

## NISHIMWE ET AL v. MUGENGA

[Rwanda SUPREME COURT – RCAA 00031/2016/SC (Nyirinkwaya P.J., Cyanzayire, Kayitesi R, Rukundakuvuga and Hitiyaremye J.) September 25, 2019]

*Property – Sale of immovable property – Sale of someone else’s property – Reimbursement of the value added to the property in case of handing back the property to the real owner – When someone buys an immovable property with someone else who is not the owner, and when it becomes necessary to handle it back to the real owner whereas he/she added value on it rather than new buildings or plants, he/she has to be refunded by the owner the added works reference made to their nature – for necessary works, is reimbursed for a total value of the works ( rembursement integral ) – for useful works, is reimbursed for the works evaluated at the time it was decided to handle back the property – for beautification works, there is no reimbursement by the real owner, rather he/she can ask the seller to reimburse for them if he /she sold in bad faith.*

**Facts:** Mugenga concluded a sale contract of the house with Kabagema, which was nullified by the first instance court of Kigali after it was found that Kabagema sold the property which he is not the owner.

Mugenga after handing that property, sued Rwamanywa’s heirs before Nyarugenge Intermediate Court stating that he has handed the house but did not receive compensation for the value he added on it, he asked Nishimwe and Mashami to pay interests for the money he spent on that house, the rent they get and the loss he suffered due to the devaluation of currency; that Court decided that Mugenga completed some works on the house and ordered to refund him their value decided in court’s discretion, it orders also Rwamanywa’s heirs to reimburse Mugenga the Counsel and procedural fee.

Mugenga and Rwamanywa’s heirs appealed for that judgment each party did not contend with its ruling, in case combined in appeal the Court decided that both appeals have no merit, to sustain the appealed judgment.

Nishimwe appealed again for that judgment before the Supreme Court stating that there was a contradiction, the Court misinterpreted the Law, whereby it decided to refund Mugenga the value added to the house whereas it is him who defaulted also that the evidence based on to evaluate the added works is doubtful.

During the hearing of the case, Mugenga raised the objection of lack of jurisdiction of the Supreme Court stating that Nishimwe who appealed lost two times for the same grounds, also that the value of the subject matter does reach 50,000,000Frw, he requested the Court to reject the appeal. The decision on the objection was rendered on 20/04/2018, the Court decided that the objection of lack of jurisdiction raised by Mugenga is rejected.

Afterward, Mugenga raised another objection stating that Nishimwe changed her opponents in appeal because Mashami is now accused whereas in previous Courts she shared interests with Nishimwe, this leads the court to raise the objection to know whether the appeal of Nishimwe has no consequences to other heirs, after pleadings on those objections, the Court decided as Mashami is concerned, the claim of Nishimwe can not be admitted, Mashami was removed from the case as

an accused, rather was summoned on the side of the appellant though she did not appeal, then the hearing resumed in substance.

In his pleadings, Mugenga stated that he did some works on the house after buying it and constructed a new building in that compound, whereas Nishimwe and Mashami state that there is nothing he added on their property, and in case he added something, they should not be the ones to reimburse him because he bought deceptively.

A property valuer expert was appointed with the agreement with parties to the case. and was asked to indicate to the Court the added value to the house and the value of new buildings in the compound mentioned in the subject matter after the year 1997 up to the year 2008 when Mugenga got out, they debated on the report made earlier by the expert then the Court found necessary to order an additional report.

**Held:** 1. When someone buys an immovable property with someone else who is not the owner, and when it becomes necessary to handle it back to the real owner whereas he/she added value on it rather than new buildings or plants, he/she has to be refunded by the owner for the added works reference made to their nature.

2. Is refunded for all necessary works (impasses necessaires), regardless of whether he/she got it by bad/good faith. Nothing is refunded by the real owner for the beautification works.

**The appeal of Nishimwe and Mashami has merit in part.  
Court fee deposited for this case equal to work done for it.**

**Statutes and statutory instruments referred to:**

The Constitution of the Republic of Rwanda of 2003 revised in 2015 article 34.

Organic Law N° 03/2013/OL of 16/06/2013 repealing Organic Law n° 08/2005 of 14/07/2005 determining the use and management of land in Rwanda, article 35, paragraph 3;

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure article 9.

Law N° 42/1988 instituting preliminary title of book one of civil code articles 388 and 389.

**Cases referred to:**

Kayitsinga Alexis, Kanyamibwa Immaculée v. Nsangineza Célestin, RS/REV/INJUST/CIV 0012/15/CS rendered by the Supreme Court on 18/01/2019.

Nibasenge Anathalie v. Nahayo François Xavier, RS/INJUST/RC 0006/2018/SC rendered by the Supreme Court on 18/01/2019,

**Authors cited:**

Gérard Cornu, Vocabulaire juridique, 6ème éd., Paris, Presses Universitaires de France, 1996, p. 312, 388 na 418.

Christian Larroumet, Droit Civil, Les Biens, Droits réels, Principaux, 5ème Ed., T.II, Paris, Economica, 2006, p. 311, 312, 372, 373.

Patrice Jourdain, Droit Civil, Les biens, Paris, Dalloz, 1995, p.229, p. 282.

