

## MUTONI v NIWENSHUTI ET.AL

[Rwanda SUPREME COURT – RCAA0014/15/CS (Mutashya P.J., Nyirinkwaya and Karimunda, J.) December 01, 2017]

*Family law – Cohabitation – Evidence – Evidence to prove cohabitation - When proving the private relationship between people does not require special elements of evidence, any mean which can establish that a man and a woman live as a husband and wife can be based on for making a decision.*

*Family law – Cohabitation – Property – Sharing of property accrued during cohabitation – Each doesn't need to demonstrate the quantity he/she contributed in acquiring or increasing those assets, instead those assets should have been acquired during that period when they cohabited because during their cohabitation everyone has something he /she contributes for the family.*

**Facts:** Mutoni K. Jackeline lodged a third party opposition against the judgment RC0615/12/TGI/NYGE whereby Niwenshuti sued Mukambuguje, requesting to divide the assets they acquired in marriage for everyone to get a half of the money got from it (½), Mutoni K. Jackeline lodged a third party opposition claiming that she was also illegitimate Niwenshuti's wife, born two children together and they constructed that house together.

Niwenshuti and mukambuguje raised an objection of inadmissibility claiming that Mutoni K. Jackeline just had children with Niwenshuti and they were partners in the business they work together but they never lived as a husband and wife, the Court overruled that objection because it found that she had interest in that case based on the fact that the Court ordered that the house she constructed with Niwenshuti be sold.

On the merit of the case, the Court found that apart from demonstrating that Niwenshuti Aloys was the one paying the taxes and the rent contract he had with the owners of the house which she worked in, there is no other proof that she jointly build the contested house, thus the Court found her claim without merit, therefore, it sustained the judgment which she had filed the third opposition. She was not contented with the decision and appealed to the High Court, which also found that she had failed to prove that she participated in the construction of the house in litigation, apart from following up on the construction activities, thus, it sustained the rulings of the appealed judgment.

She again appealed to the Supreme Court stating that the High Court held that Niwenshuti was not her husband but he just frequented her home to relax, this led to the conclusion of not sharing the house they built together, however, the former leader of Gatsata village, where they resided for the first time, the leader of Gikondo village and also that of Umurava village where they relocated, they attested that they lived as a husband and wife and he was the one paying the rent. She further explains that she met Niwenshuti when she was studying at Kabale in Uganda and begun to cohabit since 05/08/2005 and they had two children together and he showed her the celibacy certificate “*attestation de célibat*”, which brought more confidence to her, she took him to her parents in Nyagatare and he gave a dowry of 1,000,000 Frw, although there was no ceremony but the elders who received that dowry can testify it, she concludes arguing that Mukambuguje contributed nothing on the contested house because up to now he cannot

demonstrate the activity she had for her to jointly build the house with Niwenshuti, that is the reason she requests to be allocated her share on the contested house.

Niwenshuti states that he got married with Mukambuguje and the cause of dividing up the house is because Mukambuguje refused to sign for him to get a second loan on the pretext that he sired children out of the wedlock, he got angry and requested to share the house, he explains that he met with Mutoni K. Jackline since 2003, the latter knew that he had another wife in Gatsata and he does not refuse that he attended he graduation “collation des grades” in Uganda as others did, that in that intimacy they had two children and he rented for her a house because he did not want her to continue living at her brothers home. He concludes by stating that attending her graduation, sending her to deposit money on her account, renting for her a house or the statements of the village leaders are not the ones to be based on to hold that he was her husband.

Mukambuguje argues that the origin of the conflict is the second loan which Niwenshuti wanted to get and she refused after knowing that he had sired out of the wedlock, he got angry and deserted the home for six months, filed a claim requesting to share the house after they shared he came back and she also welcomed him back because he was the one at fault, she does not understand how Mutoni K. Jackline spent six years renting while she built a house. She concludes by stating that the only way those who lived like a husband and a wife without legally married can share the assets is by to demonstrate his/her participation in acquiring those assets, thus just alleging that she was illegitimate wife of Niwenshuti or they have children together do not give her the right on the house she did not build.

**Held:** 1. When proving the private relationship between people does not require special elements of evidence, any mean which can establish that a man and a woman live as a husband and wife can be based on for making a decision.

2. The documents issued by the local leaders where they resided or bills for rent that demonstrate that they lived in the same house are among the elements of evidence which can be based on to prove that they lived as a husband and wife.

