

Abess v Tunisia (striking out) (2022) 6 AfCLR 226

Application 026/2018, *Mohamed Ali Abess v United Republic of Tunisia*
Order, 23 June 2022. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: BEN ACHOUR

The Applicant, a former Presidential aspirant in the Respondent State, filed an Application alleging that the rejection of his candidacy and the promulgation of certain laws by the Respondent State were a violation of some of his Charter guaranteed rights. After the Response of the Respondent State was served on him, the Applicant failed to respond to communications from the Court's Registry, despite several reminders. Applying its Rules, the Court ordered the case to be struck out.

Procedure (striking out, 18-22, diligence in prosecuting application 27-29)

I. The Parties

1. Mr. Mohamed Ali Abess (hereinafter referred to as “the Applicant”) is a Tunisian national and an advocate at the Tunisian Court of Cassation. He challenges the rejection of his candidacy for the 2014 Tunisian presidential election and accuses the Republic of Tunisia of several violations of his rights and freedoms.
2. The Application is filed against the Republic of Tunisia (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 5 October 2007. Furthermore, on 16 April 2017, it deposited with the Chairperson of the AU Commission, the Declaration provided for under Article 34(6) of the Protocol by which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the Application that, the Applicant submitted his candidacy to run for the Tunisian presidential elections of

23 November 2014. On 29 September 2014, the Independent High Authority for Elections, *Instance Supérieure Indépendante pour Les Élections* issued a decision rejecting his candidacy. The ISIE based its decision on the ground that his candidacy failed to garner the required number of endorsements, pursuant to the provisions of the Organic Law on Elections and Referendums N° 16 of 26 May 2014.

4. Furthermore, it emerges from the record that the Applicant filed before domestic courts four (4) cases that the judiciary of the Respondent State allegedly failed to settle: i) complaint against the former President of the Republic Mohamed Beji Caid Essebsi in 2013 before the Court of First Instance of Tunis ii) complaint against the preliminary results of the elections of the Supreme Judicial Council in 2016, iii) complaint against the decision of the Speaker of the Assembly of People's Representatives to convene the meeting of the Supreme Judicial Council on 25 April 2017, and iv) complaint against holding of parliamentary by-elections for Tunisians residing in Germany in 2017, all before the Administrative Tribunal of Tunisia.
5. The Applicant also challenges the constitutionality of the two organic laws on the Supreme Judicial Council n° 34/2016 and 19/2017, as well as the organic law on reconciliation in the administrative field n°49/2015 of 2017 and on the non-establishment of the Constitutional Court.
6. He further challenges the continued membership of Judge Rafaâ Ben Achour at this Court.

B. Alleged Violations

7. The Applicant alleges the violation of the following rights:
 - i. right to enjoy rights and freedoms without discrimination under Article 2 of the Charter;
 - ii. right to equality before the law and the right to equal protection of the law under Article 3 of the Charter;
 - iii. right to a fair and impartial judiciary under Article 7 of the Charter;
 - iv. right to freely participate in the conduct of public affairs under Article 13 of the Charter;
 - v. Article 18 of the Protocol and Rule 5 of the Rules by virtue of the presence of Justice Rafaâ Ben Achour as a member of this Court;

- vi. right to equality before Courts and tribunals under Article 14 of the International Covenant on Civil and Political Rights.¹
 - vii. right to equal voting and to stand for election under Article 25 of the International Covenant on Civil and Political Rights.
8. It is also the Applicant's averment that the Respondent State's conduct also violates articles 21, 74, 102, 108, 109 of its own Constitution.

III. Summary of the Procedure before the Court

9. The Application was received at the Registry on 12 October 2018. On 19 October 2018, the Applicant was requested to submit copies of judgments rendered by domestic courts within thirty (30) days of receipt of the notification.
10. On 18 December 2018, 4 February and 11 March 2019, the Registry sent reminders to the Applicant to comply with the request to submit copies of judgments of domestic courts, within a period of thirty (30) days from receipt of each reminder. The Applicant did not submit the said documents.
11. On 10 May 2019, the Registry served the Application on the Respondent State and on 14 June 2019, it was notified to the other entities listed under Rule 42(4) of the Rules.²
12. The Respondent State filed the Response to the Application on 22 July 2019 and this was served on the Applicant on 30 August 2019, with a request to file his Reply within thirty (30) days of receipt. The Applicant did not respond to this request.
13. On 2 December 2019 and 5 February 2020, the Registry reminded the Applicant of the expiration of the period provided to file his Reply and with each reminder he was provided an additional period of thirty (30) days to file the said Reply. The Applicant did not respond to this request.
14. On 10 November 2020, the Registry granted the Applicant an additional period of ten (10) days to file his Reply and to submit supplementary documents. The Applicant did not respond.

