RE .GATERA ET. AL. (PETITION FOR REPEALING UNCONSTITUTIONAL PROVISION)

[Rwanda SUPREME COURT – RS/Inconst/Pén.0003/10/CS (Rugege, P.J., Mugenzi,Mukanyundo,Havugiyaremye,Kayitesi,Nyirankwaya,Kanyange,Mukandamage and Munyangeri, J.) 07 January 2011]

Constitution – Unconstitutional provision –Petition for review of the article 39 of the Law on prevention and punishment of gender- based violence – For the marriage of between those who lived as a wife and husband to be valid must be the marriage between one wife and one husband and celebrated before the competent administrative organ and when one of those who lived as wife and husband who lived with several wives or husbands decides to become legally married, that one who chose to become legally married shares on equal footing the property he or she co-owns or worked for with those others without being married – In case one of those who lived as wife and husband has spent some of his asset, with intention to participate in the property and the person they live accept to receive without coercion being aware that the person who them to him reasonably believes that he or she will have right on the property, in case the person who received them may appropriate them would be injustice on behalf of the person who gave them.

Facts: Gatera and Kabalisa basing on the judgment they appealed against before the High Court after not being satisfied with the ruling of the Intermediate Court of Gasabo where it ordered Kiza Anita and Gatera Johnson share equally the property of a house they co-own, they instituted the claim before the Supreme Court requesting that article 39 of the law preventing and punishing any gender based violence based on by the Intermediate Court of Gasabo in dividing the property among them be repealed since it is contrary to article 29 of the Constitution of the Republic of Rwanda. They assert that any marriage or living as husband and wife that are not recognized by the Constitution cannot produce effects as produced by a legally concluded marriage.

Kiza Anita explains that this article is not contrary to the Constitution, instead it is a way put in place by the legislator so that those who kive together as a wife and husband be able to share the property they have worked for together and the one they co-own in case of separation and this view is shared with the State attorney where this attorney adds that every person has the right on the property he co-owns with others be they those they live together or not.

Held: 1. The sharing of the property provided under article 39 of the law preventing and punishing any gender based violence is not provided as the right arising from the contract of marriage instead it is a right on the property one of the persons who lived together has based on the fact they worked for it jointly and co-own it.

2. The contract of marriage is valid only if it was concluded before the administrative organ between one husband and wife, thus the article of the law and the law in its entirety may be contrary to the Constitution, in its article 26, paragraph 1 in case that article or law would provide for that the marriage between on husband and several wives or the marriage between one wife and several husbands is recognized, or that article or law would provide that there is another way the contract of may be concluded without being celebrated before the administrative organ and have validity.

3. For the marriage of between those who lived as a wife and husband to be valid must be the marriage between one wife and one husband and celebrated before the competent administrative organ and when one of those who lived as wife and husband who lived with several wives or husbands decides to become legally married, that one who chose to become legally married shares on equal footing the property he or she co-owns or worked for with those others without being married.

4. In case one of those who lived as wife and husband has spent some of his asset, with intention to participate in the property and the person they live accept to receive without coercion being aware that the person who them to him reasonably believes that he or she will have right on the property, in case the person who received them may appropriate them would be injustice on behalf of the person who gave them.

5. To have rights over property by persons who lived as wife and husband without being married is not only based on the fact that they lived together as wife and husband, but also it has to be obvious that they co-owned or they have co-worked for it.

The petition has no merit;
Article 39 Law N°59/2008 of 10/09/2008 on Prevention and punishment of gender- based violence do not contravene Constitution of the Republicof Rwanda of 04 June 2003 as amendedtodate;
Court fees on the appellants

Statutes and statutory instruments referred to:
Constitution of the Republic of Rwanda of 04/06/2003 as amended to date, articles 26.
Law Nº59/2008 of 10/09/2008 on prevention and punishment of gender-based violence, article 39.