# Judgment

## I. BRIEF BACKGROUND OF THE CASE.

[1] Mugenga Joseph bought a house from Kabagema Ferdinand in 1994. Their sale contract was declared null and void by the first instance Court of Kigali, in the case N° RC 36.294/01 rendered on 12/02/2003. In that case, the Court found that Kabagema Ferdinand sold someone else's property which belongs to his brother Rwamanywa Jérémie and sold it illegally, for those reasons the Court declared the sale contract between Kabagema Ferdinand and Mugenga Joseph null and void.

[2] Mugenga Joseph after handing the house back, he filed a claim before Nyarugenge Intermediate Court against the heirs of Rwamanywa namely Nishimwe Claudine and Mashami Gisèle, stating that he handed the house back, however, he was not refunded the value he added to that house, he requested the interests on the money he spent for those works, the rent fee earned by Rwamanywa Jérémie's heirs and the money lost due to inflation, all amounting 137,056,112 Frw.

[3] The Intermediate Court found with merit the claim of Mugenga Joseph, as he added value on that house, and even built new boys' quarters within that plot, it ordered Rwamanywa Jérémie's heirs namely Nishimwe Claudine and Mashami Gisèle to refund Mugenga Joseph 15,591,362 Frw, it ordered them to pay also 800,000Frw of counsel fee and 100,000 Frw of the procedural fee.

[4] Mugenga Joseph and Rwamanywa Jérémie's heirs were not contended by that judgment, each party appealed before the High Court, their appeals were combined within the case RCA 0517/15/HC/KIG-0538/15/HC/KIG, rendered on 22/04/2016. The Court found without merit the appeal of each party and sustained the appealed judgment.

[5] Nishimwe Claudine made a second appeal before the Supreme Court, and the claim was registered on RCAA 00031/2016/SC, arguing that she is suing Mugenga Joseph and Mashami Gisèle: She explains that she appealed because on the following grounds;

The fact that there was contradictions which led the Court to err in law;

The fact that the court held that Mugenga Joseph must be refunded the value added on the house whereas he is the one who erred;

And also the fact that the evidence based on to determine the value added on the house is dubious.

[6] The hearing of the case was in public on 27/03/2018. At the beginning of the hearing, Mugenga Joseph recalled the objection he raised based on the fact that Nishimwe Claudine who appealed has lost the case twice for the same grounds, and the fact that the value of the subject matter does not exceed 50,000,000Frw, thus, based on article 28 paragraph 2 litera 7 and paragraph 5 of the Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, her appeal should not be admitted because it is not under the jurisdiction of the Supreme Court.

[7] On 20/04/2018, the Court overruled the objection of lack of jurisdiction raised by Mugenga Joseph, the hearing was scheduled on 12/06/2018. On that date, it was postponed due to restructuring of the judiciary, it was heard on 09/10/2018. Mugenga Joseph raised another objection, stating that Nishimwe Claudine changed her adversary in appeal level because Mashami Gisèle is now a respondent whereas she was on the same side as for Nishimwe Claudine at lower instances, that issue was adjudicated as well as the issue raised by the Court itself to know whether the appeal of Nishimwe Claudine has no consequences to other heirs.

[8] On 09/12/2018, the Court decided that the appeal claim of Nishimwe Claudine as Mashami Gisèle is concerned is not admissible, it decided to remove Mashami from the case as an accused. It decided also that based on the fact that Nishimwe Claudine shares interests with Mashami Gisèle as the subject matter is concerned because, they are both heirs of Rwamanywa Jérémie, thus any decision of the Court will affect both of them, Mashami Gisèle though she did not appeal she must be forced to be a party to the case, at the side of Nishimwe Claudine who appealed. It ordered to resume the hearing in merit on 08/01/2019.

[9] On 08/01/2019, the hearing was held in public, and was closed, the Court notified the parties that the judgment will be pronounced on 15/02/2019. In its deliberation the Court before adjudicating the case found it necessary to appoint a property valuer based on article 77 of the Law N° 15/2004 of 12/06/2004 relating to evidence and its production which provides that a court can, to resolve a case before it, order experts to examine and give opinions on certain aspects of the case that are relevant to their domain of expertise.

[10] The hearing to appoint a property valuer took place on 26/02/2019, all parties agreed on the property valuer called Ir Havugimana Justin before the Court. That expert, based on the expertise report N° 17/97 of 07/03/1997 made by the employee of the Ministry of infrastructure, and on the pleadings of each party, the property valuer was tasked to establish to the Court the value added to the house and on the plot under litigation after the year 1997 up to the year 2008 when Mugenga moved from it, and the value they had in 2008.

[11] The expert appointed by the Court submitted his report to the Supreme Court Registrar's office on 25/04/2019, the hearing of the case was scheduled on 17/07/2019. On this date the case was heard, Nishimwe Claudine represented by Counsel Abasa Fazil, Mashami Gisèle represented by Nsengiyumva Abel whereas Mugenga Joseph was assisted by Counsel Nzabahimana Augustin Néto, the parties were given the time to comment on the aforementioned report.

[12] Mugenga Joseph concurred with the report of the expert, except where he erred as regards to the boys' quarter house where he stated that it was constructed with mud bricks commonly known as rukarakara whereas it was constructed with burnt bricks, this led to miscalculation whereby the square meter was calculated at 5 600 Frw whereas it is worths 50, 000 Frw, he explained also that the expert reported that the roofing is made with woods whereas it is made with metal.