1 The Respondent State acceded to the International Covenant on Civil and Political Rights on 18 March 1969.

2 Rule 35(3) of the Rules of Court of 2 June 2010.

IV. Prayers of the Parties

15. The Applicant prays the Court to:
- i. Remove the Tunisian judge, Justice Rafaâ BEN ACHOUR from the African Court on Human and Peoples' Rights for lack of impartiality.
 - ii. Order the Respondent State, through the legal representative of the *Instance Supérieure Indépendante pour Les Élections* (ISIE), to issue a decision annulling the presidential elections of November and December 2014 and to include the Applicant in the list of candidates for the presidential elections and to organise fresh presidential elections as soon as possible;
 - iii. Order the Respondent State, to pay him Twenty Thousand (20,000) Tunisian dinars as reparation for moral prejudice he suffered for depriving him of his right to run in the presidential election;
 - iv. Order the Respondent State, to pay him the sum of One Million (1,000,000) Tunisian dinars as reparation for the rejection of his candidacy for the 2014 presidential elections;
 - v. Order the Respondent State to pay him One Hundred Thousand (100,000) Tunisian dinars, for litigation fees, attorney's fees, transport and living expenses, and to order the Respondent State to bear the legal costs.
16. The Respondent State on its part prays the Court to find:
- i. That the Applicant failed to prove any human right that has been violated within the Respondent State for which he has brought proceedings before this Court, which puts his case out of the Court's jurisdiction;
 - ii. That the Application infringes on the national sovereignty of the Respondent State.
 - iii. That the Application is inadmissible and accordingly dismiss it.

V. On the striking out of the Application

17. The Court notes that the relevant Rule on striking out of Applications is Rule 65(1) of the Rules, which provides that:
- The Court may at any stage of the proceedings decide to strike out an Application from its cause list where:
- a. An Applicant notifies the Court of his/her intention not to proceed with the case;
 - b. An Applicant fails to pursue his case within the time limit provided by the Court;
 - c. It, for any other reason, concludes that it is no longer justified to continue with the examination of the Application.

18. The Court observes that parties to an application should pursue their case with diligence.³ Where they fail or indicate, implicitly or explicitly, their lack of interest to do so, Rule 65 allows the Court to remove the application from its cause list. The Court may also decide to strike out an application *suo motu* if in the circumstances, it is no longer justified to continue with the determination of the matter.
19. The Court recalls that the rationale behind Rule 65 is to save the Court's resources from being unnecessarily expended or wasted on matters the consideration of which will not serve the interests of justice.⁴ As such, the provision encourages parties to demonstrate some level of diligence in pursuing their case or else their application risks being strike out from the Court's cause list.⁵
20. Subject to the circumstances of each case, the Court retains the discretion to decide on whether a particular application should be struck out or not.⁶
21. In the instant case, the Applicant filed his Application on 12 August 2018. The Registry, while reviewing his Application, noticed that some documents supporting the Applicant's allegations of violations of human rights were missing. Subsequently, on 19 October 2018, the Registry requested the Applicant to submit the missing documents, notably, copies of judgments of national courts within thirty (30) days of receipt of the notice.
22. The Applicant having failed to do so, the Registry sent reminders to the Applicant on 18 December 2018, 4 February 2019 and 11 March 2019, requesting him to submit the aforesaid copies of judgments of domestic courts, within a period of thirty (30) days from receipt of each reminder.
23. In the meantime, the Registry served the Application on the Respondent State on May 2019, pending the filing of the said documents by the Applicant. The Respondent State filed its Response on 22 July 2019 and this was transmitted to the Applicant on 30 August 2019, with a request to file his Reply within thirty (30) days of receipt. The Applicant did not respond to this request
24. The Registry again reminded the Applicant of the expiration of the period provided to file his Reply on 2 December 2019 and

3 *Abdallah Ally Kulukuni v the United Republic of Tanzania*, Application No 007/2018 Order (strike out) of 25 September 2020, § 18.

4 *Magweiga Mahiri v the United Republic of Tanzania*, Application No 029/2017, Order (strike out) of 24 March 2022, § 22.

5 *Ibid.*

6 *Ibid*, § 23.

5 February 2020, and with each reminder he was provided an additional period of thirty (30) days to file his Reply. The Applicant has never reacted to the various requests.

25. The Court notes, as can be seen from the preceding paragraphs, that despite several requests and extensions of time granted to the Applicant to file the documents supporting his Application and his Reply to the Respondent State's Response, the Applicant has failed to do so.
26. In this regard, the Court notes from the record that there are proofs of delivery of the notices sent to the Applicant. Accordingly, the Applicant's failure to respond to the requests cannot be attributed to the non-receipt of the notices but to his lack of due diligence in pursuing his Application.
27. The Court observes that, as the lawyer he is, the Applicant should have known the importance of pursuing his matter with due diligence by actively participating in the proceedings of the Court, including by adducing evidence to substantiate his allegations and responding to the Court's requests for additional information within the prescribed time. Nevertheless, as noted above, the Applicant repeatedly failed to comply with the Court's requests without providing reasons justifying his inaction.
28. In view of the circumstances, the Court thus concludes that Applicant has failed to pursue his case within the meaning of Rule 65(1)(b) of the Rules and thus, the Court decides to strike out the instant Application from its Cause List.
29. The Court notes that, the striking out of the Application is without prejudice to the Applicant's right to file a new application in accordance with Rule 65(3) of the Rules.

VI. Operative part

30. For these reasons,
The Court
Unanimously,
Strikes out the Application from its Cause List.