Legal and Human Rights Centre and Tanganyika Law Society v Tanzania (provisional measures) (2020) 4 AfCLR 778

Application 036/2020, *Legal and Human Rights Centre and Tanganyika Law Society v United Republic of Tanzania*

Ruling (provisional measures), 30 October 2020. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicants, who alleged violations of their civil and political rights, were co-Applicants in an earlier consolidated action that sought orders for certain constitutional amendments in the Respondent State. Claiming that they were inexplicably excluded from later stages of the earlier successful action, the Applicants brought this action along with a request for provisional measures seeking inter alia to reinstate them to the earlier judgment and to stay elections billed to take place in the Respondent State. The Court dismissed the application for provisional measures.

Jurisdiction (*prima facie*, 16)

Provisional measures (discretion of the Court, 24; urgency, 25-26; irreparable harm and extreme gravity, 26-27)

1. The Applicants are Non-Governmental Organisations, identified as Tanganyika Law Society and the Legal and Human Rights Centre. They challenge some actions and omissions relating to their civil and political rights and those of Tanzanian citizens.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter, "the Charter") on 21 October 1986, and to the Protocol on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State, deposited the Declaration provided for under Article 34(6) of the Protocol, by which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations**.** On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument of withdrawal of its Declaration**.**

3. The Applicants state that they instituted an Application against the Respondent State before this Court in 2011 vide Application

011/2011),[1] seeking orders to compel the Respondent State to amend its constitutional and legal framework to allow for independent candidacy in its electoral process.

4. The Applicants further state that they were successful in that Application, and that the Court found in their favour, that the Respondent State had violated Articles 10 and 13(1) of the Charter and ordered the Respondent State to take constitutional, legislative and all other measures necessary and within reasonable time to remedy the violations, and to inform the Court on the measures taken.

5. The Applicants contend that, without reason, the Court's judgment on the merits delivered on 14 June 2013 excluded them from subsequent stages of the case, including the reparations stage, and instead, heard only from Reverend Christopher Mtikila, who was the 2nd Applicant in Consolidated case. The Applicants argue that due to the fact that Reverend Christopher Mtikila died on 4 October 2015, there has been nobody to formally follow up with the implementation of the Court's judgments.

6. The Applicants also aver that the Respondent State has not aligned its constitutional and legal framework to allow independent candidacy, therefore failing to give effect to the rights of the Applicants and countless other citizens. This is despite the Respondent State arguing that such changes can only be through a constitutional review process, yet the Head of State has publicly stated that there shall be no constitutional review process. They contend that there is no justification for the over six years' inaction by the Respondent State to comply with the Court's decision.

7. The Applicants submit that the constitutional review process is not the only means by which to give effect to the Court's judgment and that this can be achieved through a constitutional amendment bill which would be adopted by Parliament at an ordinary or extraordinary sitting.

8. They further state that in compounding the continuous violations occasioned by the non-implementation of the decision of the Court, the Respondent State has contributed to or failed to prevent a number of activities that have contributed to shrinking

1 That Application filed by the Applicants on 2 June 2011 was registered as Application 009/2011 *Tanganyika Law Society and Legal and Human Rights Centre v United Republic of Tanzania* and not Application 011/2011, the latter having been filed by Reverend Christopher Mtikila also against the United Republic of Tanzania on 10 June 2011 and which was registered as Application 011/2011; By an order dated 22 September 2011, the Court ordered the two proceedings be consolidated and the case be titled Consolidated Application Nos. 009/2011 and 011/2011 *Tanganyika Law Society and the Legal and Human Rights Centre & Reverend Christopher Mtikila v United Republic of Tanzania*.

space in Tanzania, including:

i. Arrests and harassment of opposition politicians and journalists

ii. Banning of live broadcast of parliamentary sessions which has contributed to limiting citizen's access to information

iii. Adoption of laws and policies that restrict media freedoms and free speech

iv. The unlawful banning of political activity including political rallies and public political gatherings

9. They state that, local government elections were conducted on 24 November 2019 and Parliamentary and Presidential elections are scheduled to be held in October 2020. They argue that in the absence of a framework that provides for independent candidacy and in light of the shrunken civic and political space, it will be difficult, if not impossible, to have a fair, just and credible electoral process.

10. They argue that, they and Tanzanian citizens as a whole, continue to suffer grave and irreparable harm due to the actions and omissions of the Respondent and that should elections proceed under the current legal framework, grave consequences could follow, including electoral related disputes and violence.