[13] Counsel Abasa Fazil who represents Nishimwe Claudine and Counsel Nsengiyumva Abel who represents Mashami Gisèle state that they don't understand how the property valuer got the prices used in the expertise, they requested the property valuer to provide the method he used to calculate each component and be given the time to respond to that.

[14] After hearing the explanations of each party as regards the expert report, the Court decided to conduct further expertise, which will be handed to the Court registrar's office not later than 25/07/2019, the hearing will be resumed on 31/07/2019 on eight a.m. on that date all parties attended the hearing, the expert appointed by the Court was also present, each party had a say on the additional report, the Court closed the hearing and notified the parties that the judgment will be pronounced on 25/09/2019.

[15] In their pleadings, Nishimwe Claudine and Mashami Gisèle state that Mugenga Joseph did not add value to the house under litigation after buying it, and in case he added any value, they are not the ones to refund him because he bought it deceptively. In this case, the main issues to be examined are to determine whether there is value added to the property that Mugenga Joseph handed back which is being litigated which is composed of a plot and a house and whether he can be remursed with the value added and the person liable for it.

## **II. ISSUES TO BE ANALYSED IN THIS CASE**

### **A. Whether Mugenga Joseph added value to the property he handed back to Rwamanywa Jérémie's heirs.**

[16] The counsel for Nishimwe Claudine, together with the one who represents Mashami Gisèle state that they don't accept that Mugenga Joseph added value to the property under litigation, basing on the following grounds:

- Before the High Court, the judge stated that he visited the site of the subject matter without notifying the parties to the case and found one house built in 2004 and a new one, the reason why they don't agree with the testimony of the witnesses.
- The subject matter being a house left by Rwamanywa Jérémie before 1994, and its state has not changed until now. He states that, what Mugenga Joseph did, is just taking care of it as to repair its doors and painting.

[17] Counsel Nsengiyumva Abel who represents Mashami Gisèle states that, if there is any added value to the house, it must be compensated with the time Mugenga Joseph spent in it from 1994 up to 2008. He states that the Court should investigate to determine whether there is any added value to the house under litigation and verify the statements of the witnesses. He added that they don't need the boys' quarters, Mugenga Joseph who built it should remove it and take away his materials because he built it deceptively. He states also that, he does not acknowledge the expert's report which the lower Courts referred to, because it was in Mugenga Joseph's favour

[18] Mugenga Joseph states that the case file contains the property value report made by MINITRAP indicating the value of the property at the time of the sale, there is another property value report made in 2008 which indicates the value of the property at the time when it was handed back to Rwamanywa's heirs. He states that the last property value report (2008) indicates that Rwamanywa's heirs possess a property worthy of 64 million, whereas their property had a value of 3 million.

[19] He states that the value he added to that property is evidenced by the following:

- The property valuers report aforementioned, contained in the case file.
- The Case RC 36. 294/01 rendered by the first instance Court of Kigali on 12/02/2003, in paragraph 7, page 5, in the latter it was decided, that he added value to the house;
- The statements of all witnesses affirmed that there is an added value to that property even the authorities where the house is located affirmed that.

[20] Counsel Nzabahimana Augustin Néto who assists Mugenga Joseph states that Nishimwe Claudine and Mashami Gisèle confuse the sale price for the house under litigation and the principle of unjust enrichment, thus, Mugenga Joseph is requesting the money for the value added to the house he handed back to them, he is not requesting for the reimbursement of the sale price. He states also that, Mugenga Joseph did not build the boys' quarters only but he renovated also the main house, thus he is requesting the added value to the house not to demolish it.

## **DETERMINATION OF THE COURT**

[21] The evidence provided by Mugenga Joseph to indicate that he added value to the house, are composed of property valuer report prepared by the ministry of infrastructure on 07/03/1997, the property valuer report prepared by Ir Batanage Louis on 31/10/2008 from Mugenga Joseph's request, the affidavits of Habimana Pierre, Busogi Emmanuel and Hakizabera Louis made on 15/10/2014 before the executive secretary of Rukiri I cell named Mukasano Gaudence, and the judgment RC 36. 294/01 rendered by the first instance Court of Nyarugenge on 12/02/2003, in its paragraph 7, page 5. In the following paragraphs, the Court will analyse the value of each of the aforementioned evidence.

### **i. The property valuer report prepared by Ir Batanage Louis.**

[22] As regards to the property valuer report prepared by Ir Batanage Louis on 31/10/2008, the Court finds that it cannot be referred to regarding this case because it was prepared on Mugenga Joseph's unilateral request without the participation of other parties of the case. Though the property valuer report made by the ministry of infrastructure on 07/03/1997, was requested by Mugenga Joseph, nothing prevents the property valuer report appointed by the Court after the agreement of the parties, to refer to it, so that he can indicate the value added to the house since 1997, up to 2008 when Mugenga Joseph left it, because it was conducted before the lawsuits began and it was made by a government institution.

[23] The property valuer Havugimana Justin appointed by the Court, in his report to the Court on 25/04/2019, indicated that the value added on the house is worthy 10,577,136 Frw, boys' quarter built on the plot is worthy 6.328.659 Frw, and the works for the fence worthy 7,633,672 Frw composed of burnt bricks, the gate, parking, water pipeline, and water tank.

