

# KANYANJA ET AL v. MUKANTABANA ET AL

[Rwanda SUPREME COURT – RCAA0002/13/CS (Rugege, P.J., Mugenzi and Kanyange, J.)  
September 25, 2005]

*Family law – Testament – Joint ownership – Termination of joint ownership – The heir must enjoy the full right of getting out of the joint ownership – 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, articles 46, 56 and 91.*

*Evidence law – Burden of proof – A party alleging to be discharged from an obligation that has been established must prove that the obligation no longer exists – Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 9(2).*

*Damages – Pecuniary damages – The pecuniary damages are not awarded into Court's discretion when they are composed of the revenue which can be calculated.*

*Civil procedure – Appeal – New claim – At appeal level the new claim is inadmissible – Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 168.*

**Facts:** Buhiga made a testament whereby he determined how his estate will be apportioned among his successors. However, he declared that it should not be sold outside his successors. The latter filed a claim at Intermediate Court stating that the testament was not followed, and requested for the termination of indivision of estate as well as the sharing of other estates which are not mentioned in the testament.

The Court held that the whole estate mentioned in the testament made by the *de cuius* as well as the one unmentioned in it comprised of eucalyptus woodland, the piece of land both located at Cyarwa Sumo and seven cows and their offspring should be apportioned among persons mentioned in the testament, those who passed away being represented by their children. It further declared that there should be a sale of the estate for execution of the judgment, because in case no one of the successors is able to offer a convened price, this is not likely to prevent its acquisition by a third party. It decided in addition that the counsel fees and moral damages should be deducted from the estate.

Mukantabana, Kanyanja and Nibarere appealed to the High Court which ruled that the appeal of Kanyanja and Nibarere lacks merit while that of Mukantabana and the cross appeal of Kabanyana has merit in part. The Court ordered Kanyanja and Nibarere pay 200,000,000Frw determined in its discretion from the lease of the houses to the successors of Buhiga which they had to administer as well as to jointly pay counsel fees and moral damages from their own assets.

Kanyanja and Nibarere appealed to the Supreme Court alleging that the rulings of the previous Courts are contrary to the testament, that the Court ordered them to pay the amount of money without basis given that the pecuniary damages rely on relevant evidence. They also state that the Court disregarded that under Rwandan law the burden of proof lies on the plaintiff.

The respondents argued that they should not be forced to stay into the indivision of assets, since they have the right on estate and therefore it is impossible to terminate the indivision without

selling, the reason why in case none of the family members has got sufficient money, the estate should be purchased by third parties.

Concerning the fact that burden of proof lies on the plaintiff, they argue that the Court has the discretion to force the party who holds evidence to produce it in order for the truth to be known, the reason why Kanyanja and Nibarere are ordered to produce the evidence of the fulfilment of their obligation.

The respondents continue arguing that the appellants dragged them into lawsuits; therefore they must be held liable for various damages.

**Held:** 1. The heir must enjoy the full right, consequently there must be the termination of the indivision and this will not be possible without selling. Therefore in order to comply with the will of Buhiga, the pre-emption right to the sale must be given to the family members, but in case they would not be able to purchase, it should be done by the non-family members of Buhiga; thus, this is not in contradiction of the testament rather, its enforcement.

2. A party alleging to be discharged from an obligation that has been established must prove that the obligation no longer exists. Failure to do so, the other party wins the case. Therefore Kanyanja and Nibarere must prove the way they administered the estate.

3. The pecuniary damages should not be awarded in the Court discretion when they are composed of the revenue which should be calculated. Therefore revenues accrued from rent of the known houses can be calculated by assessing the income and expenses.

4. The fact that those who were ordered to pay the damages are not the ones who filed a claim, do not prevent them to be charged it in case the claimants resorted to the Courts of law in order to get the justice.

5. At appeal level the new claim is inadmissible. Therefore the fact that the claim for the interests generated from the cattle left by Buhiga was not filed to the previous court, it cannot be admitted in this court.

