry of employment contract, the employee shall be paid his/her salary soon after its expiry and any other indemnities he/she is entitled to under the contract”.

[21] Ndengeyingoma Louise, the counsel for IPB states that Kalisa Alphonse was never promoted as he alleges, because after the evaluation of the performance it follows the promotion of the employee. Therefore, since that decision never occurred, he should not request for the promotion accruelements while he is aware that he was never promoted on that grade.

THE VIEW OF THE COURT

[22] Article of 1.6.2.3 of the internal rules of IPB provides that “a candidate to the rank of the Assistant lecture, the holder of a doctorate degree. He/she may also be appointed to that rank the holder of a Master justifying an experience of three years in the assistant grade”; the analysis of this article shows that an assistant lecturer to be promoted to the grade of lecturer who has the duty to assist the lecturers (Chargé des Cours Associé), as prerequisite must hold a doctorate degree, he can also be promoted to that grade when he holds a Masters degree and a working experience of three years as an assistant lecturer.

[23] The document in the case file demonstrate that Kalisa Alphonse began to work as assistant lecturer on 11 September, 2006 and also holds a masters degree as demonstrated during the hearing of the case and the counsel for IPB does not contest it. Kalisa was dismissed on 19 September 2009 which is obvious that he was dismissed when he had fulfilled the requirements to be promoted.

[24] The Court finds that even though the promotion of a lecturer who is on the same grade with Kalisa Alphonse and who has fulfilled the requirements is not mandatory according to the internal rules of IPB, the grounds on the fact that the administrator of IPB could make an decision to promote or not should be explained in that decision and the person concerned informed.

[25] However, the Court finds no reason in the case file as to why Kalisa Alphonse was not promoted while the administrators' opinions suggested on his promotion "avis favorable" to the position of Chargé des Cours Associé. Additionally, Kalisa Alphonse produced evidence in support during the hearing and the counsel for IPB could not challenge the document otherwise.⁷

[26] The Court finds that even if he got the favorable opinion on 06 January 2009, the three year he was required to fulfill in order for him to be promoted was achieved on 11 September 2009, and he was dismissed on 19 September 2009 after 9 days in excess only, therefore he cannot be awarded the damage relating to the difference between the previous salary and the

⁷ Scorecard deposited by Alphonse KALISA in the hearing on 18.03.2014, signed by the administration of IPB on 06/01/2009

current salary because he was not in service and to be remunerated you should have worked. Consequently, the damages he requests for not being promoted are without merit.

3. Whether he should be awarded damages for his defamation which caused his family and him trauma.

[27] Kalisa Alphonse argues that the defamation against him by writing to all higher learning institutions stating that he is drunkard, caused trauma on his whole family because he was the one who used to provide for it, thus he requests damages for that..

[28] Regarding those damages, the counsel for IPB argues that they should not be awarded to him because he does not demonstrate any one of his family members who went to seek treatment from the counseling centre nor he demonstrates anyone who was admitted to hospital for those grounds.

[29] The Court finds that the damages he requests for his traumatized family should not be awarded to him because he did not produce evidence for it.

Concerning the damage equal to the remaining period for Kalisa Alphonse to go for the retirement leave

[30] On this issue, Kalisa Alphonse states that he relies on article 1.15.4 of the rules regulating IPB stipulating that a lecturer benefits of the retirement leave at the age of 70, and he was dismissed 19 year before the retirement which is equivalent to 202 months. Thus, he requests for the damages equal to 306,607Rwf (for monthly salary) x 202= 61,934,614Rwf.

[31] The Court finds that either in the Intermediate Court of Gicumbi, or in the High Court this issue was not debated upon, hence it cannot be examined for the first time in the Supreme Court.

[32] Kalisa Alphonse requests 140,000Rwf for the procedural costs, including transport expenses, court fees he paid throughout the progress of the case up to the Supreme Court as he demonstrated in his submissions, and also requests for the counsel fees pursuant to the written contract he concluded with his counsel.

[33] The counsel for IPB states that he should not be awarded the procedural costs because he did not produce evidence for it. For the counsel fees, she argues that Kalisa Alphonse submitted the written contract he entered with his counsel; therefore, they are the ones who are engaged as they concluded it themselves.

[34] The Court finds that there are expenses incurred by Kalisa Alphonse for the progress of this case, therefore he deserves to be awarded 140,000Rwf for the procedural fees he requested for and it is in range.

[35] Concerning the counsel fees, the Court finds that except that it is stated in his submissions that he requests it, he did not precise the amount the Court can refer to and award it.

III. THE COURT DECISION

[36] Decides that the appeal of Kalisa Alphonse has merit in part;

[37] Orders Institut Polytechnique de Byumba to pay Kalisa Alphonse the sum of 2,000,000Rwf for the damage of being defamed, 2,007,880Rwf awarded by the High Court and 140,000Rwf of the procedural fees, all amounting to 4,147,880Rwf;

[38] Orders Institut Polytechnique de Byumba to pay the Court fees amounting to 34,250Rwf.

COMMERCIAL CASES

ECOBANK v. INDIA NOVEMBER

[Rwanda SUPREME COURT – RCOMA 0005/10/CS
(Mutashya, P.J., Havugiyaremye and Rugabirwa, J.) June 10,
2010]

Commercial law – Negotiable instruments – Travellers’ cheques – The liable to pay the stolen traveller’s cheques – If the travellers cheques held by the purchaser are stolen and made the opposition within the due time, they are refunded by the agent bank, unless the latter proves that it transferred the money to the issuing bank.

Commercial law – The computation of moratory damages – Interests resulting from the loss incurred from the fact that the travellers cheques were not refunded immediately after they were stolen – The time for computation starts running after 48 hours from the day of the opposition until the date of the judgment delivery.

Facts: ECOBANK SA sold to INDIA NOVEMBER, represented by Isidore Ndabarasa, travellers’ cheques valuable at 8,000 USD. ECOBANK has withdrawn that money from the bank account of INDIA NOVEMBER open in that bank. These cheques were stolen while they were held by Isidore Ndabarasa who represents INDIA NOVEMBER. The latter has made the opposition to ECOBANK, which also notified CITICORP of the theft. INDIA NOVEMBER has written to ECOBANK several times requesting for getting back the money but it denied on the ground that the issuer which is CITICORP, is the one to pay the money back since it was transferred to it. CITICORP argues that it cannot pay back the money since INDIA NOVEMBER has

picked the cheques without signing on them in the presence of the employee of the agent bank.

INDIA NOVEMBER lodged a claim against ECOBANK before the Commercial High Court which ordered ECOBANK to refund 8,000 USD paid for the travellers' cheques to INDIA NOVEMBER, their interests, moral damages, procedural expenses and advocate fees.

