COMMUNITY COURT OF JUSTICE, ECOWAS

(2015)

LAW REPORT

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

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MR. TONY ANENE-MAIDOH
Chief Registrar

EDITORIAL BOARD FOR THE ECOWAS LAW REPORT

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT BISSAU, GUINEA BISSAU

ON THE 25TH DAY OF MARCH 2015

SUIT NO: ECW/CCJ/APP/21/14
RULING NO: ECW/CCJ/RUL/04/15

BETWEEN
SAORO VICTIMS OF HUMAN RIGHTS VIOLATION - *PLAINTIFFS*

AND
THE REPUBLIC OF GUINEA & ANOR. - *DEFENDANTS*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ABOUBACAR DIAKITÉ (ESQ.) - *REGISTRAR*

REPRESENTION TO THE PARTIES:
1. **NARCISSE KPOGOMOU, EMMANUEL BALAMOU** *AND* **MARTINE SAOROMOU, FOROMO FREDERIC LOUA (ESQ.)** - *FOR THE PLAINTIFFS*
2. **BOUBACAR SOW (ESQ.), SEKOU KOUNDIANO** - *FOR THE DEFENDANTS*

Admissibility - Inadmissibility of complaint - Nullity of expropriation - Grounds of inadmissibility - Anonymity of application - Lack of quality, interest and right to act - Restitution of land and damages - Counterclaims.

SUMMARY OF FACTS

The Applicants, indigenous people of the village of Saoro and the surrounding villages, consider that the expropriation of their land by the State of Guinea to the benefit of the Societe Guineenne de Palmiers a Huile et d'Heveas (SOGUIPAH) in violation of the custom which applies in their case.

The State of Guinea ruled that their Application is inadmissible because the alleged representatives of the victims have no locus standi, no interest and no right to act, that they are anonymised in violation of the law. Article 10 of the Supplementary Protocol of the Court; that in addition the expropriation is in compliance with the law relating thereto.

LEGAL ISSUES

- *Are the objections raised by the Defendant justified?*
- *Can Applicants prosper in their action?*

DECISION OF THE COURT

- *Rejects as unsubstantiated the objections raised by the Defendants, drawn from the non-communication of the Application to Soguipah and the failure to appoint someone to the seat of the Court;*
- *Admits, however, the dismissal of the lack of legal title necessary to take legal action;*
- *Held that this plea of inadmissibility is well founded and declares the action brought by the Applicants inadmissible;*
- *Dismiss the Defendants from their claim for damages.*

Makes the following ruling:

Between

SAORO VICTIMS OF HUMAN RIGHTS VIOLATION *(APPLICANTS)*, represented by Narcisse Kpogomou, Emmanuel Balamou and Martine Saoromou, whose Counsel is Maître Foromo Frederic Loua, Lawyer registered with the Bar Association of Guinea, with address for service as: Immeuble de l'Archevêque - Kouléwondy - Commune de Kaloum, Republic of Guinea,

And

1. **THE REPUBLIC OF GUINEA *(1st DEFENDANT)***, represented by the State Judicial Officer; office location: The Presidency of the Republic, Petit Palais, Quartier Boulbinet, Conakry;

2. **GUINEA OIL PALM AND RUBBER COMPANY ALIAS SOGUIPAH LTD. *(2nd DEFENDANT)***, a limited liability company with a board of directors whose business turnover is worth 40 Billion Guinean Francs (GF), with 100% shares owned by the Government of Guinea, located at Diécké, Yomou préfecture (administrative region) of N'Zérékoré, with a station at Conakry, Guinea, Coléah zone, on the Corniche-Sud, in the Commune of Matam, BP 123, Conakry; represented by its General Manager, Madam Mariame Camara;

   Both having their address for service at: The Headquarters of SCPA (Société Civile Professionnelle d'Avocats), Rivières du Sud; SCPA being a law firm whose partners are:

   - Maître Boubacar Sow, former judge, former President of the Bar Association of Guinea; and
   - Sekou Koundiano, Barrister-at-Law, whose main office is at: Kaloum, Quartier Boulbinet, rue Ka 020-Kaloum, Immeuble Africana, Conakry.

The Court

Having regard to the 24 July, 1993 Treaty instituting the Economic Community of West African States (ECOWAS);

Having regard to the 10 December 1948 Universal Declaration of Human Rights;

Having regard to the 27 June 1981 African Charter on Human and Peoples' Rights;

Having regard to the 10 December 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;

Having regard to the 6 July 1991 Protocol (A/P.1/7/91) on the ECOWAS Court of Justice as well the 19 January 2005 Supplementary Protocol on the ECOWAS Court of Justice;

Having regard to the 2 June 2002 Rules of Procedure of the Court;

Having regard to the Application dated 12 August 2014 filed by the above-cited Applicants;

Having regard to the Defence dated 13 November 2014 filed by the Defendants;

Having regard to the pleadings and exhibits filed in connection with the instant proceedings;

Having considered the report made by the Judge Rapporteur;

Having heard the Parties through their respective Counsel;

After deliberating in accordance with the law.

FACTS AND PROCEDURE

By Order No. 043/PRG/SGG/87 of 28 May 1987, the commercial company named SOGUIPAH (Guinea Oil Palm and Rubber Company), which was vested with an independent governing body, and created for a duration of 99 years in the Republic of Guinea, under the aegis of the Ministry of Rural Development.

By Decree D/2003/0011/PRG/SGG of 3 February 2003, SOGUIPAH was awarded 22,830 hectares of arable land bordered by the rural development communities (CRD) of Gbiliamou and Diéké, under the préfecture (regional headquarters) of Yomou, with 1,800 hectares of the total allocated land specifically located within the district of Saoro.

Following claims made by certain citizens, the President of the N'Zérékoré Court of First Instance, who was seised with an application from the Director of Cabinet of the Governor of N'Zérékoré asking for intervention, decided that the Director for Agriculture at the préfecture of Yomou must open an inquiry into the matter and see to the execution of the above-cited decree awarding lands to SOGUIPAH.

Dissatisfied, certain inhabitants of the Saoro district appealed their case through a bailiff, who prepared a report on the case, dated 9 August 2011 and entitled: "Notification Regarding Expropriation of Lands and Destruction of Plantations". This matter was subsequently tried as criminal case and culminated in prison sentences being imposed on some of the persons involved.

By Application dated 12 August 2014, registered at the Registry of the Honourable Court on 30 September 2014, the Applicants, numbering 115, brought their case before the ECOWAS Court of Justice, seeking the following, from the Court:

As to formal presentation,

A declaration that the Application is admissible;

A dismissal of the objections regarding foreclosure (estoppel) as raised by the Defendants.

As to merits,

- A **declaration** that the land expropriation exercise effected pursuant to the said Decree D/2003/0011/PRG/SGG of 3 February 2003 was null and of null effect;

- An **order** restoring the confiscated lands to the original Saoro owners and an immediate eviction of SOGUIPAH and all its associates from those lands;

- An **order** asking SOGUIPAH to pay to the said victims of human rights violations the sum of One Hundred Billion Guinean Francs (GNF 100,000,000,000) for the destruction of the plantations and agricultural farms belonging to the victims;

- An **order** asking the Republic of Guinea to pay the sum of One Hundred and Fifty Billion Guinean Francs (GNF 150,000,000,000) to the victims in reparation for all the forms of human rights violations committed against them;

- An **order** asking the Republic of Guinea and SOGUIPAH to jointly pay the sum of One Hundred Billion Guinean Francs (GNF 100,000,000,000) to the victims, as damages.

All, pursuant to the provisions of: Articles 5, 6 and 13 of the Constitution of Guinea; Articles 39, 57, 59, 60, 61, 63, 64, 65, 68 and 69 of the Code Concerning State-Owned and Privately-Owned Lands; Articles 1098, 533 and 534 of the Civil Code; Articles 17, 21 and 24 of the African Charter on Human and Peoples' Rights; Article 17 of the Universal Declaration of Human Rights; Article 1(2) and Article 2 of the International Covenant on Civil and Political Rights.

ANALYSIS OF THE COURT

As to formal presentation

Whereas the Defendants plead, through their Counsel, objections and claims of foreclosure (estoppel) which are appropriate to be examined beforehand.

1. Regarding the objection on the ground that the Application was not communicated to SOGUIPAH

The Defendants aver, through their Counsel, that even if the above-cited Application was indeed communicated to the State Judicial Officer of the Republic of Guinea, it remains true nevertheless that the Application was never communicated to SGUIPAH as a party to the trial. For a proof, as to the truth concerning the matter, the Chief Registrar of the ECOWAS Court of Justice is very explicit in his letter in which he exclusively invites the Republic of Guinea to produce its Defence within a time-limit of one month after being served with the Application, stating that once the time is exhausted, the Applicants will be heard and a default judgment may possibly be delivered.

As regards this point, the Court notes on one hand, that, as was pointed out by Counsel to the Applicants, the Republic of Guinea constituted counsel for SOGUIPAH and for itself upon receiving the letter from the Chief Registrar of the Honourable Court, and on the other hand, that Defence Counsel instantly sought orders from the Court in the interest of the two parties.

Thus, that objection is hereby dismissed.

2. Regarding inadmissibility of the complaint, for failure to designate a person at the seat of the Court

The Defendants plead that the above-cited Application is not admissible, once the Applicants have not designated at the seat of the Court, a person authorised to plead the case on their behalf.

The Court notes, in regard to this point, that the non-observation of the formality of stating an address for service in the place where the Court has its seat, as well as the name of the person who is authorised and has expressed willingness to accept service, has no effect on the admissibility of the instant Application, since in the event that the application fails to comply with the formal requirements stated herein above, Article 33 of the Rules of Procedure of the Court simply provides that all service on the party concerned, for the purpose of the proceedings, shall be effected by registered letter addressed to the agent or lawyer of that party.

That objection is therefore ill-founded.

3. Regarding anonymity of the Application and Applicants' lack of locus standi, interest at stake and capacity to plead the case before Court

Whereas the Defendants claim first of all that the Applicants present themselves before court as mere victims of human right violation without indicating precisely their identity, as required by Article 10 of the 2005 Supplementary Protocol on the Court; that apart from being vague and imprecise, the manner in which the Applicants identify themselves does not prove that they physically exist, nor does it bring out their addresses and points of contact, their legal status and their number on roll.

Further, that the Applicants claim to be represented by the persons named as Narcisse Kpogomou, Emmanuel Balamou and Martine Saoromou, whose residential locations and addresses are unknown, and that they did not file among the pleadings of the case any power of attorney or legal title justifying that the three above-named persons are acting for and on their behalf.

Finally, according to the Defendants, the Applicants do not produce any title to property covering the arable lands they lay claim to, contrary to the case of the opposing party (i.e. the Defendants) who have produced all the titles deeds relating to the landed property, which, at any rate, have not been contested; and that the Application must thus be dismissed, in line with the consistently held case law of the Court, which requires

that for one to plead his case before the Court, four conditions must be fulfilled: one must have locus standi, an interest at stake, the required status, and the capacity for bringing the action before the Court.

Whereas the Applicants object to this and argue first of all that all the relevant information concerning them are clearly stated in the affidavit dated 7 July 2014 attached to the filed dossier; that in that document, it is indicated that the Applicants mandate their lawyer, who is substantively named, to represent them and to defend their interests against the Republic of Guinea and SOGUIPAH before the domestic and international courts, and moreover, Article 1 of the code governing the practice of the legal profession in the Republic of Guinea enables every lawyer to dispense with producing an affidavit for the purposes of pleading a case in court.

Further, the Applicants ask that the said request by the Defendants must be thrown out, on the ground that it is not necessary to produce any document whatsoever for justifying that they are represented by the said Narcisse Kpogomou, Emmanuel Balamou and Martine Saoromou, given that the names of the these 3 persons do feature on the list of Applicants attached to the affidavit dated 7 July 2014.

Finally, according to the Applicants, the matter does not concern the status of the persons, but rather an issue of expropriation of land, and that in that regard, it is worthy to indicate that traditional land ownership in Guinea, just like in most African countries, heavily relies on and refers to the relevant customary law, and that the laws of Guinea provide that traditional land ownership is not required to have been formally registered beforehand, except in the circumstances of expropriation, as in the instant cause. That as a result, all the victims whose names are mentioned in the affidavit do indeed have the locus standi to plead their case in Court.

The Court is of the view that it can be inferred from the provisions of Article 19 of the 19 January 2005 Protocol on ECOWAS Court of Justice, that access to the Court is open to individuals on application for relief for violation of their human rights, upon the twin condition that the application submitted for that purpose shall not be anonymous, and shall not be made

whilst the same matter has been instituted before another International Court for adjudication.

In the instant case, it is established that an affidavit dated 7 July 2014 was indeed attached to the above-cited Application filed by the Applicants, and at the hearing of 18 February 2015, while the court session was in progress, the Defendants, upon their own request, were served with a copy of the said affidavit containing a detailed list of the citizens of Saoro invoking human rights violation against them (the Defendants). However, the Court finds that even if the Applicants have an undoubted interest at stake in the matter before it, as regards the land matter at stake, which naturally exists in every industrial zone such as that of the Saoro district and surrounding villages, as a result of the establishment of SOGUIPAH in that location, the fact still remains that the Applicants are required to justify their representation in court, as claimed by the said Narcisse Kpogomou, Emmanuel Balamou and Martine Saoromou, through a formal document (proxy or power of attorney).

The justification of such representation determines the admissibility of their action, and this formal requirement cannot be waived on the ground that the names of the above-named representatives do form part of the list of Applicants.

Furthermore, it is not apparent from the pleadings of the case, nor from the addresses and contact points, nor from the official documents pleaded by the representatives of the above-mentioned Applicants, or from any other document whatsoever, that the titles to property (decrees and orders) produced by the Defendants as attesting to the disputed lands having been awarded to them, were queried or annulled.

In the light of the foregoing, the Court holds that the action brought by the Applicants shall be declared inadmissible for lack of necessary legal title for pleading the case in Court.

4. Regarding the counter-claim

Whereas the Applicants ask for an order for the payment of a total sum of Two Hundred and Fifty Million Guinean Francs (GF 250,000,000) as

damages, in reparation for the moral and financial harm suffered in connection with the complaint brought by the Applicants; and whereas in support of their claim, the Applicants, on one hand, invoke Articles 107 and 1098 of the Guinea Civil Code and case law which provide that "any human act whatsoever which causes prejudice to another person, compels the one from whom the harm originates, to repair the injury caused, and that each person shall be held responsible for the harm he has caused, not only in action but through negligence and recklessness", and on the other hand, plead that the judges who adjudicate on the merits of a case possess supreme powers for examining the case in the direction of assessing the harm done, without being compelled to elucidate the various factors determining the amount to be awarded in compensation.

On their part, the Applicants ask the Court to dismiss the requests stated above, on the ground that they are not justified.

The Court notes first of all that it is immaterial, as far as the procedure for pleading human rights violation before the Court is concerned, to rely on the domestic law of Guinea. The Court equally notes that the proceedings instituted by the Applicants is neither frivolous nor an abuse of court process, once there is a real disagreement based on expropriation of the lands in contention.

Therefore, the counter-claims made by the Defendants are hereby dismissed.

5. Regarding costs

Whereas the prayer made by the Defendants, asking the Court to award costs against the Applicants, in compliance with the provisions of Article 66 of the Rules of the Court, shall be upheld, since the Applicants eventually came out unsuccessful.

The Court,

FOR THESE REASONS

Adjudicating in a public session, after hearing both parties in a matter on human rights violation, and in first and last resort,

As to formal presentation

- **Dismisses** as ill-founded the Preliminary Objections raised by the Defendants, regarding non-communication of the Application to SOGUIPAH, and regarding failure to designate a person to accept service in the place where the Court has its seat;

- **Admits**, however, the Defendants' claim regarding foreclosure (estoppel) of the action brought by the Applicants, for lack of the necessary legal title for pleading the case before Court;

- **Adjudges** that the Defendants' claim concerning the said foreclosure (estoppel) of the action brought by the Applicants is well founded, and the Court thus declares that the action brought by Applicants is inadmissible;

- **Dismisses** the request for payment of damages, as formulated by the Defendants;

- **Asks** the Applicants to bear the costs.

Thus made, adjudged and pronounced in a public hearing at Bissau on the 25th day of March 2015.

And the following hereby append their signatures:

1. **Hon. Justice Jérôme TRAORÉ -** *Presiding;*
2. **Hon. Justice Yaya BOIRO -** *Member;*
3. **Hon. Justice Alioune SALL -** *Member.*

Assisted By: **Maître Aboubacar DIAKITÉ -** *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 23RD DAY OF APRIL, 2015

SUIT NO: ECW/CCJ/APP/04/14
JUDGMENT NO: ECW/CCJ/JUD/01/15

BETWEEN
AZALI ABLA & ANOR. - *PLAINTIFFS*

AND
REPUBLIC OF BENIN - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **OLGA A. ANASSIDE (ESQ.)** - *FOR THE PLAINTIFFS*
2. **HIPPOLYTE YÉDÉ (ESQ.)** - *FOR THE DEFENDANT*

Violation of human rights - Access to justice - Fair trial - Reasonable time - Exhaustion of local remedies - Denial of rights.

SUMMARY OF FACTS

By Application dated 7 March 2014 Miss Azali ABLA and Mrs. Eglou Carole seised the ECOWAS Court of Justice for violations of Articles 3 and 7 of the African Charter on Human and Peoples' Rights, and article 8 of the Universal Declaration of Human Rights.

Ms Azali, after been the victim of torture and mistreatment by employer Ida Codjia, on the ground that she had an intimate relationship with her husband, appealed to the Court of First Instance of Cotonou, which sentenced Ida to four months' imprisonment. Judgment delivered on 16 June 2016 and appealed on 28 August 2006.

As for Mrs. Eglou Carole, she was the victim of a fake Gynecologist-Obstretician Dr. Pamentelo who allegedly administered treatments that worsened her ailments and her health to the point that she became sterile. The court she seised sentenced the defendant to pay her 650,000 FCFA. This judgment was also the subject of an appeal by the Respondent.

*The case of **Azali v. Codjia Ida** was indeed forwarded to the Attorney General of the Court of Appeal and then returned to the Registrar in the Court of First Instance of Cotonou for formalities to be completed but was never returned and remained without continuation while the file **Eglou Carole v. Pamentelo Fidèle** was never forwarded to the Prosecutor General's Office.*

Subsequently, the applicants seised the General Inspectorate of Judicial Services, initiative remained vain.

The Applicants consider that Benin violated their right of access to justice, their right to a fair trial and that to be tried within a

reasonable time; all things contrary to the provisions of the Article of the 1948 Universal Declaration of Human Rights and Article 3 of the African Charter on Human and Peoples' Rights which guarantee the equality of citizens before the law and their right to have access to the national courts competent for acts violating fundamental rights.

The Republic of Benin considers that, before access to the ECOWAS Court of Justice, the Applicants should bring their claims before the national courts. For this, Benin invoked Article 114 of the Constitution which provides: "The Constitutional Court is the highest court of the State in constitutional matters (...) it guarantees the fundamental rights of the human person and public freedoms".

In addition, Benin argued that it has, in the recent past, made a considerable effort to make its judicial system more efficient and its procedures more diligent, and that it refutes, on this basis, the complaints which have been articulated against it.

LEGAL ISSUES

- *Is the referral to the Constitutional Court a precondition for referral to the ECOWAS Court of Justice?*

- *Are rights of access to justice, fair trial, trial within a reasonable time violated?*

DECISION OF THE COURT

The Court considers that the issue of the exhaustion of local remedies does not arise before it. It has, in the past, had to do justice to the theses that tended to reintroduce this rule, through various interpretations, but all of which had in common not to be relevant. In its Preliminary Ruling of 14 March 2007, in the case of ***Professor Etim Moses Essien v. Republic of The Gambia and University of The Gambia****, it stated that "the preliminary objection raised by the defendants concerning non-exhaustion of local remedies has nothing to do with the procedure of referral to the Court ". It is the same in*

*its judgment of 27 October 2008," **Dame Hadjatou Mani Koraou and Republic of Niger** where the Court rejected the same objection raised by the Republic of Niger.*

The Court remains faithful to this view, it considers that it does not have to ignore the texts that govern its organisation and operation. Therefore, the motion brought before it by Miss Azali Abla and Egou Carole is admissible.

As To Merits:

The Court held that the Republic of Benin, through its system and its judicial authorities, violated the right of the two applicants to access to justice and their right to trial within a reasonable time;

The Court ordered the Republic of Benin to pay to Mrs. Azali Abla the sum of twenty million (20,000,000) CFA francs in compensation for the damages suffered;

Finally, the Court ordered the Republic of Benin to pay to Mame Eglou Carole the sum of twenty five million (25,000,000) CFA francs in compensation for damages suffered.

The Court ordered the Republic of Benin to pay the costs.

JUDGMENT OF THE COURT

I. THE PARTIES AND THEIR REPRESENTATION

1. The Applicants are Miss Abla Azali and Madam Carole Egou, both nationals of Benin, represented by Maître Olga A. Anasside, Lawyer registered with the Bar Association of Cotonou, in the Republic of Benin.

2. The Defendant is the Republic of Benin, legally represented by the Judicial Officer for the Treasury, with address for service for the purposes of this case as the Embassy of Benin at Nigeria, and Defence Counsel, as Maître Hippolyte Yédé, Lawyer registered with the Bar Association of Cotonou.

II. SUMMARY OF THE FACTS AND PROCEDURE

3. An Application dated 7 March 2014 was filed before the ECOWAS Court of Justice for violation of Articles 3 and 7 of the African Charter on Human and Peoples' Rights and Article 8 of the Universal Declaration of Human Rights. The Applicants were Miss Abla Azali and Madam Carole Egou, represented by Maître Olga A. Anasside, Barrister-at-Law, recognised as such by the courts of Benin.

4. Miss Abla Azali, at the age of 6 years, was engaged as a housemaid by Madam Ida Codjia. Claiming she was having intimate relations with her husband, Madam Ida Codjia meted out cruel, inhuman and degrading treatments against her, and those violent acts temporarily incapacitated Miss Abla Azali, the Applicant, preventing her from being able to work for forty-five (45) days. The victim therefore made a complaint against Madam Ida Codjia before the Cotonou Court of First Instance and the latter sentenced Madam Ida Codjia to four (4) months imprisonment, and reserved the civil damages, on the grounds that a medical certification attesting to the total recovery of Miss Abla Azali had not been pleaded in the case-file to enable the court assess the harms caused her. That judgment was rendered

on 16 June 2006 and it was appealed through a court process dated 28 August 2006, registered as No. 207.

5. As for the second Applicant, Madam Carole Egou, she first of all made a complaint against Mr. Fidèle Pamentelo, to whom she had been introduced by a friend of hers to find a remedy to her gynaecological problems, after experiencing repeated miscarriages. Falsely claiming to be an obstetrician-gynaecologist doctor, Mr. Fidèle Pamentelo allegedly administered certain treatments on her which worsened her ailments and health condition, resulting in her becoming sterile, and thus missing every possible opportunity of conceiving one day. In addition, the Applicant began to experience painful burns in the region of her reproductive organ, coupled with progressive loss of sight and paralysis of the left leg. She therefore made a complaint before the Cotonou Court of First Instance, and the court, by Judgment of 10 September 2007, ordered the sum of Six Hundred and Fifty Thousand CFA Francs (CFA F 650, 000) to be paid to the complainant. The judgment was appealed on 12 September 2007.

6. Article 470 of the Code of Criminal Procedure in force at the time of the incident provides that: *"Upon receiving the appeal and the application, the Registrar shall forward the application to the President of the Court of Appeal together with the judgment and the court process asking for the appeal."*

7. Whereas the case concerning **Abla Azali *v.* Ida Codjia** was transmitted to the Parquet Général (Office of the Prosecutor-General) by Letter No. 131 GTC of 28 May 2008 and returned by the Parquet Général to the Registry of the Court on 2 June 2008, under No. 3383, for certain processes to be effected, the matter has since not been forwarded back to the President of the Court of Appeal, nor has the case been pursued any further.

8. As regards the case concerning **Carole Egou *v.* Pamentelo**, no action towards the hearing of the case has so far been taken, nor has the case-file been transmitted to the Parquet Général.

9. Till today, the Applicants have neither obtained extracts from nor copies of the said judgments, despite all the efforts they have put in to get the proceedings to advance. Counsel for the two Parties, who have now brought their case before the ECOWAS Court of Justice, however addressed several correspondences to the Chief Registrar of the said Cotonou Court, with a copy to the President of the same Court and another copy to the Procureur de la République (Public Prosecutor) of that same Court, but have not received any response.

10. A writ of summons dated 31 October 2013 was even addressed to the Chief Registrar of the Court of First Instance of Cotonou, querying as to:

"1. Why the case-files on the two cases had still not been transmitted to the Office of the Prosecutor-General at the Cotonou Court of Appeal.

2. Where the two case-files could be found.

3. What steps had so far been taken to transmit the case-files to the Office of the Prosecutor-General.

4. Why no response had been given to the correspondences addressed by Counsel to the Applicants.

5. What measures had been taken to protect the interests of the Applicants."

11. Consequently, still through their Counsel, the Applicants made a complaint to the Inspector-General of Judicial Services to ask for his intervention, with a transmission of a copy of all the steps taken till then, together with the correspondences made.

12. All the various initiatives have till today yielded no response from all the quarters the Applicants addressed themselves to.

13. Today, owing to the time which has elapsed without being listed on the cause list, for them to be heard, the two cases filed by the

Applicants seem destined to come under time bar, in the terms of Article 8(2) of the Code of Criminal Procedure, which states that:

"Cases shall become time-barred after three (3) years have elapsed, in case of délits (indictable offences); and after one (1) year has elapsed, in case of contraventions (non-criminal offences)".

14. It was under these conditions that the ECOWAS Court of Justice was seised with the Application lodged on 7 March 2014.

III- ARGUMENTS OF THE PARTIES

15. The Applicants argue that within the circumstances of the case, the Republic of Benin has failed to protect their rights, as victims, and that the attitude of the administrative and judicial authorities culminated in the violation of their rights to justice, fair trial and trial within reasonable time. A provision from the Universal Declaration of Human Rights and two from the African Charter on Human and Peoples' Rights are invoked:

16. Article 8 of the 1948 Universal Declaration of Human Rights:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

17. Articles 3 of the African Charter on Human and Peoples' Rights:

"1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law."

Article 7 of the African Charter on Human and Peoples' Rights:

"1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by

conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.";

18. In support of their claims, the Applicants recall that on the whole, six (6) years have elapsed, within which time the two cases should have been transmitted to the Court of Appeal, and that from all indications, they were fighting a lost cause as a result of that.

19. As Defendant, the Republic of Benin essentially pleads two arguments:

20. Firstly, it contends, in its orders sought *in limine litis*, received at the Court Registry on 20 June 2014, that before bringing their matter before the ECOWAS Court of Justice, the Applicants should first of all have filed their claims before the domestic courts. In support of that contention, the Republic of Benin invokes provisions of the national law, notably Article 114 of its Constitution, which provides that: *"In constitutional matters, the Constitutional Court shall be the highest Court of the Republic of Benin. The Constitutional Court shall judge the constitutionality of laws and guarantee fundamental human rights and civil liberties."* In other words, the Defendant argues that before bringing any case before the ECOWAS Court, the Applicants should have pursued their claims, first and foremost, before the national courts, particularly before the Constitutional Court.

21. Secondly, the Republic of Benin asserts that of late, it is making a great effort to improve upon the performance of its judicial system, and to deliver justice in reasonable time, and it refutes, on that basis, the complaints made against it. In that regard, it cites certain pragmatic measures that have been put in place, like more staff members being recruited, a site constructed to put up the Cotonou Court of Appeal, and that the premises housing the Cotonou Court of First Instance

had been renovated. The Defendant equally cites assistance received from the American *"Millennium Challenge Account"* programme, through which the Republic of Benin has launched a project named *"Access to Justice"*. It indicated twice in its Memorial in Defence lodged on 8 April 2014, that *"the transmission of the case-files..."* in the disputed matter is *"... still ongoing"* or that it *"... is following its normal course."*

IV- CONSIDERATION AND ASSESSMENT OF THE WEIGHT OF THE ARGUMENTS ADVANCED BY THE PARTIES

22. The Court is of the view that it is worthwhile to devote attention to: (A) The objection raised by the Republic of Benin, before considering: (B) The merits of the dispute.

A) As to the preliminary objection regarding exhaustion of local remedies.

23. The Court has already pointed out that the Republic of Benin raised an objection regarding failure by the Applicants to bring their case before the national Constitutional Court, instituted by the very guarantor of the Constitution to adjudge in matters concerning freedoms (Article 114 of the Fundamental Law of Benin, as cited above). In other parts of its written pleadings, the Defendant refers more generally to local remedies which should have been sought beforehand by the Applicants.

24. On this particular point, two objections may be raised against the argumentation put forward by the Republic of Benin. The first objection is general in nature, since it deals with the very principles which govern the international order, from which an international organisation like ECOWAS derives its dynamism and life force. ECOWAS is indeed an international organisation, to which States have undoubtedly ceded powers and remits; and once so ceded, primacy is accorded the norms adopted by the overarching international body constituted as ECOWAS, over and above the domestic norms of the individual Member States forming that

international organisation. In becoming a member of an international organisation, by subscribing to the norms dictated by that international organisation as an independent legal entity, the constituent States relinquish, by so doing, an aspect of their freedom, and accept that the dictates of the international organisation shall apply to them. The resultant effect therefore is that the constituent Member States may not, by the same token, invoke their domestic law as a means of shirking their Community obligations under ECOWAS. In the instant case, it is inconceivable, in principle, for the Republic of Benin to seek shelter behind the provisions of its Constitution, as a means to create deadlock in respect of its duties under the ECOWAS Treaty, and in respect of all the legal acts deriving therefrom, among which the Protocols instituting the jurisdiction of the Community Court of Justice, ECOWAS.

25 A further and more precise objection is that the Court is of the view that the issue of exhaustion of local remedies does not arise before it. That preliminary measure is neither prescribed in any of its text in force nor in its case law. The Court has clearly stated the law in regard to arguments attempting, through various interpretations, to reintroduce exhaustion of local remedies as a condition precedent, all of which had no legal text upon which to base their arguments. In its Ruling of 14 March 2007, paragraph 13(1), delivered on Case **Concerning Professor Etim Moses Essien v. Republic of Gambia and University of Gambia**, the Court precisely held that: ***"The Preliminary Objection raised by the Defendants regarding non-exhaustion of local remedies has no relationship with the procedure for accessing the Court (...)."*** Then, in its Judgment of 27 October 2008 on **Hadijatou Mani Koraou v. Republic of Niger**, the Court, in responding to the affirmation by the Republic of Niger, to the effect that: ***"While acknowledging that the condition of non-exhaustion of local remedies does not form part of the conditions of admissibility of cases of human rights violation brought before the Court of Justice of ECOWAS, the Republic of Niger considered such absence as a lacuna which should be filled by the Court"***

(paragraph 36), clearly replied that: ***"(...) there are no grounds for considering the absence of preliminary exhaustion of local remedies as a lacuna which must be filled within the practice of the Community Court of Justice, for the Court cannot impose on individuals more onerous conditions and formalities than those provided for by the Community texts without violating the rights of such individuals."*** (paragraph 45). The Court still recalled this point in many other judgments, for instance in its judgment on **Ocean King v. Republic of Senegal** delivered on 8 July 2011.

26. The Court hereby holds on firmly to its stand, and it is of the view that it shall not disregard the texts governing its organisational framework and functioning mechanism. Hence, the Application lodged before the Court by Miss Abla Azali and Madam Carole Egou is admissible.