3. Those who lived as wife and husband for them to share the property it is not necessary that each demonstrates the quantity he/she contributed in acquiring or increasing those assets, instead those assets should have been acquired during that period when they cohabited because during their cohabitation every one has something he /she contributes for the family.

4. The quantity contributed by a wife or husband towards the acquisition of the property or increase is not the one which gives woman or man the right to have a share on the property being litigated by the one they cohabited together, instead it is an additional evidence that the property was acquired or increased during the period they cohabited even if one of them cannot give a detailed account his or her contribution.

5. Since the appellant knew that they were not wedded with Niwenshuti, she was aware that their relationship can come to an end anytime, thus, what he expected happened she should not consider it as a fault for which she can claim for damages.

**Appeal has merit**

**The house belongs to both Niwenshuti Aloys, Mukambuguje Alodie and Mutoni K. Jackline, each has a share of a third (1/3) of its value;**

## **Court fees on defendants.**

### **Statutes and statutory instruments referred to:**

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

Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 3.

### **Cases referred to:**

Gatera Johnson and Kabarisa Teddy RS/Inconst/Pén.0003/10/CS rendered on 07/01/2011 by the Supreme Court.

Nyirakamana et al. v. Mukasharangabo et. Al., RS/REV/INJUST CIV0007/15/CS rendered on 04/12/2015 by the Supreme Court.

Ahishakiye Jean v Namagabira Venantie RCAA0048/14/CS rendered on 11/03/2016 by the Supreme Court

Twahirwa Ahmed and Kaligirwa Rehema RCAA 0036/15/CS rendered on 17/11/2017 by the Supreme Court

Lothar Pettkus V. Rosa Becker [1980] rendered by the Supreme Court of Canada.

Baumgartner v Baumgartner [1987], rendered by the High Court of Australia.

### **Authors cited:**

Francois Terré et Philippe Simler, Droit Civil: Les régimes matrimoniaux, Paris: Dalloz, 2015, p.734.

Memento Pratique, Droit de la Famille 2014-2015, Lavallos: Francis Lefebvre, 2014, p. 307.

## **Judgment**

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

[1] This case started in the Intermediate Court of Nyarugenge, whereby Niwenshuti Aloys sued Mukambuguje Alodie requesting to divide the assets they accumulated during their marriage for each one to get half of the proceeds (½).

[2] In the judgment RC0615/12/TGI/NYGE rendered on 03/05/2013, the Court found that even though they both agree that they lived as a husband and a wife and now they are no longer cohabiting is the reason why they should equally divide the property made of a house located on plot n° 753 according to article 39, paragraph 2, of the Law N° 59/2008 prevention and punishment of gender-based violence especially that division of the assets provided by that article is not based on the right from marriage contract, rather, it is the right on the property one of the spouses possesses, that right is based on the fact that they jointly acquired or share as it was ruled by the Supreme Court in the judgment RS/Inconst/Pén.0003/10/CS between Gatera Johnson and Kabarisa Teddy, it decided to sell the house, a half of the price be given to

Niwenshuti Aloys, the other to Mukambuguje Alodie, the latter has to pay 410,000 Frw of the procedure and counsel fees to Niwenshuti Aloys

[3] Mutoni K. Jackline filed a third party opposition against that judgment claiming that she was also an illegitimate wife to Niwenshuti Aloys and had two children, they jointly built that house and thereafter she heard that there is a court order to share that house between Niwenshuti Aloys and Mukambuguje Alodie, and the latter contributed nothing on that house because it belongs to her and Niwenshuti Aloys who built it and therefore, they are the ones to share it.

[4] Niwenshuti Aloys and Mukambuguje Alodie first raised an objection of inadmissibility of the claim of Mutoni K. Jackline on the ground that she only had children with Niwenshuti Aloys and they were business partners but never cohabitated.

[5] In the judgment RC0632/13/TGI/NYGE rendered on 31/03/2014, the Court overruled the objection of inadmissibility which was raised on the ground that Mutoni K. Jackline only had children with him but they were never legally married because she demonstrated the interest she has in the case based on the fact that the Court ordered house she built together with Niwenshuti Aloys be sold.

[6] In the merits of the case, the Court found that apart from only demonstrating that Niwenshuti Aloys used to pay taxes and the agreement for the rent with the owner of the houses they carried business in there is no proof that they jointly built the house together, thus, her claim lacks merit and sustained the rulings of the appealed judgment.

