

Kodeih & Anor v Benin (ruling) (2022) 6 AfCLR 296

Application 008/2020, *Ghaby Kodeih and Nabih Kodeih v Republic of Benin*

Ruling, 23 June 2022. Done in English and French, the French text being authoritative.

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

The Applicants, who are citizens of the Respondent State, brought this Application alleging that their trial and conviction by administrative and judicial authorities in the Respondent State were a violation of their human rights. Upholding the objection by the Respondent State, the Court held that the Applicants had not exhausted local remedies before bringing their Application. Accordingly, the Court declared the Application inadmissible.

Jurisdiction (material jurisdiction, 28-30, withdrawal of Declaration 33)

Admissibility (exhaustion of local remedies, 50-57)

I. The Parties

1. Mr Ghaby Kodeih and Mr Nabih Kodeih (hereinafter referred to as “the Applicants”) are nationals of the Republic of Benin. They allege the violation of their rights as a result of judicial and administrative proceedings brought against them.
2. The Application is filed 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. On 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”) by virtue of which it accepted the jurisdiction of the Court to receive applications directly from individuals and Non-Governmental Organizations. On 25 March 2020, the Respondent State deposited with the African Union Commission, an instrument of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and new cases filed before the entry into force of the withdrawal, one year after its deposit, that is, on

26 March 2021.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that the Cotonou City Council issued the Applicants with a building permit² to build a four-storey hotel named “RAMADA” on a parcel of land registered under No 6063 in the Cotonou Land Register, located in the Djoméhountin neighbourhood.
4. The Applicants aver that the hotel project, initially for four (4) floors, was modified to reach eight (8) floors and to this end, *Laboratoire d'Essais et de Recherches en Génie Civil* (LERGC), a public limited company, carried out soil and structure studies, the results of which are recorded in a report dated 12 April 2017.³
5. The Applicants aver that on 31 January 2017,⁴ the Cotonou City Council suspended work on the hotel project for lack of a building permit covering the eight (8) floors. On 18 May 2017, the Applicants applied to the said City Council for another building permit in respect of the eight (8) floors. The Applicants submit that on 31 May 2017, the National Commission in charge of examining building permit applications assessed their application and requested additional documents, which were subsequently submitted.
6. The Applicants further aver that owing to the fact that the building was exposed to corrosion and deterioration, they sent several letters to the Ministry of the Living Environment and Development seeking its approval to resume work. However, there was no response to these letters.
7. They note that they were in this situation when the Cotonou City Council carried out compliance checks on 5 June 2019 and concluded that there were several irregularities on the building under construction, notably, that it had eight (8) floors instead

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

2 Building Permit No 2015/No 0094/MCOT/SG/DSEF/DAD/SAC of 6 July 2015.

3 Report n°001/04/17/LERGC/RE/A of 12 April 2017: geotechnical study as part of the construction of an R+8 type building with basement on plot Land title 6063 located in Djomehountin, Cotonou.

4 Minutes of suspension of works notification of 31 January 2017.

of the four (4) authorised and the substantial modification of the access ramp to the car park, the staircases as well as the openings of the building.

8. The Applicants aver that they were summoned by the Public Prosecutor, on 12 June 2019 to appear before the Cotonou Court of First Instance for the offence of failure to comply with the terms of the building permit and to attend the hearing of an Application for the demolition of the building under construction. The Applicants contend that they were summoned, without having been given prior notice to take compliance measures pursuant to Article 49 of Decree No 2014-205 of 13 March 2014 governing the issuance of building permits in the Republic of Benin, and while their building permit had not been cancelled.
9. They further aver that on 27 September 2019, by Judgment No044/3rd CD (hereinafter referred to as “the judgment of 27 September 2019”), the court found them guilty of the above-mentioned offence and sentenced them to a fine of West African CFA Franc Five Hundred Thousand (FCFA 500,000). The court also issued an order for the demolition of the building.
10. On 1 October 2019, the Applicants appealed against the judgment of 27 September 2019 before the Cotonou Court of Appeal, which upheld the judgment on 24 March 2020.

