

## GAHENDA v. RUTSINDURA

[Rwanda SUPREME COURT – RCAA0020/14/CS (Rugege, P.J., Mugenzi and Kanyange, J.) July 07, 2015]

*Law determining the jurisdiction of courts – Jurisdiction of the Supreme Court on the basis of the value of the subject matter – Determination of the value of the subject matter – The value of the subject matter can be determined by the Supreme Court if it was not determined by other courts – Organic Law N°03/2012 of 14/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28.*

*Evidence law – Probative value of DNA – The results of DNA test carried out by an expert is considered as irrevocable evidence with regard to determination of genetic relationship between those tested.*

**Facts:** This case was initially filed to the Intermediate Court of Huye whereby the alleged Rutsindura Alexis, the name which is denied his opponents since they instead argue that his real names are Bigirimana Cedric. In his petition, he requested to inherit the estate of those he claimed to be his parents who are late Rutsindura Alphonse and late Dusabe Emma Marie killed during the Genocide against the Tutsi in 1994. This estate was inherited by Gahenda Bienvenue and his siblings. That Court held that Rutsindura Alexis is the sole heir to the estate of late Rutsindura Alphonse and late Dusabe Emma Marie, therefore, it ordered Gahenda and his sibling to hand over the entire estate.

Gahenda appealed to the High Court, and meanwhile the criminal case which was pending before the Intermediate Court of Nyarugenge whereby the accused was being prosecuted for obtaining civil status documents through false declaration about his origin and name was disposed and the accused was acquitted on the benefit of doubt on evidence including the DNA test of which the Court declared unlawfully conducted. The High Court also sustained the appealed judgment.

Gahenda appealed against the decision of the High Court to the Supreme Court but before the hearing of the case on merit, the respondent raised a preliminary objection of inadmissibility of the appeal on the grounds that the appellant lost the case on similar grounds on the first and second level and that there is no damages worth 50,000,000Frw at least awarded in the appealed judgment. In his defence, the appellant argued that before previous courts, it was not necessary to debate over the value of the subject matter, but that there is an expertise he submitted which demonstrates that the pecuniary value of the estate requested to be inherited exceeds 50,000,000Frw. In addition, he contests that he did not lose the case on similar grounds because at the Intermediate Court of Huye, he lost due to false declarations of witnesses whereas in the High Court he lost the case due to the decision of the judge who did not wish to wait for tangible elements of evidence pretending that it was likely to delay the case.

The Supreme Court examined the objection raised and declared that the value of the subject matter can be determined by the Supreme Court if it was never determined by other courts, thus relying on the expertise submitted by the appellant which indicates that one of estates to be inherited exceeds 50,000,000Frw in value; it has material jurisdiction to hear the case. Regarding the fact that Gahenda Bienvenu lost the case on similar grounds, the Court declared that the Intermediate Court analysed the case on merit and found that the heir to the estate of late Rutsindura Alphonse is Rutsindura Alexis because those who claimed that he is

not his child failed to prove it. The High Court ruled on the objection raised whereby it examined whether the application for case review due to injustice is a ground for suspension of hearing, it also examined whether it is a right of the party to request for the intervention of the third party. It analysed in addition the issue concerning the valuation of the house. The Supreme Court found that the High Court did not rule on the crucial issue of determining the heir between the appellant and respondent, therefore it held that he did not lose the case on similar grounds.

In the appellant's grounds at Supreme, Gahenda states that the so-called Rutsindura Alexis is not a child of late Rutsindura Alphonse and late Dusabe Emma Marie for him to request to inherit them, and that the names of Rutsindura Alexis are not his genuine names because his actual names are Bigirimana Cedric whose parents are Burundian. He requests for ADN test between the so-called Rutsindura Alexis and those known to be his parents who live in Burundi.

In his defence, the respondent argues that there are many witnesses who confirmed that he is indeed a child of Rutsindura Alphonse and Dusabe Emma Marie which the opponent did not contradict. Regarding the DNA test, he finds it unnecessary because the declarations of witnesses constitute sufficient evidence in consideration of the hierarchy of evidences in civil cases and if it should be carried out, the samples should be collected from the remains of his parents and their child.

The Court ordered for the DNA test to be carried out in German between the so-called Rutsindura Alexis and the one Gahenda Bienvenu claims to be his parents (Nahishakiye Berchmas). The results of that test indicated that the so-called Rutsindura Alexis is a child of Nahishakiye Berchmas at 99.9999% rate.

**Held:** 1. The value of the subject matter can be determined by the Supreme Court in case it has never been determined by previous courts.