[24] The Court finds without merit the statement of the counsels for Nishimwe Claudine and Mashami Gisèle that the report of the property valuer cannot be based on, unless he indicates the samples of the prices he based on in the year 2008 because the property valuer explained that he referred to the prices on the market in that year which is satisfactory. The Court finds no grounds to reject that report mostly because those who reject it do not deny that it was made by a

professional who has expertise in that specific field, they don't even indicate other prices based on by other professionals which contradict the prices referred to by the property valuer appointed by the Court.

**ii. The document was signed before the Executive Secretary.**

[25] The document which was signed before the Executive Secretary of Rukiri, Cell I, Mukasano Gaudence on 15/10/2014, contains the statements of witnesses Habimana Pierre, Busogi Emmanuel, and Hakizabera Louis, they state that Mugenga Joseph was their neighbour in Ukwezi village who bought a plot which had unfinished house and carried out various renovations on the house. They state that some of those works were to renovate the house by using more durable materials, building a boys' quarter and fenced it with burnt bricks which replaced the wooden stick fence. The Court finds that these statements cannot be ignored because they were made before the authority who testified that they have been living in Rukiri cell I where the house under litigation is located. These statements confirm the findings of the property valuer appointed by the Court, basing on the statements of each party.

**iii. The Judgment RC 36. 294/01 rendered by the First Instance Court of Kigali.**

[26] With regards to the Judgment RC 36. 294/01 rendered by the First Instance Court of Kigali on 12/02/2003, the Court finds that paragraph 7, on page 5 of that judgment is not a piece of evidence to prove that there is an added value to the house, because the judge only stated that he has nothing to decide upon that, because it was not part of the claim submitted to the Court.

[27] Basing on the findings of the property valuer appointed by the Court, and on the statements of the witnesses, the Court finds that Mugenga Joseph added value to the house and the plot he handed back to Rwamanywa Jérémie's heirs namely Nishimwe Claudine and Mashami Gisèle. The following issues, the Court examines whether Mugenga Joseph should be reimbursed the value he added to the property under litigation and the person liable for that.

**B. Whether Mugenga Joseph should be reimbursed the value he added to the property and the person liable.**

[28] Counsel Rwabukamba Moussa who represents Nishimwe Claudine and Counsel Nsengiyumva Abel who represents Mashami Gisèle state that if Mugenga Joseph is to be reimbursed for something, their clients are not to be held liable, for the following reasons:

- Basing on the judgment RC 24.199/95/S1 rendered by the first instance Court of Kigali on 06/01/1996, on page two, the person liable for the value added to the property handed to Nishimwe Claudine and Mashami Gisèle is Kabagema Ferdinand, because in that judgment it was decided that he sold someone else's property;
- The High Court indicated that Mugenga Joseph bought deceptively, then it contradicted itself and interpreted erroneously article 311 and 312 of civil code book three because if it based on those provisions, the added value would be paid by Kabagema. Mugenga bought the house well knowingly that the house does not belong to Kabagema, the latter knew exactly that he is not the owner because it was registered on Rwamanywa Jérémie;

- Mugenga Joseph for not having an agreement with Rwamanywa Jérémie's heirs he has nothing to claim to them; if there is something he may claim; it shall not be awarded because he lived in that house without paying the rent since 1994 to 2008 when he was forced to leave it.
- Is without merit the claim of Mugenga Joseph that Nishimwe Claudine and Mashami Gisèle if they don't refund him the value he added to the property he handed to them, this would be unjustified enrichment, and if this would be the case, it will concern Kabagema Ferdinand who sold someone else's property.

[29] On those grounds, Mugenga Joseph argues that:

- Regarding the argument that Rwamanywa's heirs are liable to pay was well explained in previous judgments, the provisions of the Law based on, protect the buyer who bought legally, instead of awarding Rwamanywa's heirs a room for unjustified enrichment;
- The judge of the High Court motivated that for Mugenga to buy deceptively though he does not agree with him; does not imply for him to lose the value of the works he did. The judge who decided so did not contradict himself as the plaintiffs pretend, rather he indicated that the persons who benefited from his works must pay back its value.
- He bought in good faith as, the cadastral plan "fiche cadastrale" was registered on Rwamanywa Jérémie, then was made a transfer to Kabagema Ferdinand. He agrees that he was not conversant as regards the provisions of the Law regarding the Guardian, because Kabagema stated that he is the guardianship of the children.

[30] Mugenga Joseph added that the previous Courts, awarded him less money compared to the works he did to the house under litigation, that basing on the case RCAA 0018/13/CS rendered by the Supreme Court on 24/02/2012, parties being Harerimana Emmanuel versus Sebukayire, he finds that, he must be reimbursed the value of the works he did on the property under litigation as provided by the Law. He states that that the precedent referred to by Nishimwe Claudine and Mashami Gisèle has no link with the actual subject matter because he is claiming the money he spent on the house owned by Nishimwe and Mashami, not the money he paid to Kabagema.

[31] Counsel Nzabahimana Augustin Néto who assists Mugenga Joseph states that the heirs of Rwamanywa have to reimburse Mugenga Joseph the difference of 64 million exceeding the real value of the house he bought so that they don't get unjustified enrichment, also that being the ones who were given the property under litigation, they should be the ones to reimburse that difference as well.

## **DETERMINATION OF THE COURT.**

### **i. The works added to property other than the new buildings**

[32] There is no legal provision explaining what to do when someone buys an immovable property with someone else who is not the owner, then the real owner comes up and claims back his/her property, whereas the buyer did some works on it and wants compensation. Article 9 of



Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure provides that “A judge adjudicates a case on the basis of relevant rules of law. In the absence of such rules, the judge adjudicates according to the rules that he/she would establish if he/she had to act as legislator, relying on precedents, customs, general principles of law and doctrine”.

