

# TWAGIRAYEZU ET AL v. BANQUE POPULAIRE DU RWANDA (BPR)

[Rwanda SUPREME COURT – RS/REV/INJUST/CIV 0004/15/CS (Kayitesi Z., P.J., Hatangimbabazi, Gatete, Hitiyaremye and Ngagi, J.) September 11, 2015]

*Contracts or obligations law – Sale – The moment the contracting parties on sale agree on the subject matter and its price, the sale is valid, even if the object has not yet been delivered or the price paid – Law of 30/07/1888 relating to Contracts or obligations, article 264.*

*Mortgage law – The mortgage contract on immovable property – The mortgage contract on the sold property cannot be valid even if the transfer of ownership is not yet performed because the seller has no right to mortgage the property which does no longer belong to him/her – Decree Law of 15/05/1922 that governs the mortgage on the immovable property, article 12(1).*

**Facts:** Twagirayezu entered into a sale contract with Rushirabwoba of the plot N°400 located at Gasave cell, Gisozi sector, Gasabo district, Kigali City on the price amounting to 770,000Frw and they agreed that he pays him 720,000Frw, and the balance amounting to 50,000Frw to be paid after one month following the handover of the documents of the plot. Meanwhile he was allowed to begin the activities on that plot. After the expiry of the agreed month, Rushirabwoba did not hand over to Twagirayezu the documents of the plot as he had promised him.

A long time after the conclusion of that contract, Rushirabwoba applied for the loan of five Million to Bank Populaire (BPR) and he mortgaged that plot he sold to Twagirayezu without the knowledge of the latter and his wife. Rushirabwoba failed to fulfil the contractual obligations of the loan he was granted, and then BPR seized that property with purpose to auction it.

After realising that, Twagirayezu and Mukantabana filed a claim to the Intermediate Court of Gasabo requesting to suspend that auction and Bank Populaire Gikondo branch be ordered to release the documents. The Court ordered the transfer of ownership (mutation) and the plot to be registered from Rushirabwoba to Twagirayezu and Mukantabana because they co-own it.

Bank Populaire appealed against that decision to the High Court against Twagirayezu and Mukantabana and the Court held that the appeal has merit; therefore BPR should not be compelled to release the document it was given in mortgage while the loan it granted to Rushirabwoba was not yet paid.

Twagirayezu and Mukantabana appealed against that decision to the Supreme Court, and the latter also held that it should not be compelled to release the document because it is obvious that he is the owner of the plot, and indeed the fact that they did not attempt to obtain the documents for three (3) years until Rushirabwoba mortgaged that property; is an indication of their negligence and the excessive trust they had in him.

Twagirayezu and Mukantabana submitted their claim to the ombudsman office requesting the judgment N°RCAA0149/11/CS to be reviewed for injustice reasons because it is unlikely to be executed because there exists another judgment N° RCA0111/08/TGI/GSBO concerning their divorce proceedings whereby the court decided that the plot N°400 and the house it accommodates falls into their property which will be sold in order to share the proceeds of

sale, but the Supreme Court disregarded it in the course of deliberation of the judgment N° RCAA0149/11/CS.

The office of the ombudsman requested for the review of the judgment N° RCAA0149/11/CS for injustice reasons alleging that there are two final different Court decisions regarding unique property. The application for case review due to injustice was admitted.

**Held:** 1. When parties agree on the object and its price, the sale is valid, even if the object has not yet been delivered or the price paid; therefore Rushirabwoba had no right to mortgage the property which is not still belonging to him.

2. The mortgage contract entered into between Bank Populaire and Rushirabwoba should not be valid even if the transfer of ownership is not yet performed because it was done by the person who is not the owner of the property therefore Bank Populaire is ordered to release the documents of the plot N°400 it was given in mortgage illegally and be registered on Twagirayezu and Mukantabana because they are its owners.

3. Procedural damages and Counsel Fees are awarded at the discretion of the Court if what are requested is excessive and when the requesting party lost the case, he/she cannot be awarded them.

**Application for case review due to injustice has merit;  
With the court fees to Bank Populaire, Gikondo branch.**

**Statutes and statutory instruments referred to:**

Law of 30/07/1888 relating to Contracts or obligations, article 264.

