

Re MUHOZA (PETITION FOR THE REPEAL OF A LEGAL PROVISION INCONSISTENT WITH THE CONSTITUTION)

[Rwanda SUPREME COURT – RS/INCONST/CIV 0001/13/CS (Kayitesi, P.J., Mutashya, Mukanyundo, Kayitesi R., Hatangimbabazi, Kanyange, Mukandamage, Rugabirwa and Munyangeri, J.) October 25, 2013]

Constitutional law – Unconstitutional legal provisions – Petition aiming at repealing paragraph 2 of article 176 of the Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure – When one of the spouses is a party to the case regarding their co-owned property, he/she represents his/her partner – Denying the right to third party opposition to the spouse of the person who has been party to the case regarding their co-owned property is not to deprive him/her from the right to property provided for by the Constitution – The Constitution of the Republic of Rwanda of June 4, 2003 as amended to date art.29 – Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 176.

Facts: Karekezi Augustin, the husband of Muhoza Consolée, filed a case in the Intermediate Court of Gasabo, alleging that his piece of land was unlawfully occupied and lost the case. Umuhoza Consolée filed for the third party opposition but requested the court to stay the proceedings so that she may first file a case to the Supreme Court requesting paragraph 2 of article 176 of the law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure to be repealed because it is inconsistent with article 29 of the Constitution.

In the claim filed to the Supreme Court, she explained that article 176 paragraph 1 of the Law n° 21/2012 of 14/06/2012 stipulates that persons who are allowed to make a third party opposition are those who have an interest in it but paragraph two of this article provides that the provisions of paragraph one shall not apply to the spouse of either party or their children when the subject matter is family property. This article is inconsistent with article 29 of the Rwandan Constitution which provides that every person has a right to private property, whether personal or owned in association with others. Therefore this article deprives the plaintiff's constitutional right to her husband's land.

Held: Paragraph 2 of article 176 of the law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure is not inconsistent with article 29 of the Constitution because when one of the spouses is a party to the case when the subject matter is the property he/she co-owns with his/her partner, he/she is representing him or her that he/she cannot file for third party opposition since it would be contradictory to the purpose of that remedy.

**Petition without merit.
With costs to the petitioner.**

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of June 4, 2003 as amended to date, article 29.

Law n°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, article 176.

Organic law n°08/2005 of 14/07/2005 determining the use and management of land in Rwanda, article 35-36.

No case referred to.

Doctrine referred to:

Droit et Pratique de la procédure civile, Sous la direction de Serge Guichard, Dalloz, cinquième édition 2006, p.1158, 1163.

Judgment

I. BRIEF BACKGROUND OF THE CASE

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

[2] Muhoza Consolée filed a third party opposition on the case her husband lost in Gasabo Intermediate Court. However she requested the Court to stay the proceedings to allow her to file a petition in the Supreme Court, requesting that article. 176(2) of the Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure be repealed

[3] Nizeyimana Léopold, Muhoza's counsel filed a petition to the Supreme Court in place of Muhoza Consolée requesting that article 176(2) of law n°21/2012 of 14/06/2012 mentioned above be repealed because it is inconsistent with the Rwandan Constitution as well as articles 35 and 36 of the Organic Law n° 08/2005 of 14/07/2005 determining the use and management of land in Rwanda.

[4] Muhoza Consolée's petition was examined in the hearing of 31st July 2013; represented by Nizeyimana Léopold, the counsel and the Ministry of Justice was requested to give the opinions, being represented by the State Attorney, Rubango Epimaque.

[5] Nizeyimana, the counsel, was given time and recalled that he filed the petition in the name of Muhoza Consolée. He also stated that he made a self-deprivation on a part of his claim which concerns articles 35 and 36 of organic law n° 08/2005 of 14/07/2005 determining the use and management of land in Rwanda because that law was abrogated. Thus paragraph 2 of article 176 of the law n°21/2012 of 14/06/2012 is the sole issue for examination and the Court should limit its examination accordingly.

[6] Rubango Epimaque, the State Attorney also presented the opinion of the Ministry of Justice regarding Muhoza Consolée's petition.

Concerning the admissibility of the claim and the jurisdiction of the Court:

[7] The documents contained in the case file indicate the subject matter, filing date, and the signature of Nizeyimana who filed the claim in the name of Muhoza Consolée. They

indicate also the grounds of the petition and the deposit of the court fees paid by Muhoza Consolée. The petitioner also submitted a copy of the official gazette of 16/07/2012 which contains articles of the law she requests to be repealed, so the requirement for article 54 of organic law n° 003/2012 of 13/06 /2012 determining organization, functioning and jurisdiction of the Supreme Court was fulfilled.

[8] Muhoza Consollée has an interest in this case because article she requests to be repealed is prejudicial her because it prevents her from filing a third party opposition against the case her husband lost, while the subject matter is family land to which she has right.

[9] Concerning the jurisdiction of the Supreme Court, article 53 of organic law n° 03/2012 of the Law mentioned above stipulates that “The Supreme Court shall have jurisdiction over petitions seeking to declare laws or treaties unconstitutional and it also hears petitions regarding the partial or complete repeal of Organic Law, Ordinary Law, or a Decree Law on account of non-conformity with the Constitution”. Therefore, the petition filed by Muhoza Consolée is in its jurisdiction.

II. ANALYSIS OF THE LEGAL ISSUE

1. Whether article 176 (2) of Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure is inconsistent with article 29 of the Constitution:

[10] Nizeyimana Léopold, the counsel argues that article 176(1) of Law n° 21/2012 of 14/06/2012 stated above stipulates that any person who was not party to a case but who has an interest in it may make a third party application to set aside a judgment which is prejudicial to his/her rights and if neither he/she nor the person he/she represents were called at the trial, but the second paragraph of this article does not give the right to the spouse of defendant to file a third party opposition; this is inconsistent with article 29 of the Constitution which provides that “every person has a right to private property, whether personal or owned an association with others.”