**Appeal has merit in part;  
Cross appeal has merit in part;  
Appellants are ordered to jointly pay the court fees.**

**Statutes and statutory instruments referred to:**

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, articles 46, 56 and 91.

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 9(2) and 168.

Law N°42/1888 of 27/10/1988 relating to contracts or obligations, article 258.

**No case referred to.**

## **Judgment**

## I. BRIEF BACKGROUND OF THE CASE

[1] Buhiga Arcade left a testament, thereafter some of the heirs filed the claim to the Court stating that contents of that testament was not enforced, praying for the exit from the co ownership and sharing of assets which are not included in the testament.

[2] On 29 February 2012, the Intermediate Court of Huye rendered the judgment RC0173/010/TGI/HYE whereby it held that the whole estate left by Buhiga Arcade should be shared, therefore that in the course of execution of the judgment the estate mentioned in the testament made on 07 August 2000 by Buhiga as well as those not mentioned in the will including eucalyptus forest located at Cyarwa Sumo, the land located at Cyarwa Sumo, seven cows and their offspring should be apportioned among seven persons as they are mentioned in the testament, and those who passed away shall be represented by their children. It held in addition that in case one of the successors fails to pay the agreed price there will be a sale of the estate to a third party. Concerning aforementioned estate which is not indicated in the testament, the Court ordered that it should be apportioned among the successors of Buhiga through the sale in the same procedure as of bequeath.

[3] Furthermore, the Court ordered that Uwineza Claire and Muhimpundu Clarisse must be given 2,000,000Frw of counsel fees and 3,000,000Frw in moral damages and that amount must be deducted from the estate left by Buhiga because the successors of Buhiga continues to complicate the situation by refusing the termination of the indivision of the assets which led them to be dragged into the lawsuits.

[4] Concerning the income generated by the estate, it found that plaintiffs failed to produce its evidence while defendants argue that the money was used in term of renovating and managing the estate.

[5] Mukantabana Josepha, Kanyanja Emilienne and Nibarere Costasie appealed against that judgment to the High Court, Nyanza chamber, which on 18 December 2012 rendered the judgment RCA0094/12/HC/NYA in which it ruled that the appeal lodged by Kanyanja and Nibarere has no merit; the appeal of Mukantabana and the cross appeal of Kabanyana have merit in part.

[6] It ordered Kanyanja and Nibarere to give 200,000,000Frw generated from the rent of houses they had to manage within 12 years to the successors of Buhiga which are awarded in the discretion of the Court, each one having to pay 100,000,000Frw.it ordered them to jointly pay 2,000,000Frw of the counsel fees and 3,000,000Frw in moral damages to Uwineza Claire and Muhimpundu Clarisse, implying that everyone should pay 2,500,000Frw deducted from their own assets.

[7] Kanyanja Emilienne and Nibarere Costasie appealed to the Supreme Court stating that the rulings of the previous Courts are contrary to the testament and that the Court ordered them to pay 200,000,000Frw without basis. Furthermore, they argue that the Court declared that appellants deprived others of the estate while they are not the only ones in charge of its administration, and they were ordered to pay damages for dragging them into lawsuits while they are not the ones who initiated the claim.

[8] The case was heard for the first time on 18 March 2014, Kanyanja and Nibarere were represented by Counsel Niyomugabo Christophe and Munyaneza G. Pascal, Kabanyana Charlotte by Counsel Habinshuti Yves, Rugomwa Fidèle, succession Kanyumba Margueritte by Counsel Ndagijimana Augustin, succession Hategekimana Thacien and Mbarushimana François were summoned to unknown address and the case was heard by default.

[9] It was examined in limine litis the objection raised by counsel Habinshuti and Ndagijimana which relies on the provision of article 28 of the Organic Law N°03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court because they find that the appellants lost the case on the similar grounds before the previous Courts. The Court held that the objection lacks merit, therefore, the hearing continued by examining the grounds of appeal.