ECOBANK appealed to the Supreme Court, arguing that the judge of the first instance court ordered it to pay to INDIA NOVEMBER a lot of money without establishing its responsibility for the theft of the cheques. It also states that it cannot be held liable for the faults of CITICORP since Isidore Ndabarasa did not sign those cheques before its employee. Contrary, INDIA NOVEMBER states that ECOBANK should refund 8,000 USD in addition to damages since it did not prove that it transferred the dollars it got from the sale of the cheques to CITICORP.

Held: 1. If the the travellers cheques held by the purchaser are stolen and the purchaser makes an opposition as soon as possible to the agent bank, which fails to prove to have transferred the proceeds of travellers cheques to the issuer, the agent bank is the one to refund him/her, even though there may be some cheques that were paid before the opposition, since he/she has fulfilled his/her duty.

2. In case the traveller's cheque is stolen, and the purchaser makes an opposition as soon as possible, he/she shall be paid by the agent bank within 48 hours running from the day of opposition, failure of which, it shall pay moratory damages running from 48 hours after the opposition day up to the judgment delivery.

**Appeal has merit in part.
Cross appeal has merit.
Judgment changed in part.
Court fees to the appellant.**

No law referred to.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] ECOBANK SA (ex-BCDI) sold Travellers checks of CITICORP equivalent to 8.000 USD to Isidore Ndabarasa representing INDIA NOVEMBER, and consequently ECOBANK withdrew from the account that INDIA NOVEMBER was having in that bank.

[2] As stated by both parties, the travellers checks were stolen from the hands of Isidore Ndabarasa and he made an opposition on 19 June 2001, ECOBANK informed CITICORP on 20 June 2001 and then CITICORP informed other banks in order to avoid any payment in exchange for the checks. On 17 June 2001, "Chase Forex Bureau" located in Kenya, had already paid 2.000 USD to thieves who came for change.

[3] INDIA NOVEMBER addressed many letters to ECOBANK requesting to be paid back 8.000 USD withdrawn from its account. ECOBANK replied that CITICORP is the one to pay back the money because it is the issuer of the cheques

and that the money was sent to it. As for CITICORP, it denied any liability because Mr Isidore Ndabarasa took checks without signing for them before ECOBANK's officer who sold them to him.

[4] INDIA NOVEMBER decided to refer the case to the Commercial High Court against ECOBANK. The judgment was rendered on 20 November 2009 and the court ordered ECOBANK to pay back INDIA NOVEMBER 8.000 USD for travellers checks, 8.960 USD of relating interests for eight years, 5.000 USD of moral damages, 5.000 USD of procedural fees, 500.000 Rwf for advocate fees, and 634.688 Rwf for proletary fees.

[5] The last hearing on merit was held on 25 April 2011, ECOBANK assisted by the counsel, Janvier Rwagatare, and INDIA NOVEMBER assisted by the counsels, Salvator Nkurikiye, Charles Shema Gakuba and John Rwajajija.

II. ANALYSIS OF LEGAL ISSUES

Which bank between the agent and the issuer is liable to refund the purchaser in case the travellers' cheques are stolen?

[6] The counsel for ECOBANK states that it sold to INDIA NOVEMBER represented by Isidore Ndabarasa Travellers checks equivalent to 8.000 USD, and then INDIA NOVEMBER informed this bank that the checks were stolen on 19 June 2001, then the latter also informed CITICORP on 20 June 2001.

[7] He stated that the previous judge ordered ECOBANK to refund INDIA NOVEMBER too much money without proving

the role of ECOBANK in the theft of the travellers checks or in fact of not repaying INDIA NOVEMBER. He argued that ECOBANK is not liable for that illegal act of CITICORP which refused to refund INDIA NOVEMBER as indicated in the letter of 26 March 2002, because Isidore Ndabarasa did not sign for that money before ECOBANK's officer who sold them to him.

[8] The counsel for INDIA NOVEMBER states that Isidore Ndabarasa bought travellers Checks from ECOBANK on 01 June 2001 equivalent to 8.000 USD. After being stolen on 16 June 2001, he made an opposition to ECOBANK on 19 June 2001, but on 17 June 2001, the thieves had already exchanged the checks equivalent to 2,000 USD with Chase Forex Bureau located in Kenya. They requested that 8.000 USD have to be refund by ECOBANK adding damages because Ecobank did not send to CITICORP dollars from the sale of the cheques.

[9] During the examination of the case in closed session in order to take final decision, the court found better to look for an expert in matters of travellers cheques for more clarifications, then Dominiko Gakwaya was hired.

[10] After swearing to tell the truth, he briefly stated that when a purchaser of the treques, and then the agent, bank withdrew the money from his/her account, and later the cheques get stolen, the purchaser should inform the agent, bank as quick as possible. However, when the purchaser delays to inform the bank, he/she loses since he/she had been given all necessary information that can help him/her in case of theft.

[11] When the purchaser makes the opposition as soon as possible, it is the agent, bank of the travellers cheques which is liable to refund the money, even when there are some cheques

paid before the opposition is made, because the purchaser would have fulfilled his/her duties, unless the agent, bank proves that the money was deposited on the issuer's account.

[12] The court finds that the expert in matters of the use of travellers cheques above mentioned explained that if the cheques were stolen, and the purchaser had made an opposition on a due time to the agent, bank, that the latter would be the liable to refund the money, unless the agent, bank proves that the money was transferred to the issuer's account.

[13] In this case, the court finds that both parties do agree that Isidore Ndabarasa, the representative of INDIA NOVEMBER, bought the travellers cheques issued by CITICORP from ECOBANK SA (ex-BCDI) equivalent to 8.000 USD, and ECOBANK withdrew the money for the cheques from INDIA NOVEMBER's account.

[14] The court finds that both parties do agree that the cheques were stolen, and that Isidore Ndabarasa made an opposition on a due time to ECOBANK on 19 June 2001, three days after they were stolen. Additionally, ECOBANK informed CITICORP on 20 June 2001, submitting of the stolen cheques numbers.

[15] Basing on the information provided by the hired expert, the court finds the fact that INDIA NOVEMBER was stolen of travellers cheques, and made an opposition on a due time, while ECOBANK did not prove that the money was sent to CITICORP, and no proof that the latter has received the money, nor did CITICORP prove to have refunded the stolen cheques, ECOBANK is liable to give back to INDIA NOVEMBER the money equivalent to 8.000 USD of the stolen travellers cheques.