Cases referred to:
Lother Pettkus V. Rosa Becker [1980] rendered by the Supreme Court of Canada.
Baumgartener v Baumgartner [1987], rendered by the High Court of Australia

Judgment

BACKGROUND OF THE CASE

[1] Kiza Anita instituted a petition before the Intermediate Court of Gasabo against Gatera Johnson requesting that they share the property they have co-worked for before the marriage between Gatera Johnson and Kabalisa Teddy. The wife of Gatera Johnson, Kabarisa teddy was forced to intervene in that case. The court rendered the judgment and ordered that Gatera Johnson equally share with Kiza Anita the property of the house they co-owned. Gatera Johnson and Kabarisa Teddy appealed before the High court, and later on they instituted the claim before the Supreme Court requesting the article on which the Intermediate Court of Gasabo based on in ordering the equal sharing of the property, which is article 39 of the law preventing and punishing any form of gender based violence be repealed as it is contrary to the Constitution of the Republic of Rwanda.

[2] The case was heard by the Supreme Court on 17/11/2010 the plaintiffs represented by Me Kazungu Jean Bosco alongside Me Gumisiriza Hilary, Kiza Anita represented by Me

Ruberwa Silas and Me Mukamisha Claudine, the State represented by its attorney Me Rubango Epimaque. After hearing the view of each party, the Court announced that the judgment will be rendered on 07/01/2011.

The legal issue in the case

[3] In this case the legal issue to be examined is to know whether article 39 of thelaw preventing and punishing any gender based violence, ralting to the sharing of property between the persons who lived together as wife and husband without being married is not contrary to the Constitution of the Republic of Rwanda.

Analysis of the legal and the court findings

[4] The article that Gatera Johnson and Kabalisa Teddy request that the Supreme Court rpeals is that of 39 of the law No 59/2008 of 10/09/2008 on prevention and punishment of gender based violence. That article provides for that: "Those people entertaining unlawful marriages shall be married in accordance with the monogamous principle. If a person concerned with the provision of previous paragraph of this Article was living with many husbands/wives, he shall first of all share the commonly owned belongings with those husbands/wives equally." The plaintiffs assert that that article is contrary to article 26 of the constitution of the Republic of Rwanda of 04 June 2003 as amended to date, in its paragraph 1 where it states that "Only civil monogamous marriage between a man and a woman is recognized (…)" They assert that any other marriage or living together as a wife and husband not recognized by the constitution cannot produce effects and rights equal to those produced between people who are legally married.

[5] The plaintiffs assert that the second paragraph of aricle 39 of the law stated above that orders people who are not married to share the property equally makes it unconstitutional. They assert that that sharing of the property of those who lived without being married is unconstitutional because they might be obligations smilar to those who lived but being legally married and this is the sole marriage recognized by the Constitution. The counsels of Kiza Anita explains that this article is not contrary to the Constitution, instead it is a way put in place by the legislator so that those who kive together as a wife and husband be able to share the property they have worked for together and the one they co-own in case of separation and this view is shared with the State attorney where this attorney adds that every person has the right on the property he co-owns with others be they those they live together or not.

[6] In examining the issue, the Court finds that the sharing of property provided under the aforementioned article is not provided as the right arising from the contract of marriage instead it is a right on the property one of the persons who lived together has based on the fact they worked for it jointly and co-own it. The law does not provide for that those who lived without being married equally share without taking into consideration the contribution of each of them in the accumulation of that property as it is the case for those who are married under the community of property or of acquests, but in the law are two words **"co-acquired"** or **"co-owned".** This makes that the property acquired or increased by people living together cannot be accumulated by a single person.

[7] Under paragraph 1 of artilce 26 of th Constitution of the Republic of Rwanda as amended to date it is provided that only civil monogamous marriage between aman and a woman is recognized. Under this paragraph there are two main ideas, the firsr is that the

regognized marriage is the one concluded between one man and woman, which means that the marriage between one man and more than one woman or the marriage between one woman and more than one man is not recognized. The second idea is that for the marriage to be recognized in law it has to be celebrated before the public administration organ. The contract of marriage is valid only if it was concluded before the administrative organ provided for by the law. The article of the law and the law in its entirety may be contrary to the Constitution, in its article 26, paragraph 1 in case that article or law would provide for that the marriage between on husband and several wives or the marriage between one wife and several husbands is recognized, or that article or law would provide that there is another way the contract of may be concluded without being celebrated before the administrative organ and have validity in law.