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

### **1. Whether the decisions of the previous Courts were contrary to the testament**

[10] The Counsel for Kanyanja and Nibarere states that the rulings of the previous Courts are contrary to the testament and also to the claim they submitted. The Counsel explains that Buhiga Arcade planed how the sharing will be conducted among his successors whereby he declared that the bequeath will not be sold to the third person, however the High Court sustained the ruling of the Intermediate Court which ruled that in term of sharing of the estate there will be the sale and in case one of the successors fails to pay the agreed amount, there will be no obstruction against the third person to buy it, this implying that the testament was invalidated while no party prayed for it, rather, they all agreed upon the testament therefore the subject matter concerning the noncompliance of its provisions.

[11] The counsel argues that in case anyone wishes to withdraw from the co-ownership of estate, it would be done after carrying out an inventory of the estate in order to determine everyone's share, the one who withdraws from it, being obliged to sale his/her share to the family members as provided by the testament.

[12] Habinshuti, the counsel for Kabanyana (the latter represents her children) states that they should not be forced to stay in the co-ownership of the estate as it is provided for by article 33 of the civil code book III, and that basing on article 46 of Law regarding matrimonial regimes, liberalities and successions, his clients have the right on the bequeath, which could be divided basing on the provision of article 91 of the aforementioned Law according to the conducted valuation. He adds that in case none of the family members raises the agreed amount, the estate must be sold to a third person. He continues arguing that Kabanyana should be given a share of 1/7 of the estate indicated by the valuation, as well as on 909,480,000Frw of rent of the houses left by Buhiga within in the period of 13 years.

[13] Ndagijimana, the Counsel for Mukantabana Josepha and successors of Kanyumba states that the fact that the judge declared that during the sharing of the estate, the third persons may purchase, was because he/she was requested it, given that his clients find that the priority should be given to the best bidder in the family, but if it is otherwise, another person shall be allowed to acquire it.

[14] He explains that his clients agree that the testament must be enforced in respect of its clauses which comply with the Law especially the provision of article 29 of Constitution, whereas concerning indivisible estate, it should be sold and the proceeds apportioned among them. Concerning Mbarushimana, the Court should order that he inherits only his father because he is a half-brother to other successors.

[15] Rugomwa also argues that for purpose of withdrawing from the co-ownership of assets, he finds that the successors should jointly determine the value of the estate and the family member who wants to withdraw from it should pay the agreed price, without preventing the non-family members who could pay more because all successors benefit from it.

## **VIEW OF THE COURT**

[16] The legal issue of this case is whether there should be a sale in order to withdraw from the joint ownership of bequeath mentioned in the will of Buhiga, and whether it could be bought by the non-members of family of Buhiga.

[17] In the testament left by Buhiga, his last wish was that the property left to his family should not be sold, unless some of successors are willing to sale their shares which should be bought by the family members. The Court finds that there are some mentioned in the testament who pray to withdraw from the joint ownership as indicated in the submitted claim, so that they enjoy the full right on their shares, their requests meet the requirements of the provisions of article 46 of Law N<sup>o</sup>22/99 of 12/11/1999 to supplement book one of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions which stipulates that legacy is a patrimony devolved as a donation by the owner while alive and for which the legatee acquires full ownership only after the death of the donor.

[18] Parties agree upon the termination of the indivision of assets, but they disagree upon the procedure. Even if this Court admits that the will of the testator shall be executed according to the provision of article 56 of Law N<sup>o</sup>22/99 of 12/11/1999 mentioned above, which provides that a testament is an act by which a person decides on the destination of his/her patrimony after his/her death and fixes provisions of his/her last will, it finds in addition that it should also be considered the wishes of some of the heirs who are worried about the execution of the last will.

[19] The Court finds that in order to terminate the indivision of assets left by Buhiga, it is necessary that the estate be sold as it was ruled by the previous judgments especially that this is in conformity with the provision of article 91 of Law N<sup>o</sup>22/99 of 12/11/1999 mentioned above which stipulates that “a property which does not exceed an area of one hectare and any other undivided thing cannot be partitioned. The owners have rather, to agree on the modalities of their sale or exploitation and share the fruits there from”, this being carried out after the valuation of estate agreed on by all successors.