[11] He explains that an article of the Law cannot deprive Muhoza Consolée’s constitutional right because she has the right on the piece of land that her husband alienated without her consent. But article 176 paragraph 2 deprives her of the right to sue for her property in the Court because her spouse lost the case.

[12] Additionally, the family cannot be compared to a commercial company as the State Attorney adduces since it has no legal personality. Furthermore, since Karekezi pleaded and lost the case without the knowledge of his spouse, she must have another means to sue for the property to which she has right.

[13] Rubango Epimaque, the State Attorney states that paragraph 2 of article 176 of the Law n° 21/2012 of 14/06/2012 mentioned above is not inconsistent with article 29 of the Constitution because the property Muhoza Consolée claims is not her personal property but rather the family property which she co-owns with others. When the family has a representative and he pleaded in the family interest, it’s not inconsistent with the Constitution.

[14] He argues that article which is requested to be repealed gives the right to sue for the family property in court, but it provides that if it is sued for by the one who has the right to do

it, it is not necessary that the other family members one at a time may also sue for it because it was previously sued by the one who represented the family interest. He makes a comparison to the commercial company which has many shareholders and one legal representative. After the lawsuit which concerns the company's interest, takes place each one of the shareholders is precluded from filing a case on the previously litigated matter concerning their general interest.

[15] He explains that the paragraph of article which is requested to be repealed was put into place so that lawsuits could come to an end, because it is not understandable how the judgement would be final when each family member has to wait for the ruling to file his/her claim again which can provoke the first case to be reheard. A case pleaded in the family interest is for all family members and also obligates all members to follow it and the right to plead it in a manner to which they all consent.

THE VIEW OF THE COURT.

[16] The article 29 of the constitution provides that *“every person has a right to private property, whether personal or owned an association with others”*, but the article 176 of Law n°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure provides that *“Any person who was not a party to a case but who has an interest in it may make a third party application to set aside a judgment which is prejudicial to his/her rights and if neither he/she nor the person he/she represents were called at the trial”*. The second paragraph provides that *‘The provision of the Paragraph one of this article shall not apply to the spouse of either party or their children when the subject matter is the family property’*.

[17] In regards to matrimonial property, article 17(2) law n°22/99 of 12/11/1999 completing code of family law book I and also *instituting the part five concerning the management of matrimonial property, donation and succession provided that “In case of marriage under the regime of community of property and that of limited community of acquests, the spouses shall choose who, among themselves, shall be responsible for the management of the common patrimony. They are also equally entitled to monitor and represent.*

[18] Article mentioned above bestows spouses the right to know how they can manage their common property and to choose who will be responsible for that property whether the wife or the husband. That article *confers also* the equal capacity to manage that property, implying that either the wife or the husband can enjoy that right in family interest, without obtaining consent from his/her spouse when they are legally married.

[19] That article implies that when the spouses opt for the regime of common property or limited community of acquests, that property is for the husband and the wife which is brought into the community to meet the expenses of the family. That is to say the husband and wife cannot claim a special right on the property because it is indivisible.

[20] Therefore if one of the spouses can sue for the property which he/she shares with another which is meant to meet the family expenses, it should be understandable that he/she sued representing the one with whom they share it with, to the extent that the one who did not get involved in the case cannot be regarded as a person who did not sue or be sued as mentioned in paragraph 1 of article 176 of the law n°21/2012 of 14/06/2012 stated above.

[21] All that has been stated above concurs with the opinions of the law scholar Serge Guinchard pursuant to the provisions of article 1421 of the French family law which also stipulates that the wife and the husband have equal right on the management of matrimonial property. He states that a third party opposition filed by one of the spouses is inadmissible regardless of whether it is the husband or wife¹.

[22] Therefore, one of the spouses being represented in the lawsuit concerning matrimonial property, cannot alter and file a third party opposition because it is contrary to the role of that remedy as stipulated in paragraph one of article which is requested to be repealed concurs with what the scholars in law also wrote showing that extraordinary appeal is meant for those who were not a party to the case, either him/herself or represented².

[23] Basing on all the given explanations, the Court finds paragraph 2 of article 176 of the Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure is not inconsistent with article 29 of the Constitution.

III. THE DECISION OF COURT

[24] Admits the petition of Muhoza Consolée since it was filed in conformity with the law;

[25] Decides that the petition is without merit.

[26] Decides that article 176 (2) of the Law n° 21/2012 of 14/06/2012 relating to civil commercial, labour and administrative procedure is not inconsistent with article 29 of the Rwandan Constitution of 04/06/2003 as amended to date.

[27] Orders Muhoza Consolée to pay the court fees amounting to 16,200Rwf. If she fails to do so within eight days that amount will be deducted from her assets through Government coercion.

¹ Chacun des époux administre les biens communs de telle sorte que la tierce opposition de l'époux non partie au procès est irrecevable, sans qu'il y'ait plus aujourd'hui à observer s'il s'agit du mari ou de la femme: Droit et Pratique de la procédure civile, Sous la direction de Serge Guinchard, Dalloz, cinquième édition 2006, p.1163

² S'agissant d'une voie de recours exceptionnelle destinée uniquement à protéger ceux, qui sans avoir été appelés au procès, peuvent pâtir de son résultat, l'accès doit être réservé aux personnes, qui n'ont effectivement pas été parties, soit directement ou par représentation au débat judiciaire: Droit et Pratique de la procédure civile, Op Cit, p.1158