

Ajavon v Benin (provisional measures) (2021) 5 AfCLR 85

Application 002/2021, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*

Order, 29 March 2021. 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, a national of the Respondent State residing outside its territory, brought this Application based on the fallout of tax procedures before domestic authorities. Applicant alleged that tax assessments of companies he was linked to, the rejection by the Supreme Court of his appeal against the assessments, and the consequent confiscation of his properties and properties of his family members all violated his Charter protected rights. Along with the main claim, the Applicant brought an Application for provisional measures to stop execution of the domestic judgments permitting sale of the confiscated properties pending the outcome of the Application before this Court. The Court granted the Applicant's prayers.

Jurisdiction (*prima facie* jurisdiction, 14, 18; effect of withdrawal of article 34(6) declaration, 17)

Provisional measures (discretion of the court, 36; extreme gravity, 38, 42; irreparable harm, 47; real and imminent risk, 40)

I. The Parties

1. Mr. Sébastien Germain Marie Aïkoué Ajavon, (hereinafter referred to as “the Applicant”) is a Beninese citizen and businessman, residing in Paris, France, as a political refugee. He seeks the stay of execution of three (3) decisions rendered by the Supreme Court of Benin, following appeals for the annulment of tax adjustments in respect of companies of which he is a shareholder.
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 deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”), 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 had no bearing on pending cases and on new cases filed before the withdrawal came into effect on 26 March 2021, that is, one year after its deposit.¹

II. Subject of the Application

3. In his Application, the Applicant alleges the violation of the rights to defence and of equality before the law as well as the principle of fairness during the tax reassessment proceedings initiated against the companies, *Comptoir Mondial de Négoce (COMON) SA*, *JLR SA Unipersonnelle* and the real estate civil company *l'Elite*, of which he is a shareholder.
4. He further states that in spite of these violations, the Supreme Court of the Respondent State, by Judgments No. 209/CA² and No. 210/CA³ of 5 November 2020, and No. 231/CA⁴ of 17 December 2020, (hereinafter referred to as “the three Supreme Court judgments”) dismissed the appeals for the annulment of the said tax adjustments.
5. In respect of provisional measures, the Applicant prays the Court to order the Respondent State to stay the execution of these judgments and the confiscation and sale of his assets, those of his family members and those of the companies in question, pending the determination of the Application on the merits.

III. Alleged violations

6. The Applicant alleges violation of the following rights:
 - i. The right to defence, protected by Article 7(1)(c) of the Charter;
 - ii. The rights to equality before the law and equal protection of the law, protected by Articles 3(1) and (2) of the Charter.

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (Order of 3 June 2016) 1 AfCLR 540 § 67; *Houngue Eric Noudehouenou v Republic of Benin* ACTHPR, Application No. 003/2020 Order of 5 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020.

2 This judgment was in the case between the following parties: *Comptoir Mondial de Négoce (COMON) SA Company v Ministry of Economy and Finance and 2 Others*.

3 This judgment was in the case between the following parties: *JLR SA Unipersonnelle Company v Ministry of Economy and Finance*.

4 This judgment was rendered in the case between the following parties: *L'Elite SA Company v Ministry of Economy and Finance and two others*.

IV. Summary of the Procedure before the Court

7. The Application instituting proceedings, together with a request for provisional measures, were filed at the Registry on 4 January 2021.
8. On 25 January 2021, the Application was served on the Respondent State, together with the request for provisional measures, with deadlines for submitting responses set at ninety (90) days and fifteen (15) days, respectively.
9. On 8 February 2020, the Respondent State filed its response to the request for provisional measures.

V. *Prima facie* jurisdiction

10. The Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 59 of the Rules of Court (hereinafter referred to as “the Rules”), that in matters of provisional measures, the Court need not be satisfied that it has jurisdiction on the merits of the case but merely that it has *prima facie* jurisdiction.
11. The Applicant further points out that the Respondent State has ratified the Charter as well as the Protocol, and has deposited the Declaration. The Applicant further alleges a violation of the rights protected by Articles 3(1) and 7(1)(c) of the Charter.
12. The Respondent State did not make any submission on the Court’s jurisdiction.

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, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
14. In addition, Rule 49(1) of the Rules provides: “(t)he Court shall preliminarily ascertain its jurisdiction...”. However, with respect to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits, but merely that it has *prima facie*

jurisdiction.⁵

15. In the instant case, the rights alleged by the Applicant to have been violated are all protected by the Charter which has been ratified by the Respondent State.
16. The Court further notes that the Respondent State has also ratified the Protocol and has deposited the Declaration.
17. The Court observes, as mentioned in paragraph 2 of this Ruling, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of its Declaration made in accordance with Article 34(6) of the Protocol. The Court found that the withdrawal of the Declaration has no retroactive effect on pending cases, nor any impact on cases filed before the withdrawal⁶ took effect, as is the case in this Application. The Court reiterated its position in *Houngue Eric Noudehouenou v Republic of Benin*⁷ and confirmed that the withdrawal of the Declaration by the Respondent State would take effect on 26 March 2021. Consequently, the said withdrawal has no effect on the personal jurisdiction of the Court.
18. The Court, therefore, concludes that it has *prima facie* jurisdiction to hear the Application for provisional measures.