B. Alleged violations

11. The Applicants allege a violation of the following rights:
 - i. the right to a fair trial, protected by Article 7(2) of the Charter;
 - ii. the right to property, protected by Article 14 of the Charter;

III. Summary of the Procedure before the Court

12. On 17 February 2020, the Applicants filed the Application and a request for provisional measures. These were served on the Respondent State on 25 February 2020 for its response to the request for provisional measures within eight (8) days and the Application on the merit, sixty (60) days, from the receipt of the notification.
13. On 28 February 2020, the Court issued a Ruling for provisional measures, the operative part of which reads as follows:
 - i. stay the execution of judgement No 04413è CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou which ordered the demolition of the building pending consideration of the merits of the case by this Court.

- ii. report to the Court within fifteen (15) days as from the date of receipt of this Order, on measures taken to implement the Order.
- 14. The Parties filed their pleadings on the merits and reparations within the stipulated time limits.
- 15. Pleadings were closed on 28 March 2022 and the Parties were duly notified.

IV. Prayers of the Parties

- 16. The Applicants pray the Court to:
 - i. Declare that it has jurisdiction;
 - ii. Declare the Application admissible;
 - iii. Declare that the Republic of Benin violated Articles 7(2) and 14 of the African Charter on Human and Peoples' Rights;
 - iv. Order the annulment of Judgment No44/3/CD of 27 September 2019 rendered by the Court of First Instance of Cotonou;
 - v. Serve notice to the Applicants to produce evidence of the harm he suffered, certified by experts;
 - vi. Order the State of Benin to pay to them the sum of 20 000 000 000 FCFA as damages;
 - vii. Order the Republic of Benin to report to the Court on the implementation of the decision to be taken within such time as the Court may determine;
 - viii. Order the Republic of Benin to pay the costs.
- 17. The Respondent State prays the Court to:
 - i. Find that there is no violation of the human rights alleged to have been violated;
 - ii. Find that the Applicants seek the annulment of Judgment No Judgment No44/3/CD of 27 September 2019 rendered by the Court of First Instance of Cotonou.
 - iii. Find that the Court itself has already ruled that it is not an appellate court of decisions rendered by domestic courts;
 - iv. Find that the Court lacks jurisdiction;
 - v. Consequently, declare that it lacks jurisdiction.
 - vi. Find that at the time of hearing the Application, local remedies had not been exhausted before the parties brought the case before the African Court;
 - vii. Find that local remedies are available, effective and offer a chance of success;
 - viii. Consequently, declare Mr. Ghaby Kodeih and Mr Naby Kodeih's Application inadmissible.
 - ix. Find that there has never been a violation of the right to a fair trial.

- x. Find that the offence of non-compliance with the terms of a building permit is constituted in relation to the Applicants.
- xi. Find that the demolition of the building ordered by the judge is a sanction provided for by Decree 2014-2015 of 13 March 2014 governing building permits in the Republic of Benin.
- xii. Find that the Respondent State has not violated Article 7(2) of the African Charter on Human and Peoples' Rights.
- xiii. Find that the Respondent State has not violated the property rights of the Applicants and therefore has not violated the provisions of Article 14 of the African Charter on Human and Peoples' Rights.
- xiv. Find that the Applicants adduce no evidence of the harm allegedly suffered owing to the actions of the Respondent State;
- xv. Find that the Respondent State did not commit any fault that resulted in any harm requiring any compensation;
- xvi. Declare that there is no ground for compensation;
- xvii. Consequently, purely and simply dismiss the Application by Mr Ghaby Kodeih and Mr Naby Kodeih.

V. Jurisdiction

18. Article 3 of the Protocol provides:

- 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 as to whether the Court has jurisdiction, the Court shall decide.

19. Furthermore, according to Rule 49(1) of the Rules of Court, "The Court shall conduct preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules".⁵

20. Based on the above-mentioned provisions, the Court must, for every application, examine its jurisdiction and rule, where appropriate, on any objections to its jurisdiction.

21. The Court notes that the Respondent State raises an objection to the Court's material jurisdiction.

A. Objection to material jurisdiction

22. The Respondent State notes that the Applicants seek the annulment of the judgment of 27 September 2019. The Respondent State contends that this request amounts to asking the Court to challenge the decisions of its domestic courts.

