

MUKAMUSONI v. MUKAGASANA ET.AL

[Rwanda High Court – RCA0087/12/HC/KIG (Murekatete, P.J.)
May 10, 2013]

Family law – Succession – Custom – Right of woman to inherit or to be inherited – The fact that the Rwandan custom would not grant women/girls the right to inherit or to be inherited by their family members has negative and serious impact on the principle of the equality of all persons before the law.

Family law – Succession – The claims relating to succession which began before the promulgation of the succession law – To resolve the problems relating to succession which began before the promulgation of the law governing it, the jurisprudences which grant the right to succeed or to be succeeded for a woman or a girl should always be applied by the courts, for men and women to have equal right to succession.

Fact: Mukagasana and Sarushi were involved in a lawsuit concerning succession of estate left by Kabera and his spouse Usabuwera who passed away in 1994 without leaving a child at the High Court; unfortunately, Sarushi died before the adjudication of the case. In the judgment rendered, that Court held that basing on custom, the relatives of the husband were the only ones entitled to inheritance, therefore Mukagasana should be the one to inherit estate.

After realising that Mukagasana was about to sell houses in litigation, Mukamusoni lodged a third party opposition against the judgment praying for its reversal because she has interest,

since she is a daughter of Sarushi, thus, she has the right to inherit Usabuwera in place of his late father, especially that the judgment was adjudicated without summoning Sarushi's heirs.

Mukamusoni claims that the irregularities which prejudice her interests in this judgment is that in its ruling, the court based its decision on custom whereas the Constitution of the Republic of Rwanda which was into force from 1962 up to the current one as well as international conventions ratified by Rwanda provide for the principle of equality of all human beings before the law without any form of discrimination.

Mukamusoni continues stating that the custom may be based upon to adjudicate cases only if it is not contrary to the public order and good morals or when it is not inconsistent with the Constitution, therefore, stating that the descendants from husband's family are the only ones entitled to inheritance was to be applied it would be contrary to those principles because a custom which discriminates people is unacceptable.

In her defence, Mukagasana argues that by the time she filed a succession claim of her brother's estate, the law of 1999 relating to succession was not yet in force and the judgment which is being opposed by a third party ruled that she is the sole heir, thus, that judgement should be sustained because it complies with the law.

Mukarurinda states that even though she is involved in this case as respondent but she also has interest because she is a mother of Usabuwera. Therefore, she finds that Mukagasana was given big portion than what she was supposed to get, due to the judge's motivations that there was no legal provision governing that matter while there were International conventions on the rights of men and women, those treaties should be relied on.

Held: 1. The fact that the Rwandan custom would not grant women/girls the right to inherit or to be inherited by their family members has negative and serious impact on the principle of the equality of all persons before the law.

2. To resolve the problems relating to succession which began before the promulgation of the law governing it, the jurisprudences which grant the right to succeed or to be succeeded for a woman or a girl should always be applied by the courts, so that men and women to have equal right to succession.

3. Damages are not awarded in case the claimant does not prove the prejudice.

**The third party opposition has merit;
With the Court fees to Mukagasana.**

Statutes and statutory instruments referred to:

The constitution of republic of Rwanda of 04/06/2003 as it is amended to date, article 16.

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 6.

Law N°18/2004 of 20/06/2004 relating to civil, commercial, labour and administrative procedure, article 6.

Law N°22/99 of 12/11/1999 supplement book one of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, articles 49, 95.

Cases referred to:

Mukamusoni and Buyitare, RA0967/13.03/84 rendered on 10 April 1985 by cassation Court of Rwanda.

RC28.691/98 rendered on 22 September 1998 by First Instance Court of Kigali.

RC28.846/98 rendered on 2 November 1998 by the First Instance Court of Kigali.

RC31.549/99 rendered on 16 February 2000 by the First instance Court of Kigali.

RC28.867/98 rendered on 15 December 1998 by the First instance Court of Kigali.

RC28691/98 rendered on 22 September 1999 by the First instance Court of Kigali.

RCA8689/132 rendered on 29 October 1996 by the Court of appeal of Nyabisindu.