B) As to the merits of the case

27. The Court will first of all address in B.1: The issue of actual violation of a right, before finally examining in B.2: The consequences arising from the conclusion the Court may have reached thereby.

a.i) Regarding violation of the Applicants' rights

28. The Court observes that as at the time the case comes before it, more than six (6) years, in one instance, and more than seven (7) years, in another instance, had passed, in the processing of two different cases, regarding a procedure one may consider in overall terms as still pending. The Court observes that the Applicants, through their Counsel, had taken series of steps to get the procedure to move forward towards its logical conclusion. Evidence to that effect is filed in the case- file of the instant case, notably:

    - A correspondence addressed to the Chief Registrar of the Court of First Instance of Cotonou, dated 20 November 2008;

- A correspondence to the Inspector-General of Judicial Services at Cotonou, dated 21 January 2009;

- A correspondence addressed to the Chief Registrar of the Court of First Instance of Cotonou, dated 25 May 2009;

- A correspondence addressed to the *Procureur de la République* (Public Prosecutor), dated 26 May 2009, informing him of the proceedings at hand;

- A correspondence addressed to the President of the Court of First Instance of Cotonou, dated 26 May 2009, for the same purposes;

- A correspondence to the Inspector-General of Judicial Services at Cotonou, dated 22 June 2010;

- A correspondence dated 7 March 2011 addressed still to the Chief Registrar of the Court of First Instance of Cotonou (there may have been a new Chief Registrar appointed to the Court);

- A writ of summons dated 31 October 2013, addressed to the Chief Registrar of the Court of First Instance of Cotonou.

29. Judging from the pleadings filed in the case-file, none of the steps undertaken as depicted above, yielded the least possible reaction from the recipients. The Court is of the view that the situation is indicative of undisputable negligence on the part of the judicial services, coupled with signs of a malfunctioning judicial machinery, all combining to jeopardise the rights of the Applicants. It must be pointed out, in that connection, that today, there is every indication that all hopes of being able to pursue the matter further before the courts of Benin have been obliterated, regardless of whatever argument the Defendant may have put up concerning this fact. As things stand now, the Court must find that as far as the actual pleading of the case before this Court is concerned, the claims of denial advanced by the Republic of Benin remain relatively "general" in

nature and do not respond accurately and satisfactorily to the questions raised by the Applicants. The inertia of the judicial authorities has led to an objective situation of denial of the rights of the victims - Miss Abla Azali and Madam Carole Egou.

30. The rights in question here may be subdivided as: the right of access before the courts of justice, the right to be informed of the current stage of a procedure in which one is a party, and the right to be tried in reasonable time. The right to bring one's case before a judge in a court of justice is realised through the formal existence of a well laid-out channel of access to the judge and available channels for appeal. Substantially, this is achieved through simplification of the access procedure, and by pruning down pitfalls and hindrances which do not necessarily augur well for an efficient administration of justice. Both litigants and those assisting them are entitled to be informed of where the proceedings is heading towards, as a right, and this does not only imply serving and notifying them with court processes in due time, but equally means upholding the right of the parties in a dispute to obtain a response from the competent judicial services whenever the latter is required to do so. The right to be tried in reasonable time implies banishing undue bureaucracy and procedural complexities, with a view to averting every form of the threat of negation of litigants' rights, as may occur through the measure of a time bar, thus preventing justice seekers from pleading their case before the courts. This, undoubtedly, was the sort of absurd fate which befell the Applicants in the instant case.

31. Considering all the points made above, the Court finds that the judicial system of the Defendant State bears traces of deficiencies which unquestionably renders the Defendant State blameworthy in the instant case. At this juncture, the Court deems it appropriate to recall a number of judgments delivered on the issue of implementation of court decisions, on the right to trial in reasonable time, and on right of access before the judge:

- Judgment of 31 January 2012 delivered on **Aziablevi Yovo and 31 Others *v.* Société Togo Télécom and Republic of Togo**:

The Court found that the matter brought before it by the Applicants precisely concerned non- execution of a final judgment delivered by a Court of Appeal, and the Court equally found that such instance of non-enforcement of a decision which had acquired res judicata, added weight to the allegations of human rights violation as brought by the Applicants;

- Judgment of 31 October 2012 delivered on **Baldini Salfo *v.* Burkina Faso**: The Court found that the national judicial authorities were under obligation to act as expeditiously as required, so as to ensure that at every phase of the criminal procedure (inquiry, trial and judgment), there would be no undue, superfluous or unjustified delay. Therefore, the Court held that every form of superfluous or unjustified delay occurring at any stage of the procedure inevitably affects the right to trial in reasonable time;

- In the Judgment of 3 July 2013 delivered on **Aziagbede Kokou and 33 Others**, **Atsou Komlavi and 4 Others**, and **Tomekpe A. Lanou and 29 Others *v.* Republic of Togo**, the Court held as follows:

> ***"(…) the Court is of the view that the inaction of the Togolese judicial authorities, in terms of investigating the complaints brought by the Applicants and examining their cause in accordance with Togolese law, during a period of 3 or 4 years for some, and 7 years for others, resulted in a situation where it had become clearly obvious that the Applicants' right to have their cause examined in reasonable time had been violated";***

- In the Judgment of 28 January 2012 delivered on **Alimu Akeem *v.* Federal Republic of Nigeria**, the Court was of the view that the inertia of the judicial authorities in the course of the six-year period sufficed to establish that the Applicant was not heard in reasonable time.

32. It is appropriate to add that the deficiencies found against the Republic of Benin in the instant case can hardly be understood, much the less so when the Applicants were made to continue to remain in such conditions as to harm their physical integrity very seriously, resulting in certain chronic or irreversible harms (for instance, one of them became sterile and thus lost every possible opportunity of conceiving one day), a situation compounded further by the fact that to remedy such harms would require the sort of medical care the humble background and modest financial conditions of the Applicants may not be able to cater for.

33. In conclusion, the Court holds that the rights of the Applicants were disregarded and that it was rightful that Article 8 of the Universal Declaration of Rights and Articles 3 and 7 of the African Charter on Human and Peoples' Rights were invoked and relied on.

b) Regarding the compensation asked for

34. In their written pleadings, each of the Applicants asked for the sum of Fifty Million CFA Francs (CFA F 50,000,000) in reparation for the harms done against them.

35. The Court regrets that the Applicants did not support their Application with documents capable of providing an idea of the expenses they may have incurred as from the time those pains and injuries were inflicted on them. The Court, unfortunately, has no knowledge of the degree of physical and psychological pain or harm endured by the victims, neither is the Court aware, of course, of any expenditure on vital medical treatments they may have had to undergo as a result. The Court cannot, in that regard, overlook the humble economic background of the Applicants. In the light of all these factors, and in regard to the practice followed by the Court in awarding compensations, the Court considers that it shall be reasonable to award to each of the Applicants, compensation in the sum of Twenty Million CFA Francs (CFA F 20,000,000) to be paid to them by the Republic of Benin.

FOR THESE REASONS

The Court

Adjudicating in a public session, after hearing both parties, in first and last resort, in a matter concerning human rights violation;

In terms of formal presentation,

- **Dismisses** the preliminary objection on exhaustion of local remedies raised by the Republic of Benin;

In terms of merits,

- **Adjudges** that the Republic of Benin, through its judicial system and judicial authorities, violated the right of the two Applicants to access the courts of justice, and to be tried in reasonable time;

- **Adjudges** that the Republic of Benin shall pay to each of the Applicants the sum of Twenty Million CFA Francs (CFA F 20,000,000) in reparation for the physical and psychological harm they suffered.

- **Orders** the Republic of Benin to bear the costs.

Thus made, declared and pronounced in a public hearing at Abuja, by the ECOWAS Court of Justice, on the day, month and year stated above.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding.*
- **Hon. Justice Hamèye F. MAHALMADANE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 23RD DAY OF APRIL 2015

SUIT NO: ECW/CCJ/APP/19/14
JUDGMENT NO: ECW/CCJ/JUD/02/15

BETWEEN
TIDJANI ABDOULKARIM & 3 ORS. - *PLAINTIFFS*

AND
THE REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **BOUBACAR AMADOU (ESQ.)** - *FOR THE PLAINTIFFS*
2. **THE SECRETARY GENERAL OF THE GOVERNMENT, ASSISTED BY SCPA THEMIS.** - *FOR THE DEFENDANT*

- Expedited procedure
- Time limit for filing a defence in the expedited procedure
- Specification of infringed rights.

SUMMARY OF FACTS:

By Application dated 23 September 2014, Tidjani Abdoulkarim, Amadou Ali Djibo, Saidou Bakari, Boubacar Mossi applied to the ECOWAS Court of Justice for a declaration that the bureau of the National Assembly of Niger installed during the months of May and June 2014 does not comply with Article 89 (1) of the Constitution of Niger in the sense that it does not reflect the political configuration of the assembly; that this office was constituted without the 2 posts of vice-presidents belonging to the opposition being filled;

They argued that the parliamentary majority is solely responsible for this situation, which is a violation of the rights of the parliamentary opposition to participate in the management of the affairs of the Assembly;

That this incomplete composition is a one-way street just resulted in the authorisation to arrest the Speaker of the National Assembly before the withdrawal of his immunity;

The Applicants submitted that the Court should submit this case to the expedited procedure in order to avoid a serious and irremediable danger to the proper functioning of the National Assembly of Niger.

In support of its defence, the Republic of Niger submits that the Registry of the Court granted it a period of 15 days to file its defence on the basis of the expedited procedure; that the purpose of the expedited procedure is not to reduce the time limits granted to the defence by Article 35 of the Rules of Court,

The Respondent submitted that there was no need to order an expedited procedure and asked the Court to dismiss the Application as unfounded.

LEGAL ISSUES:

- *Can the expedited procedure be granted at the request of Tidjani Abdoulkarim and others?*

- *Can the Court admit the defence of the Republic of Niger filed in the expedited procedure?*

- *Can the Court grant a request that does not specify the right of the violated person?*

DECISION OF THE COURT

The Court held that there is no need to submit the present Application to the expedited procedure;

Declared the defence filed by the Republic of Niger on 20 October 2014 admissible;

Admitted the Application by Tidjani Abdoulkarim and 3 others;

Declared it to be ill-founded.

JUDGMENT OF THE COURT

I- PROCEDURE

1. On 23rd September 2014, Messrs. **TIDJANI ABDOULKARIM AMADAOU ALI DJIBO, SAIDOU BAKARI, BOUBACAR MOSSI**, brought a case against the Republic of Niger, before the Community Court of Justice, ECOWAS, for human rights violation;

2. On the same date, Plaintiffs/Applicants filed an Application seeking the admission of the case to expedited procedure;

3. On 3rd October, notification of the two Applications was done on the Republic of Niger, by the Chief Registrar, who gave the Defendant State fifteen (15) days to file its Memorial in defence;

4. On 20th October 2014, the Republic of Niger filed its Memorial in defence at the Registry of the Court;

5. The case was scheduled for the oral hearing on 23rd February 2015;

6. Plaintiffs/Applicants were not in Court on that date, despite that they were informed on the hearing of that date;

7. The Republic of Niger, which was represented by its Counsel and the Director of State Litigations Office, was heard and the case was adjourned for deliberations.

II- FACTS-CLAIMS AND PLEAS-IN-LAW BY PARTIES

8. By Application dated 23rd September 2014, Messrs. TIDJANI ABDOULKARIM AMADAOU ALI DJIBO, SAIDOU BAKARI, BOUBACAR MOSSI, brought a case before the Community Court of Justice, seeking from the Court to find and adjudge that:

- The Bureau of the National Assembly, that was inaugurated during May/June 2014, was not inaugurated pursuant to Article

89 (1) of the Constitution of Niger in the sense that it does not reflect the political configuration of the National Assembly as defined by the jurisprudence of the Constitutional Court of Niger, and constitutes a violation of Protocol (A/SP.1/12/01);

- MPs of the majority party in Parliament are solely responsible for this situation, which is a violation of the rights of the opposition MPs to participate in the management of the affairs of Parliament. This is because majority Party MPs just chose those MPs that they put in charge of the management of Parliament's affairs;

- All decisions taken by the illegal Bureau are illegal, null and void, and therefore of no effect;

- The vote that led to the inauguration of the Bureau must be re-cast, with a view to have a proper configuration of the Bureau, wherein the legal opposition MPs will feature**;**

9. In support of their claims, they aver that the current Bureau of the National Assembly is not inaugurated pursuant to the provisions of Article 89(1) of the Constitution of 25 November 2010, Articles 13.1, 13.2 and 15.6 of Resolution 003/AN of 19th February 2011 on the Rules of the National Assembly, because the composition is lacking the posts of two Opposition Vice - Presidents; also, the Composition of the Bureau does not comply with the rules of good governance as enacted by the ECOWAS Member States under the Supplementary Protocol on Democracy and Good Governance of ECOWAS to which Niger is a signatory;

10. They equally aver that this incomplete composition of the Bureau prevents any form of expression by Opposition MPs because it operates in one direction; also, this one-way operation has resulted in the authorisation of the arrest of the Speaker of the National Assembly before the lifting of his immunity, and without hearing him, all this constitutes a serious infringement upon fundamental human rights;

11. By separate Application dated 23rd September 2014, Plaintiffs/ Applicants sought leave of the Court to submit this case to an expedited procedure, in order to avoid a serious and irredeemable danger to the proper functioning of the National Assembly, which no longer has a Speaker, while its next Plenary comes up in the first week of October;

12. Plaintiffs/Applicants declared that they filed the instant case pursuant to the provisions of Article 59 of the Rules of the Court;

13. In its defence, the Republic of Niger solicits that may it please the Court as follows:-

    - To **declare** as admissible its defence;

    - On the main proceedings, to **declare** and **adjudge** that there is no reason to admit the instant case to an expedited procedure;

    As to merits:

    - To **dismiss** the Application filed by TIDJANI ABDOULKARIM, AMADOU ALI DJIBO, SAIDOU BAKARI and BOUBACAR MOSSI as unfounded;

14. In support of its defence, the Republic of Niger claimed that the Registry of the Court granted it fifteen (15) days to file its defence, based on the Application seeking admission of the case to expedited procedure;

15. Defendant also claimed that an Application for expedited procedure is not intended to reduce the time-limit allowed for the defence under Article 35 of the Rules of Court; it therefore considers that the Court must declare as admissible its Memorial in defence filed on 20th October 2014;

16. As regards the Application for expedited procedure, Defendant considers that it is not based on any urgency, and the reason of the absence of the Speaker of the National Assembly cannot justify it;

and moreover, the budgetary session of the Assembly came under way on the date fixed by the Bureau, and the work in that session is continuing with the participation of the Opposition MPs;

17. Also, Defendant pleaded with the Court to equally reject the plea tending to declare the Bureau of the National Assembly, as presently constituted as illegal, as well as any action taken by it insofar as the composition of the said Bureau is not in contradiction with the provisions of Article 89 (1) of the Constitution of Niger, and that the actions it has taken are lawful and legally taken;

18. Defendant also contends that the two (02) positions of Vice-President, reserved for the Opposition MPs are yet to be filled, by majority party MPs in Parliament; that they can still be filled by Members of Opposition MPs; and that the Bureau of the National Assembly, contested by Plaintiffs/Applicants, has Opposition Members, including the Speaker himself, MOUSSA ADAMOU elected as quaestor, DAOUDA JIGO and NOUHOUN MOUSSA both elected as Parliamentary Secretaries; that it is therefore misleading to claim that the Bureau of the National Assembly is composed only of MPs belonging to the majority party in parliamentary; thus, as this Bureau was legally constituted, its actions are legal and legitimate;

19. Defendant further argues that it did not violate the Constitution by authorising the arrest of the former Speaker of the National Assembly since it received a request seeking the arrest of Mr. Hama Amadou and responded accordingly;

III- GROUNDS FOR THE JUDGMENT

1- As to form

1.1- On the Application for expedited procedure

20. Whereas under Article 59.2 of the Rules of the Court, *"the Application seeking to submit a case to an expedited procedure*

must be presented by separate document when the initiating Application or defence is filed";

21. Whereas in the instant case, in seeking to submit the case to an expedited procedure Plaintiffs/Applicants lodged both the initiating Application and the one seeking expedited procedure were lodged at the Registry of the Court on 23rd September 2014, through separate documents;

22. Consequently, the Court must declare the Application as admissible, because it satisfies the provisions of Article 59.2 of the above-referred Rules;

23. Whereas Article 59 of the Rules of Court provides that: *"On application by the Applicant or the Defendant, the President may exceptionally decide, on the basis of the facts before him and after hearing the other party, that a case is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules, where the particular urgency of the case requires the Court shall give its ruling with the minimum of delay. (...)"*; therefore, it follows from this provision that recourse to the expedited procedure must be based on the particular urgency of the case;

24. Whereas in the instant case Plaintiffs/Applicants have in no way justified the urgency requiring the Court to admit the present case to expedited procedure; whereas the argument of the absence of the Speaker of the National Assembly does not constitute a situation characterising a particular emergency; whereas this is not a serious and irredeemable danger that could compromise the rights of Plaintiffs/Applicants;

25. Whereas however, the Court has already affirmed in its judgments (N°: ECW/CCJ/JUD/05/10 of 08/11/2010: in the case of **Mamadou TANDJA *v.* Republic of Niger and General SALOU DJIBO** case N°: ECW/CCJ/JUD/06/12 du 13/03/2012: **AMENGAVI Isabelle Manavi *v.* Republic of Togo**); that it is up

to the Court, in the light of the facts presented before it, to ascertain the urgency of the case, in order to decide whether or not to submit it to expedited procedure;

26. Whereas, moreover, the oral phase was opened and the case debated and adjourned for deliberations;

27. Whereas in regard to the foregoing, it should therefore be declared that there is no reason to admit the present case to expedited procedure;

1.2- On admissibility of the Memorial in defence filed by the Republic of Niger

28. Whereas under Article 35 of the Rules of Court, the defence is filed by the Defendant within one month of service of the initiating Application; whereas the Defendant thus benefits from a period of one (01) month to file its defence, as soon as the service of the initiating Application is effected on it;

29. Whereas Article 59 of the Rules of the Court empowers the President, exceptionally, to admit a case to expedited procedure; whereas although this provision gives liberty for the ordinary procedure before the Court to be softened a bit, it is not intended to reduce the time - limit for filing the defence, within the meaning of Article 35;

30. Whereas by effecting notification of both the initiating Application and the Application for expedited procedure on the Republic of Niger, in the instant case, the Chief Registrar of the Court, gave the Defendant State a period of fifteen (15) days to file its defence, while no legal provision allows him to reduce the period of one (01) month provided for under Article 35;

31. Whereas the Republic of Niger received notification of both the initiating Application and the Application for expedited procedure, on 3rd October 2014 and filed its defence on 20th October 2014; thus it follows that between the date of notification of Applications

and that of the filing of the defence, a period of less than one month has elapsed;

32. Whereas, as a consequence, the defence filed by the Republic of Niger should be declared admissible, for having satisfied the time-limits prescribed by the provisions of Article 35 of the Rules;

2. <u>As to merit</u>

33. Whereas under Article 9-4 of the Supplementary Protocol (A/SP.1/01/05) amending Protocol (A/P.1/7/91) on the Community Court of Justice, ECOWAS:

> « *The Court has jurisdiction to determine cases of violation of human rights that occur in any Member States* »;

whereas Article 10-d of the same instrument provides that:

> *«Access to the Court is open:*
>
> *d) Individuals on application for relief for violation of their fundamental human rights: the submission of Application for which;*
>
> *ii) Shall not be made whilst the same matter has been instituted before another international Court for adjudication»*;

34. Whereas on the strength of these provisions, the ECOWAS Court of Justice has jurisdiction over cases of violation of rights on the condition that an Application that is presented to it satisfies the conditions provided for in Article 10-d of the above-referred Protocol;

35. Whereas pursuant to its area of competence provided for in Article 9 of the Protocol, it should be recalled that the Court of Justice of ECOWAS Community cannot assess the legality of decisions rendered by the national courts of the Member States;

36. Whereas the Court has also affirmed in several of its decisions that it is neither a Court of Appeal, nor a Court of Cassation, or even a Court of reform of the decisions rendered by the courts at the national level (case of **KPATCHA GNASSINGBE** (Case ECW/CCJ/JUD/06/13 of 03/07/2013);

37. Whereas in order for his Application to succeed, Plaintiff/Applicant must indicate the human rights, which are the subject of violations and prove the said violations;

38. Whereas in the instant case, in view of the facts exposed, Plaintiffs/Applicants not only failed to state the specific human rights which were violated by the Republic of Niger, but also failed to prove such violation; whereas the narration of the facts relating to the inauguration of the Bureau of the National Assembly in no way demonstrates human rights violation;

39. Consequent upon the above, it is appropriate to declare their Application as ill-founded;

IV- ON COSTS

40. Whereas under Article 66-2 of the Rules of Court: *"…. Any unsuccessful party is ordered to pay the costs, if they were applied for by the other party"*; whereas in Plaintiffs/Applicants have succumbed in instant case;

41. Whereas they should be ordered to bear costs.

FOR THESE REASONS

The Court,

Sitting in a public hearing, after hearing both parties, in a human rights violation matter, in first and last resort,

As to formal presentation:

- **Declares** that there is no need to admit the instant case to expedited procedure;

- **Declares** as admissible the Memorial in defence filed by the Republic of Niger on 20 October 2014;

- **Declares** as admissible the Application filed by Messrs. TIDJIANI Abdoul Karim and three (03) others;

As to merit:

- **Declares** the initiating Application of Plaintiffs/Applicants as ill-founded

- Consequently, **dismisses** all their claims;

- **Ordered** Plaintiffs/Applicants to bear all costs.

Thus made, adjudged and pronounced in a public hearing in Abuja, Federal Republic of Nigeria, by the Community Court of Justice, ECOWAS, on the day, month and year stated above.

And the following have appended their signatures:

- Hon. Justice Jérôme TRAORE - *Presiding.*

- Hon. Justice Yaya BOIRO - *Member.*

- Hon. Justice Hamèye-Founé MAHALMADANE - *Member.*

Assisted by **Aboubacar Djibo DIAKITE (Esq.) -** *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 24TH DAY OF FEBRUARY, 2015

SUIT NO: ECW/CCJ/APP/26/14
JUDGMENT NO: ECW/CCJ/RUL/02/15

BETWEEN
CONVENTION DEMOCRATIQUE SOCIALE, ALIAS CDS RAHAMA - *PLAINTIFF*

AND
REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE YAYA BOIRO** - *PRESIDING*
2. **HON. JUSTICE JÉRÔME TRAORÉ** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **SOULEYE OUMAROU (ESQ.)**
   AND **KARIMOUN NIANDOU (ESQ.)** - *FOR THE PLAINTIFF.*
2. **SECRETARY GENERAL TO THE GOVERNMENT** - *FOR THE DEFENDANT.*

- Violation of human rights - Expedited procedure - Stay of execution - Lack of jurisdiction

SUMMARY OF FACTS

Subsequent to internal dissensions, the CDS-Rahama party was sued before the civil court of Niamey on 30 March 2011, by a group of activists wishing to obtain the cancellation of the deliberations of party meetings during which they were sanctioned. That during a first hearing, where a motion for adjournment for absence and a withdrawal of the deliberations were requested by the CDS-Rahama council, a second proceeding for the annulment of some deliberations of the governing bodies of the party finally took place, and the civil court of Niamey granted the holding of a congress by the dissenters, in place of the party leadership.

The Applicant submits that in view of the imminence of the local elections in 2015 and the parliamentary and presidential elections in 2016, the seriousness and urgency of the situation justifies special attention to their application, and that the Respondent State does not present any serious defence.

The Respondent, on the other hand, argues that the Court is not a court of appeal against decisions rendered at last instance by the courts of ECOWAS Member States, that the Applicant did not demonstrate the urgency of taking a decision to stay execution and the violation of the rights of the defence, particularly the adversarial principle.

Thus on appeal of the Judgment, the Court of Appeal, on 19 August, 2012 overturned the judgment of the civil court, an appeal in cassation was lodged against the judgment rendered, which was quashed and annulled by another judgment of the State Court, on 25 February 2014.

That in the face of all these Applications, expedited procedure and stay of execution, the Court had to decide the following issue.

LEGAL ISSUE:

- *Is the urgency to justify a stay of execution sufficiently established in this case?*

DECISION OF THE COURT

In its preliminary Ruling, the Court noted that there was no urgency justifying a stay of execution of the contested judgment, given that the merits of the case were being examined for a decision to be taken as soon as possible, and that, moreover, the Application came up against a serious challenge, the examination of which would lead to a solution that would prejudge the eventual outcome of the dispute.

Makes the following ruling:

Between

Convention Démocratique Sociale, alias CDS Rahama (APPLICANT), whose headquarters is at Niamey, at Avenue de l'OUA, represented by its Chairman, Mahamane Ousmane, assisted by Maître Oumarou Souleye, Barrister-at-Law;

And

Republic of Niger (DEFENDANT), represented by the Secretary General to the Government, assisted by SCPA-Justicia, Law Firm, with Maître Moussa Mahaman Sadissou as Senior Partner.

The Court,

Having regard to Article 79 and related articles of the Rules of the Community Court of Justice, ECOWAS;

Having regard to the Application dated 6 June 2013 filed by the political party named Convention Démocratique Sociale (alias CDS Rahama), whose headquarters is located at Avenue de l'OUA, represented by its Chairman, Mahamane Ousmane, assisted by Maître Oumarou Souleye, Barrister-at-Law.

FACTS AND PROCEDURE

Whereas it is apparent from the pleadings on the case that, following internal strife, the party known as CDS Rahama was dragged before the Civil Court of Niamey on 30 March 2011 by a group of militants seeking annulment of certain meetings of the party at which they had been sanctioned; that the court hearing was held on 29 June 2011, and a final judgment delivered on 27 July 2011, regardless of an application for adjournment made by CDS Rahama, firstly on the ground that Counsel for CDS Rahama had not put in an appearance, and equally because CDS Rahama had put in a request on 19 July 2011 for a suspension of the judges' deliberation.

A second procedure was set in motion on 22 September 2011 by other members of CDS Rahama, equally seeking to annul certain deliberations made by the leadership of the party. On 25 January 2012, the Civil Court of Niamey granted those requests. Upon an appeal by CDS Rahama, the judgment was overturned by the Appeal Court. Not long after, the same Court of Appeal declared (cf. Judgment of 19 August 2012) that the requests made by the Applicants in the case whose judgment had already been delivered by default in the first procedure, as referred to above, were purposeless, on the ground that the tenure of the concerned persons had expired, and that the sanctions instituted against them had already been executed.

An application was therefore filed by CDS Rahama to quash the latter judgment delivered by the Court of Appeal. Seised with an application for reversal of the said latter judgment made by the Court of Appeal, the State Court of Niger dismissed the application via a judgment dated 6 June 2013. The appeal for withdrawal of the judgment, as filed by CDS Rahama, was equally dismissed by a judgment dated 25 February 2014.

Having thus exhausted the avenues available at the national level, CDS Rahama decided to bring its case before the ECOWAS Court of Justice, dragging the Republic of Niger before the Court.

In its Application, CDS Rahama lodged three formal requests before the Court:

- A substantive application, received at the Registry of the Court on 24 October 2014, alleging violation of a series of human rights;

- An application, received the same day, asking the Court to hear the case under expedited procedure; and

- An application dated the same day requesting from the Court an order for stay execution of Civil Judgment N°. 13-156/CIV of 6 June 2013 delivered by the State Court of Niger.

I. Regarding the request for stay of execution of court decisions

Whereas to ensure that its Application is favourably considered, CDS Rahama submits, through its Counsel, that following internal strife among its activists, in connection with application of the texts of the CDS Rahama political party, the State Court of Niger, by its Judgment N°. 13-156/ CIV of 6 June 2013, quashed and annulled without adjournment, Civil Judgment N°. 55 dated 4 June 2012 which was delivered in their favour; that the said State Court of Niger thus declared as inadmissible the appeal made by CDS Rahama, in violation of its own rules of competence. That emboldened by the said court decision, the dissidents within the party decided to hold a congress, thus usurping the management powers and functions of the leadership of the party.

That the Minister of Interior and Public Security of Niger, citing the above-said overturned judgment, on the basis of a report submitted by the Counsellor of the State Court of Niger, addressed two letters rogatory to the Chairman of CDS Rahama, for enforcement of the judgment which had been delivered in violation of the principle that both parties must be heard in court.

The Applicant pleads urgency and a serious risk of danger to its case, to justify its request for special attention to matter brought before the Court, considering the closeness of the time for the 2015 local elections, and for the 2016 legislative and presidential elections, coupled with the fact that the Republic of Niger had not submitted any serious pleadings in defence; finally, the Applicant avers that the ECOWAS Court is not a domestic court and that it is therefore not bound by the legislative texts of the Member States of the ECOWAS Community.

Whereas the Republic of Niger avers, through the Secretary General to the Government, assisted by SCPA-Justicia, a law firm, that the pleas-in-law advanced by the Applicant, claiming thereby that the Honourable Court is not an appeal court over the domestic courts of the Member States of ECOWAS, as may be applicable to the judgments delivered by the State Court of Niger; that, again, the Applicant does not demonstrate in specific terms what constitutes, in the first instance, the urgency in

undertaking a stay in execution of the court decision, and in the second instance, in what manner its rights to defence may have been violated, notably as regards the principle that both parties must be heard. Finally, the Defendant maintains that the preliminary ruling does not serve any purpose anymore because the Court had already began examining the merits of the case, and additionally, the local, presidential and legislative elections at stake were not to be held in the very near future and that the body to take charge of supervising the elections (CENI) had not yet been put in place.

Whereas it is a principle that the judge intending to make the preliminary ruling cannot take any provisional or conservatory measures unless within the circumstances of urgency, and on condition that the said measures do not constitute a serious bone of contention.

Whereas in the instant case, the Court finds that there is no urgency for making a pronouncement on a stay of execution in respect of the judgment complained of, considering the fact that the merits of the case are still being tried in court and that a decision will be made thereon in the shortest possible time, at any rate, before the elections referred to by CDS Rahama. Whereas, again, the Application submitted is faced with a serious contestation whose argumentation at this stage of the proceedings would end up suggesting a solution which could prejudice the probable outcome of that dispute.

II. Regarding costs

Whereas in compliance with the provisions of Article 66 and related articles of the Court, costs shall be reserved.

FOR THESE REASONS

The Court,

Adjudicating in a public session, after hearing both parties, in a matter concerning referral for preliminary ruling, in first and last resort;

Substantively, asks the Parties to seek a mutually agreed mode of redress as they would deem fit;

In terms of formal presentation

- **Admits** the Application submitted by CDS Rahama;
- **Declares** that it has no jurisdiction to adjudicate on the case;
- **Reserves** costs.

Thus made, adjudged and pronounced in a public hearing at Bissau on the 24th day of February 2015.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Yaya BOIRO** - *Presiding.*
- **Hon. Justice Jérôme TRAORÉ** - *Member.*
- **Hon. Justice Alioune SALL -** *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 23RD DAY OF APRIL 2015

SUIT NO: ECW/CCJ/APP/26/14
JUDGMENT NO: ECW/CCJ/JUD/03/15

BETWEEN
CONVENTION DEMOCRATIQUE SOCIALE, ALIAS CDS RAHAMA - *PLAINTIFF*

AND
REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **SOULEYE OUMAROU (ESQ.)**
   AND **KARIMOUN NIANDOU** - *FOR THE PLAINTIFF.*
2. **SECRETARY GENERAL TO THE GOVERNMENT** - *FOR THE DEFENDANT.*

- Violation of human rights - Admissibility of the Application - Incompetence of the Court to assess the relevance of strict measures for the administration of justice before the domestic courts of Member States.

SUMMARY OF FACTS

On 24 October 2014, the Convention Démocratique et Sociale Rahama Niger Political Party, having exhausted all the resources available to it under the national procedure, filed a main Application, a motion to submit the case to the expedited procedure and a motion for the indication of provisional measures to order a stay of execution of the civil judgment of 6 June 2013 handed down by the National Court of Niger. These applications were dismissed by an order of the Court, inviting the parties to plead the substantive issues.

In his main Application, the Applicant alleged violation of his rights to equality before the law, to an independent and impartial tribunal and to respect for the rights of defence.

Responding, the Government of Niger, while not challenging the admissibility of the Application, contended that no violation of the rights of the Applicant could be imputed to it and accordingly requested the Court to dismiss the Application with all its pleas, purposes and submissions.

LEGAL ISSUES:

- *Does the Court have jurisdiction to examine the relevance of strict measures of the administration of justice before the domestic courts of Member States, such as the dismissal of a case or the quashing of deliberation?*
- *Is it a court of reformation or cassation of the decisions of national courts?*

DECISION OF THE COURT

As a matter of form, the Court declared the action admissible. On the merits, the Court stated that it was not a Court for the reversal of decisions of national courts and that there was no violation of the rights of the Applicant. In consequence, the Court dismissed the claim and ordered the costs to be borne by the Applicant.