[33] There is a general principle of law that states that the seller provides to the buyer a guarantee in case of eviction.<sup>1</sup> Reference made to that principle, the seller must pay or must request for the buyer to get paid by the person who evicts him/her about the property he/she bought (this may be the real owner), regarding any works he/she completed by adding value to the immovable property. This means that in case the buyer loses the ownership of the house he/she bought, he/she would not lose the necessary works he/she did while repairing it or adding to it some value. In that case, the seller must reimburse him/her or should ask the person who evicts him/her to reimburse him/her. When the seller sold the property deceptively, he/she must pay personally for the beautification works or unnecessary expenses, he cannot rather ask the real owner who evicted the buyer to pay for that.

[34] The statement above must be considered together with the principle of unjust enrichment motivated by the High Court as well. In case the seller won't benefit from the value added to the property that way, though he/she may reimburse according to the guarantee he/she provided to the buyer that none will evict him/her from his/her property, he may get paid back by the real owner by application of the unjust enrichment principle; meaning that the debtor is the person who will benefit and use them. However, When the seller sold the property deceptively, he/she must pay personally for the beautification works or unnecessary expenses, as aforementioned.

[35] The motivations in the paragraphs above are corroborated by explanations given by Law scholars who link it with what they qualify as “la théorie des impenses” meaning the works made by a person who is not the owner of the immovable property and has to handle it to the real owner<sup>2</sup>

[36] The Law scholar named Christian LARROUMET explains that the Courts used “la théorie des impenses” which originates from Romans basing on the principle of unjust enrichment, to solve the issue between the real owner of the property and the person who added value to it.<sup>3</sup> He explains in that theory that there should not be distinction between good or bad faith<sup>4</sup> as far as the works added to the property are concerned. Another Law scholar Patrice JOURDAIN explains also that, for the claimant requesting to get back his/her immovable property, he/she must reimburse, the person who gives back the property, the value he/she added on it known as “impenses”. He states that the Courts motivated the grounds of the reimbursement, which have

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<sup>1</sup> Obligation pour le vendeur de défendre l'acquéreur contre le trouble apporté par autrui à sa possession et de l'indemniser au cas où la propriété de la chose vendue serait reconnue appartenir à un tiers ou grevée de droits réels”; Gérard CORNU, Vocabulaire juridique, 6ème éd., Paris, Presses Universitaires de France, 1996, p.388.

<sup>2</sup> Dépenses faites sur un immeuble par une personne qui est tenue de le restituer”; ibidem, p.418

<sup>3</sup> Se fondant sur la notion d'enrichissement sans cause....., la jurisprudence a appliqué la théorie romaine des impenses..... Cette théorie, intervenant dans les rapports du propriétaire et de celui qui a effectué des réparations ou améliorations...; CHRISTIAN LARROUMET, Droit Civil, Les Biens, Droits réels Principaux, 5ème Ed., T.II, Paris, ECONOMICA ,2006, p. 311-312.

<sup>4</sup> Dans la théorie des impenses aucune distinction n'est faite entre celui qui, de bonne foi, c'est à dire dans la croyance d'en être le propriétaire, effectue des travaux sur un bien et celui qui effectue les mêmes travaux alors qu'il est de mauvaise foi”; ibidem, p.312

no link to whether the person with the property acquired it in good or bad faith rather the nature of the works done.<sup>5</sup> This is furthermore collaborated by other Law scholars like François TERRE and Philippe SIMLER.<sup>6</sup>

[37] These Law scholars make three categories of works made to the immovable property and the person who has to handle back it to the real owner (nature des impenses):

- Necessary works (les impenses nécessaires), this means the necessary works to be done to maintain the property and if it was not done would result in damages or deterioration of the property<sup>7</sup>;
- The useful works (les impenses utiles), means the works which are not necessary but add value to the property. Their author must be reimbursed for the works he/she added to the property valued at the moment it was ordered to get back his/her property.<sup>8</sup>;
- The beautification works, this means the works which are not necessary, they are just done for the beauty. Their author shall not claim reimbursement for their value but has the right to remove them in case nothing can be damaged.<sup>9</sup>

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<sup>5</sup> «Le revendiquant doit indemniser le défendeur évincé des dépenses de celui-ci qui ont été incorporées à l'immeuble et qui portent le nom d'impenses. La jurisprudence a défini les conditions de cette indemnisation, qui ne dépendent pas de la bonne ou de mauvaise foi du possesseur évincé mais qui varient suivant la nature des impenses »; Patrice JOURDAIN, Droit Civil, Les biens, Paris, Dalloz, 1995, p.282

<sup>6</sup> «La jurisprudence, s'inspirant de la tradition romaine.....a retenu le principe d'une indemnisation du possesseur évincé, en fonction, non plus, cette foi, de sa bonne ou mauvaise foi, mais de la nature des travaux entrepris ou des frais exposés, appelés impenses»; François TERRE et Philippe SIMLER, Droit Civil, les biens, 9ème éd, Paris, Dalloz, 2014, p.412.