Authors Cited:

Sr Karomba F, *Des Régimes matrimoniaux, libéralités et Succession*, Notes de cours, UNR, Faculté de Droit, p.153.

S. Murererehe, *Analyse juridique de l'évolution des droits successoraux de la femme au Rwanda*, mémoire, Faculté de Droit, UNR., Butare, 2003, p.25.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On behalf of Mukamasoni Cathérine, Counsel Nzirabatinyi Fidèle argues that on April 24, 2009, this Court on the appellate level adjudicated the case RCA0162/06/HC/KIG whose subject matter related to the partition of the property left by Kabera Charles and his spouse Usabuwera Jeannette who

passed away in 1994 without leaving a child. Mukagasana Domitilla was claiming to inherit the part of her brother Kabera Charles while Sarushi requested to inherit the part of his daughter Usabuwera. Ncogoza voluntarily intervened requesting to be paid rents originating from the tenancy contract of houses located in Kicukiro which are part of the inheritance. Before the adjudication of the case, Sarushi died and his heirs including Mukamusoni Cathérine were not summoned to appear, and they came to know about it when Mukagasana started selling those houses, and this is the ground for her lodging a third party opposition to defend her interest.

[2] Counsel Nzirabatinyi argues that the concerned assets should not be exclusively appropriated by Mukagasana based on custom whilst the Constitution of 1962 as well as the current one provide for equality before the law and the law on succession provides that people who were legally married without specifying their matrimonial regime are presumed to be governed by the community of property regime. He adds that the custom should not have been relied on when it is inconsistent with the Constitution as well as the International Conventions which were ratified by Rwanda which all provide for equality before the law without any form of discrimination. He concludes that given the above; even the heirs of Usabuwera, including her sister Mukamusoni Catherine, are legally entitled to that property.

[3] Counsel for Mukarurinda, Mudakemwa Apolline, states that the law of succession which came in force in 1999 is not retroactive and not applicable to what happened in 1994 because at that time, succession was governed by custom, whereby the relatives of the husband were the only ones entitled to inherit.

The fact that there is no specific will left by the deceased means Mukamusoni is not eligible to inherit from her elder sister. She prayed court to uphold the judgment subject of the third party opposition and that the Court orders Mukamusoni to pay damages equivalent to 150,000Frw for vexatious lawsuits and 200,000Frw for counsel fees.

[4] Counsel Nsengimana Elie for Ncogoza, states that Ncogoza seeks confirmation of what he was awarded in the judgment RCA0162/06/HC/KIG. Whereas Counsel Hamri Dieudonné argues that his client Mukarurinda is the mother of Usabuwera Jeanette and therefore has an interest in the success of the opposition even though she is a respondent because her co-respondent Mukagasana has exclusively acquired the entire property. He furthermore states that he agrees with the submissions of Counsel Nzirabatinyi Fidèle.

[5] The legal issues to be analysed are to determine the merit of the grounds for third party opposition of the judgment RCA0162/06/HC/KIG and also the merit of the requested damages.

II. ANALYSIS OF THE LEGAL ISSUES

With regard to the basis of the third party opposition of the judgment RCA0162/06/HC/KIG

[6] Counsel Nzirabatinyi Fidèle states that Mukamusoni Cathérine has interest in the judgment for which she filed for third party opposition because she is the daughter of late Sarushi, and she has the right to inherit from Usabuwera in place of the deceased Sarushi. He further argues that the irregularities which prejudice her interests in that judgment is

that in its ruling the court based its decision on custom whereas the Constitution of the Republic of Rwanda from the time Rwanda got independence up to the current one, the Universal Declaration of Human Rights of 10 December 1948, the International Covenant on Civil and Political Rights of 19 December 1966 as well as African Charter on Human and Peoples Rights of 27 June 1981 provide for the equality of men and women and prohibits any form of discrimination. He added that although custom may also be based upon to adjudicate a case, it's only based upon when it is not inconsistent with the public order and good morals, or when it is not inconsistent with the Constitution (the preamble of the Constitution of the Republic of Rwanda of 04/06/2003), and that those conventions have a binding force as that of the law, and they are superior to custom, Rwanda committed itself to abide by them.