JUDGMENT OF THE COURT

I - THE PARTIES AND THEIR REPRESENTATION

1. The Application, received at the Registry of the Court on 24 October 2014, was lodged by the Nigerien political party known as Convention Démocratique et Sociale, alias CDS Rahama, whose headquarters is at Niamey, Avenue de l'OUA. The Applicant is represented by its Chairman, Mr. Mahamane Ousmane, and Lawyers Maîtres Souleye Oumarou and Karimoun Niandou, both registered with the Bar Association of Niamey, Niger.

2. The Defendant is the Republic of Niger, legally represented by the Secretary General to the Government, located at the Presidential Palace of the Republic of Niger, Niamey.

II - SUMMARY OF THE FACTS AND PROCEDURE

3. The case brought before the Court takes its roots from various national judicial procedures initiated by the Applicant.

4. Following internal strife, the party known as CDS Rahama was dragged before the Civil Court of Niamey on 30 March, 2011 by a group of militants seeking annulment of certain meetings of the party at which they had been sanctioned. The court hearing was held on 29 June 2011, and the final court judgment was delivered on 27 July 2011, regardless of an application for adjournment, for no appearance put in by Counsel for CDS Rahama, and a request for suspension of deliberation of the panel of judges, equally put in by the same CDS Rahama on 19 July 2011.

5. A second procedure was set in motion on 22 September 2011 by other members of CDS Rahama, equally seeking to annul certain deliberations made by the leadership of the party. On 25 January 2012, the Civil Court of Niamey granted those requests. Upon an appeal by CDS Rahama, the judgment was overturned by the Appeal

Court. Not long after, the same Court of Appeal declared (*cf*. Judgment of 19 August 2012) that the requests made by the Applicants in the case whose judgment had already been delivered by default in the first procedure, as referred to above, were purposeless, on the ground that the tenure of the concerned persons had expired, and that the sanctions instituted against them had already been executed.

6. An application was therefore filed by CDS Rahama to quash the latter judgment delivered by the Court of Appeal. Seised with an application for a reversal of the said latter judgment made by the Court of Appeal, the State Court of Niger dismissed the application via a judgment dated 6 June 2013. The appeal for withdrawal of the judgment, as filed by CDS Rahama, was equally dismissed by a judgment dated 25 February 2014. The Applicant makes a case against the courts which participated in the procedures, for reversing the judgment by the Court of Appeal, and for systematically adopting the orders made by the Judge Rapporteur and the submissions of the Office of the Public Prosecutor.

7. Having thus exhausted the avenues available at the national level, CDS Rahama decided to bring its case before the ECOWAS Court of Justice by dragging the Republic of Niger before the Court.

8. In its Application, CDS Rahama lodged three formal requests before the Court:

   - A substantive application alleging violation of a series of human rights, received at the Registry of the Court on 24 October 2014;

   - An application asking the Court to hear the case under expedited procedure, received the same day; and

   - An application dated the same day asking the Court for an order to stay execution of Civil Judgment No. 13-156/CIV of 6 June 2013 delivered by the State Court of Niger.

9. The last two applications constitute thus a request for interim measures, for addressing, according to CDS Rahama, the urgency of having to avert execution of the Judgment of 6 June 2013.

III - ARGUMENTS OF THE PARTIES

10. In its substantive application, CDS Rahama asserts that the Republic of Niger violated the following instruments or provisions:

    - Protocol A/P.1/7/91 of 6 July 1991;
    - Protocol A/SP.1/01/05 of 19 January 2005;
    - Articles 2, 7, 8, 10, 28 and 30 of the 1948 Universal Declaration of Human Rights;
    - Articles 2, 5(2) and 26 of the 16 December 1966 International Conventional on Civil and Political Rights;
    - Articles 3, 7 and 26 of the 1981African Charter on Human and Peoples' Rights;
    - Articles 8, 116(1), 117(1) and 118 of the 7th Republic Constitution of Niger;
    - Basic Principles on the Independence of the Judiciary as provided for in United Nations Resolution 40/32 of 29 September 1985 and United Nations Resolution 40/146 of 31 December 1985;
    - Article 3 of the Constitutive Law of 22 July 2004 laying down the rules of organisation and the jurisdiction of the courts in the Republic of Niger on observance of the right to defence.

11. According to the Application, these provisions cover the following rights:

    - Equality before the law;

- The right to be tried by an independent and impartial court or tribunal;

- Respect for the right to defence.

12. More specifically, and in relation to the procedures initiated before the national courts of Niger, the Applicant complaints that regardless of the application for adjournment put in by its Counsel before the Civil Court of Niamey on 27 June 2011, same court took no account of the request and rather delivered a default judgment, which, according to CDS Rahama, "constitutes a human rights violation" *(page 3 of the substantive application)*.

13. CDS Rahama equally takes the position that in systematically adopting the orders made by the Judge Rapporteur and the submissions of the Office of the Public Prosecutor, the judgments delivered by the State Court of Niger on 6 June 2013 and by the *Cour de Cassation* (Cassation Court) on 25 February 2014 violated its rights.

14. Finally, CDS Rahama cites disregard for its rights to defence and for the principle that both parties must be heard, on the basis that none of the documents (the orders of the Judge Rapporteur and the submissions of the Office of the Public Prosecutor) were communicated to it, nor did it have any knowledge of those documents *(page 5 of the substantive application).*

15. The Republic of Niger, Defendant, deposited a Memorial in Defence at the Registry of the Court, received on 8 January 2015. In its written pleadings, it first of all asserts that, pursuant to the Constitutional Law of Niger (Article 117 of the 7th Republic Constitution) and the Constitutive Law N°. 2004-50 of 22 July 2004 on Organisation and Powers of the Courts of the Republic of Niger (Article 1), the Republic of Niger perfectly fulfils the criteria for an independent and functional judiciary, in line with the relevant international commitments it has subscribed to.

16. In a second point, the Republic of Niger argued in terms of the "*lawfulness of Civil Judgment N°. 13-156/CIV of 6 June 2013*,

at the end of which it requests the ECOWAS Court to *"recognise the lawfulness of Civil Judgment No. 13-156/CIV of 6 June 2013 made by State Court of Niger, in the light of the provisions of Articles 22, 27, 59 and 62 of the Constitutive Law No. 20106-16 of 16 April 2010 Determining the Organisation, Powers and Functioning of the State Court of Niger, and to find that the Republic of Niger violated no regional or international human rights instrument"*.

17. In the third and final point of its defence argumentation, the Republic of Niger supports the *"legality of the orders issued by the minister responsible for political parties"*, notably in the sense that following the court decisions made by virtue of the Political Parties' Charter of Niger, the said minister asked CDS Rahama to hold an ordinary congress to renew the leadership of the party. The Republic of Niger thus argued that by so doing, the minister in question only exercised the powers conferred on him by the said Charter, and that no violation of the Applicant's rights may be inferred from the step taken by the minister.

18. In conclusion, the Republic of Niger does not challenge the admissibility of the Application, and it asks the Court to dismiss all the pleas in law and the orders sought by CDS Rahama, together their intents and purposes.

III - ANALYSIS OF THE COURT

19. The matter brought before the Court deals with several points, and it is worthwhile that they be examined one by one. These points concern (A): Technicalities and (B): Merits.

A - TECHNICALITIES

20. In terms of technicalities, one is called upon to examine (1): The jurisdiction of the Court in relation to the substantive application, and (2): The relevance for indication of interim measures by the Court.

1. The jurisdiction of the Court in relation to the substantive application.

21. The substantive application submitted before the Court cites human rights violation on the territory of the Republic of Niger, a Member State of ECOWAS, and party to the various legal instruments on human rights. The substantive application equally relies on Articles 9(4) and 10 of the Supplementary Protocol A/SP.1/01/05 on the Court. Pursuant to the consistently held case law of the Court, these criteria are sufficient requirements which establish the jurisdiction of the Court.

B - Merits

22. The substance of the dispute rests on complaints brought by the Applicant in regard to : (1) Refusal by the national courts to grant its application for adjournment (2) Non-communication of court processes as alleged by the Applicant (3) Alleged political dimension of the case, and finally (4) Overturning or voiding decisions made by the domestic courts.

1. Refusal by the national courts to grant the Applicant's request for adjournment of court proceedings and suspension of deliberation by the judges

23. In its written pleadings, CDS Rahama denounced the refusal by the Civil Court of Niamey to adjourn proceedings in examining the dispute between it and some of its militants. The application for the adjournment had been made by Counsel for CDS Rahama through a letter dated 27 June 2011. Regardless of the application, a court hearing was held on 29 June 2011. Its Counsel therefore made a new request seeking suspension of deliberation by the judges, but the said Civil Court eventually gave a default judgment. For the Applicant, such persistent refusals amount to violation of the right to defence.

24. The Court is of the view that it is a normal occurrence, in the course of a proceedings instituted before a court, for the court to adjourn

once or several times, either on its own motion (suo motu) or upon a request by a party to the proceedings. As such, adjournments may indeed appear to be buttressed in rights held by the parties pleading their case before the Court, but they are not so exclusively limited. Adjournments actually constitute, as well, judicial-administration measures which form an integral part of the mechanism for directing the procedure, or for preparing the causes in subsequent hearings. In that light, whether or not an adjournment or a suspension of deliberation shall be granted remains a matter to be determined within the sovereign powers of the judge in charge of the case. Thereby, it is not within the ambit of an international court like the ECOWAS Court to determine the relevance of the adjournment of a case, or else to assume the role of the domestic judge in adjudging the appropriateness or otherwise of a measure of judicial administration at the domestic level.

The experience of the domestic courts show, at any rate, that the adjournment of court proceedings or suspension of judges' deliberations are not matters over which litigants hold any acquired rights. One may only talk of violation of human rights or violation of the right to fair trial where series of measures of a certain degree of gravity have been adopted, whose cumulative effect result in a concrete prejudice or a significant breach in equality of arms at trial, against the litigant. Nothing shows that such is the case here.

25. Furthermore, if the ECOWAS Court of Justice were to commit itself to examining such measures as complained of by the Applicant, the Court would very soon find itself in an awkward position *vis-à-vis* the stand it has taken above not to act as a court of appeal or as a *cour de cassation* over the domestic courts of Member States; for the simple reason that, the measures sought for by the Applicant, if granted by the Court, may take the form of a court decision, notably the form of "an Order of Court".

26. For all these reasons, the Court holds that those seeking justice before the law courts shall not claim adjournment of court proceedings or

suspension of judges' deliberation as their rights. Consequently, the refusal to grant the Applicant those requests, in a specific instance, does not constitute violation of "human rights".

27. The claim brought by CDS Rahama in regard to that point is therefore dismissed.

2. Non-communication of court processes as alleged by the Applicant

28. CDS Rahama equally claims that it was not informed of the orders of the Judge Rapporteur, nor it aware of the submissions of the Office of the Public Prosecutor. It claims that this as an instance of *"... violation of the right to defence and the right to hear both parties."*

29. The Court notes however that the Applicant does not cite any text which compels the Judges of this Court to transmit the court processes in question. It is even possible that within the specific context of a given judicial framework and its principles of procedure, communication of the court processes complained of may come under rules determining how far they could be communicated, in contrast with pleadings that may permissibly be within the possession of the parties to the proceedings, in the strict sense of the term. In other words, it not stated that it is all the documents relating to a judicial procedure that shall be transmitted. Whatever the case may be, at the current stage of the proceedings, once again, it is not demonstrated that what the Applicant is alleging is a right possessed by parties at trial, nor that such non-non communication could have had any decisive effects on the situation of CDS Rahama. The Court cannot therefore conclude, on the sole basis of failure to communicate orders made by the Judge Rapporteur and the submissions of the Office of the Public Prosecutor, that there was a human rights violation.

30. The Court equally dismisses the claim brought by CDS Rahama in regard to this point.

3. An alleged political dimension to the case

31. In the substantive application submitted before the Court, CDS Rahama purports, or alludes several times, to a highly significant political involvement in the conduct of the case in which it is a party, and suggests therefore that it appears the Judiciary of Niger had not given a true account of the impartiality expected of it. CDS Rahama thus asserts that the various trials at which it featured as a party had not been fair proceedings.

32. In that light, the Applicant recalls the current political context of Niger and its own status as *"... an opposition political party..."*, whereas *"... all its opponents lend their support to the camp of the President, in violation of the Political Parties Charter and the Opposition Statute."* The Applicant equally recalls that among its opponents, *"...two (2) are occupying or have occupied State ministerial posts in the Government and several others are Presidential Advisers..."* (Page 8 of the substantive application in French). The Applicant further claims that *"...the Public Prosecutor's Office has become....an opponent of one of the parties."* (Page 10 of the substantive application in French), and that *"From the transcript of the hearing, CDS Rahama requested that the President of the Court should recuse himself from the matter, due to his close connection to the President of the Republic of Niger, who is at the centre of the dispute."* (Page 11 of the substantive application in French).

33. It can equally be found in the application for expedited procedure, and in the request for stay of execution of judgment, as filed by CDS Rahama, references to allegations of a predominantly political trial of the case. One thus reads in application for expedited procedure, that: *"...in order to reward these anti-party activities against CDS Rahama, some were appointed Ministers and Advisers in the Government for a job well done."* (Page 1 of French version), and in the request for stay of execution, that: *"...there is urgency, danger and very serious risk of malfunction of the Party"* (Page 2 of the French version).

34. In its written pleadings, CDS Rahama equally invokes, in support of its claim of unfair trial and impartiality of the State judiciary, that the Chairman of the Superior Council of Judicature postponed the promotion of two (2) judges of the Court on grounds of *"... questionable moral character..."*. It finally avers that the judge rapporteur of the first decision of the appeal proceedings was *"... relieved of his duties and transferred to the Ministry of Justice to carry out administrative duties."*

35. The Court is well aware that once it is seised with a matter from a political body, the case will necessarily depict a political landscape. The Court shall however recall, as it has done in other decisions, that the political intents or declarations of one party or the other have no relevance to its legal mandate. More precisely, its mandate, in regard to disputes on human rights violation, is limited to examining, in reality and in concrete terms, whether there is violation of a well-defined right, and the Court does not unnecessarily entangle itself with political motives and statements.

36. In its judgment of 23 March 2012 on **Barthélémy Dias *v.* Republic of Senegal**, the Court clearly stated that:

> ***"the statements made by the public authorities of the Republic of Senegal, as to the historical facts behind the proceedings instituted against the applicant in that case, constituted personal opinions relevant only to those who made the statements, and that those opinions, even when originating from the highest political authorities, as they were in that very case, shall not compromise the independence and impartiality of the judge to whom that applicant's case had been assigned."***

37. In other words, the mandate and actions of the Court shall not in any way whatsoever be questioned by the fact that a political party, CDS Rahama, has filed a case before it, or by the fact that the judgment of the Court may have objective consequences on the

political scene of the Republic of Niger. The Court shall not seek to derive any consequences whatsoever from the very fact that the exercise of its mandate in connection with the instant case could have repercussions on the political or electoral scene.

38. As a result, the Court shall not entertain the considerations made by CDS Rahama in this instance; and as well, those considerations cannot be entertained by the Court for the purposes of finding out whether human rights violations have been committed or not.

39. The Court further observes that the Applicant narrows itself to making the following statement about the minister in charge of political parties, concerning the measures adopted by him: *"... relying on the decision of the Court of Cassation, he wrote two (2) threatening letters to the Chairman of CDS Rahama, asking him to enforce the Judgment of the Court of Cassation, failing which the Party will be suspended."* Here, no violation of a precise right is made against the minister. There is every indication that in the instant case, the minister in question acted within the confines of his powers, as provided for by the Political Parties Charter.

40. Consequently, the Court holds that no blame may be apportioned to the Minister of Interior and Public Security of Niger, as having committed a violation of any right.

4. ***Overturning or voiding decisions made by the national judge in the domestic courts of Niger***

41. Upon careful reading through the various documents produced before it by the Applicant, the Court considers that there is no doubt that in the final analysis, the Applicant is asking the Court to halt the execution of rulings or judgments delivered by the courts of Niger.

42. Already, in the application seeking an order from the Court for stay of execution, CDS Rahama first of all asks the Court: *"To order the stay of execution of the Civil Judgment No. 13-156/CIV of 6 June 2013 delivered by the State Court of Niger, till this*

Honourable Court delivers its judgment which bring to a close the case now pending before Your Honourable Court." In the same application, CDS Rahama does not hide the fact that his intention behind the request is to ask the Court *"... to criticise the conditions in which the contested decision was made."*

43. In the substantive application, CDS Rahama indicates that it has *"... produced in the case file several judgments which showed that the Court of Cassation of the Republic of Niger violated its own case law on admissibility of applications brought for the purposes of overturning previous judgments"* (Page 11 of French version) before expressly asking *"... that the future decision of the instant Court overrule the decisions complained of."* (Page 14 of French version).

44. The Court has stated above, as to adjudication on the application for expedited procedure, its position on judicial decisions rendered by judges of the domestic courts in ECOWAS Member States. The Court has to state the law once more, at this juncture, all because various applications submitted before this Court always tend to raise the issue of revocation of judgments already delivered by the judge in the domestic courts of Niger.

45. In the judgment on **Jerry Ugokwe *v.* Nigeria** dated 7 October 2005, the Court declared that:

> ***"Appealing against the decision of the National Courts of Member States does not form part of the powers of the Court…"*** (§32).

46. In the judgment on **Moussa Léo Keïta *v.* Republic of Mali** delivered on 22 March 2007, the Court held:

> ***"The Court declares that it is incompetent to adjudicate upon the decision made by the Supreme Court of Mali…"*** (§39).

47. In the judgment on **Al Hadji Hammani Tidjani *v.* Federal Republic of Nigeria and Others** dated 28 June 2007, the Court decided that:

> ***"Admitting this Application will amount to this Court interfering in the criminal jurisdiction of the Nigerian courts without justification."*** (§45).

48. Finally, in the judgment on **Alimu Akeem *v.* Federal Republic of Nigeria** dated 28 January 2014, the Court recalls that:

> ***"It is trite that in those cases where the subject-matter of the dispute essentially had to do with a re-examining of judgments already delivered by the domestic courts, the Honourable Court held that they be dismissed."*** (§ 42).

49. This doctrine shall not only be recalled when the Court is expressly asked to void or overturn decisions already pronounced by the domestic courts, but shall assume an overriding importance, any time an application implicitly ends up seeking revocation or annulment of a decision already made by a judge in the domestic courts, without expressly stating so. The choice remains with applicants coming before this Honourable Court not to raise their issues in terms of seeking to overrule decisions made by the national judge at the domestic court or tribunal, but rather to situate their cause exclusively upon the terrain of human rights violation.

50. Again, in regard to this point, it is appropriate to recall two judgments delivered by the Court.

51. In Case Concerning **Bakary Sarré and 28 Others *v.* Republic of Mali**, the Court held that:

> ***"from an analysis of the application lodged before it by Mr. Bakary Sarré and 28 Others against the Republic of Mali, the request substantially sought to revoke Judgment Nos. 188 and 166 delivered by the Supreme Court of Mali, and intended to prop up the***

ECOWAS Court as a "court of cassation" over the decisions of the Supreme Court of Mali. Viewed from that angle, the Court declared that it had no jurisdiction to adjudicate over the matter.

(Refer to Judgment of 17 March 2011, § 31).

52. Then in the case law on *Case Concerning* **Isabelle Manavi Ameganvi *v.* Republic of Togo**, the Court found as follows:

"The Court finds that the application to retrieve the lost seats is akin to an application brought against Decision N°. E018/10 of 22 November 2010 of the Constitutional Court of the Republic of Togo, which is a domestic court of a Member State; and in following its established jurisprudence, the Court has no jurisdiction to sit as an appellate court or a cassation court, and so it cannot reverse the said Decision." *(Judgment on Application for Revision, delivered on 13 March 2012, § 17).*

53. On the basis of the principle behind this standpoint, it can be deduced that the requests of CDS Rahama concerning the decisions of the local courts of Niger cannot be granted, the reason being that the Court has no remit for examining such decisions; and more generally, after decisions are made by the domestic courts of Niger, the Court has no jurisdiction to examine whether those local courts of Niger adhered or not to their jurisprudence or generally, to the national law of Niger.

54. Consequently, the Court declares that it has no jurisdiction to adjudicate on all requests of such nature, as brought by the Applicant.

FOR THESE REASONS

Adjudicating in a public session, after hearing both Parties, in first and last resort,

The Court,

In terms of technicalities,

- **Declares** that it is competent to examine the violations of human rights alleged by CDS Rahama against the Republic of Niger;

- **Declares** that it has no jurisdiction to adjudicate on those aspects of the Application which seek to revoke the decisions made by the domestic courts of Niger;

- **Dismisses** the request for stay of execution of court decisions as brought by CDS Rahama;

In terms of merits,

- **Adjudges**, in regard to the other aspects of the Application, that the Republic of Niger has committed no human rights violation.

As to costs,

- **Asks** each Party to bear its costs.

And the followung hereby append their signatures:

1. **Hon. Justice Jérôme TRAORÉ** - *Presiding;*
2. **Hon. Justice Yaya BOIRO** - *Member;*
3. **Hon. Justice Alioune SALL** - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON 23RD DAY OF APRIL 2015

SUIT NO: ECW/CCJ/APP/19/13
JUDGMENT NO: ECW/CCJ/JUD/04/15

BETWEEN
ELI HAGGARMI - *PLAINTIFF*

AND
THE REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **MAZET PATRICK (ESQ.)** - *FOR THE PLAINTIFF*
2. **MAHAMAN HAMISSOU** - *FOR THE DEFENDANT*

- Violation of the right to a job - Violation of his right to integrity

SUMMARY OF FACTS

The Applicant Eli Haggarmi, a member of the customs administration, said he was dismissed from the Customs due to the denunciation of the Director General of that administration through a report dated 21 June, 1984. This report denounced the Applicant's bad behaviour, namely drunkenness, scandal on public roads and driving without a driving license. He then came before this Court of Justice with an Application to condemn the State of Niger for the violation of his right to employment and integrity.

The State of Niger countered that the Applicant's revocation order did not suffer any irregularities. It then concluded that Mr. Haggarmi had exceeded the deadline to take legal action and that the Applicant's claims should be rejected outright.

LEGAL ISSUES

1. *Can the late filing of a memorial result in dismissal for exceeding of deadline?*
2. *Was the Applicant arbitrarily dismissed?*
3. *Was the Applicant's integrity violated?*

DECISION OF THE COURT

In its decision, the Court rejected the Appellant's objection to dismiss the statement of defence for time-barred. The Court considers that the Defendant's pleadings were filed well before the commencement of the case and clearly did not cause any prejudice to the Applicant.

The Court concluded in the light of the international instruments that the Applicant's right to employment was violated because the faults he was accused of were not committed in a professional context. On the other hand, the Court rejected the allegations relating to the violation of his integrity on the ground that the Applicant did not provide evidence of his alleged violations.

JUDGMENT OF THE COURT

II - FACTS AND PROCEDURE

II.1- Mr. Eli HAGGARMI brought a case against the Republic of Niger, through an initiating Application dated 27 September 2013, filed at the Registry of the Court on 7 October 2013, sequel to the violation of his human rights, especially:

- His right to gainful employment;
- The respect for moral integrity of his person;

II.2- Mr. HAGGARMI was a civil servant in the Customs Department of the Republic of Niger from 5 September 1977 to 28 March 1985;

He was relieved of his duties, upon a report submitted to the authorities, by the Comptroller-General o Customs of Niger Republic;

II.3- Indeed, in a report dated 21 June 1984, the Comptroller-General of Customs exposed to the Minister of Finance and National Planning, his overseeing Minster, the behaviour of Mr. Eli HAGGARMI, to which he had drawn Plaintiff/Applicant's attention; the negative behaviour noticed in him was broken down to drunkenness, scandal on public motorway, and driving without a valid driver's license;

He viewed these acts not being compatible with Plaintiff/Applicant's job;

II.4- Taking strength in the said report, the Minister of Finance and National Planning brought the matter to the attention of his counterpart in the Ministry of Labour and Public Service who, by Decision n°1892/MFP/T of 27 August 1984, placed Mr. HAGGARMI on suspension, before taking him before the

Disciplinary Council, via Ministerial Order n° 1842/MFP/T of 19 November 1984;

II.5- After investigating the matter, the Disciplinary Council decided to propose to the Administrative Authority the sanction of warning in writing, to Mr. HAGGARMI;

II.6- By Ministerial Order n°814/MFP/T dated 14 May 1985, the Minister of Labour and Public Service went beyond the proposal on written warning, to inflict on Plaintiff/Applicant, the of *"sack, with the rights to draw from his retirement benefits"*;

II.7- Mr. HAGGARMI has not ceased from requesting that his case be re - examined, by successive Government Authorities, especially the successive Ministers Labour and Public Service, the Ministers of Finance and Economic Matters, the Chairman of the National Commission on Crimes and Abuse of Political, Social and Cultural Powers, the President of the Council of State the Chairman of the National Human Rights Commission and Fundamental Liberties, **the Médiateur de la République,** the Prime Minister and even the Head of State;

Undeterred, he instituted proceedings before the **Tribunal de Grande Instance** of Niamey, dealing with administrative matters;

II.8- All these steps taken by Plaintiff/Applicant could not bear any fruit, including the ultimate intervention by the **Médiateur de la République**, who brought the case up to the Head of State, and pleaded for a Presidential Pardon, has not changed the plight of Plaintiff/Applicant;

II.9- Thus, he decided to bring the instant case before this Honourable Court, against the Republic of Niger, in order that the Court should note the arbitrary manner of the sanction that was taken and applied against him, by the Republic of Niger, which constitutes a violation of his human rights;

II.10- Notification of the initiating Application was done onto the Defendant State on 7/10/2013;

The Memorial in defence of the Republic of Niger dated 15 November 2013, was filed at the Registry of the Court on 5 December 2013;

Plaintiff /Applicant, through his Counsel, filed a rejoinder dated 1st February 2014, which was received at the Registry of the Court on 6th February 2014;

The Republic of Niger failed to reply to this rejoinder;

II.11- The case came-up for hearing, at the court session of 23 February 2015;

All parties were present at the said hearing;

II.12 The matter went into deliberation, for judgment to be given on 23 April 2015;

III - CLAIMS AND PLEAS-IN-LAW BY PARTIES

III.1- Mr. HAGGARMI claims that he was wrongly sanctioned, that the decision to sack him did not conform with legal provisions on the matter, that he was wrongly sacked by the regime of President KOUNTCHE, that, indeed, despite the proposal contained in the report submitted by the Disciplinary Council, a sack decision was taken and applied against his person, that that sack decision constitute a violation of his human rights, especially his right to a gainful employment, and the respect for the moral integrity of his person, and that he has exhausted all local remedy to no avail;

III.2- In support of his claims, he insisted on the fact that the misdemeanours for which he was accused did not exist, the lack of legal grounds for those purported misdemeanours, on the violation of Law n°59-6 of 3rd December 1959 on the General Statutes of Labour and Public Service, in its Articles 17, 45 and

46 and Decree 75-158/PCMS/MFPT of 11 September 1975, on the particular Status of the Staffs of the Customs Department;

III.3- He recalled that the punishment meted out on his person, by the Republic of Niger violates international human right protection instruments, especially the International Covenant on Social, Economic and Cultural Rights, Article 6, of the Universal Declaration of Human Rights, Article 5 of the African Charter on Human and Peoples' Rights, in its Article 4;

III.4- Finally, Plaintiff/Applicant claims that the Republic of Niger ratified all these international legal instruments on the promotion and protection of human rights;

III.5- He pleads, that may it please the Honourable Court:

- To **admit** his Application as properly filed, as to form;
- To **adjudicate** on the violation of his rights to gainful employment and the respect for the moral integrity of his person, in the light of the established case law of the Court, and the instruments invoked, in his Application;
- To **declare** that the misdemeanours that form the grounds for the sanction that was inflicted upon his person do not exist, within the purview of Articles 17, 45 and 46 (1) of Law 59-6 of 8 December 1959;
- To **note** that Order n° 0814/MFP/T of 14 May 1985, in which his sack was mentioned, was issued well beyond legal time - limit, and without any legal grounds, all in violation of Law 59-6, without publication of the grounds for the misdemeanours, should be declared of no legal effect whatsoever;
- To **declare** that his sack was arbitrary and constitutes a violation of his right to gainful employment, and a lack of respect for the moral integrity of his person;

- To **Order** the Republic of Niger to pay him, as reparation of the said violation, the equivalent of his salaries and emoluments (allowances), which shall be calculated from the date of his sack, till his retirement age of 60 years, plus other damages, for the moral prejudices suffered, all amount that shall not be inferior to four hundred millions (400.000.000) CFA francs;

- To **Order** the Republic of Niger to bear all the costs;

III.6- In response, the Republic of Niger declared that the order on the sack of Mr. HAGGARMI does not suffer from any illegality;

III.7- It declared that Plaintiff/Applicant brought a case against it in the national courts, on 25 June 2012, and that the said case is still pending there, that Plaintiff/Applicant also hurriedly brought the instant case before this Honourable Court, without waiting to get to the end of the procedures in the national courts;

III.8- It accused Plaintiff/Applicant to have waited 26 years before making any salary claim to the Authorities; that whereas, filing a case for effective remedy, against abuse of powers is provided for, within prescribed time-limit;

III.9- In support of his claims, Defendant invoked Order n° 2010-16 of 15 April 2010 on the Organisation, Duties and Functioning of the Cour d'Etat;

III.10- It further claims that Article 89 (1) of this Order substantially provides that any administrative recourse must have been made, ab initio, within the first 30 days of the publication of the attacked Decision, and as such, the Application by Mr. HAGGARMI, for abuse of powers was not filed within the legally stipulated time, because, it was addressed to the Prime Minister on 9th February 2012, whereas the attacked Decision dates back to 14 May 1985;

Defendant concluded that, having filed an Application on abuse of powers, well beyond legal time-limit, to bring any such case before a court, Plaintiff/Applicant's Application, in the instant case should simply and purely be thrown out;

IV- LEGAL GROUNDS:

- On the debarment sought by Counsel to Applicant

IV.1- In his rejoinder dated 1st February 2014, Counsel to Applicant claims that the Republic of Niger filed its defence beyond the legal time - limit; he then sought for the rejection of the said defence, on debarment, pursuant to Article 11 Protocol (A/P.1/7/91) on the community Court of Justice, ECOWAS;

IV.2- The invoked Article 11 relates to the Rules of the Community court of Justice, ECOWAS;

The Rules in its Article 35, requests Defendant to file its defence within the next 30 days after notification of the initiating Application must have been done onto it;

IV.3- In the instant case, the notification of the initiating Application was certainly done onto the Republic of Niger on 7th October 2013, but, a study of the case file, especially the acknowledgment of receipt of same notification, which was produced by DHL reveals that Defendant only received the documents on 9th October 2013;

It therefore follows that, taking into consideration the distance that is provided for under Article 76 (2) of the same Rules, Defendant had up to 20th November 2013, to file its defence;

Whereas, the Memorial in defence by the Republic of Niger was only received, at the Chamber of the Presiding Justice at the Court on 28th November 2013;

IV.4- Thus, it appears that the said Memorial in defence did not get to the Court within the prescribed time-limit;

Yet, the writs by Defendant were filed at the Court well before the case was put on the cause list, thus this did not retard its consideration by the Court;

Thus, it follows therefore that the seemingly late filing of the writs by Defendant did not cause any prejudice to Applicant;

In these circumstances, the relief sought by Mr. HAGGARMI relating to the rejection of the Memorial in defendant by the Republic of Niger on debarment, cannot be favourably considered;

Thus, there is need to set it aside;

- On the violations of Plaintiff/Applicant's rights

IV.5- In his initiating Application, Mr. Eli HAGGARMI alleged the violation of his right to gainful employment, and the lack of respect for the moral integrity of his person, by the Republic of Niger;

IV.6- The Republic of Niger claims that the Ministerial Order, upon which Mr. HAGGARMI's sack was effected dos not suffer from any illegality;

It based its arguments on legal provisions contained in national legal instruments, to support the fact that Plaintiff/Applicant filed his case on abuse of power in Court, well beyond the prescribed legal time-limit;