[7] Mutoni K. Jackline was not contented with the rulings and appealed to the High Court arguing that the previous court held that the house belongs to Niwenshuti Aloys and Mukambuguje Alodie while she is the one who jointly built it with.

[8] In the judgment RCA0176/14/HC/KIG rendered on 27/02/2015, the court found that Mutoni K. Jackline does not prove that he contributed in the construction of that house apart from following up on its construction and thus, sustained the rulings of the appealed judgment.

[9] Mutoni K. Jackline was not contented with the rulings and appealed to the Supreme Court arguing that:

- a. He produced to the court statements of witnesses demonstrating that she was a wife of Niwenshuti Aloys for eight years and had two children but those statements were not included in the copy of the judgment;
- b. The High Court misinterpreted article 39, paragraph 2 of the Law N<sup>o</sup>59/2008 of 10/09/2008 on prevention and punishment of gender- based violence;
- c. The High Court held that Niwenshuti Aloys withdrew money from the bank account so that he can lend it to her without any basis in disregard that he withdrew it purposely for construction;
- d. The High Court held that Niwenshuti Aloys and Mukambuguje Alodie got married as a rejuvenation of their relationship while they did it after the lawsuits had begun to mislead the court;

- e. The Court was partial to Niwenshuti Aloys when it held that he was stolen « plan original » of the house in litigation, cheque book she used whenever she went to withdraw money, the stamp used at the workplace which are kept by Mutoni K. Jackline, without any proof because no theft case opened by Niwenshuti Aloys;
- f. She was ordered to pay 500,000 Frw of the procedural and counsel fees for dragging them in lawsuits while they are the ones that dragged her in those lawsuits;

[10] Mutoni K. Jackline also requests to this court to hold that Niwenshuti Aloys disgraced her and did not cater for the upbringing of the children they have and lied to her that he does not have another wife, thus, he should give her damages of 4,000,000 Frw and 2,500,000 Frw of counsel fees on all instances.

[11] The hearing was held in public on 30/05/2017, Mutoni K. Jackline assisted by Counsel Karangwayire Epiphanie and Counsel Mukundamana Eric, Niwenshuti Aloys assisted by Counsel Kimanuka John while Mukambuguje Alodie assisted by Counsel Karega Blaise Pascal, The Court first examined the objection raised by Counsel Karega Blaise Pascal of inadmissibility of the appeal of Mutoni K. Jackline because he lost the case on first and second instance on the same ground and that even if the court finds that she did not lose on the same grounds, it should hold that one third (1/3) of the value of the house of 53,000,000 Frw which he sued for is not in the jurisdiction of the Supreme Court because it does not reach to 50,000,000 Frw, and even if it holds that it is in its jurisdiction it should reject it because it is the third appeal.

[12] On 30/06/2017, this Court overruled the objections raised and admitted the appeal, it ordered that the hearing will resume on 26/09/2017. On that date, the Court found that Niwenshuti Aloys had requested to postpone the hearing on the ground that he fell sick in Uganda while Mukambuguje Alodie, Counsel Kimanuka John and Counsel Karega Blaise Pascal were not present without a reason.

[13] The Court examined the grounds given by Niwenshuti Aloys, who has a counsel and found them baseless and found that it is a means to delay the case and fined him 100,000 Frw, while Counsel Kimanuka John, assisting him and Counsel Karega Blaise Pascal, representing Mukambuguje Alodie, each was fined 200,000 Frw, but in the interest of justice based on the fact that the hearing should be while all parties present, the Court held that the defendants should be warned and summoned, the hearing was postponed on 24/10/2017.

[14] On that day the hearing was held in public, Mutoni K. Jackline assisted as before, Niwenshuti Aloys represented by Counsel Ruberwa Ngarukiye Silas, while Mukambuguje Alodie assisted by Counsel Kamushoshi Gandin.

