

## Kante &amp; Ors v Mali (admissibility) (2021) 5 AfCLR 222

Application 006/2019, *Moussa Kante & thirty-nine (39) Others v Republic of Mali*

Ruling, 25 June 2021. Done in English and French, the French text being authoritative.

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

Recused under Article 22: SACKO

Dissatisfied with the delay in their appeal in a domestic labour dispute before the Supreme Court of the Respondent State, the Applicants brought this Application, claiming a violation of their rights arising from alleged manifest unwillingness to render justice to them. The Court held that the Application was inadmissible for failure to exhaust local remedies.

**Admissibility** (exhaustion of local remedies, 31-33; duration of national proceedings, 37)

## I. The Parties

1. Mr. Moussa Kanté and Thirty-nine (39) others<sup>1</sup> (hereinafter referred to as “the Applicants”) are Malian nationals and former workers of *Société africaine d’Etude et de réalisation-Emploi* (The African Research and Employment Company) (hereinafter referred to as “SAER-emploi”). They allege the violation of their rights during legal proceedings initiated following their dismissal by SAER-emploi.
2. The Application is filed against the Republic of Mali (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 on 20 June 2000. The Respondent State also deposited, on 19 February 2010, the Declaration prescribed under Article 34(6) of the Protocol, by which it accepts the jurisdiction of the Court to receive applications filed by individuals and Non-Governmental Organisations having observer status with the African Commission on Human and Peoples’ Rights.

1 See List of Applicants attached.

## II. Subject of the Application

### A. Facts of the matter

3. The Applicants state that they were hired by *SAER-emploi* whose main activity is to recruit workers to be placed at the disposal of certain companies in the mining sector.
4. They aver that following a failed attempt in 2014 to dismiss them, in January 2015, their employer withdrew their access badges to their workplace, even though they had not committed any malpractice and without any document being served on them to that effect, thus preventing them from going about their professional activities. They indicate that they have not received any compensation from their former employer.
5. The Applicants further contend that this action by *SAER-Emploi* violated their contractual relationship and the provisions of the Labour Code. Believing this breach to be prejudicial, they filed a suit, on 19 January 2016, against their former employer before the Sikasso Labour Tribunal to claim their reinstatement and the payment of their back wages.
6. They claim that by Judgment No. 010/JUGT of 11 May 2016, the Tribunal upheld their claims. However, on appeal by *SAER-emploi*, the Court of Appeal of Bamako, by Judgment N°190 of 15 December 2016, declared their action inadmissible.
7. They further aver that by Application No. 62 of 9 November 2017, they filed an appeal in *cassation* at the Supreme Court against the judgment of the Court of Appeal of Bamako and that the Supreme Court was yet to rule on this appeal at the date of their filing of the Application to this Court.
8. They conclude that the Malian justice system demonstrated a manifest unwillingness to render justice to them, which constitutes a clear violation of their fundamental rights.

### B. Alleged violations

9. The Applicants allege the following violations:
  - i. Violation of the right to equality before the law, the right to equal protection of the law, set out in Article 3(1) and (2) of the Charter;
  - ii. Violation of the right to have one's case heard enshrined in Article 7(1)(a) and (b) of the Charter.

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

10. The Application was filed on 21 February 2019. It was served on the Respondent State on 14 June 2019 for its response within sixty (60) days of receipt.
11. The Parties filed their submissions on the merits and on reparations within the prescribed time limits.
12. Pleadings were closed on 16 April 2021 and the Parties were duly notified.

### **IV. Prayers of the Parties**

13. The Applicants pray the Court to:
  - i. Find that the Application is admissible;
  - ii. Find that the Application is well-founded;
  - iii. Order the Respondent State to pay:
    - One billion CFA francs (1,000,000,000) as arrears for their salaries;
    - Ten million CFA francs (10 000 000) to each employee as damages;
    - pay all arrears of INPS (Social security insurance) contributions;
  - iv. Order the issuance of their labour certificates;
  - v. Attach to the decision a fine of two million CFA francs (2,000,000) per day of delay from the date of pronouncement of the decision;
  - vi. Order the provisional execution of the decision on half of the rights to be implemented.
14. The Respondent State prays the Court to:
  - i. Declare the application inadmissible;
  - ii. Declare the application unfounded and dismiss it;
  - iii. Order the Applicants to bear the costs.

### **V. Jurisdiction**

15. The Court notes that Article 3 of the Protocol provides as follows:
  1. 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.
  2. In the event of a dispute whether the Court has jurisdiction, the Court shall decide.