[20] Furthermore, the Court finds that in order to comply with the will of Buhiga, the priority to the sale must be given to members of his family, but due to the concern raised by some of successors that some of them who would not be able to buy, therefore the estate should be bought by the non - family members of Buhiga, otherwise, the termination of indivision of assets would be impossible while the heir must enjoy the full right.

[21] The court finds that sustaining the previous holdings which are similar to the rulings of the previous Courts, does not contradict the testament as the appellants allege, rather, it consists of the enforcement of the will, which is also in conformity with the provisions of the law. It is neither ruling *ultra petita* because the plaintiff claimed for withdrawal from the joint ownership of assets; therefore the ground of appeal lacks merit.

## **2. Concerning the amount of 200,000,000Frw which the appellants were ordered to pay.**

[22] The counsel of Kanyanja and Nibarere states that the High Court unlawfully ordered them to pay 200,000,000Frw because the pecuniary damages have to be based on the material evidence. The Counsel alleges in addition that the Court relied on the legal opinions which are contrary to the law because they state that the defendant has the burden of proof whilst article 9 of Law relating to the civil, commercial, labour and administrative procedure, provides that the evidence is produced by the plaintiff, therefore the court ruled contrary to the provision of article 6 of the mentioned law which stipulates that legal doctrines shall not be referred to in case they are contrary to the Rwandan law.

[23] The counsel alleges further that the High Court held that they deprived others of the estate, however, they were not the only ones who had the responsibility of its administration because the testament provides the family council which includes Mukantabana Josepha; that even in the High Court Rugomwa acknowledged that they were called by the head of family with the purpose of assessing how they should jointly manage the co-owned property but he refused to attend.

[24] The Counsel of Kabanyana states that even if article 9 mentioned above requires the defendant to produce evidence of the facts s/he alleges; but in this case, Nibarere was the one who always concluded the rent contracts with the tenant, and according to the information they got the tenants pay between 300,000Frw and 200,000Frw monthly, however the Court would force the one who holds the evidence to produce it in order to establish the truth. The counsel states that basing on information they have, the rent should be amounting to 909,480,000Frw deducted of expenses.

[25] The Counsel of Mukantabana and successors of Kanyumba argues that the income generated from rent should be equal to 699,600,000Frw but the judge awarded 200,000,000Frw and that among the evidence produced by their opponents there is neither rent contract nor its income, rather, they only declared the expenses. The Counsel continues to allege that the appellants disregard the provision paragraph two of article 9 mentioned above which compels them to produce evidence they fulfilled their obligations, and also the doctrines relied on should be linked to the provision of that paragraph.

[26] Rugomwa Fidèle also adduces that Kanyanja and Nibarere withheld the estate, furthermore, there was no renovation of the houses as they allege, and some were even closed because of being damaged, therefore, they must be liable for all amount generated from the rent except the expenses for which they possess their evidence.

[27] After realising that the litigants do not agree upon the income which was accumulated from the estate, the Court appointed an expert whom they agreed on namely Kigali Consult and Supply Ltd represented by Nsanzimana Anastase and he was tasked with the evaluation of

management of the estate left by Buhiga and to establish its income as well as the expenses for managing it since his death.

[28] That report indicates that the income accrued from the rent since 2002 till 2004 amounts to 305,610,000Frw that expenses are equal to 212,145,561Frw, as well as other expenses amounting to 2,599,755Frw for which original elements of evidence were not produced. It indicates also that 45,196,754Frw of deposits on the account; therefore the amount which must be handed over by the administrators of the estate is 50,867,440Frw.

[29] Counsel Ndagijimana Augustin states that the report of an expert is not true, rather, it should be considered the previous report which demonstrated that the amount the administrators of the estate have to hand over equals 243,139,457Frw. He challenges among others the fact that the number of the tenants reduced over time to the extent that there is a surplus of 12 tenants between two different years while none of the house was excluded; there are also the tenants who paid 47,600,000Frw to the bank account (in 2013 to 2014) while not being on the list of the tenants. In addition to this the report indicates that MTN pays 100,000Frw and 200,000Frw while it is known that it pays 500,000Frw.

