

## **NDAHUNGA v. MUKAKALISA ET AL**

[Rwanda SUPREME COURT - RCAA 0022/15/CS (Nyirinkwaya, P.J; Hitiyaremye and Munyangeri) December 15, 2017]

*Family Law – Family property – Management of family property – The consent of both spouses is mandatory before the sale or conveying any right on the immovable property which they jointly own.*

Facts: Mukakalisa filed a claim before the Intermediate Court against her husband Nduwayo and Ndahunga, requesting the Court to annul the sale agreement of a house concluded between them because she was not aware of it, the hearing of the case conducted in absentia of Nduwayo but he was summoned according to the Law. That Court decided that the claim of Mukakalisa has no merit.

Mukakalisa appealed for that decision before the High Court, which decided to nullify the contract concluded by Nduwayo alone because his wife did not sign, she was not even aware of it whereas their mutual consent is required as provided by the Law.

Ndahunga appealed for that judgment before the Supreme Court, stating that the High Court dismissed the objection he raised for not admitting the claim of Mukakalisa because the time to oppose for that contract had expired. After all, the legislator provided five (5) years for immovable property for one of the spouses who should have expressed his/her consent despite his/her absence, if he/she was absent due to serious circumstances, that period was enough for her to oppose for the agreement concluded by her husband, therefore, the fact that the contract was concluded in 2002, and she filed a claim in 2012 after ten (10) years, this indicates that the agreement was final and irreversible, he adds that the Court also disregarded the indirect evidence he submitted which indicate that, though the defendant did not sign on the sale agreement, she was aware of it.

Mukakalisa argues that the issue of the period for filing a claim was heard before the High Court but it was not considered as an objection, thus this objection should not be raised for the first time before the Supreme Court, hence, it should not be admitted. She further states that she had never been informed that her husband concluded a sale agreement on their common property because he used to conceal everything from her.

**Held:** 1 The consent of the spouse is necessary before the sale of their joint immovable property or conveying any right on it.

**The appeal has merit;  
The contract is still valid.**

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

Law N° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, article 17,21 and 22.

**No cases referred to.**

# **Judgment**

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

[1] This case started before the Intermediate Court of Nyarugenge, Mukakalisa Dancille suing her husband Nduwayo Nathan and Ndahunga Jean Marie Vianney, praying the Court to annul the sale agreement of a house located on parcel N° 5798 concluded between them on 08/02/2002 because she was not aware of it, the case was heard in absentia of Nduwayo Nathan though he was lawfully summoned.

[2] On 21/06/2013, the Court rendered the judgment deciding that Mukakalisa Dancille's claim is without merit because she failed to demonstrate what she did when she knew that Ndahunga Jean Marie Vianney was building in the plot he bought from her husband while the latter has traveled abroad, whereas the spouses have equal rights to follow up their patrimony and stand for it, the Court ordered to give Ndahunga Jean Marie Vianney, moral damages and counsel fees.

[3] Mukakalisa Dancille appealed for this decision before the High Court, then on 15/05/2015 that Court decided that her appeal has merit, It annulled the agreement concluded by her husband Nduwayo Nathan alone who sold the house which was in plot N° 5798 to Ndahunga Jean Marie Vianney because his wife did not sign it and she was not even informed whereas there should be a consent of both as provided by the Law.

[4] Ndahunga Jean Marie Vianney appealed for this case before the Supreme Court, stating that the High Court did not consider the objection he raised for not admitting the claim of Mukakalisa Dancille because of the expiry of the prescribed period for filing a claim, that the Court also disregarded the elements of evidence he submitted indicating that, though Mukakalisa Dancille did not sign the sale agreement of the house, she was aware of it. He further states that the Court declared void the sale agreement of that house but It failed to give him the money equivalent to the value he added on that house and in that plot as indicated by the expert's report.

[5] The hearing of the case conducted in public on 18/07/2017, Ndahunga Jean Marie Vianney represented by Counsel Ndagijimana Emmanuel whereas Mukakalisa Dancille was represented by Counsel Habimana Pie, Nduwayo Nathan did not appear but he was summoned to an unknown address. On that day, Counsel Habimana Pie raised an objection of lack of jurisdiction of the Supreme Court, then on 15/09/2017 the Court overruled it. It ordered to resume the hearing of the case in merit on 14/11/2017.