[16] The court finds that some interest have to be accrued to that money, namely the court and advocate's fees as it was confirmed by the previous court. However, the court has to revise the figures in computing the interests, because it had granted an extra money, and was based to the wrong figures. Moratory interests have to be computed until the final court decision as required by INDIA NOVEMBER in its cross appeal that the court finds with merit.

[17] Regarding the moratory interests, the court finds that INDIA NOVEMBER made an opposition on 19 June 2001, that was a due time, but ECOBANK held up the money until when the case was submitted to the Commercial High Court, while it was supposed to be refunded as the use of travellers cheques so requires¹, especially that as a trader, INDIA NOVEMBER should have gained a benefit from the cheques. Evidently, ECOBANK caused it a big loss, so the moratory interest of 14 % per year has to be computed as confirmed by the previous court.

[18] Regarding the payment, experts in the use of travelers cheques explain that when the purchaser is stolen the travellers cheques and made an opposition on a due time has to be refunded within 48 hours counted from the day he made the opposition. The court finds that ECOBANK received the opposition on 19 June 2001 and following the above mentioned explanations, ECOBANK has to refund to INDIA

¹ En cas de perte ou de vol de chèques de voyage, ... en général, le remboursement est effectué sous 48h” in <http://www.alertes-meteo.com/astuce/ chèque-voyage.htm>.

NOVEMBER moratory interests computed from 21 June 2001 up to 10 June 2011, the day of the final judgment delivery, computed in the following terms: = 8,000 USD x 14 x 3,589 days = 11,165 USD: 100 x 360.

[19] Regarding civil damages, the previous court had granted to INDIA NOVEMBER 5.000 USD of civil damages. The court finds that INDIA NOVEMBER should not be granted civil damages and moratory interests, it was granted moratory interest for the time ECOBANK spent holding up the money, thus, the 5.000 dollars has to be annuled.

[20] Regarding the procedural and advocate fees, the previous court has granted to INDIA NOVEMBER 5.000 USD and 500.000 Rwf respectively. The court finds that INDIA NOVEMBER has paid in the course of this case, the transport, meal and the hired advocates at both levels of jurisdiction. The court finds in its appreciation that ECOBANK has to refund 2.000 USD of procedural and advocate fees to INDIA NOVEMBER because 5.000 USD and 500.000 Rwf confirmed by the previous court are excessive.

[21] The court finds that the money that ECOBANK has to refund to INDIA NOVEMBER includes 8.000 USD for travellers cheques, 11.165 USD of moratory interests and 2.000 USD of advocate and procedural fees, totalling 21.165 USD.

III. DECISION OF THE COURT

[22] Receives the appeal of ECOBANK and appeal of INDIA NOVEMBER because they were legally submitted;

[23] Decides that the appeal of ECOBANK has merit in parts, and the cross appeal of INDIA NOVEMBER has merit;

[24] Orders ECOBANK to refund INDIA NOVEMBER 8.000 USD withdrawn from its account for the travellers cheques, 11.165 USD of moratory interest, 2.000 USD of procedural and advocate fees, all totalling 21.165 USD, and proletary fees of 4% equivalent to 846 USD to be paid within 8 days;

[25] Orders that the judgment RCOM 0066/09/HCC rendered by the Commercial High Court on 20 November 2009 is partialy modified;

[26] Orders ECOBANK to pay 40.900 of the court fees including those decided by the previous court, to be paid within 8 days, otherwise, it would be deducted from its assets by government coercion.

KZ NOIR(R) Ltd v. KUBWIMANA ET AL

[Rwanda COMMERCIAL HIGH COURT– RCOMA
0232/14/HCC (Kadigwa, P.J.) 12 June 2014]

Arbitration law in commercial matters – Jurisdiction to hear an urgent claim relating to arbitration – One of the parties to arbitration may request the court, before or during arbitral proceedings, for an interim measure– Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, article 3 and 10.

Commercial procedure – Determination of the subject matter – The subject matter of the claim shall be determined by the claims made by respective parties – In examination of admissibility of the claim, the Court is not limited to the title of written submissions, in contrast it considers its content and the pleadings of the parties – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 4.

Commercial procedure – Not to hear on merit the case annulled by the appellate Court – In case the appellate Court annuls the judgement, it cannot hear it on merit, rather it is heard by the competent Court to hear it at the first instance level in case the plaintiff intends to continue the proceedings – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 172.

Facts: KZ NOIR (R) Ltd entered into a contract with Kubwimana Chrysologue and Kubwimana Philippe with a clause providing that any conflict relating to it shall be referred

to the arbitration. Both parties turned to arbitration but pending the decision on merit, KZ NOIR (R) Ltd filed the summary procedure to the Commercial Court of Musanze requesting it to take provisional measures but the court it rejected the claim because there is no related main suit.

KZ NOIR (R) Ltd appealed to the Commercial High Court stating that its claim should be admitted and examined because the main suit was pending before arbitration and that is in accordance with the law.

In appeal, Kubwimana Chrysologue and Kubwimana Philippe stated that interim measures fall under jury of arbitrators who are competent to settle the matter.

Held: 1. One of the parties may, before or during arbitration process, request the Court to take interim measures and the Court may do so as long as it is in accordance with arbitration agreement. Therefore, the Commercial Court of Musanze should have admitted the claim referred to it.

2. The subject matter of the claim shall be determined by the claims made by the respective parties. When it is clear in the details of the claim figured out in submissions and pleadings of the plaintiffs that it was intending to request the Court to take interim measures, the title of submission is not the sole to be considered..

3. The Court that annuls the appealed judgment shall not hear it on merit; rather, it should be heard by the competent court to hear the case at first instance level in case the parties intend to pursue the proceedings. Therefore, the appealed case should be heard by the Commercial Court of Musanze.

Appeal has merit.

**Appealed case is quashed.
Court fees to the defendants.**

Statutes and statutory instruments referred to:

Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 4 and 172.

Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, article 11 and 23.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The parties made a contract with a clause stipulating that any related conflict shall be submitted to arbitration. In the case R.COM 0144/TC/MUS rendered by the Commercial Court of Musanze on 21 April 2014 the plaintiff filed a summary procedure as set in the subject matter. The Court rejected it because of lack of main suit by virtue of article 316 of Code of civil, commercial, labor and administrative Procedure.

[2] The Plaintiffs were not satisfied with the decision since they were convinced that the fact that the main suit was pending before arbitration was sufficient and in accordance with the arbitration law. They set out as an example of article 11 and 23 of the Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters.

[3] The legal issue to be analyzed in this case is whether the summary procedure attached to the main suit referred to arbitration shall be received by the Court that normally has jurisdiction to hear cases of such nature.

II. ANALYSIS OF LEGAL ISSUES

[4] The first instance court decided that the case it was filed, is a summary procedure normally heard following the special procedure related to such cases as provided for by the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.