[7] He continues stating that both in the Constitution and those International Treaties, it is provided that any form of discrimination, including that one which is gender based is prohibited, and if the custom which provides that the male and his descendants are the only ones entitled to inherit were to be applied it would be contrary to those principles because a custom which treats people unequally is unacceptable. He further argues that in this case relating to the succession of two persons who jointly owned property and inheriting being a personal right, anyone deprived of it would have suffered injustice. Therefore he requests that the judgment, subject of third party opposition should be overturned for Usabuwera's share to be inherited in the same way as that of her husband Kabera Charles.

[8] Counsel Mudakemwa Apolline states that in 1995 Mukagasana filed a claim requesting to inherit her brother Kabera Charles's property and in the judgment RC23.350/95/R1 she was awarded those properties. He states that at that time the Law of 1999 relating to succession was not yet in existence. The judgment subject of third party opposition agrees with that earlier decision that Mukagasana is the only lawful heir. He argues that the said judgment should be the one to be followed because it complies with the law. As regards Ncogoza, Counsel argued that he should not claim for anything because he benefited from the tenancy agreement and there were some obligations he was mandated to carry out which he did not and which offset what he would be entitled to.

[9] Counsel Hamuri Dieudonne states that Mukarurinda is involved in this case as a mother of Usabuwera Jeanette and therefore has an interest. He argues that respondent Mukagasana Domitilla was given more than what she was supposed to get because the judge mistakenly relied on custom arguing that there was no legal provision relating to the matter while there was the International convention on people's rights (article 3 of International Covenant on Civil and Political Rights and article 16 of the Universal Declaration on human rights of 10 December 1948) which should have been relied on.

FINDINGS OF THE COURT

[10] The court finds that article 49 of the Law N°22/99 states that succession is an act by which the rights and obligations on the patrimony of the deceased are transferred to the heir. The succession starts at the death of the deceased and takes place at his/her domicile or residence. Article 95 of the same law

provides that the mentioned law comes into force on the date of its publication in the Official Gazette of the Republic of Rwanda. These provisions imply that the law cannot be relied upon in matters regarding the succession which begun before its publication in the Official Gazette in November 1999. This view concurs with the decision in the judgment which is being subjected to third party opposition as it is indicated in « Court Decision part 6 » as follows: “ The court finds that Sarushi had no right to inherit the share of his daughter Usabuwera Jeanette before the Law N°22/99 on succession came into force because there was no law bestowing on her such right given that at that time, it was custom, which provided that property was inheritable by only the relatives of the husband, which governed succession and, on the other hand, there was no special agreement between Kabera Charles and his wife Usabuwera Jeanette on how their property would be inherited in case they died without descendants”.

[11] Concerning the legal issue which was debated upon during the hearing as to whether the custom which deprived a woman of the right to succession which was in place before the enactment of the Law N°22/99 on matrimonial regimes was inconsistent with the Constitution, the court finds that it should not be examined in this case. This finding is on the ground that there is a special procedure to be followed for such constitutional challenges. What needs to be examined is whether there exist other legal provisions or general principles of law or case law which should have been relied upon for the determination of the issue of succession on the side of Usabuwera considering the hierarchy of norms provided for by Article 6 of Law N°18/2004 of 20/06/2004 relating to Civil, Commercial, Labour and Administrative Procedure which was

in force at the time of the hearing of the case for which intervention was filed. That law provides that “Judges shall decide cases by basing their decisions on the relevant law or, in the absence of such a law, on the rule they would have enacted, had they to do so, and guided by judicial precedents, customs and usages, general principles of law and written legal opinions”. This provision implies that it is not the custom which takes precedence in the absence of relevant law for a given matter but rather judicial precedents are given preference.

[12] Article 16 of the Constitution of the Republic of Rwanda of 04/06/2003 as amended to date provides that “All human beings are equal before the law. They shall enjoy, without any discrimination, equal protection of the law”. This principle is also reiterated in the Universal Declaration of Human Rights of 10/12/1948 as well as different international conventions ratified by Rwanda as mentioned in paragraph 6 of this judgment. Article 190 of the Constitution of Rwanda stipulates that “Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws (...)”. Even though this principle existed and was provided for by those conventions as discussed in the court below, this in itself is not what entitles a woman with the right to inheritance or to be inherited from in circumstances where the succession became open before the existence of the relevant law; rather, it is the interpretation of this principle by courts in different cases which triggered the evolution of the custom regarding the succession by women. For this reason, it is court decisions which should have been given weight to shape the direction on the right of succession claimed by Usabuwera’s relatives.

