

NZISABIRA SUCCESSORS v. RWANDA FOAM

[Rwanda SUPREME COURT – RCOMAA 0033/13/CS (Havugiyaremye, P.J., Rugabirwa and Mukandamage M., J.) June 6 ,2014]

Commercial procedure – The objection of inadmissibility of a claim because of lack of status and interest – Time of raising an objection of inadmissibility of a claim – Inadmissibility for lack of status and interest to file a claim may be raised by a party or the court on its own motion, at any stage of the proceedings because it is of the nature of public law and order – When the previous court has ruled on the objection of inadmissibility of a claim, this cannot prevent to be appealed against together with the case on its merits because the hearing was not closed at first instance even if they may be appealed against alone – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, Article 2, 19 2° and 142.

Commercial procedure – Evidence submitted after the closing of the hearing – The rectified judgment and its rectifying judgment are complementary; they cannot be separated but they shall be considered together – Their communication to the other party for respecting the right to defence – When a party submits a new and relevant document or facts which can help to demonstrate the truth, it is considered provided that it is communicated to the other party who replies to it before the judgment is rendered – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, Article 69.

Contracts or obligations law – The validity of a contract which does not show the cause of its termination – Contracts made in accordance with the law shall be binding between parties – In case the seller has undertaken to deliver and do his best to have the sold thing registered in the name of the buyer, he/she cannot state that the agreement cannot have effects on him/her on the ground that he/she is not the one who was in possession of it or delivered it – Law n°45/2011 of 25/11/2011 governing contracts, article 64 and Decree of 30/07/1888 relating to contracts or contractual obligations, articles 263 and 264.

Contract or obligation law – Damages resulting from reimbursement of the price of the thing purchased – The deliberate sale of properties belonging to others is null – If the buyer did not know that it belonged to another, he/she shall be reimbursed of the price and be indemnified – When the claimant of damages does not provide their calculation method, they are determined in the discretion of the Court – Law of 30/07/1888 relating to contracts or obligations, article 276.

Law of contracts or contractual obligations – Damages for the added value to the house – The person liable to pay those damages – If the sold object is given back to the owner, its buyer cannot be paid by the seller its added value – Damages for the added value to the house are paid by the one who is given the property for preventing the unjust enrichment.

Law of contracts or contractual obligations – Restitution of rent fees – The buyer of the object which does not belong to the seller cannot get the rent therefrom, in case it is restituted to the owner because he/she is not the owner and he/she has no right over it.

Commercial procedure – Penalty forcing the execution – If there is a final judgement and no evidence showing that the losing party will not execute the judgement is produced to Court, it is not necessary to order the penalty forcing the execution.

Facts: This case stated as a civil case before Rusizi Intermediate Court where the successors of NZISABIRA Trojan sued RWANDA FOAM alleging that it sold to them the house located in plot n° 33 at Kamembe which does not belong to it and requested damages resulting from the amount paid as the price of the house and amount of money used in its extension. After losing this case, RWANDA FOAM appealed before the High Court, Rusizi Chamber, which decided that the subject matter of claim is in the jurisdiction of Commercial Courts.

The Commercial High Court seized decided that the claim of successors of NZISABIRA Trojan has no merit because of lack of certain evidences proving their arguments on the sale contract of the house NZISABIRA made with two different persons who are RWANDA FOAM and successors of MPUNYU. The Commercial High Court decided also that the judgments in which successors of Nzisabira intervened and to which the successors of MPUNYU were parties, the former did not request the intervention of RWANDA FOAM which means that they knew that there was no claim from the latter especially that the plot was not registered in its name.

Successors of NZISABIRA appealed before the Supreme Court saying that the Commercial High Court did not take into consideration the evidences submitted and requested avoidance of the contract made between their parents and RWANDA FOAM and to be restituted the price of the house plus the amount of its added value, moral damages for being disturbed on their parents property, rent fees of that house from the time of their dispossession of the same house, procedural fees, damages for being sold the house not belonging to RWANDA FOAM unknowingly and they requested to condemn RWANDA FOAM to the penalty forcing the execution as well.

