

## Kodeih v Benin (provisional measures) (2020) 4 AfCLR 24

Application 006/2020, *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 Applicant in this action alleged that the process leading up to an order for the seizure and auctioning of his property was in violation of his Charter guaranteed rights. Applicant brought this request for provisional measures to stay the auctioning of his property and any change of name of land title pending determination of the case on the merit. The Court granted the request.

**Jurisdiction** (*prima facie*, 15, 18)

**Provisional measures** (preventive nature, 40; interest of parties or justice, 42; extreme gravity or urgency, 45)

### I. The Parties

1. Mr. Ghaby Kodeih, (hereinafter “the Applicant”) is a Benin national born on 13 November 1977, he is a businessman, residing in Cotonou, plot Q-9, les Cocotiers, sole proprietor and General Manager of the Hotel, Restaurant and Leisure Company (SHRL), a private enterprise whose capital is 120 000 000 CFA Francs with headquarters in Cotonou, C/57 Tokpa XOXO, Dako Donou Street, P.O. Box 1342 Cotonou, registered at RCCM under No. RB/COT 11 B 6968.
2. The Republic of Benin, (hereinafter “the Respondent”) became a party to the African Charter on Human and Peoples Rights (hereinafter “The 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 thereby accepting the jurisdiction of the Court to receive applications from

individuals and non-governmental organizations.<sup>1</sup>

## **II. Subject matter of the Application**

### **A. Facts of the Matter**

4. The Applicant affirms that a seizure procedure on a building covering an area of 1ha 54a and 34 ca, with land title (T F) No. 14140 in the Lands Register of Cotonou, belonging to the SHL Company where he is the sole proprietor has been initiated by Société Générale de Banque of Benin (SGB).
5. Within this framework, the Court in Cotonou, seating as a last resort, dismissed his arguments and fixed the date of 30 January 2020 for auction sale of the building by Jean Jacques GBEDO, the Notary.
6. The SHRL Company noted the appeal of the said judgement with adjournment from 31 December 2019 and notified all the parties in the said appeal as well as an application for auction.
7. The Applicant contends that at the auction hearing on 30 January 2020, the Court dismissed the request for postponement of auction sale and suspended the matter and the parties pending the establishment of the record of proceedings.
8. The Applicant affirmed that even though he received notification of the application for put off of the auction sale, the appointed Notary conducted the auction in favour of the SGB for the amount on auction sale, that is Seven Billion (7.000.000.000) CFA Francs, due to the absence of bidders and especially without awaiting the decision for the request of postponement of auction sale.
9. The Applicant contends that as a judgment of the last resort of 19 December 2019, the Benin judiciary considered wrongly, that local remedies against this decision had been totally exhausted, which constitutes, according to him, a violation of human rights.
10. From there on, he became worried that if the change was done in the name of the auctioneer, or any third party beneficiary, the changed land title would become final and cannot be challenged

1 The Respondent State has also ratified the International Covenant on Civil and Political Rights on 12 March 1992 as well as the African Charter on Democracy, Elections and Governance on 28 June 2022 and the ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security on 21 December 2001. The Respondent State is equally a party to the African Charter on Democracy, Elections and Governance ratified by law No 2022-18 of 5 September 2011.

through the application of the provisions of Article 146 (1) of Law No. 2017-15 of 10 August 2017 to amend and complete Law No. 2013-01 of 14 August 2013 on the Lands Code of the Republic of Benin.

## **B. Alleged violations**

11. The Applicant alleges the violations by the Respondent State of Articles 7-1 (a), 7-1 (d) and 14 of the African Charter on Human and Peoples Rights

## **III. Summary of procedure before the Court**

12. The Application comprising a request for provisional measures was filed at the Registry of the Court on 14 February 2020;
13. Pursuant to Article 34(1) the Registry acknowledged receipt on 18 February 2020 pursuant to Rule 36 of the Rules of Court, it was communicated on 18 February 2020 to the Respondent State requesting the latter to submit its response on the merits within sixty (60) days and on provisional measures within eight (8) days.
14. The Respondent State did not file any response on provisional measures.