2. The Intermediate Court examined the rightful heir to the estate of Rutsindura Alphonse while the High Court examined the objection raised, therefore the appellant did not lose the case on same grounds.

3. The results of DNA test carried out by an expert is considered as irrevocable evidence with regard to determination of child and father genetic relationship, therefore, the test carried out between the so-called Rutsindura Alexis and Nahishakiye Berchmas indicated that the genetic relationship between them is that of a child and father on the level of 99,9999%. Basing on that ground, the so-called Rutsindura Alexis has no right to inherit the estate of Rutsindura Alphonse.

**Appeal has merit;  
Court fees to the respondent.**

**Statutes and statutory instruments referred to:**

Organic Law N°03/2012 of 14/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, article 28.

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 7.

Law N°15/2004 of 12/6/2004 relating to evidence and its production, articles 3 and 76.

Law N°22/99 of 12/11/1999 supplement book one of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, article 50.

No case referred to.

## Judgment

### I. BRIEF BACKGROUND OF THE CASE

[1] The respondent in the names of Rutsindura Alexis, whereas the other party avers that his names are Bigirimana Cedric petitioned the Intermediate Court of Huye requesting to inherit the estate of his late parents Rutsindura Alphonse and Dusabe Emma Marie that were murdered during the Tutsi genocide in 1994. That estate was inherited by Gahenda Bienvenue and his siblings pursuant to the judgment RCA8697/132 rendered by the Court of appeal of Nyabisindu on 15 June 2004.

[2] On 05 January 2010, the Intermediate Court of Huye rendered the judgment RC00053/08/TGI/Hye and held that Rutsindura Alexis is the sole heir of Rutsindura Alphonse and Dusabe Emma Marie, that he should inherit the deceased's entire estate wherever it is. Therefore, it ordered Gahenda Bienvenue and his siblings to hand over the entire estate of Rutsindura Alphonse and Dusabe Emma Marie which they inherited following the judgment RCA8697/132 or any other estate belonging to them which they might have taken on their own or which might be located elsewhere.

[3] Gahenda Bienvenu appealed against the judgment to the High Court, chamber of Nyanza and the appeal was recorded on RCA0003/10/HC/NY. Meanwhile, the criminal case, which was pending before the Intermediate Court of Nyarugenge whereby the respondent was prosecuted for obtaining the civil status documents through false declaration of his origin and name, was delivered. The Intermediate court of Nyarugenge acquitted him on the benefit of doubt on evidence including the DNA test of which the Court declared it was unlawfully conducted. The result of that DNA test indicated that Rutsindura Alexis is a child of Nahishakiye Jean Berchmans. In the judgment RCA0003/10/HC/NY rendered by the High Court, Chamber of Nyanza on 12 March 2014 the Court sustained the appealed judgment.

[4] On 03 April 2014, Gahenda Bienvenu appealed against the judgment rendered by the High Court in the Supreme Court. The hearing in the Supreme Court commenced on 13 January 2015 whereby the appellant Gahenda Bienvenue was represented by Counsel Protais Mutembe whereas the respondent was represented by Counsel Mwine Geoffrey.

[5] Before the hearing of the case on merit, Mwine Geoffrey, the Counsel for the respondent raised a preliminary objection of inadmissibility of Gahenda's appeal basing on the last paragraph of article 28<sup>1</sup> and litera7<sup>2</sup> of the Organic Law N°03/2012 of 14/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court. He elaborated that there is no damages worth 50,000,000Frw at least awarded in the appealed judgment; none of the judges indicated that the value of the subject matter exceeds

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<sup>1</sup>This paragraph stipulates that "However, a 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".

<sup>2</sup>Litera7 of the paragraph 2 stipulates that The Supreme Court shall also have appellate jurisdiction over cases heard and decided in the second instance by the High Court, the Commercial High Court ...if such cases ...Involve a judgment in respect of which there was an award of damages of at least fifty million Rwandan francs (50,000,000Frw), or when the value of the case, as determined by the judge in case of a dispute, is at least fifty million Rwandan francs (50,000,000Frw).

50,000,000Frw and also the appellant lost the case in the Intermediate Court and High Court on similar grounds.

[6] Counsel Mutembe Protais argued that the objection lacks merit because it was not necessary to debate on the value of the subject matter before the Courts which rendered the appealed judgment, but that there is a valuation report which was submitted by his client, demonstrating that the value of the subject matter to be inherited exceeds 50,000,000Frw. Regarding the ground that Gahenda lost the case on similar grounds, Counsel Protais Mutembe contested that those grounds are not similar because at the Intermediate Court of Huye, Gahenda lost the case due to the witnesses who gave false testimonies whereas in the High Court he lost the case due to judge who did not wish to stay the hearing in order to wait for the reliable evidence with the pretext of that it would delay the case.