RWANDA FOAM stated that the appeal of the successors of NZISABIRA Trojan should not be admitted because they do not indicate their certain identifications, which means that they lack of status and interest for filing a claim. As for the contract used by the successors of NZISABIRA, RWANDA FOAM states that the appellants did not submit to Court any evidence showing that they were given the house in litigation by it. As for the damages requested by the appellants, RWANDA FOAM states that they have no merit because they submitted no evidences thereof.

Held: 1. The objection of lack of status and interest may be raised at any stage of the proceedings. They may be raised for the first time at the appeal level even though they may have been decided on at the first instance. It cannot be an obstacle to be appealed for with the judgment on merits because the hearing is not closed at that level. Therefore, nothing could prevent RWANDA FOAM from raising them before the appellate Court.

2. The judgment rectifying and rectified judgment are complementary and considered together. It cannot be considered as evidence submitted after the closing of the hearing while it was debated on by both parties for respect of the right to defense. Then, the judgment RC 0098/14/TB/KMB rendered by Kamembe Primary Court on the 6th March 2014 completing the judgment RC 0040/141/TB/KMB shows that the appellants were the children of NZISABIRA without doubt. The objection of RWANDA FOAM for inadmissibility of their claim and the fact that the judgment RC 0098/14/TB/KMB rectifying the previous judgment cannot be considered because it was submitted after the closing of the hearing have no merit.

3. An agreement between the buyer and the seller who undertakes do his best to have the sold thing registered in the name of the buyer, shall be binding between them. Therefore, the contract between RWANDA FOAM and NZISABIRA Trojan of the 10th March 1992 is valid because

RWANDA FOAM which states that it never owned or delivered the house sold to Nzisabira and did not produce any evidence of termination of the contract they made.

4. The Sale of property belonging to another is null, it can give rise to damages when the buyer did not know that it belonged to another. Therefore, , successors of Nzisabira must be reimbursed 5,500,000 Frw paid by NSIZABIRA as the price of the house and damages of 2,000,000 Frw determined in the discretion of the Court because he bought the house without knowing that it did not belong to RWANDA FOAM.

5. When a person initiates an action for recovery of his immovable property from the possessor, the damages for added value of the house are given by the person to whom the property is restituted to avoid unjust enrichment. Therefore, the successors of NZISABIRA cannot be given damages for added value to the house because the house sold by RWANDA FOAM did not belong to it and it was restituted to its owners. Therefore, they can request the added value from the owner.

6. When a house is given back to its owner; the dispossessed buyer cannot request damages for rent from the seller because of lack of right to rent. Thus, the successors of NZISABIRA shall not be given rent fees for the house because it does not belong to them.

7. When a case is definitely decided and no evidence was submitted to Court showing that it shall not be executed, it is not necessary to order the penalty forcing execution. Therefore, the penalty forcing RWANDA FOAM to provisional execution has no merit.

**Appeal has merit in part.
Appealed judgment is changed.
Court fees to the defendant.**

Statutes and statutory instruments referred to:

Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 2, 19, 20, 69 and 142.

Law of 30/07/1888 relating to contracts or obligations, article 264, 276 and 282.

No case referred to.

Authors cited:

François Terré et Philippe Simler, *Le Droit civil, Les biens*, Précis Dalloz, 7e éd., Paris, 2006, p. 406.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case started before Rusizi Intermediate Court as a civil case where the successors of NZISABIRA Trojan sued RWANDA FOAM requesting the damages as mentioned above in the subject matter of the case. That Court decided that RWANDA FOAM must reimburse them the amount of 5,500,000 Frw paid in the purchase of the house located on the plot n° 33 at Kamembe. RWANDA FOAM appealed before the High Court, Chamber of Rusizi which decided that the subject matter of claim is within the jurisdiction of Commercial Courts.

[2] Before the Commercial High Court, the successors of NZISABIRA explained that the damage that they are requesting are based on the fact that on the 10th March 1992 RWANDA FOAM sold to their parent NZISABIRA Trojan the house located in plot n° 33 at Kamembe, Rusizi District which does not belong to it for the price of 5,500,000 Frw. He used the house for commercial activities and extended it which increased its value. They said that house was given back to the successors of Omar ABDULAZIZ represented by ASSIN Omar after winning the case RCA 0046/05/HC/CYG filed against the Republic of Rwanda represented by Ministry of Land, Settlement and Environment Protection and in which the successors of MPUNYU and of NZISABIRA were forced to intervene whereby applicants claimed nullification of land title n° VOL RVIII Folio 21 for that plot registered in the names of MPUNYU Zacharie.