[5] The plaintiffs argued that the claim they submitted to the court was intending to request it to take interim measures as provided for by articles 11 and 23 of the Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, even if the title of their submissions outlined that they were filing for an urgent claim.

[6] The court finds that the first instance Court considered only the title of plaintiffs' submissions indicating that they lodged an urgent claim and it ignored the content of their submissions and pleadings explaining that they filed a claim requesting the court to take interim measures as provided for by article 11 and 23 of the Law n° 005/2008 of 14/02/2008.

[7] The Court finds fact that the court that rendered the judgment in the first instance considered solely the title of the plaintiff's submission explaining that they filed an urgent claim and ignored its content and their pleadings, is inconsistent with article 4 of the Law n° 21/2012 of 14 June 2012 relating to the

civil, commercial, labour and administrative procedure providing that the subject matter of the claim shall be determined by the claims made by the respective parties. These claims shall be indicated in the plaintiff's and defendant's submissions.

[8] The court finds that it is not only the title of the written submissions that can be considered while its content and pleadings of the plaintiffs indicated that their claim was intending to request the court to take interim measures as provided for by the Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters.

[9] Articles 3 and 10 of the Law n° 005/2008 of 14/02/2008 above mentioned provide that “the court mentioned by the law is a competent court in the Judiciary of Rwanda”. The Court finds that the court which rendered the judgment at the first instance level should have admitted this claim by virtue of article 11 of the mentioned law providing that “One of the parties to arbitration may request the court, before or during arbitral proceedings, for an interim measure and of which the court may grant. Such a measure shall not be contrary to arbitration agreement”.

[10] The court finds without merit the statement made by Buhuru Célestin, the counsel for the defendants in appeal that interim measures fall under the competence of arbitration because pursuant to article 19 of the Law n° 005/2008 of 14/02/2008 above mentioned provides that arbitration may take such decisions at request of one of parties in arbitration.

[11] Considering the aforementioned reasons, the court finds that the decision taken in the appealed judgment R.COM

0144/TC/MUS rendered by the Commercial Court of Musanze on 21 April 2014 should be quashed.

[12] Pursuant to article 172 providing that the court which annuls the appealed judgment shall not hear it on merit, the court finds that the claim filed by the plaintiff in appeal, shall be admitted by the competent court to hear it on merit at the first instance, in case the plaintiff intends to continue the proceedings.

III. THE DECISION OF THE COURT

[13] The Commercial High Court :

[14] Admits the appeal of KZ NOIR (R) Ltd and finds it with merit;

[15] Decides that the claim of KZ NOIR (R) Ltd shall be heard by the Court which heard it at the first instance level;

[16] Decides that the appealed judgment R.COM 0144/TC/MUS rendered by the Commercial Court of Musanze on 21 April 2014 is quashed;

[17] Orders Chrysologue Kubwimana and Philippe Kubwimana to jointly pay the court fees.

SETRAPCO v. BARBARA A. STIEFEL FOUNDATION

[Rwanda SUPREME COURT – RCOMA 0153/12/CS (Kayitesi R., P.J., Rugabirwa and Mukandamage, J.) 04 April 2014]

Commercial procedure – Lack of the status by the defendant – The objection of lack of status by the defendant is of public order, it must be admitted and examined at any stage of proceedings– Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 142.

Commercial procedure – Suing of private corporations, non-governmental companies and associations with legal personality – The claim is inadmissible in case it is initiated against private corporations, non-governmental companies and associations with legal personality under representation of individuals without the legal status – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 31, 5°.

Facts: SETRAPCO Ltd entered into a construction contract with BARBARA A. STIEFEL FOUNDATION relating to students' hostels which had to be executed within 180 days at a price of 129,670,559 Rwf. Due to misunderstanding, SETRAPCO Ltd filed a case to the Commercial High Court requesting to be paid the balance of 29,908,359 Rwf plus various damages because it accomplished its duties. During the hearing, BARBARA A. STIEFEL FOUNDATION raised an objection of inadmissibility of the claim of SETRAPCO stating

that the contract on which SETRAPCO based its request of damages has been quashed by the judgment RCOM 0210/11/HCC rendered on 29 November 2011. The Court decided that the claim of SETRAPCO Ltd is inadmissible because it cannot request damages basing on the contract quashed by the judgment mentioned above.

SETRAPCO Ltd appealed to the Supreme Court but at the beginning of the hearing, BARBARA A. STIEFEL FOUNDATION raised an objection of inadmissibility of the claim of SETRAPCO ltd because it was sued under representation by Rwamuranga Steven and Penny Ensley while they have legal status to represent it before the Courts, but rather, the legal status is vested with Barbara A. Stiefel.

SETRAPCO Ltd states that the objection has no merit because BARBARA A. STIEFEL FOUNDATION did not raise it in its defense submission and in the course of preliminary hearing.

Held: 1. The ground for inadmissibility of the claim may be raised by a party or the Court on its own motion in case it is of public order.

2. The claim is inadmissible in case it is initiated against private corporations, non-governmental companies and associations with legal personality under representation of individuals without the legal status. The claim of SETRAPCO Ltd is not admissible since it sued BARBARA A. STIEFEL FOUNDATION under representation of Penny Ensley and Stephen Rwamurangwa while they have no legal status to represent it before the courts.

**Objection of lack of status of the defendant sustained.
Appeal rejected.
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, articles 31, 5° and 142.

No case referred to.

Authors cited:

S. Guinchard, *Droit et Pratique de la Procédure Civile*, 5^e Edition, Dalloz, Paris, 2006-2007, p. 22.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 19 August 2010, BARBARA A. STIEFEL FOUNDATION represented by Barbara A. Stiefel entered into construction contract of students' hostels of Kayonza Modern Secondary School with SETRAPCO Ltd. The school is located in Kayonza District, Eastern Province, and parties agreed the completion period to be 180 days at the price of 129,670,559 Rwf.

[2] Later on, SETRAPCO Ltd filed a case against Barbara A. Stiefel Foundation to the Commercial High Court and the claim was registered under RCOM 0291/11/HCC. The appellant was requesting the balance of 29,908,359 Rwf in addition to

various damages because it executed the construction of the building above mentioned.

[3] During the hearing before the Commercial High Court, the counsel for BARBARA A. STIEFEL FOUNDATION raised an objection of inadmissibility of the claim of SETRAPCO Ltd because the contract of 19 August 2010 on which it bases the damages has been quashed by the judgment RCOM 0210/11/HCC rendered by the same Court on 29 November 2011. The Court decided that the claim of SETRAPCO Ltd is inadmissible because it cannot request damages basing on the contract quashed by the judgment RCOM 0210/11/HCC it appealed to the Supreme Court.