[7] The Court overruled the preliminary objection raised by Mwine Geoffrey, the Counsel for the respondent. Concerning the value of the subject matter, the Court declared that it can be determined by the Supreme Court as long as it has never been determined by other Courts and in this case it was not determined because it was not necessary in the previous Courts. Pursuant to the valuation report submitted by the appellant who indicates that among the estates to be inherited there is one valued above 50,000,000Frw, the Court held that it has material jurisdiction to hear the case.

[8] Regarding the fact that Gahenda Bienvenu lost the case on similar grounds, the Court declared that the Intermediate Court found that the heir to the estate of Rutsindura Alphonse is Rutsindura Alexis because those who claimed that he is not his child failed to prove it. The High Court ruled on the objection raised and analysed whether the application for the case review due to injustice is a ground for suspending the hearing. It also analysed whether it is a right of the party to request for the forced intervention of a third party, it analysed the issues concerning the valuation of the house and it sustained the appealed judgment. The Court found that the High Court did not resolve the crucial issue of determining the heir of Rutsindura Alphonse between the appellant and respondent, while the Intermediate Court ruled on the matter, therefore it held that he did not lose the case on similar grounds.

[9] Gahenda Bienvenu and his counsel Mutembe Protais argued that the so-called Rutsindura Alexis is not the son of Rutsindura Alphonse and Dusabe Emma Marie for him to request to inherit them, and also that he named himself Rutsindura Alexis to justify that he is a descendant of the decujus, given that his real names are Bigirimana Cedric whose parents are burundians. They request for ADN test between the so – called Rutsindura Alexis and those they argue to be his parents living in Burundi.

[10] Counsel Mwine Geoffrey avers that many persons were interrogated and confirmed that his client is the son of Rutsindura Alphonse and Dusabe Emma Marie and Gahenda did not contradict it, whereas regarding the DNA test, he finds that the Courts which rendered the appealed judgement decided on it, thus it is not necessary to carry it out especially that the parents of Rutsindura Alexis are deceased and in case it is to be carried out, samples should be taken from the remains of his parents and their child. Finally, he emphasises that ADN is not essential because there is hierarchy of evidence in civil matters; therefore declarations of witnesses are enough.

[11] The Court decided that the evidence to settle the disputes of determining whether the respondent in the names of Rutsindura Alexis is not a child of Rutsindura Alphonse should be a DNA test between the so-called Rutsindura Alexis and those Gahenda Bienvenu considers

as his parents. On 23 February 2015, the Chief Registrar of the Supreme Court wrote to the Prosecutor General requesting him to assist the Court so that DNA test be carried out between Nahishakiye Berchmas from Burundi and the so - called Rutsindura Alexis. On 24 February 2015, the saliva samples were sent to Germany, the DNA test was carried out by Dr Christa Augustine from the Institute of Legal Medicine located at Hamburg in that Country on 26 March 2015. On 02 April 2015 the Prosecutor General wrote to the Chief Justice delivering to him the result of the requested test. The hearing resumed on 09 June 2015 for the parties to debate on the DNA test result. On that day, Counsel Uwimabera Beatha also came representing the respondent who is in the names of Rutsindura Alexis.

## **II. ANALYSIS OF THE LEGAL ISSUE**

### **Determining whether the respondent is a child of late Rutsindura Alphonse for him to be titled to inherit his estate.**

[12] Counsel Mwine Geoffrey states that he does criticise neither the DNA test nor the organs which participated in its process be it the police or the prosecution. However, the researchers confirmed that the expert who carried out the DNA test can make a mistake at the rate of 75%. He requested for another DNA test between his client and the descendants of the father of Gahenda called Seburikoko Narcisse, so that the results compared with former DNA test. According to him that will permanently settle the dispute, because normally the expertise requires a cross expertise.

[13] Counsel Uwimabera Beatha states that she is worried of the fact that DNA test was forcibly carried out without the consent of his client who denied knowing the one considered as his father from Burundi. She argues that the statement made by Gahenda alleging to be a Burundian were accepted, the same should apply to her client who states that he is a Rwandan. Furthermore, she states that both parties should agree on a doctor to accompany them to carry out the DNA test in another country than Germany, for them to believe that justice has been rendered.