[3] The Commercial High Court decided that claim of the successors of NZISABIRA Trojan has no merit because of lack of undoubted evidences proving their arguments. It explained that it is clear that on the 10th March 1992 NZISABIRA first made the contract of purchasing the house with RWANDA FOAM for 5,500,000 Frw and then it was discovered that there is another contract related to the same house he made with the successors of MPUNYU represented by NIYIBIZI Ruben as mentioned in the letter n° 18.04.081/4189 of the 30th June 1993 where the Minister of Public Services and Energy wrote to Commissioner General of taxes requesting the transfer because the house was sold and they do not provide any explanation about those contracts that NZISABIRA made with two different persons.

[4] In addition, the Court noted that in all the cases in which the successors of NZISABIRA has intervened which involved also the successors of MPUNYU they never requested forced intervention of RWANDA FOAM; this makes it clear that they knew very well that there is no claim against the latter with more reasons that the plot was not registered in its names. Moreover, the fact that 18 years passed without requesting the transfer was another proof they had no claim about that house.

[5] The Court ordered the successors of NZISABIRA to jointly pay RWANDA FOAM Ltd 1,500,000 Frw of procedural and advocate fees.

[6] The successors NZISABIRA Trojan appealed before the Supreme Court saying that the Court disregarded the proofs submitted to it and the Judge took an emotional decision by placing himself in the shoes of RWANDA FOAM Ltd and said that the fact that the successors of NZISABIRA have filed cases without forcing RWANDA FOAM Ltd to intervene means that

they knew it was not liable. They request nullification of the contract made between NZISABIRA and RWANDA FOAM, refund by the latter of the amount of the price of the house with its current added value, damages of being disturbed in their parents' property, the rent fees for the same house calculated from the time they were deprived of it up to now, procedural fees, damages of being fraudulently sold the house not belonging to RWANDA FOAM, to condemn RWANDA FOAM to the penalty forcing execution and order provisional execution of the judgment.

[7] RWANDA FOAM states that the appeal of successors of NZISABIRA Trojan should not be admitted because they have no status and interest of filing a claim; but in a case it may be admitted, the Court should decide that it has no merit and order them to pay damages for being involved in court proceedings without reason, advocate and procedural fees.

[8] The case was heard in public on the 21st January 2014, on the 25th February 2014 and on the 29th April 2014 where the successors of NZISABIRA Trojan were represented by Counsels NGARAMBE Raphaël and HAKIZIMANA Théogène while Rwanda FOAM was represented by Counsels MUHAYIMANA Isaïe and ABIJURU Emmanuel.

II. LEGAL ISSUES AND THEIR ANALYSIS

a. Whether the appellants do not have status and interests to file a claim.

[9] Counsels for RWANDA FOAM say that the appeal of the successors of NZISABIRA Trojan should not be admitted because the appellants do not provide their certain identifications; nothing proves if all 6 of them are alive or if all of them are successors of NZISABIRA Trojan because it is unbelievable how all those people beyond 30 years old say to live in one house located at the place called at Cyapa. Counsels say also that there is no official document issued by authorities proving that that place is their domicile and residence and that even the documents submitted to Court contain false information, they accept themselves that case RC 0040/141/TB/KMB till case RC 0045/141/TB/KMB rendered by KAMEMBE Lower Instance Court in substitution of their birth certificates based on in issuing those documents contain also faults like where it stipulated that it was rendered on the 30th January 2013, it has the wrong number, etc.

[10] They find also that the rectifying judgment RC 0098/14/TB/KMB was submitted to Court by the successors of NZISABIRA after closing the hearing in contradiction with article 69 CPCCSA because it was submitted on the 13th March 2014 without its prior notification to RWANDA FOAM because it was notified of it on the 10th April 2014; thus it should not be considered.

