

MUKAKALISA v. MUKAMUSANA ET AL

[Rwanda SUPREME COURT – RCAA0037/15/CS (Nyirinkwaya, P.J., Mukandamage and Nyirandabaruta, J.) April 29, 2016]

Law determining the jurisdiction of courts – Appellate jurisdiction of the Supreme Court – Preliminary objection of lack of jurisdiction – Losing the case at first and second instance for the same grounds – Objection for lack of jurisdiction has no merit in case the grounds based on for losing the case at the first and second instance are not the same – Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28(5).

Facts: This case is based on the succession of the property left by Ntuyenabo Fidèle who was legally married with Nyiramfabakuze with whom they had three children who are Mukamusana Liliane, Musana Landry and Musanabera Sylvie and in 1990, they divorced.

In 1993, he got married with Mukakalisa and had also three children, Ntwari Musana Nelson, Musana Lys and Musana Lynn, and on 11 May 2012 Ntuyenabo passed away. In 2013 Mukamusana Liliane, Musana Laundry and Musanabera Sylvie seized the Intermediate Court of Musanze requesting for the succession of their late father's property which had been illegally possessed by the defendants.

In her defence, Mukakalisa argued that she is entitled to the disputed property because she was legally married with the deceased, by which she produced the marriage certificate.

That Court held that Mukakalisa did not prove that she was married with Ntuyenabo because the document she produced as an evidence does not contain the main provisions which it is supposed to have, therefore it cannot be considered as an authentic deed of the (marriage) to resolve the dispute for all the parties, and also it held that the successors to the deceased who are his six children he had with both wives must share equally the property mentioned in the case, it also ordered Mukakalisa to pay 76,734,949Frw of the revenues he got from the property of Ntuyenabo which the successors must also share equally, she was also charged damages.

Mukakalisa appealed to the High Court claiming that the Intermediate Court refused to grant her the share on property she co owns with Ntuyenabo.

The High Court decided that the appeal of Mukakalisa has no merit and indicated Ntuyenabo's property which must be inherited and its location. It cancelled the land and the provisional titles which indicated that the estate to be inherited is jointly owned by Ntuyenabo and Mukakalisa; it declared that the appealed judgement is only superseded in regards with the property to be inherited and Mukakalisa to pay to the respondents the counsel fees incurred on the appellate level.

Mukakalisa appealed to the Supreme Court, claiming that the High Court, chamber of Musanze misinterpreted article 39 of the law mentioned above and also the judgment RS/INCONST/PEN0003/10/CS, that it disregarded the facts and laws regulating the duties of the parents in raising their children, that it cancelled the documents for the immovable property on illegitimate ground.

Mukamusana raised a preliminary objection of lack of jurisdiction on the ground that Mukakalisa lost the case on the first and second instance on similar grounds.

In her defence, Mukakalisa argued on that objection in stating that the grounds relied on in the adjudication of the case are not similar because on the first instance, the Court heard and examined whether she is the legitimate wife of Ntuyenabo for her to have right on the property of Ntuyenabo and consequently it was declared that she is not a legitimate wife of Ntuyenabo, whereas on the second instance the litigation was about examining whether she can have the right entitled to illegitimate wife of Ntuyenabo whereby it was decided that there is no proof that they acquired it together especially that the appellant avers that Ntuyenabo had it before they lived together.

Held: Even though the appellant lost the case in both Courts; but at the first instance her right on property which she jointly owns with Ntuyenabo was based on the ground that they were legally married though she failed to prove that marriage and she lost the case whereas at the second instance she based that right on the ground that she cohabitated with him although they were not legally married and they co-owned that property and she lost because the Court held that Ntuyenabo had that property before living with her, therefore those grounds are not the same, hence the objection raised by the respondents is overruled.

**The objection is overruled;
Court fees suspended.**

Statutes and statutory instruments referred to:

Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28(5).

Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, article 39.

Case referred to:

Gatera v. Kalisa, RS/Incost/Pen.0003/10/CS, rendered by the Supreme Court on January 07, 2011.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case is based on the issue of succession of the estate of the late Ntuyenabo Fidèle who was deceased on 11 May 2012 in Nairobi Kenya. He was legally married with Nyiramfabakuze Bibiane and they gave birth to three children, namely Mukamusana Liliane, Musana Laundry and Musanabera Sylvie.

[2] Ntuyenabo Fidèle and Nyiramfabakuze divorced¹ in 1990 and in 1993, Ntuyenabo Fidèle got married with Mukakalisa Marie Louise with whom they had three children together, namely Ntwari Musana Nelson, Musana Lys and Musana Lynn. Ntuyenabo deceased on 11 May 2012.

