# MUKABARUNGI v. GATSINZI

[Rwanda SUPREME COURT – RCAA 0007/13/CS (Kayitesi Z., P.J., Munyangeri and Hitiyaremye, J.) April 17, 2014]

*Family law – Divorce – The sharing of assets under the regime of community of property – The property acquired by one of the spouses after legal separation – The legal separation always entails the separation of property; its effects at the day of the submission of the claim to the court – The asset acquired by one of the spouses after the dissolution of the regime of community of property is not included among the assets to be shared – Law n° 42/1988 of 27/10/1988 instituting preliminary title and book I of civil code, article 289.*

*Civil procedure – Damages – Being dragged into lawsuit – Damages are not awarded in case the claimant did not demonstrate to the Court how they were computed and it is obvious that the appellant did not intend to drag him into lawsuit.*

**Facts:** Mukabarugi filed a divorce claim in the Intermediate Court of Saint Brieue of France on 28 June 2000 against Gatsinzi. That Court made an order of non conciliation but ordered a legal separation between them. Later, she filed a claim in the First Instance Court of Kigali requesting for the divorce which was granted and ordered the two parties to share equally their assets.

Mukabarungi appealed to the High Court arguing that there are two jointly owned houses, which the previous court did not apportion between them. Pending the delivery of the judgment, she filed a summary procedure case in that court requesting to be granted the alimony, and the court ordered Gatsinzi to provide the alimony to her for every month up to the date of judgment delivery. Gatsinzi appealed against this decision before the Supreme Court which dismissed his appeal on the ground that the appeal of interlocutory judgment is filed jointly with the appeal for the case in merit.

In interlocutory judgment the High Court decided to make an inventory of the property to be shared, including the houses which were not shared in the First Instance Court, in order to be apportioned after determination of their value by property valuators.

Gatsinzi lodged a third party opposition against that decision on behalf of his child, stating that the house which is on plot n° 4423 at Remera III should not belong to the community property because he offered it to that child who has got its documents registered on his name. The High Court decided that the house be separated from the property which should be shared.

In 2013, the High Court rendered the judgment RCA 0039/05/HC/KIG in merits, and it decided that Gatsinzi and Mukabarungi must share all properties equally, except the plot n° 4423 and the house on it because Gatsinzi donated them to his child named Irebe Gatsinzi Lars who has got their documents as it was held by the judgment of which the third party opposition was lodged against.

Mukabarungi appealed to the Supreme Court arguing that the house which is on plot n° 4423 at Remera was removed from the property they have to share, while it is a family property and that, even though it was acquired after the legal separation, it originates from the community property.

In his defence, Gatsinzi states that the house must not be included among the assets to be shared, because he acquired it after separating with Mukabarungi, therefore he had the right to donate it to Irebe Gatsinzi Lars who owns its document.

The counsel for Gatsinzi raised an objection stating that the Supreme Court lacks jurisdiction to try claims relating to assets of which the principal claim is divorce, but it decided that it has jurisdiction to hear them.

**Held:** 1. The legal separation always entails the separation of property, which is retroactive to the date of the submission of the claim to the court. Consequently, the property acquired after the dissolution of the community property, has to be considered as a personal property of Gatsinzi which must not be shared, thus he had the right to use it as he deems fit.

2. The damages of being dragged into lawsuits cannot be awarded when the party requesting for them did not demonstrate to the Court how they were computed and it is obvious that the appellant did not intend to drag him into unnecessary lawsuits.

**Appeal without merit.**
**Court fees to the appellant.**

**Statutes and statutory instruments referred to:**
Law n° 42/1988 of 27/10/1988 instituting preliminary title and book I of civil code, article 289.
Law n° 22/99 of 12/11/1999 supplementing book one of the civil code and instituting part five regarding matrimonial regimes, liberalities and successions, article 24.

**No case referred to.**

**Authors Cited:**
Alain B., *Droit Civil: La famille*, Paris, Litec, 2003, p.274.
Francois T. et Dominique F., *Droit Civil: Les personnes, la famille et les incapacités*, Paris, Dalloz, 1996, pp.451-452.

## Judgment

## I. BRIEF BACKGROUND OF THE CASE

[1] This case began in the First Instance Court of Kigali whereby Gatsinzi Marcel filed a claim requesting for divorce. In the Judgment RC 35.932/01 rendered on 04 February, 2003, the Court decided to admit the divorce basing on the faults of both Gatsinzi Marcel and Mukabarungi, and ordered them to share the joint properties comprising of the house which is on plot n° 3119 and the piece of land which is at Gasogi in Kigali City equally.