Decree Law of 15/05/1922 governing mortgages on the immovable property, article 12(1).

**Case referred to:**

Nteziryayo v. Rutabayiro, RCAA0003/13/CS, rendered by the Supreme Court on 31/01/2014.

**Authors Cited:**

FRANCOIS T’KINT, L’hypothèque de l’immeuble d’autrui est nulle, 3<sup>e</sup> édition, Larcier, Rue des Minimes 39, B-1000 Bruxelles, p.301.

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] This case originates from the contract Twagirayezu Thadée who is married to Mukantabana Consolée concluded with Rushirabwoba Aimable on 06 August 2004, where the latter agreed to sell to him a plot N° 400, located at Gasave cell, Gisozi Sector, Gasabo district, Kigali city, on seven hundred seventy thousands Rwandan franc (770,000Frw).

[2] Just after the conclusion of the contract, there was immediate payment of seven hundred and twenty thousand Rwandan francs (720,000Frw) and other fifty thousand Rwandan francs (50,000Frw) should have been paid after submission of the plot's title to Twagirayezu Thadée. In order to ensure Twagirayezu Thadée, Rushirabwoba gave to him a cheque in pledge which was valid for one month and had value of seven hundred twenty

thousand Rwandan francs (720,000Frw) equivalent to the amount of price paid by Twagirayezu who consequently was allowed to start activities on that plot.

[3] After one month, Rushirabwoba Aimable did not hand the plot's title as he had promised him, and Twagirayezu Thadée also did not use the cheque he was given to withdraw the money in reimbursement of what he had paid. Meanwhile Twagirayezu Thadée together with his wife Mukantabana Consolée erected on that plot a house with the value of 30,375,538Frw by December 2011.

[4] In 2007, after three years (3) following the conclusion of the contract between Twagirayezu Thadée and Rushirabwoba Aimable, Rushirabwoba Aimable requested for the loan at Bank populaire (BPR) and he offered the plot mentioned above in mortgage, without knowledge of Twagirayezu Thadée and his wife Mukantabana Consolée. In that loan contract, there was a provision stating that in case Rushirabwoba Aimable fails to pay, the Bank will realize the payment on the mortgage as provided for by the law, and also that it has the right to request the auction of the mortgage without recourse to judicial proceedings.

[5] Due to non-performance of the contract in 2009, the Bank seized the property he was given as mortgage with intention to auction it, when Twagirayezu Thadée and Mukantabana Consolée realised it, they initiated a claim to request for suspension of the auction and this was the beginning of court proceedings.

[6] Twagirayezu Thadée and Mukantabana Consolée filed a claim at the Intermediate Court of Gasabo which was recorded to N° RC006/10/TGI/GSBO and N°RC007/10/TGI/GSBO requesting the Court to change and register the plot N° 400 in their names and the Bank Populaire, branch of Gikondo was also sued so that it hand back documents it was submitted by Rushirabwoba Aimable in bad faith. On 28 January 2011; that Court rendered the judgment N°RC0006/10/TGI/GSBO/RC0007/TGI/GSBO and ordered the transfer (*mutation*) of the plot from Rushirabwoba Aimable and be registered on Twagirayezu Thadée and Mukantabana Consolée as they jointly own it.

[7] Bank populaire appealed against that decision to the High Court and the appeal claim was recorded to N°RCA0062/11/HC/KIG, whereby it directed the appeal to only Twagirayezu Thadée and Mukantabana Consolée, and on 25 November 2011; this Court held that the appeal has merit and the ruling of the judgment of the Intermediate Court of Gasabo is overturned in whole, that BPR should not be compelled to give back the documents that it was given in mortgage as long as the loan that it granted to Rushirabwoba Aimable is not yet paid. In taking this decision, the Court based on the ground that Twagirayezu Thadée did not receive full titles of the plot since he did not encourage Rushirabwoba Aimable to deliver them to him, and the result was that the latter handed them to the bank in order to secure a loan.

