Noudehouenou v Benin (provisional measures) (2021) 5 AfCLR 139

Application 032/2020, *Houngue Eric Noudehouenou 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

Alleging that the delivery by a domestic court, of a judgment which threatened his right to property without notice to him, in a case in which he voluntarily intervened was in violation of his rights, the Applicant brought an Application before the Court. The Applicant further filed a request for provisional measures to stay execution of the impugned domestic judgment. The Court dismissed the request for provisional measures on the grounds that the urgency of the request was not established.

Jurisdiction (*prima facie*, 15-16, 20; effect of withdrawal of Declaration 18-19)

Provisional measures (urgency, 33; irreparable and imminent risk, 33; irreparable harm, 34-40)

I. The Parties

1. Mr Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin. He seeks the stay of execution of the Judgment in a civil suit delivered against him on 5 June 2018, by the Cotonou Court of First Instance (hereinafter referred to as the "Cotonou CFI").

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 organizations. 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 or 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 the main Application, the Applicant alleges that on 5 June 2018, following a civil suit in which he had voluntarily intervened, the Cotonou CFI delivered a judgment without his knowledge on 5 June 2018. According to him, this judgment, which was never served on him, deprived him of his right to property.

4. This judgment was delivered between the Houngue Gandji group on the one hand, and Akobande Bernard, Mrs Anne Pogle, née Kouto, and Kouto Gabriel, on the other. The Applicant, the Djavac association and the Hounga group intervened voluntarily as third-parties in these proceedings. The operative part of the judgment, inter alia, reads as follows:

For these reasons,

- Ruling publicly, adversarialy, in a civil matter on land and state property law and in the first instance;
- Validates the framework agreement dated 4 October 2016, the amicable settlement dated 4 April 2016 and the minutes dated 4 May 2017 and makes them enforceable;
- Acknowledges that Houngue Gandji group has withdrawn its action;
- Notes that Mrs Anne Pogle née Kouto and Gabriel Kouto are presumed owners of the plots "S" of Lot No. 3037 of Agla estate, plotted under number 1392 and "R" of Lot No. 3037 of Agla estate, plotted under number 1462 F;
- Notes that the DJA-VAC association represented by Koty Bienvenue acquired landed property of 4ha 62a 58ca from the Houngue Gandji group;
- Confirms the property rights of: Pedro Julie on Plots Numbers 403h and EL 404h at Agla estate;
- Mrs Anne Pogle, née Kouto on Plot "S" of Lot 3037 of Agla estate, under number 1392 F;
- Kouto Gabriel on Plot "R" of lot 3037 of Agla estate under number 1462 F;
- DJA-VAC association on land the size of 4ha 62a 58ca;

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*** ACHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020.

- Dismisses the Application by Trinnou D. Valentin, Houenou Eleuthère, Alphonse Adigoun and Houngue Eric and orders them to pay costs;
- Notifies the parties that they have a period of one (01) month to appeal.

5. He submits that he is filing the instant Application for provisional measures for this Court to order all necessary measures, notably, the stay of execution of the said judgment.

III. Alleged violations

6. The Applicant alleges the violation of the following rights:

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

ii. The rights to equality before the law and to equal protection of the law, protected by Article 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, protected 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

7. The Applicant filed an Application on 15 October 2020. On 20 October 2020, the Application was served on the Respondent State, which was given a time limit of ninety (90) days to file its response.

8. On 16 December 2020, the Applicant filed the instant Application for provisional measures which was duly served on the Respondent State with a time limit of fifteen (15) days from the date of receipt to file its response**.**

9. As of 14 January 2021, when the time for filing the response to the Application for provisional measures elapsed, the Registry had not received the response of the Respondent State.

V. *Prima facie* jurisdiction

10. The Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 51 of the Rules of Court (hereinafter referred to as "the Rules")[2] that in matters of provisional measures, the Court need

2 This Article of the former Rules of 2 June 2020 corresponds to Rule 59 of the new Rules which came into force on 25 September 2020.

not be satisfied that it has jurisdiction on the merits of the case but merely that it has *prima facie* jurisdiction.

11. Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as the Republic of Benin has ratified the African Charter, the Protocol and deposited the Declaration provided for in Article 34 (6) thereof; and insofar as he alleges violations of rights protected by human rights instruments.

12. He adds that although the Respondent State withdrew its Declaration on 25 March 2020, this withdrawal only becomes effective on 26 March 2021.

13. The Respondent State did not respond to this point.

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14. 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.