[30] Concerning the expenses, he states that the report demonstrates that they exceeds the income, and that 52,572,388Frw were spent for renovation of the house, while there are no supporting evidence, and that amount increased to 84,399,228Frw. He finds that the evidence made in 2005 produced by Engineer Byemayire Lambert should not be relied on because no long term contract concerning 52,572,388Frw was demonstrated nor it was not proven the acknowledgement of payment, rather, the available evidence demonstrates that he was remunerated 2,140,000Frw only.

[31] Counsel Ndagijimana states in addition that there are the expenses which were not in interest of the family, rather, in the appellants' interests; that the expenses which his clients recognises amount to 83,436,749Frw comprised of 6,085,700Frw for funeral cost, 31,995,773Frw for taxes, 11,680,000Frw received by successors, 7,494,580Frw for kanyanja's children school fees, 5,272,540Frw for insurance, 4,902,156Frw for water and electricity, 9,535,000Frw for watchmen, 6,000,000Frw for an expert and 471,000Frw for renovation.

[32] Rugomwa Fidèle also argues that the report indicates that there is a lot of money paid for water without demonstrating the tenants who consumed it, that the remuneration of Nibarere is not clear because she does not prove what she did, and she was appointed by Kanyanja without the consent of others.

[33] Counsel Habinshuti Yves representing Kabanyana Charlotte also states that the report of an expert does not establish the truth, rather, estimation; that there are the monthly rents which were not included in the income, whereby he cites the examples of OKAPI CAR, Gahenda Jean Baptiste, RAMA and Uwimana Jeanne. He states in addition that there is 8,860,000Frw of counsel fees which was charged on Succession of Buhiga while they were not spent in its interest because it was not sued nor filed a claim, therefore it should be paid by Kanyanja and Nibarere as their opponents pay themselves the advocates they hire.

[34] Furthermore, there is some amount of money which was included among the expenses of a certain year while it was not paid in that year, which implies that it was calculated twice. He cites examples of 36,572,388Frw pretended to have been spent for house renovation in 2003 and was computed again in expenses in the following years, there is also 16,000,000Frw which is considered as expenses in 2003 while it was not spent, and it was computed as such on the day it was released.

[35] He continues arguing that there also other amount considered as expenses without providing the evidence, he gives examples of tax paid on rent and property 2004 - 2007, 2009, 2011, school fees for 2006 - 2014, and also there is no explanation for money spent during the years 2008 – 2010 and 9,509,405Frw for water bills of the years 2005 - 2011 does not have relevant explanations, and there is no proof that it was paid. Regarding the 16,632,182Frw for water and electricity bills the expert computed them on the side of succession of Buhiga whilst he explained that the tenants were the ones paying the water and electricity bills. In addition to this, the expert declared that the children of Nkurikiyimana were given child support throughout all months while there is a time when Kanyanja refused to allocate it and they resorted to courts of law. He concludes by stating that the report was made in favour of Nibarere and Kanyanja because the expert reduced the income and increased the expenses, relying on irrelevant evidences.

[36] Counsel Munyemana representing Kanyanja and Nibarere states that concerning the income, he agrees with the declaration of the valuation report because he considered the defects which are demonstrated vis a vis to the first report. However, concerning the expenses he argues that he does not agree with the report on the royalties paid for water and electricity bills because it is 23,184,346Frw instead of 16,632,182Frw as demonstrated; that the expenses for renovation of the houses are 87,977,671Frw instead of 84,399,288Frw, whereas the school fees of the children of Nkurikiyimana are 8,140,200Frw instead of 7,494,580Frw. He continues stating that the paid taxes are not equal to 32,765,331Frw as it has been demonstrated by the report rather 33,395,773Frw, and also the expert did not consider the value of 8,500,000Frw used for renovating the ruins located at Cyarwa.

[37] Furthermore, he states that the expert should not have rejected the documents of expenses of 2,599,755Frw on the basis that they are not accounting statements while the administrators did not expect the arise of disputes which would lead to an audit, therefore he should have considered the nature and the status of the subject of the audit, as well as the existence of the documents which were not availed due to the long time elapsed, and there are activities carried out but not supported by written document because of their nature.

