Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389

Application, 009/2017, *Fidele Mulindahabi v Republic of Rwanda*

Judgment, 4 July 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: MUKAMULISA

The Applicant alleged that his vehicle was unlawfully confiscated and auctioned by the Respondent State. He claimed that the Respondent State violated his right to property, violated its obligation to provide redress, failed to adopt legislative and other measures to give effect to international instruments that it is party to, and violated his right to work. The Court dismissed the Application on the basis that the Applicant, by his own admission, failed to exhaust local remedies.

Procedure (default judgment, 15)

Admissibility (lack of evidence, 31; exhaustion of local remedies, 32, 33)

Dissenting opinion: BENSAOULA

Procedure (default judgment, 5, 14)

I. The Parties

1. Fidèle Mulindahabi (hereinafter referred to as “the Applicant”) is a national of the Republic of Rwanda, residing in Kigali, who complains that he has been a victim of violations as regards his urban transport business.

2. The Respondent State is the Republic of Rwanda which acceded to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 25 May 2004. Furthermore, on 22 January 2013, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 29 February 2016, it notified the African Union Commission of its decision to withdraw the aforesaid Declaration, and on 3 March 2016, the African Union Commission notified the Court in this regard. On 3 June 2016, the Court issued an Order stating that the withdrawal of the Declaration would take

effect on 1 March 2017.[1]

II. Subject of the Application

A. Facts of the matter

3. The Applicant alleges that on 21 March 2009, a police officer seized his vehicle on the grounds that it had no motor vehicle licence and a spare tyre. He was fined twenty thousand Rwandan francs (FRw 20,000) and "as security for this payment the police seized the yellow card.[2]" The Applicant avers that on 23 March 2009, he paid the fine of Twenty Thousand Rwandan Francs (FRw 20,000) but the yellow card was not given back to him.

4. He further alleges that "in complicity, his driver … declared that he had lost the police charge sheet and the receipt, while the police declared verbally to him that they had lost his yellow card." Thereafter, the Applicant went to the tax office to obtain the duplicate of the yellow card but his efforts were all in vain. He argues that "later, through a conveyor [he] was able to recover the original of the charge sheet ... and that of the receipt".

5. The Applicant alleges that "pursuant to the provisions of Article 40 of Rwandan Law No. 34/1987 of 17/9/1987 on the road transport and traffic police, the payment of the fine puts an end to the government action. Consequently, the fine of twenty thousand Rwandan Francs (FRw 20.000) paid on 23/03/2009 erased the offence and [he] should have been re-established in [his] rights…". He states that "…However, this was not the case, the vehicle was not returned to him, but was rather parked for lack of a yellow card at a place where the soldiers of the Presidential Guard impounded the vehicle and confiscated it from the police."

6. The Applicant alleges that he spoke to the President of the Republic who was visiting the population on 8 June 2010, and that in spite of this initiative, the said vehicle was auctioned on 6 April 2011.

B. Alleged violations

1 See Application 003/2014. Order of 3 June 2016 (Jurisdiction), *Ingabire Victoire Umuhoza v Rwanda*; on the withdrawal by the Respondent State of the declaration it made under Article 34(6) of the Protocol.

2 "Yellow Card" means "Vehicle Registration Card".

7. The Applicant avers that the Respondent State:

i. violated his right to property provided under Articles 17(2) of the Universal Declaration of Human Rights (UDHR) and 14 of the Charter;

ii. failed in its obligation to provide the requisite remedies pursuant to Article 2(3)(c) of the International Covenant on Civil and Political Rights;

iii. failed in its obligation to adopt legislative and other measures to give effect to the international instruments ratified, as provided under Article 1 of the Charter;

iv. violated his right to work provided under Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

III. Summary of the procedure before the Court

8. The Application was filed on 27 February 2017 and served on the Respondent State on 16 March 2017 with the request that it file its Response to the Application within sixty (60) days of receipt of the notice.

9. On 11 May 2017, the Registry received a letter from the Respondent State reminding the Court of its withdrawal of the Declaration made under Article 34(6) of the Protocol and informing the Court that it would not take part in any proceedings before the Court. It consequently requested the Court to desist from transmitting any information on cases concerning it until it finalises the review of the declaration and communicates its position to the Court.

10. On 22 June 2017, the Court sent a reply to the Respondent State, noting that “by virtue of the Court being a judicial institution and pursuant to the Protocol and Rules of Court, the Court is required to exchange all procedural documents with the parties concerned.”

11. On 30 June 2017, the Application was transmitted to the Chairperson of the African Union Commission and, through him, to the Executive Council of the African Union and to the State Parties to the Protocol, in accordance with Rule 35(3) of the Rules.