[2] Mukabarungi Julienne was not satisfied with the judgment and appealed to the High court stating that there are assets she jointly owns with Gatsinzi comprising of the house which is on plot n° 4423 situated in Remera III in Kigali City, and another one on plot n°

4704 also located at Remera III in Kigali City which the Court did not apportion between them.

[3] Pending the judgment in the High Court, Mukabarungi filed a summary procedure claim in that Court requesting to be awarded alimony. On 18 August 2008, the Court ordered Gatsinzi Marcel to pay 80,000 Rwf to Mukabarungi every month until the judgment is rendered.

[4] Gatsinzi was not satisfied with the decision and appealed against it to the Supreme Court. In the Supreme Court's decision of 17 March 2009, the Court decided to dismiss the appeal because it was formed against the interlocutory judgment while article 163 of the law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure stipulates that the appeal against an interlocutory judgment shall be made only jointly with the final judgment.

[5] Meanwhile, the High Court decided to make an inventory of all properties to be shared including the properties which were not apportioned by the First Instance Court, so that their value be determined by the property valuators.

[6] Gatsinzi, on behalf of his child named Irebe Gatsinzi Lars, lodged a third party opposition against that decision stating that the house which is on plot n° 4423 at Remera III do not deserve to be put in the family property since he offered it to that child who owns its documents registered on his name.

[7] In the judgment RCA 0099/10/HC/KIG rendered on 16 September 2010, the High Court found that the house which is on plot n° 4423 at Remera III is registered in the names of Irebe Gatsinzi Lars, then decided it should be removed from the property to be apportioned between Gatsinzi Marcel and Mukabarungi.

[8] In the judgment RCA 0039/05/HC/KIG rendered on 3 May 2013, the High Court decided that Gatsinzi Marcel and Mukabarungi Julienne must share the properties and each one takes a half of them which is comprised by the plot n° 3119 located at Rugunga, the house on plot n° 4707 located at Nyarutarama, the piece of land located at Gasogi all of which situated in Kigali City. All these assets amounting to 223,784,264Rwf equally.

[9] The Court decided again, that the plot n° 4423 and the house on it should not be shared by Gatsinzi and Mukabarungi because, Gatsinzi gave them to his child named Irebe Gatsinzi Lars who has got their documents.

[10] Mukabarungi appealed to the Supreme Court arguing that the house which is on plot n° 4423 Remera III in Kigali City was isolated from the property they had to share while it is a family property. Gatsinzi states that the house does not deserve to be included among the properties to be shared, because it belongs to Irebe Gatsisnzi Lars.

[11] In the hearing of 07 January 2014, Kazungu, the counsel assisting Gatsinzi raised the objection that the Supreme Court does not have jurisdiction to try the claims related to properties attached to the principal claim of divorce, and then in the interlocutory judgment RCAA 0007/13/CS rendered on 31 January 2014, the Supreme Court ruled that it has jurisdiction to try those claims and scheduled the hearing on merit on 26 March 2014.

[12] On that day, the hearing was conducted in public, Mukabarungi represented by Counsel Rusanganwa Jean Bosco, and Gatsinzi Marcel present on behalf of his son Irebe Gatsinzi Lars assisted by Kazungu Jean Bosco, the counsel.

## II. ANALYSIS OF LEGAL ISSUES

**1. Whether the house on plot n°4423 Remera III in Kigali City should be returned in the property which must be apportioned between Gatsinzi Marcel and Mukabarungi Julienne.**

[13] Rusanganwa, the Counsel for Mukabarungi states that he appealed to the Supreme Court requesting to take back the house on plot n° 4423 at Remera III into the family property so that Mukabarungi shares it with Gatsinzi Marcel because he offered it from the common property unlawfully, especially article 24 of Law n° 22/99 of 12/11/1999 regarding matrimonial regimes, liberalities and successions which stipulates that the regime of community of property shall be dissolved by divorce.

[14] Rusanganwa, the Counsel argues also that the fact of relying on article 44 of the civil book II or the consideration of the time the title deed was issued should not be considered because the house was bought from the proceeds of common property, and that this is the view of the Supreme Court, in the case of Nyirabizimana Ziripa against Musoni Ndamage whereby it decided that in these kinds of cases what should be analyzed is the origin of the property rather than the title deed.