[14] Gahenda Bienvenu states that he acknowledges the results of DNA because it confirms what he already knew, and the previous DNA test indicated that his opponent is not a child of Rutsindura Alphonse. Both DNA test demonstrate that the so-called Rutsindura Alexis is a child of Nahishakiye Berchmans at the rate of 99.9999%. Concerning the fact that Nahishakiye Berchmans stated that he does not know him, Gahenda Bienvenu argues that during the assistance investigation he confessed that Bigirimana Cedric is his child and that they had lost him. He concludes stating that there is a judgment RPAA0054/10/CS rendered by the Supreme Court that holding that the result of DNA test at the rate of 99.9999% is reliable.

[15] Counsel Mutembe Protais avers that he does not challenge the DNA test results, but does not consent to another tests to be carried out with the purpose of proving that his opponent is a child of Rutsindura Alphonse because all the tests carried out proved that he is a child of Nahishakiye Berchmas. In addition, he argues that there is other evidence which confirms the results of DNA test including the pictures which demonstrate that the child Rutsindura Alexis had forward slanting ears, while opponent of Gahenda has backward slanting ears.

## **OPINION OF THE COURT**

[16] The High Court, chamber of Nyanza which rendered the appealed judgment did not examine the main issue of the case which is determining whether the respondent in the name of Rutsindura Alexis is the heir to Rutsindura Alphonse. Thus that Court contradicted article 7 of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure which provides that the judge rule only and on all that which is referred to the court. On that ground this Court should examine the issue of determining whether the respondent is a child of Rutsindura Alphonse for him to be entitled to inherit him.

[17] Article 3 of Law N°15/2004 of 12/6/2004 relating to evidence and its production provides that “each party has the burden of proving the facts it alleges”. Whereas article 76 of the same law stipulates that “evidence by experts is that which is intended to give to the court, explanations based on expertise as well as conclusion which is beyond the ordinary knowledge of a judge in his or her duties, depending on the underlying special expertise”.

[18] The Court finds that the case file contains the results of DNA test which was submitted by an expert called Dr Christa Augustine from the Institute of Legal Medicine in Germany. The DNA test which was carried out on the so-called Rutsindura Alexis and Nahishakiye Jean Berchmas indicates that the genetic relationship between them is that of a child and father at the rate of 99.9999%. The expert who carried out the DNA test confirmed that basing on the samples tested they found that Jean Berchmas Nahishakiye and Alexis Rutsindura share at least one allele in every STR-system tested here. Thus Jean Berchmas Nahishakiye cannot be excluded from paternity.

[19] The Court finds that result of ADN test has weight because it was carried out by an expert on the basis of saliva samples of the respondent in this judgment and Nahishakiye Jean Berchmas, therefore it must be considered as an irrevocable evidence in regard to determine whether the one who pretends to be Rutsindura Alexis is not the son of Rutsindura Alphonse, rather Nahishakiye Jean Berchmas’s.

[20] The Court finds that the DNA test clearly indicates that the so-called Rutsindura Alexis is a child of Nahishakiye Jean Berchmas. This excludes the allegations of the so-called Rutsindura Alexis that he is the child of Rutsindura Alphonse. The DNA test has more weight and is reliable than testimonies produced by the respondent, the so-called Rutsindura Alexis (Bigirimana Cedric) with the purpose of justifying that he is the son of Rutsindura Alphonse. It is not the first time that the DNA test proves that the so-called Rutsindura Alexis is a child of Nahishakiye Jean Berchmas, as it was once carried out in the criminal case (RPA0138/11/TGI/NYGE) before the Intermediate Court of Nyarugenge, although that Court invalidated it because of the procedural irregularities but not the content. It had also indicated that the accused is a child of Nahishakiye Jean Berchmas at the rate of 99.9999999%.

[21] Regarding the arguments of Counsel Mwine Geoffrey that the researchers confirmed that the expert who carried out the DNA test can make a mistake at the rate of 75%, basing on the document he submitted, the Court finds that it is not mentioned like that, rather according to that document, the researchers explained that the less people understood the technology of ADN test the higher were conviction rates. Low understanding of the technology translated to 75% conviction rates versus 42% conviction with better knowledge<sup>3</sup>.