12. On 5 October 2017, the Court *proprio motu* granted forty-five (45) days extension to the Respondent State to file its Response, indicating that it would proceed to issue a judgment in default should the Response not be filed.

13. Pursuant to Rule 63 of the Rules, the Court at its 49th Ordinary Session (16 April to 11 May 2018) decided that the merits of a case would be considered together with reparations. On 6 August 2018, the Applicant filed its submission on reparations and this was served on the Respondent State on 9 August 2018. The latter

was invited to respond within thirty (30) days.

14. On 9 October 2018, the Court *proprio motu* granted thirty (30) days extension to the Respondent State to file its Response, indicating that that extension of time would be the final, and that it would proceed to render a judgment in default should the Response not be filed. The notification was sent by courier service to the Respondent State, which received the same on 11 October 2018.

15. Although the Respondent State received all the notifications, it did not respond to any of them. Consequently, in accordance with Rule 55 and in the interest of justice, the Court renders this judgment in default.[3]

IV. Prayers of the Parties

16. The Applicant prays the Court to take the following measures:

i. order the State of Rwanda to pay him damages;
ii. order the restitution of his vehicle or pay an equivalent amount in lieu;
iii. recognisee that Rwanda has violated the relevant legal human rights instruments which it ratified.

17. The Applicant also prays the Court to grant the following in terms of reparation:

i. Return the minibus taxi, Toyota Hiace RAA 417H in its prior state or pay compensation in the amount of 40,349,100 FRw;
ii. Pay daily compensation in the amount of 111,540 FRw from 23 March 2009 up to the date the vehicle is returned;
iii. The amount of 23,043,236,533 FRw being revenue on reinvestment;
iv. Payment of 7.4% interest on income not received;
v. The sum of 40,000,000 FRw as damages for the suffering endured;
vi. The sum of 5,000,000 FRw for procedural costs in domestic courts and 3,000,000 FRw before this Court;
vii. Lawyers' fees before this Court.

18. The Respondent State having refused to participate in the proceedings did not make any prayers.

V. Jurisdiction

19. In terms of Article 3(1) of the Protocol the "jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning

3 Application 003/2014. Judgment of 7 December 2018 (Reparation), *Ingabire Victoire Umuhoza v Rwanda*, paras 14, 15 and 17.

the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.” Furthermore, according to Rule 39(1) of the Rules “the Court shall conduct preliminary examination of its jurisdiction …”

20. Having conducted a preliminary examination of its jurisdiction, and noting that nothing on file indicates that it does not have jurisdiction, the Court therefore holds that:

i. it has personal jurisdiction, given that the Respondent State is a party to the Protocol and has deposited the Declaration under Article 34(6) thereof, which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol. On the other hand, the Application was filed within the one-year period set by the Court for the withdrawal of the Declaration by the Respondent State to take effect;

ii. it has material jurisdiction as it alleges the violation of Articles 1 and 14 of the Charter; Article 2(3)(c) of the International Covenant on Civil and Political Rights (ICCPR); Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESC); Article 17(2) of the Universal Declaration of Human Rights (UDHR), all instruments ratified by the Respondent State, of which the Court is endowed with the power to interpret and apply, as *per* Article 3 of the Protocol;

iii. it has temporal jurisdiction given that the alleged violations are continuous in nature since the Applicant’s car remains confiscated;[4]

iv.

v. it has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

21. In view of the aforesaid, the Court finds that it has jurisdiction to consider the instant application.

VI. Admissibility

22. Pursuant to Article 6(2) of the Protocol: “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”. In accordance with 39(1) of the Rules: “the Court shall conduct preliminary examination of … the admissibility of the application in accordance with articles 50 and

4 See Application 013/2011. Ruling of 21 June 2013 (Preliminary objections), *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablassé, Ernest Zongo, Blaise Ilboudo & The Burkinabè Movement on Human and Peoples’ Rights v Burkina Faso,* paras 71 to 77.

56 of the Charter and Rule 40 of these Rules."

23. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:

"1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

24. The Court notes that the requirements set forth in Rule 40 are not in contention between the parties because the Respondent State did not take part in the proceedings. However, pursuant to Rule 39(1) of the Rules, the Court shall examine the conditions for admissibility of the Application.

25. The Court notes that the Applicant alleges that all the conditions of admissibility set out in Sub-Rules (1 to 7) of Rule 40 of the Rules have been met.