[15] He explains that even if he was on the side of the respondent, it should not be considered the time Mukabarungi filed a divorce claim in the Intermediate Court of Saint Brieue in France on 28 June 2000, should no t be considered because no judgment on legal separation or divorce was rendered by this Court, that rather the Court declared the divorce will be heard by the Rwandan Courts, thus Gatsinzi bought the plot and the house in litigation on 07 March 2001 before he got a divorce, implying they originate from the family property, and that, its demonstrated by the fact that, before they divorced Gatsinzi continued to visit his wife in Europe, they reciprocally transferred money and all family assets are still administered by Gatsinzi until now, that therefore the High Court contradicted itself in the Judgment RCAA 009/10/HC/KIG whereby it decided that the house be isolated from the common property, which is again contrary to the provision of article 24 of the Law N° 22/99 of 12/11/1999 mentioned above which states that the regime of community of property shall be dissolved by divorce.

[16] Kazungu, the Counsel for Gatsinzi states that the Law n° 22/99 of 12/11/1999 regarding matrimonial regimes, liberalities and successions, especially its article 24 which provides that the regime of community of property shall be dissolved by the divorce, should not be applied in this judgment, because that provision stipulates for what will happen after the divorce judgment, instead of stating its effects which run at the time of the submission of the divorce action provided for by article 247 of Law n° 42/1988 of 27/10/1988 mentioned above. He states that if it is considered that the effects of divorce start running after the divorce judgment only, it would lead to unjust enrichment of one of the spouses because he/she may benefit from the revenue of the partner while there is no longer any relationship between them.

[17] Kazungu, the Counsel states that even if there is no court decision on legal separation of Gatsinzi Marcel and Mukabarungi Julienne; since the end of Genocide they did not live

together again because Mukabarungi stayed in France while Gatsinzi continued to live in Rwanda, that the separation became "de facto", also that among the things Mukabarungi was sued for, includes the family abandonment, and that if Mukabarungi confirms that she came to Rwanda after 1994 she should produce evidences; thus the reciprocal transfer of money and visiting do not evidence that they cohabited.

[18] Kazungu, the Counsel states again that Mukabarungi is the one who first filed a case for divorce in the Intermediate Court of Saint Brieue in France on 28 June 2000. The Court made an order of non conciliation, and Gatsinzi filed a divorce case in Rwanda on 23 August 2001 and meanwhile appealed the decision of the Intermediate Court of Saint Brieue, which decided that the divorce matter will be heard by the Rwandan Courts, thus the supreme Court should refer to the time the divorce claim was filed in France, meaning on 28 June 2000 and decide that the house and plot n° 4423 located at Remera III are not in the family common property because the title deed demonstrates that the property was acquired after filling divorce action on 28 June 2000 and belongs to Irebe Gatsinzi Lars.

[19] Kazungu, the Counsel continues to argue that the High Court did not contradict itself because what was examined entails the asset which the spouses should have shared, the Court finds that Irebe Gatsinzi Lars has the legitimacy of filing a third party opposition against the judgment which included his house in the common property which is a portioned to the spouses while he is not a party to that case, isolating that house from the shared property complied with article 44 civil code book II and the article 247 of Law n° 42/1988 of 27/10/1988 instituting preliminary title and book I of civil code which was disregarded before yet it emphasises that the community of property regime dissolves from the date of submission of the divorce action in whatever Court, therefore when the judgment has been rendered and the divorce is admitted, the spouses share only the assets which were in existence at the day of filing the action

## THE VIEW OF THE COURT

[20] Article 24 of the Law n° 22/99 of 12/11/1999 supplementing book one of the civil code and instituting part five regarding matrimonial regimes, liberalities and successions stipulates that one of the things which may led the community property to be dissolved is the legal separation.

[21] Article 289 of the Law n° 42/1988 of 27/10/1988 instituting preliminary title and book I of civil code provides that legal separation allows the spouses not to cohabit. It entails the separation of the property of the spouse. This separation retroactive to the date when the action of divorce was submitted to the court.

[22] The Court finds that in the case file there is a document which demonstrates that Gatsinzi Marcel got the plot n° 4423 on 07 March 2001 and the title deed of the house on that plot dated 18 July 2002.