IV.7- It can be deduced from the provisions of Article 1 (h) of Protocol A/SP.1/12/01 of 21 December 2001 on Democracy and Good Governance that *"The rights set out in the African Charter on Human and People's Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States..."* ;

It therefore follows that the acts invoked by Plaintiff/Applicant must be considered, pursuant to the provisions of the African Charter on Human and Peoples' Rights, and international instruments and not from the purview of national legal provisions, as Defendant seems to claim;

In these circumstances, the invocation of national legal instruments, by Defendant, to deny Plaintiff/Applicant the right to bring a case before this Honourable Court, cannot prosper;

IV.8- The Administrative Authorities of Niger Republic accuse Plaintiff/Applicant of acts of drunkenness, scandal on public motorways, and driving without a valid driver's license, to bring disciplinary proceedings against him;

IV.9- Through the procedure brought against Mr. HAGGARMI it could not be established whether the acts for which he was accused were committed during, or at the time of the exercise of his official functions, for them to constitute professional misdemeanours, thus, sanctionable by disciplinary measures;

IV.10- Article 17 of Law 59-6 of 3rd December 1959 on the General Statutes of Labour and Public Service, in Niger Republic does not provide for disciplinary actions, except when there were professional misdemeanours committed;

Indeed, it provides that:

> *"Any misdemeanour by a state official, in the exercise of his functions, or in circumstances leading to the exercise of his duties shall bring disciplinary measures on him, without prejudice, or, as provided for under the penal law"*;

IV.11- On the contrary, the acts for which Plaintiff/Applicant was accused, were outside the professional realm;

Indeed, acts of drunkenness, scandal on public motorways, and driving without a valid driver's license, could only have been committed outside the professional realm;

Furthermore, the outcome of the investigation carried out by the Disciplinary Council was favourable to Plaintiff/Applicant;

IV.12- The investigation revealed that Mr. HAGGARMI was always scored high, in his Annual Performance Assessment Form, and was highly praised for his commitment to duty, by the different immediate bosses, under whom he had to serve;

Moreover, at the time of being reported by the Director General of Customs, his immediate boss, who was the Head of Bureau "Niamey-Route'' declared, in his witness deposition as follows: ***"I cannot even think that Eli drinks alcohol, in fact, his behaviour at work is such an exemplary one. In all sincerity, I strongly believe that, whatever his behaviour may be, outside office, he is not an officer to be wasted";***

IV.13- The acts for which Mr. HAGGARMI was accused, all seem to be in the realm of common penal law; yet, the Administrative Authorities have never invoked a judicial decision, which, unequivocally establishes the fact that Plaintiff/Applicant was found guilty of the acts, for which he was accused;

IV.14- Upon all this, by Order n°814/MFP/T dated on 14 May 1984, the Minister of Labour and Public Service approved the sack, without denying Plaintiff/Applicant his right to draw from his retirement benefits, whereas the Disciplinary Council recommended a written warning for Mr. HAGGARMI;

IV.15- In these circumstances, it is right to examine the facts of the case within the purview of international instruments invoked by Plaintiff/ Applicant, notably the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights of 1948;

IV.16- The right to gainful employment, otherwise known as the right to work, is a fundamental right provided for, under various international human rights protection legal instruments;

Thus, it is, in the African Charter on Human and Peoples' Rights (Article 15), as well as the Universal Declaration of Human Rights of 1948 and the International Covenant on Economic, Social and Cultural Rights of 1966 (Article 6);

IV.17- Article 15 of the African Charter on Human and Peoples' Rights provides that *"Every individual shall have the right to work under equitable and satisfying conditions and shall receive equal remuneration for equal work";*

IV.18- The African Charter on Human and Peoples' Rights, in its Article 13 provides that:

> *"Every citizen shall have the right to participate freely in the government of his country, either directly, or through freely chosen representatives, in accordance with the law;*
>
> *Every citizen shall have the right of equal access to the public service of his country;*
>
> *Every citizen shall have the right of access to public property and services in strict equality of all persons before the law."*

IV.19- The International Covenant on Economic, Social and Cultural Rights, in its Article 6, provides that *"(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right";*

IV.20- The right to moral integrity is also protected under international human rights protection legal instruments;

Mention can, notably be made of the African Charter on Human and Peoples' Rights (article 4) and the Universal Declaration of Human Rights of 1948 (Article 5);

IV.21- The African Charter on Human and Peoples' Rights in its article 4: *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one shall be arbitrarily deprived of this right";*

Article 5 of the Universal Declaration of Human Rights of 1948 provides as follows: *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment";*

IV.22- From the annexure filed in the case file, it can be deduced that the Republic of Niger has ratified the international legal instruments especially the African Charter on Human and Peoples' Rights and the International Covenant on Economic, Social and Cultural Rights, and adhered to the Universal Declaration of Human Rights of 1948. All these instruments enjoin the promotion and protection of fundamental rights, which are human rights;

IV.23- International Human Rights Law determines the obligations that are incumbent on State Parties, to respect and protect;

Indeed, when a State becomes party to a treaty, it is an obligation upon it, to respect the rights enunciated in the said treaty, to protect its citizens, and all that live on the territory of its jurisdiction, and to instore the conditions for the enjoyment of such rights;

IV.24- Thus, the State undertakes to adopt measures that would protect peoples against human rights violations;

Thereafter, it forbids to itself, any move that could pave the way to being an impediment to the exercising of the rights;

Finally, the State puts in place necessary initiatives that could facilitate the exercise of the said rights;

IV.25- On the strength of the foregoing, the Republic of Niger, which is a State Party to the African Charter on Human and Peoples' Rights,

had the obligation to guarantee the application of the prescriptions of the said rights, on its territory;

In the instant case, the Republic of Niger had the obligation to preserve, and protect the right to gainful employment of Mr. HAGGARMI;

IV.26- But, the Republic of Niger deprived Mr. HAGGARMI of the exercise of his right to gainful employment, on the basis of wrong legal instruments;

Thus the Republic of Niger made Plaintiff/Applicant to lose his gainful employment;

Therefore the Republic of Niger has violated Plaintiff/Applicant's right to gainful employment;

IV.27- In these circumstances, the sack order n°814/MFP/T dated 14 May 1984 by the Minister of Labour and Public Service constitutes a violation of human rights;

IV.28- The claims by Mr. HAGGARMI that the Court should note the violation of his right to gainful employment, are well founded;

Therefore, there is need to declare that his right to gainful employment was violated by the Republic of Niger;

IV.29- Plaintiff/Applicant claims that his right to the respect for the moral integrity of his person was violated, but he never points out, in what ways this violation took place;

Indeed, no proof of the violation of this fundamental right was brought by Plaintiff/Applicant;

In the absence of such proof, the claims by Plaintiff/Applicant on this issue cannot be examined;

- As to the reparations sought

IV.30- Mr. HAGGARMI sought reparation to the tune of an amount of money that would not be less than four hundred million CFA Francs (400.000.000), for all prejudices suffered;

IV.31- It is undisputable that the violation of his right to gainful employment has his career asunder;

It therefore follows that the request by Plaintiff/Applicant seeking sanctioning of the Republic of Niger to pay him indemnity is a legitimate one;

In regard to reparation, it should be right to put Plaintiff/Applicant in a situation, where he can enjoy the full benefits and advantages that could accrue to him if his career were to run unbroken;

In these circumstances, there is need to order the Republic of Niger to pay to Plaintiff/Applicant, the equivalent of his salaries and other emoluments, from the date of his suspension to the date on which he would proceed on retirement;

IV.32- It is clear that the behaviour of the Republic of Niger towards Mr. HAGGARMI has caused the latter both moral and physical prejudices;

But Plaintiff/Applicant has not brought exhibits to enable the Court to examine, and evaluate the prejudices suffered in this regard;

In such circumstances, The Court has always fallen back on the principle of equity to order an amount for reparation (See Judgment n° ECW/CCJ/JUD/06/13 of 03 July 2013, in the matter of Kpatcha GNASSINGBE and others against the Republic of Togo);

Therefore, it is important to order the Republic of Niger to pay to Plaintiff/Applicant the sum of three million (3.000.000) CFA Francs as damages;

- As to costs

IV.33- Article 66.2 of the Rules of procedure of the Community Court of Justice, ECOWAS, provides that: ***"The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings";***

In the instant case, the Defendant State has fallen;

Furthermore, Plaintiff/Applicant has expressly sought an order on the Republic of Niger, as to costs;

Therefore, there is need to order the Republic of Niger to bear all costs;

FOR THESE REASONS

The Court,

Adjudicating in a public hearing, in a human right violation case, in last resort, and after hearing both parties;

As to form,

- **Rejects** the request of foreclosure made by Plaintiff/Applicant against the Republic of Niger;

As to merit,

- **Declares** the Application filed by Mr. HAGGARMI as admissible, and declares it as partially well-founded;

- **Declares** that Mr. HAGGARMI's right to gainful employment was violated by the Republic of Niger;

- **Declares** however that the allegation on the violation of his right to respect for moral integrity was not established;

- **Orders** the Republic of Niger to pay him the equivalent of his salaries, and other emoluments, with effect from the date of his suspension, to the date on which he would proceed on retirement, together with the reconstitution of his career;

- Furthermore, **Orders** the Republic of Niger to pay to Plaintiff/ Applicant, the sum of three million (3.000.000) CFA Francs as damages;

- **Orders** the Republic of Niger to bear all costs;

THUS MADE, ADJUDGED, AND PRONOUNCED IN A PUBLIC HEARING AT THE SEAT OF THE COURT IN ABUJA, ON THIS 23RD DAY OF APRIL 2015;

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding;*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member;*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY, 23RD DAY OF APRIL 2015

SUIT NO: ECW/CCJ/APP/20/14
JUDGMENT NO: ECW/CCJ/JUD/05/15

BETWEEN
MR. GEORGES CONSTANT AMOUSSOU - *PLAINTIFF*

AND
THE REPUBLIC OF BENIN - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JEROME TRAORE** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **ALFRED POGNON (ESQ.), YVES KOSSOU (ESQ.), DIEUDONNÉ MAMERT ASSOBA (ESQ.)** - *FOR THE PLAINTIFF.*
2. **HIPPOLYTE YEDE (ESQ.)** - *FOR THE DEFENDANT*

-Human rights violations -Arbitrary arrest and detention

SUMMARY OF FACTS

Mr. Georges Constant Amoussou, former Minister and former Attorney General, explained that he was investigated following his participation in ICC SERVICE, a fund placement structure of the Economic and Financial Brigade, following a complaint from the Ministry of Economy and Finance. He added that the Commission arrested him and took him into custody on 12 July 2010 and that on 16 July 2010 the Commission terminated the measure and that it was on 17 July that the President of the Judicial Chamber notified him of his placement under a detention order. He believes that between 16 July and 17 July he was illegally detained, which is why he was first referred to the Constitutional Court, which ruled that his detention was legal and not arbitrary.

He added that on the basis of the constitution and the instruments ratified by Benin, he applied a second time to the Constitutional Court to rule on the illegality of his continued imprisonment and that despite the legal deadline of 8 days given to the Court, it did not rule. It is on these grounds that he brought the case before the Community Court to establish the violation of his rights and to draw the consequences.

The Republic of Benin revealed in an objection that the facts have already been decided before the Community Court and that there is no need to pronounce on them yet again. In its submission on the merits, the Respondent stated that Mr. Amoussou was accused of fraud in accordance with the legal provisions in force in Benin and that the rights of the Applicant were respected. It requested that the Court declare all of the claims advanced by the applicant as unfounded and order him to pay the costs.

LEGAL ISSUE:

1. Can the Court hear a case it has already decided?

DECISION OF THE COURT

The Court, in its decision, noted that the facts presented before it are not new as it has already pronounced a decision dated 06 March 2014 on the same allegations. The possibility for the Court to examine a case it has already decided is when it is an opposition, a third opposition and a review. However, the action of the applicant cannot form part of any of those remedies. Unquestionably, in this case there is res judicata, which prohibits the parties from renewing before the court the dispute, which has already been decided.

In these circumstances, the action of Mr. Amoussou should be declared inadmissible.

JUDGMENT OF THE COURT

I- PARTIES

I.1- **APPLICANT: Monsieur AMOUSSOU Georges Constant**,

former Prosecutor at the Court of Appeal of Cotonou, domiciled at carre No. 312- S Sègbèya, represented by Master Alfred POGNON, Yves KOSSOU, Dieudonné Mamert ASSOBA, all lawyers at the Court of Appeal of Cotonou with an address collectively at Master Yves KOSSOU firm located at Gauhi, Immeuble Meideros behind Diamond Bank, 06 BP 1416 Cotonou, tel: (229) 21 3124 18, Fax: 21 31 39 88, e-mail koss_y@yahoo.fr;

II.2- **DEFENDANT: The Republic of Benin**,

legally represented by the Judicial Treasury Agent domiciled Treasury Benin, route de l'aeroport, Cotonou, with an address for the purposes of the case in Abuja Embassy of Benin in Nigeria, located at Plot No. 2579 (near AlgonGuest House) Yedserram Street, Maitama, Abuja, defended by Mr. Hippolyte YEDE, whose firm is located at: Parcelle du T 'lot 2157, rue pavee du Benin marche, immeuble GBEDIGA, 03 BP: 338 Jericho Cotonou, tel / fax: +229 21 38 01 83; mobile: +229 90 93 55 07/97 80 55 60; fax: +229 21 38 01 84, e-mail h.yede@yahoo.fr; cabinetavocatyede@yahoo.fr;

II- FACTS AND PROCEDURE

II.1- AMOUSSOU Mr. Georges Constant sued the Republic of Benin before this Court to make the following declaration:

- that the **retention** exerted on his person from 16 to 17 July 2010 by the Independent Judicial Commission of Inquiry constitutes an arbitrary arrest, order accordingly his immediate release;

- that he is **seeking** the benefit of the provisions of Article 9.5 of the International Covenant on Civil and Political Rights;

- **Order** the Republic of Benin to pay him for each day of arbitrary detention undergone since 12 July 2010 until the date of its actual release a sum of money that the Community Court may wish to arbitrate in all Sovereignty in its quantum;

- And **Order** the Republic of Benin to bear the entire costs;

II.2- Mr. AMOUSSOU Georges Constant's application dated 11 August 2014 but was filed in the Registry of the Court on 23 September 2014; It is accompanied by another application, with the same date of writing and submission, requesting that his case be examined under the expedited procedure;

II.3- Both the originating application and that for expedited procedure were served to the Defendant on 09/26/2014;

II.4- The Republic of Benin produced a statement of defence on 20 November 2014, a statement on the merit and observations relating to the application for expedited procedure dated 21 November 2014 all filed at the Registry of the Court on 04 December 2014;

II.5 The statement of defence was in turn, served to the Applicant on 4 December 2014; the latter responded with two conclusions all dated 21 November 2014;

The Republic of Benin closed the trial stage by correspondence dated 22 December 2014 filed at the Registry on 12 January 2015;

II.6- The case was adopted and debated at the external Court Session held in Bissau (Guinea Bissau) on 23 March 2015. The parties were not present but wrote requesting the judgment of the case based on their written submissions;

II.7- The case was reserved for decision delivered in Abuja, the seat of Court on 23 April 2015;

III- ARGUMENTS AND CLAIMS

III.1- The Applicant stated that in February 2010, a judicial investigation was opened at the Economic and Financial Brigade following complaint from the Minister of Economy and Finances against four illegal fund investment structures of which ICC Services, having been casually informed questioned the Deputy acting for the State Prosecutor and directed him to submit the report terminating the investigation for the purposes of reporting to the hierarchy, that on 03 March 2010 in accordance with the directives of the Deputy sent him the report issued by the Economic and Financial Brigade, that without interruption on the same day he reported to the Minister of Justice asking what to do, that the latter did not respond and on 17 May 2010 he instructed the Public Prosecutor at the Court of First Instance of Abomey Calavi to investigate ICC Services;

III.2- He maintained that this decision caused a panic and hostility of the highest dignitaries of the regime, that it was at this time he learnt that authorities have set up a an Independent Judicial Commission of Enquiry, of which one of the main tasks is to make him the scapegoat of the political and financial scandal, that it is in this context that the said Commission arbitrarily arrested and detained him on 12 July 2010, that on 16 July 2010 the Commission terminated the police disposition of deprivation of liberty and presented him before the Attorney General at the Supreme Court who requested the opening of a judicial enquiry against him before the judicial Chamber of the said Court; that on Saturday, 17 July 2010 the President of the Judicial Chamber notified him of his placement under custody till this date;

III.3- He said he notified the Constitutional Court of Benin by an application dated 14 September 2010 to contest the legality of the Constitution of these acts including his arrest and detention, that

two (02) months later this court delivered decision P-CC-10-140 dated 23 November 2010 and on the issue of custody disposed *"furthermore, considering that it is established that Mr. Georges Constant AMOUSSOU was kept in custody in the premises of the Compagnie de Gendarmerie de Cotonou from 12 July 2010 to 11pm on 16 July 2010 after an extension of forty-eight hours of this custody on 14 July 2010 by the third Deputy Prosecutor of the Republic at the Court of First Instance of Cotonou, that consequently, the said custody is not unreasonable and does not constitute a violation of the Constitution"* that the Court clearly defined the time of the arrest and duration of police custody, that the option of legal information having been retained on 16 July 2010 the warrant which he seems to have been the subject should have intervened this 16 July and not on 17 July 2010 as was indicated in the warrant, that it thus appears arbitrary detention period from 16 July 2010 declared date of termination of custody and the beginning of the judicial enquiry on 17 July 2010 which is twenty-four hours after the end of official custody, that not being released in this time period from arrest or detention in the hands of members of the famous Independent Judicial Commission of Inquiry;

III.4- He added that based on the Constitution and duly ratified conventions by the Republic of Benin, he came before the Constitutional Court with an application dated 11 November 2013 filed and registered on 26 December 2013 to make an order on the continued violation which kept him in prison, the Constitutional Court did not adjudicate even though the deadlines in this regard should not only be eight (08) days;

III.5- In support of his claims, he relied on the African Charter on Human and Peoples' Rights, in its Articles 3 and 6, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Constitution of Benin, in its article 18, paragraph 4, of Law No. 91-009 of 31 May 2001 on the organic Law on the constitutional Court, Article 33;

III.6- He requested this Court to:

- **Assume** jurisdiction;
- **Declare** that his action is admissible;
- **Declare** that the Constitutional Court of Benin haven declared by decision P-CC 10-140 dated 23 November 2010 that his custody lasted from 11pm on 12 July 2010 to 16 July 2010, the retention exerted on his person from 16 to 17 July 2010, by the Independent Judicial Commission of Inquiry having arrested him, until the issuance of a warrant by the Trial Judge against him without prior decision of the Prosecutor General of the Supreme Court constitutes an arbitrary arrest;
- **Order**, as a result of this evidence his immediate release;
- **Find**, that he claims the benefit of the provisions of Article 9.5 of the International Covenant on Civil and Political Rights;
- Accordingly, **Order** the Republic of Benin on this ground to pay him for each day of arbitrary detention served from 12 July until the actual date of release, an amount of money that this Court may wish to specify;
- In addition, **Order** the Republic of Benin to bear the costs;

III.7- The Republic of Benin, first in a preliminary objection, developed the inadmissibility of the Application filed by Mr. AMOUSSOU;

III.8- It stated that the Applicant had filed an Application before this Court on 25 April 2012 at the Registry on 1 June 2012, that among the various violations discussed therein are the arrest, custody and his detention in jail all which he qualified as arbitrary, that this case registered as N°: ECW/CCJ/APP/07/12 has been tried and closed out by the judgment delivered on 6 March 2014 which moreover

is currently under appeal first for failure to adjudicate and secondly an action for the interpretation, that this judgment has acquired the definitive authority of res judicata;

III.9- The Defendant sought in his preliminary objection from this Court to:

- **Find** that there is *res judicata* with respect to newly formulated claims by the Applicant;
- Accordingly, **declare** the Application for sanction of arrest and arbitrary detention dated 11 August 2014 inadmissible;
- **Order** the Applicant to pay the costs;

III.10- While examining the merits, the Republic of Benin argued that Mr. AMOUSSOU Georges Constant was prosecuted and convicted in criminal proceedings before the Judicial Chamber of the Supreme Court of Benin to respond to scam complicity with public appeal for concealment, breach of complicity in the regulation of mutual, cooperatives and credit institutions, corruption, that after a regular custody from 12 to 16 July 2010 with an extension of 48 hours on 14 July 2010, he was presented to the Attorney General at the Supreme Court on 17 July 2010, the latter requested opening a criminal investigation against him in which Mr. AMOUSSOU was the subject of a warrant, that the Applicant felt that it seem to be a retention period from 16 July 2010 which would have been declared date of termination of custody and 17 July 2010, the beginning of the judicial investigation which is twenty-four (24) hours;

III.11- The Defendant explained that this is in accordance with Article 51 of the Code of Criminal Procedure that Mr. AMOUSSOU was presented to the Attorney General at the Supreme Court of Benin on 17 July 2010, the date when his warrant was served to him, that the procedure was in line with the requirements of Article 51 of the former code of criminal procedure in force during his arrest, that Mr. AMOUSSOU has not been subject to any arbitrary

retention and that his arrest, police custody and detention all have legal grounds as it had already being considered by this Court in its judgment dated 6 March 2014;

III.12- In support of his claims, he relied on the Constitution of Benin, the Code of Criminal Procedure and the Penal Code;

III.13- As to the merit, he requested the Court to:

- **Reject** outright any assumptions, purposes and conclusions of the Applicant as unfounded;
- **Order** the Applicant to pay the costs.

IV- MOTIVATION

As to the motion for expedited procedure:

IV.1- Mr. AMOUSSOU Georges Constant asked the Court to declare the emergency and hold that his application will be subjected to expedited procedure provided by Article 59 of the Rules of procedure of the Court; He motivated the urgency by the desire to receive specialized care required by his state of health within his family and preferably outside of Benin where security does not seem guaranteed;

IV.2- The Republic of Benin, in its observations made on 21 November 2014, requested the outright rejection of the motion for expedited procedure introduced by the Applicant;

IV.3- Article 59.1 of the Rules of the Court of Community Justice - ECOWAS states that ***"On application by the Applicant or the Defendant, the President may exceptionally decide, on the basis of the facts before him and after hearing the other party, that a case is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules, where the particular urgency of the case requires the Court shall give its ruling with the minimum of delay.";***

Point 2 of the Article requires that the application, which tend to submit a case to an expedited procedure be made by separate document when filing the application or the defence;

IV.4- The motion for expedited procedure of the applicants was filed at the Court on 23 September 2014, along with the originating application;

It therefore appears that the application was made in the form and time required by the Rules;

It is therefore admissible and the Court should therefore examine it;

Indeed, with regard to detention and state of health, there is always urgency to decide on the measure sought;

An expedited procedure tends to try the case in a relatively short time;

In this case, the suit having been enrolled directly on the merit, was debated and under deliberation;

It then follows that the motion for expedited procedure is groundless;

- On the inadmissibility of the application made by the Defendant:

IV.5- The Republic of Benin, in a "preliminary objection" dated 20 November 2014 filed simultaneously with the merit i.e. the same 4 December 2014, rejected the application by Mr. AMOUSSOU Georges Constant taken from the authority of res judicata;

IV.6- It maintained that Mr. AMOUSSOU's application is inadmissible for the simple reason that this Court has already delivered on 6 March 2014 a judgment in relation to the arrest, custody and detention of the Applicant in the case of the ICC-Services between the parties in this case;

IV.7- Mr. AMOUSSOU argued in his conclusions reply dated 30 December 2014 mainly, that the conclusions of the Republic of Benin dated 20 November 2014 is inadmissible for violation and/ or non-compliance with the requirements of Articles 33 and 35 of the Rules of Court and secondarily, that the plea of inadmissibility is unfounded;

IV.8- Article 33.2 of the Rules of the Community Court of Justice requires electing domicile in the place where the Court has its seat and indicating the name of the person who is authorized and has consented to receive all services;

The examination of the "preliminary objection" dated 20 November 2014 by the Republic of Benin shows that the document meets the requirements of Article 33.2 of the Rules of Court;

In fact, he mentioned the election of domicile by the Republic of Benin as the Embassy of Benin in Nigeria, located at Plot No. 2579 (near Algon Guest House) Yedserram Street, Maitama in Abuja seat of the Court;

IV.9- Article 33.3 of the Rules of the Community Court of Justice provides that: *"...the application may state that the lawyer or agent agrees that service is to be effected on him by telefax or other technical means of communication...."*;

In the present case, counsel for the Republic of Benin indicated his consent to accept service by fax and e-mail;

It follows then that the requirement of the article has been satisfied;

Moreover, in view of the wording of this provision, the indication of consent is only optional;

IV.10- Article 35 of the Rules of the Community Court of Justice indicates the time the Defendant is to present his defence, the contents of defence and the ability to extend the submission deadline;

The Applicant criticized the Defendant for not having presented its defence brief on time and not having received an extension;

The analysis of documents filed shows that the application, and that for expedited procedure were served to the Defendant on 26 September 2014 and that the latter did not find it necessary to reply until 4 December 2014;

It appears that the statements by the Republic of Benin were not filed within the periods prescribed by the Rules;

But respect for the adversarial principle requires the other party to be heard;

Then, it is obvious that the late filing of the defendant's statements did not cause any damage to the Applicant in that his case was examined within a reasonable time;

For all these reasons, it is not appropriate to grant the motion of Mr. AMOUSSOU tending to move for the foreclosure of the statement filed by the Republic of Benin;

- As to the application of Mr. AMOUSSOU

IV.11- Mr. AMOUSSOU Georges Constant came before this Court with an application primarily to hold that the retention exerted on his person from 16 to 17 July, 2010 by the Independent Judicial Commission of Inquiry constitutes an arbitrary arrest and order accordingly his release;

IV.12- The Republic of Benin rejected the application by relying on the authority of *res judicata*;

IV.13- The Republic of Benin argued that the complaints made by Mr. AMOUSSOU against the judgment of 6 March 2014 to find out the inaccuracies and failure to adjudicate should have made him to exercise the remedies allowed by the Rules of Court, that the judgment not been the subject by the parties for appropriate remedy, it has acquired the authority of *res judicata*;

IV.14- Mr. AMOUSSOU argued that no authority of res judicata can at this stage of the proceedings be recognized in this case because of the obvious inaccuracies in it and the failure to adjudicate on arguments of public order;

IV.15- According to Mr. AMOUSSOU in his own application, this Court has delivered a judgment on 6 March 2014 against the Republic of Benin;

IV.16- It therefore appears from the foregoing that Mr. AMOUSSOU sued the Republic of Benin to this Court to hear judgment on the arbitrary nature of his arrest, police custody and detention, that after this procedure, the Court issued on 6 March 2014 the judgment that is as follows:

"Ruling publicly, contradictorily, in area of human rights and as last resort;

As to the form:

- **Find** that the Court has jurisdiction to entertain the Application for violation of human rights presented by Mr. Constant AMOUSSOU against the Republic of Benin, said accordingly admits the Application.

As to the merit:

- **Notes** that the Republic of Benin has not violated any human right to the detriment of Mr. Constant AMOUSSOU.
- Consequently, **rejects** all claims by the Applicant Constant AMOUSSOU.
- **Leave** the costs for each party to bear";

IV.17- In paragraphs 41 and 44 of it's reasoning, the Court finds that neither the Applicant's arrest or detention are arbitrary;

IV.18- It is easy to see that this judgment was delivered between the same parties namely Mr. Constant AMOUSSOU and the Republic of

Benin, was on the same cause that is to say the ICC-Services and has the same subject in particular the arrest, custody and detention of the Applicant;

IV.19- The claims of the Applicant in this procedure are not new to the Court;

Indeed, they are part of those which the Court has already examined in 2014 in the proceedings N°. ECW/CCJ/APP/07/12 and for which it had to make the decision dated 6 March 2014;

IV.20- Moreover, the assessments that a national court, be it the Constitutional Court, gives the facts on which this Court has already ruled, are not necessary to it to the point of questioning its jurisprudence;

IV.21- Therefore, it is legitimate to wonder: can the Court deal with a matter that has already been judged? The general rule of law want the response not to be only negative, outside, in the case of the Community Court of Justice - ECOWAS, opposition opportunities, third party proceedings and revision provided for in Articles 90, 91 and 92 of the Rules;

However, the Applicant's action cannot be enrolled in any of these remedies;

IV.22- unquestionably, in this case there is authority of *res judicata*; whereby, this principle prohibits the parties to bring anew before the court the dispute that was already settled;

IV.23- In these conditions it is necessary to declare the action of Mr. AMOUSSOU inadmissible;

- As to the Costs

IV.24- Article 66.2 of the Rules of the Community Court Justice - ECOWAS states that *"The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings"*;

In this case, the applicant's action will not prosper;

In addition, the Republic of Benin has specifically requested the order for costs;

It is therefore applicable to order the Applicant to bear the cost;

FOR THESE REASONS

Adjudicating publicly, in first and last resort, after hearing both parties on the issue of human rights violation;

- **Admits** the expedited procedure requested by Mr. AMOUSSOU;
- **Declares** that it has become obsolete;
- **Declares** that there is no reason to exclude the statement of the Republic of Benin;
- **Receives** the objection of inadmissibility of the authority of res judicata filed by the Republic of Benin;
- **Declares** it to be well founded;
- **Declares** the motion for the sanction of arrest and arbitrary detention of Mr. AMOUSSOU inadmissible;
- **Order** the respondent to bear the costs;

THUS MADE, ADJUDGED, AND DELIVERED IN PUBLIC HEARING, AT THE SEAT OF COURT IN ABUJA, THIS 23rd DAY OF APRIL 2015;

THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding;*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member;*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by: **Athanasius ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON 24TH DAY OF APRIL 2015

SUIT N°: ECW/CCJ/APP/16/14
JUDGMENT N°: ECW/CCJ/JUD/06/15

BETWEEN
BODJONA AKOUSSOULELOU PASCAL - *PLAINTIFF*

AND
THE REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **DOVI AHLONKO (ESQ.); TALBOUSSOUMA E. EULOGE (ESQ.); TCHASSANTE T. GBATI (ESQ.); ATA MESSAN AJAVON (ESQ.); &**
   AFANGBEDJI KOSSI (ESQ.) - *FOR THE PLAINTIFF.*
2. **N'DJELLE A. EDAH (ESQ.)** - *FOR THE DEFENDANT*

- Jurisdiction

SUMMARY OF FACTS

Mr Bodjona A. Pascal filed an Application against the Republic of Togo before the Community Court of Justice, ECOWAS for violation of his human rights. By separate Application, he requested the benefit of an expedited procedure in accordance with Article (59) of the Rules of Court.

The Applicant submitted that, following a complaint for fraud and complicity in fraud filed on 2 March 2011, the Public Prosecutor at the Tribunal de instance de Lomé requested a judicial inquiry during which the Applicant was heard on 18 March 2011 by the Gendarmerie Nationale Togolaise, while he was still Minister of Territorial Administration, Decentralisation and Government Spokesman and as such could only be validly heard by the President of the Lomé Court of Appeal. The Applicant filed his Application before the domestic courts, which upheld the irregularity of his hearing.

However, on 31 July 2012, on the occasion of a cabinet reshuffle, Mr. Bodjona was ousted from the government and on 10 August, the proceedings against him were reopened. He was held in police custody for 11 days and was incarcerated until 9 April 2013, when he was released on bail. On 6 December 2013, the Indictments Chamber of the Lomé Court of Appeal annulled the proceedings initiated against him and referred the matter back to the examining magistrate for investigation. It was therefore before this Judge that the Applicant was summoned again on 14 August 2014, before being arrested a second time on 21 August 2014. According to the Applicant, this proceeding took an unusually long time, almost four years.

The Republic of Togo argued in its defence that the arrest of the Applicant was due to his refusal to appear in court. All the allegations made by the Applicant are contested on the grounds that, first, the delay by the judicial authorities both in the conduct of the proceedings

and in the execution of the judicial decisions in favour of the Applicants are not attributable to him but are rather due to the "complex" nature of the offence.