16. Under Rule 49(1) of the Rules of Court,<sup>2</sup> “the Court shall conduct a preliminary examination of its jurisdiction and the admissibility of an application in accordance with the Charter, the Protocol and these Rules”.
17. On the basis of the above-mentioned provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections to its jurisdiction, if any.
18. The Court notes that the Respondent State has not raised any objection to its jurisdiction.
19. After a preliminary examination of its jurisdiction, and having found that there is nothing on the record to indicate that it lacks jurisdiction, the Court concludes that it has:
  - i. Material jurisdiction, insofar as the Applicants allege the violation of Articles 3(1) and (2) and 7(1)(a) and (b) of the Charter which has been ratified by the Respondent State.
  - ii. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration that allows individuals and Non-Governmental organisations with Observer Status with the African Commission on Human and Peoples’ Rights to file cases directly to the Court.
  - iii. Temporal jurisdiction, insofar as the violations were allegedly committed as from January 2015, therefore, after the entry into force of the Charter and the Protocol for the Respondent State and after the deposit of the Declaration.
  - iv. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.
20. Accordingly, the Court holds that it has jurisdiction to hear the Application.

## **VI. Admissibility**

21. Article 6(2) of the Protocol provides that “the Court shall rule on the admissibility of applications taking into account the provisions of Article 56 of the Charter”.
22. Pursuant to Rule 50(1) of the Rules of Court, “the Court shall ascertain the admissibility of an application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules”.<sup>3</sup>

2 Formerly Rule 39(1) of the Rules of 2 June 2010.

3 Formerly Rule 40 of the Rules of 2 June 2010.

**23.** Rule 50(2) of the Rules of Court, which in substance restates Article 56 of the Charter, provides that:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter request anonymity;
- b. Are compatible with the Constitutive Act of the African Union and with the Charter;
- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the African Union;
- d. Are not based exclusively on news disseminated through the mass media;
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
- g. Do not deal with cases that have been settled in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

**24.** The Court notes that the Respondent State has raised an objection to admissibility based on non-exhaustion of local remedies.

**A. Objection based on non-exhaustion of local remedies**

**25.** The Respondent State submits that the requirement of exhaustion of local remedies is an important requirement under Rule 40(5) of the Rules,<sup>4</sup> which provides that Applications should "...be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged".

**26.** The Respondent State draws the Court's attention to the fact that the Applicants have not exhausted the available local remedies insofar as they filed this Application before the Supreme Court ruled on the appeal *in cassation* that they filed against judgment No. 190/16 rendered on 8 November 2017 by the Court of Appeal of Bamako.

**27.** It concludes that the Court should declare the Application inadmissible.

**28.** The Applicants assert, in their response that, by Application No. 62 of 9 November 2017, they lodged an appeal in *cassation*

4 Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.

against the judgment of 15 December 2016.

29. They contend that the appeal in *cassation* in this case is ineffective since the procedure is unduly prolonged. Accordingly, they pray the Court to dismiss the objection raised.

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30. The Court recalls that, in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, applications must be filed after the exhaustion of local remedies, if any, unless it is clear that the proceedings are unduly prolonged.
31. The Court notes that the requirement of exhaustion of local remedies prior to bringing a case before an international human rights court is an internationally recognised and accepted rule.<sup>5</sup>
32. The Court further requires that the local remedies to be exhausted are those of a judicial nature. These must be available, that is, they must be available to the Applicant without hindrance and effective in the sense that they are “capable of satisfying the complainant” or of remedying the situation in dispute. The Court also emphasises that the condition of exhaustion of local remedies is assessed, in principle, as at the date of the institution of proceedings before it.<sup>6</sup>
33. The Court further notes that the compliance with this condition presupposes that the Applicant not only initiates the domestic remedies, but also awaits their outcome.<sup>7</sup>
34. The Court further notes that in the instant case, in order to challenge their dismissal by the *SAER-emploi* company the Applicants brought their case before the Sikasso Labour Tribunal, which rendered judgment No. 10/JUGT of 11 May 2016.
35. Following the appeal lodged by their former employer against this judgment, the Court of Appeal of Bamako rendered, on 15 December 2016, an invalidating judgment No. 190/16 against which the Applicants filed an appeal in *cassation* on 9 November 2017 before the Supreme Court which has jurisdiction to hear appeals in *cassation* against decisions in social matters, pursuant

5 *Yacouba Traoré v Republic of Mali*, ACTHPR, Application No. 010/2018, Ruling of 25 September 2020 (jurisdiction and admissibility), §39.

6 *Idem* § 41 and 42.