[6] On that day, parties to the case appeared before the Court, Ndahunga Jean Marie Vianney was represented by Counsel Ndagijimana Emmanuel and Counsel Rukundo Emile, whereas Mukakalisa Dancille was represented by Counsel Habimana Pie, Nduwayo Nathan was absent but he has been summoned to unknown address as provided by the Law.

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

**Whether Mukakalisa Dancille exceeded the time limit prescribed to file a claim contesting the contract concluded by her husband Nduwayo Nathan.**

[7] Counsel Rukundo Emile argues that the first ground of Ndahunga Jean Marie Vianney's appeal of his client is that the High Court disregarded the objection he raised aiming at rejecting the claim of Mukakalisa Dancille because the time for its filing has expired, that it is not raised for the first time before the Supreme Court as the respondent pretends because it is clear that the judge examined it (page 5, paragraph 18, judgment RCA 0415/13/HC/KIG).

[8] Counsel Rukundo Emile continues stating that as provided by article 22 of the Law N° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions, the legislator gave a time limit of five (5) years to one of the spouses who were not around at the time of the transaction to express her/his opinion, thus, if Mukakalisa Dancille was absent due to serious reasons, that period was enough for her to oppose against the agreement concluded by her husband. He continues arguing that, this corroborates with the provisions of article 17 of the law N° 22/99 of 12/11/1999 aforementioned, which provides that the spouses have equal right to follow up their patrimony and stand for it.

[9] Another ground for appeal submitted by Ndahunga Jean Marie Vianney as arguing by his Counsel Rukundo Emile is that the indirect evidence indicating that Mukakalisa Dancille should not deny having known the sale agreement as to the one who remained in the country when her husband was not around, if she believed that the house was under rent as she pretends, and having noticed it being demolished for rehabilitation whereas she knew that the house was hers, she would have followed it up because she had the same rights with her husband concerning the management of their patrimony, therefore, the fact that she failed to take any action within five years (5) provided by the Law, it implies that she knew that sale agreement.

[10] Counsel Rukundo Emile states that the proof which indicates that Ndahunga Jean Marie Vianney has rights over the plot he bought, is that, he was given a construction permit by authorities, whereby the latter wrote to the owner of the garage which is in that plot allowing him to build a wall and he was given afterward the permission to work in that garage.

[11] From these grounds of appeal, Counsel Ndagijimana Emmanuel who also assist Ndahunga Jean Marie Vianney adds that the agreement which his client concluded with Nduwayo Nathan is authentic because it was done before the notary, the property's title submitted by the seller indicates that he is the sole owner, he does not indicate that he is either married or single. He further states that at time Ndahunga Jean Marie Vianney bought that plot it contained a small house and he demolished it and built in a garage, and during that period, Mukakalisa Dancille used to pass nearby every day heading to her job because that place is on the way to Bralirwa where she was working, however, she never stated that the property is hers

[12] Counsel Ndagijimana Emmanuel continues stating that Ndahunga Jean Marie Vianney had an agreement with Nduwayo Nathan in the year 2002, then Mukakalisa Dancille filed a claim in 2012 after ten (10) years, this demonstrates that the agreement has become final and irreversible, that the High Court misunderstood article 22, paragraph 3, of the Law N° 22/99 of

12/11/1999 aforementioned because it stated that Nduwayo Nathan did not demonstrate the reason why his wife did not sign.

[13] Concerning indirect evidence which proves that Mukakalisa Dancille acknowledges the agreement concluded by her husband, Counsel Ndagijimana Emmanuel states that after selling, Nduwayo Nathan traveled to Europe, the buyer built a garage and he also paid rental taxes, land tax, all these show that Mukakalisa Dancille was informed of this agreement.

[14] Counsel Ndagijimana Emmanuel concludes by praying the Court that alternatively if it finds necessarily to annul the sale agreement between Nduwayo Nathan and Ndahunga Jean Marie Vianney, which will result in returning the property in litigation to Mukakalisa Dancille, the latter should be ordered to refund to Ndahunga Jean Marie Vianney 177,533,575Frw equivalent to the value he added to that property as indicated by the expert's report available in the case file, this is to prevent unjust enrichment (enrichissement sans cause), mostly because Ndahunga Jean Marie Vianney bought that property in good faith.