LEGAL ISSUES

- *Was the right to liberty and security of the Applicant violated?*
- *Was the right of the Applicant to trial within a reasonable time violated?*

DECISION OF THE COURT

The Court held that the Application for expedited procedure is no longer relevant.

The Court ordered the Republic of Togo to bring the Applicant to trial as soon as possible or, in the absence of evidence against him, to release him.

It considered the detention of the Applicant for the period from 1 September 2012 to 9 April 2013 to be arbitrary.

The Court ordered the Republic of Togo to pay the Applicant the sum of FCFA 18 million as compensation for the various prejudices suffered.

THE COURT THUS CONSTITUTED

DELIVERS THE FOLLOWING JUDGMENT:

I - Parties to the case and their Counsels

1. The Application lodged at the Registry of the Court on 4 September 2014, was filed by Mr. Bodjona Akoussoulelou Pascal, former Minister in the Republic of Togo. He was represented by the following Counsels, who are all registered with the Bar in Togo:

   - Robert Ahlonko Dovi (Esq.);
   - Edoh Agbahey (Esq.);
   - Dodji Kokou Apevon (Esq.);
   - Georges Latévi Lawson (Esq.);
   - Euloge Talboussouma (Esq.);
   - Isabelle Manavi Ameganvi (Esq.);
   - Jean Tchessa Abi (Esq.);
   - Gbati Tchassante Tchedre (Esq.);
   - Jil Benoît Kossi Afangbedji (Esq.);
   - Ata Messan Zeus Ajavon (Esq.);
   - Raphael Nyama Kpande-Adzare (Esq.) ;

2. The Defendant in the case is the Republic of Togo, which was represented by Edah Ndjelle (Esq.), Lawyer registered with the Bar in Togo. In a reply to the afore-mentioned Application, the Republic of Togo filed a Memorial in defence, which was lodged on 1st December 2014 at the Registry of the Court.

II - Summary of facts and procedure

3. Following a written complaint on swindling and complicity in swindling filed on 2nd March 2011, by one Abass Al Youssef, an Abu Dhabi based businessman, against Mr. Agba Sow Bertin and others, the State Prosecutor in the **Tribunal de Première Instance de Première Classe** of Lomé ordered an investigation into the complaint.

4. It was in these circumstances that Mr. Bodjona A. Pascal, who was then Minister for Territorial Administration, Decentralisation and Local collectivities, and at the same time, the Spokesperson for the Togolese Government was invited, and interrogated by the **Gendarmerie nationale**… on 18 March 2011.

5. Pursuant to the provisions of Article 422 of the Code of Penal Procedure of Togo, Plaintiff/Applicant thereafter pleaded with the Investigating Chamber of the Court of Appeal in Togo, to declare as null and void, the interrogation conducted on him by the **Gendarmerie**. Indeed, the said Article 422 provides thus: "The Members of Government can only be interrogated, upon written approval by the Head of State. A request to this effect is transmitted, together with the case file, by the Minister of Justice.

6. In this regard, the concerned Member of Government shall be interrogated, either in his official residence, or his office, by the President of the Court of Appeal ".

7. In Judgment no. 009 dated 23 January 2012, the Investigation Chamber ordered that Minister Bodjona could only be heard as a witness, since pursuant to the content of the same Judgment: *"Mr. Bodjona's statement shall be made before the President of the Investigating Chamber in lieu and place of the Investigating Judge."*

8. Since this decision neither seems to antagonise the provisions of Article 422 of the Code of Penal Procedure, it was attacked at the Supreme Court. Thus, in a Judgment dated 20 June 2012, the

Supreme Court of Togo set aside the decision of the Investigating Chamber, in the following terms*: "(The Supreme Court) hereby declares null and void Judgment n° 009/2012 by the Investigating Chamber, at the Court of Appeal in Lomé, because the Chamber declared that Mr. Bodjona's statement shall be made before the President of the Investigating Chamber in lieu and place of the Investigating Judge, instead of the President of the Court of Appeal of Lomé".*

9. Thus, it appears that only the President of the Court of Appel was the judge recognised by law, to interrogate Plaintiff/Applicant, pursuant to the letters of Article 422 of the Code of Penal Procedure.

10. Through a cabinet reshuffle that occurred on 31 July 2012, Mr. Bodjona was relieved of his ministerial post.

11. Mr. Bodjona was thereafter summoned to appear before the Investigating Judge on 10 August 2012, and 13 August 2012.

12. At this stage of the procedure, Plaintiff/Applicant had, on the one hand, argued his summon before the Investigating Judge, by claiming that the said Judge was earlier requested to hands off the case, and, on the other hand, he claimed that he appealed against a Judgment of the Investigating Chamber dated 28 August 2012.

13. At a time when the case was still pending before the Supreme Court of Togo, Mr. Bodjona was whisked away from his home on 1st September 2012, by officers of the Gendarmerie nationale.

14. Following this whisking away, Plaintiff/Applicant was kept in police custody, for eleven (11) days, before he was detained, knowing full well that, ab initio, there was no document confirming the prolongation of the period of police custody was issued. It was only on 9 April 2013 that he was provisionally released, with a committal order again issued against him.

15. Immediately after this, M. Bodjona again came before the Investigating Chamber, seeking annulment of the proceedings against

him. As at this time, he claims before this Honourable Court that, whereas the Application for annulment ought to come up for hearing, within the following ten days, after filing, pursuant to the provisions of Article 166 of the Code of Penal Procedure, it took the Court of Appeal a whole eight (8) months, that is in December 2013, to consider the appeal. Indeed, in a Judgment dated 6 December 2013, the Investigating Chamber *"simply and purely annulled the procedure against the indicted Bodjona Akoussoulélou Pascal, before the Investigating Camber, in a case relating to swindling, and complicity in swindling."* Nevertheless, the same Judge was to continue investigation on the charges brought against Plaintiff/ Applicant.

16. It was still before this same Judge that Plaintiff/Applicant was summoned, to appear on 14 August 2014, before he was arrested, for the second time, on 21 August. On the same day, he filed an Application on the violation of a certain number of the provisions of the Code of Penal Procedure of Togo.

17. Up till this day, Plaintiff/Applicant has still been in detention. It was in these circumstances that he filed the instant case at the Registry of the ECOWAS Court of Justice, on the violation of his rights. The same day, he equally filed a separate Application seeking to submit the main case to expedited procedure.

III - Arguments by parties

18. Plaintiff/Applicant believes that, considering the way and manner his ordeal has dragged on, for almost four years now, starting from his first interrogation by the Gendarmerie in March 2011, various violations of his rights have been committed, by the Togolese Authorities.

19. These violations consist, first of all, of arbitrary arrest and detention, in total dis-regard for Articles 13 (2) and 15 (1) of the Togolese Constitution of 14 October 2012, Article 9 of the Universal Declaration of Human Rights of 1948, Article 9 (1) of the International Covenant on Civil and Political Rights of 1966 and of

Article 6 of the African Charter on Human and Peoples' Rights of 1981. In support of this claim, Plaintiff/Applicant mainly invokes the Judgment by the Investigating Chamber of 6 December 2013, and alleges that the detention for seven (7) months and nine (9) days that he was made to experience, (that is from 1st September 2012 to 9 April 2013) was arbitrary.

20. Secondly, Plaintiff/Applicant believes that the committal order issued against him was illegal. All measures relating to such an order, which were taken against him, before the Judgment dated 6 December 2013 are as illegal as the said Judgment itself. Plaintiff/Applicant equally cites the principle of *" non bis in idem"* to support his claim that he cannot be indicted twice and be placed twice under a committal order by both the Investigating Judges in the 1st and 4th Chambers - whereas the charges brought against him were the same. Furthermore, Plaintiff/Applicant claims that the measures that relate to a committal order are limited in number - they are not more than seven (7) - pursuant to Article 119 of the Code of Penal Procedure of Togo; yet, M. Bodjona was prevented from traveling out of the country; this was a measure, which is not known to Article 119 referred to. For all these reasons, Plaintiff/Applicant claims that the committal order imposed on his person was illegal. To this effect, he cites the provisions of the Togolese Constitution, and Article 9 (1) of the International Covenant on Civil and Political Rights of 1966.

21. Also, Plaintiff/Applicant alleged that the proceedings initiated against him have seriously infringed upon his honour, reputation, dignity and his public image, before citing, in support of this claim, Article 28 (3) of the Togolese Constitution, Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, under which the rights to honour, and the defence of one's reputation are guaranteed. In this regard, Plaintiff/Applicant referred to the circumstances of his arrest on 1st September 2012, in a neighborhood of Lomé, before a mammoth crowd, by heavily armed security personnel.

22. In his Application, Mr. Bodjona equally made reference, to *"the loss of a life - time opportunity"* owing to, according to him, the brilliant political career that was laid before him in life, which must have been gravely affected by the judicial ordeal he was made to go through.

23. Plaintiff/Applicant equally claimed the violation of his right to have Court Judgments in his favour enforced. In this regard, he cited the provisions of Article 19 of the Togolese Constitution, Article 10 of the Universal Declaration of human Rights, Article 14 (1) of the International Covenant on Civil and Political Rights, and Article 7 of the African Charter on Human and Peoples' Rights, all these provisions under which are enshrined the right to have one's case heard, by a competent and impartial tribunal, and within reasonable period.

24. Equally in the Application, mention was made of the violations of the right of defence, and the principle of *"non bis in idem",* before acts of torture, cruel, inhuman and degrading treatments were highlighted, and all of which Mr. Bodjona claimed he was victim. After invoking the relevant provisions under which these acts are prohibited - Article 21 of the Togolese Constitution, Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights of 1966, Article 1 of the UN Convention against torture of 1984, and Article 5 of the African Charter on Human and Peoples' Rights -, Plaintiff/Applicant produced a medical certificate detailing psychological trauma that he suffered, in support of all these allegations.

25. Finally, and owing to all the prejudices that he suffered, Plaintiff/ Applicant sought from the Court, an order on the Republic of Togo, to pay him, a total sum of eight (8) billion CFA Francs, as reparation - spread over each of the various prejudices - and a sum that the Court shall deem sufficient enough, for the reparation of the psychological troubles, and torture that this procedure have caused him.

26. In its Memorial in defence, the Republic of Togo started by claiming that Mr. Bondjona had always proven reluctant to respond to the summons by the Investigating Judge, and this explained the reason for the heavily armed security personnel who were moved out, for his arrest. Moreover, there were *"very serious and incriminating evidences",* relating to acts of swindling, which were highlighted in the complaint that was lodged against him. The length of time it took the Togolese Judicial Authorities could be explained by the fact that it was a series of offences committed by a "network" of swindlers. And, this, according to the Defendant State, made the investigation by the Judicial Authorities very tedious.

27. After equally debunking the claim on infringement upon honour, and reputation made by Plaintiff/Applicant, the Defendant State claimed that it was not to be blamed for the lateness observed in the enforcement of Togo National Court Decisions that were in Plaintiff/ Applicant's favour.

28. Furthermore, the Republic of Togo claimed that the principle of *"non bis in idem"* that was invoked by Plaintiff/Applicant only applies to facts of cases that were already adjudicated upon, and that such was not the situation in the instant case. Finally, the Defendant State challenged Plaintiff/Applicant's allegation of tortures suffered by him, while referring to the definition provided for the notion of torture, as is understood in the UN Convention against torture itself.

29. In all, according to the Defendant State, it cannot be accused of any human rights violation exerted on Plaintiff/Applicant.

IV - Legal Analysis by the Court

As to form,

30. The Court first notes that an Application seeking to submit the main Application to expedited procedure was filed on 4 September 2014. This Application was served on the Republic of Togo by DHL, on the same day. One of the Counsels to Plaintiff/Applicant even

graciously, and in a brotherly manner, took a copy of the same expedited procedure Application to the Togolese Judicial Authorities on 21 October 2014.

31. Through a correspondence forwarded to the Presiding Judge at the Court, Counsel to the Republic of Togo sought the leave of the Court, for his client to file a rejoinder, out of time. The said correspondence was filed at the Registry of the Court on 6 October 2014.

32. After making sure that the Memorial in defence of the Republic of Togo was properly filed, the Court declared it admissible. The reason for proper verification on the said Memorial in defence was that, on the one hand, it was discovered that in the service of court processes done onto the Republic of Togo, earlier, there was an error, and, on the other hand, Defendant filed a request for time elongation, within reasonable period, but, that request was not duly actioned on time.

33. With regard to the Application for expedited procedure, the Court concluded, upon agreement by both parties, that it was no longer needed, thus, parties argued the case on its merit.

As to merit,

34. The Court has to, first of all, recall the general framework of its legal analysis, before examining a case straight on its merit, especially when parties have raised some salient issues.

35. This is exactly the situation, in the instant case, firstly, as concerning some reasons relating to the political circumstances that led to removing Mr. Bodjona from the Government of the Republic of Togo, following a cabinet reshuffle that took place on 31 July 2012. On this development, Plaintiff/Applicant avers that relieving **Mr. BODJONA Akoussoulèlou Pascal**, was an ill-conceived step, and erroneously sanctioned, by Government ***"with the sole aim of circumventing both Article 422 of the Togolese Code of criminal Procedure, and the enforcement of Judgment No 48/12 of the Supreme Court"*** **(p. 4 of the initiating Application).**

Further in the same Application, Plaintiff/Applicant equally avers that: *"The truth of the matter was that Minister Bodjona Akoussoulélou Pascal was simply persecuted, through the instrumentality of the judiciary, for hidden political reasons" (p 38 of the Application)*. Finally, Plaintiff/Applicant alluded to the *"loss of a life-time opportunity"* being part of the prejudices that he suffered, owing to the fact that *"he was destined for a long and brilliant political career, which now highly seemed to be mortgaged." (p 25 of the Application)*

36. The Court shall not, in anyway premise its legal analysis, on these issues raised by Plaintiff/Applicant. The Court must re-affirm, as it has always done in its well established jurisprudence, that it hardly considers issues such as political undertone, that are contained in a case, but, that the duty of the Court is to examine the facts, as presented before it, and try to find out, if really Plaintiff/Applicant's rights are violated. Consequently, the Court shall not border itself with the facts, which are purely political facts that Mr. Bodjona raised in his Application.

37. In the same vein, the Court shall not concern itself with any references made to the Constitutional Law of the Republic of Togo, by parties, in their court processes. Indeed, the Togolese Constitution was frequently referred to, by parties to the instant case. Whereas it is not the responsibility of the Court to exercise the right of constitutionality, or determine the legality of the decisions taken by the national courts of ECOWAS Member States. This is the duty of the national courts, and the ECOWAS Court cannot be a substitute for the national courts of Member States. Thus, in its analysis, the Court shall refer exclusively to the international instruments in international law, which, in principle, are binding on State Parties, which have ratified them. For the same reason, the Court shall set aside a point of defence from Plaintiff/Applicant, relating to the number of times that the committal order issued against him shall apply. It is a well-known fact that Mr. Bodjona argued the ban placed on him, from traveling out of the Togolese territory, on the ground

that this measure is not among those that could be taken against an indicted person, who comes under a committal order. It goes without saying that the Court can only but abstain from making a pronouncement on this issue, because doing so shall be understood to be the examination of the legality of a decision of the national judicial authorities of Togo.

38. Finally, the Court believes that its duty is to find out, if, throughout the proceedings initiated against Mr. Bodjona there were violations of his human rights. The Court is of a strong opinion that it can make a pronouncement on this issue, without opening afresh, the highly technical debate, which, for a long period, opposed both parties on the principle of *"non bis in idem",* that is, on the issue of trying to find out if Plaintiff/Applicant was tried twice successively for the same charges brought against him.

39. As it is, the examination of the procedure initiated against Plaintiff/Applicant, before the national courts of Togo, seems to reveal that certain infringement upon his rights took place.

40. In this regard, the Court first notes that Mr. Bodjona was kept in Gendarmerie custody for eleven (11) days. This fact, which is not denied by the Republic of Togo, could not have happened, without repeated elongation of the custody periods from the judicial authorities of Togo. Indeed, pursuant to the provisions of the Togolese Code of Penal procedure, the period of police custody, which is forty-eight (48) hours, can only be elongated, upon express approval from the State Prosecutor (article 52). Yet, there was no trace of such an approval in the case file. Whereas whenever the Court notices a situation like this, it concludes that there was indeed the violation of Plaintiff/Applicant's human rights. In the case of **Badini Salfo *v.* the Republic of Burkina Faso** (Judgment dated 31 October 2012), the Court declared that:

> ***"the period over which Plaintiff/Applicant was kept in police custody, which went beyond the period approved under the law (...) is abusive",***

consequently, there was, at least partly, the:

> ***"violation of Article 6 of the African Charter on Human and Peoples' Rights"***,

which proscribes arbitrary arrest and detention. The Court has simultaneously noted that:

> ***"the Republic of Burkina Faso failed to produce before it, approval for the elongation of the period of police custody, by the State Prosecutor, pursuant to the provisions of the law…"*** (§ 25).

Thus, the Court can only reiterate its position, in the instant case: by detaining Mr. Bodjona for eleven (11) days, and by failing to produce proof approving such an elongation, the judicial authorities of Togo have violated Plaintiff/Applicant's right to personal liberty and security.

41. In the examination of his Application before the Indictment Chamber, following his provisional release on 9 April 2013, Mr. Bodjona's rights were again not respected. Whereas the Prosecutor General was supposed to transmit his case file to the Indictment Chamber, within the legal time - limit of ten (10) days, it took him eight (8) months, to accomplish this official task; thus, Mr. Bodjona's file could only be effectively treated at the hearing of 6 December 2013. It can be deduced that Plaintiff/Applicant's right to be tried within reasonable period was disregarded. This is another prejudice that Plaintiff/Applicant has suffered, and for which the judicial authorities of Togo must be held liable.

42. At this juncture, the Court must strongly set aside the argument by the Defendant, when it claimed that *"The Republic of Togo cannot be liable for the wrong doing of its Judicial Institutions, when it is not even proven that such institutions have gone beyond the powers and missions conferred on them by the law "* (p. 9 of their rejoinder), or even that *"it is the responsibility of Plaintiff/ Applicant to press for the enforcement of Court decisions in his favour, and failure by him cannot be blamed on the Defendant*

State" (p 11 of their rejoinder). Such arguments are really specious arguments, as it is true in the instant case that it is the responsibility of the Togolese judicial authorities to ensure the enforcement of court decisions, and that, on the other hand, it is also the responsibility of a State that shall be at stake, whenever its judicial authorities are found wanting. Thus, it is in vain that the Republic of Togo tried to jettison its responsibility on this issue.

43. Incidentally, the final judgment given by the Indictment Chamber on 6 December 2013 has disqualified the first procedure against Mr. Bodjona. The Togolese Judge indeed ***"purely and simply annulled the procedure initiated against the indicted Bodjona Akoussoulélou Pascal before the Indictment Chamber 1in a case of complicity in swindling."*** Thus, it can evidently be deduced that Mr. Bodjona's arbitrary arrest and detention, for the whole period under reference (September 2012 - April 2013) occurred, with total disregard for legal procedures.

44. But, beyond all sorts of incidents and sudden developments on the judicial procedure concerning Plaintiff/Applicant's case, the Court cannot but be concerned with the fact that the excessive and unjustified slow pace at which his case file was examined. All the proceedings initiated against him were in succession, knitted to one another, broken at a point in time, before appearing as if they were eternally at their beginning. It is these aspects of the proceedings that must be noted and frowned at.

45. The Court remains conscious of the fact that a complaint on complicity in swindling was lodged against Mr. Bodjona, and that within the framework of the investigations that shall be carried out, he was likely to have his movement curtailed, or even, he be detained. But, it is imperative that these annoying gestures take place with the respect for legal procedures, and the guarantee for the rights of the justice seeker. It is specifically fundamental that the procedure be carried out, in a way as to reduce, to the barest minimum, unnecessary delay in giving judgment, in order to make the detainee's fate known to him. On this issue, the Court notes that no precise or

decisive proof was included in the case file, which was likely to justify Mr. Bodjona's prolonged detention. In all the processes that it filed at the Court, the Republic of Togo only contented itself in claiming that Mr. Bodjona *"was indicted, and his trial was on the ground that there existed serious indices of culpability against him"* (p 8 of its rejoinder), *or that, there were "reasonable doubts that he committed a crime"* (p 9 of its rejoinder), without ever pointing, specifically at these *"indices"* or these *"reasons"*.

46. After putting Plaintiff/Applicant in detention for many months, the Court cannot be convinced by imprecise proofs, to justify the elongation of such detention. At this juncture, the Court shall recall its constant jurisprudence, in this regard.

47. In the case of "**Mr. Chude Mba *v.* the Republic du Ghana**" (Judgment of 6 November 2013), after establishing the violation of Plaintiff/Applicant's rights, the Court declared that:

> ***"The object of detention for questioning is to further a criminal investigation by confirming or discontinuing suspicions which provide the grounds for detention. The suspicion however must be based on reasonable grounds in order to safeguard against arbitrary arrest and detention."*** (§ 88 & 89).

While referring to the jurisprudence of the European Court of Human Rights on the notion of "reasonable doubt", the Court further declared that ***"what is reasonable depends upon all the circumstances, but the court must be furnished with at least some facts or information capable of satisfying it that the arrested person was reasonably suspected of having committed the alleged offense."*** *(§90).* Finally, still recalling the jurisprudence of the European Court of Human Rights, the Court added that ***"the words "reasonable suspicion" meant the existence of facts or information which would satisfy an objective observer that the persons concerned might have committed the offence."*** (§91).

48. In its Judgment dated 28 January 2014, in the case of "**Alimu Akeem *v.* the Federal Republic of Nigeria**", the Court noted that the Defendant State ***"failed to file a crucial proof for the examination of the circumstances surrounding the instant case"*** (§45) and concluded that the arrest and detention of Plaintiff/ Applicant are arbitrary.

49. The Court strongly believes that it is the same circumstances that are presented before it, in the instant case. Certainly, Mr. Bodjona was not arrested without any legal basis, since it was a complaint on complicity in swindling that was lodged against him. The Court can neither remove the fact that, unlike those other Plaintiffs/Applicants, he was presented before a judge. From this viewpoint, and *ab initio,* his arrest and detention could not be considered to be purely an arbitrary one.

50. But, when the investigation goes on endlessly, when the proceedings succeed themselves in turn, without any incriminating evidence being brought, as to the merit of the case, there is serious risk for a detention, which was based, at the beginning, on a legal basis, to end up in becoming an arbitrary one. The Court wishes to recall here, its declaration in the aforementioned Judgment in the "**Badini Salfo *v.* the Republic of Burkina Faso**" thus: ***" … an arbitrary detention is any form of curtailment of individual liberty that occurs without a legitimate or reasonable ground, and is in violation of the conditions set out under the law. One or all of these indices shall be said to be missing, if the detention, which is, at the beginning, not arbitrary, but is too prolonged. It thus leads to an abusive detention"*** (§21).

51. For any useful purposes, the Court believes that, as at the time the present Judgment is being delivered, Mr. Bodjona is still in detention, and, this has been on for the past four (4) years (since March 2011) that the judicial proceeding initiated against him has been on. The Court equally wishes to recall that it delivered a Judgment on 11 June 2013 (Judgment in the case of "**Agba Sow Bertin *v.* the**

Republic of Togo"), which also relates to the same procedure on the complaint on complicity in swindling, and that it has already sanctioned the Republic of Togo, for arbitrary detention, on the strength of the following legal instruments:

- **Article 9** of the Universal Declaration of Human Rights: *"No one shall be subjected to arbitrary arrest, detention or exile"*;

- **Article 9 (1)** of the International Covenant on Civil and Political Rights: *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"*;

- **Article 6** of the African Charter of Human and Peoples' Rights: *"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"*;

52. Finally, Plaintiff/Applicant tendered before the Court, the viewpoint of Mr. Loïc Le Floch Prigent, a French citizen, who has been at the heart of the whole procedure relating to complicity for swindling. In an excerpts from his book, titled "The Black Sheep'' (Pygmalion Ed.) he writes: ***"People in High Places were frightened, and vowed to put me through scrutiny if I refused to testify in the fairy tale by ABASS Youssef, which has it that BODJONA had lied to him, swindled him…"*** (p. 42), then ***"I do not have in my possession, any proof of whatever nature, which could be tendered, to support the claim that BODJONA Akoussoulèlou Pascal has effectively taken part in the swindling, for which my former partner was accused…"***

(p 43). And in the Minutes of the interrogation, as to the merit, which was conducted on 20 July 2011, which was filed as annexure, Mr. Le Floch Prigent added that: ***"I hereby state that Minister BODJONA, has not played any role, whether directly or indirectly, in this case, which I do not consider as one"***.

53. Without attaching any absolute faith to these declarations, the Court believes that they constitute facts that should be taken into consideration, within the general procedure that concerns Plaintiff/ Applicant. Whatever the case, these declarations have given backing to the Court's postulations above: that the Republic of Togo has failed to tender before the Court, any decisive proof, to support Mr. Bodjona's culpability, and to justify the elongation of his detention.

54. From the above accounts, the Court strongly believes that Plaintiff/ Applicant was placed in an arbitrarily arrested and was so detained over the period, which ran from 1st September 2012 to 9 April 2013, which is more than eight (8) months. On this specific grievance, it is important to grant Plaintiff/Applicant the benefit of his claims.

55. In like manner, it must be noted that Mr. Bodjona suffered a moral prejudice, infringement upon his honour and reputation, owing to his long incarceration, and the conditions under which he was first summoned on 1st September 2012 in Lomé. The Court made the same declaration in the aforementioned judgment in the case of "**Agba Sow Bertin v. the Republic of Togo**" (Judgment of 11 June 2013).

56. Finally, Plaintiff/Applicant made available to the Court, a Medical Certificate, which attests to the fact that he is suffering from psychological trauma, which is as a result of his detention, and that this manifests itself in the form of **"insomnia (…) nightmares (…), signs of arterial hypertension (…), anguish (…), palpitations"**. Without necessarily trying to find out if all these signs are to be taken to be **"acts of torture, inhuman cruel and degrading treatments"** suffered by Plaintiff/Applicant, the Court holds on to the existence of these troubles, and the need to get reparation for the resulting prejudice.

57. On the other hand, the Court considers that it cannot order for the reparation for the loss of a life-time opportunity, which is tied to a political career. The Court neither has the responsibility to examine the legality of the committal order issued against Plaintiff/Applicant. With regard to the claims of Plaintiff/Applicant, relating to the violation of his right to have his case heard, and the violation of the principle of *"non bis in idem"*, the Court considers these to be covered by the violations that it has noted above.

FOR THESE REASONS:

The Court, sitting in a public hearing, in first and last resort, after hearing both parties, in a case on human rights violations:

As to form,

The Court,

- **Declares** its jurisdiction over the Application filed by Mr. Bodjona Akoussoulélou Pascal against the Republic of Togo;

- **Declares** the Application filed by Mr. Bodjona Akoussoulélou Pascal against the Republic of Togo as admissible;

- **Declares** that there was no need to admit the Application to an expedited procedure;

As to merit,

- **Orders** the Republic of Togo, to organise the trial of Mr. Bodjona Akoussoulélou Pascal, within reasonable period, or, for lack of any incriminating proof against him, he should be released;

- **Declares** that Mr. Bodjona Akoussoulelou Pascal's arrest and detention from 1st September 2012 to 9 April 2013 is arbitrary;

Consequently, **Orders** the Republic of Togo, to pay Mr. Bodjona Akoussoulelou Pascal, the following sums of money:

- Ten (10) million CFA Francs, for the reparation of the prejudice suffered, as a result of arbitrary arrest, and detention;

- Five (5) million CFA francs, for the reparation of moral prejudice;

- Three (3) million CFA francs, for the reparation of the prejudice of psychological trauma;

  All this amounting to the sum of eighteen (18) million CFA francs.

- **Rejects** any other claims made by Mr. Bodjona Akoussoulélou Pascal;

- **Order** the Republic of Togo to bear all the costs.

Thus made, adjudged, and pronounced in French being the language of procedure, in a public hearing in Abuja, by the Court of Justice of the Economic Community of West African States, on the day, month, and year stated above.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

1. **Hon. Justice Jérôme TRAORE** - *Presiding;*
2. **Hon. Justice Yaya BOIRO** - *Member;*
3. **Hon. Justice Alioune SALL** - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 24TH DAY OF APRIL, 2015

SUIT NO: ECW/CCJ/APP/14/14
JUDGMENT NO: ECW/CCJ/JUD/07/15

BETWEEN
AGRILAND CO. LTD. - *PLAINTIFF*

AND
THE REPUBLIC OF CÔTE D'IVOIRE - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **EMILE SONTÉ (ESQ.)** - *FOR THE PLAINTIFF*
2. **THE LEGAL DEPARTMENT OF THE TREASURY** - *FOR THE DEFENDANT*

Admissibility - Impartiality - Principle of equality of arms - Adversarial principle - Effective remedy - Jurisdiction - Damages and interests

SUMMARY OF FACTS

On 25 August 2014, AGRILAND, anonymous company of Ivorian law, filed an Application against the State of Côte d'Ivoire with the Registry of the Court for the violation of its human rights. It considers that the acts and decisions rendered by the Ivorian courts in the case against the management Company and participation constitute serious violations of its rights, that there was partiality against them, non-compliance of the principle of equality before the law and weapons and the adversarial principle.

The State of Côte d'Ivoire considered that there was no violation of the rights of the applicant and that the claim for reimbursement is not within the jurisdiction of the Community Court of Justice, ECOWAS.

LEGAL ISSUES

1. *Is the Application admissible by the ECOWAS Court of Justice and does the Court have jurisdiction? If so, was there partiality and non-respect of the principles of equality before the law and weapons and the adversarial principle leading to an ineffective remedy before the Ivorian courts?*
2. *Therefore, is there a need to compensate the Applicant?*

DECISION OF THE COURT

- *Adjudge admissible the Application of Societe AGRILAND SA for having satisfied the legal prescriptions;*
- *Held that the human rights violations invoked by the AGRILAND Company are ill-founded;*
- *Consequently, the dismissal of all his claims;*
- *Held that there is no need to rule on the lack of jurisdiction raised by the Republic of Cote d'Ivoire.*

JUDGMENT OF THE COURT

I. PROCEDURE

1. On 25 August 2015, Agriland Co. Ltd filed its case before the ECOWAS Court of Justice, claiming violation of its human rights, and seeking an order for payment of damages against the Republic of Côte d'Ivoire.

2. On 26 August, the Chief Registrar of the Court served the said Application on the Republic of Côte d'Ivoire and the latter lodged its Defence at the Registry of the Court on 8 October 2014, dated 2 October 2014.

3. On 10 November 2014, the Applicant lodged its Reply at the Registry of the Court, and on 16 December 2014, the Republic of Côte d'Ivoire filed its Rejoinder.

4. On 8 January 2015, the Applicant filed further written pleadings.

5. The case was scheduled for hearing on 24 February 2015 and the Applicant made oral submissions during the hearing.

6. The Republic of Côte d'Ivoire, which was served with notice of the hearing, did not appear in court.

7. Upon hearing the Plaintiff Counsel's oral observations, the Court adjourned to deliberate on the case.

II- THE FACTS OF THE CASE - CLAIMS AND PLEAS-IN-LAW OF THE PARTIES

1. By Application dated 25 August 2014, Agriland Co. Ltd. brought its case before the Community Court of Justice, ECOWAS, asking the Court to:

As to formal presentation,

- **Declare** that the Application it brought before the Court was duly filed, and that it is admissible;

As to merits,

- **Declare** that the Application is well founded;

- **Adjudg**e and **declare** that the steps taken and the judgments delivered by the courts of the Republic of Côte d'Ivoire in the case against Agriland Co. Ltd. constitute serious violations of the human rights of Agriland Co. Ltd.;

- **Declare** that the violations in question are attributable to the Republic of Côte d'Ivoire, as responsible for the acts of its judicial authorities;

- **Find** that the widespread human rights violations, perfectly established, caused great harm to Agriland Co. Ltd.;

- **Order** the Republic of Côte d'Ivoire to pay to Agriland Co. Ltd. the sum of Two Billion CFA Francs (CFA F 2,000,000,000) in reimbursement for its colossal investments;

- **Order** the Republic of Côte d'Ivoire to bear all the costs relating to the proceedings, including the legal fees due Maître Emile Sonté, barrister-at- law.