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

### **II. 1. Whether Mutoni K. Jackline lived as a husband and a wife with Niwenshuti Aloys for them to share the house in litigation.**

[15] Mutoni K. Jackline states that she appealed because the High Court held that Niwenshuti Aloys was not her husband rather he used to visit her often to relax and then, it did not share the house they jointly built among them, while Kalisa Théoneste who was the chief of the village

of Gatsata, where they first resided, Habimana ally, the chief of the village of Gikondo, even Ndagimana Athanase, chief of the village of Umurava where they successively shifted to, confirmed that she lived with him as her husband, and was the one paying rent fees. She further explains that she knew Niwenshuti Aloys since she was studying at Kabare in Uganda, they started living together since 05/08/2005, they had their firstborn on 23/04/2006, on 20/11/2011 they had their second born, in 2012, Niwenshuti Aloys showed her his celibacy certificate, whereby she trusted him they went to her parents at Nyagatare and he gave a dowry of 1,000,000 Frw, though there were no big ceremony, the elders who received that dowry can testify it.

[16] She concludes in stating that on 20/08/2012 Mukambuguje Alodie told the leaders of Niboye cell that, she refused to give to Niwenshuti Aloys the titles of the house in litigation because he married another wife. On 13/11/2012, Niwenshuti Aloys wrote to the Land Registrar's office stating that Mukambuguje Alodie betrayed him and registered his house in her names while they are not legally married, concerning Judgment RC0915/12/TGI/NYGE rendered by Intermediate Court of Nyarugenge on 03/05/2013, this means that Mukambuguje Alodie testified that Niwenshuti Aloys had another wife, even Niwenshuti Aloys adduced that Mukambuguje Alodie did not contribute to the house in litigation, this is also emphasized by the fact that she can not indicate what was her occupation which could assist her to build jointly with Niwenshuti Aloys that house, this is the reason why she seeks justice and thus, benefit her part on that house.

[17] Her Counsel Mukundamana Eric states that Niwenshuti Aloys removed Mutoni K. Jackline from school, and they cohabitated for eight years (8), they shared business to "quartier commercial" as testified by witnesses, up to now the debits of Niwenshuti Aloys, commercial documents, cheque book and the cadastral map of that house are kept by Mutoni K. Jackline, the latter also, gave Niwenshuti Aloys a cheque of 500,000 Frw, all these elements of evidence indicate that they lived together as a wife and husband which was disregarded by the previous Court, and dismissed the request of Mutoni K. Jackline concerning her share on the house in litigation.

[18] Karangwayire Epiphanie, the Counsel for Mutoni K. Jackline states that Niwenshuti Aloys suddenly legally married Mukambuguje Alodie because he was aware that Mutoni K. Jackline started claiming her rights on the house in litigation, Mutoni K. Jackline immediately opposed that marriage so that the proceedings get closed, this means that before legal marriage, he was living with two wives, reason why Mutoni K. Jackline has to benefit her share on that house as it is provided by article 39 of the Law N° 59/2008 of 10/09/2008 preventing and punishing gender basic violence.

[19] Niwenshuti Aloys states that he married Mukambuguje Alodie in 1993, then in 1994 she came back, his brother called Rutamu Diogène gave him a land in which he built the house in litigation with a loan of 8,000,000 Frw given by the Bank Populaire to him conjointly with Mukambuguje Alodie, when he wanted to take another loan because the first was insufficient, Mukambuguje Alodie refused to sign with a pretext that he had children out of the wedlock and asked for the division of that house. He explains that he legally married Mukambuguje Alodie as a refusal of his status of cohabitation, meanwhile, he had met with Mutoni K. Jackline since 2003, the latter was aware that he has another wife who lives at Gatsata. He states that he does not deny that he attended her graduation in Uganda as it was attended by other guests, within that

relationship, two children were born and he rented for her a house so that she can leave her brother's house. He concludes saying that to attend the graduation party, to deposit money on his account, to rent for her a house or the statements of the chiefs of villages are not the grounds to held that he was the husband of Mutoni K. Jackline, mostly because it is not the responsibility of local government authorities to affirm that, reason why he prays the Court to hold that the appeal has no merit.

[20] His Counsel Ruberwa Ngarukiye Silas states that the subject matter, in this case, is not to determine whether Mutoni K. Jackline lived together with Niwenshuti Aloys as a wife and husband, because they don't deny that they have children or that, they were carrying business in the same house while each had his/her own business, rather, the subject matter is to know whether Mutoni K. Jackline has a share on the house in litigation. He explains that the documents in case file indicate that the land was given by Rutamu Diogène in 2006, Mukambuguje Alodie was among the signatory witnesses, on 05/08/2007 Mukambuguje Alodie and Niwenshuti Aloys conjointly requested a bank loan in 2008 they shifted in that house, all these happened in the presence of Mutoni K. Jackline and she did not do anything, in 2011 they got registered on that house and she did not object to that, he finds that the High Court correctly interpreted article 39 paragraph 2, of the Law N° 59/2008 of 10/09/2008 aforementioned because up to date, Mutoni K. Jackline can not indicate her input on that house so that she can claim her share.