15. Furthermore, Rule 49(1) of the Rules provides that "[t]he 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]

16. In the instant case, the rights the Applicant alleges to have been violated are all protected by the Charter and the ICCPR, instruments to which the Respondent State is a Party.

17. The Court further notes that the Respondent State has ratified the Protocol and deposited the Declaration under Article 34(6) of the Protocol.

18. The Court notes, as stated in paragraph 2 of this Ruling, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of its Declaration pursuant to Article 34 (6) of the Protocol.

19. The Court also recalls that it has held that the withdrawal of a Declaration has no retroactive effect on pending cases and has

3 *Ghati Mwita v Republic of Tanzania,* ACHPR, Application No. 012//2019, Ruling of 9 April 2020 (provisional measures), § 13.

no bearing on new cases filed before the withdrawal comes into effect,[4] as is the case in the instant case. The Court reiterated its position in its Ruling of 5 May 2020 *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 the said withdrawal has no bearing on its personal jurisdiction in the instant case.

20. The Court finds that it has *prima facie* jurisdiction to hear the instant Application for provisional measures.

VI. Provisional measures sought

21. The Applicant prays the Court to order "the stay of execution of the judgment of the Cotonou CFI" as well as "all other measures to preserve the efficacy of the judgment on the merits. […] so as to avoid irreparable harm which may result from the violation of his basic rights […] in the event of the execution of the said judgment."

22. The Applicant submits that the fact that he brought proceedings before the Court sixteen (16) months after the delivery of the impugned judgment of which he is seeking a stay of execution is due to several factors which, according to him, constitute urgency and irreparable harm.

23. He asserts that he was arbitrarily deprived of the knowledge and enforceability of the judgment of 5 June 2018, pointing out that the Respondent State has not proved that he was informed of the judgment date. According to him, there is urgency since 5 December 2019, the date on which the six (06) month notification period elapsed, as provided for in Article 547 of the Civil Procedure Code (CPC).

24. He further notes that he could not bring the matter before the Court until 7 September 2020, the date on which he was informed by a third party of the existence of the judgment of the Cotonou CFI which, according to him, became enforceable because the time limit for filing an appeal, pursuant to Article 621 of the CPC,

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

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

had elapsed.

25. He notes that "the beneficiaries of the Cotonou CFI judgment never notified him", contrary to the provisions of Articles 570,[6] 57[7] and 70[8] of the Civil Procedure Code. He specifies that "he cannot know their identity since he does not have the means to hire the services of a bailiff".

26. He further submits that the Respondent State's refusal to enforce the decisions handed down by this Court, that is, the Rulings on provisional measures of 6 May[9] and 25 September 2020,[10] and the Judgment of 4 December 2020[11] show that the irreparable nature of the harm is not hypothetical. Similarly, he points out

6 This article provides that: "Unless execution is voluntary, judgments may not be enforced against those against whom they are opposed until eight (08) days after they have been notified".

7 This article states that: "Notification done by a bailiff is valid. Notification may always be made otherwise even if the law provides for it in another form.

8 This article provides that: "The bailiff may not act in cases which personally concern his parents, his spouse and his direct lineal allies, his parents and his collateral allies up to the level of cousin from first cousin inclusively, on pain of the annulment of the act, by implementation of articles 197 and 198 of the present code".

9 The operative part of this Ruling of 6 May 2020 issued in Application 004/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, reads, inter alia, as follows: " i. Orders the Respondent State to stay the execution of the judgment of 25 July 2019 of the Court for Repression of Economic Crimes and Terrorism against the Applicant, Houngue Eric Noudehouenou, until the final judgment of this Court is rendered on the merits; ii. Requests the Respondent State to report on the implementation of this Order within fifteen (15) days of receipt; iii. Dismisses all other prayers made".

10 The operative part of this Ruling of 25 September 2020 issued in Application 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* reads, inter alia, as follows: " i. Orders the Respondent State to take all necessary measures to effectively remove any administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming presidential election in 2021; ii. Dismisses all the other measures requested; iii. Orders the Respondent State to report to the Court within thirty days of notification of this Ruling, on the measures taken to implement the order".