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<sup>3</sup>[www.news-medical.net/news/20100329/DNA](http://www.news-medical.net/news/20100329/DNA)

[22] The Court finds that the arguments of the counsels for the respondents regarding the carrying out of another DNA test between him and the descendants of Seburikoko Narcisse lacks merit because it cannot solve anything when the one already carried out indicate that the so-called Rutsindura Alexis is a child of Nahishakiye Jean Berchmas. Furthermore, they do not demonstrate what they contest on that test in order to invalidate its result by carrying out another test. In his conclusion, the expert who carried out the DNA test between the respondent in the names of Rutsindura Alexis and Nahishakiye Jean Berchmas does not hesitate that the genetic relationship between them is that of a child and father. Those are sufficient for the Court to make a ruling without carrying out a similar test, unless the counsels for the respondent were able to challenge the expert who carried out the test.

[23] Between the year 2007 and 2014, Rwanda sent DNA samples at the Institute of Legal Medicine, University Hospital of Hamburg in Germany, and more than 400 DNA tests were carried out. Dr. Christa Augustine who carried out the DNA test in this case is employed in that institution. She is in charge of carrying out DNA test and she is the head of Forensic Genetics Laboratory in that institution. There is no problem ever detected in the results of all the DNA tests sent from Rwanda of which she was requested to carry out. From the Organization Research Gate, Dr. Christa Augustine has already written more than 46 scientific papers relating to DNA. All of those demonstrate that she is an expert in matters concerning DNA test. The fact that the Counsels for the respondent in the names of Rutsindura Alexis argue that they would be satisfied after carrying out another DNA test and compared its results with the one carried out, without demonstrating how they challenge it, is groundless.

[24] Furthermore, the Court finds that in the case file there is a report made by the Burundian prosecutor of Muramvya, which he called “rapport d’une descente effectuée sur la colline Gahweza Commune de Kiganda, Province de Muramvya en date du 23/11/2010”. In that report the Prosecutor states that he showed a photo of Bigirimana Cedric to Nahishakiye Jean Berchmas and he responded that he is his fourth born, Nahishakiye even asked him if his child is still alive. Quoting him, he wrote “[...] j’ai rencontré sieur Nahishakiye Jean Berchmas. Son épouse était encore aux champs. Je lui ai alors montré la photo de Bigirimana Cédric. Il l’a aussitôt reconnu et a déclaré que c’est son fils et qu’il est son quatrième enfant. Avec beaucoup d’étonnement, il m’a demandé de lui dire si son fils vivait encore”. The results of the DNA test, emphasize the statement of the National Prosecutor of Muramvya/Burundi that the parents of the so-called Rutsindura Alexis recognized him when they saw his photo and accepted that he is their fourth born.

[25] In the report mentioned in the previous paragraph, the National Prosecutor of Muramvya/Burundi also demonstrates that the respondent in this Court kept on changing names several times. It is clear that his parents do not know him by the names of Rutsindura Alexis. They mentioned his different names as he changed them but they never mentioned that one. The prosecutor further noted that the mother of the so-called Rutsindura Alexis stated that her child before he was baptized, was called Nahishakiye Cedric and later he named himself Bigirimana Cedric. He quoted “elle a précisé qu’avant qu’il ne soit baptisé, il s’appelait Nahishakiye Cédric mais qu’il s’est baptisé Bigirimana Cedric [...]”. Changing of the names by the respondent to the extent that he is not known by the names of Rutsindura Alexis in Burundi where he lived; further emphasizes that he is not a child of Rutsindura Alphonse. Basing on the motivations contained in this paragraph and the previous ones, the Court finds that the respondent in the names of Rutsindura Alexis (Bigirimana Cedric) is not a child of Rutsindura Alphonse.

[26] Article 50 of the Law N°22/99 of 12/11/1999 supplement book one of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions provides that all legitimate children of the *de cuius*, in accordance with civil laws, inherit in equal parts. That is to say for a person to be entitled to inheritance, in accordance with the civil procedure, the heir must be a child of the predecessor. The respondent is not a child of Rutsindura Alphonse as already motivated above. In accordance with article 50 cited in this paragraph he is not entitled to inherit the estate of the late Rutsindura Alphonse, therefore the rulings of all the previous cases granting him the right to inherit that estate are hereby overturned.

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

[27] Holds that the appeal of Gahenda Bienvenu has merit;

[28] Holds that the respondent in the names of Rutsindura Alexis (Bigirimana Cedric) is not a child of Rutsindura Alphonse therefore he is entitled to inherit his estate;

[29] Declares that the judgment RCA0003/10/HC/NYA rendered by High Court, chamber of Nyanza on 12 March 2014, which was appealed against in this Court and the judgment RC0053/08/TGI/HYE rendered by the Intermediate Court of Huye on 05 January 2010 are overturned;

[30] Orders the respondent in the names of Rutsindura Alexis (Bigirimana Cedric) to deposit the court fees equivalent equal to 100,000Frw.