<sup>7</sup> « Les impenses nécessaires sont celles qu'imposait la conservation de la chose: à leur défaut, l'immeuble eût péri ou eût certainement perdu en valeur (...). Le possesseur, même de mauvaise foi, a droit au remboursement intégral des impenses de cette nature »; *ibidem.*, p. 412

« Les impenses nécessaires correspondent aux travaux qui devaient être faits pour assurer la conservation de la chose (...). En ce cas, le propriétaire doit rembourser le coût des travaux »; Christian LARROUMET, *op.cit.*, p. 372. « Les impenses nécessaires, à défaut desquelles la conservation de l'immeuble aurait été compromise (comme les réparation d'une charpente menaçant ruine), donnent lieu au remboursement intégral »; Patrice JOURDAIN, *op.cit.*, p. 282.

<sup>8</sup> « Les impenses utiles sont celles qui, sans être indispensables, ont procuré une plus-value à l'immeuble (par exemple, extension de la surface utile ou surélévation, installation du chauffage central, de l'eau courante, d'un ascenseur, travaux de drainage du sol). La restitution en est due au possesseur, même de mauvaise foi, mais seulement jusqu'à concurrence de la plus-value appréciée au jour où la revendication est admise »; François TERRE et Philippe SIMLER, *op. cit.*, p. 413.

«Les impenses utiles correspondent à des travaux qui n'étaient pas indispensables, mais qui ont eu pour effet d'augmenter la valeur de la chose (...). L'immeuble profite de l'amélioration et il serait injuste que celui qui y a procédé ne soit pas indemnisé. C'est une application de l'idée d'enrichissement sans cause »; Christian LARROUMET, *op.cit.*, p. 373.

« Les impenses utiles, qui n'étaient pas indispensables à la conservation de l'immeuble, mais qui ont augmenté sa valeur (...), donnent lieu aussi à indemnisation, mais celle-ci est calculée sur la base de la plus-value donnée à l'immeuble, telle qu'elle apparait au jour de la restitution »; Patrice JOURDAIN, *op.cit.*, p. 282.

<sup>9</sup> « Les impenses voluptuaires ou somptuaires sont des dépenses de pur luxe ou agrément, effectuées en vue de satisfaire les goûts personnels de celui qui les a engagées.....Le possesseur ne peut jamais demander l'indemnité pour de telles impenses, mais il a la faculté d'enlever les objets apposés sur le fonds, s'il est possible de le faire sans dégradation »; François TERRE et Philippe SIMLER, *op.cit.*, p. 413. « Les impenses voluptuaires ou somptuaires sont des améliorations de pur agrément pour celui qui les a effectuées. Elles n'apportent aucune plus-value appréciable à l'immeuble. Aucune indemnisation n'est due et le propriétaire peut même exiger la disparition des travaux »; Christian LARROUMET, *op.cit.*, p. 373.

[38] These explanations of Law scholars, considered together with the content of paragraphs 33 and 34 of this judgment, suggests:

- In case someone buys a property with someone else who is not the owner, and ordered afterward to handle it to the real owner whereas he/she added value to it, which is not a new building, he/she must be reimbursed for the added value in accordance with their nature;
- Is reimbursed by the real owner who got back his/her property to avoid the unjust enrichment;
- No matter whether he/she got the property in good or bad faith;
- For necessary works, he/ she is reimbursed for their real value (remboursement intégral);
- For useful works, he/ she is reimbursed considering the moment it was ordered to get back his/her property;
- The beautification works, are not reimbursed for their value by the real owner but have the right to claim their value from the bad faith seller.

[39] Basing on the content of paragraphs 24 and 26 of this judgment, the Court finds that Mugenga Joseph added value to the house he handed to Rwamanywa Jérémie's heirs which value is composed of:

- To build m<sup>2</sup> 0.69 of adobes bricks put on "claustra" and "mosquito net", the stones around the house and beams (389,950Frw);
- Build up new roofing (1.115475 Frw):
  - changing from simple galvanized sheets to more modern sheets,
  - He added metal roofing, gutter in plastic, fascia board, downpipe,
- The pavement of the sidewalk, tiling of the house, baseboard and plastering the house." (1,056,583Frw);
- the ceiling of the house (1.217.487 Frw);
- painting (2.693.612 Frw);
- Inserting doors and painting them (591.030 Frw);
- electrify the house (588.000 Frw);
- installing sanitary and plumbing (2,925,000 Frw);

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« Les impenses voluptuaires qui ont un caractère de luxe ou de pur agrément et satisfont surtout le gout personnel de celui qui les a engagées, ne donnent pas lieu à indemnité. Le possesseur évincé pourrait d'ailleurs enlever les ornements qu'il aurait ajoutés au fonds, à charge de ne pas détériorer celui-ci » ; Patrice JOURDAIN, op.cit., p. 282

- Setting the courtyard of the house by building the fired bricks fence, gate, parking, channeling water and water tank which added value to the house (7.633.672 Frw);
- All additional works have a value of 10.577.136 Frw + 7.633.672 Frw = 18.210.808 Frw, that value is of the year 2008, the year in which MUGENGA Joseph handled the house.

[40] Referring to the nature of works completed, the Court finds that all works done are essential, (*impenses utiles*), because they added value to the house. As regards the roofing of the house in particular, the previous Courts stated that the works done cannot be considered as essential whereas the house had a wood roof before and simple sheets, this Court finds that in case the roofing wood was changed to metal roofing, simple sheets changed to more modern and durable sheets, this can't be considered as beautification (*impenses voluptuaires*) because the house became stronger and more valuable.