[8] Twagirayezu Thadée and Mukantabana Consolée appealed against this decision to the Supreme Court and the case was registered to RCAA0149/11/CS. He states that the principle according to which “no one can legally represent a person before the court without the power of attorney granted to him/her by the principal” and that relating to the relativity of the judgment according to which “the judgment concerns the parties to the case and they are the ones who benefit or incur consequences; were disregarded by the appealed decision. They also allege that the judge modified the subject matter whereby he reversed the decision ordering the transfer of ownership whereas the concerned parties with whom they concluded the sell contract did not appeal against it.

[9] On 16 November 2012, the Supreme Court also held in the judgment N°RCAA0149/11/CS that BPR should not be forced to release the titles that it was given in mortgage as long as the loan it granted to Rushirabwoba Aimable is not paid.

[10] Twagirayezu Thadée and Mukantabana Consolée submitted their claim to the ombudsman's office requesting the revision of the judgment N°RCAA0149/11/CS for injustice reasons because it could not be executed due to the fact that there exists another judgment N°RCA0111/08/TGI/GSBO concerning their divorce proceedings whereby the court decided that the plot N°400 and the house it accommodates constitutes their joint property which will be sold in order for them to share the proceeds of sale, However, they allege that the Supreme Court disregarded these statements at the time of deliberation with respect to the judgment N°RCAA0149/11/CS.

[11] On 16 July 2014, the office of the ombudsman wrote to the President of the Supreme Court, requesting that the judgment N°RCAA0149/11/CS should be reviewed for injustice reasons. This states that there have been two different Court decisions relating to one property; both of which have become final.

[12] After analysing the report of the general inspectorate of Courts, on 31 March 2015, the President of the Supreme Court took an order N°11/2015, ordering this judgment be transferred to the Supreme Court registry in order to be recorded in their registers for revision, and consequently, it was recorded on N°RS/REV/INJUST/CIV0004/15/CS.

[13] In their submissions, Twagirayezu Thadée and Mukantabana Consolée argued that the Court ruled in their disadvantage because it rendered its decision in disregard of the statements of Rushirabwoba Aimable who affirmed that the plot he mortgaged did not belong to him because he had sold it to them and that there is even a judgment N°RCA0111/08/TGI/GSBO rendered by the Intermediate Court of Gasabo which became final that held that the plot N°400 on which it is erected a house is the property of Twagirayezu Thadée and Mukantabana Consolée.

[14] The hearing was conducted in public on 30 June 2015, where Mukantabana Consolée was represented by Counsel Mukamazimpaka Hilarie together with Counsel Kaboyi Benoît, who also represents Twagirayezu Thadée while Bank Populaire du Rwanda, Gikondo branch (which shall be referred to as Bank Populaire in short words in this case) is represented by Counsel Mubangizi Frank.

## II. ANALYSIS OF THE LEGAL ISSUES

**To determine whether the plot N° 400 located at Gisozi and the house which is on it, is the property of Twagirayezu Thadée and Mukantabana Consolée which must be registered on them.**

[15] Twagirayezu Thadée and Mukantabana Consolée argues that as they indicated in their Court submissions, Bank Populaire does not have the right of mortgage on the house located on plot N° 400, because that property is registered on Twagirayezu Thadée and Mukantabana Consolée. They add that another evidence of the absence of the security mortgage on this property, is that there is nowhere the bank registered it as mortgage in compliance with the law.

[16] He states in addition that Bank Populaire filed a case at appeal level against Twagirayezu Thadée and Mukantabana Consolée while they did not conclude a loan contract with it; instead the one it concluded it with was Rushirabwoba Aimable. She went ahead to state that at the Intermediate Court of Gasabo when they were debating about the transfer of the property, Rushirabwoba Aimable admitted that the property he mortgaged at Bank Populaire was sold to them, therefore, the fact that Bank populaire did not appeal against those statements of Rushirabwoba Aimable, implies that it admitted them.

[17] Kaboyi Benoit, the Counsel for Mukantabana Consolée and Twagirayezu Thadée states that the Supreme Court upheld the decision of the High Court, while the judge who took it did not motivate the reason why he quashed the decision that was taken by the Intermediate Court and replace it with a decision devoid of any legal basis yet the quashed one relied on the law.