[15] Counsel Habimana Pie representing Mukakalisa Dancille states that the issue of the time limit for filing a case was heard before the High Court, but it was not considered as an objection, thus, it cannot be raised for the first time before the Supreme Court. He continues stating that, article 21 of the Law N° 22/99 of 12/11/1999 aforementioned institutes the principle that any time there is a property to be sold, one of the spouses should be notified, whereas article 22 of the same law provides an exception relating to the situation when one of the spouses is not available.

[16] Counsel Habimana states that Ndahunga Jean Marie Vianney should not have signed on the agreement without asking the wife of his counterpart whereas it was clear that he is a married man, as it is a practice for a buyer to investigate the property he/she is about to acquire, with regard to the provisions of article 17 of the Law N° 22/99 of 12/11/1999 which has often been stated, cannot apply in this case because this article provides for the management and disposal of spouse's patrimony.

[17] Concerning indirect evidence raised by her opponents arguing that those elements of evidence prove that Mukakalisa Dancille was informed of the agreement concluded by her husband, Counsel Habimana Pie submits that their statement has no merit. After all, it was possible to lose information on works which were done in the plot sold because its location is different from Mukakalisa Dancille's residence; whilst the fact that Ndahunga Jean Marie Vianney is the one who pays taxes, he finds that this is baseless because this is not among how someone acquires a property (moyen d'acquisition de la propriété).

[18] Counsel Habimana Pie concludes stating that, in case the agreement is annulled, nothing would be refunded to Ndahunga Jean Marie Vianney by Mukakalisa Dancille because the matter can be restored as before signing the agreement, he finds that, their request is out of the subject matter.

[19] Mukakalisa Dancille who attended the hearing was asked by the Court about this case and explained that she did not know that her husband sold the house and the parcel which is in litigation, because he used to hide everything from her, that he told her that he rent that place and

she accepted. She further stated that it is true that during that time she was working nearby but she couldn't know whether that property was sold, rather she knew about it during the period of land registration, at that same time she heard that her husband has started receiving money even before 2002.

[20] Concerning the fact that Mukakalisa Dancille had once asked rent from Ndahunga Jean Marie Vianney when her husband was abroad, she argues that she went to Kicukiro sector office to ask about the tenant of the plot and the house under litigation and found that Ndahunga Jean Marie Vianney was the one, who even pays taxes that when she asked his guard how she can find him, he replied that he does not know where he lives, thus she could not write to him without knowing his address.

## **DETERMINATION OF THE COURT**

[21] Article 17, paragraph two, of the Law N° 22/99 of 12/11/1999 to supplement book I of the civil code and to institute part five regarding matrimonial regimes, liberalities and successions which was in force when Nduwayo Nathan concluded the sale agreement with Ndahunga Jean Marie Vianney, provides that “ In case of marriage under the regime of community of property or that of limited community of acquests, the spouses shall choose who, among themselves, shall be responsible of the management of the common patrimony, they are also equally entitled to monitor, to represent”.

[22] Article 21 of the Law N° 22/99 of 12/11/1999 previously mentioned, provides that whatever be the matrimonial regime has chosen and the management modalities of the patrimony of the spouses, the agreement of both spouses shall be required for the donation of immovable property and any other property in the community, as well as for the acknowledgment of any right attached to these properties”.

[23] Article 22 of the same law provides that when one of the spouses is involved in a transaction that requires the consent of the other spouse, he or she shall obtain this consent at the time of ratification of this transaction or within six months thereafter. This consent shall be notified to the third contracting party by written notice. Where no reply from the latter is made within a month following the date of notification, his or her consent shall be deemed given. Where, for some reasons the spouse whose consent is required is not available or due to serious reasons beyond his/her control could not give it, the transaction shall be deemed final one year (1) after its ratification for movable property and five years (5) for immovable property”.