[11] They say that article 142 of Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure shows clearly that those reasons including lack of status, capacity or interest to sue (défaut de qualité, de capacité et d'intérêt d'agir) which lead to inadmissibility of the claim are of public order and they shall be raised by the Court on its own initiative and on top of that articles 2 and 19 of the aforementioned law provides for conditions of admissibility of a claim.

[12] Counsels for successors of NZISABIRA say that before the previous Court RWANDA FOAM had raised the reason for inadmissibility of their claim because they failed to indicate their residence and they filed their cases illegally because each has not filed its case individually for it to be recorded alone and have its proper file; but were instead joined together; but the Judge took a clear decision thereon and RWANDA FOAM did not appeal; thus, it should not come again to this question. They say that the objection of lack of status and interest is raised for the first time at the appeal level and that it should not be accepted and on top of that the appealed against case was changed to a commercial matter upon request of RWANDA FOAM and it never raised that objection when it was still a civil case.

[13] Counsels for successors of NZISABIRA say that in case those objections may be admitted, the Court should decide that they have no merit because RWANDA FOAM does not deny that NZISABIRA Trojan and his wife MUSOMAYIRE Marie are dead, that the right successors are their ascendants who appealed and on top of that there is case RC 0040/141/TB/KMB till RC 0045/141/TB/KMB rendered by KAMEMBE Lower Instance Court in substitution of their birth certificate as provided by article 86 of Civil Code Book I showing that they are all mature and each one has paid his court fees in filing the claim.

[14] As for the irregularity in that judgment, Counsels for successors of NZISABIRA say that it is the irregularity in the form which cannot lead to judgment vacation and on top of that this was done before the pronouncement where, on the 06th March 2014, the Lower Instance Court of Kamembe which rendered it delivered another judgment RC 0098/14/TB/KMB rectifying the previous one whereby the number of the judgment, its date of delivery as well as the birth date of NZISABIRA Chantal were rectified. Thus, those cases should be referred to by the Court in admitting their appeal.

View of the Court

In regard to admissibility of the objection of lack of status and interest of the claimants

[15] Article 142 of Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, (CPCCSA) provides that “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”. While article 143, first paragraph of the same Law stipulates that “The judgement as to inadmissibility of a claim may be appealed alone if that judgement can lead to the final hearing”.

[16] The Court finds that the objection of lack of status of the appellants of filing a claim and lack of interest of claiming are of the nature of public law and order, and can be raised for the first time at the appeal level and that even if there were decided on by previous Court, this cannot be an obstacle to appeal for them jointly with the judgment on merits because the case hearing has not stopped at that level; thus, nothing prevents RWANDA FOAM from raising such objections at the appeal level in this Court.

Basis for the raised objections

[17] For the required condition of admissibility of a claim, article 2 the first paragraph of Law n° 21/2012 of 14/06/2012 mentioned above provides that a claim cannot be accepted in court unless the plaintiff has the status, interest and capacity to bring the suit while article 19, 2° of the same Law relating to the contents of the claim provides that a claim shall indicate the names, profession and residence of the plaintiff and if necessary, the names, competence and residence of his/her legal representatives.

[18] The Court finds that the judgment RC 0098/14/TB/KMB rendered by Kamembe Lower Instance Court on the 6th March 2014 completes judgment RC 0040/141/TB/KMB till RC 0045/141/TB/KMB rendered by that Court as provided for by the article 153 of Law n° 21/2012 of 14/06/2012 mentioned; therefore those judgments taken together indicate that the appellants are children of NZISABIRA Trojan, that they reside in the cell of Kamurera, Sector of Kamembe, District of Rusizi, Western province; that all of them are of majority age for claiming themselves and they have thus status and interest of claiming because they are claiming the property that belonged to their parent as his legal inheritors.

[19] The fact that Counsels for RWANDA FOAM say that the case RC 0098/14/TB/KMB rectifying the other should not be considered because it was submitted after closing the hearing in contradiction with article 69 of Law n° 21/2012 of 14/06/2012¹, the Court finds that their argument should not be considered because that article, in exception, accepts that it is possible to present to the court a new and relevant document or fact which can help to demonstrate the truth which is discovered by one of the parties, before judgment is rendered, after having communicated it to the other party for respect of right to defence of each party. The Court finds also that both parties were given opportunity to discuss those proofs before delivery of the judgment. Therefore, as explained above, that judgment together with the one it rectifies, they make one judgment and they cannot be separated (art. 153 of Law n° 21/2012 of 14/06/2012).

b. Whether the contract between RWANDA FOAM and NZISABIRA Trojan is valid.