[4] SETRAPCO Ltd appealed to the Supreme Court and the claim was registered under RCOMA 0153/12/CS which was jointed to the case RCOMA 0010/12/CS as they were related.

[5] On 31 January 2014, the Supreme Court rendered the judgment RCOMA 0010/12/CS - RCOMA 0153/12/CS in which it quashed the judgement RCOM 0210/11/HCC rendered by the Commercial High Court on 29 November 2011 because Barbara A. Stiefel has personally filed a case for annulment of the contract mentioned above while she would have done so on behalf of BARBARA A. STIEFEL FOUNDATION. Moreover, the court postponed the hearing of the case RCOMA 0153/12/CS between BARBARA A. STIEFEL FOUNDATION and SETRAPCO LTD on 18 March 2014.

[6] On that very day, the case was heard in public, SETRAPCO Ltd represented by Ritararenga Didas, its Managing Director, assisted by the counsel Ngirumpetse JMV

while BARBARA A. STIEFEL FOUNDATION was represented by the counsel Niyondora Nsengiyumva.

[7] At the beginning of the hearing, the representative of BARBARA A. STIEFEL FOUNDATION raised an objection relating to inadmissibility of appeal of SETRAPCO Ltd because it sued BARBARA A. STIEFEL FOUNDATION under representation by Rwamurangwa Steven and Penny Ensley while they do not have the legal status to represent it before the courts, but rather, the status is vested with Barbara A. Stiefel. He added that SETRAPCO Ltd immediately sued it before the Commercial High Court while article 13 of the contract they concluded provides that they shall seize courts only if the mediation process fails.

[8] Concerning the hearing on merit, SETRAPCO Ltd requests BARBARA A. STIEFEL FOUNDATION to pay the balance of 29,908,359 Rwf in addition to various damages and interests because it executed the construction of the school above mentioned. SETRAPCO Ltd keeps stating that it may also be paid by Kayonza District since it is the beneficiary. BARBARA A. STIEFEL FOUNDATION states that it cannot pay those damages to SETRAPCO Ltd because it did not comply with the contract they concluded; rather it is SETRAPCO Ltd which should pay damages requested in its cross appeal submissions.

II. ANALYSIS OF LEGAL ISSUES

The objection of inadmissibility of appeal of SETRAPCO Ltd resulting from filing a case against a wrong party (lack of status of defendants).

[9] The counsel for Barbara A. Stiefel Foundation states that the appeal of SETRAPCO Ltd could be inadmissible because it filed a case against BARBARA A. STIEFEL FOUNDATION under representation by Rwamurangwa Steven and Penny Ensley as proved by written submissions in first instance while they do not have the legal status to represent it before the Courts. He added that SETRAPCO Ltd should have filed a case against BARBARA A. STIEFEL FOUNDATION represented by Barbara A. Stiefel since she is the one vested with the legal status to represent it as decided by the Supreme Court in the judgment RCOMA 0010/12/CS - RCOMA 0153/12/CS rendered on 31 January 2014. Therefore, he added that its appeal does not meet the requirements set out by article 2 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, for its admissibility.

[10] He further states that the fact that SETRAPCO Ltd did not sue BARBARA A. STIEFEL FOUNDATION under legal representatives as provided for by the law, implies it was summoned in violation of the provisions of article 31 5° of the law n° 21/2012 of 14/06/2012 referred to above which provides that private corporations, non-governmental companies and associations with legal personality are summoned in the name of their legal representative.

[11] He argues that BARBARA A. STIEFEL FOUNDATION has raised the objection before the Commercial High Court, but the latter did not examine it as it did not admit the claim of SETRAPCO Ltd since the court found that it should have not filed a claim while the contract was annulled by the judgment RCOM 0210/11/HCC. Therefore, he requests the court to analyse the objection and sustain it.

[12] The counsel for SETRAPCO Ltd states that the objection has no merit because BARBARA A. STIEFEL FOUNDATION did not mention it in its defence submissions of 15 March 2013 and raise it in the preliminary hearing of 28 March 2013.

[13] Furthermore, he states that SETRAPCO Ltd legally sued BARBARA A. STIEFEL FOUNDATION because Rwamurangwa Steven and Penny Ensley signed the construction contract of 19 August 2010, and that Barbara A. Stiefel vested them with the power of attorney to represent BARBARA A. STIEFEL FOUNDATION considering her letter of 19 August 2010.

THE VIEW OF THE COURT

Concerning the admissibility of the objection.

[14] Article 142 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that the request for inadmissibility of a claim may be made by a party or court at its own motion. Request for inadmissibility of a claim shall be raised by the court on its own initiative if its reasons are of the nature of public law and order such as exceeding the time limit within which to appeal or lack of status, capacity or interest to sue.

[15] Even if this objection of lack of legal status of the defendant was not examined at the first instance, the Court finds that it is of public order which must be examined at any stage of proceedings. Therefore, the objection raised must be admitted and examined.

Concerning the merit of the objection

[16] Article 31, 5° of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that legal representatives are summoned in the name of the private corporations, non-governmental companies and associations with legal personality they represent.

[17] The Law Scholars including Serge Guinchard state that for the claim to be admitted, both the plaintiff and the defendant must have status; otherwise the claim cannot be admitted¹ .

[18] The plaintiff's submissions of 28 November 2011 before the Commercial High Court indicates that SETRAPCO Ltd sued BARBARA A. STIEFEL FOUNDATION in the name of its legal representatives who are Penny Ensley and Stephen Rwamurangwa, requesting to be paid the balance of 29,908,359 Rwf which it did not pay after the completion of the construction mentioned above as well as various damages.

[19] The Court finds that the evidence in the case file including the construction contract of 19 August 2010 concluded between BARBARA A. STIEFEL FOUNDATION and SETRAPCO Ltd, the letter of 16 August 2011 that Barbara A. Stiefel wrote to SETRAPCO Ltd requesting it to receive the payment of 4,385,495Rwf equivalent to the works carried out as provided for in the contract, the letter of 26 July 2011 that

¹ “La qualité est une condition d’existence de l’action, exigée tant en demandant qu’en défense. Le défaut de qualité donne lieu à une fin de non-recevoir”, par Serge Guinchard, *Droit et Pratique de la Procédure Civile*, 5 ème Edition, Dalloz, Paris, 2006-2007, p. 22.