## **IV. Jurisdiction of the Court**

15. In support of the admissibility of the application, the Applicant affirms, pursuant to Article 27(2) of the Protocol and Rule 51 of the Rules that in matters of provisional measures the Court does not have to convince itself that it has jurisdiction on the merits of the case but simply has to ensure that it has *prima facie* jurisdiction.
16. Referring further to Article 3(1) of the Protocol, he averred that the Court has jurisdiction because, on the one hand, the Republic of Benin has ratified the African Charter, the Protocol and has made the declaration under Article 34(6) and, on the other, it alleges the violation of rights protected by human rights instruments.
17. 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”).
18. Regarding provisional measures however, the Court recalls its constant jurisprudence according to which it does not have to ensure that it has jurisdiction on the merits of the case, but should

contend itself with its *prima facie*<sup>2</sup> jurisdiction.

19. Article 3(1) 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”.
20. According to Article 5(3) the Protocol, “the Court may entitle relevant nongovernmental organizations (NGOs) with observer status before the Commission and individuals to institute case directly before it in accordance with Article 34(6) of this Protocol”.
21. The Court notes that the Respondent State is a party to the African Charter on Human and Peoples Rights 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.
22. The Court further notes, that the rights alleged by the Applicant to have been violated are all protected under the Charter, and, accordingly, it has *rationae materiae* jurisdiction to hear this application.
23. In light of the above, the Court finds that it has *prima facie* jurisdiction to hear the application.

## V. Provisional measures sought

24. The Applicant explains that in view of constructing a five (5) star hotel, he established the company SHRL with a capital of One Hundred and twenty Billion (120 000 000 000) CFA Francs, with himself as the sole proprietor and signed an agreement with Marriott Hotels & Resorts to enable him use their license.
25. Within the framework of implementation of this project, was to come from the West African Development Bank (hereinafter “BOAD”) to the tune of Seven Billion four Hundred million (7.400.000.000) Francs CFA Francs, from a banking consortium to the tune of Eleven Billion Nine Hundred Million (1 1 900.000.000) Francs CFA Francs and by his personal input of — Eleven Billion Seven

2 See Application no 004/2013 *Lohé Issa Konaté v Burkina Faso* (Order for Provisional Measures) 4 October 2013, and Application no 001/2015 *Armand Guehi v Republic of Tanzania* (Order for Provisional Measures) 18 March 2016; Application no 020/2019 *Komi Koutché v Republic of Benin* (Order for Provisional Measures) 2 December 2019.

- Hundred and Fifty Three Million (11 .753.000.000) CFA Francs.
26. That was how by a notary agreement signed on 13 November and 16 December 2014, the banking consortium (comprising Société Générale de Banque in Côte d'Ivoire (hereinafter "SGCI"), the Société Générale de Banque of Burkina Faso (hereinafter "SGBF") and the SGB), signed an agreement with the SHRL on a long term loan of the amount of Eleven Billion Nine Hundred Thousand (11 .900.000.000) CFA Francs with an Addendum of 27 and 28 February 2017 on the mortgage of the building which has not been constructed covering an area of Iha 54a 34 ca, belonging to the company SHRL and whose land title was No. 14140 in the Lands Register of Cotonou.
  27. The Applicant alleges that most of the suspensive conditions imposed by the BOAD for the disbursement of the loan were met by the SHRL and by himself, except those which depended directly on the SGB which were not met, being the fault of the latter, which led BOAD to annul the disbursement, whereas the construction of the hotel was almost over.
  28. Furthermore, the Applicant affirms, that the SGB unilaterally denounced the current account binding it to the SHRL and claimed from the latter the payment of the sum of Fourteen Billion Seven Hundred and Forty Nine Million Four Hundred and Twenty Five Thousand and Eight (14.749.425,008) CFA Francs following a real seizure order of 4 September 2019 aimed at an auction sale of the building.
  29. The SGB further deposited specifications on 11 September 2019 at the Registry of the Cotonou Trade Tribunal (Benin).
  30. The Applicant alleges that it is within the framework of this procedure that at the eventual hearing of 19 December 2019, in which SHRL and him were parties, after the arguments made by the defence, the Court rendered judgement No. 14/19/CSI/TTC against which SHRL filed an appeal and notified all the parties to the said appeal as well as an application for a postponement of auctioning.
  31. The Applicant contends that at the auction hearing of 30 January 2020, his request for postponement of the sale was thrown out by the Court.
  32. The Applicant affirms that the appointed Notary conducted the auction in favour of the SGB for the amount at sale, that is, Seven Billion (7.000.000.000) CFA Francs.
  33. The Applicant notes that in rendering the judgement as a last resort on 19 December 2019, the Benin judiciary considered, and wrongly so, that local remedies against this decision have been completely exhausted which constitutes, according to him a

human rights violation.

