

Kodeih v Benin (provisional measures) (2020) 4 AfCLR 18

Application 008/2020, *Ghaby Kodeih v Republic of Benin*

Order (provisional measures), 28 February 2020. Done in English and French, the French text being authoritative.

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

The Applicants, who had been convicted of non-compliance with building permit regulations, brought this action alleging that the domestic judgment, particularly the order to demolish their building, violated their Charter protected rights. The Applicants requested for provisional measures to stay implementation of the demolition order. The Court granted the order.

Jurisdiction (*prima facie*, 14)

Provisional measures (preventive nature, 31; demolition of building irreparable harm, 34)

I. The Parties

1. The Applicants, Mr. Ghaby Kodeih, a Benin national, born on 13 November 1977, businessman, residing in Cotonou, plot Q-9, les Cocotiers, Tel: +229 97 09 99 99; and Mr. Nabih Kodeih, a Benin national, residing in Cotonou, lot Q-9 les Cocotiers, P.O. Box 1342 Cotonou; (hereinafter “the Applicants”).
2. The Republic of Benin, (hereinafter “the Respondent”) became a party to the African Charter on Human and Peoples Rights (hereinafter “Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples Rights on the establishment of an African Court on Human and Peoples’ Rights, on 22 August 2014.
3. The Respondent State further deposited the declaration under Article 34 (6) of the Protocol on 8 February 2016 accepting the jurisdiction of the Court to receive Applications from individuals and non-governmental organizations.

II. Subject of the Application

A. Facts of the Matter

4. The Applicants affirm that, following judgement No. 044/3 rd CD of 27 September 2019, the First Class Court of First Instance, in Cotonou found them guilty of non-compliance with the building permit of their building, levied a fine of 500,000 CFA Francs and ordered the demolition of the building in question.
5. They contend that the above mentioned judgement violated their rights under the Charter;
6. They allege that the demolition ordered by this judgement will lead to irreparable harm for them because they will receive no compensation whereas they constructed this building with their own funds.

B. Alleged violations

7. From the foregoing, the Applicants allege human rights violations by the Respondent State, notably the right to fair trial and the right to property, protected under Articles 7 and 14 of the African Charter on Human and Peoples Rights.

III. Summary of the Procedure the Court

8. On 17 February 2020, the Applicants filed an application in the Registry of the Court on the merits and provisional measures.
9. On 20 February 2020, pursuant to Rule 34(1), the Registry acknowledged receipt of the above mentioned application and pursuant to Rule 36 of the Rules of Court, notified the Respondent State.
10. In the said correspondence, the Registry requested the Respondent State to kindly file its response to the request for provisional measures within eight (8) days and a response to the application on the merits within sixty (60) days.
11. The Respondent State is yet to respond to the request for provisional measures.

IV. Jurisdiction of the Court

12. In support of the admissibility of the application for provisional measures, the Applicants affirmed, on the basis of Article 27(2) of the Protocol and Rule 51 of the Rules, that in matters of

provisional measures, the Court does not need to convince itself that it has jurisdiction on the case but it simply has to ensure that it has *prima facie* jurisdiction.

13. Referring further to Article 3(1) of the Protocol, the Applicants contend that the Court has jurisdiction because, on the one hand, the Republic of Benin has ratified the African Charter, the Protocol and made the declaration under Article 34(6) and, on the other, they allege violations protected under the Charter.
14. When seized of an application, the Court carries out a preliminary examination of its jurisdiction, pursuant to Articles 3 and 5(3) of the Protocol and Rule 39 of the Rules of Court (hereinafter “the Rules”).
15. However, with regard to provisional measures, the Court recalls its constant jurisprudence which provides that it does not need to ensure that it has jurisdiction on the merits of the case but simply has to ensure that it has *prima facie*¹ jurisdiction.
16. Article 3(1) of the Protocol provides as follows “the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned”
17. Article 5(3) of the Protocol, provides as follows “the Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol’
18. The Court notes that the Respondent State has ratified the Charter and the Protocol. It has also made the declaration accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations pursuant to Articles 34(6) and 5(3) of the Protocol read jointly.
19. The Court further notes that the rights alleged by the Applicants to have been violated are all protected under the Charter.
20. In light of the foregoing, the Court finds that it has *prima facie* jurisdiction to hear the application.