[23] The case file demonstrates also that Mukabarungi filed a claim for divorce in the Intermediate Court of Saint Brieue of France on 28 June 2000 requesting for the divorce with Gatsinzi Marcel. That Court made an order of non conciliation on 27 February 2001. The Court ordered the following: 1. The legal separation was admitted to them, 2. It prohibits each other to cause insecurity at another ones residence, 3. It orders them to give to each other personal belonging, 4. It orders that the three children be raised by their mother, 5. It

orders that Gatsinzi Marcel should be visiting those children on the mutual consent, 6. It orders Gatsinzi Marcel to pay alimony of the family and school fees for the children.

[24] The Court finds that the order stated above grants legal separation to Gatsinzi and Mukabarungi, which is provided by article 289 of the Law n° 42/1988 of 27/10/1988 mentioned above. This article provides also that the legal separation always entails the separation of property, which is retroactive to the date of the submission of the action to the court, therefore in this case the date of 28 June 2000 should be considered as the date of submission of the action which was relied on in making the decision of legal separation. The provisions of this article 289 concerning the effects of legal separation concurs with what are provided for by article 302 of French civil code book I , which stipulates that legal separation always entails the separation of property[1].

[25] Thus, the Court finds that what the counsel for Mukabarungi adduces that there was no legal separation is not true because there is a Court order which confirms it, well as what he argues that Gatsinzi continued to pay alimony and to visit the family, it was to execute the court order, so those grounds are without merit.

[26] On the issue of not only considering the time the house was obtained, but also to consider that it originated from the common property as adduced by the counsel of Mukabarungi, the Court finds that, except stating them verbally, she does not produce any evidences to the Court to establish that after the legal separation and the separation of the property, there are other means that house would have originated from the common property, moreover when there was no common property between her and Gatsinzi; therefore that article should not be valued relying on article 9 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure stipulates that every plaintiff must prove a claim. Failure to obtain proof, the defendant wins the case.

[27] Relying on the explanations given above, the Court finds that the plot n° 4423 and the house which is on it, were obtained after the Court granted Gatsinzi Marcel and Mukabarungi a legal separation entailing their separation of property since on 28 June 2000, which means that the asset was obtained after the dissolution of the community property, therefore it should be considered as a personal property of Gatsinzi Marcel, which should not be shared, of which he had the right of *usus*. Thus the request of Mukabarungi of including the house on plot n° 4423 among the common property, she acquired with Gatsinzi Marcel has no merit, for not a common property.

[28] This is also the view of the family law scholars, were they state that the legal separation for the spouses entails the separation of property because there is no relationship, between them anymore, and that instead of the regime of community of property it is regarded as they are governed by separation of property, so that before divorcing, no one will use the pretext of the regime of community of property and take a half of the properties acquired by another after suing for a divorce or to make the decision which prejudices the property of another[2].

**2. Whether the damages Gatsinzi Marcel requests should be awarded**

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[1] Article 302 of France civil code provides for that "Legal separation always entails the separation of property ..."

[2] See Alain Bénabent, *Droit Civil: La famille*, Paris, Litec, 2003, p.274 na Francois Terré na Dominique Fenouillet, Droit Civil: *Les personnes, la famille et les incapacités*, Paris, Dalloz, 1996, pp.451-452.

[29] In the cross appeal, the counsel for Gatsinzi Marcel and Irebe Gatsinzi Lars states that Irebe Gatsinzi Lars was dragged into unnecessary lawsuits because he had to plead for his house, and moreover he owns its title deed which demonstrates that it is his own house and for Gatsinzi Marcel was dragged into lawsuits provocation of Mukabarungi, therefore they request for the moral damages equal to 1,000,000 Rwf.

[30] The Counsel for Mukabarungi argues that the damages requested are groundless because there was no provocation and also that the properties were administered by Gatsinzi Marcel.

[31] Concerning the damages equal to 1,000,000 Rwf requested by Gatsinzi Marcel, the Court find that apart from not demonstrating how they were computed, there was no provocation done by Mukabarungi Julienne because she appealed the judgment which she lost basing on the provisions of the law, therefore the requested damages are without merit.

## III. DECISION OF THE COURT

[32] Decides that the appeal of Mukabarungi Julienne is without merit;

[33] Decides that the plot n$^{o}$ 4423 and the house built on it, are not among the apportioned asset between Gatsinzi Marcel and Mukabarungi Julienne, because it is not among the common property.

[34] Declares that the appealed judgment is sustained;

[35] Orders Mukabarungi Julienne to pay the Court fees equal to 226,400Rwf.