[18] He explains that the Supreme Court erred in law with regard to article 264 of the Civil Code book III (CCLIII) which it based on to uphold the decision of the High Court, to declare that the contract Rushirabwoba Aimable concluded with Twagirayezu Thadée was not valid so as to be considered as the owner of the plot which was on sale before being delivered its titles, whereas in contrast, that article stipulates well that a sale contract is valid when the parties agreed on the thing and the price, although the sold thing has not yet been delivered.

[19] He argues that on the similar issue to this one, there is a judgment N°0003/13/CS rendered by the Supreme Court on 31 January 2014 whereby Rutabayiru Eric concluded a sale contract regarding a plot with Nteziryayo Eric, where the seller tried to refuse to handover the plot's titles, and the Supreme Court ordered Nteziryayo Eric to cooperate in order to operate the transfer of ownership in favor of Rutabayiru Eric because they agreed on the sold houses and on their costs.

[20] He explains that the loan contract of five millions concluded between Rushirabwoba Aimable and Bank Populaire should not be considered, because in its article 2, they stipulated that the creditor gives to the bank the plot located at Gisozi in mortgage to secure the payment of the loan, without indicating its number for the purpose of its identification due to the fact that there are many plots at Gisozi. Therefore this is contrary to the provision of paragraph 3 of article 8 of the Civil Code Book III, which stipulates that in order for the contract to be valid, there must be exist a certain subject matter constitutes the cause of the agreement.

[21] Counsel Kaboyi Benoit states also that there was no mortgage registered because there is evidence of mortgage registration by Bank Populaire over that plot N° 400 as he admitted before the Supreme Court, moreover it would have not been possible because that plot is registered on Twagirayezu Thadée and Mukantabana Consolée. He goes on to state that this is contrary to the statements of article 19 of the law of 15 May 1922 governing mortgages, according to which there is no mortgage over immovable property without being registered in the land registration book.

[22] Counsel Mukamazimpaka Hilarie who also represents Mukantabana Consolée states that the case which is subject to review due to injustice, was not was unjust toward them because it disregarded the statement of Rushirabwoba Aimable before the Intermediate Court while Bank Populaire was then represented, where it consented to the error made relating to the fact that the seller who gave the plot in litigation in mortgage while he had already sold it

and the latter admitted the transfer of ownership (*mutation*). he argues in addition that the fact that Banque Populaire did neither lodge an appeal against those statements before the High Court nor apply for the third party opposition against the judgment N°RCA0111/08/TGI/GSBO rendered on 30 January 2009 which ordered that the house in litigation should be apportioned between Mukantabana Consolée and Twagirayezu Thadée with it was notified to him, this implies that it was in agreement with the statements of Rushirabwoba Aimable.

[23] She argues that at the time of the conclusion of the loan contract with Rushirabwoba Aimable in 2007, Bank Populaire had negligence because it did not go to visit the property it was given in mortgage in order to see its condition, because if this was done, it would have found out that the subject of mortgage was not a plot of land, rather, a house belonging to third parties who are different from Rushirabwoba Aimable who misled it.

[24] Counsel Mukamazimpaka Hilarie also stresses the provisions of article 264 of the Civil Code Book III and article 33 of that book, where she argues that by entering into the sale contract of the plot between Rushirabwoba Aimable and Twagirayezu Thadée; the ownership of that plot passed directly to the buyer, even if he was not given its titles yet. Therefore, he could not encumber it as mortgage to the bank. He states also that the Supreme Court has already decided on such issue in the judgment N°RCAA0003/13/CS.

[25] Mubangizi Frank, Counsel for Bank Populaire argues that the grounds that are presented by the appellants are groundless because Bank Populaire was given the documents of the plot located at Gisozi as mortgage indicating that he was the owner, thus it should not have any other worry. Concerning the fact that there are many plots at Gisozi as it is stated by the Counsel for the appellant, he argues that this should not be considered because all those plots do not have N°400 which is in the documents Bank Populaire was given; therefore, article 8(3) of the Civil Code Book III was complied with.

[26] Concerning the fact that the mortgage it was given was not registered in compliance with the provision of article 19 of the Law of 15 May 1922 governing mortgage over immovable property, counsel Mubangizi Frank says that this was not necessary since that article concerns the mortgage over the property which has the title of ownership. He adds that given that the mortgagor has no problem; it is not up to the appellants to ask about that mortgage because they are not concerned with it.