[8] Article 39 of the aforementioned law on prvention and punishment of gender based violence provides for that those people entertaining unlawful marriages shall be married in accordance with the monogamous principle. If a person concerned with the provision of previous paragraph of this Article was living with many husbands/wives, he shall first of all share the commonly owned belongings with those husbands/wives equally (...). Ideas in this article are two. The first is that for the marriage of those who entertained illegal marriage to be recognized has to concluded basing on the law, that is to say that it has to abide by the provisions of article 26 of the Constitution, thus it must be the marriage between one man and woman and be celebrated before the competent administration organ. Another idea is that in case one of the persons who entertained illegal marriage who was living with many husbands/wives decides to get married in accordance with the law, that is to say in case they choose the marriage between one man and woman and celebrated before the competent public administration organ, that one who chose to become legally married shall first of all share the commonly owned belongings with those husbands/wives equally. These provsions of article 39 is are no contrary to article 26 paragraph 1 of the Constitution since it is not provided for that the marriage between one husband and several wives or the marriage between one wife and several husbands is recognized or the marriage that is not concluded before the competent public administration is recognized. Instead it is way adopted by the legislator to avoid injustice with regard to property of persons who want to stop from entertaining illegal marriage, and one of them chooses to be according to the provisions of the law.

[9] The fact that in the law on prevention and punishement of the gender based violence, it is provided for that the persons who entertained illegal marriage is not the particularity of Rwanda. In some countries, took a step further and put in place specials law relating to the property of those who entertained illegal marriage. In Canada, in the province of Manitoba, there is a law called ***Homesteads Act[1]/ Loi sur la propriété familiale*** that accepts the principle that those who entertained illegal marriage have rights over property, it also indicates the scope of those rights. Another palce is the country of New Zealand[2] where they

[1] The Homesteads Act C.C.S.M. c. H80 on http://web2.gov.mb.ca/laws/statutes/ccsm, see the section one regarding the definition of "**Owner/ Propriétaire**" (*Means a married person, or a person in a common-law relationship, who is an owner of a homestead/ Personne qui est mariée ou liée à une autrepersonne par une union de fait et qui est propriétaire d'une propriété familiale) and section 2.2* regarding the "**Homestead rights of second spouse or common-law partner"**.

[2] See article 11 of Property (Relationships) Act 1976 where it states … "On the division of relationship property under this Act, each of the spouses or partners is entitled to share equally in— (a) the family home; And (b) the family chattels; And (c) any other relationship property."

enacted the law relating to the property of those who are married and not married of 1976 especially in its article 11 where it is provided that "On the division of relationship property under this Act, each of the spouses or partners is entitled to share equally in— (a) the family home; And (b) the family chattels; And (c) any other relationship property." The sharing of property between those entertaining illegall marriage can be ssen in the laws applicable in some provinces of Australia. [3]

[10] Apart from particular laws relating rights on the property of those who live together as wife and husband, there are cases rendered by higher courts of different countries, which indicated that any person among those who live as wife and husband has the right over the property they co-own or co-acquired. For instance in Canada there are cases rendered that indicate one of those who entertain illegal marriage has the right over property they co-acuired or co-own. In the famous case of "**Pettkus *v.* Becker"**[4] of 1980, Roser Becker and Lothar Pettkuslived as wife and husband for 19 years, since 1955 until 1974, in all those years they kept bees, bought land in three different places on which they had to keep bees, on the money saved by Pettkus, Rosa Becker paid the rent of their home house and other household expenses and he worked in the bees' farm. That bee keeping generate an appreciable interests. In 1974 they separated and Rosa Becker requested that ½ of the land and ½ of their beehives be registered on her.

[11] The Supreme Court of Canada held that Rosa Becker and Pettkus who lived as a wife and husband have to share on equal basis the land and beehives they owned. That Court held: "*where one person in a relationship tantamount to spousal, prejudiced herself in reasonable expectation of receiving an interest in property and the other in the relationship freely accepted benefits conferred by the first person in circumstances he knew or ought to have known of that expectation, it would be unjust to allow the recipient of the benefit to retain it.*"[5]

[12] Another smilar case is the case of **Beaudouin Daigeault *v.* Richard Paul Eugene**[6] of 1984 where the Supreme Court of Canada held that after the separation of those who lived as a wife and husband yet there is the property of land they have co-acquired registered on the husband, they must share it. The Court opined that those who lived as a wife and husband in certain period of time, the worked in different to develop their household, they brought