[20] Counsels for successors of NZISABIRA say that the Court has not considered the sale contract of the 10th March 1992 between RWANDA FOAM and NZISABIRA Trojan; but rather considered the other between him and MPUNYU Zacharie without indicating the time when it was executed and the parties who signed it because no party in the case has mentioned it for discussion during the hearing so that it could be challenged, if necessary, by the contesting party as a forged document and that in the letter n° 0009/16.03/RNRA/02W of the 25th October 2011 written by National Land Center responding the letter written by MPAYIMANA, Counsel for RWANDA FOAM that institution has confirmed that there was no sale contract between MPUNYU and NZISABIRA It explained well the history of the plot n° 33, indicating that it was already registered under land title volume R. VIII Folio 21 in the names of MPUNYU Zacharie, which was later invalidated by the judgment RC 2169/R52000 rendered by Cyangugu First

¹ Article 69 CPCCSA provides “No documents in general, conclusions of the case and the document containing provisions pertaining to the case may be deposited with the court after the hearing has been declared closed. However, if before deliberations, a new and relevant document or fact which can help to demonstrate the truth is discovered by one of the parties, he/she may, before judgment is rendered, present it to the court after having communicated it to the other party. The court alone shall assess whether it is necessary to re-open hearing.”

Instance Court on the 15th July 2002 and ordered the provisional registration of that plot in the names of successors of Omar ABDULAZIZ.

[21] In addition, Counsels for successors of NZISABIRA say that another evidence proving the existence of the sale contract of plot n° 33 between RWANDA FOAM and NZISABIRA, which it refuse to show for escaping the responsibility of selling the plot which does not belong to it, is the letter n° 73/MAT/171 written by its Managing Director to NIYONDAMYA Jacques, son of MPUNYU Zacharie and copied to NZISABIRA for information saying that the transfer between RWANDA FOAM and successors of MPUNYU on one hand and transfer between RWANDA FOAM on another hand was delayed by the Ministry of Public Services and Energy which requested prior production of the land title. The Managing Director of RWANDA FOAM requested him to do his best to help getting that land title which was in Rwanda Commercial Bank (BCR) and that he shall notify him after getting it so as to finalize matters related to those transfers.

[22] They continue saying that the previous Court took a decision whereby it ruled that what confirms invalidity of the sale contract between RWANDA FOAM and NZISABIRA and its replacement by the one between the successors of MPUNYU Zacharie represented by NIYIBIZI Ruben is allegedly the existence of other cases about the property located in plot n° 33; but in which the successors of NZISABIRA never forced RWANDA FOAM to intervene to explain how it sold them the property which does not belong to it allegedly because they knew it was not liable to them. Therefore it disregarded that there is no legal provision depriving them of their right of suing RWANDA FOAM after those cases where their rights were violated.

[23] Counsels for RWANDA FOAM explain the contract used by the successors of NZISABIRA in their pleading where they say that MPUNYU was a seller of the mattresses of RWANDA FOAM and later he stopped to pay and NZISABIRA who was a businessman negotiated with MPUNYU and paid RWANDA FOAM and took possession of the house of MPUNYU and when the successors of NZISABIRA came across the contract they filed a claim against RWANDA FOAM.

[24] They realize that the appeal of the successors of NZISABIRA seeks to request confirmation of validity of the sale contract between RWANDA FOAM and NZISABIRA while it is impossible.

[25] They explain that article 276 of Civil Code Book III provides that the sale of the thing belonging to another is null and void (*la vente de la chose d'autrui est nulle*) and the nullity of such a sale does not need to be declared by the court (*nullité absolue*); that the appellants have produced no evidence in Court proving that the house located in plot n° 33 Kamembe has ever belonged to RWANDA FOAM and that the only legal evidence in terms of immovable property provided for by the law is the land title and the house was rather registered in the names of MPUNYU.