[24] The interpretation of article 21 and 22 previously mentioned, implies that it's a principle for spouses to have a mutual consent before making any liberality or any disposal rights (mortgage, sale....) on a common immovable property when the agreement is concluded by one of the spouses, he/she has to notify his/her partner for the consent and then notify the contracting party. If one of the spouses is not available for any reason to express his /her consent, the legislator provided one year (1) for movable property and five years (5) for immovable property, so that spouse who was absent the time of concluding the transaction, expresses his/her consent or refusal if nothing is done during that period, the agreement becomes final. The legislator deemed this period to be enough for one of the spouse who was not able to provide his approval regarding the agreement concluded by his/her partner in his/her absence, so that he/she can apply

for its annulment in case he/she disagrees. This is helpful for the buyer for his safety to manage his property without fear that someone may establish a caveat on it.

[25] Regarding this case, the documents of the case file indicate that on 08/02/2002, Nduwayo Nathan, the husband of Mukakalisa Dancille, concluded an agreement with Ndahunga Jean Marie Vianney to whom he sold a house built in the plot N° 5798 located in Amajyambere village, Gasharu cell, Kicukiro sector, Kicukiro district, in Kigali city, for seven million and five hundred Rwandan francs (7.500.000Frw), in presence of Niyonzima Fidèle, Umugwaneza Miriam, Kobusingye Penina, and Uwayezu Dorothy as witnesses.

[26] Those documents also indicate that on 07/12/2012 Mukakalisa Dancille filed a claim before the Intermediate Court of Nyarugenge requesting the court to annul the agreement concluded between Nduwayo Nathan and Ndahunga Jean Marie Vianney for the sale of the plot N° 5798 containing a garage which is located in Amajyambere village, Gasharu cell, Kicukiro sector, Kicukiro district, in Kigali city because the seller is her lawful husband, who sold it without her knowing and went afterward to Europe. In her submissions prepared by Counsel Mukamisha Claudine, Mukakalisa Dancille explained that she believed that the house is still theirs because she has not been notified about that sale till the time she went for land registration and meet with Nduwayo Jean Marie Vianney's wife who was also registering the same property, she also explains that she did not follow up that property because she believed that her husband rented it to look after their children who travelled with him.

[27] The intermediate Court of Nyarugenge found Mukakalisa Dancille's claim without merit because there are constructions built on that land after demolishing the older ones, while she was around and she did not react whereas she had the same rights as her husband concerning the management of their property, the issue of long term rent that she was told by her husband, she does not prove it<sup>1</sup>. The High Court found that the agreement between Ndahunga Jean Marie Vianney and Nduwayo Nathan should be annulled because Mukakalisa Dancille did not express her consent as required by article 22 of the Law relating to matrimonial regime aforementioned.<sup>2</sup>

[28] The Supreme Court finds, that the time for which the contract was concluded, Nduwayo Nathan did not notify his wife Mukakalisa Dancille so that the latter may express her consent because she does not even appear among those who signed, there is not even other evidence which indicates that after concluding it, he notified her about it till he went to Europe in March 2003.

[29] The Supreme Court finds, though for any reason Mukakalisa Dancille was not notified by her husband about the agreement he concluded with Ndahunga Jean Marie Vianney on common property, she had a period of five years (5) to follow up her property as provided by article 22 of the Law N° 22/99 of 12/11/1999 aforementioned, especially that her whom she states that she was in disputes with him, he went to Europe, she had legal standing for following up and represent it pursuant to article 17 of aforementioned Law. The fact that Mukakalisa Dancille had to take a decision on the sales contract which was concluded between her husband Nduwayo Nathan and Ndahunga Jean Marie Vianney and five years lapsed without doing

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<sup>1</sup> See the judgment RC 0014/13/TGI/NYGE paragraph 7, page 2

<sup>2</sup> See judgment RCA 0415/13/HC/KIG, paragraph 13, page 4.

anything, implies that the contract became binding and cannot be nullified on the ground that she did not consent to it when it was concluded.

[30] The Supreme Court finds that the interpretation of the High Court that article 17 of the Law on matrimonial regime concerns only the right for managing common property, (*gestion du patrimoine commun*) is false, because that article states clearly that they have equal right for monitoring and representing it, thus, this article is also the one which gives Mukakalisa Dancille the right to follow up the common property with her husband Ndahunga Nathan while he was absent, especially that she admitted before the Court that she used to pass by that place on her way to the work, thus, it is not reasonable how she would not have seen new buildings which were constructed so that she reacts accordingly.