Barbara A. Stiefel wrote to Ritararenga Didas; the legal representative of SETRAPCO Ltd notifying him that not all works as agreed were completed but a part of them which they were seeking to clear the payment. Finally, the letter of 23 August 2011 of Barbara A. Stiefel wrote to SETRAPCO Ltd notifying it that its refusal to accept the payment of 4,385,495 Rwf would then lead to the meeting aiming at amicable settlement, failure of which SETRAPCO Ltd would refer the case to the courts as provided for by the contract they concluded; therefore, it implies that Barbara A. Stiefel is the legal representative of BARBARA A. STIEFEL FOUNDATION in Rwanda because she regularly signed in that capacity.

[20] The Court finds with no basis the statement made by made SETRAPCO that Penny Ensley and Stephen Rwamurangwa had the power of attorney conferred by Barbara A. Stiefel of representing BARBARA A. STIEFEL FOUNDATION before courts, because the document of 19 August 2010 indicates that Barbara A. Stiefel has vested them with the power to approve the works done and related invoices and before the payment.

[21] Basing on laws and explanations provided above, the Court finds that the appeal of SETRAPCO is inadmissible because it sued BARBARA A. STIEFEL FOUNDATION represented by Penny Ensley and Stephen Rwamurangwa while they do not have the legal status to represent it before the courts.

III. THE DECISION OF THE COURT

[22] Admits the objection of lack of status of the defendant raised by BARBARA A. STIEFEL FOUNDATION;

[23] Decides that it has merit;

[24] Decides that the appeal filed by SETRAPCO Ltd against the judgment RCOM 0291/11/HCC is inadmissible;

[25] Orders SETRAPCO Ltd to pay 35,250 Rwf of court fees within eight day, otherwise it shall be deducted from its property by the government coercion.

CRIMINAL CASE

PROSECUTION v. MWIZERWA

[Rwanda HIGH COURT – RPA0921/13/HC/KIG (Bukuba P.J.)
7 March, 2014]

Criminal Procedure – Time limit of the appeal – When the date of verdict delivery is postponed without informing the party of the other date, the time limit of his/her appeal will be the time of notification of the decision of the court instead of that of verdict delivery – Law n°30/2013 of 24/5/2013 relating to criminal procedure, article 176 and 177.

Criminal law – Mitigating circumstances considered by the previous court – The fact that the request of the appellant has been considered in the previous court without any challenge about how it was done, is the ground to uphold the decision.

Facts: Mwizerwa was charged of embezzlement, forgery and use of forged documents in the Intermediate Court of Nyarugenge. In the Judgment rendered on 10 January 2012, he was convicted of the offences and sentenced to four years of imprisonment. He appealed to the High Court on 6 August 2012.

During the hearing, the prosecution requested for inadmissibility of Mwizerwa's appeal as it was submitted after the time limit of the appeal. Mwizerwa argues that, he appeared on the date of his verdict delivery but it did not take place and he was not informed of the date of adjournment. He added that he knew the decision when they brought him the copy of the judgment at the prison. He further challenges that he was sentenced to the heavy penalties while he pleaded guilty and

was the first offender. He added that his plan to commit the offence was not fulfilled and therefore requests for the penalty reduction.

Held: 1. If at the date of the delivery of the judgment, the action did not happen and no statement in the file indicating what was done in lieu of its delivery, and there is no other evidence that the appellant was present to be notified of the postponed date and there exists no other evidence to prove that he was notified of the court decision, the reference date for computation of the time limit of appeal is the day that the appellant states to have been notified of the decision. The fact that the appellant was notified of the court's decision on 8 July 2012 and appealed on 6 August 2012 indicates that the time period of one month provided for by the law was not expired. Therefore, the request of the prosecution as to reject the appeal due to the expiry of the time of appeal is groundless

2. The fact that the request of the appellant has been considered in the previous court and the appellant does challenge how it was done, is the ground for upholding the previous decision in the appellate court.

**Appeal admit but without merit.
Appealed judgment upheld.**

Statutes and statutory instruments referred to:

Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure, articles 176 and 177.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case commenced in the Intermediate Court of Nyarugenge where the prosecution charged Mwizerwa Etienne the offence of embezzlement, counterfeit and use of counterfeited documents. In the judgment rendered on 10 January 2012, the court convicted him and sentenced him with four (4) years of imprisonment. Mwizerwa Etienne was not satisfied with this decision and appealed to the Supreme Court on 6 August, 2012.

[2] On hearing day in the appellate level, the prosecution stated that Mwizerwa Etienne appealed after the time limit for filing an appeal provided by the law had expired and requested the court not to admit it, while Mwizerwa Etienne argued that he came on the day he was informed that the pronouncement of the verdict would take place, but it did not and he was not even told the day on which it had been adjourned to, to the extent that he came to know the day on which it was pronounced when he was brought the copy of the judgment at the prison.

[3] Mwizerwa Etienne further explained that he criticize the fact that he was given harsh penalties when moreover he pleaded guilty and it was his first time to commit an offence and also that he did not accomplish his intention of committing the offence. Therefore, he requests for penalty reduction and he returns in the Rwandan society because he thinks that the three years he has spent in the prison has rehabilitated him.

[4] The prosecution argued that this ground of appeal is baseless because he was charged with two offences and the prosecution requested for him a sentence of 16 years of imprisonment but the court sentenced him to 4 years of imprisonment , thus it is of the view that the appealed decision should be sustained.

[5] The legal issues to be analyzed are to know whether Mwizerwa Etienne appealed after the time limit for filing an appeal had expired so that his appeal is inadmissible as the prosecution pleads and whether he can benefit the penalty reduction on the appellate level.

II. ANALYSIS OF THE LEGAL ISSUES

A. Concerning the period of appeal

[6] The judgment which Mwizerwa Etienne is appealing was rendered on 10 January, 2012 as indicated on the copy of the judgment on mark 51, he appealed on 6 August, 2012 which is the basis of the prosecution 's argument that he appealed after the time limit of appeal as provided for by the law had already expired. On the other hand, Mwizerwa Etienne adduce that he appealed within the time limit provided for by the law ,for he appealed after receiving the copy of the judgment, as for the date of pronouncing the verdict he adduces that he went to the court and found that the Judge had fallen sick and he was not informed the day on which the pronouncement of the verdict was adjourned to and the copy of the judgment was brought to him in prison on 18 July 2012 which is the basis of his appeal on 6 August 2012.

[7] The court finds that article 176 of the law n° 30/2013 of 24/5/2013 regulating the code of criminal procedure which provides that “An appeal must be filed within a period of one (1) month from the pronouncement of the judgment with respect to a party that was present or represented at the pronouncement of the judgment” while article 177 of that law provides in its paragraph 5 that “If the appellant is in prison, he/she may file the appeal by writing a letter to the court registrar through the prison director. The prison director shall sign on the letter by noting on it the date of receipt which shall be deemed the date of appeal. The prison director shall immediately submit the appeal to the court expected to hear the appeal”.