7 *Idem* §§ 46 and 47.

to Article 217 of Law No. 92-020 of 23 September 1992 of the Labour Code of Mali<sup>8</sup> and Article 87 of Organic Law No. 2016-046 of 23 September 2016 setting out the organization, rules of procedure of the Supreme Court and the procedure followed before it.<sup>9</sup>

36. The Court notes that the Applicants filed their Application before this Court on 21 February 2019 while their appeal *in cassation* was still pending before the Supreme Court which rendered its decision on 15 December 2020.<sup>10</sup>
37. With regard to the Applicants' argument that proceedings before the Supreme Court were unduly prolonged, the Court recalls that it has considered that the assessment of the nature of the duration of the proceedings relating to local remedies must be carried out on a case-by-case basis, according to the specific circumstances of each case.<sup>11</sup> In its analysis, it "takes into account, in particular, the complexity of the case or of the proceedings relating to it, the conduct of the parties themselves and that of the judicial authorities in order to determine whether or not the latter displayed passivity or definite negligence".<sup>12</sup>
38. In the instant case, the Court notes that the Applicants filed their appeal *in cassation* by Application No. 62 of 9 November 2017 in accordance with Article 133<sup>13</sup> of Law No. 2016-046 of 23 September 2016 on the Organic Law establishing the

8 Article 217 "the Supreme Court shall hear appeals in cassation against final judgments and judgments of the Court of Appeal. The appeal shall be lodged and judged in the forms and conditions provided for by the law on the organization and procedure of the Supreme Court".

9 Article 87: « The Judicial Section shall be the supreme judge of all the decisions rendered in civil, social and criminal and commercial matters by the courts of the Republic, with the exception of disputes relating to the OHADA uniform Acts.

10 Judgment No.93 of 15 December 2020 of the Supreme Court of Mali:  
" The Court  
In the form: Upholds the appeal.  
On the merits: dismisses it.  
Orders the Public Treasury to bear the costs".

11 *Beneficiaries of Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92.

12 See *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (merits) (21 March 2018) 2 AfCLR 237, § 38; *Wilfred Onyango Nganyi and 9 others v Tanzania* (merits), § 136.

13 Article 133: "The declaration of appeal shall be made by a document containing, under penalty of nullity: 1. If the Applicant for cassation: a) is a natural person: his surname, first name, domicile, nationality, date and place of birth; b) is a legal entity: its form, name, registered office and the body that legally represents it; 2. The name, surname and domicile of the Respondent or, if it is a legal entity, its name and registered office; 3. An indication of the impugned decision. The statement shall indicate, where applicable, the points of the decision at issue, to

organisation, the rules of operation of the Supreme Court and the procedure followed before it.

39. The Court notes that while the aforementioned law, in particular, in its article 147,<sup>14</sup> grants a period of thirty (30) days from the appeal to file an additional memorandum containing the submission at the Supreme Court and arguments, a document that sets in motion the investigation of the case, the Applicants submitted their memorandum to the Supreme Court on 8 June 2018,<sup>15</sup> that is, seven (7) months after filing the appeal *in cassation*.
40. The Court holds, therefore, that the Applicants demonstrated some degree of negligence, which lengthened the duration of the proceedings before the Supreme Court. Consequently, what the Applicants allege as undue prolongation of the appeal is attributable to them.
41. In light of the foregoing, the Court finds that the Applicants have not exhausted local remedies. Accordingly, the Application does not meet the requirements of Rule 50(2)(e) of the Rules.
42. Having found the Application inadmissible on the basis of the above mentioned ground, the Court need not examine the other admissibility requirements, as these conditions are cumulative in nature.<sup>16</sup>

## VII. Costs

43. The Applicants did not make any submissions on this point.
44. The Respondent State prays the Court to order the Applicants to bear the costs.

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which the appeal is limited. It shall be signed and accompanied by a copy of the decision”.

- 14 Article 147: “The Advocate for the Applicant in cassation must, under penalty of forfeiture, file with the Registrar’s office of the Supreme Court, at the latest within thirty (30) days from the date of receipt of the case file at this Registrar’s office, a supplemental brief containing the legal grounds invoked against the contested decision, and where applicable, the documents invoked in support of the appeal (...)”.
- 15 See judgment No. 93 of 15 December 2020 of the Supreme Court of Mali.
- 16 *Frank David Omary and Others v United Republic of Tanzania (admissibility)* (2016) 1 AfCLR 383 § 52.



45. Rule 32(2) of the Rules<sup>17</sup> provides that “unless otherwise decided by the Court, each party shall bear its own costs”.
46. Based on the above provisions, the Court decides that each party shall bear its own costs.

### **VIII. Operative part**

47. For these reasons,  
The Court,  
*Unanimously,*  
*On jurisdiction*

- i. *Declares* that it has jurisdiction.

*On admissibility*

- ii. *Upholds* the objection to admissibility based on the non-exhaustion of local remedies;
- iii. *Declares* the Application inadmissible.

*On costs*

- iv. *Orders* that each Party shall bear its own costs.

17 Formerly Rule 30(2) of the Rules, 2 June 2010.