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

23. It contends that the Court would effectively be exercising appellate jurisdiction, whereas according to its jurisprudence, in particular the judgment – in *Alex Thomas v United Republic of Tanzania*, it is not an appellate court with regard to domestic courts. Accordingly, the Respondent State requests the Court to find that it lacks jurisdiction.
24. The Applicants contend that when a court decision is in itself a violation of human rights, the Court, which has a mandate to protect the human rights of citizens, has no choice but to intervene and denounce the violation.
25. They submit that it is not a question of reviewing the legality of a decision rendered by a domestic court but of finding a clear violation of human rights contained in a judicial act. They further contend that while the Court cannot assess the proper application of domestic law by national judges, it retains jurisdiction to identify human rights violations even when they emanate from a decision of domestic courts.
26. The Applicants consider that, in the instant case, the Court has jurisdiction to assess whether the judgment of 27 September 2019 was consistent with the requirements of the Charter and any other international human rights instrument.

27. The Court considers that, under Article 3(1) of the Protocol, it has jurisdiction to hear all cases brought before it insofar as they relate to alleged violations of the Charter, the Protocol and any other human rights instrument ratified by the Respondent State.⁶
28. The Court recalls, in accordance with its jurisprudence “that it is not an appellate body with respect to the decisions of national courts”. However, “this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or with any other human rights instrument ratified by the

6 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465 § 45; *Kennedy Owino Onyachi and another v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65 § 34-36; *Jibu Amir aka Mussa and another v United Republic of Tanzania* (merits and reparations) (28 November 2019), 3 AfCLR 629, § 18; *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No 008/2016, Judgment of 25 June 2021 (merits and reparations) § 21.

State concerned.⁷

29. The Court observes that in the instant case, the Applicants allege a violation of the right to a fair trial and the right to property protected by Articles 7(2) and 14 of the Charter, respectively, the interpretation and application of which fall within its material jurisdiction.
30. Accordingly, the Court is not called upon to sit as an appellate court but rather to act within its material jurisdiction. It follows that the objection raised by the Respondent State cannot be upheld.
31. Accordingly, the Court finds that it has material jurisdiction to hear the instant case.

B. Other aspects of jurisdiction

32. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in accordance with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction have been fulfilled before proceeding with the Application.
33. As regards its personal jurisdiction, the Court notes that, the Respondent State is a party to the Charter and the Protocol, and it deposited the Declaration. The Court recalls, as it has stated in paragraph 2 of this Ruling that, the Respondent State deposited the instrument of withdrawal of the Declaration on 25 March 2020. In this regard, the Court recalls its jurisprudence according to which the withdrawal by the Respondent State of its Declaration has no retroactive effect and has no bearing on cases pending at the time of the withdrawal or new cases filed before the withdrawal takes effect, twelve (12) months after its deposit, that is, on 26 March 2021. Accordingly, the withdrawal has no bearing on the instant Application, as the Application was filed before the withdrawal of the Declaration took effect.⁸
34. With regard to temporal jurisdiction, the Court finds that it has been established, because the alleged violations occurred, after the Respondent State became a party to the Charter, the Protocol and had deposited the Declaration.

⁷ *Kenedy Ivan v United Republic of Tanzania* (merits) (March 2019), 3 AfCLR 48 § 26; *Armand Guéhi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018), 2 AfCLR 287 § 35.

⁸ See paragraph 2 of this Ruling.

35. As regards its territorial jurisdiction, the Court finds that it has jurisdiction insofar as the facts of the case and the alleged violations took place in the Respondent State's territory.
36. Accordingly, the Court finds that it has jurisdiction to consider the Application.

VI. Admissibility

37. Article 6(2) of the Protocol provides that "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".
38. According to Rule 50(1) of the Rules of Court,⁹ "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".
39. Rule 50(2) of the Rules of Court, which restates in substance the provisions of Article 56 of the Charter, provides:
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 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 the Commission is seized with the matter, and
 - g. Do not deal with cases which have been settled by those States involved 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.
40. The Court notes that the Respondent State raises an objection to the admissibility of the Application based on non-exhaustion of local remedies.