[38] He states further that the appellants should not be accused of withholding the estate while since the household for Kabanyana was destroyed in 1994, she resides in one of the houses of Buhiga for free, and she has shopping rooms where she carries out her commercial activities and others for rent, thus the Court may consider all of these grounds. He prays to rely on the judgment RCAA0069/12/CS rendered by this Court on 04 April 2014, the judgment RA109/13.03/82 rendered by the Court of cassation on 16 November 1982 and on the doctrine of the law scholars F.Terre and Lequette, les Successions.

## VIEW OF THE COURT

[39] The Court finds that 200,000,000Frw which the High Court ordered Kanyanja and Nibarere to give to the successors of Buhiga was awarded in its discretion while it is composed of the revenue accrued from the rent of the known houses, which should be calculated by assessing the income and expenses used in renovation or administration of those houses.

[40] Regarding the burden of proof, article 9 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, stipulates that every plaintiff must prove a claim. Failure to obtain proof, the defendant wins the case. Paragraph two stipulates that a party who alleges that he/she has been discharged from an obligation that has been established must prove that the obligation no longer exists. Failure to do so, the other party wins the case.

[41] Kanyanja and Nibarere do not deny that they administered the estate left by Buhiga in accordance with the testament whereby Kanyanja was appointed as the head of the family, deputized by Nibarere and Mukantabana, even though nothing was demonstrated to prove that Mukantabana carried out any activity to administer that estate, however, it is obvious that Nibarere is the one who always concludes the rent contracts with the tenants, and it is clear that she and Kanyanja are the users of the rent account. Therefore the Court finds that basing on paragraph two of article 9 mentioned above, Kanyanja and Nibarere are the ones to prove how they administered the estate.

[42] The report of the expert appointed by the Court upon the agreement of the parties, demonstrated the income and expenses as it is stated in paragraph 28 of this judgment, but the parties do not agree with it, as mentioned above, apart from the Counsel for Kanyanja and Nibarere who states that he accepts it only in regards to the income.

[43] Concerning the value of the report, article 98 of the Law N°15/2004 of 12/06/2004 relating to evidence and its production, provides that a court is not bound to follow the opinion of experts if it is contrary to their conviction.

[44] The appointed expert explains that after considering the defect which parties demonstrated in the report submitted before, the calculation changed, the income from rents changing from 432,840,000Frw to 305,610,000Frw, and expenses from 208,175,932Frw to 212,145,561Frw, therefore the amount to be justified by the administrators changed from 243,139,457Frw to 50,867,440Frw.

[45] Concerning the expenses, the Court finds that the explanations provided by the expert was not satisfactory with regard the amount of 52,572,388Frw which he declared that it was paid to Engineer Lambert Byemayire, because the certificate of 12 January 2015 he relies on does not constitute an element of evidence to prove that it was really spent, because even if it was paid installment there must be the supporting documents, therefore the money considered to have been paid with the corresponding evidence is 2,140,000Frw, implying that the balance of 50,432,388Frw must be considered as among the income.

[46] In addition to that there is 8,500,000Frw which the previous report indicated as the income whereas the second report included it in the expenses and that it was paid in the following years without supporting evidence; therefore it must be considered as income.

[47] Regarding water and electricity bills, the Court finds that the expert provided the contradictory explanations whereby he demonstrated in the first report that Succession Buhiga has to pay for water only by basing on the information he got from one of the tenants that they had to pay for electricity bills themselves; while in the second report, he debited all royalties for water and electricity on the liability of succession.

[48] Concerning water and electricity fees explanation, the Counsel for Kanyanja and Nibarere states that it was paid before installation of cash power, and this is not likely to contradict the provision of article 3 of the rent contract which states that the tenants pay themselves the fees of water and electricity. Therefore 16,632,182Frw which was computed as the expenses of water and electricity should be not be considered as such.