2. In support of its claims, it averred that following a dispute between it and *Compagnie de Gestion de Participation* (CGP), legally incorporated according to the laws of Côte d'Ivoire, it brought the matter before Ivorian courts, notably before the Court of Appeal of Abidjan and the Supreme Court of Côte d'Ivoire, which delivered judgments that violated the principles of equality before the courts, right to fair trial and right to impartiality before the courts, equality before the law, and right to effective remedy.

Regarding violation of the principles of equality before the law courts, right to fair trial and right to impartiality before the Courts

3. Agriland Co. Ltd. submitted in regard to this point that the Première Chambre Civile of the Abidjan Court of Appeal, in the case between it and CGP, delivered Judgment No. 633 of 27 July 2012 unfairly in favour of CGP because the Court did not take account of certain expert findings in agriculture furnished by the Supreme Court; that it thereby violated its duty regarding impartiality and the principle of equality of arms;

4. That as a result of the biased judgment given by the Première Chambre Civile of the Abidjan Court of Appeal, its fundamental human rights were violated;

5. That its rights were equally violated by the "misjudgement of the case" by the Supreme Court of Côte d'Ivoire presided over by its President, the Criminal Chamber of the Supreme Court, and the Court of Divo, which were partial, partisan, non-independent and unfair;

6. That the Supreme Court of Côte d'Ivoire presided over by its President refused to grant it authorisation to file its case for interim ruling before the Supreme Court, by rejecting its application whereas there had not been any oral hearing of the two parties; but at the same time, the same Supreme Court admitted the requests brought by CGP, in granting it stay of execution of a decision and by authorising a summary judgment for its case on a timely basis;

7. That the Supreme Court rejected its supplementary memorial deposited at its General Secretariat; that it thus violated the principles of impartiality before the courts, equality before the law, equality of arms and the principle of having to hear both parties; that its manner of judging, consisting of ignoring the entire case-file of the two parties, with the sole aim of allowing the adverse party win the case, violates these principles;

8. The Applicant further pleads that the judge in chambers at the Divo Court also showed partiality in the handling of the case between it and CGP;

9. That it cites as basis of the alleged violations, Articles 7 and 10 of the Universal Declaration of Human Rights, Articles 3 and 7 of the African Charter on Human and Peoples' Rights, Articles 14(1) and 26 of the International Covenant on Civil and Political Rights, and Article 20 of the Constitution of Côte d'Ivoire.

Regarding violation of the principle of equality before the law

10. The Applicant justifies violation of this principle by the disregard of its supplementary memorial; that indeed, the Supreme Court, in rejecting its supplementary memorial, whereas it was lodged in accordance with the provisions of Article 212 of the Code of Criminal Procedure of Côte d'Ivoire, had put it in a situation of clear disadvantage in comparison with CGP and thus deprived it of the protection of the law;

11. That it cites as basis for the violation, Article 7 of the Universal Declaration of Human Rights, Article 3 of the African Charter on Human and Peoples' Rights, Article 2(2) of the Constitution of Côte d'Ivoire;

Regarding violation of the right to effective remedy

12. The Applicant maintains, under this point, that in the laws of Côte d'Ivoire, there shall be no appeal against an unfavourable judgment voluntarily violating a legal text whose application should not pose any particular difficulty, like the one in the instant case; that such void of applications on cases thrown out by the Supreme Court and which grossly violate the law, undoubtedly amounts to violation of the Applicant's right to effective remedy before the competent domestic courts, and that it violates the fundamental rights the Applicant is entitled to under the Constitution, and by law;

13. That the Appeal Court of Abidjan equally violated its right to effective remedy in declaring that no application may be brought against its order of closure of the phase of the procedure devoted to preparing the case for hearing;

14. That it cites, as basis for its pleas in law, Article 8 of the Universal Declaration of Human Rights, Article 3(4) of the International Covenant on Civil and Political Rights, and Article 7(1) of the African Charter on Human and Peoples' Rights.

Regarding reimbursement of the sum of Two Billion CFA Francs

15. Agriland Co. Ltd., on the basis of the alleged violations and referring to the investments made on the plantation, asks for a declaration from the Court ordering Côte d'Ivoire to reimburse to it the sum of Two Billion CFA Francs (CFA F 2,000,000,000) representing the value of its investments;

16. In its Memorial in Defence, the Republic of Côte d'Ivoire, represented by the State Judicial Officer, asks the Court for the following:

As to formal presentation,

- **Adjudge**, by stating the law, whether the Application filed by Agriland Co. Ltd. is admissible or not;

As to the merits of the case,

- **Declare** the Application filed by Agriland Co. Ltd. ill-founded;
- **Adjudge** that in the instant case, no human rights violation is committed by the Republic of Côte d'Ivoire;
- **Find** that the application for reimbursement falls outside the jurisdiction of the ECOWAS Court of Justice;

That in the event of the request for declaration of lack of jurisdiction being discountenanced by the Court, the Applicant requests the Court to:

- **Find** that the Republic of Côte d'Ivoire is not a debtor to Agriland Co. Ltd.;

- **Declare** that there are no grounds for ordering reimbursement from the Republic of Côte d'Ivoire to Agriland Co. Ltd.;

- **Dismiss** the request for reimbursement as made by Agriland Co. Ltd.;

- **Dismiss** the Application filed by Agriland Co. Ltd. against the Republic of Côte d'Ivoire for human rights violation;

- **Ask** Agriland Co. Ltd. to pay all costs relating to the instant proceedings.

17. The Republic of Côte d'Ivoire concludes that there is no evidence of violation of the principles of equality before the law courts, right to fair trial, and impartiality before the courts, as pleaded by the Applicant; that the latter built its argumentation rather on criticisms of decisions authoritatively made by various orders of court; that it maintains that the Court affirmed in its judgment delivered on 3 July 2013 in **Kpatcha Gnassingbe *v.* Republic of Togo**, that it adjudicates only on human rights violation, and that it is not a court of appeal or cour de cassation (court of cassation), and that it has no powers to reverse decisions made by the domestic courts of Member States; that the principle of equality before the courts is indeed enshrined in Article 20 of its Constitution, which clearly provides that everyone is entitled to free and equal access to justice, and that it has thoroughly complied with the international norms safeguarding the right of access to justice, notably as regards compliance with the prescriptions of Articles 3 and 7 of the African Charter on Human and Peoples' Rights and Article 14(1) of the International Covenant on Civil and Political Rights;

18. That it is incontrovertible that the Applicant has always had access to the public services of the Judiciary on equal terms with CGP, without any form of discrimination whatsoever in terms of the court pleadings;

19. That the Applicant submits no established fact capable of being interpreted as a discriminatory act committed against it by the Ivorian courts; that no inkling of evidence in support of the allegations of human rights violations is yet to be produced by the Applicant;

20. That from the foregoing, it is manifest that the plea-in-law brought forth for violation of Article 20 of the Ivorian Constitution, of Articles 3 and 7 of the African Charter on Human and Peoples' Rights, and of Article 14(1) of the 1966 International Covenant on Civil and Political Rights, are ill- founded and must consequently be dismissed;

21. That the allegations of the Applicant in the terms of which it was a victim of partial, partisan, non-independent and unfair justice, are equally groundless; that just like CGP, Agriland Co. Ltd. won or lost one proceedings or the other, instituted between them and tried by judges who were subject to the authority of the law only; that the decisions made by the courts were sufficiently supported with reasons in law and none of them may be deemed as arbitrary, since they were delivered in conformity with the Ivorian law, namely Articles 142 and 206 of the Code of Civil Procedure;

22. That the Honourable Court is urged to find that once again, it is a matter of allegations, not backed by the slightest indication of a formal proof by the Applicant;

23. The Republic of Côte d'Ivoire further pleads that the allegations of violation of the principle of equality before the law are equally baseless, in that Agriland Co. Ltd. does not cite any specific case where it found itself in the same legal context with another litigant, and such other litigant was given a better and discriminating treatment; that moreover, the rejection of its supplementary pleading on which it relies in alleging that there is violation of equality before the law, is a consequence of the failure, on its own part, to observe a procedural rule; that the Civil Chamber of the Supreme Court of Côte d'Ivoire, which set aside the supplementary pleading of Agriland Co. Ltd., was sufficiently grounded, in line with the requirements of a fair trial;

24. That just like the other allegations of human rights violation, those made on violation of the right to effective remedy is ill-founded; that contrary to the written pleadings of the Applicant, the Ivorian laws offer a wide range of remedies to every litigant considering that his rights are transgressed, to have recourse either to the traditional judicial system, so as to seek redress for such right violation, or to employ other non-judicial mechanisms; that it was as a result of the existence of such safeguards that Agriland Co. Ltd. was able to file its case before the Ivorian courts;

25. That finally, it is erroneous for Agriland Co. Ltd. to affirm that Côte d'Ivoire has no means of sanctioning the 1st Civil Chamber B of the Supreme Court of Côte d'Ivoire, for the violations of laws committed against it, since there is an exceptional mechanism for seeking redress provided for by Article 217 and related articles of the Ivorian Code of Civil Procedure, whereby formal complaints may be made against judges who may have sat on a case;

26. That the Honourable Court is urged to dismiss that plea-in-law as of erroneous allegations and an ill-founded argumentation;

27. That regarding the request for reimbursement of the sum of Two Billion CFA Francs (CFA F 2,000,000,000), the Republic of Côte d'Ivoire argues that what is asked for by the Applicant is outside the jurisdiction of the Community Court of Justice, ECOWAS and it cites the judgment of 3 July 2013 on **Kpatcha Gnassingbe *v.* Republic of Togo** in support of its assertion; it further argues that the request for reimbursement, which may only be granted by the national courts, has already come before the domestic courts of the Republic of Côte d'Ivoire and that the judgment delivered thereon has acquired the force of res judicata; that hence, the application for reimbursement is outside the competence of the ECOWAS Court of Justice, whose mandate is limited to human rights violation; and therefore, it has no jurisdiction to challenge the decisions made by the national courts; that it shall be ripe and appropriate for the Honourable Court to declare that it has no jurisdiction to adjudicate

on that specific request, as brought by the Applicant, in respect of reimbursement;

28. That if the request to disregard the Applicant's application for reimbursement should fail, the Honourable Court is requested to find that there are no grounds for reimbursement to the Applicant, in that the Republic of Côte d'Ivoire is not indebted to Agriland Co. Ltd, and that it is not a party to the dispute between the Applicant (i.e. Agriland Co. Ltd.) and CGP.

II. GROUNDS FOR THE DECISION AS TO FORMAL PRESENTATION

Regarding admissibility of the Application filed by Agriland Co. Ltd.

29. Whereas in the terms of Article 9(4) of the Supplementary Protocol A/SP.1/01/05 amending Protocol A/P/1/7/91 on the Community Court of Justice, ECOWAS**: "The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State";** whereas in the instant case, the Applicant invokes violation of its rights, namely the right to equality before the courts, the right to fair trial, and the rights to impartiality before the Courts, equality before the law, and to effective remedy.

30. Whereas in the light of the nature of the rights invoked and the powers of the Court, it is appropriate therefore to declare that the Application filed by Agriland Co. Ltd. is admissible.

AS TO THE MERITS OF THE CASE

1. Regarding violation of the principle of equality before the Courts, the right to fair trial, and the right to impartiality before the Courts

31. Whereas the International Covenant on Civil and Political rights provides in its Article 14(1) that: **"All persons shall be equal before**

the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (…)".

32. Whereas the principle of equality before the courts signifies that every person shall be entitled to be tried by the same courts or tribunals, and according to the same rules of procedure, without the slightest form of discrimination; whereas this implies the possibility for every litigant to bring his case before the courts, for the purposes of claiming his rights; whereas this implies that litigants finding themselves in the same situation shall be treated in the same manner before the courts and that no litigant shall be a victim of discrimination before the law courts on the basis of social class, origin, sex, nationality, etc.

33. Whereas it can be deduced from the foregoing, that violation of the principle of equality before the courts would be established where discriminatory acts are committed against a litigant, thus putting the litigant in a situation of net disadvantage with respect to its opponent at trial in Court.

34. Whereas in the instant case, the Applicant, throughout its submissions, could not produce evidence of violation of the principle of equal access to the public service of the Judiciary of the Republic of Côte d'Ivoire; whereas it does not establish that the right of access to justice was denied it for any reason whatsoever or that it was a victim of a discriminatory measure; whereas it appears rather from the procedure that it easily availed itself of the services of the Ivorian courts by giving testimony of the suits it had filed, which resulted in court decisions, some of which went in its favour.

35. Whereas in the absence of evidence, the Court will not be in a position to find human rights violation; whereas it is on the basis of such proofs of evidence that the Court will be able to conclude whether there was an occurrence of violation or not; whereas the

Court at any rate held in paragraph 35 of its Judgment of 17 February 2010 on Case Concerning **Daouda Garba *v.* Republic of Benin** (Judgment No. ECW/CCJ/JUD/01/10 of 17/02/2010) that:

> ***"It is a general rule of law that during trial the party that makes allegations must provide evidence. The onus of constituting and demonstrating evidence is therefore upon the litigating parties. They must use all the legal means available and furnish the points of evidence which go to support their claims".***

36. Whereas it can be deduced from the pleadings that Ivorian courts, namely the 1st Civil Chamber of the Court of Appeal of Abidjan, and the Supreme Court of Côte d'Ivoire presided over by its President, were seised with the disputes between the Applicant and CGP, and court decisions were made on those disputes; whereas it is not the Court's duty to examine the legality of those decisions; whereas at any rate, the Court, in its judgments delivered respectively on 27 October 2008 in the **Hadijatou Mani Koraou Case** (Judgment N°. ECW/CCJ/JUD/06/08 of 27 October 2008) and on 22 February 2013 in the **Abdoulaye Baldé Case** (Ruling N°. ECW/CCJ/APP/JUG/04/13 of 22 February 2013), held that it has no jurisdiction to examine decisions made by the domestic courts of Member States, on the ground that it is not an appeal court or a *cour de cassation* (cassation court);

37. Whereas as for the right to fair trial, it is understood as provided by Article 10 of the Universal Declaration of Human Rights, Article 7 of the African Charter on Human and Peoples' Rights, Article 14 of the International Covenant on Civil and Political Rights, as the right for everyone to have his cause heard in all fairness, in public, and within reasonable time, by an independent and impartial court or tribunal as established by law; whereas the principle of equality of arms, which is one of the ingredients of the concept of fair trial, requires that each party be availed a reasonable opportunity to present his cause under conditions which do not put him in a net disadvantage, with respect to his opponent in cause; whereas the concept of

impartiality before the courts, which is also a component of the right to fair trial, implies that the judge shall not take sides in examining the cases submitted before him, or act in such manner as to give advantage to one of the parties in dispute;

38. Whereas in the instant case, Agriland Co. Ltd. lodged before the Ivorian courts, various applications which were publicly heard, as attested to by the operative statements of judgments delivered thereupon; whereas the different parties in the case, comprising the Applicant and CGP, were heard in the course of the trial and that they chose their counsel of their own free will to represent them before the Ivorian courts; whereas by virtue of the judgments delivered by the Ivorian courts, there is no doubt that the principle of hearing both parties was indeed adhered to and that each party was able to put its defence appropriately;

39. Whereas moreover, no evidence is provided that the Ivorian courts showed partiality in the handling of the dispute between the Applicant and CGP; whereas indeed, it is not demonstrated that one of the judges may have concretely taken sides for one of the parties while processing the case; whereas the impartiality of the Ivorian courts is therefore not established;

40. Whereas from the foregoing, it is appropriate to declare ill-founded the Applicant's claim relating to violation of its rights to equality before the Courts, the right to fair trial, and the right to impartiality before the Courts.

2. Regarding violation of equality before the law

41. Whereas equality before the law is guaranteed by Article 7 of the Universal Declaration of Human Rights, Article 3 of the African Charter on Human and Peoples' Rights, Article 26 of the International Covenant on Human and Peoples' Rights; whereas these texts recognise that all human beings are equal before the law and have equal protection of the law without distinction;

42. Whereas by virtue of the texts, violation of the principle of equality before the law should result from the conduct of discriminatory acts against a citizen by an administration or any person in whom authority is vested, on the basis of the victim's sex, race, origin, nationality, ethnicity, religion, etc.; whereas the Court, in its judgment delivered on 22 February 2013 in Case Concerning **Abdoulaye Baldé and 4 Others *v.* Republic of Senegal (**Ruling **N°. ECW/CCJ/JUD/04/13 of 22 February 2013)**, recalled that:

> ***"…the principle of equality of citizens before the law implies that citizens are made to go through the same mode of application of the law by a particular judicial institution, in the sense that citizens coming before the courts to seek justice and finding themselves in the same situation shall be tried by the same court or tribunal and according to the same legal rules of procedure."***;

43. Whereas in human rights violation, as mentioned above, the onus is on the person making the claim to produce evidence thereof; whereas in respect of violation of equality before the law, it is incumbent upon the Applicant to provide the Court with evidence as to any discriminatory act which may have been committed against it by the judges of the Supreme Court of Côte d'Ivoire, and which may have put it in a position of net disadvantage vis-à-vis its opponent in court in the case, CGP ;

44. Whereas in the instant case, Agriland Co. Ltd. does not prove in any way whatsoever that it is a victim of the said human rights violation, as it claims to be; whereas the mere rejection of a supplementary pleading by the Supreme Court cannot constitute a breach of the principle of equality before the law;

45. Whereas it is important to recall that the Honourable Court, a Community Court of Justice, has no mandate to examine decisions made by the domestic courts of Member States, much less to interpret the provisions of their domestic law; whereas indeed, the

Court has, in several judgments it has delivered, held that adjudication on applications seeking to reverse decisions of the domestic courts of Member States falls outside its jurisdiction:

- Case Concerning **Jerry Ugokwe *v.* Federal Republic of Nigeria** (Judgment N°. ECW/CCJ/JUD/03/05 of 7 Octobers 2005);

- Case Concerning **Moussa Leo Keita *v.* Republic of Mali** (Judgment N°. ECW/CCJ/JUD/03/07 of 28 June 2007);

- Case Concerning **Bakary Sarré and 28 Others *v.* Republic of Mali** (Judgment N°. ECW/CCJ/JUD/03/11 of 17 March 2011);

46. Whereas moreover, the Court has always stated that it is not an appeal court or a cassation court over the judgments delivered by the domestic courts of the Member States of the Community:

- The **Kpatcha Gnassingbe Case** (Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013);

47. Whereas finally, the Court, in Case Concerning **Hadijatou Mani Koraou** (Judgment N°. ECW/CCJ/JUD/06/08 of 27 October 2008), the Court declared that it has no mandate to examine the laws of the domestic courts of Member States;

48. Whereas in the absence of any other proof of evidence that may establish violation of equality before the law, it is appropriate to conclude that the Applicant's claim is ill-founded.

3. Regarding violation of the right to effective remedy before the domestic courts

49. Whereas the right to effective remedy is guaranteed by Article 8 of the Universal Declaration of Human Rights, Article 7(1) of the African Charter on Human and Peoples' Rights, and Article 2(3) of the International Covenant on Civil and Political Rights; whereas these

provisions recognise that everyone is entitled to bring his case before a competent domestic court in case of violation of his fundamental rights, and the same provisions impose on States the obligation to create room for every citizen to defend his fundamental rights in case of violation;

50. Whereas it can be deduced from these provisions that the right to effective remedy before the domestic courts implies the opportunity available to everyone to defend his cause before the national courts; whereas that presupposes that the State shall put in place effective and efficacious judicial structures before which every citizen may defend his cause;

51. Whereas in the instant case, it is apparent from the pleadings of the procedure that Agriland Co. Ltd. did file its case before the Ivorian courts in connection with the dispute between it and CGP; whereas it even filed an appeal before the Daloa Court of Appeal and an application before the Supreme Court aimed at quashing a judgment; being able to institute those proceedings attests to the existence of a judicial structure enabling the Applicant, not only to file its case before the Ivorian Judiciary, but also to file for appeal before the various structures made available by the Ivorian laws;

52. Whereas moreover, the Republic of Côte d'Ivoire provides for everyone seeking justice, the opportunity to hold a judge to task, through a system whereby formal complaints may be made against him under Article 217 and related articles of the Ivorian Code of Civil Procedure, where there are serious defaults in respect of his professional obligations as a judge;

53. Whereas in the light of the foregoing, it is ripe to conclude that the Applicant's claim on violation of the right to effective remedy before the national law courts is ill-founded;

54. Whereas it is appropriate to declare ill-founded the claims of human rights violation brought by Agriland Co. Ltd., and consequently, dismiss that claim with all its intents and purposes.

As to incompetence of the Court regarding request for reimbursement

55. Whereas the Republic of Côte d'Ivoire raises the issue of incompetence of the Court to adjudicate on Agriland Co. Ltd.'s request for the sum of Two Billion CFA Francs (CFA F 2,000,000,000);

56. Whereas it is not proved that there is any human rights violation whatsoever, it does not appear necessary any more to examine this head of claim brought by the Republic of Côte d'Ivoire;

57. Whereas it is ripe to conclude that there is no ground for adjudicating on the said request.

As to costs

58. Whereas Article 62(2) of the Rules of the Court states that:

> *"The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings";*

59. Whereas on that ground the Applicant is ordered to bear the costs.

FOR THESE REASONS

The Court,

Adjudicating in a public session, after hearing the two parties, in a matter on human rights violation, in first and last resort;

As to formal presentation

- **Declares** that the Application brought by Agriland Co. Ltd. is admissible, for satisfying the legal requirements;

As to the merits of the case

- **Adjudges** that the human rights violations claimed by Agriland Co. Ltd. are ill-founded;

- Consequently, **dismisses** the Application, with all its intents and purposes;

- **Adjudges** that there is no ground for adjudicating on the issue of incompetence of the Court as raised by the Republic of Côte d'Ivoire;

- **Asks** Agriland Co. Ltd to bear the costs.

Thus made, declared and pronounced in a public hearing at Abuja, by the Community Court of Justice, ECOWAS, on the day, month and year stated above.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding;*
- **Hon. Justice Yaya BOIRO** - *Member;*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar*.

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 24TH DAY OF APRIL 2015

SUIT NO: ECW/CCJ/APP/15/14
JUDGMENT NO: ECW/CCJ/JUD/08/15

BETWEEN
KPATCHA GNASSINGBE & 6 ORS. - *PLAINTIFFS*

AND
REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:
1. HON. JUSTICE JÉRÔME TRAORÉ - *PRESIDING*
2. HON. JUSTICE YAYA BOIRO - *MEMBER*
3. HON. JUSTICE HAMÈYE F. MAHALMADANE - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **JII-BENOIT KOSSI AFANGBEDJI (ESQ.);**
   DARUIS ATSOO (ESQ.);
   ATA MESSAN ZEUS AJAVON (ESQ.) - *FOR THE PLAINTIFFS*
2. **SANVEE OHINI (ESQ.)** - *FOR THE DEFENDANT*

- Violation of human rights - Jurisdiction - Res judicata

SUMMARY OF FACTS

Mr. Gnassingbe Kpatcha and 06 others of Togolese nationality have applied to the Community Court of Justice, with an application dated 30 July 2014 against the Republic of Togo for violating their right to a fair trial. They maintain that by judgment dated 03 July 2013, the Court, among other things, condemned the Republic of Togo for violating their right to a fair trial and consequently, ordered the Republic of Togo to take all necessary and urgent measures to stop this violation. The Applicants claim that this Judgment was not fully executed by the Republic of Togo that they are still in detention. They added that by so doing the Republic of Togo violated their right to have their case heard. The Applicants alleged that the execution of a Judgment is an integral part of the right to a fair trial.

LEGAL ISSUES

- *Does the Court have jurisdiction to examine an Application concerning the partial fulfilment of a decision made by it?*

- *Can the Court hear a Case that it has already heard by it between the same parties?*

DECISION OF THE COURT

The Court answered in the negative and concluded in res judicata.

THE COMMUNITY COURT OF JUSTICE,

Delivers the following judgment on human rights violation, in Case Concerning **Kpatcha Gnassingbe and 6 Others v. Republic of Togo**:

I. PARTIES

I.1- APPLICANTS:

- **Mr. Kpatcha Gnassingbe** (detainee at the civilian prison of Lome, Togo);
- **Mr. Ougbakiti Seïdou** (detainee at the civilian prison of Lome, Togo);
- **Mr. Essozima Gnassingbe** (detainee at the civilian prison of Tsevie, Togo);
- **Mr. Abi Atti** (detainee at the civilian prison of Atakpame, Togo);
- **Mr. Soudou Tchinguilou** (detainee at the civilian prison of Atakpame, Togo);
- **Mr. Kokou Tchaa Dontema** (detainee at the civilian prison of Sokode, Togo);
- **Mr. Efoé Sassouvi Sassou** (detainee at the civilian prison of Sokode, Togo);

All assisted by:

- Maître Jil-Benoit Afangbedji, Barrister-at-Law, whose law firm is located at 99, Rue de l'Antenne, near Festival des Glaces (former "Restaurant la Pirogue"), BP 12250, Telephone:22 22 64 40,
  e-mail: cabinetafangbedji@yahoo.com;

- Maître Darius Atsoo, Barrister-at-Law, Kegue, Rue Notre Dame de la Miséricorde, 3rd turn to your right at 150 metres, BP 7722, Telephone: 22 20 01 01 / 90 13 64 66 E-mail: madarius@yahoo.fr;

- Maître Ata Messan Zeus Ajavon, Barrister-at-Law, whose law firm is located at 1169, Avenue de Calais, BP 1202, Lome, Togo, Telephone: 23 20 57 79 / 90 33 07 63, E-mail: atamjavon@yahoo.fr

I.2- DEFENDANT

Republic of Togo, whose headquarters is located at Lome, Palais de l'Ancienne Primature, 596, Rue de l'Entente, BP 121, Lome, Togo, represented by the Garde des Sceaux (Keeper of the Seals) and Minister of Justice, also in charge of Relations with the Institutions of the Republic, resident and domiciled at Lome, at Rue de l'Entente, assisted by Maître Ohini Sanvee, Barrister-at-Law, whose law firm is located at 32, Rue des Bergers, BP 62091, Telephone: 22 26 56 82 E-mail: cabinetvallion@yahoo.fr, Lome, Togo.

II- FACTS AND PROCEDURE

II.1 Messieurs Kpatcha Gnassingbe (detainee at the civilian prison of Lome, Togo), Ougbakiti Seïdou (detainee at the civilian prison of Lome, Togo), Essozima Gnassingbe (detainee at the civilian prison of Tsevie, Togo), Abi Atti (detainee at the civilian prison of Atakpame, Togo), Soudou Tchinguilou (detainee at the civilian prison of Atakpame, Togo), Kokou Tchaa Dontema (detainee at the civilian prison of Sokode, Togo) and Efoé Sassouvi Sassou (detainee at the civilian prison of Sokode, Togo) brought their case before the Community Court of Justice, ECOWAS in an Application dated 30 July 2014, received at the Registry of the Honourable Court on 4 September 2014, against the Republic of Togo, for violation of their right to fair trial;

II.2 By another request dated 1 August 2014, received by the Registry on 4 September 2014, the Applicants asked the Court to bring the trial of their case under expedited procedure, in accordance with Article 59 of the Rules of Procedure of the Court;

II.3 The two requests were served on the Republic of Togo on 8 September 2014;

II.4 The Republic of Togo lodged both its Memorial in Defence and a further memorial on 30 October 2014, both of which were received by the Registry of the Court on the same date, i.e. 30 October 2014;

III.5 The case was scheduled on the cause list and heard during the Court hearing of 24 February 2015;

All the Parties were represented by their Counsel;

II.6- The matter was scheduled for deliberation, towards delivery of judgment on 24 April 2015.

III- PLEAS-IN-LAW AND CLAIMS

III.1- Messieurs Kpatcha Gnassingbe, Ougbakiti Seïdou, Essozima Gnassingbe, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema, and Efoé Sassouvi Sassou sued the Republic of Togo before the Honourable Court of Justice for violation of their right to fair trial, and more precisely, for the total execution of a court judgment;

III.2- They invoked the provisions of Article 7 of the African Charter on Human and Peoples' Rights, Article 10 of the Universal Declaration of Human Rights, Article 14(1) of the International Covenant on Civil and Political Rights, and the 16 December 2005 Resolution No. 60/47 of the United Nations General Assembly;

III.3- They submitted that they had filed a case before the Community Court of Justice, ECOWAS for violation of their human rights by

the Republic of Togo; that by virtue of Judgment No. ECW/CCJ/JUD/06/13 of 3 July 2013, the Court, among others:

- **Adjudged** that their right to fair trial was violated on account of the use of evidence extracted under the effects of torture;
- **Adjudged** that their right to defence was violated;
- **Ordered** as a result, that the Republic of Togo must take all the necessary and urgent steps and measures to terminate the violation of their right to fair trial;
- **Asked** the Republic of Togo to bear the costs;

III.4- They maintained that the said judgment, though duly served on the Republic of Togo, had hardly brought any change in their situation; that besides payment of the damages for reparation of the acts of torture, cruel and inhuman or degrading acts, the Republic of Togo has not deemed it fit to comply with the instructions in the judgment; that the judgment has not been totally implemented by the Republic of Togo; that till today, they are still languishing in jail, in violation of the right to have their cause heard;

III.5- In regard to admissibility of their Application, they pleaded that in the terms of Article 9(4) of Supplementary Protocol A/Sp.1/01/05 amending Protocol A/P.1/7/91 on the ECOWAS Court of Justice*: "The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State"*; that Article 10 of the same Protocol provides that access to the Court is open to individuals on application for relief for violation of their human rights, the submission of application for which shall not be anonymous nor be made whilst the same matter has been instituted before another International Court for adjudication; that besides, it is consistently held in the case law of the Court that the Court shall uphold its jurisdiction and declare an application admissible whenever the applicants allege human rights violation; that in Case Concerning **Isabelle Manavi Ameganvi and Others *v.* Republic of Togo (§52)**, the Court held that: ***"The Court notes***

that of primary importance is the simple reference to the international instruments, as cited above, and which constitute the essential part of the Community Judicial order in matters relating to human rights violation. This therefore makes it binding on the Court to declare its jurisdiction, as provided under Articles 9(4), as it relates to subject-matter, and 10(d) as it relates to access to the Court; that since its jurisprudence is constant in this regard, the Court must declare its jurisdiction, and consider the case on its merit."