26. It is clear from the case file that the Applicant's identity is known as well as his nationality. The Application is not incompatible with the Constitutive Act of the African Union and the Charter. It does not contain disparaging or insulting language, nor is it based exclusively on news disseminated through the mass media.

27. Regarding exhaustion of local remedies, the Applicant avers that he took steps to meet senior political and administrative authorities of the country, notably, the Police department, the Office of the Prosecutor, the Ministry of Infrastructure in charge of Transport, the Ministry of Internal Security in charge of the Police, the Ministry of Justice, the Ombudsman, the Prime Minister's Office, the Parliament, the Senate, the President of the Republic, the National Human Rights Commission, the Rwanda Transparency

and the civil society.

28. The Applicant further contends that:

> "seeking redress from courts was not envisaged because when presidential guards are involved in a matter, such a matter runs the risk of not being determined by the courts, and today the Application would have been inadmissible following the deadline after the remedy provided under Article 339 of Law No. 18/2004 of 26/6/2004 on the Civil, Commercial, Social and Administrative Procedure Code".

29. The Court notes that only ordinary judicial remedies must be exhausted[1] and this requirement may be dispensed with only if the said remedies are unavailable, ineffective, insufficient, or if the domestic procedures to pursue them are unduly prolonged.[2] In effect, the non-judicial remedies pursued by the Applicant are not considered material to the exhaustion of local remedies.

30. In the instant case, the Court notes that the Applicant has clearly acknowledged that he has not pursued local remedies alleging that, firstly, that such remedy would not yield any results because the soldiers of the Presidential Guard were involved and, secondly, that the deadline for filing an appeal had already lapsed as at the time the proceedings before the administrative and political authorities were concluded.

31. On the first allegation, the Court notes that, without any supporting evidence, the Applicant simply argues that the proceedings before the Respondent State's jurisdictions were futile because the soldiers of the Presidential Guard were involved. This Court has held that "general statements … are not enough. More substantiation is required."[3] The Court therefore dismisses this allegation.

32. On the second allegation, the Court notes that the Applicant has not submitted his appeal before the domestic courts within reasonable time because, as he claims, he was attempting to seek a resolution before the administrative and political bodies. However, nothing prevented the Applicant from pursuing non-judicial avenues at the same time as he pursued judicial

1 Application 007/2013. Judgment of 3 June 2016 (Merits), *Mohamed Abubakari v United Republic of Tanzania* (*hereinafter referred to as* "*Mohamed Abubakari v Tanzania* (Merits)"), para 64. See also Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania (hereinafter referred as to* "*Alex Thomas v Tanzania* (Merits)"), para 64; Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi & 9 others v United Republic of Tanzania*, para 95.

2 Application 004/2013. Judgment of 05 December 2014 (Merits), *Lohé Issa Konaté v Burkina Faso*, para 77; See also Application 004/2013. Ruling of 24 March 2014. (Jurisdiction and Admissibility), *Peter Chacha v Tanzania*, para 40.

3 *Alex Thomas v Tanzania* (Merits), para 140.

remedies. He ought to have exercised the requisite remedies so as to exhaust the local remedies.

33. In light of the foregoing, the Court finds that the Applicant has not exhausted the remedies available in the Respondent State, and that none of the grounds adduced for failing to do so, falls within the exceptions provided under Rule 40(5) of the Rules.

34. Having found that domestic remedies have not been exhausted, and considering that the conditions for admissibility are cumulative, the Court will not proceed to examine the other conditions of admissibility set out in Rule 40 of the Rules.[1]

35. Based on the foregoing, the Court declares the application inadmissible.

VII. Costs

36. The Court notes that Rule 30 of its Rules provides that: “unless otherwise decided by the Court, each party shall bear its own cost.”

37. In view of the above circumstances, the Court rules that each party shall bear its own costs.

VIII. Operative

38. For these reasons,

The Court,

Unanimously:

i. *Declares* that it has jurisdiction;

ii. *Declares* that local remedies have not been exhausted;

iii. *Declares* that the Application is inadmissible;

iv. *Declares* that each Party shall bear its own costs.

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Dissenting opinion: BENSAOULA

1. I share the opinion of the majority of the Judges regarding the

1 Application 022/2015. Judgment of 11 May 2018 (Jurisdiction and Admissibility), *Rutabingwa Chrysanthe v United Republic of Tanzania*, para 48.

jurisdiction of the Court and the inadmissibility of the Application.

2. On the other hand, I think that the way the Court treated "the default" is at variance with:

- the provisions of Rule 55 of the Rules of Court;
- Article 28(6) of the Protocol;
- its jurisprudence and comparative law.