[21] Mukambuguje Alodie states that the origin of disputes is the second loan requested by Niwenshuti Aloys which she denied her approval because she was aware that he had a children out of the wedlock, then he got hungry, he deserted, he spent six months without return, she filed a claim to Court while he was away, requesting to share that house, after sharing he came back and she received him because he is the one who faulted. She states that he does not understand how Mutoni K. Jackline spent six years renting while she has built a house, she requests the Court to sustain the ruling of the appealed judgment and held that the appeal has no merit.

[22] Her Counsel Kamashoshi Gandin states that the way one of the partners who lived together in cohabitation can get rights to properties of the husband or the wife who lived together is to prove his/her input in the concerned property, that what is provided by article 39 of the Law N°59/2008 of 10/09/2008 aforementioned, he finds that the statements of Mutoni K. Jackline and her counsels that the latter was a cohabitant of Niwenshuti Aloys or that they had together children are not the reasons to get a share on the house she did not build.

## **COURT'S DETERMINATION**

[23] Article 39 of the Law N° 59/2008 of 10/09/2008 on prevention and punishment of gender- based violence provides that «Those people entertaining unlawful marriages shall be married in accordance with the monogamous principle. If a person concerned with the provision of the 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 ».

[24] Article 3 of the Law N° 15/2004 of 12/06/2004 relating to evidence and its production provides that «Each party has the burden of proving the facts it alleges ».

[25] The documents in case file contain a document of the chief of the village of Nyakaliba, Kalisa Théoneste, affirming that Niwenshuti Aloys and Mutoni K. Jackline live in that village as a wife and husband since 2006 up to December 2009; Nyamaswa Eugène, the chief of the village of Kabeza, states in his document of 17/09/2013, that Niwenshuti Aloys and his wife Mutoni K. Jackline live in the house of Gabiro Grégoire in that same village since 27/12/2012, there is also a document of the Umurava village's committee testifying that Niwenshuti Patience and Niwenshuti Patrick were left by their father who went to another wife who is in the village of Mwijito in Kicukiro. they also contain the document of Kigali Investment Company(KIC) testifying that Mutoni K. Jackline run businesses in the shop N° B2 35 on basis of a contract signed by Niwenshuti Aloys, there is also a lease contract between Gabiro Grégoire and Niwenshuti Aloys of 27/12/2010 of 100,000 Frw per month (see Identification mark 26-30 and 115).

[26] The case file indicates that on 27/12/2011, Mutoni K. Jackline deposited 1,600,000 Frw, on the account N° 403-1085982-11 of Niwenshuti Aloys in BPR, "quartier commercial" branch, on 30/12/2011 she deposited 2,300,000 Frw, on 18/04/2012, she deposited 140,000 Frw, on 15/06/2012 she deposited 150,000 Frw, then on 19/06/2013, she signed a cheque for Niwenshuti Aloys of 500,000 Frw (Identification mark 22-25 and 75).

[27] The case file also contains a donation contract of a land concluded before notary between Rutamu Diogène and Niwenshuti Aloys of 15/01/2006, on that contract, Umukundwa Chantal and Mukambuguje Alodie signed as witnesses, it contains also a loan contract (contrat de prêt 357/2007) of 8,000,000 Frw between BPR and Niwenshuti Aloys conjointly with Mukambuguje Alodie, the loan had to be reimbursed not later than 05/07/2011 (Identification mark 103)

[28] The case file also contains the document of 30/07/2012, which is the letter that Niwenshuti Aloys wrote to the executive secretary of Niboye cell stating that due to the disputes he had with Mukambuguje Alodie, while is the one who keeps the titles of his house, he requests for its protection so that she can neither sale it nor mortgage it without him knowing, there is also a document of 13/11/2012, that Niwenshuti Aloys wrote to the president of the committee in charge of the land in Niboye sector requesting to solve the problem he has with Mukambuguje Alodie who got registered on the house he built on the land he received from his brother, she states that they jointly own that house while she has no share on it (identification mark 19- 20).