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[3] New South Wales (Property Relationships Act 1984), Victoria (Relationships Act 2008), Queensland (Property Law Act 1974), South Australia (Domestic Partners Property Act 1996), Western Australia (Family Court Act 1997, the amendment act 2002), Tasmania (Relationships Act 2003), Australian Capital Territory (Domestic Relationships Act 1994, Legislation Act 2001 s 169), Northern Territory (De Facto Relationships Act 1991)

[4] Supreme Court of Canada, **Lother Pettkus *V.* Rosa Becker** [1980] 2 S. C. R. 834, http://www.scc-csc.gc.ca/decisions/index-fra.asp

[5] *.....lorsqu'une personne liée à une autre dans une relation qui équivaut à une union conjugale, se cause un préjudice dans l'expectative raisonnable de recevoir un droit de propriété et que l'autre personne accepte librement les avantages que lui procure la première, alors qu'elle connaît ou devrait connaître cette expectative, il serait injuste de permettre au bénéficiaire de conserver cet avantage. /.....where one person in a relationship tantamount to spousal, prejudiced herself in reasonable expectation of receiving an interest in property and the other in the relationship freely accepted benefits conferred by the first person in circumstances he knew or ought to have known of that expectation, it would be unjust to allow the recipient of the benefit to retain it*

[6] Supreme Court of Canada,Beaudouin – PaulEugen Richard, [1984] 1 R.C.S.2.

together their power with the aim of increasing their property as those who are legally married do , in case of separation, no one should accumulate the entire property yet they all contributed to it.

[13] It is not only in Canada courts tooks decisions to divide the property of those who lived as a wife and husband, even in Australia Courts took such decisions. For instance in **Baumgartner *v* Baumgartner**[7] of 1987, the High court of Australia held that the decision taken by the Court of Appeal of New South Wales was founded, that ruling ordered those who lived as wife and husband share the property of house and land they owned. This has been also the case in New Zealand in Hayward v. Giordani[8] where the Court of Appeal held that after the death of the wife the person they lived together as wife and husband be awarded ½ of the property that was registered on the wife that they lived together within 5 years without having been married.

[14] The foregoing laws and case laws from other jurisdictions helps as to cleary understand that the approach provided under article 39 aims at protecting those who separated yet they have lived as wife husband for considerable time, cooperating in all. That separation should not be a problem between them or one of them be the victim of that separation, simply because they are not leagally married. The sharing of property between those who lived as wife and husband is not agaisnst, much like it does infringe on the marriage.

[15] In this case, the plaintiffs assert that letting those who lived as wife and husband share the property would amount to giving rights and obligations equal to those of those who are married. The effect on the property of those who lived as wife and husband in case of separation are the same as those in case of divorce between persons who are legally married. When the persons legally married have chosen the community of property or the community of acquests as their matrimonial regime, and later on they are divorced they share on equal basis the entire property.

[16] The right on that property is based on that contract in that in case of sharing there is no other evidence required. However, when those who lived as wife and husband separate, for them to share the property they must have co-acquired or co-own it. Having right on the property is not only based on having lived together as wife and husband but it has to be obvious that they co-own it or they co-acquired it.

[17] Basing on what have been mentioned in previous paragraphs, article 39 of the law No 59/2008 of 10/09/2008 on prevention and punishment of gender based violence is not contrary to article 26 of theConstitution of the Republic of Rwanda of 04 June 2003 as amended to date, but it makes that the property those who live as wife and husband co-own or co-acquired is not accumulated by one of them only.

IV. DECISION OF THE SUPREME COURT

[18] The Supreme rules to admit the claim of Gatera Johnson and Kabalisa Teddy.

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[7] High Court of Austraria, Baumgartener v Baumgartner [1987] HCA 59; (1987) 164 CLR 137 (10 December 1987)

[8] [8] The Right Honourable Lord Justice NOURCE, *Unconscionability and the unmarried couple. Some development in the Commonwealth,* Royal Courts of Justice, London, *p104-105*

[19] It rules that it is not founded

[20] It rules that article 39 of the law No 59/2008 of 10/09/2008 on prevention and punishment of gender based violence is not contrary to the Constitution of the Republic of Rwanda of 04 June 2003 as amended to date.

[21] It ordered Gatera Johnson and Kabalisa Teddy to jointly pay the court fee of this case equal to 7400 Rwf, each paying 3700 Rwf.