11. The Applicants pray the Court for the following orders:

a. Provisional measures pursuant to Article 27 of the Protocol to order the Respondent to stay council members, parliamentary and presidential elections scheduled for 2020 pending the determination of this Application;

b. An order reinstating the Applicant to proceedings in Application 9 of 2011 before the Court.

c. An order compelling the Respondent to take all necessary measures to give effect to the decision on the merit decision in such manner so as to ensure that independent candidates can vie for council members, parliamentary and presidential elections scheduled for October 2020 respectively.

d. An order finding that the Respondent in violation of Article 1 of the African Charter.

e. An order compelling the Respondent to periodically report to the Court within a reasonable timeframe on the measure taken to give effect to the decisions of the Court.

f. An order to declare the Respondent has disobeyed the Court orders of this Honourable Court of 14th June 2011.[2]

2 The correct date of this Judgment is 14 June 2013 and not 14 June 2011 as stated by the Applicants.

I. Summary of the Procedure before the Court

12. The Application which contained a request for provisional measures was received at the Registry of the Court on 16 October 2020.

13. The Application was notified to the Respondent State on 19 October 2020 and the Respondent State was provided until 22 October 2020 to send its observations. At the end of this period, the Respondent State did not submit observations.

14. The Applicants have not submitted on jurisdiction. The Respondent State has not submitted any observations.

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15. Article 3(1) of the Protocol provides that:

> 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.

16. Rule 49(1) of the Rules provide that: "[T]he Court shall conduct preliminary examination of its jurisdiction …". However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but it simply needs to satisfy itself, *prima facie*, that it has jurisdiction.[3]

17. In the instant case, the rights the Applicants allege have been violated are all protected under Articles 1, 9, 10 and 13 of the Charter, an instrument to which the Respondent State is a Party.

18. The Court further notes that the Respondent State has ratified the Protocol. It has also made the Declaration by which it accepted the Court's jurisdiction to receive applications from individuals and Non-Governmental Organisations in accordance with Articles 34(6) and 5(3) of the Protocol, read jointly.

19. The Court notes, as stated in paragraph 2 of this Ruling, that on 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration, filed on 29 March 2010 in accordance with Article 34(6) of the Protocol. The Court has

3 See *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (15 March 2013) 1 AfCLR 145, §10; *African Commission on Human and Peoples' Rights v Kenya* (provisional measures) (15 March 2013) 1 AfCLR 193, § 16.

held that the withdrawal of a Declaration has no retroactive effect and has no impact on cases under consideration before the Court prior to the deposit of the instrument of withdrawal of the Declaration[4], as is the case in the present matter. The Court has reiterated this position in its Judgment in *Andrew Ambrose Cheusi v United Republic of Tanzania* and held that the withdrawal of the Declaration will take effect on 22 November 2020.[5] Accordingly, the said withdrawal does not affect its personal jurisdiction in the present case.[6]

20. The Applicants pray the Court to order 'the Respondent to stay council members, parliamentary, and presidential elections scheduled for 2020 pending the determination of this Application'.

21. The Respondent State has not made any submissions.

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22. 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".

23. Furthermore, Rule 59(1) of the Rules provides that:

> Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.

24. It therefore lies with the Court to decide, in the light of the circumstances of each case, whether to exercise the powers provided for in the above-mentioned provisions.

25. The Court notes that it delivered the Judgment on the merits in *Consolidated Application Nos. 009/2011 and 011/2011 Tanganyika Law Society and the Legal and Human Rights Centre & Reverend Christopher Mtikila v United Republic of Tanzania* on 14 June 2013, seven (7) years and four (4) months ago. In

4 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

5 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

6 *Ibid* § 37.

that Judgment, the Respondent State was 'directed to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken'[7].

26. Had there been a real risk that irreparable harm would be caused to the Applicants' and other Tanzanian citizens' rights, they would have sought the provisional measures earlier than they did. The electoral cycles for local government, parliamentary and presidential elections are established the applicable legal frameworks and are in the public domain. The electoral cycles are therefore within the Applicants' knowledge, and would have been of particular interest in view of the Judgment mentioned above, in a matter involving them as one of the Parties. In these circumstances, the Court therefore finds that the Applicants have failed to demonstrate that their request for provisional measures is of extreme urgency.

27. The Court further notes that the Applicants have not demonstrated that they and Tanzanian citizens would be prevented from participating in the electoral process or that such a process would occasion irreparable harm to them or in the exercise of their rights. The Court also observes that, the Applicants' general statement that, the holding of elections under the current legal framework could result in grave consequences does not suffice to demonstrate that there exists a situation of extreme gravity necessitating it to grant the provisional measures sought.

28. Consequently, the Court declines to exercise its powers under Article 27(2) of the Protocol, and Rule 59(1) of the Rules, to order the Respondent State to stay council members, parliamentary and presidential elections pending the determination of the Application on the merits.

29. For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudge the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

30. For these reasons,

The Court,

Unanimously:

i. Dismisses the Applicants' requests for provisional measures.

7 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (merits) (14 June 2013) 1 AfCLR 34 § 126 (4).