9 Article 40 of the Rules of 2 June 2010.

A. Objection based on non-exhaustion of local remedies

41. The Respondent State contends that the requirement of exhaustion of local remedies under Article 56(5) of the Charter and Rule 40 of the Rules of Court¹⁰ implies that a case concerning the violation of human rights must be heard at all levels of domestic courts before being brought before the Court.
42. It notes, in the instant case, that although the Applicants appealed the High Court judgment of 27 September 2019 before the Cotonou Court of Appeal, pursuant to Article 509 of the Criminal Procedure Code, Law No 2012-15 of 18 March 2013, they filed their Application before this Court without awaiting the outcome of the appeal proceedings. They state that the Cotonou Court of Appeal ruled on its appeal by Decision No066/1CC/20 of 24 March 2020.
43. The Respondent State finds that in the instant case the Application was submitted before the exhaustion of local remedies and must therefore be declared inadmissible.

44. The Applicants argue that the requirement to exhaust local remedies implies, *inter alia*, that the available judicial remedies are effective.
45. They submit that in the instant case, the local remedies are ineffective due to the fact that domestic courts lack independence because of the massive intrusion of the executive power in the High Judicial Council (hereinafter “HJM”) as a result of the new Article 1 of Organic Law No 2018-02 relating to the HJM, which calls into question the principle of separation of powers and the independence of the judiciary.
46. They also cite the lack of independence and impartiality on the part of Mr. Justin Gbenameto, President of the First Correctional Chamber of the Cotonou Court of Appeal.
47. According to them, Mr. Justin Gbenameto “is under the control of the executive power” because he was reinstated as a magistrate

10 *Idem*.

by the Constitutional Court.¹¹ This is in spite of a decision rendered by the High Judicial Council¹² for his removal and the subsequent decision rejecting the appeal to his removal as inadmissible.¹³

48. The Applicants contend that there was no need to seek effective justice before the Correctional Chamber of the Cotonou Court of Appeal which heard their appeal, nor before the Supreme Court. They submit that the objection based on admissibility of the Application should therefore be dismissed.

49. The Court notes that, pursuant to Article 56(5) of the Charter and Rule 50(2) of the Rules, for an application to be admissible, local remedies must have been exhausted if they are available, unless it is clear that the procedure has been unduly prolonged.
50. The Court notes that the remedies to be exhausted are those of a judicial nature. These must be available to the Applicant without hindrance and be effective, in the sense that they are “capable of satisfying the complainant or of remedying the situation in question”.¹⁴
51. The Court states, moreover, that compliance with the requirement under Article 56(5) of the Charter and Rule 50(2) of the Rules presupposes not only that the Applicant initiates local remedies, but also that he awaits the outcome.¹⁵ In the same vein, the Court also stated that in order to determine whether the requirement to exhaust local remedies has been met, the proceedings to which the Applicant was a party must have been finalised at the time of filing the Application with the Court.¹⁶

11 Decision DCC 19-270 of 22 August 2019 of the Constitutional Court.

12 Decision No 001/CSM of 14 January 2014 of the High Judicial Council.

13 Decision DCC 14-123 of 3 July 2014 of the Constitutional Court.

14 *Beneficiaries of the late Norbert Zongo, Aboulaye Nikiema a.k.a. Ablassé, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabè des droits de l’homme et des peuples v Burkina Faso*, Judgment (5 December 2014) (merits) 1 AfCLR 219, § 68; *Ibid. Konaté v Burkina Faso* (merits) §108.

15 *Yacouba Traoré v Republic of Mali*, ACTHPR, Application No 010/2018, Judgment of 25 September 2020 (jurisdiction and admissibility) §§ 46 and 47.

16 *Komi Koutché v Republic of Benin*, ACTHPR, Application 020/2019, Judgment of 25 June 2021, §61; *Sébastien Marie Aikoué Ajavon v Republic of Benin*, ACTHPR, Application 027/2020, Judgment of 2 December 2021, §74.