[13] Different legal scholars who wrote on customary succession in Rwanda until the coming into force of the positive law, concur that Rwandan customary law preventing women or female child as well as her relatives to inherit or to be inherited from, had grave repercussions on the principle of equality before the law and the principle that any form of discrimination, including that based on gender, was prohibited by the Constitution of the Republic of Rwanda since Rwanda gained its independence and as subsequently amended. The customary position is also inconsistent with the Universal Declaration of Human Rights of 10 December 1948 ratified by Rwanda as well as other International Conventions ratified by Rwanda promoting the principle of equality.

[14] Among the scholars, is a lecturer at the National University of Rwanda who in her course materials titled "*Régime Matrimoniaux, Liberalités et Successions*", supports the court decisions which were made during the years 1990 - 1999 granting female litigants the right to inherit and to be inherited from, based on that principle of equality where she states: "for successions opened before the publication of the law on Matrimonial Regimes, Liberalities and Succession, courts should not apply the law N°22/99, but should be inspired by the jurisprudence to which the judges referred, especially between the years 1990-1999, where the majority of the judges seized, on the basis of the equality principle mandated by all constitutions Rwanda has known since 1962 and the international conventions to which Rwanda is a party, granted inheritance rights, on equal terms, to both girls and boys."¹ This means that in handling issues relating to succession that took

¹Sr. KarombaF.,Des Régimes matrimoniaux, liberalités et succession, Notes de cours, U.N.R, Faculté de Droit, p.153, inédit.

place before the promulgation of the succession law of 1999, court decisions on similar issues should be followed and hence men and women should be entitled to succession with equal rights.

[15] In her Dissertation required for the fulfillment of university studies for the bachelor's degree, Murererehe S. emphasized that the custom excluding the females from succession has progressively changed due to decisions rendered by Courts where the courts explained general principles provided in domestic laws as well as international conventions ratified by Rwanda''(...) *Le droit des successions est resté longtemps soumis au régime du droit coutumier, lequel droit écartait la femme de la succession. Toutefois, le droit coutumier a évolué grace à l'interprétation que les juridictions donnaient aux principes généraux posés par le droit interne et les conventions internationales que le Rwanda a ratifiées*''.² ("The right to succession has long been subject to customary law, which excluded the woman from succession. However, customary law has evolved through the interpretation that the courts gave to the general principles of domestic law and international conventions that Rwanda has ratified"). She then gave examples of such judgments rendered in accordance with that principle as provided in the constitution that was in force then, such as judgment RCA2995/KIG rendered by the Court of Appeal of Kigali on 5/02/1971, where she says: "It is noted that an effort was made in case law because the decisions of the judges tended to recognize for the woman, the right of succession. Thus the Kigali Court of Appeal decided that the

²S.MUREREREHE, Analyse juridique de l'évolution des droits successoraux de la femme au Rwanda, mémoire, Faculté de Droit, U.N.R., Butare, 2003, p.25.

girl N. had the right to inherit the property left by her parents, and that her share must be equal to that of her brother. The court motivated this decision on the basis of Article 16 of the Rwandan Constitution, which promotes equality between children without gender distinction.³

[16] With regard to International Conventions emphasizing the principle of equality before the law without any discrimination mentioned in the previous paragraphs, which were ratified by Rwanda, Murererehe noted that they have binding force in Rwanda, and that it bestows to the women the right to inherit and to be inherited from on an equal basis with the men as indicated in various judgments such as RC28691/98 rendered by the Court of First Instance of Kigali on 22/09/1999, RCA8689/132 rendered by the Court of Appeal of Nyabisindu on 29/10/1996 (see that dissertation on page 27).