3. Indeed, Rule 55 of the Rules states in Paragraph 1 that:

"Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, render a judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertaining to the proceedings".

It is clear from the foregoing Paragraph 1 that a decision to render a Judgment in default must meet certain criteria:

- absence of one of the parties or;
- failure to defend its case;
- rendered on the application of the other party;
- service of the application on the defaulting party;
- service of the other documents pertaining to the proceedings.

4. The key element in this paragraph is that the default must be pronounced "on the application of the other party".

Therefore, making a decision in default can be a mere issue of form no doubt, but not of procedure that requires a substantive discussion regarding the elements of appreciation and a legal basis.

However, neither the case file nor the Applicant's application reveals that he prayed the Court to hand down a Judgment in default.

5. And that the Court not only inserted its decision to render the Judgment in default in the chapter on Proceedings before the Court, but also did not give any legal basis to this decision to render the Judgment in default without the application of the other party, contenting itself with declaring in paragraph 15 under the Summary of the Procedure before the Court that, "On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final 45 days extension and that, after that deadline, it would enter a ruling in default in accordance with Rule 55 of its Rules in the interest of justice..." and concluding in paragraph 17 on the same grounds that, "Consequently, the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules".

6. No reference to the basis of this "interest of justice" or how rendering a judgment in default was fundamental to the Court, especially since such judgments are not subject to opposition or appeal, and how such a decision taken on the basis of its

discretionary power could refer to Rule 55 of the Rules, which does not apply to discretion.

7. Moreover, reference to the *Ingabiré* Judgment is in no way a basis for the decision in default because in that Judgment, at no point in the body of the Judgment or in its operative part is there mention of a judgment in default, as no party had requested for it and the chapter 17 cited in this reference states as follows: "Consequently, in the interest of justice, the Court will examine the instant brief for reparation in the absence of any response from the Respondent State".

8. To render a judgment in the absence of the respondent is in no way the legal definition of default which, under the provisions of the aforementioned Rule 55, meets conditions which must be controlled by the Court.

9. It is clear and, as mentioned above, that the default judgment must meet certain conditions and that the Court is under the obligation to give reasons for any decision it makes, even more so when it is at variance with the clear provisions of a provision of the Rules.

By ruling in this way, the Court breached the provisions of Article 28(6) of the Protocol which obliges it to give reasons for its judgments.

10. In comparative law, there is a wealth of case law supporting this reasoning, such as the Judgment of 30 November 1987, *H v Belgium,* where the European Court of Human Rights recognised, for the first time, the right to give reasons in judicial decisions in these terms: "…this very lack of precision made it all the more necessary to give sufficient reasons for the two impugned decisions on the issue in question. Yet in the event the decisions merely noted that there were no such circumstances, without explaining why the circumstances relied on by the applicant were not to be regarded as exceptional" (para53) and in the Judgment of 16 December 1992, *Hadjianastassiou v Greece*, the Court noted that "the obligation to state reasons constitutes a minimum guarantee which is limited to the requirement of sufficient clarity of the grounds on which the judges base their decisions". [*Translation by Registry*]

11. It is therefore unquestionable that taking the decision to render a judgment in default requires a clear reasoning and may in no way suffice in one line of the chapter "Procedure before the Court", thus ignoring the conditions required by the aforementioned Rule 55.

12. It is clear from reading the aforementioned Rule that default is not part of the procedure and that it is still a matter of form to which the Court must respond in relation to its jurisdiction, the

admissibility and basis of the Applicant’s claims.

13. And that even if the Court chooses to use its discretionary power to hear the case *suo motu* and rule by default, it cannot do so by considering this point of law as one of the elements of the procedure and simply base its decision on the interest of justice without specifying and explaining how making a judgment in default is in the interest of justice.

14. In comparative law, many human rights courts treat the default decision as a formal decision that comes well after jurisdiction and admissibility. To quote just one rendered by the Court of Justice of the Economic Community of West Africa States on 16 February 2016, Judgment ECW/CCJ/JUGG/03/16, the Court, in Chapter III: Reasons for the decision: On the form, after dealing with the admissibility of the application and jurisdiction, addressed the issue of default against the Republic of Guinea and later, on the merits, handled the allegations of human rights violations. In its operative part, it stated that “the Court ruling publicly, by default against the Republic of Guinea, in the matter of human rights violations, in the first and last resort’” [*Translation by Registry*]

In adjudicating as it did, the Court delivered a judgment devoid of any legal basis and contrary to the provisions of the aforementioned Rules and Articles regarding default, especially as this provision of default does not appear in its operative part either.