52. The Court notes, in the instant case that, it is not disputed that on 1 October 2019, the Applicants, pursuant to Article 509 of the Code of Criminal Procedure,¹⁷ appealed the judgment of 27 September 2019 before the Cotonou Court of Appeal and that the Applicants filed the instant Application on 17 February 2020, while the appeal proceedings were pending. The Court also notes that the Cotonou Court of Appeal rendered its decision on 24 March 2020,¹⁸ one (1) month and one (1) week after the filing of the instant Application.
53. It notes that to justify bringing a case before the Court without awaiting the decision of the Court of Appeal, the Applicants advance two (2) arguments, namely, the lack of independence of the judiciary as well as the lack of independence and impartiality of the president of the First Correctional Chamber of the Cotonou Appeal Court.
54. With regard to the first argument, the Court notes that, insofar as the requirement to exhaust local remedies is assessed at the time of bringing a case before it, an Applicant cannot rely on circumstances subsequent to the filing of the application in order to be exempted from compliance with this requirement.¹⁹ It follows that in the instant case, the argument relating to the lack of independence and impartiality of the HJC, which the Court ruled on in its judgment of 4 December 2020, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, relates to a circumstance subsequent to the filing of the instant Application. Consequently, the Court rejects this argument.
55. As regards the second argument, the Court has held that “ the impartiality of a judge is presumed, and that compelling evidence is needed to rebut this presumption”.²⁰
56. The Court notes, in the instant case, that the Applicants did not provide any evidence of the partiality and lack of independence of the President of the Correctional Chamber, which is a collegiate

17 Article 509 of Law No 2012-15 of 30 March 2012 on the Code of Criminal Procedure provides that “judgments handed down by the Court of First Instance ruling on criminal matters may be appealed. The appeal shall be brought before the Court of Appeal”.

18 Decision No 66/1CC/20 of 24 March 2020 of the First Correctional Chamber of the Cotonou Court of Appeal.

19 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No027/2020, Judgment of 2 December 2021 § 79.

20 *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Judgment of 4 December 2020 (merits and reparations), § 293; *Alfred Agbesi Woyome v Republic of Ghana* (28 June 2019) (merits and reparations), 3 AfCLR 235 § 128.

body of the Cotonou Court of Appeal before which they appealed the judgment of 27 September 2019. Consequently, the Court rejects the Applicants' arguments.

57. In view of the foregoing, the Court finds that the Applicants should have awaited the outcome of their appeal before filing the instant Application, unless the appeal procedure was unduly prolonged. The Court notes that the Applicants filed the Application four (4) months and seventeen (17) days after filing their appeal but before the said appeal was determined. The Court finds that the Applicants filed their Application prematurely.
58. Accordingly, the Court finds that the objection based on non-exhaustion of remedies is well-founded and that the Application does not satisfy the requirement of Rule 50(2)(e) of the Rules.

B. Other aspects of admissibility

59. Having found that the Application does not satisfy Rule 50(2)(e) of the Rules, and since the admissibility requirements are cumulative,²¹ the Court does not need to rule on the admissibility requirements set out in Article 56(1), (2), (3), (4), (6), and (7) of the Charter and Rule 50(2)(a), (b), (c), (d), (f) and (g) of the Rules.²²
60. In view of the foregoing, the Court declares the Application inadmissible.

VII. Costs

61. Each Party prays that the other be ordered to pay the costs.

21 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 237 § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018), 2 AfCLR 361 § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACTHPR, Application No 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility) § 39.

22 *Ibid.*

62. According to Article 32(2) of the Rules,²³ “Unless otherwise decided by the Court, each party shall bear its own costs, if any”.
63. The Court notes that nothing in the circumstances of the instant case warrants a departure from this provision.
64. Accordingly, the Court decides that each party should bear its own costs.

VIII. Operative part

65. For these reasons,
The Court
Unanimously,
Jurisdiction

- i. *Dismisses* the objection to material jurisdiction;
- ii. *Declares* that it has jurisdiction;

Admissibility:

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

Costs:

- v. *Orders* that each party shall bear its own costs.

23 Article 30(2) of the Rules of 2 June 2010.