[29] The case file also contains a report on the disputes resolution between Niwenshuti and his wife Alodie made by the executive secretary of Niboye cell on 20/08/2012, whereby Mukambuguje Alodie stated that she refused to give Niwenshuti Aloys the titles of the house because of the disputes they had resulting from the fact that Niwenshuti was cohabitant with another wife; with regards to the report made by Havugimana Cléophas, who is in charge of economic development in village of Nyamugari, which affirms that Niwenshuti Aloys lived with his wife Mutoni K. Jackline in that village since 2006 up to 2010. The case file contains also, an affidavit of the hearing of 29/01/2015 before High Court, Ndagijimana who was the chief of Umurava village in Gisozi sector, he stated that Mutoni K. Jackline "she was living with her husband, he was the head of the family,... between 2011 and 2013..., this man claimed before me about the problem he had with his landlord and I attended the hearing of their case disputes, ...[the time he left] I was aware...and I informed all this to the person in charge of security that Mutoni came to see me... to tell me that his husband left her, that she and her children do not



have food and she used to come to Muganda and used to pay security fees also she was active in disputes resolution of other citizens (identification mark 71, 102 and 129).

[30] The Court finds that regarding the issue of proving cohabitation between husband and wife, Francois Terré and Philippe Simler state, that kind of private relation between persons does not require special element of evidence, but any possible means to prove that the wife and the husband lived together shall be based in taking a decision, the book of *Mémento Pratique* Francis Lefebvre, Droit de la Famille also indicates that in evidencing that two persons are living as wife and husband, any evidence may be based on including a document of authorities where they resided or an invoice resulting from a rental contract indicating that they were living together.<sup>1</sup>

[31] The Court finds that Niwenshuti Aloys admits that he met with Mutoni K. Jackline since 2003, that time Mutoni K. Jackline was a student at Kabare in Uganda when she completed her studies he accompanied her to the graduation party, then they started carrying business together, the rent of the house they were trading in, have been paid by Niwenshuti Aloys, that time Mutoni K. Jackline was living at her brother, afterward he rented for her a house, and had two children, the rental contract of Gabiro Grégoire's house in Kabeza village indicates that Niwenshuti Aloys was in charge of rent, the chief of that village Nyamaswa Eugène, even Kalisa Théoneste, the chief of the village of Nyakaliba where they lived in beginning, affirm that Niwenshuti Aloys and Mutoni K. Jackline lived as wife and husband, thus, confirm without doubt that since 2005 they lived stably and continuously till the time they were separated.

[32] The Court also finds that Niwenshuti Aloys and Mutoni K. Jackline cohabited because Mukambuguje Alodie testified that Niwenshuti Aloys left her with children when she refused to consent to take the second loan after that she became informed that he cohabited with another wife with whom they gave birth to children, and also Niwenshuti Aloys does not deny for cohabiting with Mutoni K. Jackline though he intends to convince that it was to safeguard his children, he would not have rent for her a boutique, a dwelling house, participating in community works (Umuganda) where Mutoni K. Jackline resides, paying security fees, participating in disputes resolution for the residents, Mutoni K. Jackline kept his documents including bank checkbook and drawing of the house he was building, Mutoni K. Jackline used to make deposits on his account Niwenshuti Aloys concealed Mutoni K. Jackline that he has another wife, he remained in such situation till the Court ordered the house in litigation to be shared with Mukambuguje Alodie.

[33] With regard to whether Mutoni K. Jackline has rights over the house built while cohabiting with Niwenshuti Aloys, the Court finds, the statements of Counsel Ruberwa Ngarukiye Silas and Counsel Kamashoshi Gandin that guideline set by this Court in the petition seeking to annul the provisions alleged to be unconstitutional filed by Gatera Johnson and Kabarisa Teddy<sup>2</sup> that each one of the cohabitants should prove his or her contribution to the

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<sup>1</sup> “ *S'agissant d'une situation de fait, la preuve du concubinage peut être apportée par tous moyens: certificate de concubinage obtenu auprès de la mairie du domicile des concubins, ... quittances des loyers ou factures établies aux deux noms, relevés des comptes bancaires indiquant la même adresse, etc.*” *Mémento Pratique, Droit de la Famille 2014-2015, Lavallos: Francis Lefebvre, 2014, p. 307.*

<sup>2</sup> See the case RS/Inconst/Pen.0003/10/CS rendered on 07/01/2011 by the Supreme Court, Gatera Johnson and Kabarisa Teddy petitioned for annulment of article 39 of the law N° 59/2008 of 10/09/2008 on prevention and

property in litigation, these statements cannot be considered because in that case, the Court held that in case of separation cohabitants, they have to share the property when they co-own or co-acquired<sup>3</sup>. Co-ownership or acquisition does not imply that each should prove his contribution on the property or his role in increasing the value of that property, what is important is that property has to be acquired in that period of living together since what matters is that everyone contributes in one way or another.