11 The operative part of this Judgment in Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* reads, with regard to reparations, as follows: "xii. Orders the Respondent State to take all measures to repeal Law 2019-40 of 1 November 2019 revising Law 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws to guarantee that its citizens will participate freely and directly, without any political, administrative or judicial obstacles, before any election, without repetition of the violations found by the Court and under conditions respecting the principle of presumption of innocence; xiii. Orders the Respondent State to comply with the principle of national consensus enshrined in Article 10(2) of the ACDEG for any constitutional revision; xiv Orders the Respondent State to take all measures to repeal Inter-Ministerial Decree No. 023/MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019; xv Orders the Respondent State to take all measures to put an end to all the effects of the constitutional revision and the violations for which it has been found responsible by the Court; [...] xvi. Orders the Respondent State to submit to the Court, within three (3) months from the date of notification of the present judgment, a report on the measures taken to implement paragraphs xii to xv of the [...] operative part".

that in its response of 18 September 2020, filed in another case he brought against the Respondent State, the latter claimed immunity from enforcement.

27. The Applicant further notes that the continued enforcement of the judgment of 5 June 2018 will cause him unquestionable irreparable harm in relation to his rights protected by Articles 1, 2, 5, 7, 14, 17 and 18 of the Charter, Articles 26 and 27 of the Protocol, 1(h) of the Protocol of the Economic Community of West African States on Democracy, Articles 2, 7, 14(1), 18 and 26 of the ICCPR.

28. He points out that Article 34 of the Respondent State's Land Code deprives him of the right to enjoy his right to property even if the Court decides in his favour on the merits, thus nullifying his rights protected by Article 27(1) of the Protocol, Article 2(3) of the ICCPR and Article 7(1) of the Charter.

29. He further explains that in relation to his right to freedom of worship protected by Article 18 of the ICCPR, he will suffer irreparable harm if the Judgment of the Cotonou CFI is enforced; since, based on his religious and personal convictions regarding the spiritual functions and virtues of land, he can only sell his property to persons who share his faith, whereas Articles 528(1) and (5) and 530 of the Property Law of the Respondent State compel him to sell his property to unknown persons.

30. He adds that these same provisions are inconsistent with Article 17(2) of the Charter, which protects his right to freely take part in the cultural life of his community, since his property is ancestral land and for this reason must only be sold among members of the tribe.

31. Finally, the Applicant emphasises that the requested measure is in the interest of the parties and of the work of the judiciary, since continuing the execution of the judgment will cause him irreparable harm in relation to his right to equality of the parties pursuant to Articles 14(1) and 26 of the ICCPR, 3 and 7 of the Charter.

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32. The Court notes that Article 27(2) of the Protocol provides that:

> [i]n 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.

33. The Court recalls that urgency, which is consubstantial with extreme gravity, means an "irreparable and imminent risk that an irreparable harm will be caused before it renders its final judgment".[12] The risk in question must be real, which excludes a purely hypothetical risk and which explains the need to cure it immediately.[13]

34. With respect to 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.[14]

35. The Court notes that the two conditions required under the above-mentioned Article, that is, extreme gravity or urgency and irreparable harm are cumulative, to the extent that where one of them is absent, the measure requested cannot be ordered.

36. The Court notes that in the instant case, urgency must result from the imminence of execution of the Cotonou CFI judgment. This imminence can be inferred from its binding nature.

37. The Court notes that the decision of the Cotonou CFI is an adversarial judgment rendered at First Instance[15] which is binding only if its execution is temporary or if it is established that it is not subject to suspensive remedies.[16]

38. In this regard, the Court notes that on the one hand, it is not stated with regard to the judgment of the Cotonou CFI that its execution will be temporary.[17]

39. On the other hand, the only suspensive remedy which, in the instant case, could be lodged is an appeal. The absence of this remedy must, in principle be attested to by a certificate of non-appeal, issued by the Registry of the court before which it should have been filed.[18] In the instant case, the Applicant has not brought any such proof.

40. It follows from the foregoing that the judgment of the Cotonou CFI is not binding, such that the risk of the harm cited occurring is

12 *Sébastien Ajavon v Republic of Benin,* ACtHPR, Application No. 062/2019, Ruling of 17 April 2020 (provisional measures), § 61.

13 *Ibid*, § 62.

14 *Ibid*, § 63.

15 See § 4 of this Ruling;

16 Article 571 of CPCCSAC provides: "The enforceability of the judgment is proven by the judgment itself even if it is not subject to suspensive appeal or is provisionally enforced".

17 *Ibid*.

18 Article 572 of CPCCSAC provides: "Any party may have a certificate issued by the registry of the court before which the appeal could be lodged attesting to the absence of opposition, appeal or cassation (...)".

not imminent. This means that the condition of urgency required under Article 27(2) has not been met.

41. Accordingly, without the need to determine the existence of irreparable harm, the Court dismisses the Applicant's request for provisional measures.

42. For the avoidance of doubt, the Court reiterates 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

43. For these reasons

The Court

Unanimously,

i. *Dismisses* the request for provisional measures.