III.6- They further maintained that they are entitled to having their cause heard and that includes ensuring that the Republic of Togo executes in good faith Judgment ECW/CCJ/JUD/06/13 of 3 July 2013, by virtue of Article 7 of the African Charter on Human and Peoples' Right, together with Article 10 of the Universal Declaration of Human Rights, and Article 14(1) of the International Covenant on Civil and Political Rights; that as a result, their action must be declared admissible as far as formality is concerned;

III.7- As regards violation of Article 7 of the African Charter on Human and Peoples' Rights, together with Article 10 of the Universal Declaration of Human Rights, and Article 14(1) of the International Covenant on Civil and Political Rights, they contended that the Republic of Togo violated their right to have their cause heard; that it is entitled to, and shall be guaranteed that right during the phases which occur both before and after the delivery of the judgment; that the case law of the European Court of Human Rights is consistent and abundant in that sense (*cf.* **Aircy *v.* Ireland, 9 October 1979, Series A, No. 32 JDI, 187, Chron. P. Rollandes; AFDI, 1980, 323, Chron, R. Pelloux**); that in compliance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which is the equivalent of Article 7 of the aforesaid African Charter on Human and Peoples' Rights, the European Court of Human Rights has stated that the article equally covers the procedure following the trial, such as enforcement of the judgment; that the said European Court thus

held in its judgment on **Hornsby *v.* Greece** that the right to fair trial under Article 6 would be illusory if the internal legal order of a State party made it possible for a court decision which had already acquired the force of res judicata, to be stripped of its power of enforcement, to the detriment of a party; that the same European Court emphasised that point of view in **Burdov *v.* Russia**, concerning default in the enforcement of a judgment which had ordered payment of compensation to an Applicant in reparation for his exposure to radioactive emissions; that it appears therefore that, the obligation upon States to enforce the court decisions or judgments of any court or tribunal whatsoever, which is both imperative and binding, forms an integral part of the right to fair trial; that in the instant case, the Republic of Togo has not totally executed Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013; that within the prevailing circumstances, in the terms of Article 62 of the Rules of the Community Court of Justice, ECOWAS: ***"The judgment shall be binding from the date of its delivery"***;

III.8- They submitted that in point 103 of its Judgment, the Court ruled that: ***"Concerning the specific issue of right to fair trial, the Court orders the Republic of Togo to take necessary and urgent measures to ensure that the violation of that right ceases"***; that in international human rights law, violation of the right to fair trial renders null and of null effect the orders made at the end of the trial complained of; that under such conditions, it is the duty of the Court as a judicial organ for the international protection of human rights, to indicate to the defaulting State party how it shall proceed to terminate the violation in question; that Resolution No. 60/47 adopted on 16 December 2005 by the General Assembly of the United Nations on the fundamental principles and directives regarding right to fair trial and reparation for victims of flagrant violation of international human rights, provided for restoration of victims to their original situation in which they were before the occurrence of the flagrant human rights violations; that such restoration shall comprise reclaim of freedom, enjoyment of human rights and citizenship, return to the former residence,

reinstatement of employment position and return of properties; that in the instant case, termination of violation of the right to fair trial as ordered by the Community Court of Justice can only be effected by regaining their freedom, in compliance with the principle of restoration as enunciated in the above- mentioned Resolution of the United Nations;

III.9- They finally asked the Court to:

- **Find** that the Republic of Togo has not totally enforced Judgment ECW/CCJ/JUD/06/13 dated 3 July 2013;

- **Adjudge** that the Republic of Togo violated the provisions of Article 7 of the African Charter on Human and Peoples' Rights, together with Article 10 of the Universal Declaration of Human Rights, and Article 14(1) of the International Covenant on Civil and Political Rights; Consequently,

- **Order** the Republic of Togo to release them immediately;

- **Order** the Republic of Togo to pay to each of them the sum of Eighty Million CFA Francs (CFA F 80,000,000), for violation of their right to fair trial;

- **Order** the Republic of Togo to bear the costs;

III.10- By another application dated 1 August 2014 but received at the Registry on 4 September 2014, the Applicants asked the Court to find the particularly urgent nature of the case, and to adjudge and declare that their substantive application shall be brought under expedited procedure as provided for under Article 59 of the Rules of Procedure of the Court;

III.11- The Republic of Togo responded that Resolution 60/147 as cited by the Applicants was adopted on 16 December 2005 by the General Assembly of the United Nations; that the General Assembly undertakes from time to time to reflect on human rights and makes

recommendations to States; that such resolutions have no binding effect on the States, unlike the resolutions of the Security Council; that it is incontrovertible that in public international law, these recommendations can only become binding on a State after it has agreed to abide by them; that such is not the case at hand; that the non-binding nature of Resolution 60/147 is so palpable that upon reading it, one realises that it is no more than a reminder and a restatement of the principles contained in the previous instruments of protection which had already been cited by the Applicants and applied by the Court in Judgment ECW/CCJ/JUD/06/13;

III.12- As to the partial execution of the Judgment of the Court, the Republic of Togo pleaded that it has taken all the steps and measures towards ceasing violation of the right to physical integrity constituted by the acts of violence denounced; that in ordering the Republic of Togo to cease the acts of torture, the Court did not order it to release the Applicants; that it could never have been the case since in that same judgment, it was clearly stated in point 11 of the operative statement that: ***"…that since the Applicants' detention was lawful, and thus not arbitrary, the Court has no grounds upon which to order that they be released from detention"***; that it was therefore erroneous and pure cunning for the Applicants to ask for their release; that it is again erroneous and pure greed for them to be asking for a further sum of CFA 80,000,000 for violation of their right to fair trial; that it shall be ripe and appropriate to dismiss their claims, purely and simply;

III.13- The Republic of Togo asked the Court to:

- **Adjudge** and **declare** that Resolution No. 60/47 adopted on 16 December 2005 by the General Assembly of the United Nations is not a binding instrument which fixes legal obligations upon the Republic of Togo, and that the said resolution is inapplicable to the Republic of Togo;

- **Adjudge** and **declar**e that the Republic of Togo has entirely honoured its obligations under the 10 December 1984

United Nations Convention Against Torture, and executed entirely Judgment ECW/CCJ/JUD/06/13 of 3 July 2013;

Consequently,

- **Dismiss** the request made by the Applicants asking for their release, and an order from the Court for payment of CFA F 80,000,000 to the Applicants in reparation for violation of their right to fair trial;

- **Order** the Applicants to bear the costs;

III.14- In a further memorial dated 30 October 2014 and received by the Registry on the same date, the Republic of Togo argued that the case brought by the Applicants is inadmissible on grounds of the res judicata of Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013;

III.15- The Republic of Togo maintained that in accordance with Article 19(2) of the Protocol on the Court, decisions of the Court shall be final and immediately enforceable; that the Rules of Procedure has however provided for ordinary and exceptional review procedures; that an ordinary review procedure may be the case of a judgment by default and an application to set it aside, whereas the extraordinary review procedures are constituted by third-party proceedings and revision; that again, the Rules of Procedure provide for applications for interpretation; that the force of Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013 cannot be challenged except on the strict grounds of the review procedures provided, namely: an application to set aside a judgment by default, third-party proceedings, and revision or interpretation; that the action filed by the Applicants do not fit into any of the three moulds designed for questioning the authority of Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013, since it is a request for immediate release from prison custody and an order for payment of damages; that their action is therefore inadmissible; that the inadmissibility of the action is strengthened by the tripartite nature of the identity of the Parties, and of the subject-matter of the case;

III.16- The Republic of Togo asked the Court to:

- **Declare** inadmissible the action for immediate release and compensation of the Applicants, on the ground that Judgment N°. ECW/CCJ/JUD/06/13 of 3 July has acquired the force of a decided judgment;

- **Ask** the Applicants to bear the costs.

IV- REASONING

IV.1- Messieurs Kpatcha Gnassingbe, Ougbakiti Seïdou, Essozima Gnassingbe, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema, and Efoé Sassouvi Sassou asked the Court to find that their case was urgent, and to adjudge and declare that their Application shall be heard under expedited procedure as provided for under Article 59 of the Rules of Procedure of the Court;

The reason advanced for the urgency was that there was a necessity to terminate their state of being under detention;

IV.2- The Republic of Togo did not file any observation on the application for expedited procedure made by the Applicants;

IV.3- Article 59 (1) of the Rules of the Community Court of Justice, ECOWAS provides that: *"On Application by the Applicant or the Defendant, the President may exceptionally decide, on the basis of the facts before him and after hearing the other party, that a case is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules, where the particular urgency of the case requires the Court shall give its ruling with the minimum of delay."*

Point 2 of that Article requires that an Applicant bringing a case to be decided under an expedited procedure shall make the application by a separate document lodged at the same time as the application initiating the proceedings or the memorial in defence;

IV.4- The Applicants' request for expedited procedure was lodged at the Registry of the Court on 4 September 2014, at the same time as the initiating application;

It is apparent therefore that the request for expedited procedure was made in due form and within the time-limit required by the Rules of the Court;

The request is therefore admissible and the Court should have examined it; Indeed, as far as detention and state of health are concerned, there is always an urgency for a declaration to be made on the measure requested;

An application for expedited procedure seeks to have the trial conducted within relatively short time-limits;

In the instant case, the matter was heard directly on its merits and deliberated upon;

Hence, the request for expedited procedure had become purposeless.

As to inadmissibility of the Application

IV.5- The Republic of Togo, in an "exceptional memorial" dated 30 October 2014, lodged at the same time as the Defence, requested that the Application of Messieurs Kpatcha Gnassingbe, Ougbakiti Seïdou, Essozima Gnassingbe, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema, and Efoé Sassouvi Sassou be declared foreclosed;

The Republic of Togo pleaded that the inadmissibility arises from res judicata of Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013;

IV.6- The Republic of Togo contended that the above-cited judgment was delivered by the Honourable Court on the basis of an application filed by the Applicants in August 2011; that Article 19(2) of Protocol A/P.1/07/91 on the ECOWAS Court of Justice provides that judgment of the Court are final and immediately enforceable;

that the Rules of the Court has sanctioned review procedures such as applications to set aside default judgments, third-party proceedings, revision and interpretation of judgments; that the said judgment of 3 July 2013 can only be challenged therefore through the instrumentality of one of the cited review procedures; that the matter brought by the Applicants does not fall into any of those cases; that their action seeks to obtain their release and the award of damages; that the said Judgment of 3 July 2013 has already made pronouncements on those heads of claim;

IV.7- The Republic of Togo averred that the Applicants of the instant proceedings featured among those against whom Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013 was delivered; that the parties are the same; that the previous procedure dealt with the same subject-matter and the same cause of the instant one; that in line with the principle of res judicata, the same application between the same parties acting in the same capacities, on the same subject-matter, sustained by the same cause, cannot be brought afresh before a court; that the principle forbids parties from bringing the same dispute which has already been tried;

IV.8- The Republic of Togo maintained that the reliefs sought by the Applicants in the instant procedure are thus not new before the Court; that the reliefs are identical to those the Court examined in 2011, culminating in Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013;

IV.9- The Applicants did not respond to the Defendant's pleas-in-law regarding the latter's request that the Court should declare their Application foreclosed;

IV.10- An analysis of the oral pleadings and the court processes filed in the case-file reveals that in the course of 2011, certain Applicants, including the six Applicants in the instant proceedings, sued the Republic of Togo before this Honourable Court for violation of their fundamental human rights;

In connection with that case, the Court delivered Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013;

IV.11-The operative statement of the said judgment was made in the following terms:

"The Court,

Adjudicating in a public hearing, after hearing both Parties, in a matter on human rights, and in last resort;

In terms of formal presentation,

- **Declares** that the action brought by the Applicants is admissible;

In terms of merits,

1. Regarding the parliamentary immunity of Mr. Kpatcha Gnassingbe;

   - **Declares** that there is no violation, in that it is the procedure in respect of flagrant offence which was employed by the domestic court, pursuant to the constitutional provisions of the Defendant State;

As to rights violation

2. **Adjudges** that the Republic of Togo, through its officers, committed acts of torture on the Applicants and thus violated their rights to physical and moral integrity;

3. **Upholds** the stand taken by the Republic of Togo to repair the damage caused the victims of those acts of torture;

4. **Equally adjudges** that the Applicants' right to fair trial was violated by virtue of the fact that in the course of the trial, evidence obtained under the effect of acts of torture was used in the proceedings;

5. **Adjudges** that the Applicants' right to defence was violated;

6. **Consequently**, orders the Republic of Togo to take all the necessary and urgent steps to ensure that violation of the right to fair trial ceases.

As to other rights

7. **Declares** as non-established, the allegation of arbitrary arrest and detention made by the Applicants;

8. **Declares** that the Republic of Togo did not violate the Applicants' right to freedom;

9. **Declares** that violation of the right to health as alleged by the Applicants is not proven;

10. **Declares** that the Applicants' right to be tried in reasonable time was not violated;

11. **Declares** that since the Applicants' detention was lawful, and thus not arbitrary, the Court has no grounds upon which to order that they be released from detention;

12. **Adjudges** that the Republic of Togo did not violate the Applicants' right to visit.

As to reparation of damage

13. **Orders** the Republic of Togo to pay to the Applicants, in reparation for the respective harms suffered by them, and as damages for all harms suffered:

    - The sum of Twenty Million CFA Francs (CFA F 20,000,000) to each of the victims of acts of torture as listed in the National Human Rights Commission (CNDH) report and recognised by the Republic of Togo;

- And the sum of Three Million CFA Francs (CFA F 3,000,000) to each of the remaining Applicants who had not suffered acts of torture.

14. **Asks** the Republic of Togo to bear the costs.

IV.12- The rule of res judicata violated, presupposes that the request made, as compared to a previous one, are the same, based on the same cause, made between the same parties, and brought by the same applicants against the same defendants in the same capacities as previously;

IV.13- It appears, from Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013, that the seven (7) Applicants in the instant procedure do feature among those who, during the year 2011, had sued the Republic of Togo before the Honourable Court for violation of their fundamental human rights;

The Court equally finds that the heads of claim applied for by the Applicants do appear among those already adjudicated upon by the Court and which yielded Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013;

Indeed, the Court examined the heads of claim relating to detention and reparation and made a pronouncement thereupon, by declaring, respectively in points 11 and 13, that it has no grounds upon which to order that they be released from detention, and that damages be paid to them by the Republic of Togo;

It is finally established that the facts invoked are those arising from the events of April 2009 and their aftermath;

IV.14- It follows therefore that the Court has already adjudicated on the same matter between the same parties, in the same capacities before court, regarding the very cause and subject-matter pursued in the Application dated 30 July 2014 by Messieurs Kpatcha Gnassingbe, Ougbakiti Seïdou, Essozima Gnassingbe, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema and Efoé Sassouvi Sassou;

The Court responded to the Applicants' action through Judgment N°. ECW/CCJ/JUD/06/13 of 13 July 2013;

IV.15- Besides, the Applicants never contested these facts but attempted to explain that it was the partial non-execution of the judgment which gave rise to their action; that their Application is not intended to seek a re-trial of the case;

IV.16- But it is obvious, that the questions raised by the Application are not merely related to enforcement of the judgment of 3 July 2013;

The Application filed claims which purport to challenge the said judgment; Indeed, it sought the immediate release of the Applicants;

Whereas, the judgment of 3 July 2013 clearly states in its point 11 that**: "…since the Applicants' detention was lawful, and thus not arbitrary, the Court has no grounds upon which to order that they be released from detention";**

IV.17- Whatever the case may be, it appears the status of the Parties in the instant proceedings has not changed;

The same thing applies to the subject-matter and the cause;

As things stand therefore, it shall be legitimate to make a pronouncement on what becomes of the Defendant's objection regarding the force of *res judicata*;

IV.18- Again, the Court will have to ask the following question and draw conclusions from the legal effects which derive from the answer to the question

- ***Can the Court adjudicate on a case it has already tried, having heard both parties?***

IV.19- The Court addressed such issue in a previous decision (Judgment N°. ECW/CCJ/JUD/05/15 of 23 April 2015: Case Concerning **Georges Constant Amoussou *v.* Republic of Benin**), by asking

first of all whether it has the power to try again a case it has already adjudicated upon, and it answered as follows:

That it is trite that the answer to such a question must be in the negative, aside (as far as the Community Court of Justice, ECOWAS is concerned) the specific instances of: judgments by default and applications to set them aside, third-party proceedings, and applications for revision; as provided for respectively under Articles 90, 91 and 92 of the Rules of the Court; that the action brought by the Applicant in the case cited above (Georges Constant Amoussou *v.* Republic of Benin) did not fall in line with any of the measures of review stipulated in the Rules of the Court; and that it was incontestable that their action went against the force of authority of the decided case, which bars parties from filing afresh before the Court disputes which have already been settled;

IV.20- In the instant case as well, the action brought by the Applicants do not come under any of the review procedures permitted by the Rules of the Community Court of Justice, ECOWAS namely: judgments by default and applications to set them aside, third-party proceedings, and applications for revision;

The Court shall therefore answer in the negative, to the question asked in our point IV.18 above;

It follows therefore that the Applicants in the procedure which resulted in Judgment N°. ECW/CCJ/JUD/06/13 of 3 July 2013 cannot legitimately drag the Republic of Togo before this Honourable Court for the same cause and on the same subject-matter;

IV.21- Under such conditions, the Defendant's objection to the Applicants' action on the grounds that it is foreclosed, is legally grounded and well founded;

It is therefore appropriate to admit the objection and uphold the claim made therein.

As to costs

IV.22- Article 66(2) of the Rules of the Community Court of Justice, ECOWAS provides that: *"The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings"*;

In the instant case, the action filed by the Applicants shall not be admitted; Moreover, the Republic of Togo expressly requested that the Applicants be made to pay the costs;

There is ground therefore to ask the Applicants to bear the costs.

FOR THESE REASONS

The Court,

Adjudicating in a public session, after hearing both Parties, in a matter on human rights violation, and in first and last resort;

- **Adjudges** that the application for expedited procedure has become purposeless;
- **Admits** the objection made by the Republic of Togo regarding inadmissibility of the Application on the ground of res judicata;
- **Declares** that the said objection is well founded;
- **Declares** therefore that the Applicants' action is inadmissible;
- **Orders** the Applicants to bear the costs;

Thus made, adjudged and pronounced in a public hearing, at the seat of the Court, at Abuja, on the 24th day of April 2015;

With the following Members on the Bench:

- **Hon. Justice Jérôme Traoré** - *Presiding;*
- **Hon. Justice Yaya Boiro** - *Member;*
- **Hon. Justice Hamèye Founé Mahalmadane** - *Member.*

Assisted By: **Athanase ATANNON (Esq.)** - *Registrar*.

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY THIS 23RD DAY OF APRIL, 2015

SUIT N°: ECW/CCJ/APP/07/12/ INT
JUDGMENT N°: ECW/CCJ/JUD/09/15

BETWEEN
MR. GEORGES CONSTANT AMOUSSOU - *PLAINTIFF*

AND
THE REPUBLIC OF BENIN - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE HAMEYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **ALFRED POGNON (ESQ.); YVES KOSSOU (ESQ.); DIEUDONNE MAMERT ASSOBA (ESQ.);** AND **YVES KOSSOU (ESQ.)** - *FOR THE PLAINTIFF*
2. **HIPPOLYTE YEDE (ESQ.)** - *FOR THE DEFENDANT*

Violation of human rights -Interpretation - Res judicata -Rejection.

SUMMARY OF FACTS

The Applicant, by Application dated 18 July 2014, registered in the Registry of the Court on 23 September 2014, brought an action before the Court for the purpose of interpreting the Judgment delivered on 6 March 2014 in suit N°. ECW/CCJ/APP/07/12. Reserved for decision to be delivered in Abuja on 23 April 2015, the Court declared the claim unfounded, and dismissed the Applicant's claims.

He submitted that during the various phases of the proceedings prior to the rendering of the decision to be construed, his counsel, who was constantly present at the hearings unlike that of the respondent, was not asked to comment on the continuation of the proceedings, because of the absence of a judge associated with the oral proceedings, and was not notified of the date of delivery of the judgment.

That, in view of the various changes in the composition of the Court before the decision was rendered, the Court violated the provisions of Article 29-4 (b) of the Protocol on the ECOWAS Court of Justice, and 23 and 61 of the Rules of Court failed to notify the Applicant of the date of delivery of the judgment.

The Applicant considers that it follows from the foregoing that the assessment of the facts and principles of law may have been negatively influenced, hence the need to interpret the decision of the Court in accordance with the provisions of Article 25 of the Protocol of the Community Court of Justice.

The Respondent State stated in its defence that interpretation is an operation which consists in discerning the true meaning of an obscure text and does not depart from that given by Article 23 of the Protocol relating to the Court which provides that: "In the event of difficulty

as to the meaning and scope of a decision or an advisory opinion, it is for the Court to interpret it, at the request of a Community party or institution justifying an interest in that end".

The Defendant submits that the Application for interpretation of a judgment does not mean an appeal for a reconsideration of the decision on the points alleged to be incomprehensible, and that, consequently, the points of interpretation are requested in this procedure is, rather, a review of the file, this cannot be the purpose of an Application for interpretation.

LEGAL ISSUES

1- Can the Applicant's Application for interpretation be successful even though it does not indicate any part of the operative part of the judgment to be interpreted?

2- Does the authority of res judicata attached to the Judgment of 06 March 2014 not preclude reconsideration of the case?

DECISION OF THE COURT

The Court dismissed the Applicant on the ground that:

- *The request for interpretation of a Judgment, which seeks to resolve any obscurities or equivocations affecting the meaning and scope of a judgment of the Court, must expressly address the point of the operative part to be interpreted, which the Applicant has failed to do.*

- *The authority of res judicata attached to the Judgment on the Application for interpretation precludes a re-examination of the case already decided, and the Court accordingly dismisses the Application altogether.*

JUDGMENT OF THE COURT

I- PARTIES:

I.1- **APPLICANT: Mr. AMOUSSOU Georges Constant**, former Prosecutor at the Court of Appeal of Cotonou, domiciled in carre n°312-S Sègbèya, represented by Mr. Alfred POGNON Yves KOSSOU, Dieudonné Mamert ASSOBA All Lawyers registered at the Court of Appeal in Cotonou choosing collectively to use the address of Mr. Yves KOSSOU's firm based in Gauhi, immeuble de Meideros behind Diamond Bank, 31 39 88, e-mail koss_y@yahoo.fr;

I.2- **DEFENDANT: The Republic of Benin**, Represented by the Judicial Officer Treasury having domicile of its offices in the grounds of the General Directorate of the Treasury and Public Accounting, route to the international airport Cardinal Bernardin Gantin, Having an address for the purposes of cause Abuja Embassy of Benin in Nigeria, defended by Mr. Hippolyte YEDE lawyer registered at the Court of Benin, whose office is located at: Subdivision T 'lot 2157 reu pavee du Benin, immeuble GBEDIGA , 03 BP: 338 Jericho Cotonou, tel / fax: +229 21 83; mobile: +229 90 93 55 07/97 80 55 60; fax: +229 21 38 01 38 01 84, e-mail h.yede@yahoo.fr, cabinetavocatyede@yahoo.fr ;

II. FACTS AND PROCEDURE

II.1- Mr. AMOUSSOU Georges Constant sued the Republic of Benin before this Court to come hear it rule on his application for interpretation of the judgment of 6 March 2014 in the case ECW/CCJ/APP/07/12;

II.2- His application dated 18 July 2014, was filed at the Court on 23 September 2014;

II.3- It was served to the Republic of Benin on 26/09/2014;

II.4- The Defendant filed a defence statement on 4 November 2014 filed at the Registry on 12 November 2014;

II.5- The defence by the Republic of Benin was served to the Applicant on 14/11/2014;

II.6- Mr. AMOUSSOU replied with two documents dated 21 November 2014 filed at the Registry of the Court on 8 December 2014;

II.7- The case was adopted and discussed at the External Court Session of Bissau (Guinea Bissau) of 23 March 2015. The parties were not present but wrote to request the judgment of the case based on filed documents;

II.8- The case was reserved for decision in Abuja, the seat of the Court on 23 April 2015;

III- ARGUMENTS AND CLAIMS

III.1- The Applicant stated that due to some legal situations in which he felt that his fundamental rights were violated, he came before the ECOWAS Court to rule on the multiple violations inflicted on his fundamental rights and individual freedoms, that following a first application dated 25 April 2012, he sought the sanction of all violations against his rights in the course of criminal proceedings against him, in a second application also dated 25 April 2012 he requested that the Court may wish to determine the case using the expedited procedure, at the hearing of 14 December 2012 the Court granted his application for expedited procedure;

III.2- He noted that after adjournments, a deliberation, adjournment of deliberation, an immediate quashing of deliberation, adjournments, the decision of the Court scheduled for 29 January 2014 was not made until 10 July 2014 when a correspondence for information on the fate of the procedure was sent to the court who in reply sent him the judgment of 06 March 2014;

III.3- The Applicant submitted that during all phases of the procedure, through one of his counsel in the person of Master Dieudonné Mamert ASSOGBA, he was constantly present at the hearings opposed to the Lawyer to the Republic of Benin, at each stage of the procedure except error on his part the members of the court composing the panel of the Court responsible for proceedings were not the same, that as the Court or the changing of the panel were made in violation of Article 29-4 (b) of the Protocol on the ECOWAS Court of Justice and 23 and 61 of the Rules, that at no time was his opinion sought for the continuation of the procedure on account of the absence of a judge involved in the oral stage of the proceeding, that no notice was sent to him in order to notify him of the judgment date which was obviously 29 January and not 06 March 2014, that service of judgment was made to him at his express request and several months after the presumptive date of its delivery;

III.4- He felt that under these findings certain heaviness negatively influence the assessment of the facts and legal principles relied on and justify what might be called euphemistically as Article 63 of the Rules describes so well "of clerical errors" "obvious inaccuracies" which unfortunately can no longer lead to the correction procedure in the provision and forced him to the procedure for interpretation, that he relies therefore on the provisions of Article 25 of the Protocol on the Community Court of Justice, ECOWAS;

III.5- He said the Court in paragraph 34 of its judgment indicates that there is no interference in the judiciary since "**in accordance with the legal system of the respondent State, the prosecution powers, so judicial police, remain in the hands of the executive and therefore not included in the judiciary power**" and that "**as such, the judicial commission of inquiry chaired by the prosecutor and created by him on the instructions of Minister of Justice in his capacity as the highest placed prosecuting authority does not infringe the principle**" of the

separation of powers, that as well in paragraph 36 of the judgment, the Court further stated that ***"the prosecuting authority in criminal matters is not part of the judiciary in the legal system of the respondent State"*** that the Constitution of 11 December 1990 which only gave the Republic of Benin a pluralist democracy regime seems as misunderstanding on his part to have created a presidential system of separation of powers, that the constitutional court properly seised on the matter submitted an objection to its jurisdiction implicitly indicating that it is the duty of the Indictment division to pronounce on it, as part of the procedure produced, none of the entries generated even by the Republic of Benin stated that it never established a broken Judicial power belonging in part to the Executive and the other to the Judiciary;

III.6- The Applicant wrote that it is in view of these considerations that it is respectfully asking the Honourable Court to kindly clarify to him the source of this dichotomy of a shared judiciary partly for Executive and partly for the Judiciary;

III.7- Also he is seeking answers to the following questions from the Court:

- Does it arise from the application or interpretation of the Constitution of Benin?
- Or from Community texts?
- Or any other general provisions that the parties to the proceedings in their ignorance have not discussed during the proceedings?
- Or is it simply a manifest error by the Honourable Court as a result of understandable confusion or erroneous assessment which occurred in handling multiple basic texts of fifteen (15) Member States that led to the meaning of Article 63 of the Rules "obvious inaccuracies"?

III.8- The Applicant, relying on the premise observed in paragraphs 34 and 36 of the judgment, continued by stating that the Court held that as soon as the case or the meaning of article 517 *"public action used against the Applicant must necessarily begin with the prosecutor that transmits the case file to the prosecutor General"* and that *"the prosecuting authority in criminal matters is not part of the judiciary power in the legal order of the respondent State"*, that, does the Community Court intend making him understand that the memo N°. 3529-PRC/2010 constitutes notification of detention, service of fact, subject of this detention and is in full compliance with the public policy requirements of Article 52 of the old Code of Criminal Procedure and 63 of the new Code, does the Court mean that it checked as well the provisions of former Article 52 and new 63 on its interrogation report that substantial indications were brought therein, that finally the Honourable Court could condescend to enlighten these circumstances provided that the Prosecutor's memo to the Republic and the inquiry report neither seems to guide it in the right understanding of the decision of the Court;

III.9- Mr. AMOUSSOU also challenged the Court on the guarantees offered by the specific procedures;

He hoped that the Court would want to make clear to him which of the guarantees usually recognized in the specific procedures emerges from the provisions of Articles 547, 548 and 549 of the former Code of Criminal Procedure;

He wonders if the various points of the Court in its judgment tend to mean that the trial conducted in accordance with the requirements of Article 548 paragraph 1 of the former Code of Criminal Procedure is required to meet the requirement of formal presentation and on the merit provided in the chapter of the Code: Rules/investigative actions and to which the trial judge is subjected to, that the judge cannot accomplish any act or make use of a prerogative which is expressly provided for by the code of criminal

procedure, the investigative actions performed are subject to the possibility of natural and mandatory remedies exercised before the Indictment Division and likely to cause their annulment, that the referral judgment of the Judicial Chamber has the same legal value as an order of a trial judge, and therefore is subject to appeal before the Indictment Division;

III.10- Finally, he emphasized that the Court, in paragraphs 54, 55, 56 and 57 of its judgment, held that the Applicant himself indicates that the sealing of the doors and windows of his house subject title property No. 8403 of the land act of Cotonou would be a conservatory measure, therefore concludes that it does not constitute a violation of his property rights, that also the Community Court may wish to specify whether it should be understood from its Judgement that the dispossession of the enjoyment of his property ownership issued by a trial judge having no authority for this purpose and making use of a commission rogatory whose mission is to prescribe regular surveys is lawful and consistent with the requirements of international instruments;

III.11- The Republic of Benin stated in its defence that, in legal parlance, the application for interpretation is *"the step to discern the true meaning of an obscure text"*, that this definition is not far from that given in Article 23 of the Protocol on the Court which provides that: *"If the meaning or scope of a decision or advisory opinion is in doubt, the Court shall construe it on application by any party or any Institution of the Community establishing an interest therein"*, that the application for interpretation of a judgment does not include an action in order to a revision of the decision on the items alleged to be incomprehensible;

III.12- He explained, concerning the parties subject to interpretation, that the Applicant has misinterpreted Articles 125 and 126 of the Constitution of 11 December 1990 in getting annoyed that the prosecuting authority in criminal matters is not part of the judiciary of the respondent State, the public Prosecutor are not judges, as

their role is to exercise public action, that the creation of the commission on the orders of the Minister of Justice cannot be interpreted as interference by the executive in the judiciary, that the Applicant rather seeks revision of the memorandum number 3529- PRC/2010, document which he filed himself, that this is not the objective of an application for interpretation and not the competence of this Court, the Court has already stated in its judgment of 6 March 2014 that *"the Applicant's arrest was not arbitrary"* and that *"his detention has a legal ground and was not arbitrary"* and this cannot be ambiguous or incomprehensible by the Applicant, that this application for interpretation must be dismissed;

III.13- The Defendant noted that the role of the Court is not to compare the provisions of both codes which are not of the same period, that at no time the guarantees offered by the specific procedures were violated and that the Applicant's case was heard by the Supreme Court pursuant to the provisions on the subject;

III.14- The Republic of Benin argued that the Applicant claims not to understand the reasoning of the Court who ordered the conservatory measure taken against him and which resulted in the sealing of his legal home, that he made no request for interpretation on this point, that besides the authority of *res judicata* is attached to the judgment of 6 March 2014;

III.15- He stated that the points where interpretation is sought in these proceedings are not difficult to understand because they suffer no ambiguity, that this appeal differs from an application for interpretation, it is rather a revision of the case, that this cannot be the target of an application for interpretation;

III.16- In support of his allegations, he denied any application of the text relied on by the Applicant before supporting his argument by Articles 95 of the Rules of this Court, 19 and 23 of the Protocol on the Court.

III.17- He requested the Court to:

- **Declare**, pursuant to the application for interpretation of the judgment of 6 March 2014, that no interpretation is sought;

- **Declare** that the Applicant's intention is to see the Court retry the case with a reconsideration of unfounded complaints he had raised during the original proceedings;

Consequently :

- **Declare** that the application for interpretation of a judgment does not include a request for revision of an already tried case in a final manner;

- **Confirm** the authority of res judicata attaching to the judgment of 6 March 2014 made between the parties by this Court;

- **Dismiss** outright on the whole the interpretations sought in the application for interpretation of the judgment of 6 March 2014 made by the Applicant;

- **Order** the Applicant to pay the entire costs of the main case as well those of the present.

IV- MOTIVATION

IV.1- Mr. AMOUSSOU Georges Constant sued the Republic of Benin before this Court of Justice to hear it proceed to the interpretation of the judgment of 6 March 2014 in case N°. ECW/CCJ/APP/07/12 on the points relating to the questions of:

- The creation of the Independent Judicial Commission of Inquiry and the violation of the principle of separation of powers;

- The detention and regularity of his arrest;

- Extensive guarantees offered by the specific procedures;

- violation of his rights to property.

IV.2- The Defendant responded by asking the Court to find:

- Pursuant to the of the application no interpretation was sought;

- That the Applicant's intention is to see the Court retry the case with a reconsideration of unfounded complaints he had raised during the original proceedings;

and accordingly sought:

- **Adjudge** that the application for interpretation of a judgment does not include a request for reconsideration of a case already tried and that has acquired the authority of res judicata

- **Confirm** the authority of res judicata attaching to the judgment of 6 March 2014 delivered by this Court between the parties;

- **Dismiss** outright the interpretations sought on the whole;

- **Order** the Applicant to pay the entire costs of the main case as well those of the present.