34. In this regard, he recalls that Article 300 of the OHADA Uniform Law on the Organisation of Simplified Procedures for Recovery and Execution (AUPSRVE) provides as follows “judgements rendered in matters relating to seizure of property are not subject to appeal. They shall only be subject to appeal when they deal with the same principle of debt or arguments relating to the inability of one of the parties, of the property, the impossibilities to seize or the inalienable nature of the goods seized. The decisions of the Court of Appeal shall not be subject to opposition. Local remedies are open in conditions of droit commun’.
35. The Applicant contends that once the Court has adjudged the principle of an impugned loan, the judgement cannot be rendered as a last resort.
36. Invoking Article 27 of the Protocol and Rule 51 of the Rules, the Applicant prays the Court to order the Respondent State to desist from changing the land title No. 14140 volume LXIX folio 149 of the Cotonou District in favour of the Auctioneer or any third party beneficiary and any attempt at seizing the building from the Applicant, in executing judgement ADD No. 14/19/CSI/TCC of 19 December 2019 pending the judgment on the merits of the application before this Court.
37. To buttress his request for provisional measures, the Applicant alleges that in case of handing it over to the Auctioneer or any other third party beneficiary, the changed land title will become final and cannot be impugned pursuant to the provisions of Article 146 (1) of Law No. 2017-15 of 10 August 2017 to amend and complement Law No. 2013-01 of 14 August 2013 of the Lands and Domain Court of Benin.
38. The Court notes that Article 27 (2) the Protocol provides as follows: “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”.
39. The Court further recalls that Rule 51 (1) of the Rules provides as follows. “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”.
40. Based on the foregoing, the Court will consider the applicable law in matters of provisional measures, which are preventive in nature and do not prejudice the merits of the application. The Court cannot order them pendente lite except the basic conditions required are met, that is, extreme gravity or urgency and the

- prevention of irreparable harm on persons.
41. The Court notes that the Applicant is seeking a postponement of any change of name of land title No. 14140 volume LXIX folio 149 of the Cotonou District in favour of the Adjudicator or any other third party beneficiary and any other decision that will seize the building from the Applicant in the execution of judgement ADD No. 14/19/CSI/TCC of 19 December 2019, pending the judgement on the merits of the application from this Court.
  42. The Court is of the view that it is endowed to issue orders for provisional measures not only in cases of “extreme gravity or urgency or when it is necessary to avoid irreparable harm” but also “in the interest of the parties or of justice”.
  43. To that end, the Court notes that following a property dispute in which the Applicant alleges violation of human rights, the property in question has been adjudged in favour of the Société Générale Benin.
  44. The Court notes that pursuant to Article 146 of Law No. 2017-15 of 10 August 2017 to amend and complete Law No. 2013-01 of 14 August 2013 on the Lands and Domain Law of Benin, the land certificate is final and cannot be questioned.
  45. In view of the following, the Court finds, that in the instant case there is a matter of extreme gravity or urgency, same as a risk of irreparable harm because the change is done through a new registration on the land title which will become final and unquestionable.
  46. The Court therefore finds that circumstances in the instant case require it to order immediately and pursuant to Article 27(2) of the Protocol and Rule 51(1) of the Rules, the suspension of any change of ownership of the land title No. 14140 volume LXIX folio 149 of the Cotonou District in favour of the Auctioneer or any third party beneficiary and to halt any measure aimed at seizing the building from the Applicant, in execution of judgement ADD No. 14/19/csv-rcc of 19 December 2019.
  47. To avoid any confusion, the Court wishes to state precisely that this order does not in any way prejudge its findings on the jurisdiction, admissibility and merits of the application.

## **VI. Operative part**