[27] Counsel Mubangizi Frank states that in paragraph 17 of the judgment minutes, the Court explained that the contract concluded between Twagirayezu Thadée and Rushirabwoba Aimable was not valid in order to consider Twagirayezu Thadée as the lawful owner of the plot because he was not given its titles. In addition, he states that in paragraph 18 of the judgment, the Court declared that he/she who is legally considered as the owner of the plot is the one who presents its authentic titles. He also states that the statements of the appellants in respect of which they allege that the court contradicted itself concerning the interpretation of article 264 of Civil Code Book III, are groundless because it provided its motivation in details.

[28] Concerning the case law relied on by Counsel Kaboyi Benoît, Counsel Mubangizi Frank declares its facts to be different from those in the case law at hand, because the subject matter of the case between Bank Populaire against Twagirayezu Thadée and Mukantabana Consolée does not relate to the sale contract as it is the case in that case law.

## VIEW OF THE COURT

[29] Among the documents of the case file including the sale contract of the plot that was concluded on 06 August 2004 whereby Rushirabwoba Aimable agreed to sell to Twagirayezu Thadée a plot which has N°400, located at Gasave cell, Gisozi sector, Gasabo district on seven hundred seventy thousand Rwandan francs (770,000Frw). This contract also demonstrates that the parties to the contract agreed that the buyer paid seven hundred twenty thousand Rwandan francs (720,000Frw) and the balance of fifty thousand Rwandan francs would be paid after the buyer (Twagirayezu Thadée) receives the titles which indicate the owner of the plot. The other element if the contract agreed between parties to the sale contract, is that Twagirayezu Thadée as the acquirer of the plot is allowed begin his activities in that plot immediately after the signature of the contract.

[30] In addition, it included also in the file of the case, the loan contract N°007/2007 concluded on 22 May 2007, between Bank Populaire and Rushirabwoba Aimable whereby Rushirabwoba received a loan from the Bank Populaire amounting to five million Rwandan francs (5,000,000Frw) scheduled to be paid in three years (36 months), and in article 2 of that contract, the borrower furnished his plot located at Gisozi in mortgage to secure its payment..

[31] The Court finds that in the case N° RC0006/10/TGI/GSBO//RC0007/10/TGI/GSBO Mukantabana Consolée and Twagirayezu Thadée sued Rushirabwoba Aimable and Bank Populaire where they requested for the transfer of ownership over the plot they bought and to be registered in their names. The Court ordered that the plot should be registered on Mukantabana Consolée and Twagirayezu Thadée, and also that Bank Populaire should hand back its titles because it was furnished as mortgage unlawfully.

[32] The Court finds also that in the appeal decision of the mentioned judgment, the High Court held that Bank Populaire shall not be compelled to hand back the titles of the plot N° 400 which is in litigation that it was furnished in mortgage by Rushirabwoba Aimable as long as the loan was not yet paid, and this coincides with the decision of the Supreme Court taken in the judgment N°RCAA0149/11/CS on the basis of articles 264 and 282 of the Civil Code Book III.

[33] Article 264 of the Civil Code provides that “sale is valid between the parties, and the seller hands over to the buyer the sold property; the moment they agree on the object and its price, although the object has not yet been delivered or the price paid”, whereas article 282 of that book provides that “the obligation to deliver the property is fulfilled by the seller when he handed over the keys, if it is a building, or when handed property titles”.

[34] In the judgment N° RCAA0149/11/CS which is subject to review due to injustice, the Supreme Court motivated that the contract of 06 August 2004 which Rushirabwoba Aimable entered into with Twagirayezu Thadée was not lawfully valid in order to consider Twagirayezu Thadée as the rightful owner of the plot because he was not given its titles, therefore Rushirabwoba continued to be perceived as an owner *erga omnes* of the plot because he had the titles as provided for by the law.