[41] This Court finds that basing on the law provisions and the explanations given by the Law scholars indicated in the above paragraphs, Mugenga Joseph must be reimbursed for the added value to the house which is necessary (excluding new building which will be examined in the following paragraphs), he will be reimbursed by Rwamanywa Jérémie's heirs to whom the house was handled back namely Nishimwe Claudine and Mashami Gisèle. The Court finds thus that, Nishimwe Claudine and Mashami Gisèle must refund Mugenga Joseph 18,210,808Frw.

#### **ii. New building built in the compound**

[42] Article 35 of the organic Law N° 03/2013/OL of 16/06/2013 repealing the Organic Law N° 08/2005 of 14/07/2005 determining the use and management of land in Rwanda, paragraph, provides that "When buildings or crops have been developed by a person on the land that is not his/hers through procedures that are contrary to laws or agreement with the landowner, the later has the right to request the person who performed them to remove such development without prejudice to the landowner to claim indemnities for any damages suffered".

[43] The provision of this article concerns buildings and plants cultivated on someone's land, which is different from the value added to the existing property to maintain it or to add value to it. This is what is explained by the Law scholars Patrice JOURDAIN who states that new buildings and plants can not be considered as works done/added to immovable property (*les impenses*)<sup>10</sup> this is also explained by other Law scholars like François TERRE and Philippe SIMLER<sup>11</sup>, by interpreting article 555 of French Law on civil code which content it the same as for article 35 of the Law determining the use and management of land in Rwanda aforementioned.

[44] As regards new buildings or plants, illegally put on someone else's land, the idea of the legislature in article 35 of Organic Law above cited, is the rights invested in the owner of the land to request their author to remove them. Basing on the provisions of this article, it is obvious that if

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<sup>10</sup> les constructions neuves et les plantations ne sont pas considérées comme des impenses....", Patrice JOURDAIN, op. cit., p.282

<sup>11</sup> "Les mots « plantations, constructions et ouvrages » doivent être entendus de manière assez large. Il résulte cependant de la jurisprudence qu'il doit s'agir d'ouvrages nouveaux. Elle écarte donc l'application du texte s'il n'y a eu que de simples travaux de réparation et d'amélioration, voire de transformation de constructions existantes, serait-ce sous la forme d'une surélévation »; François TERRE et Philippe SIMLER, op.cit, p.229

someone puts new buildings on the land he/she bought from someone else who is not the owner, whereas he/she knows that the seller is not the real owner, he/she has built illegally because selling someone else's property is to depriving him/her the right of ownership, whereas it is prohibited by article 34 of the Constitution of Republic of Rwanda which provides that Everyone has the right to private property, and the Private property is inviolable.<sup>12</sup> This paragraph is different from the situation where the buyer did not notice whether the seller is not the owner of the land, and buys in good faith.

[45] In this case, Mugenga Joseph bought from Kabagema Ferdinand a house located in a plot registered on Rwamanywa Jérémie. Mugenga Joseph admitted before the Court that the cadastral plan « fiche cadastrale » was registered on Rwamanywa Jérémie. Meaning that he bought with Kabagema Ferdinand knowing that he is not the owner of the house and the plot where is located. The statement of Mugenga Joseph that Kabagema Ferdinand was the Guardian « tuteur de droit » of Rwamanywa Jérémie's children, this does not affect the fact that he knowingly bought with the seller who is not the owner of the property, because the guardian of the children has no rights to sell their property without the authorization of the guardian's counsel, rather he/she has to look after and manage it as provided by articles 389<sup>13</sup> and 388<sup>14</sup> of Law N° 42/1988 instituting preliminary title of book one of civil code which was in use at the time of sale agreement.

[46] Basing on the result of the property valuer's report appointed by the Court, Mugenga Joseph put a new building named boys' quarters « annexe » in the plot where the house he bought was located. The Court finds that the house was built on land illegally, because, it was built on the land which Mugenga Joseph bought knowingly that the seller is not the owner as motivated above.

[47] The Court finds then, basing on the provisions of article 35 of the Organic Law N° 03/2013/OL of 16/06/2013 above stated, the landowner meaning Rwamanywa Jérémie's heirs namely Nishimwe Claudine and Mashami Gisèle, have the right to ask Mugenga Joseph to remove new house named « annexe » he built on the land they received back. However, if they find it not appropriate to opt that way, and choose to keep that house, they have to agree with Mugenga Joseph on the value they shall refund him. This holding is based on the equity" principle, this was also upheld in other judgments rendered by the Supreme Court.

- Case N° RS/REV/INJUST/CIV 0012/15/CS rendered on 18/01/2019, opposing Kayitsinga Alexis, Kanyamibwa Immaculée v. Nsangineza Célestin (paragraphs 52 and 66);
- Case N° RS/INJUST/RC 0006/2018/SC rendered on 18/01/2019, opposing Nibasenge Anathalie v. Nahayo François Xavier (paragraphs 33 and 43).

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. "Everyone has the right to private property, whether individually or collectively owned.

Private property, whether owned individually or collectively, is inviolable.

The property right shall not be encroached upon except in public interest and in accordance with the provisions of the law". Article 34 of the Constitution of Republic of Rwanda of 2003 revised in 2015

<sup>13</sup> «Any act of donation, sale or any disposal act of the child's property by the guardian is prohibited unless is authorized by the council for the guardian»

<sup>14</sup>. « the Guardian complete him/herself all acts of management and protection of the property aiming at child's sake and he/she manage it to produce interests if possible».