[34] The court finds, it is demonstrated in paragraph 9 to 13, the Supreme Court took that decision basing on the case law of *Hayward vs Giordani* of New Zealand, and cases from Canada: *Baumgartner vs Baumgartner*, *Beaudouin Daigeault vs Ricahrd Paul Eugene*, *Pettkus vs Becker*, the Court also based on *Homesteads acts of Manitoba(Canada)*, *New Zealand Relationships act 1976* and laws of some provinces of Australia, these laws and cases affirm that those who live as husband and wife without legal marriage have equal rights over property co-owned or acquired together, particularly in the case between *Pettkus vs Becker*, the latter was given a half of land and beehives they owned stating that Rosa Becker contributed in the interests of the household that she paid the rent of their home house and other household expenses and he worked in the bees farm, therefore, since Niwenshuti Aloys does not deny for having accepted money from Mutoni K.Jackline to develop their household including construction of house in litigation, they also co-own business, all these prove that they live as husband and wife, hence, they have to share the property acquired together.

[35] The court also finds, the contribution of wife or that of husband does no matter because that contribution is not the one to bestow to the cohabiting partners' rights of sharing the property, but it can be considered as supplement proof that the property was got or that its value was increased while living together as wife and husband though one of the partners cannot prove his or her role. This was also decided so by this Court in the case between *Nyirakamana Marciana et. al. vs Mukasharangabo Eugenie et.al* whereby the Court held that even if *Nyirakamana Marciana* was not legally married to *Karimunda Gérard*, the fact that they lived together as wife and husband from 27/11/1970 until his death in 1994, she has the right to be given ½ of the property jointly owned or belongings acquired together with *Karimunda Gérard*<sup>4</sup>, besides, in the case between *Ahishakiye Jean vs Namagabira Venantie*, this Court held that when a wife gave contribution of whatsoever nature to the household, it is sufficient ground for granting her rights to share with her husband the property they co-owned or acquired<sup>5</sup>, this also affirms that Mutoni K.Jackline has rights over the property acquired together with Niwenshuti Aloys.

[36] The Court further finds, when Niwenshuti Aloys and Mutoni K.Jackline lived together, on 15/01/2006, Niwenshuti Aloys concluded with Rutamu Diogene a donation contract of plot, Mukambuguje Alodie appears on that contract as a witness, in 2007, Mukambuguje Alodie together with Niwenshuti Aloys sought a loan of 8,000,000 Frw for constructing that house, both

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punishment of gender- based violence because it contravenes with the Constitution of the Republic of Rwanda of 04 June 2003 as revised to date.

<sup>3</sup> See paragraph 15 of the judgment (in fine)

<sup>4</sup> See the judgment RS/REV/INJUST CIV 0007/15/CS rendered on 04/12/2015 by the Supreme Court, paragraph 30.

<sup>5</sup> See the judgment RCAA0048/14/CS rendered on 11/03/2016 by the Supreme Court, paragraphs 26 and 17, the judgment RCAA0036/15/CS between Twahirwa Ahmed and Kaligirwa Rehema rendered on 17/11/2017 by the Supreme Court, paragraph 21.

admit that they moved to that new house in 2008, this is also affirmed by Harerimana Gaspard, the chief of Mwijuto village who states that the house is theirs, that Niwenshuti Aloys and Mukambuguje Alodie reside in that house with their five children, this implies that from 2006 to 2012 Niwenshuti Aloys have two wives, consequently, both have to share that house pursuant to article 39 paragraph 2 of the Law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence mentioned above.

[37] In light of foregoing, the Court is of the view that Mutoni K. Jackline has right of 1/3 over the house built on plot UPI:1/03/09/02/753 located in Niboye Village, Kicukiro District, Kigali City, that is to say, 52,924,870 Frw/3 of the value of the house demonstrated by property valuer appointed by Mukambuguje Alodie in his report dated 02/07/2012 (identification mark 22-37) equivalent to 17,641,623 Frw to be paid by Niwenshuti Aloys together with Mukambuguje Alodie.