[3] In 2013 Mukamusana Liliane, Musana Laundry and Musanabera Sylvie seized the Intermediate Court of Musanze claiming for the succession of the estate of their deceased

¹ Judgment RC17.413/R43/90 of 31/08/1990.

parent which is in possession of the defendants who are not entitled the right to it. In the Judgment N° RC0127/13/TGI/MUS rendered on 20 March 2014, that Court held that Mukakalisa Marie Louise did not prove that she was legally married with Ntuyenabo Fidèle, and that the rightful heirs of Ntuyenabo Fidèle are Mukamusana Liliane, Musana Landry, Musanabera Sylvie, Ntwari Musana Nelson, Musana Lyn and Musana Lys who have to share equally the estate of Ntuyenabo Fidèle mentioned in that judgment. It also ordered Mukakalisa Marie Louise to pay 76,734,949Frw of the revenue she got from Ntuyenabo Fidèle's estate which must also be shared equally among the heirs, and it charged her damages.

[4] Mukakalisa Marie Louise appealed against that judgment in the High Court, Chamber of Musanze claiming that the Intermediate Court did not allocate to her the share on the property she jointly owned with Ntuyenabo Fidèle. In the judgment RCA0043/14/HC/MUS, rendered on 30 September 2015 by the High Court, Chamber of Musanze, this Court held that the appeal of Mukakalisa Marie Louise has no merit, hence, it précised the estate of the late Ntuyenabo Fidèle which must be inherited and its location², cancelled the land and emphyteutic lease titles which indicated that the estate to be inherited is jointly owned by Ntuyenabo Fidèle and Mukakalisa Marie Louise, that the land registrar should register it in the names of Ntuyenabo Fidele. It declared that the appealed judgement is only superseded in regards with the estate to be inherited. It ordered Mukakalisa Marie Louise to pay to Mukamusana Liliane, Musana Landry and Musanabera Sylvie the Counsel fees.

[5] Mukakalisa appealed to the Supreme Court, claiming that the High Court, chamber of Musanze misinterpreted article 39 of the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence and also the case law RS/INCONST/PEN0003/10/CS. It disregarded the facts and laws regulating the duties of the parents in raising their children and cancelled the immovable property titles on the basis of illegitimate grounds.

[6] The case was heard in public on 05 April 2016, Mukamusana Liliane, Musana Landry and Musanabera Sylvie represented by Counsel Kavuyekure Dieudonné whereas Mukakalisa Marie Louise represented by Counsel Nzirabatinyi Fidèle, and on that day the parties argued about the preliminary objection of lack of jurisdiction which was raised by the Counsel for Mukamusana Liliane and others on the ground that Mukakalisa Marie Louise lost the case on first and second instance on similar grounds.

II. ANALYSIS OF THE LEGAL ISSUE

Determining whether Mukakalisa Marie Louise lost the case on the first and second instance basing on similar grounds.

[7] Counsel Kavuyekure Dieudonné argues that Mukakalisa Marie Louise pleaded in Intermediate Court of Musanze claiming that she is entitled to the Ntuyenabo Fidèle's estate on the ground that they were married and during the summary procedure the estate was put under her administration on the ground that she lived with late Ntuyenabo Fidèle as legally married, but after the judgment RCA0291/14/TGI/NGOMA which held that Mukakalisa never got legally married to Ntuyenabo Fidèle, she changed the claim and pleaded in the High Court arguing that she demands the right on the property she jointly acquired with

² The judgment RCA0043/14/HC/MUS, rendered on 30 September 2015 by High Court, Musanze, p.12-13 ([22]).

Ntuyenabo Fidèle, therefore it is evident that she pleaded on the first and second instance about the estate and lost the cases, because it was held that when she lived with Ntuyenabo Fidèle, he was already in possession of the contested estate.

[8] Counsel Nzirabatinyi Fidèle argues that Mukamusana Liliane and others are the ones who seized the court at first instance, and the Court heard the arguments on whether Mukakalisa Marie Louise is the legitimate wife of Ntuyenabo for her to be entitled the right to his estate and it was decided that she is not a wife of Ntuyenabo, whereas on the second instance the argument was about determining whether Mukakalisa Marie Louise could have the right as a wife who cohabited with Ntuyenabo Fidèle without being legally married. In his view, he finds that the decisions of both Courts are the same, but relied on different grounds.

THE VIEW OF THE COURT

[9] Article 28 of the Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court provides for in its fifth paragraph that the case lost by a party to proceedings in the first and second instances basing on similar grounds shall not be appealed for to the Supreme Court.

[10] In the Judgment RC0127/13/TGI/MUS rendered on 20 March 2014 by Intermediate Court of Musanze, the plaintiffs were Mukamusana Liliane, Musana Landry and Musanabera Sylvia and the defendants were Mukakalisa Marie Louise, Ruragije Jonas alias Mugezi and Munyemanza Faustin and Ntwari Musana Nelson voluntary intervened while Mukakalisa Marie Louise was forced to intervene to represent her children Musana Lys and Musana Lynn. The subject matter was “the succession of the estate of our late parent Ntuyenabo Fidèle who deceased on 11 May 2012 and that estate is possessed by the defendants who are not entitled to it”.