[49] Another amount of money for which there is no supporting evidence of the reason it should be borne by Succession Buhiga, is 8,860,000Frw indicated in the report alleged to have been paid to the counsel since 2009 to 2014 while no supporting evidence was produced nor the reason of payment explained, especially that it was not even paid in respect to this case given that the latter began in 2012.

[50] Concerning the remuneration awarded to Nibarere, the Court finds that since it is obvious that there are duties she carried out relating to the management of the estate, such as the conclusion of the lease contract, to seek for payment from the tenants as well as other necessary related duties, this implies that the remuneration she was paid has merit, thus it must be computed among the expenses. The aforementioned statements also concerns alimony and school fees which was given to the children of Nkurikiyimana as provided by the testament, those who challenges its amount did not demonstrate what should have been allocated and how it should be calculated.

[51] Regarding other irregularities alleged by the parties, the Court finds that their statement lack merit because they do not produce relevant evidence which contradict what was based on by the expert because concerning the income, even the respondents do not agree with each other on the same amount rather they only provide estimates; while the expert explained that he relied on some available contracts, paid taxes and the written documents of Banks. Furthermore, it is difficult to establish the exact amount of income from rent given the time Buhiga passed away and the time the plaintiffs filed a claim, which is 13 years now and this time led to the lack of evidence which could demonstrate the truth on the administration of the estate.

[52] Basing on motivations provided above, the Court finds that the income from rent and the expenses should be computed as follows : 305,610,000Frw (which the report indicated as income from lease) + 50,432,388Frw (mentioned in paragraph 45) + 8,500,000Frw (mentioned in paragraph 46) – 212,145,561Frw (which the report indicated as expenses) – 16,632,182Frw (mentioned in paragraph 48) + 8,860,000Frw (mentioned in paragraph 49) = which implies 364,542,388Frw – 186,653,379Frw = 177,889,009Frw, that amount deducted of 42,898,140Frw of deposit on Succession Buhiga bank account, which means that Kanyanja and Nibarere should

avail 177,889,009 – 42,898,140Frw = **134,990,869Frw**. Therefore they should reimburse it to the estate and be deposited on bank account. In addition, Kanyanja and Nibarere are not allowed to use the rent without the consent of other successors, from the pronouncement of this judgment

[53] Concerning the estates which have not been declared in the testament, the Court finds that the rulings of the previous judgments should be sustained, therefore they should be shared entirely.

### **3. Concerning the damages charged to Kanyanja and Nibarere for dragging others into unnecessary lawsuits and damages requested in cross appeal.**

[54] Counsel for Kanyanja and Nibarere alleges that they were charged the damages for dragging the plaintiffs into unnecessary lawsuits while they are the ones who were sued, especially that the plaintiffs contested the testament which should have been complied with by all of them.

[55] The Counsel for Kabanyana states that Kanyanja and Nibarere led her to be in this litigation; therefore they must bear damages for it, consequently through cross appeal they should be ordered to pay 10,000,000Frw for dragging his clients into the lawsuits in addition to 3,000,000Frw which they were awarded before as well as 3,000,000Frw for the counsel and procedural fees.

[56] The counsel for Mukantabana and successors of Kanyumba argues that the damages charged to the appellants have merit because they excluded others from the estate which led them to resort to courts of law. He in addition raised a cross appeal requesting that everyone from his clients be awarded 1,000,000Frw of the procedural fees, and the appellant pay 10,000,000Frw of the two advocates. He further states that the appellants managed the estate during 13 years and they earned interests from it; thus they should be ordered to pay 20,000,000Frw to each of his clients, and pay also 24,500,000Frw of 7 cows which remained in their possession equaling to  $49(7 \times 6 = 42 + 7)$  during 12 years, considering that each cow has the value of 500,000Frw.

[57] Concerning the request in cross appeal, the counsel for the appellant argues that 20,000,000Frw which they request from them is groundless because it is contrary to the rent alleged by the claimants, that even other requested damages are groundless because the appellants were sued by then so that they may demonstrated the way they administered the estate and they did so, therefore they are not the ones who dragged them into lawsuits. Regarding the money got from the cattle, he states that the available ones should be apportioned among successors, whereas the damages which counsel Habinshuti prays for his clients, is groundless because it was not the intention of the appellant to delay the case rather, they sought for justice.