[26] Moreover, they say that the appellants submitted no evidence to the Court showing that the house located in that plot was delivered to them by RWANDA FOAM by at least proving that the latter handed to them its keys to have its possession so that they can claim to court they have been evicted. They add that it is not understandable how the purchaser can sue over

dispossession of the house while the seller has not yet delivered it to the former; therefore, he should first sue him over failure to deliver the purchased house.

[27] Counsels for RWANDA FOAM say that it has produced the proof beyond reasonable doubt from the file of the case of the successors of NZISABIRA against ASSIN Omar and the Republic of Rwanda showing that there is a sale contract between MPUNYU as the owner of the house and NZISABIRA constituted by the letter n° 18.04.081/4189 addressed by the Minister of Public Services and Energy to the Commissioner General of taxes on the 30th June 1993 notifying him that Succession MPUNYU as seller and NZISABIRA Trojan as purchaser have requested the transfer of the plot n° 33 located at Kamembe and that the sale price was 5,700,000 Frw, and none has proved that this document never existed or that it is forgery.

[28] They say that the appellants do not indicate the receipt where they paid taxes on that plot during 18 years they possessed it so that it can be clear they paid taxes on that plot in the name of RWANDA FOAM and on top of that it is clear that, from the expert report produced by TUYIZERE Emmanuel on the 15th October 2010, the house belongs to MPUNYU and it cannot be registered in the name of RWANDA FOAM.

[29] Counsels for RWANDA FOAM concluded that the existence of a document called sale contract between NZISABIRA and RWANDA FOAM has no legal effects (absence d'effet juridique) because the appellants have not filed their claim basing only on the existence of that document; but the claim is rather the request for damages resulting from eviction from the commercial house located on the plot n° 33 sold to our parent while it does not belong to the seller. Even if the document were made, it would not help them in case NSIZABIRA was involved in its drafting with more reasons that it was not drafted by RWANDA FOAM because if it had drafted it, it would not have included article 6 providing that they elect the domicile at Cyangugu while it did not have headquarters office or activities there. This kind of document has no legal value for having legal effect. The fact that NZISABIRA made another contract with MPUNYU means that he knew that the previous contract with RWANDA FOAM was invalid.

View of the Court

[30] Article 64 of the Law n° 45/2011 of 25/11/2011 governing contracts provides that contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith.

[31] With respect to the sale contract, article 263 of Law of 30/07/1888 instituting Civil Code Book III, provides that a sale is a contract by which one person undertakes to deliver a thing and the other to pay for it. It can be recorded in authentic deed or private deed, while its article 264 provides that “the sale is complete between the parties, and ownership is acquired as of right by the buyer with respect to the seller, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered or the price paid”.

[32] With regard to the sale of immovable property, article 282 of the aforementioned law provides that the obligation to deliver immovable properties is fulfilled on the part of the seller where he/she has handed over the keys, in case of a building, or where he has handed over the title deed.

[33] From the document in file called “sale contract” made before the Notary, it is clear that on the 10th March 1992, RWANDA FOAM sold to NZISABIRA Trojan the house located in the plot n° 33 at Cyangugu for 5,500,000 Frw, and agreed to do its best to have the house registered in his name (articles 1 - 4).

[34] In the letter n° 73/MAT/171 written by the Director General of RWANDA FOAM to NIYONDAMYA Jean Jacques he was requesting him to give him the “title deed” by then in the hands of BCR for the transfer of that plot between the successors of MPUNYU Zacharie and RWANDA FOAM SARL on the one hand, and between RWANDA FOAM and NZISABIRA Trojan on the other hand; which means that RWANDA FOAM was complying with provisions of the aforesaid contract.

[35] The Court finds that the contract made between RWANDA FOAM and NZISABIRA is binding between parties because it does not produce any evidence of its nullification, so it cannot escape its effects.

[36] With regard to the argument of RWANDA FOAM that it never owned that house and that it did not deliver it to NZISABIRA, the Court finds it without merit as it says that MPUNYU delivered it so as to pay its debt and it was sold to NZISABIRA who paid the debt due to RWANDA FOAM in place of MPUNYU. It is in this framework that he got possession of the house after concluding the aforementioned contract where RWANDA FOAM sold to NZISABIRA the house located in plot n° 33 in Cyangugu, and played a considerable role in initiating formalities of transfer of that house (mutation) which was impeded by the death of NZISABIRA. Thereafter, the successors of Omar ABDULAZIZ seized the court claiming the change of land title which was still registered in the name of MPUNYU Zacharie.