[8] It finds that the copy of appeal of Mwizerwa Etienne was signed by the administration of the prison on 6 August, 2012 while as mentioned above, the appealed judgment was pronounced on 10 January, 2014. From this perspective, basing on these dates, the time limit of appeal of one month had expired. However, it is clear that the hearing of this case in the first instance on 9 November 2011, made a decision to pronounce this case on 8 December, 2011 as it is demonstrated by that order which is contained in the file on mark 45. On that date, the verdict was not pronounced and there is no statement in the case file to indicate what was done on that date instead of pronouncement moreover it is the only evidence to prove to the court that the appellant was present for him to know the day on which the pronouncement have been adjourned and it doesn't find any other evidence proving that those rulings were communicated to him while the appellant, in his letter of appeal, states that those rulings were communicated to him on 18 July 2012. Therefore, this is the date of reference in determining the period of appeal and that's why it is clear that from that date

up to 6 August 2012, the period of one month provided by the law had not yet expired. From this perspective, the request of the prosecution of not admitting this claim due to the time limit of appeal is not valid.

B. Concerning the penalty reduction

[9] Mwizerwa Etienne further explained that he was given harsh penalties while he pleaded guilty and also it was the first time he committed an offence and he did not achieve his criminal objective, therefore he prays for the penalty reduction since the three years he spent in prison was enough for being corrected and therefore requests for penalty reduction and go back in Rwandan society.

[10] The prosecution states that the ground of appeal is not valid since he was charged with two offences and requested for him to be sentenced to 16 years of imprisonment but the court sentenced him to only four (4) years of imprisonment, therefore the appealed decision should not be overruled.

[11] After its analysis, this Court finds that in first instance Mwizerwa Etienne was charged of the offences of embezzlement, counterfeit and use of counterfeited documents which constitute the ideal concurrence of offences provided for in article 93 of the penal code which was into force in Rwanda at that time of the judgement, it sentenced him with the penalty provided for in article 220 of that law since it found that it was the heaviest one but also while analyzing the pleadings of Mwizerwa Etienne who pleaded guilty, committed the offence for the first time, the Court considered that as mitigating circumstances and reduced the penalties, basing on the provisions of article 83 of that law.

[12] Considering what has been explained above, the court finds that the requests of Mwizerwa have been awarded to him in the first instance and he does not challenge the way it was conducted in that instance, the reason why that decision is sustained.

III. DECISION OF THE COURT

[13] Admits the appeal of Mwizerwa Etienne but after its analysis, it finds that it is without merit.

[14] Rules that the appealed judgment is sustained.

PROSECUTION v. NSHIMIYIMANA

[Rwanda SUPREME COURT – RPAA0034/10/CS (Mutashya, P.J., Kanyange and Hitiyaremye, J.) 8 November 2013]

Criminal procedure – Evidence beyond any reasonable doubt – When there exists no reliable evidence proving beyond reasonable doubt that the accused committed the offence, he/she shall be acquitted – Law n°13/203 of 24/05/ 2013 relating to the Code of criminal procedure, article165.

Evidence law – Testimony – When eye witnesses’ testimonies contradict about what they saw at the same period of time, their testimonies should not constitute evidence beyond any reasonable doubt to convict the accused – Law n° 15/2004 of 12/06/ 2004, relating to evidence and its production, articles 62 and 65.

Facts: The accused was charged with the child defilement committed against a one and a half year old child. The charges are based on witnesses’ testimonies and a medical report which provided evidence of excessive redness around the victim’s vaginal orifice. The Intermediate Court of Muhanga found him guilty, sentenced him to 15 years of imprisonment, and fined him one hundred thousand Rwandan francs (100,000 Rwf). The accused appealed to the High Court, chamber of Nyanza, which also sustained the appealed judgment.

The accused appealed to the Supreme Court, alleging that the Court convicted him based on the eye witnesses’ testimonies which indicated that he spent the day with the child while none of them saw him committing the crime, and the medical report

proving that the child was actually sexually abused which could not link the accused to that abuse.

The Prosecutor argued that the Court relied on the eye witnesses' testimonies, because they testified as to their knowledge. He added that the medical certificate does not cause any doubt, since the physician demonstrated what he found on the child's sex especially that the Court relied on other evidence.

Held: 1. When eye witnesses' testimonies contradict on what is observed at the same period of time, the testimonies should not be considered to have proved beyond any reasonable doubt that the accused is guilty, especially that none of the witnesses actually saw the accused committing the crime or at least heard about it from a person who has witnessed the crime at the scene.

2. In criminal cases, any doubt benefits the accused. If there is no reliable evidence proving beyond reasonable doubt that the accused committed the offence, she/he is acquitted. The court allows an appeal on merit because of doubt created by the contradiction in the testimonies of the respondent's witness.

**Appeal granted.
Conviction for the child defilement quashed.
Immediate release of the appellant ordered.
Court fees to the public treasury.**

Statutes and statutory instruments referred to:

Law n°13/203 of 24/5/ 2013 relating to the Code of criminal procedure, article 165.

Law n° 15/2004 of 12/6/2004 relating to evidence and its production, articles 62, 65 and 98.

No case referred to.

Authors cited:

H. Bosly et D. Vandermeersch, *Droit de la procédure pénale*, 4^e édition, p.1316, §5.

Judgment

BRIEF BACKGROUND OF THE CASE.

[1] On 20 May 2003, a one and a half year old girl named N.B walked to Gatete's home where Nshimiyimana was employed. When her mother went to seek for the child, Nshimiyimana brought her sleeping in his arms, and she carried her on her back. U.F, the mother of the child, says that in the evening, when she was giving her a bath, the child cried when she touched her genitals. She observed and noticed a small wound and sperms inside. She immediately suspected that she was sexually abused by Nshimiyimana Samuel and reported the case to the police station. Investigations were carried out and the case was filed to the Intermediate Court of Muhanga.

[2] The Intermediate Court of Muhanga found the accused guilty. A verdict was rendered on 3 October 2008, sentencing him to fifteen years (15) of imprisonment and fine of one hundred thousand Rwandan francs (100,000 Rwf).

[3] The court considered the fact that the accused acknowledged that the child spent the day with him, as confirmed by the witnesses and the medical report which provided the evidence that the child's genital were damaged.

[4] Unsatisfied by the decision, the accused appealed to the High Court, chamber of Nyanza, where the appealed judgment was sustained. In deciding the case, the court relied on the testimonies of the prosecution's witnesses and on the medical report which proved that the child's genital was damaged.