## **II.2. The basis of damages claimed**

[38] Mutoni K. Jackline is claiming to hold that Niwenshuti Aloys did not respect her, that he did not care of the children's education; that he also lied to her for not having married to someone else, thus, she claims damages worth 4,000,000 Frw as well as counsel fees of 2,500,000 Frw.

[39] Niwenshuti Aloys, Mukambuguje Alodie and their advocates state that damages claimed are groundless because Mutoni K. Jackline did not contribute to the house in litigation. They explain that Mutoni K. Jackline established a caveat on that house so that it does not generate interests, thus, Niwenshuti Aloys requests moral damages of 3,000,000 Frw and 500,000 Frw for procedural fees, Mukambuguje Alodie also states that her activities were suspended, hence she claims damages worth 3,000,000 Frw, both, they request 2,000,000 Frw for counsel fees.

[40] Mutoni K. Jackline and her advocates argue that she should not be liable for damages because Niwenshuti Aloys and Mukambuguje Alodie deliberately seized the court, that they should not invoke the loss from that house while they live in Uganda, rather, they come to Rwanda for the court hearing. They add that she cannot be solvent in case she is ordered to pay damages since she cares for her children with her little salary because Niwenshuti Aloys refused to provide alimony.

## **COURT'S DETERMINATION**

[41] The court finds that the damages should not be awarded basing on the fact that Niwenshuti Aloys left Mutoni K. Jackline though he may have lied that he has no legitimate wife because Mutoni K. Jackline accepted that at any time their union may end knowing that they are not legally married, in case of they are separated, she should not claim compensation from the separation.<sup>6</sup>

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<sup>6</sup> *Le concubinage est essentiellement précaire ; en ne se mariant pas, les concubins ont précisément voulu se réserver la liberté de rompre à leur gré cette liaison, chacun d'eux en s'y prêtant, a accepté ce risqué, et ... celui qui le subit ne peut demander à l'autre d'en réparer les conséquences.*" see Francois Terré et Philippe Simler, *Droit Civil : Les régimes matrimoniaux*, Paris, Dalloz, p.741

[42] The Court finds that Mutoni K. Jackline fails to prove how Niwenshuti Aloys dishonored her, also, the issue of not caring for the children should not be examined in the present case because it is not among the grounds of the claim.

[43] However, the Court finds that Niwenshuti Aloys disregarded that he had two wives unlawfully and that in accordance with article 39 of the law N°59/2008 of 10/09/2008 on prevention and punishment of gender-based violence mentioned above, those wives are equal before the law, therefore, damages and counsel fees that Niwenshuti Aloys and Mukambuguje Alodie request are groundless and procedural fees requested by Niwenshuti Aloys should not be awarded because he is the one who initiated court proceedings and he loses the case.

[44] The Court finds that Mutoni K. Jackline was dragged into lawsuits by Niwenshuti Aloys together with Mukambuguje Alodie, Mutoni K. Jackline came to defend herself which is reasonable, hence, she deserves to be awarded the counsel fees she claims, however, the fact that she does not prove that she paid 2,500,000 Frw as she claims, in court discretion, she is awarded 1,500,000 Frw at all instances, that amount has to be paid by Niwenshuti Aloys and Mukambuguje Alodie jointly.

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

[45] Decides that the appeal of Mutoni K. Jackline has merit;

[46] Declares that the ruling of the case RCA 0176/14/HC/KIG rendered by the High Court on 23 February 2015 is overturned;

[47] Decides that the house situated on plot UPI 1/03/09/02/753 located at Mwijuto Village, Niboye Cell, Niboye Sector, Kicukiro District, Kigali City belongs to Niwenshuti Aloys, Mukambuguje Alodie and Mutoni K. Jackline, with a share of 1/3 to each of them ;

[48] Orders Niwenshuti Aloys, Mukambuguje Alodie to pay Mutoni K. Jackline 17,641,623 Frw equivalent to 1/3 of the value of the house situated on plot UPI 1/03/09/02/753 located at Mwijuto Village, Niboye Cell, Niboye Sector, Kicukiro District, Kigali City;

[49] Orders Niwenshuti Aloys, Mukambuguje Alodie to jointly pay Mutoni K. Jackline 1,500,000 Frw of the counsel fees;

[50] Orders Niwenshuti Aloys, Mukambuguje Alodie to jointly pay court fees.