[37] With respect to the formation of another contract between MPUNYU and NZISABIRA after the aforesaid contract , the Court finds that the parties have not availed it so that it can decide whether it really existed, except what is said in the letter n° 18.04.081/4189 the Minister of Public Services and General Energy wrote to the General Commissioner of taxes on the 30th June 1993 that it sold the very house to him for the price of 5,700,000 Frw, with more reasons that even the transfers RWANDA FOAM was requesting had to be made between the successors of MPUNYU Zacharie and RWANDA FOAM SARL, on the one hand, and between RWANDA FOAM and NZISABIRA Trojan ,on the other hand.

c. Basis of the damages claimed by the successors of NZISABIRA Trojan

[38] Counsels for successors of NZISABIRA say that the sale contract between NZISABIRA and RWANDA FOAM is valid because the latter did not show any other contract; therefore, it is binding between them as provided for by article 64 of Law n° 45/2011 of 25/11/2011 governing contracts and it may only be revoked at the consent of the parties or for reason based on law. They shall be performed in good faith.

[39] They say that it was provided under article 5 of that contract that RWANDA FOAM represented by its Managing Director as seller shall assume all consequences that NZISABIRA as purchaser would suffer in case he would be disturbed in his rights over the sold house located in plot n° 33 at Kamembe; it is in this respect that the successors of NZISABIRA, as the successors having rights over the property of their parent, request it to perform its contractual

obligations because the expectation happen when ASSINI Omar as successor of Omar ABDULAZIZ and ZURA won definitively the judgment evicting them from the house bought from RWANDA FOAM. Therefore, it must refund them money for the price of the house (303, 307 1 paragraph 1 and 4, 310 of Civil Code Book III) equal to 5,500,000 Frw plus its current value equal to 44,333,488 Frw as valuated by the expert, rental fees equal to 37,100,000 Frw which shall continue to be calculated till the pronouncement of the judgment (700,000Frw x 53 months during which they were evicted from their house) and damages for procedural fees spent at the first instance and before the Supreme Court equal to 3,000,000 Frw and 5,000,000 Frw respectively.

[40] Basing on articles 258, 276 of Civil Code Book III, Counsels for successors of NZISABIRA explained that the sale of a thing belonging to another is null and it may give rise to damages where the buyer did not know that the thing belonged to another; therefore, the contract between NZISABIRA and RWANDA FOAM is null because it has knowingly sold to him the property belonging to another and this harmed their life projects, emotionally stressed them and lead them into poor living conditions while their parent have planned and saved for their future and this has frustrated their planning had not they been evicted from their property. Therefore, it must pay 6,000,000 Frw in moral damages therefrom.

[41] Counsels for successors of NZISABIRA find that, for the purposes of protecting them from any delay and in the interest of the justice, when the judgment will become final, the Court should order the penalty of payment of delay damages of 100,000 Frw per day forcing RWANDA FOAM to execute the final judgment and order provisional execution.

[42] Counsels for RWANDA FOAM say that those damages have no merit because the claimants have not proved them and that the expert report of the house was drafted by them and it shows that it belongs to MPUNYU Zacharie; thus it cannot be based on in the case against RWANDA FOAM. They say that the successors of NZISABIRA have not provided the response to the request to produce the tax receipts while everyone knows that tax payment is a duty, thus their request for damages has no basis. Moreover, they say that the claimants of those damages do not provide any document proving the construction permit authorizing them to build houses they claim they have added on the plot so that it can be made clear they constructed them in the name of RWANDA FOAM.

View of the Court

- With regard to the refund of the price for the house and damages of 6,000,000 Frw.

[43] Article 276 of Civil Code Book III provides that the sale of a thing belonging to another is void: it may give rise to damages where the buyer did not know that the thing belonged to another.

[44] This article explains that the sale of the property belonging to another is null and it may give rise to damages where the buyer did not know that the thing belonged to another.