[5] Nshimiyimana Samuel appealed to the Supreme Court, alleging that the Court wrongfully convicted him. He explained that the court based its decision on witnesses' testimonies which indicated that he spent the day with the victim, although none of them actually saw him committing the offence and the medical report proving that the child was indeed damaged but which cannot link the accused to that abuse.

[6] The public hearing took place on 9 October 2013 and both parties were present. Nshimiyimana Samuel was assisted by counsel Olivier Mukwende and the prosecution was represented by Béatrice Ntawangundi, the National Prosecutor.

II. ANALYSIS OF LEGAL ISSUE.

Whether the evidence considered by the High Court were beyond any reasonable doubt to convict Nshimiyimana Samuel.

[7] Nshimiyimana Samuel argues that he appealed because the court convicted him basing on the testimonies of the child's mother and her daughter who do not testify that they saw him

committing the crime, apart from saying that they saw him holding the child in his arms. He adds that none of other witnesses interrogated, actually accused him apart from repeating what the child's mother told them. He argues that U.F falsely accused him because of conflict she had with his employer. He adds that she might have interest in falsely incriminating him because sometimes he used to lend her money he retained from the sale of clothes for his employer, which she hardly refund him and sometimes this led them to conflicts.

[8] Regarding the medical report, Nshimiyimana argues that although it proves that the victim's genital was swollen, the child defilement could not be the only cause of the swelling especially that the physician was doubtful of the fact that the victim was sexually abused. The physician attested that the victim's genital had sore which caused her a lot of pain. Therefore, if the child was sexually abused, she would have cried and Gatete who was sleeping in the same place at that time, should have heard her.

[9] Mukwende, Nshimiyimana's counsel, states that he does not understand why U.F did not immediately take the victim to the physician, instead of waiting for two days, when she noticed that she was sexually abused.

[10] The Prosecutor states that the court relied on the witnesses' testimonies, because they testified as to their knowledge. He further argued that based on article 65 of the Law n^o 15/2004 of 12/06/2004 relating to evidence and its production; only the court can assess the relevance, pertinence and admissibility or rejection of testimonial evidence.

[11] The Prosecutor argues that there is no doubt on the medical report because the physician demonstrated what he found on the child's sex. Moreover, the court relied on other evidence.

THE VIEW OF THE COURT

[12] In convicting Nshimiyimana Samuel, the High Court considered the witnesses' testimonies of the victim's mother and U.G her sister. The Court also relied on the medical report proving that the child sex had signs of the child defilement.

[13] With regards to the testimonial evidence, article 62 of the Law n° 15/2004 of 12/06/ 2004 relating to evidence and its production, attests that testimonial evidence includes the statements made in court by an individual regarding what he or she personally saw or heard that is relevant to the object of trial. Article 65 of that law stipulates that only the court can assess the relevance, pertinence and admissibility or rejection of testimonial evidence. The court shall not be influenced by the number of witnesses; it shall mainly consider their knowledge of facts and the objectivity and sincerity of their testimonies.

[14] In this case, the court finds that among the witnesses interrogated, those accusing Nshimiyimana Samuel include U.F, the victim's mother. She says that on the day the crime was committed; she asked where her daughter was and returned to the house after being told that she was with Nshimiyimana Samuel. She adds that after she asked Samuel to bring her daughter, he brought her sleeping in his hands. While she was giving a bath to the child, the latter cried when she touched her genital. She observed and saw small wounds and sperms on the

child's genitals and immediately went to inform Samuel's employer, Gatete. Another witness interrogated is U.G, the other daughter of U.F; who confirms that they looked for the child everywhere but could not find her. When her mother started cursing her, they saw Samuel holding her in his arms from Gatete's home. She pursued stating that it was evening when her mother noticed that her daughter was sexually abused and immediately went to inform Samuel's employer. This is contrary to the statement of her mother, that she asked Samuel to bring her child (as she was aware that the victim was with him).

[15] The Court finds that the contradicting testimonies do not constitute evidence, beyond any reasonable doubt, to make Nshimiyimana Samuel guilty. This is especially true considering that neither U.G nor U.F confirm that they saw him committing the offence or heard it from those who witnessed it. Moreover, Gatete, Nshimiyimana Samuel's employer states that he was at home and did not see or hear anything.

[16] The Court also finds that in the testimonies of Gatete and his wife Uwizeye, they state that U.F came to their home in the morning, saying that her daughter was sexually abused by their employee. However, during the interrogation, U.F stated that she went there immediately in that same evening, after noticing that her daughter has been abused. The contradiction of U.F on the time creates doubt on what abused her.

[17] The medical report shows an exaggerated redness of the vulva around the vaginal orifice. The Court finds that the exaggerated redness does not prove that it was caused by sexual violence or that Nshimiyimana is guilty. This is especially true that if he had sexually abused the child as grave as proved by

the physician, the child would have cried and her mother and Gatete who were in the vicinity could have heard her.

[18] For this ground, article 98 of the Law n° 15/2004 of 12/06/ 2004 relating to evidence and its production, which provides that the court is not bound to follow the opinion of experts if it is contrary to their conviction, the Court cannot rely on the medical report to confirm that what was found on the child's vagina was actually caused by Nshimiyimana Samuel.

[19] The court also finds that there is uncertainty in determining whether actually N.B had that redness of the vulva for two days, bearing in mind that her parent stated that the offence was committed on 20 May 2003 ,but took the victim to the Doctor on 22 May 2003 and that is when the medical report was established. The Court wonders why the victim's parent took that long to take her child to the hospital while her child was in agony.

[20] Article 165 of the Law n°13/2013 of 24 May 2013 relating to the code of criminal procedure provides that the benefit of doubt must be given in favour of the accused. If the proceedings are conducted as completely as possible, but do not enable judges to find reliable evidence proving beyond reasonable doubt that the accused committed the offence, the judges shall order his/her acquittal. In this case, based on Nshimiyimana's defence, all evidence raise doubt, therefore, he must be acquitted.

[21] Doctrines on criminal procedure also state that none can be convicted at the end of the trial, unless the prosecution has proved beyond any reasonable doubt of his guilty¹ .

III. THE DECISION OF THE COURT

[22] Decides that Nshimiyimana Samuel's appeal has merit.

[23] Acquits Nshimiyimana Samuel of the crime he was charged of because of doubt.

[24] Overrules Judgment RPA 0219/08/HC/NYA rendered by the High Court, Chamber of Nyanza.

[25] Orders immediate release of the appellant.

[26] Orders the court fees to be charged to the public purse.

¹ Henry Bosly et Damien Vandermeersch, *Droit de la procédure pénale*, 4^e édition, p. 1316, § 5.

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