[31] The Supreme Court also finds that, the findings of the High Court in paragraph 17 that “there is no prescription period for one of the spouses to claim for her/his rights provided by article 22 aforementioned”, this position is wrong because as aforementioned, the legislator’s will was one year (1) for movable property and a period of five years (5) for immovable property for a contract to be final and irreversible for a spouse who did not express her/his consent regarding the contract concluded by his/her partner when he/she could not be around or for serious reasons he/she has precluded him/her from expressing his/her opinion, this period is set purposely for pursuing rights to anyone in case of need.

[32] The Supreme Court finds, if the law provides that the one who should accept the agreement concluded by his/her partner was not able to appear or to express his/her opinion due to serious reasons, the contract becomes final and irreversible in one year(1) for movable property and five years(5) for immovable property, therefore, it is not reasonable, how Mukakalisa Dancille who states that she was around, would stay such long time of ten years(10) without follow up her property which she states that, was sold by her husband.

[33] Basing on the motivation and the laws aforementioned, the Supreme Court finds that the sales contract for the house located on plot N° 5798, in Amajyambere village, Gasharu cell, Kicukiro sector, Kicukiro district, Kigali city, concluded between Nduwayo Nathan and Ndahunga Jean Marie Vianney on 08/02/2002 should not be annulled because Mukakalisa Dancille delayed filing a claim against it.

[34] The Supreme Court finds it not necessary to examine the issue related to whether Mukakalisa Dancille should refund Ndahunga Jean Marie Vianney the money equivalent to the value he added on the property in litigation because of the contract she claimed to be annulled, remains valid.

**Whether the parties are entitled to be awarded damages they request.**

[35] Counsel Habimana Pie requests that at this level Mukakalisa Dancille be awarded 1,000,000Frw for counsel fees and 300,000Frw for procedural fees. He also claims that she is awarded 20,000,000Frw for moral damages for not enjoying her property whereas she is an old woman and that she lives in poverty, she also claims to be refunded 10,000Frw she paid for court fee before the Intermediate Court and in High Court.

[36] Counsel Rukundo Emile states that he cannot respond to these damages because Ndahunga Jean Marie Vianney request to consider that contract, rather in his submissions he jointly prepared together with Counsel Ndagijimana Emmanuel, they request that Mukakalisa Dancille and Nduwayo Nathan be ordered to pay Ndahunga Jean Marie Vianney procedural fees equal to 2,000,000Frw and counsel fees equal to five 5,000,000Frw and moral damages worth 10,000,000Frw.

[37] Concerning the damages requested by Ndahunga Jean Marie Vianney, Counsel Habimana Pie stated during the pretrial conference, that is without merit because he faulted for buying from Nduwayo Nathan whereas in absence of his wife, thus he can not base on his faults and claim some rights (Nul ne peut invoquer sa propre turpitude).

### **DETERMINATION OF THE COURT**

[38] The Supreme Court finds that Mukakalisa Dancille cannot be awarded damages because she loses the case, rather, she should pay jointly with Nduwayo Nathan to Ndahunga Jean Marie Vianney money he used to hire advocates who represented him. However, because the requests excessive amount, they should both pay him one million (1.000.000Frw) for counsel fees and procedural fees. The Court finds without merit the moral damages requested by Ndahunga Jean Marie Vianney because he cannot justify them.

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

[39] Decides that the appeal of Ndahunga Jean Marie Vianney has merit;

[40] Decides that the sale's contract of the house located in plot N° 5798 in Amajyambere village, Gasharu cell, Kicukiro sector, Kicukiro district, in Kigali city, concluded between Ndahunga Jean Marie Vianney and Nduwayo Nathan on 08/02/2002 is sustained;

[41] Decides that the Judgment RCA0415/13/HC/KIG rendered by the High Court on 15/05/2015 is reversed in whole;

[42] Orders Mukakalisa Dancille and Nduwayo Nathan to pay to Ndahunga Jean Marie Vianney one million (1,000,000 Frw) for counsel fees and procedural fees;

[43] Orders Mukakalisa Dancille and Nduwayo Nathan to refund Ndahunga Jean Marie Vianney one hundred thousand (100,000Frw) for court fees he paid in this Court.