1 See Application 004/2013 *Lohé Issa Konaté v Burkina Faso* (Order on provisional measures dated 4 October 2013) and Application 001/2015 *Armand Guéhi v Republic of Tanzania* (Order on interim measures dated 18 March 2016); Application 020/2019 *Komi Koutché v Republic of Benin* (Order on provisional measures dated 2 December 2019)

V. Provisional measures sought

21. The Applicants affirm that the Council in Cotonou issued them a building permit No.2015/N0.0094/MCOT/SG/DSEF/DAD/SAC on 6 July 2015 relatively, for a building to be constructed in Cotonou, in Djoméhountin quarter not far from the Conference Centre for the construction of a hotel named RAMADA Hotel.
22. They contend that before the beginning of construction works, the hotel project, which was initially a four (4) floor building, was modified to an eight (8) floor building and construction work started in compliance with the technical specifications of the Engineer and the Laboratory
23. Further, on 18 April 2017, there was an update of the building permit to make it consistent with the building under construction.
24. An expert report of LERGC Laboratory confirmed that the technical norms had been respected.
25. The Applicants allege that on 5 June 2019, a technical compliance check was conducted by the Council of Cotonou, which found that there were several irregularities in the building under construction.
26. The Applicants affirm that on this basis, without any warning for them to comply with existing measures, pursuant to Article 49 of Decree No. 2014205 of 13 March 2014 on the regulation of issuance of building permits in the Republic of Benin and without having obtained a prior annulment of the building permit, the First Class Court of First Instance of Cotonou rendered the above mentioned judgement.
27. The Applicants contend in fact that they were summoned to appear before a correctional chamber to respond to the violation of provisions of Article 51 of Decree No. 2014-205 of 13 March 2014 on the regulation of issuance of building permits in the Republic of Benin whereas a Decree can never define a criminal offence.
28. Invoking Article 27 of the Protocol and Rule 51 of the Rules, the Applicants pray the Court to order stay of the implementation of judgement No. 044/3é CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou pending consideration of the application on the merits by this Court.
29. The Applicants allege that the demolition ordered in the judgement will cost them irreparable harm because they will not be paid any compensation whereas they have constructed the building using their own funds.
30. The Court notes that Article 27(2) of the Protocol provides that: “in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such

- provisional measures as it deems necessary”
31. The Court further recalls that Rule 51(1) of the Rules provided that “pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, the Commission, or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice’
 32. In view of the foregoing, the Court will take into account the applicable law in matters of provisional measures which are of a preventive nature and do not in any way prejudice the merits of the application. The Court cannot issue the order “pendente lite” except the basic conditions required have been met, notably extreme gravity or urgency and the prevention of irreparable harm on persons.
 33. The Court recalls that the Applicants sought the stay of the implementation of judgement No. 044/3é CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou which ordered the demolition of an eight (8) floor building belonging to them.
 34. The Court notes that it behoves on it to decide in each case if, in light of the specific circumstances surrounding the case, it has to exercise its jurisdiction conferred on it by the above mentioned provisions.
 35. The Court is of the opinion that the demolition of a building which is an extremely radical decision will cause irreparable harm to the Applicants because not only did they invest huge sums of money in the construction, but also, they will not be paid any compensation if the judgment is implemented.
 36. Based on the foregoing, the Court finds that the circumstances surrounding this case constitute a situation of extreme gravity and present a risk of irreparable harm to the Applicants, if the judgement rendered on 27 September 2019 were to be implemented before the judgement of this Court on the merits in the matter before it.
 37. The Court therefore orders the staying of the execution of judgement No. 044/3é CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou pending consideration of the merits of the case before it.
 38. To avoid any confusion, the Court wishes to state precisely that this order does not in any way prejudice its decisions on jurisdiction, admissibility and the merits of the application.

VI. Operative part

39. For these reasons

The Court,

Unanimously,

Orders the Respondent State to:

- i. stay the execution of judgement No. 044/3é CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou which ordered the demolition of the building pending consideration of the merits of the case by this Court.
- ii. report to the Court within fifteen (15) days as from the date of receipt of this Order, on measures taken to implement the Order.