VI. Provisional measures requested

19. The Applicant prays the Court to order the Respondent State to stay the execution of the three Supreme Court judgments, the confiscation and sale of his property, those of the members of his family and those of companies in which he is a shareholder until the matter is determined on the merits.
20. In support, the Applicant contends that in his Application No. 062/2019⁸ and 065/2019,⁹ he made reference to the non-execution of the decisions rendered by this Court in his favour and of the annulment of the tax adjustments against l'Elite SCI, JLR SAU and COMON SA, of which he is a shareholder, and for

5 *Ghati Mwita v United Republic of Tanzania*, ACTHPR, Application N°012/2019, Order of 9 April 2020 (provisional measures), § 13.

6 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (Order of 3 June 2016) 1 AfCLR 540 § 67.

7 *Houngue Eric Noudehouenou v Republic of Benin* ACTHPR, Application No. 003/2020 Order of 5 May 2020 (provisional measures), §§ 4-5 and Corrigendum of 29 July 2020.

8 The matter of *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*.

9 The matter of *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*.

violation of Article 7 of the Charter.

21. He affirms that the Supreme Court dismissed his appeals for annulment of the tax adjustments made in violation of his human rights. According to him this trial lacked fairness since he did not receive the submissions of the public prosecutor's office for comments, in violation of Article 937(1) of the Code of Civil, Commercial, Social, Administrative and Accounting Procedure (CPCCSAC). The Applicant also contends that this is despite the principle of equality of arms and the principle of adversarial procedure which require that each party should be able, at all stages of the procedure, to present its case in line with the jurisprudence developed under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰
22. The Applicant states that he seeks provisional measures in view of the massive human rights violations committed against him and the imminent confiscation and sale of all of his property.
23. In this regard, he argues that there is urgency and extreme gravity insofar as, despite the judgment on reparations of 28 November 2019,¹¹ in which this Court ordered the Respondent State to "lift forthwith the seizure of the accounts and property of the Applicant and those of members of his family", following the tax adjustment proceedings against JLR SA, SCI Elite and COMON SA, the Respondent State has maintained the effects of the said seizures.
24. The Applicant adds that, as a result of the three judgments of the Supreme Court, the Respondent State is going to confiscate, remove and sell all of his assets, although he has supranational judicial decisions in his favour, that prescribe otherwise.
25. On irreparable harm, he points out that in the event of confiscation and sale of his assets, it will be difficult for him to obtain compensation as long as the current regime is in place, which, moreover, is corroborated by the Respondent State's failure to comply with this Court's decisions.
26. He also notes that he will automatically lose his civil and political rights in relation to the presidential election scheduled for April 2021, since he will not be able to obtain, in his current state, the tax clearance certificate that is part of the requirements for his candidacy.

10 ECHR Judgment on *Niederost-Hubert v Switzerland*, 18 February 1997.

11 The judgment on reparations in Application No. 013/2017 – *Sébastien Germain Ajavon v Benin*.

- 27.** The Applicant believes that for these reasons, he is entitled to request a stay of execution of the three Supreme Court's judgments of 5 November and 17 December 2020, of the dispossession and sale, in any form whatsoever, of the tangible and intangible movable and immovable property belonging to him, to the members of his family and to the three companies in questions, pending the examination on the merits, of the Application initiating proceedings of 29 December 2020.

- 28.** The Respondent State submits that, in the instant case, there is neither urgency nor extreme gravity nor imminent irreparable harm to warrant the orders requested.
- 29.** In support of its submission, the Respondent State contends that the requirement of urgency or extreme gravity is in relation to an actual situation of imminent human rights violations and not reliance on the judgment in Application No. 013/2017,¹² of which the disputed execution is referenced under the cover of violation of the rules of fair trial.
- 30.** The Respondent State further submits that the statement by the Applicant that "the confirmation of the adjustments contested before the African Court will allow the confiscation, removal and sale" of his assets cannot stand insofar as the enforcement of a court ruling is consistent with constraining formalism that guarantees the protection of the debtor and the means of contestation before the enforcing judge.
- 31.** Regarding the imminence of irreparable harm, the Respondent State submits that the Applicant does not establish any threat to his life and does not demonstrate any restriction to which he is subject, but merely relies on a precarious situation of extreme and unbearable gravity with unforeseeable consequences.
- 32.** The Respondent State further submits that by stating that the situation he alleges cannot be remedied for as long as the Talon regime is in place, the Applicant admits that the supposed prejudice that he alleges is reparable. The Respondent State contends that in respect of provisional measures, only irreparable prejudice is taken into account.

12 *Ibid.*

33. Furthermore, the Respondent State points out that the Applicant does not adduce any evidence of the violation of Article 937 of CPCCSAC insofar as, after the depositions of the submissions by the Public Prosecutor and the responses of the Parties, a hearing is scheduled and the advocates notified fifteen (15) days in advance.
34. The Respondent State further states that at this hearing, the Parties are free to request for any communication or documents and to make any submissions by presenting, when necessary, any grievances in respect of the procedure.