[17] It is in the above context that, pursuant to article 6 of the Law N°21/2012 of 14/06/2012, relating to the Civil, Commercial, Labour and Administrative Procedure which provides that in the absence of the law related to the subject matter judicial precedents are to be relied on the first rank in deciding cases, the court finds that in the determination of this case, it has to rely on other decisions rendered in matters of a similar nature such as RA0967/13.03/84 rendered by the Court of Cassation of Rwanda on 10 April 1985 between Mukamusoni and Buyitare whereby Mukamusoni requested for cassation of the judgment which ruled that she cannot inherit the land of her father because she is a girl. That court found merit in her arguments and held as follows:“The court finds merit in Mukamusoni’s contention because the court below had no legal

³Murererehe, as above, p.27.

basis for declaring that a female child cannot inherit the property of her father, given that the current constitution in its article 16 does not permit any form of gender based discrimination.” It should be understood that the above statement by the highest court set precedent for settling such disputes in a manner which is not inconsistent with the Constitution or international principles.

[18] This was also confirmed in other judgments, such as RC28.691/98 rendered on 22 September 1999 by the Court of First Instance of Kigali, RC28.846/98 rendered on 02 November 1998 by the Court of First Instance of Kigali, RC31.549/99 rendered by the Court of First Instance of Kigali on 16 February 2000 and RC28.867/98 rendered by the Court of First Instance of Kigali on 15 December 1998 (those cited judgments are found in the archives of the intermediate court of Nyarugenge, including those cited in paragraphs 13 and 14 of this judgment). In all those judgments the courts confirmed that a girl/woman has a right to succession on equal basis with that of a male, the decisions always taken by those courts on the basis of the principle which prohibits gender based discrimination.

[19] Those judicial precedents are therefore the ones to be relied on in the determination of this case, in deciding that Usabuwera’s relatives from her natal family have the right to inherit from her, as there is no reason as to why custom should have been applied whereas there are judicial precedents in cases of the same nature with this one which set the guidelines.

[20] The parties in this case agree on the fact that Kabera Charles and Usabuwera were legally married, before the Law N°99 came into force. With regard to the matrimonial regime, it was presumed that those married before the 1999 law and who

did not determine their matrimonial regime, were under the regime of community property. Therefore, Usabuwera should be inherited from, in the same way as her spouse is inherited from by his relatives because they did not leave children.

[21] This implies that family members of Kabera Charles the same as those of Usabuwera should inherit 50% of the whole property of late Kabera Charles and Usabuwera who died without leaving behind any children especially since Mukagasana Domitilla who wants to take over all the property for herself, does not prove that the deceased were under the regime of separation of property.

With regard to damages requested

[22] On behalf of respondent Mukagasana Domitilla, Counsel Ntamakemwa Apolline prays the Court to order Mukamusoni to pay his client 150,000Frw due to the fact that she was dragged into unnecessary law suits and 200,000Frw as the advocate fee.

[23] The Appellant on the other hand submits that she does not have to pay damages rather that the decision be set aside because Mukagasana should not exclusively enjoy the property.

[24] The Court finds that the prayer for damages by Mukagasana Domitilla lacks merit, because she does not show the prejudice she suffered for which she should be awarded damages, especially since the grounds for the third-party opposition of Mukamusoni have merit. The court finds no valid basis for awarding damages to Mukagasana Domitilla.

III. THE DECISION OF THE COURT

[25] The Court finds the third party opposition filed by Mukamusoni Catherine has merit;

[26] Decides that Usabuwera Jeannete's relatives from the family in which she was born, including Mukamusoni Catherine, have the right to inherit from her 50% and those relatives on the side of Kabera Charles, including Mukagasana Domitilla, 50% of the whole property of Kabera Charles and Usabuwera Jeanette;

[27] Decides that the judgment RCA0162/06/HC/KIG is set aside with regard to the grounds of the third-party opposition only;

[28] Orders Mukagasana Domitilla, Ncogoza Gerard and Mukarurinda Antoinette to jointly pay court fees equivalent to thirty thousand and eight hundred Rwandan francs (30,800Frw) and failure to do so, it will be taken out of their assets by public force;

[29] Reminds the parties that the judgment was not delivered on time as scheduled due to the reasons explained in the order adjourning delivery of judgment dated 19 April 2013.