[11] In that judgment as it is evident on paragraph three [3] on page 2-3, the Court examined the issue relating to whether Mukakalisa Marie Louise was legally married to Ntuyenabo Fidèle for her to be entitled to his estate, determination of the estate of late Ntuyenabo Fidèle, and its succession procedure and the damages requested by the parties in the case.

[12] On the issue of determining whether Mukakalisa Marie Louise was legally married with Ntuyenabo for her to be entitled to his estate, the Court based on the photocopy of the marriage certificate submitted by Mukakalisa Marie Louise which was issued by the former Bicumbi district. The court ruled that the photocopy of the marriage certificate does not indicate the main provisions which should be in such a document, therefore it should not be considered as an authentic deed (marriage certificate) with an *erga omnes* value, and also the fact that the civil status officer did not confirm that Ntuyenabo Fidèle was married with Mukakalisa Marie Louise, the court could not hold that they were married since there was no marriage certificate issued by the public servant who has the competence to do so (paragraphs 9 - 17 of the judgment RC0127/13/TGI/MUS rendered on 20 March 2014, especially paragraphs 12, 15 and 17).

[13] The Court finds that this ground was not examined in the judgment RCA0043/14/HC/MUS rendered on 30 September 2014 by the High Court, chamber of Musanze, because Mukakalisa Marie Louise did not again present the argument that she was legally married with her husband Ntuyebabo Fidèle, because at appeal level she pleaded

arguing that the previous Court refused to grant her the share of the contested property as a wife who cohabited with Ntuyebabo Fidèle since 1993 till 2012. She argued that her right is based on article 39 of the Law N°59/2008 of 10/09/2008 on the prevention and punishment of gender based violence, and on the judgment RS/INCONST/PEN0003/10/CS³ rendered on 07 January 2011 by the Supreme Court.

[14] On the issue of determining the estate of late Ntuyenabo Fidèle and on how it will be inherited, it is indicated in the case file that the Intermediate Court of Musanze with the aid of the administration of Musanze, Burera and Kicukiro districts, identified the assets of Ntuyenabo and their location, and other various documents in file such as registration certificate folio 87 vol.E.XI, and other documents demonstrating various bank account, as it is in the judgment RC0127/13/TGI/MUS mentioned above on the page 7-8, paragraph [21-25] and [42]. Therefore it held that the immovable property left by Ntuyenabo Fidèle which must be inherited is constituted by the plots registered on N°2433, N°2244, N°5971 and N°4024 located in Muhabura cell, Nyange Sector, Musanze district; plots registered on N°577, N° 5969 located in Ruhengeri cell, Muhoza Sector, Musanze district, the plot registered on N°373 located in Migeshi cell, Cyuve Sector, Musanze Sector, and the other one registered on N°08/49 which is located in former Mulinzi- Gasiza in Ruhengeri.

[15] Regarding the heirs to the estate and also the money left and that of the revenue got from the deceased's asset amounting to 76,734,949Frw, the Court ruled that when Ntuyenabo divorced with the mother of the children who seized the court (legitimate wife named Nyiramfabakuze Bibiane) in 1990, the entire property got back in his possession, and even when he lived with Mukakalisa Marie Louise the property was still his because they did not get married legally. Thus it must be inherited by all of his children who are; Mukamusana Liliane, Musana Landry, Musana Sylvie, Ntwari Musana Nelson, Musana Lynn and Musana Lys (see the paragraph of [26] - [30] of the judgment RC0127/13/TGI/MUS.

[16] On the issue of the right to the property, before the High Court, as indicated above, Mukakalisa Marie Louise argued that the previous Court refused to grant her a share on the contested property as a wife who stayed in concubinage with him since 1993 till 2012. She states that her right is grounded on article 39 of the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, and on the case law RS/INCONST/PEN0003/10/CS rendered on 07 January 2011 by the Supreme Court.

[17] That Court examined the provision of article 39 of the Law N°59/2008 of 10/09/2008 mentioned above and the interpretation of article 39 by the Supreme Court in the judgment RS/Incost/Pen.0003/10/CS, whereby it interpreted that the right on the property by one of these who lived in concubinage without a legal marriage is based on the fact that they acquired it together and that right is not only based on the fact that they lived as husband and wife without a legal marriage, rather it must be obvious that they jointly own that property or

³ The judgment RS/ Incost/Pen.0003/10/CS, Gatera Johnson and his wife Kalisa Theddy requested for the repeal of article 39 of Law N°59/2008 of 10/09/2008 on prevention and punishment of gender based violence, which provides for the equal right on property for the people entertaining unlawful marriages because it contravenes article 26 of the Constitution. The Supreme court held that article of 39 does not contravenes the constitution, that the effects on the property of those who lived as a wife and husband without a legal marriage when they decide to separate are not the same as for those who were legally married and they divorce, that the right on property of the married people are based on marriage contract they chose at their on the eve of their marriage, whereas for those who lived as a wife and husband that right is based on the fact that jointly owned it or acquired together.

acquired it together⁴ and then it examined the issue of the immovable property that Mukakalisa Marie Louise argued that it is registered on her and Ntuyenabo Fidèle for assessing whether she has a right over it.