[45] As explained above, RWANDA FOAM sold to NZISABIRA the house located in the plot n° 33 in Cyangugu and the latter was not aware that it did not belong to RWANDA FOAM

because it was discovered later in the judgment RCA 0046/05/HC/CYG where the successors of Omar ABDULAZIZ represented by ASSIN Omar filed a claim against Republic of Rwanda represented by the Ministry of Land, Settlement and Environment Protection requesting to nullify land title n° VOL RVIII Folio 21 of that plot registered in the name of MPUNYU Zacharie as that the house belongs to them and claimed it back. Thus that contract is null and the successors of NZISABIRA should be reimbursed 5,500,000 Frw that NSIZABIRA paid as the price for the house, and be paid damages there of.

[46] With regard to the value of those damages, the Court finds the successors of NZISABIRA do not provide the method used to calculate damages they request. Therefore, the Court should award them 2,000,000 Frw in its discretion.

- Damages related to the value of the house and the additions thereon

[47] In respect to 44,333,488 Frw the successors of NZISABIRA request as the actual value of the house basing on expert report they submitted, the Court finds that they should not be awarded them because the house was delivered to its owners who are also in possession of additions thereto and thus they cannot be claimed from RWANDA FOAM.

[48] This is consistent with the opinion of legal scholars François Terré and Philippe Simler who explain that when someone initiates an action for recovery of his immovable property from the actual possessor (action en revendication) such damages related to additions to the house which increase its value are paid by the person to whom the property is restituted to avoid unjust enrichment by the latter².

With respect to rental fees of 37,100,000 Frw which should be calculated until pronouncement of the judgement

[49] The Court finds that the successors of NZISABIRA should not be awarded the house rental fees because it does not belong to them and it was restituted to its owners as mentioned above. Therefore, they should not have right to rents there from from the time of its restitution to the successors of Omar ABDULAZIZ until now.

- Procedural and advocate fees at both levels of instance of 3,000,000 Frw and 5,000,000 Frw before the first instance Court and the Supreme Court respectively.

[50] The Court finds that the successors of NZISABIRA must be given procedural and advocate fees because they incurred expenses for following up this case at both levels; but they do not prove how they calculated them and, thus, they should be awarded 800,000 Frw for procedural and advocate fees at both levels of instance granted at Court's discretion.

² Le possesseur, spécialement s'«ils» est cru propriétaire et si la possession a duré un certain temps, a pu entreprendre sur le bien dont il est évincé des travaux constitutifs d'«améliorations. En laisser purement et simplement le bénéfice au revendiquant eût procuré à ce dernier un enrichissement injustifié. La jurisprudence, s'«inspirant de la tradition romaine et de dispositions éparées dans le Code civil, a retenue le principe de l'«indemnisation du possesseur évincé, en fonction, non plus, cette fois, de sa bonne ou mauvaise foi, mais de la nature des travaux entrepris ou frais exposés, appelés impenses».

Le Droit civil, Les biens, par François Terré, Philippe Simler , p. 406.

[51] The Court finds that total damages that RWANDA FOAM must pay the successors of NZISABIRA Trojan are equal to 5,500,000 Frw of the price for the house + 2,000,000 Frw of damages + 800,000 Frw of procedural and advocate fees, which makes a total of 8,300,000 Frw.

- Penalty forcing RWANDA FOAM to provisionally execute the judgment.

[52] The Court finds that this judgment is heard at the last instance and it is not necessary to order the provisional execution.

[53] The Court finds also that no evidence was produced that RWANDA FOAM will not execute the judgment so that it can be condemned to the penalty forcing execution of judgment.

III. DECISION OF THE COURT

[54] It decides to admit the objection of lack of status and interest of the claimants raised by RWANDA FOAM.

[55] It decides, however, that it has no merit.

[56] It decides that the appeal of the successors of NZISABIRA Trojan has merit in part.

[57] It orders RWANDA FOAM to pay the successors of NZISABIRA Trojan 8,300,000 Rwf in damages as explained above.

[58] It orders RWANDA FOAM to pay 24,000 Frw of court fees which, if not paid within 8 days, shall be deducted from its assets by State coercion.

[59] It rules that the judgment RCOM 0248/12/HCC rendered by the Commercial High Court on the 26th November 2012 is entirely over ruled.