[48] Basing on motivations provided regarding know whether Mugenga Joseph has to be reimbursed for what he/she added on the property and the person liable, the Court finds that Nishimwe Claudine and Mashami Gisèle have to refund him for necessary works, worthy 18,210,808 Frw whereas with regarding new house named "annexe" built in the compound, the Court finds that if Nishimwe Claudine and Mashami Gisèle choose to keep it, they shall make an arrangement with Mugenga Joseph on the value they shall refund him, otherwise he should remove it.

### **C. Examination of Damages Requested**

#### **i. Damages requested by Nishimwe Claudine and Mashami Gisèle**

- **The rent since the time Mugenga Joseph lived illegally in the house up to the time he left it.**

[49] Counsel Nsengiyumva Abel who assists Nishimwe Claudine and Counsel Abasa Fazil who assists Mashami Gisèle state that Mugenga Joseph, must pay damages worthy 97,250,000 Frw because they did not claim to him the rent for the time he spent in the house under litigation, this concern the period since 1994 up to 2008, accounting for 450,000 Frw per month for 14 years for which he kept the house.

[50] Mugenga Joseph states that these damages they are requesting have no merit, as he lived in that house because he had bought it, and was registered on him till in 2008 when he executed the Court decision, he was thus living in his property and was not renting it. He states that he can not be asked to pay damages for living in the property he believed himself as the owner till he was removed from it, also that, he does not understand where his opponents get the rent of 450,000 Frw from because Nishimwe Claudine and Mashami Gisèle did not provide the rental contract unless just making a statement.

## **DETERMINATION OF THE COURT.**

[51] Basing on the testimony of Habimana Pierre, Busogi Emmanuel, and Hakizabera Louis, Mugenga Joseph bought the unfinished house under litigation, which is corroborated by the content of the property valuer report made by the ministry of infrastructure on 07/03/1997. The Court finds that Nishimwe Claudine and Mashami Gisèle can not indicate how an unfinished house value is 3,169,145 Frw, could rent 450,000 Frw per month as they plead, and could lose such money during the time they did not have it. The court finds that Nishimwe Claudine and Mashami Gisèle could not indicate how they calculate their loss incurred due to not managing their house. The Court finds then that 97,250,000 Frw they are requesting can not be awarded. However, due to the time they spent without enjoying their house (perte de jouissance), whereas MUGENGA Joseph bought it illegally, the Court finds that they may be awarded in its discretion damages worthy 2,000,000 Frw.

- **Moral damages, procedural and Counsel fee.**

[52] Nishimwe Claudine and Mashami Gisèle ask Mugenga Joseph to pay for moral damages equal to 10,000,000 Frw because he admits also that, he bought with the no owner, he has to refund them 3,000,000 Frw of Counsel fee and 200.000 Frw of the procedural fee.

## **DETERMINATION OF THE COURT.**

[53] The Court finds in judgment RC 36.294/01 rendered by the first instance Court of Kigali on 12/02/2003, Rwamanywa Jérémie's heirs were accusing Mugenga Joseph requesting for getting back their house under litigation, the representative of the heirs requested moral damages for being homeless whereas they had one, the Court awarded them 300,000 Frw. The Court finds then that, in case moral damages were awarded in the case aforementioned which acquired res judicata, can not be an issue in this case.

[54] As regarding the procedural and Counsel fee, requested by Nishimwe Claudine and Mashami Gisèle the Court finds that they cannot be awarded as they lose the case in part.

### **ii. The damages requested by Mugenga Joseph in the cross appeal**

[55] Mugenga Joseph requests from Nishimwe Claudine and Mashami Gisèle to pay for moral damages for unnecessary Lawsuits equal to 2,000,000Frw, counsel fee of 1,500,000Frw and 200,000Frw for the procedural fee.

## **DETERMINATION OF THE COURT**

[56] The Court finds that the moral damages requested by Mugenga Joseph for unnecessary Lawsuits cannot be awarded because procedural fees are awarded purposely for unnecessary Lawsuits also apart from that, his opponents have won for some issues.

[57] The Court finds that the procedural and Counsel fee requested by Mugenga Joseph cannot be awarded because he has lost for some issues in the case.

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

[58] Decides that the appeal claim of Nishimwe Claudine and Mashami Gisèle has no merit;

[59] Decides that the appealed judgment N° RCA 0517/15/HC/KIG-RCA 0538/15/HC/KIG rendered by the High Court on 22/04/2016, is reversed in part;

[60] Decides that Mugenga Joseph added value to the house and to the plot he handed back to Rwamanywa Jérémie's heirs namely Nishimwe Claudine and Mashami Gisèle;

[61] Orders Nishimwe Claudine and Mashami Gisèle to reimburse Mugenga Joseph 18,210,808Frw of the added value;

[62] Orders Nishimwe Claudine and Mashami Gisèle to pay Mugenga Joseph the money they will agree on, regarding the house built in the plot named « annexe », in case they choose to keep it, otherwise, Mugenga Joseph will remove it;

[63] Orders Mugenga Joseph to pay Nishimwe Claudine and Mashami Gisèle 2,000.000Frw for the time elapsed without enjoying their house;

[64] Declares that the court fee deposited covers the work done in this case.