[35] The Supreme Court finds that there was misapplication of the provisions mentioned above, whereby it was held in paragraph 17 of the judgment subject to review due to injustice, that Twagirayezu Thadée should not be considered as the owner of the plot he bought because he was not yet given its titles. This decision was relied on article 282 of the Civil Code Book III as aforementioned, yet this provision indicates when the seller fulfills

his/her obligation towards the performance of sale contract; and that obligation consists of handing over of the keys, in case of a building, or handing over of the property titles. The fact therefore for the seller to eventually breach his/her obligation could not invalidate the sale contract as it is motivated in article 264 of the Civil Code Book III mentioned above.

[36] The Court that rendered the judgment which is subject to review due to injustice, explained also that the fact that Twagirayezu Thadée admits that during three years after the sale, he was not given the titles and he did not take measures to be given them till the time Rushirabwoba Aimable furnished them in mortgage to secure the payment of the loan, and till the time the plot and its accessories were under auction proceedings by Bank Populaire because Rushirabwoba Aimable failed to pay the loan he was given; constitutes negligence and the excessive trust he had in him.

[37] The Court finds that this entrenches are contrary to what are provided for by article 264 of the Civil Code Book III, where it provides that since the parties to the sale contract already agreed on the object and its price, the sale exists, although the object has not yet been delivered or the price paid.

[38] The Court finds in addition that the motivation of this article was also mentioned in the judgment N° RCAA0003/13/CS whereby the Supreme Court relied on the opinion of the law scholar Laurent Collon, in his book named *Vente d'immeuble* where it held that the sale is valid in case the parties to the sale contract agree on the object and its price even if they themselves can add in some other obligations<sup>1</sup>.

[39] The Court finds that what is provided for in article 282 of the Civil Code Book III relating to the handover of the title of the property to the buyer, constitutes an obligation that the parties shall have after sale, which is not therefore the essential formality, the breach of which the contract is void, instead, one of the parties to the sale contract may request to invalidate the sale contract when those obligations are not respected. However, in this case, none among the parties to the contract requested for the termination of the sale contract because of non-performance of the obligation. Rather, the issue has arisen when Twagirayezu Thadée requested for the transfer of ownership and realized that the plot he bought was furnished as mortgage to the bank.

[40] The Court finds the contract concluded on 06 August 2004 entered into between Rushirabwoba Aimable and Twagirayezu Thadée entitled Twagirayezu Thadée the right of ownership over the plot, to the extent that Rushirabwoba Aimable had no right to use it with the pretext that he did not hand to him property title or he was not yet paid the total amount (to offer it, to sale it or to mortgage it).

[41] The Court also finds the fact that parties provided that the balance amounting to fifty thousand Rwandan francs would be paid after Twagirayezu Thadée is handed the titles, does not also constitute a resolute condition, rather the contract is effective, pending the fulfillment of other formality after the payment of the balance of the price. This is the position of the Supreme Court in its judgment N°RCAA0003/13/CS of 31 January 2014, whereby Rutabayiru Eric entered into a sale contract of the houses with Nteziryayo Eric, and the seller tried to refuse to hand over the titles of the plot. The Supreme Court declared that

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<sup>1</sup> See the judgment N°RCAA0003/13/CS rendered by the Supreme Court on 31<sup>st</sup>/01/2014 between Nteziryayo Eric and Rutabayiro Eric.



sale contract which Nteziryayo Eric concluded with Rutabayiru Eric valid because they agreed on the sold house and its price, and then it ordered the latter to operate the transfer of property in favor of Rutabayiru Eric.

[42] Therefore, the Court finds that as it is already explained above, Rushirabwoba Aimable had no right to furnish the property which no longer belonged to him in mortgage because it was already in the ownership of Twagirayezu Thadée and Mukantabana Consolée, thus the mortgage contract which was performed between the Bank and Rushirabwoba Aimable should not be valid, as it is provided for by the first litera of article 12 of the decree of 15/05/1922 which governed the mortgage over immovable property<sup>2</sup> that was into force when the plot N°400 was mortgaged by Rushirabwoba. Indeed, the provision of this article collaborates with the opinion of the law scholar *François T’Kint* in his book “*Sûretés et principes généraux du droit de poursuites des créances*”<sup>3</sup>.