## **VIEW OF THE COURT**

[58] The ruling of the judgment of the intermediate Court of Huye indicates that the basis of the damages awarded to children of Kabanyana Charlotte, is that the successors of Buhiga continued to make it hard for them to withdraw from joint ownership which led them into lawsuits while their request had merit, they were awarded 2,000,000Frw of the counsel fees and

3,000,000Frw in moral damages which must be deducted from the estate of Buhiga, and the High Court sustained it but held that it will be deducted from Kanyanja and Nibarere' s assets.

[59] The Court finds the fact that Kanyanja and Nibarere did not file a claim cannot prevent them to be charged the damages in case its claimants resorted to courts of law in order to get right on estate inherited to them, therefore the awarded damages are in range because they are based on the provision of article 258 of the Civil Code Book III which provides that “any act of man, which causes damage to another obliges the person by whose fault it happened to repair it” consequently this ground of appeal lacks merit.

[60] Concerning the interest of 20,000,000Frw requested by the Counsel Ndagijimana and 24,500,000Frw originated from the Cattles left by Buhiga, the Court finds that they should not be awarded to them because they were not requested in the previous Courts, therefore it cannot be requested at the appeal level with respect to article 168 of the Law relating to the civil, commercial, labour and administrative procedure which stipulates that no new claim may be lodged at the appeal level, unless it concerns compensation or the new claim constitutes a defence to the principal action before the appeal court, or as it is stipulated in paragraph of that article, claims interests, rents and other accessories which were realized since the pronouncement of the judgment, the Court finds that the interest requested by Counsel Ndagijimana are contrary to those provided for by that paragraph.

[61] Regarding 1,000,000Frw of procedural fees and 10,000,000Frw of counsel fees requested by the counsel for Mukantabana and successors of Kanyumba, the Court finds that it has merit basing on the provisions of article 258 mentioned above, but the fact that Kanyanja and Nibarere won the ground relating to the amount of money accumulated from the rent, they have to pay 250,000Frw of the procedural fees and 500,000Frw of the counsel fees at this instance, for each to pay 375,000Frw.

[62] Concerning damages for being dragged into lawsuits, procedural and counsel fees requested by Counsel for Kabanyana Charlotte, the Court finds that on similar ground mentioned in the previous paragraph, they should be awarded 500,000Frw of the counsel fees and 250,000Frw of the procedure fees, in addition to 5,000,000Frw awarded by the High Court, that is 5,750,000Frw, each of the appellants pays 2,875,000Frw.

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

[63] Holds that the appeal of Kanyanja Emilienne and Nibarere Costasie has merit in parts;

[64] Holds that the cross appeal of Kabanyana Charlotte, Mukantabana Josepha and successors of Kanyumba has merit in parts;

[65] Holds that in term of getting out of the indivision of assets, there should be a sale of the estate left by Buhiga Arcade, mentioned in the testament or not, after establishing its valuation agreed upon by all the successors and the priority to buy be given to the family of Buhiga, in case it is not possible the estate be bought by non-family members;

[66] Holds that the income accrued from the rent of the houses left by Buhiga is 177,889,009Frw including 42,898,140Frw deposited on the bank account of Succession Buhiga, Kanyanja and Nibarere should reimburse the balance of 134,990,869Frw, that money and the one deposited on the bank accounts be included among the joint property to be shared;

[67] Orders that from the pronouncement of this judgment, Kanyanja and Nibarere are not allowed to use the income from rent without the consent of the successors;

[68] Orders Kanyanja and Nibarere to pay 5,750,000Frw to Kabanyana Charlotte representing her children Uwineza Claire and Muhimpundu Clarisse, as explained above, each one pays 2,875,000Frw;

[69] Orders Kanyanja and Nibarere to pay 750,000Frw to Mukantabana and successors of Kanyumba as explained above; each one pays 375,000Frw;

[70] Orders Kanyanja and Nibarere to jointly pay the court fees amounting to 100,000Frw