Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 742

Application 032/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Ruling (provisional measures), 27 November 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 brought an action against the Respondent State, alleging that a judgment of the domestic court of the Respondent State violated his rights to property, equality, equal protection of law and to have his cause heard. Applicant also sought provisional measures to restrain execution of the domestic court's judgment. The Court dismissed the request for provisional measures.

Jurisdiction (*prima facie*, 14, 18; effect of withdrawal of Art 34(6) Declaration, 17)

Provisional measures (meaning of urgency, 32; irreparable harm, 34; absence of urgency,36)

I. The Parties

1. Mr Houngue Éric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin. He requests the stay of execution of a judgment of the Court of First Instance of Cotonou, which according to him violates his right to property.

2. The Application is brought against the Republic of Benin (hereinafter referred to as "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "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 (hereinafter referred to as "the Protocol") on 22 August 2014. It further made the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration") on 8 February 2016, by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases nor

on new cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its filing.[1]

II. Subject of the Application

3. In his Application on merits, the Applicant alleges that, following a domestic proceeding in which he had voluntarily intervened, the Court of First Instance of Cotonou (hereinafter referred to as "Cotonou CFI") issued a judgment on 5 June 2018 without his knowledge, which denied him his property rights and moreover, was never notified to him.

4. To avoid initiating further proceedings related to this judgment, he filed the present Application before the Court to order all necessary measures, including stay of the execution of the said judgment.

III. Alleged violations

5. The Applicant alleges the following violations:

i. The right to property, guaranteed by Article 14 of the Charter;

ii. The rights to equality before the law and equal protection of the law, guaranteed by Articles 3(1) and (2) of the Charter and 26 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR");

iii. The right to have one's cause heard, guaranteed by Articles 7 of the Charter, 14(1) of the ICCPR and 8 of the Universal Declaration of Human Rights.

IV. Summary of the Procedure before the Court

6. The Application on the merits was filed on 15 October 2020 together with a request for provisional measures.

7. On 20 October 2020, the Application together with the request for provisional measures were served on the Respondent State for its Response on the merits within ninety (90) and observations on the request for provisional measures within fifteen (15) days of receipt of the notification, that is 27 October 2020.

8. The Registry received the Respondent State's Response on 16 November 2020. Although this Response was filed out of

1 *Ingabire Victoire Umuhoza v Republic of Rwanda (*Jurisdiction*)* (03 June 2016) 1 AfCLR 540 § 69; ***Houngue Eric Noudehouenou v Republic of Benin*** ACtHPR, Application 003/2020 Ruling of 05 May 2020 (provisional measures), §§ 4- 5 and ***Corrigendum*** of 29 July 2020.

time, the Court decides, in the interests of justice, to take it into consideration.

V. *Prima facie* jurisdiction

9. The Applicant asserts pursuant to Article 27(2) of the Protocol and Rule 51 of the Rules of Court (hereinafter referred to as "the Rules"),[2] that in matters pertaining to provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.

10. Referring further to Article 3(1) of the Protocol, the Applicant asserts that the Court has jurisdiction, in so far as, on the one hand, the Republic of Benin has ratified the African Charter, the Protocol and made the Declaration, and on the other, he alleges violations of the rights protected by human rights instruments.

11. The Applicant further argues that although the Respondent State has withdrawn its Declaration on 25 March 2020, the withdrawal does not take effect until 26 March 2021.

12. The Respondent State has not made any observations on this point.

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13. 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, the Protocol and any other relevant human rights instrument ratified by the States concerned."

14. Rule 49(1) of the Rules provides: "the Court shall ascertain its jurisdiction ..." However, with respect to provisional measures, the Court need not ensure that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.[3]

15. In the instant case, the rights alleged to have been violated are guaranteed by the human rights instruments ratified by the Respondent State.

2 This Rule of the Rules of 2 June 2010 corresponds to Rule 59 of the Rules of 1 September 2020 which entered into force on 25 September 2020.

3 *Ghati Mwita v United Republic of Tanzania,* ACtHPR, Application 012/2019, Ruling of 9 April 2020 (Provisional Measures), § 13;

16. The Court further notes that the Respondent State has ratified the Protocol and has made the Declaration.

17. The Court observes, as stated in paragraph 2 of the present Ruling, that on 25 March 2020, the Respondent State deposited an instrument of withdrawal of its Declaration. The Court also recalls that it has held that the withdrawal of a Declaration filed in accordance with Article 34(6) of the Protocol has no retroactive effect, and has no bearing on pending cases nor on new cases filed before the withdrawal comes into effect[4] as is the case in the present matter. The Court reiterated this position in *Houngue Eric Noudehouenou v Republic of Benin,*[5] and held that the Respondent State's withdrawal of the Declaration will take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal does not affect its personal jurisdiction in the present case.