[43] Basing on the motivation provided above, the Supreme Court finds that the plot N°400 located at Gasave cell, Gisozi Sector, Gasabo District belong to Twagirayezu Thadée and Mukantabana Consolée because they lawfully bought it on the basis of article 264 of the Civil Code Book III which is referred to above, therefore the judgment N° RCA0062/11/HC/KIG rendered by the High Court and the judgment N° RCAA0149/11/CS rendered by the Supreme Court on 16 December 2012 are overturned in whole and Bank populaire is ordered to release the documents of the plot N°400 which it was furnished in mortgage unlawfully by Rushirabwoba Aimable and be registered in the names of Twagirayezu Thadée and Mukantabana Consolée because it belongs to them.

#### **Concerning the Damages requested for by every side in this case;**

[44] Counsel Kaboyi states that Twagirayezu Thadée and Mukantabana Consolée should be given damages which are amounting to eight million Rwandan francs (8,000,000Frw) as a result of what were damaged on the house built on the plot N°400 belonging to Twagirayezu Thadée and Mukantabana Consolée; one Million (1,000,000Frw) of the procedural fees, considered from the beginning of this case; one Million (1,000,000Frw) of moral damages for being taken to court by Bank Populaire while it did not give them the loan, and two million (2,000,000Frw) of the Counsel fees since the beginning of the lawsuits till now.

[45] Mubangizi Frank, the Counsel for Bank Populaire, states in his submissions, that appellants should not be given damages because the bank did not file against them, rather they filed against it, and the fact that the Bank lost the case and appealed against it, is its right provided by the law. He continued to argue that if they want damages, they could not request them from Bank Populaire but they could have requested them from the one who lied to them about sale.

[46] Basing on article 106 of the Law N°21/2012 of 14/06/2012 relating to the Civil, Commercial, Labour and Administrative Procedure and article 258 of the Civil Code book III, Counsel Mubangizi Frank requested damages worth of four million (4,000,000Frw) for being vexatiously dragged into litigation and one million Rwandan francs (1,000,000Frw) as counsel fees.

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<sup>2</sup> There are valid mortgage contract: If the person agrees to be currently building owner or holder of the right to encumber or has a present right to become, and if has capacity to alienate [...]

<sup>3</sup> The grantor of the mortgage must be owner of the building that he strikes –or, more accurately, holder of a real right on the property. The mortgage of another's property is null, FRANCOIS T’KINT, 3<sup>rd</sup> edition, Larcier, Rue des Minimes 39, B-1000 Bruxelles, 2000, p.301.

[47] Counsel Kaboyi Benoît states that those damages should not be given to Bank Populaire because it rather made injustice toward Twagirayezu Thadée and Mukantabana Consolée in refusing to sue the right person therefore dragged them in vexatious litigation.

[48] The Supreme Court finds that; concerning damages of one million (1,000,000Frw) requested for by Counsel Kaboyi Benoît should not be awarded to them because he failed to produce the explanations thereto. Whereas concerning the procedural and counsel fees he requested for on behalf of his clients, they should be awarded one million Rwandan franc (1,000,000Frw) which is awarded upon Court discretion because the two million and five hundred thousand (2,500,000Frw) Rwandan francs he requests is excessive.

[49] Concerning the requested damages by Bank Populaire in the cross appeal, the Supreme Court finds that it should not be awarded them because it has lost the case in whole.

### **III. DECISION OF THE COURT**

[50] The Court holds that the claim of Mukantabana Consolée and Twagirayezu Thadée requesting the revision of the judgment RCAA0149/11/CS rendered by the Supreme Court on the 16 November 2012 due to injustice has merit.

[51] It overturns in whole the judgment RCAA0149/11/CS rendered by the Supreme Court on 16 November 2012 and the judgment N° RCA0062/11/HC/KIG rendered by the High Court on the 25 November 2011.

[52] It orders Bank Populaire, Gikondo Branch to release the titles of the plot N°400 located at Gasave cell, Gisozi Sector, Gasabo district, Kigali city and be handed and registered to Mukantabana Consolée and Twagirayezu Thadée.

[53] It orders Bank Populaire, Gikondo Branch to also pay Mukantabana Consolée and Twagirayezu Thadée one million Rwandan francs (1,000,000Frw) for counsel fees.

[54] It orders Bank Populaire, Gikondo Branch to pay the court fees equal to one hundred thousand Rwandan francs (100,000Frw).