[18] The High Court, in accordance with the statements of the counsel for Mukakalisa Marie Louise that the property she demonstrated in the valuation report belonged to Ntuyenabo before they cohabitated in 1993, but that they jointly owned that property because it was registered on both of them, and there were some transformations made on it⁵, but apart from arguing that, she failed to prove to the Court those transformations or the renovation made on the immovable property owned by Ntuyenabo, so that he could indicate the share of Mukakalisa Marie Louise on it. It also examined the validity of the emphyteutic lease of the immovable property to be inherited which is registered on Ntuyenabo and Mukakalisa Marie Louise and it found as indicated in part [14] and [15] of the appealed judgment that there was fraud (it was revealed in the investigation carried out by the Court at the administration of Musanze District on 26 February 2013 that it was based on the fact that the letter of 26 February 2013 requesting for the land title addressed to the Mayor of Musanze district, was written in secretariat of Musanze district, by Ntuyenabo while he was not alive by that time because he deceased on 11 May 2012, and the fact that the investigation carried out by the Court on 29 September 2015 at the office of the Deputy Registrar General of land titles in Northern Province indicates also that Mukakalisa stated that the origin of one of the property of which she possesses documents which she submitted to the court, which is among the assets to be inherited was bought by her and Ntuyenabo, the other being their inheritance and the rest was given to them by the government. These statements are contrary to the statements of her counsel Nzirabatinyi who stated that the contested property was all in ownership of Ntuyenabo before cohabitation with Mukakalisa in 1993.

[19] The Court finds that it is according to aforementioned grounds that were considered by the High Court, whereby basing on the attributions of the Office of the Registrar General of land titles bestowed to him by article 20 of Law N°43/2013 of 16/06/2013 governing land in Rwanda demonstrating that the land title may be cancelled, (those are emphasised by article 10 part 5 of the presidential order N°97/01 of 18 June 2004 determining the functioning and the competence of the land registrar) which regards the cancellation of the emphyteutic lease title, it cancelled the final and provisional emphyteutic lease titles which indicated that the immovable property to be inherited belongs to both Ntuyenabo Fidèle and Mukakalisa Marie Louise. Instead, the Registrar general of Land titles registered them in the names of Ntuyenabo Fidèle.

[20] As demonstrated above, the court finds that, at the first instance Marie Louise relied her pretensions on the fact that she was legally married to Ntuyenabo Fidèle and they live together until Ntuyenabo Fidèle died in 2012, therefore she must get a share on the contested property, and she lost because she failed to prove that the marriage existed and it was declared that it is only six children of Ntuyenabo Fidèle who should inherit the contested property.

[21] The Court finds that at the second instance, Mukakalisa Marie Louise did not base her rights on her being fact that she was married to Ntuyenabo Fidèle, rather she based that right on the ground that she lived with him in concubinage relationships as a wife and husband although they were not legally married and they co-owned that property. In consequence, she

⁴ Idem, p.5-6 ([8]-[9])

⁵ Idem, p.7 ([12])

submitted to the court the emphyteutic lease title which demonstrated that it belongs to her and Ntuyentabo, and she lost the case because her Counsel argued that Ntuyenabo owned all properties before he began to live together with Mukakalisa Marie Louise, who argues that she made some transformations on it but failed to prove them. The fact that the documents she submitted were obtained fraudulently, that Court held that the appealed judgment is superseded only on the property to be inherited (because there are other additional assets which were demonstrated by Mukakalisa Marie Louise).

[22] Therefore as demonstrated above, the Court is of the view that even if Mukakalisa Marie Louise lost the case in both Courts, she did not lose on similar grounds, thus the preliminary objection raised by the respondents in this case has no merit.

[23] The Court finds that it is not necessary to examine other grounds on which both Courts decided, because it is already evident that in those Courts, Mukakalisa Marie Louise did not lose cases on similar grounds.

III. DECISION OF THE COURT

[24] It holds that the preliminary objection of lack of jurisdiction by the Supreme Court raised by Kavuyekure Dieudonné, counsel for the respondents in this case has no merit.

[25] It declares that the hearing of the case on merit will resume on 12 July 2016.

[26] It orders the Court fees to be suspended.