18. The Court, thus, finds that it has *prima facie* jurisdiction to hear this Application for provisional measures.

VI. Provisional measures requested

19. The Applicant submits that the execution of Judgment No. 006/2DPF/-18 of June 2018 of the Cotonou CFI will cause him irreparable harm because the said judgment deprived him of his right of ownership and authorised third parties to occupy his land, without adequate possibility of reparation. He attributes this irreparable damage to the following six factors.

20. The Applicant argues that the first factor is financial, in the sense that he will not be able to obtain any pecuniary compensation, since the occupation of his land by third parties is based on a court decision.

21. Secondly, he contends that under the provisions of Articles 523 et seq. of the Land Code he is prohibited from evicting the third parties without first seeking alternative remedies, which according to him constitutes forced dispossession.

22. Thirdly, he avers that he will no longer be able to enjoy his right of ownership, not only because of the large size of his land which would make it impossible to evict the occupants unless the Respondent State decided to convert the land into public property,

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

5 *Houngue Eric Noudehouenou v Republic of Benin,* ACtHPR, Application 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and corrigendum of 29 July 2020.

which would deny him adequate reparation, but also because of the lengthy domestic eviction procedures that would enable the illegal occupants to exercise the right of acquisitive prescription.

23. Fourthly, the Applicant contends that there is no adequate reparation due to the inconsistency of the domestic jurisprudence, in violation of the principle of legal certainty. Failure to order the measures sought will give rise to a serious dispute between the occupants of the Applicant's land and the Applicant, which will render the Court's decision ineffective, even if it is favourable to him.

24. Fifthly, he claims that even if this Court renders a favourable decision on the merits without suspending the execution of the judgment of the Cotonou CFI, the Applicant will not be able to have the occupants of the land evicted because the Court will have found that the proceedings before the Cotonou Court lasted from 2004 to 2018, that is, fourteen (14) years.

25. Lastly, he maintains that the dismissal of his Application will cause him irreparable harm since, in all likelihood, the judgment on the merits will not be implemented, just like the two Rulings issued in his favour by this Court.

26. The Applicant infers from this that even if this Court were to issue a favourable decision on the merits, without first ordering a stay of the execution of the Cotonou CFI judgment, he will not be able to enjoy his right to property because of the domestic law, particularly because of the lengthy proceedings, coupled with the inconsistency of the jurisprudence of the Respondent State and of the non-execution of the decisions of this Court, which amounts to a violation of Articles 2, 7(1) and 14 of the Charter.

27. The Applicant therefore prays the Court to order all necessary measures, including the stay of execution of Judgment No. 006/2DPF/-18 of 5 June 2018 of the Cotonou CFI until this Court has made its final determination.

28. The Applicant pointed out that such a decision would in no way prejudge the merits, since the issue at stake is one of safeguarding the endangered rights and freedoms pending final determination by the Court.

29. The Respondent State submits that the provisional measures should be dismissed. It avers that the arguments of the Applicant relating to the length of the proceedings, the inconsistency of the domestic jurisprudence and lack of compliance with the decisions of the Court are unsubstantiated claims.

30. The Respondent State maintains that these claims have not been objectively established and it further submits that the fact that the Applicant merely makes these assertions does not constitute evidence of urgency and of a risk of irreparable harm.

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31. 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".

32. The Court notes that it decides on a case by case basis whether, in light of the particular circumstances of a case, it should exercise the jurisdiction conferred on it under the above provisions.

33. The Court recalls that urgency, which is consubstantial with extreme gravity, means a "real and imminent risk will be caused before it renders its final judgment."[6] The risk in question must be real, which excludes purely hypothetical risk and explains the need to remedy it in the immediate future.[7]

34. As regards irreparable harm, the Court considers that there must be a "reasonable probability of occurrence" having regard to the context and the Applicant's personal situation.[8]

35. The Court observes in this case that the Applicant's submissions are based on assumptions and speculations. Indeed, his allegations do not prove the fulfillment of the criteria of imminent risk or irreparable harm, as developed in the Court's jurisprudence.

36. The Court notes that the absence of urgency is evidenced by the Applicant's long delay. Indeed, between 5 June 2018, the date on which the judgment of the Cotonou CFI was delivered and 15 October 2019, the date of filing the main Application at the Registry of the Court, sixteen (16) months and nine (9) days have passed. This long delay calls into question the fact that the Applicant considers that there was urgency in the present case.

37. The Applicant has not provided any explanation for the length of this delay nor did he provide any indication of the possible

6 *Sebastien Ajavon v Republic of Benin,* ACtHPR, Application 062/2019, Ruling for Provisional Measures of 17 April 2020, § 61.

7 *Ibid*, §-- 62.

8 *Ibid,* § 63.

existence of an obstacle to seize the Court. Such an attitude is sufficiently indicative of the absence of real and imminent risk.

38. In summary, the Court finds that the conditions required by Article 27(2) of the Protocol have not been met.

39. The Court therefore finds that there is no need to order the requested measures.

40. For the avoidance of doubt, the Court recalls that 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.

VII. Operative part

41. For these reasons

The Court

Unanimously,

i. *Dismisses*, the Applicant's request for provisional measures.