35. 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.”
36. It is for the Court to decide, on case-by-case basis, in the light of the particular circumstances of the matter, if it must exercise the jurisdiction conferred on it by Article 27(2) of the Protocol.
37. The Court recalls that urgency, which is consubstantial with extreme gravity, means “irreparable and imminent risk being caused before the Court issues the final judgment in the matter”.¹³ The risk in question must be real, which excludes purely hypothetical risk and justifies the need to forestall it immediately.¹⁴
38. With regard to irreparable harm, the Court holds that there must be a “reasonable probability of occurrence” given the personal context and situation of the Applicant.¹⁵
39. In view of the above, the Court shall take into account applicable laws on provisional measures, which are preventive in nature and do not prejudge the merits of the Application.
40. The Court notes that it is not disputed that the three Supreme Court judgments are final and, therefore, binding. There is, in fact, no obstacle to their execution. For this reason, the Court is of the

13 *Komi Koutche v Republic of Benin*, ACtHPR, Application No. 013/2020, Ruling (Provisional measures) (02 April 2020), § 32.

14 *Ibid.*

15 *Ibid.*, § 63. *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application N°003/2020, Ruling (Provisional measures), § 28.

view that such an execution may take place at any time before it renders its final decision. In this regard, the existence of a real and imminent risk is established.

41. The Court concludes, therefore, that the condition of urgency and extreme gravity is met.
42. With respect to irreparable harm, the Court notes that the tax adjustments concern two public limited liability companies and a real estate company, which is commercial in nature. The Court emphasises that a public limited liability company has its own legal personality.¹⁶ Consequently, “separated from the company by numerous barriers, the shareholder cannot be identified with it”¹⁷ and that “the separation of property rights as between company and shareholder is an important manifestation of this distinction”.¹⁸ Consequently, the forced recovery of debts, even if they are tax debts, cannot, in principle, be enforced against the assets of individuals.
43. The Court further observes that neither the Applicant nor any member of his family was a civil party or was joined to the proceedings that led to the three Supreme Court judgments.
44. The Court notes that in its judgment on reparations of 28 November 2019 issued between the two parties in Application No. 013/2017, it ordered the Respondent State to “take the necessary measures, in particular, to lift forthwith the seizure of the accounts and property of the Applicant and those of members of his family in the context of the tax adjustments in respect of JLR SA, SCI Elite and COMON SA.”¹⁹
45. The Court notes that the seizures of which it ordered a withdrawal were protective seizures and as such, they had the effect of rendering the assets inaccessible and could deprive the Applicant and his family of the means of subsistence.²⁰
46. The Court notes, independently of this situation, that if the seizures had just been conducted on the basis of the three Supreme Court judgments that are binding, they would not only be protective. They would have been for the purpose of dispossessing the owner of the seized assets.

16 ICJ, Barcelona Traction Light Power Company Limited (New Application 1962) (*Belgium v Spain*) (5 February 1970), § 44.

17 *Ibid.* § 41.

18 *Ibid.*

19 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No. 013/2017, Judgment on Reparations (28 November 2019), §§ 108 and 111.

20 *Ibid.* § 110.

47. The Court considers that such seizures will also deprive the Applicant and his family of means of subsistence, which will cause them irreparable harm, whereas neither he nor any member of his family was a party to the proceedings which led to the three Supreme Court judgments.
48. Based on the foregoing, the Court holds that there is an imminent risk of irreparable harm.
49. Given all the above, the Court finds that the conditions set out in Article 27 (2) of the Protocol have been met and that it is appropriate to grant the request for provisional measures to preserve the status quo²¹ pending consideration on the merits.
50. Based on the foregoing, the Court orders the stay of the three judgments of the Supreme Court No. 209/CA (*COMON SA v Ministry of Economy and Finance and two (2) others*) and No. 210/CA (*Societe JRL SA Unipersonnelle v Ministry of Economy and Finance*) of 5 November 2020 and No. 231/CA (*Societe Elite SCI v Ministry of Economy and Finance and 2 others*) of 17 December 2020).
51. 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, the admissibility of the Application and the merits thereof.

VII. Operative part

52. For these reasons:

The Court

By a majority of six (6) votes for and five (5) against, Judges Suzanne Mengue, M-Thérèse Mukamulisa, Blaise Tchikaya, Stella I. Anukam, Imani D. Aboud dissenting:

- i. Orders the stay of execution in respect of Judgments of the Supreme Court of the Respondent State No. 209/CA (*COMON SA v Ministry of Economy and Finance and two (2) others*) and No. 210/CA (*Société JLR SA Unipersonnelle v Ministry of Economy and Finance*) of 5 November 2020, and No. 231/CA (*Société l'Elite SCI v Ministry of Economy and Finance and two others*) of 17 December 2020.
- ii. Report to the Court within thirty (30) days, from the date of notification of this Ruling, on the measures taken to implement the order.

21 *Alfred Agbesi Woyome v Republic of Ghana*, (provisional measures) (24 November 2017) 2 AfCLR 213. § 26;