IV.3- New Article 25 of the Protocol (A/P.1/7/91) on the Community Court of Justice as resulting from the wording of Protocol (A/SP.1/01/05) of 19 January 2005 provides that *"in case of trouble on the meaning and scope of a decision or advisory opinion, it is for the Court to interpret it at the request of a party or an institution of the Community establishing an interest therein"*;

IV.4- It appears from the submissions of the Applicant, that at first he had no intention of seeking for the interpretation of the judgment;

Indeed, he first reported on complaints against the conduct of the proceedings leading to the judgment which he claims to seek the interpretation and eventually recognize what he believes to be "clerical errors" or "obvious inaccuracies" can no longer lead to the appropriate procedure namely for correction under the provisions of Article 63 of the Rules;

IV.5- Thus, it is in order to avoid foreclosure enacted by Article 63 of the Rules of the Community Court of Justice - ECOWAS that the Applicant thought he should initiate proceedings for interpretation;

Indeed Article 63 of the Rules confines the exercise of the action for rectification within one month from the date of delivery of the judgment;

In this case, the judgment was delivered on 6 March 2014 and it appears that the Applicant was no longer on time in initiating a rectification procedure at the time of filing his application at the Registry which is on 23 September 2014;

IV.6- Also, did Mr. AMOUSSOU think it wise to go through the interpretation channel to re-debate the developments of the Court?

IV.7- The points that Mr. AMOUSSOU wanted to hear interpreted are all related to the motivation of the Court;

Indeed, the Applicant explained that he was unable to understand the real meaning of development of the Court in the judgment of 6 March 2014 in the parts relating to the creation of the Independent Judicial Commission of Inquiry and the violation of the principle of separation of powers, to the detention and regularity of his arrest, the guarantees offered by the specific procedures and violation of his right to property;

IV.8- Yet, the motivations of the Court cannot be clearer or more precise;

Mr. AMOUSSOU was certainly not convinced by them, but they cannot take on other meaning than those indicated in the judgment;

In any case, the Court is not required to have the same assessment of the facts that Mr. AMOUSSOU, especially it is not obliged to have the same understanding as the Applicant in the points mentioned;

IV.9- All points perceived as incomprehensible by the Applicant do not seem so much they were detailed in a simple and accessible legal language;

IV.10- Moreover, it is a general principle of law that an application for the interpretation of a judgment shall relate mainly that part of the judgment;

This seems to be the position of the Court of Justice of the European Union ECJ in its decision, **ord, 20 April, 2010 aff.c.114 / 08 P (R) int**, **Pellegrini c/ commission**. E**urope 2010, pers. 198, obs. A BOUVERESSE**, when it held that an application for interpretation of a judgment must aim to reduce any obscurities or ambiguities affecting the meaning and scope of a judgment of the Court to the claim that it has to decide; such application must specifically target the point of the judgment to be interpreted and its essential reasons (Site, Lexis Nexis - Juris Classeur);

IV.11- In the present case, the Applicant has not indicated any part of the Judgment to be interpreted;

Mr. AMOUSSOU's approach tends to lead the Court to reconsider the motivations of the judgment of 6 March 2014, to adopt his and thus to challenge the decision;

But this cannot be the purpose of an application for interpretation;

IV.12- In the light of the foregoing, it appears that the action of Mr. Georges Constant AMOUSSOU cannot prosper;

IV.13- Consequently, it should be said there is no need to interpret the provisions of the judgment of 6 March 2014 and therefore dismiss the Applicant of his claims;

- As to the Cost,

IV.14- Article 66.2 of the Rules of the Community Court of Justice, ECOWAS states that:

> "The unsuccessful party shall be ordered to pay the costs if it has been concluded as such";

In the present case, the Applicant's action will not prosper;

In addition, the Republic of Benin has specifically requested the order for costs;

Therefore, it is in order to **order** the Applicant to bear the cost.

FOR THESE REASONS

Adjudication in open Court and after hearing both parties on human rights violation and in first and last resort;

As to the Form:

- **Admit** Mr. Amoussou's Application;

As to the merit;

- **Declare** it as unfounded;
- **Dismisses** the Applicant of his claims;
- **Order** the Applicant to bear the entire costs;

THUS DONE, ADJUDGED AND DELIVERED IN PUBLIC HEARING, AT THE SEAT OF COURT IN ABUJA, THIS DAY 23RD APRIL, 2016.

SIGNED :

- Hon. Justice Jérôme TRAORE - *Presiding;*

- Hon. Justice Hamèye Founé MAHALMADANE - *Member;*

- Hon. Justice Alioune SALL - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY 23RD DAY OF APRIL, 2015

SUIT NO: ECW/CCJ/APP/32/14
JUDGMENT NO: ECW/CCJ/JUD/10/15

BETWEEN
MR. GEORGES CONSTANT AMOUSSOU - *PLAINTIFF*

AND
THE REPUBLIC OF BENIN - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUDGE JEROME TRAORE** - *PRESIDING*
2. **HON. JUDGE F. HAMÈYE MAHALMADANE** - *MEMBER*
3. **HON. JUDGE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **MASTER ALFRED POGNON, YVES KOSSOU, DIEUDONNÉ MAMERT ASSOBA,** - *FOR THE PLAINTIFF.*
2. **HIPPOLYTE YEDE (ESQ.)** - *FOR THE DEFENDANT.*

- Failure to act - Inadmissibility

SUMMARY OF FACTS

By Application dated 18 July 2014, Mr Georges Constant Amoussou seised the ECOWAS Court of Justice to rule on facts of request omitted in the judgment of 6 March 2014 delivered in the case N°. ECW/CCJ/APP/07/12.

The Applicant asked the Court for replies to the requests contained in his first referral ECW/CCJ/APP/97/12 which resulted in the judgment of 6 March 2014. This is the request for the sanctioning of all violations of his rights in the course of the criminal proceedings against him and that relating to the expedited procedure.

In the Judgment of 6 March 2014, the Applicant noted that it is easy to find that neither in the summary of his requests, nor in the summary of the facts, nor in the summary of the legal grounds invoked, nor in his claims, the Court did not refer to violations of his rights in the course of the criminal proceedings against him.

In its brief dated 12 November 2014, the Republic of Benin asked the Court to declare the application for omission by Georges Constant Amoussou inadmissible on the grounds that the appeal is no longer within the legal period of one month from of the service provided for in Section 32.3 of the Rules.

LEGAL ISSUE

- *Is the Application by Georges Constant Amoussou admissible?*

DECISION OF THE COURT

The Court observed that Mr. Amoussou's Application is supposed to have been drafted, that is to say on 18 July 2014 (which supposes that the notification was made to him) to that of its registration at the Registry of the Court, which is on 23 September 2014, therefore,

more than two months had elapsed, thus exceeding the time limit set by Article 64 of the Rules for the exercise of appeal.

The Court received the plea of inadmissibility raised by the Republic of Benin against the action of Mr. Amoussou and declares it well founded.

The Court declared the action by Mr. Amoussou inadmissible.

JUDGMENT OF THE COURT

I- PARTIES

I.1- **APPLICANT: Monsieur AMOUSSOU Georges Constant**, former Prosecutor at the Court of Appeal of Cotonou, domiciled at carre No. 312-S Sègbèya, represented by Master Alfred POGNON, Yves KOSSOU, Dieudonné Mamert ASSOBA, all lawyers at the Court of Appeal of Cotonou with an address collectively at Master Yves KOSSOU firm located at Gauhi, Immeuble Meideros behind Diamond Bank, 06 BP 1416 Cotonou, tel: (229) 21 3124 18, Fax: 21 31 39 88, e-mail koss_y@yahoo.fr;

I.2- **DEFENDANT: The Republic of Benin**, legally represented by the Judicial Treasury Agent domiciled Treasury Benin, route de l'aeroport, Cotonou, with an address for the purposes of the case in Abuja Embassy of Benin in Nigeria, located at Plot No. 2579 (near Algon Guest House) Yedserram Street, Maitama, Abuja, defended by Mr. Hippolyte YEDE, whose firm is located at: Parcelle du T'lot 2157, rue pavee du Benin marche, immeuble GBEDIGA, 03 BP: 338 Jericho Cotonou, tel / fax: +229 21 38 01 83; mobile: +229 90 93 55 07/97 80 55 60; fax: +229 21 38 01 84, e-mail h.yede@yahoo.fr, cabinetavocatyede@yahoo.fr;

II- FACTS AND PROCEDURE

II.1- AMOUSSOU Mr. Georges Constant sued the Republic of Benin before this Court to hear the ruling on the main claims omitted in the judgment of 6 March 2014 made in the suit ECW/CCJ/APP/07/12;

II. 2- The Applicant came before the Court by application dated 18 July 2014 but filed at the Registry on 23 September 2014;

II.3- The originating application was served on the Defendant on 26 September 2014;

II.4- The Republic of Benin filed a statement of defence and a statement on the merit all on 31 October 2014, filed at the Registry on 12 November 2014;

II.5- The Applicant responded with two statements, both dated 21 November 2014 filed in the Registry on 8 December 2014;

II.6- The suit was adopted and discussed at the external court session in Bissau (Guinea Bissau) of 23 March 2015. The parties were not present but wrote to request the judgment of the case based on written briefs;

II.7- The case was reserved for decision in Abuja, the seat of the Court on 23 April 2015;

III- ARGUMENTS AND CLAIMS

III.1- The Applicant claimed that on 25 April 2012, he came before this Court of Justice with two Applications against the Republic of Benin, the first is to decide on the sanctioning of all violations of his rights in the course of criminal proceedings against him and the second to seek from the Court the use of expedited procedure, that is this procedure that was used for number ECW/CCJ/APP/97/12 which resulted in the judgment of 6 March 2014;

III. 2- He maintained that the service of the judgment was only made to him at his express request and this was several months after the presumptive date of its delivery, that some sluggishness had negatively influenced the consideration of facts and principles of law relied upon and justifies what might be called euphemistically as well described by Article 63 of the Rules as "clerical mistakes", "obvious slips" which unfortunately cannot give more to correction and constraints to resort the omission to give rule procedure, that the present proceedings therefore has the task to implore reparations of omissions to give ruling committed during the delivery of the judgment dated 6 March 2014 specifically on:

- Arguments concerning the violation of his rights subject statement of conclusions dated 26 September 2013,

- The abbreviate application of the procedural delay introduced separately from the main application,

- The inadmissibility of the conclusion by the Republic of Benin dated 20, 21 and 22 November 2012;

III.3- To start with, he explained that on the issue of the lawfulness of his committal order dated 17 July 2010 and secondly that of the non observance of the rules of public order prior to any admission to a prison, were asked directly for the first time at the Court in the

conclusions of 26 September 2013, that it is easy to note that neither in the summary of his claims, nor in the summary of facts nor in the summary of pleas in law raised in support of his claims, nor in his claims, did the Court find and discussed the absolute authentic documents establishing breaches in the committal order of 17 July 2010 and breaches in the mandatory observance of prior and essential formality of public order of registration of the title of detention in prison register, that at no time nor at any level of the judgment the Court was there a ruling on the public policy raised by the conclusions of 26 September 2013, that the procedure which led to the judgment subject of the omission to give ruling also manifestly failed to rule on the separate motion seeking that the judgment of the case be submitted to the expedited procedure, that it is necessary to emphasize that conclusions statements were exchanged by the Republic of Benin and himself, that the Court delivered its decision to that effect at the seat following the waiver expressly formulated by the Counsel to the Republic of Benin to answer to his reply, the Court has to correct either by notifying him of the judgment delivered on 30 October 2012 on the expedited procedure, or by ruling if secondarily that was not the case, that before the hearing on 30 October 2012 in which the Republic of Benin pleaded before the Court on the motion for expedited procedure by two letters from its lawyer Maître YEDE invited the Court to rule on documents stating unequivocally his intention not to be present for this argument, nor reply to rejoinder on the matter or on any other question of law, that as a result, the Republic of Benin decided to rescind its decision and submit the replies which it expressly abandoned, that he then presented three conclusions dated 20, 21 and 22 November 2012, that Mr. ASSOGBA one of the counsel to the Republic of Benin specifically raised the inadmissibility of such conclusions and sought a ruling from the Court, that the latter joined the incident on the merit, the Court's response is crucial, that as such there is the need that the Court rule on this plea which it has failed to respond to in its judgment of 06 March 2014;

III.4- In support of his claims, he relied on the Protocol on the Community Court of Justice, in Article 29-4 (b) and the Rules of Court, in Articles 23 and 61;

III.5- He requested this Court to:

- **Declare** the present application admissible;

- **Award** him the full benefit of its conclusions of 17 December 2012 requesting the inadmissibility of the conclusions by the Republic of Benin dated 20, 21 and 22 November 2012;

- **Award** him the full benefit of its conclusions of 26 September 2013;

- To **adjudge** and **declare**, in relation to the motion for expedited procedure dated 25 April 2012: If secondarily it was not considered, it is substantive and to grant it in the light of the conclusions of parties,

Or if such is already the case so that it supports it, to kindly notify the parties;

To take into consideration while ruling for legal purpose in respect of these proceedings;

- To **find** the arbitrary nature of his detention in the light of the content of the minutes of findings with bailiff summons dated 16 and 23 September 2013, to note that he requested the benefit of Article 9.5 of the International Covenant on civil and Political rights and on this grounds, requested that the Court award him financial compensation which it may wish to fix supremely the quantum for each day of arbitrary detention undergone since 12 July 2010 until the day of his actual release;

- **Order** the Republic of Benin to pay him full reparation;

- Also **Order** the Republic of Benin to bear the entire costs.

III.6- In response, the Republic of Benin filed in the Registry of the Court on 12 November 2014 a "statement of" and "substantive statement" both dated 31 October 2014;

III.7- The Republic of Benin claimed in the defence, that pursuant to Article 64 of the Rules of Court **"Where the Court omits to give a decision on a specific head of claim or on costs, any party may within a month after service of the judgment apply to the Court to supplement its judgment…"** that the application of Mr. AMOUSSOU is dated 18 July 2014 eight (08) days after his follow-up letter to the Court and its receipt at the Registry is 23 September 2014 which is two (02) months later, that the application dated 18 July suggests that the Applicant obtained service of judgment under appeal before that

date if not he would have noticed that there is a omission to rule in the judgment, between 18 July 2014 date of application and 23 September 2014 date of receipt at the Registry it would be more than two (02) months in that this action no longer fits within the statutory period of one month from the date of service provided for in Article 32.3 of the Rules, having filed outside the deadline, the appeal of Mr. Georges C. AMOUSSOU should be declared inadmissible;

III.7- In his "substantive statement" the Republic of Benin argued that the Applicant refers to its conclusions dated 26 September 2013 and filed late in violation of the procedural rules of this Court and without justifying reasons for this delay, that in his conclusions that he has raised the inadmissibility of these new findings of the Applicant, that the inadmissibility was already demonstrated in the most simple details, that otherwise he sought the rejection of the whole pleas developed in the conclusions of 26 September 2013, that in relation to the opening of the expedited procedure he took and addressed to the Court two (02) different observations, that the observations concerns the undated application and that concerning counter reply, that the Applicant challenged the Court for not having ruled on his conclusions of 17 December 2012 in which he first raised the inadmissibility of the conclusions of the Republic of Benin dated 20, 21 and 22 November 2012 and secondly a reconciliation of date, that he showed to the Applicant that no legal consequences can be drawn from the conclusions dated 17 December 2012 which he relies on unnecessarily, that it could be liable to undermine the authority of res judicata attached to the judgment of 6 March 2014;

III.8- The Defendant requested this Court to:

- **Declare** all new claims or exhibits relied on or filed in this case by the Applicant as inadmissible;

- **Award** him the benefit of the terms of his conclusions mentioned below:

    1. Reply conclusions dated 28 October 2013 filed at the Court on 4 November 2013;

    2. Comments on the undated application for expedited procedure of 24 July 2012;

    3. Observations on the reply against undated motion for expedited procedure on 22 November 2012;

4. Reply comments on the last conclusions of inadmissibility by the Republic of Benin and merging of hearing date of 30 January 2013 filed at the Court on 11 February 2013;

- **Confirm** the authority of res judicata attached to judgment of 6 March 2014 delivered by this Court;

- **Declare** that the original application was submitted outside the time prescribed by Article 64 of the Rules of Court;

- **Declare** unfounded the appeal for omission to give ruling;

- **Order** the Applicant to pay the entire costs;

IV- MOTIVATION

IV.1- By application dated 18 July 2014 Mr. Georges Constant AMOUSSOU came before the Community Court of Justice, ECOWAS to rule on omissions on the head of claim in the Judgment of 6 March 2014 made in the proceedings No. ECW/CCJ/APP/07/12 initiated against the Republic of Benin;

IV.2- The Republic of Benin, in its "statement of defence" dated 31 October 2014 filed simultaneously with the substantive brief at the Registry of the Court namely 12 November 2014, rejected the application by Mr. Georges Constant AMOUSSOU;

IV.3- He explained that an appeal on omission must be filed within one month of service of the judgment of which rectification is sought, that Mr. AMOUSSOU Georges Constant has not demonstrated that he came before the Court with his application within the above prescribed time, that therefore the judgment criticized by the Applicant for not having ruled on some heads of claim has acquired the authority of res judicata;

IV.4- He relied on Articles 32.3 and 64 of the Rules of this Court and concluded on the inadmissibility of the action by Mr. AMOUSSOU;

IV.5- It results from these discussions that in 2012 the Applicant applied to this Court with two applications against the Republic of Benin, for, first, to decide on the punishment for violations made on his rights in the course of criminal proceedings against him and the second to seek the court to consider his case in an expedited procedure, that this procedure registered as number ECW/CCJ/APP/97/12 has resulted in a decision dated 6 March 2014;

IV.6- The examination of exhibits filed appears that neither the judgment of 6 March 2014, nor the act of service of this judgment were filed; But the Applicant himself argued in his pleadings that the service of the judgment was made in reply to his express request for information made 10 July 2014 and that is several months after the presumptive date of its delivery;

IV.7- Article 64.1 of the Rules of the Community Court of Justice confines the action to redress an omission to give ruling on whether a single head of claim or on costs, within a months of service of the judgment being attacked;

IV.8- The Applicant argued not to have been actually informed of the existence of the judgment dated 6 March 2014 until 10 July 2014 when he submitted to the Court a correspondence on the fate of the procedure, that after having exercised his action by his request dated 18 July 2014, eight (08) days after his correspondence, he felt to be on time;

IV.9- Article 32.3 of the Rules provides: *"All pleadings shall bear a date. In the reckoning of time limits for taking steps in proceedings, only the date of lodgement at the Registry shall be taken into account"*.

IV.10- It then appears that for this case, the counting of the period for exercising the appeal had to start from the service of the judgment and to end on the date of registration of the appeal by the Registry;

IV.11- If the date of registration of Mr. AMOUSSOU's appeal by the Registry is not subject to any challenge, that of the service of the judgment remains unknown;

IV.12- But, obviously, for a Judgment delivered on 6 March 2014, challenged by a motion dated 18 July 2014 but was only received in the Registry of the Court on 23 September 2014, the deadline set by the provisions of Article 64 of the Rules has expired for long;

IV.13- In fact, the date on which the application of Mr. AMOUSSOU is supposed to have been written which is to say, 18 July 2014 (which supposes that service was made to him) to that of its registration at the Registry of this Court *i.e.* 23 September 2014, it took more than two (02) months that is more than the time limit allotted by Article 64 of the Rules for successful applications; It follows therefore that the debate surrounding the date of notification no longer serves any purpose;

IV.14- Moreover, it is for Mr. AMOUSSOU to prove in compliance with the law that his appeal is admissible to act within the time prescribed by the Rule;

He was unable and did not justify the benefit of the extension of time provided for in Article 64.2 of the Rule;

IV.15- In light of these developments, it appears that the appeal by Mr. AMOUSSOU is out of time;

It follows therefore that the Applicant is time-barred; it is appropriate in these circumstances to declare his application inadmissible;

- As to the Costs

IV.22- Article 66.2 of the Community Court of Justice, ECOWAS states that *"The unsuccessful party shall be ordered to pay the costs*

if they have been applied for in the successful party's pleadings".

In this case, the Applicant's action will not prosper;

In addition, the Republic of Benin has expressly requested the order for costs;

Therefore, it is applicable to order the Applicant to bear the cost;

FOR THESE REASONS

The Court adjudicating in open Court and after hearing both parties pursuant to general principles of law, in first and last resort;

- **Receives** the motion of inadmissibility raised by the Republic of Benin against Mr. AMOUSSOU's case;
- **Declare** it well founded;
- **Declare** that Mr. AMOUSSOU inadmissible in his action; Order the Applicant to bear the cost;

THUS DONE, ADJUDGED AND DELIVERED IN PUBLIC HEARING, AT THE SEAT OF THE COURT ABUJA, THIS DAY 23 APRIL 2015;

SIGNED:

- Hon. Justice Jerome TRAORE - *Presiding;*

- Hon. Justice Hamèye Founé MAHALMADANE - *Member;*

- Hon. Justice Alioune SALL - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA ON

THE 4th DAY OF MAY 2015

SUIT N°: ECW/CCJ/APP/20/13
JUDGMENT N°: ECW/CCJ/JUD/11/15

BETWEEN
MOHAMMED EL TAYYIB BAH - *PLAINTIFF*

AND
REPUBLIC OF SIERRA LEONE - *DEFENDANT*

COMPOSITION OF THE COURT:

1- **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2- **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3- **HON. JUSTICE HAMEYE F. MAHALMADANE** -*MEMBER*

ASSISTED BY:
ABOUBACAR DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1- **RAY ONYEGU & SOLA EGBEYINKA** - *FOR THE PLAINTIFF*
2- **DEFENDANT** - *ABSENT AND UNREPRESENTED*

- Human Right violation - Right to Fair Hearing
- Evidence - State Responsibility
(Reparation for violation of international obligations)

SUMMARY OF FACTS

The Plaintiff was enlisted in the Defendant's Police Force sometime in 1984 and subsequently promoted to an Acting Superintendent of Police. During the course of his duty, he was accused of insubordination. He was also accused of having a link with the RUF, a rebel group who was at that time fighting the legitimate government of the Defendant. The Plaintiff was dismissed from the Defendant's Police Force without being heard.

The Plaintiff appealed to the police authorities to review the dismissal. The authorities found that the dismissal was done in blatant violation of his human rights as he was not afforded the opportunity to defend himself. Despite the findings of the Police authorities the Defendant refused to reinstate the Plaintiff or pay him his entitlements.

The Plaintiff further petitioned the ombudsman, who wrote to the Ministry of Internal Affairs of the Defendant for comments and necessary action. The Ministry considered the Plaintiff's dismissal and decided that there was no justifiable ground to reverse the decision dismissing the Plaintiff from the Police Force.

The Defendant failed to respond to the allegations made by the Plaintiff/Applicant. Whereupon, the Plaintiff brought an application for judgment in default of defence.

LEGAL ISSUE

- *Whether the failure of the Defendant to afford the Plaintiff an opportunity to defend himself either personally or by legal representation before dismissing him has not violated the*

Plaintiff's human right to fair hearing guaranteed by Article 7 of the African Charter on Human and People's Rights?

DECISION OF THE COURT

The Court held:

- *That the Defendant/Respondent being a state party to the African Charter on Human and People's Rights, is obliged to guarantee the actual implementation of the stipulated rights under the Charter, more particularly the right of the Plaintiff/Applicant to have his cause heard and to prevent all acts and practices which are* ***inimical*** *to those obligations.*

- *That the dismissal of the Plaintiff/Applicant was a premeditated decision by the agents of the Defendant devoid of any procedure or hearing.*

- *That, the evidence adduced by the Plaintiff/Applicant is sufficient, compelling and convincing to suggest the truth of the alleged violations of the Plaintiff/Applicant's right to fair hearing by the Defendant/Respondent.*

- *That the Plaintiff/Applicant has established his claims and that there were sufficient grounds for granting the reliefs sought.*

JUDGMENT OF THE COURT

1- SUBJECT-MATTER OF THE PROCEEDINGS:

The subject-matter of the suit pertains to the unlawful and unfair dismissal of the Plaintiff/Applicant from the Police Force of the Defendant/ Respondent, on trumped up charges, and without a hearing thereby violating the Plaintiff/Applicant right to fair hearing guaranteed by Art. 7 of the African Charter on Human and People's Rights.

2- SUMMARY OF FACTS AND PROCEDURE:

By an Application lodged before the Court on the 14th of October, 2013, the Plaintiff/Applicant (hereinafter called the Applicant) a citizen and a former Superintendent of Police of the State of Defendant (Republic of Sierra Leone) alleged that he was unlawfully and unfairly dismissed from the defendant's Police Force without being afforded a hearing in contravention of the Art 7 of the African Charter on Human and People's Rights.

The Applicant was enlisted in the Sierra Leone Police Force as a Cadet Assistant Superintendent of Police in 1984 and based on his meritorious service to the Force, he was commissioned as an Acting Superintendent of Police (Asp in 1992).

In the course of the performance of his duties and in exercise of his freedom of expression, he had a discussion (apparently a bobby trap) with the then Inspector General of Police, Mr. Waiter Nicol who on the basis of the Applicant's statements turned around and accused him (the Applicant) of insubordination. He was also accused of having a link with the Revolutionary United Front (RUF) Rebels who were then engaged in war with the legitimate government of Sierra Leone.

On the basis of these allegations and without being afforded the opportunity to answer to them, the Applicant who had served Defendant's Police Force diligently for 10 years was dismissed from service.

By a letter dated the 15th of March, 2008 the Applicant appealed to the relevant authority for review of his dismissal. The Police authorities found that the dismissal of the Applicant was in blatant violation of his human rights as he was not afforded the opportunity to defend himself *(see Annexure A)*.

Notwithstanding the findings in Annexure A the Defendant refused to reinstate the Applicant and/or pay him his entitlements. By a letter dated 5th December, 2012 the Applicant, through his Counsel Tanner Legal Advisory petitioned, the ombudsman (Annexure B), who upon investigation wrote to the Ministry of Internal Affairs of the Defendant for comments and necessary action *(Annexure C)*.

In reply via a letter dated 23rd June 2013, the Ministry of Internal Affairs of the Police Council considered the Applicant's dismissal and *"decided that there was no justifiable ground to reverse the decision dismissing Mohammed El Tayyib Bah (the Applicant) from the Police Force" (Annexure D)*.

It was also alleged that following the dismissal, the Applicant was ejected from his apartment in the Police quarters. He could not take care of his family which resulted in desertion by the wife (Mrs. Ramatu Bah) and the death for his mother as a result of lack of medical attention.

The Applicant could not secure an alternative employment, on account of his previous record of dismissal from service.

The Applicant also alleged that he lost the parliamentary election contested by him in November, 2012 on account of the said dismissal, as his opponents informed the electorate that a dismissed Police Officer is unfit to rule.

As a result of these acts of the Defendant, the Applicant has been subjected to psychological trauma since 1994 (the date of dismissal).

Neither the Police authorities nor the Police council who reviewed his case gave him opportunity to make a representation when it considered his dismissal from the Force.

The Applicant in consequence of the misfeasance of the Defendant sought from this Court the following reliefs:

(i) A **declaration** that the dismissal of the Plaintiff from the Police Service of the Defendant in 1994 and further confirmed by a letter dated 3rd June 2013 is illegal, null and void as it violates the Plaintiff's right to fair hearing guaranteed by Article 7 of the African Charter on Human and People's Rights.

(ii) An **order** mandating the Defendant to reinstate the Plaintiff and pay him his outstanding salaries, benefits and entitlements.

(iii) An **order** awarding the sum of $25,000,000 (Twenty-Five Million Dollars) as general damages for embarrassment, mental and psychological trauma and death of this mother.

It must be stated at this juncture that the Defendant did not file documents in answer to the Applicants claim nor signified intention to defend this suit despite the service of the pleadings on her.

3- ARGUMENT OF THE PARTIES

As stated earlier, the Plaintiff brought this action against the Defendant for the violation of his right to fair hearing as enshrined in Article 7 of the African Charter on Human & People's Rights by dismissing him from the Force without giving him the opportunity to answer to the charges upon which his dismissal was predicated.

He therefore sought three reliefs outlined in the statement of facts (see above).

The Defendant did not respond to any of the allegations against her contained in the Applicant's application.

Pursuant to his action, the Applicant formulated one issue for determination, namely:

Whether the failure of the Defendant to afford the Plaintiff an opportunity to defend himself either personally or by legal representation before

dismissing him has not violated the Plaintiff's human right to fair hearing guaranteed by Article 7 of the African Charter of Human and People's Rights.

In his argument, Counsel to the Applicant submitted that by Art 7 (I) of the African Charter on Human and People's Rights, every individual shall have the right to have his cause heard. He further stated that this Court has in a long line of cases upheld the right to fair hearing as a fundamental principle of Law (*See* **Ugokwe *v.* Okeke (2008)** I CCJ L.R (P7 1) 149 especially at 164.

He also referred the Court to its decision in **Manneh *v.* Republic of Gambia (2009)** and submitted that the dismissal of the Applicant by the Defendant without affording him the opportunity of being heard is illegal, null and void, having been taken in violation of Article 7 of the African Charter on Human and People's Rights.

He further contended that the Applicant is a Community citizen and that where an act of a member state violates his right, he is entitled to be heard by this Court.

Furthermore, that where an act amounts to the violation of the rights of the Applicant, the Court is empowered to make a consequential order.

He concluded by urging the Court to grant the reliefs sought by the Applicant.

Following the close of pleadings, the Defendant did not take any action in defence of the claim against her by the Applicant.

Pursuant to Article 91 of the Rules of this Court, the Applicant brought a motion on notice seeking for an order of the Honourable Court entering default judgment against the Defendant.

The application was supported by a six paragraphs affidavit as well as an eleven paragraphs affidavit of urgency enlisting facts why the motion should be granted. There was no counter affidavit in contradiction of the depositions.

Accordingly, by law, any uncontroverted evidence is presumed to have been established and the Court so holds. The motion on notice of the Applicant seeking the Court to enter default judgment in his favour is hereby granted as prayed.

However, the granting of the application for default judgment against the Defendant does not automatically mean entering judgment on the substantive suit in favour of the Applicant. The Court must consider issues of competence, admissibility and proof before determining the case on its merit.

4- THE WEIGHT OF EVIDENCE ADDUCED BY THE PLAINTIFF

As earlier noted in considering the merits of the case, it is necessary to evaluate the evidence adduced by the Applicant so as to determine whether it is sufficient to ground a decision of this Court in his favour.

However, it is appropriate at this stage to recapitulate the facts and circumstances of the cause of action before this Court, namely:

(i) The Applicant was dismissed by the Agents of the Defendant's from her Police Force on grounds of insubordination and membership of the Rebel group, the Revolutionary United Front (RUF).

(ii) The Applicant complains that he was not heard before the decision to dismiss him from the Police Force of the Defendant was made.

(iii) The Applicant contested his dismissal before the Police Authorities, which set up an investigative Panel, who found that there was no basis for the dismissal of the Applicant. But the Defendants still refused to reinstate him or pay his entitlements.

(iv) The Applicant further made representations to the Agents of the Defendants through the Ombudsman following the decision in (iii) above that the dismissal did not follow due process.

(v) In answer to the Omubdsman's inquiry, the Minister of Internal Affairs of the Defendant stated that *"there was no justifiable ground to reverse the decision dismissing Mr. Mohammed Bah El Tayibb from the Police Force."*

It was on the basis of the above facts that the Applicant sought the following reliefs from this Honourable Court in a suit filed against the Defendants:

A- A **declaration** that the dismissal of the Applicant from the Police Service of the Defendant in 1994 and confirmed via a letter of 3rd June, 2013 is illegal, null and void as it violates the Plaintiffs human right to fair hearing guaranteed by Article 7 of the African Charter on Human and People's Rights.

B- An **order** mandating the Defendant to reinstate the Applicant and pay him all his outstanding salaries, benefits and entitlements.

C- An **order**, awarding general damages of $25,000,000.00 (twenty-five million dollars) being general damages for the embarrassment, mental and psychological trauma and death of his mother as a result of preventable disease to which the Plaintiff was subjected as a result of his illegal dismissal from the Police Service of Sierra Leone.

Before examining the substance of these requests, the Court must consider whether the case is appropriately before it. In a long line of cases the Court have stated that for an application before it to be entertained it must neither be anonymous or pending before another International Court or Tribunal.

More specifically, Article 11 of the 1991 Protocol A/P.1/7/91 relating to the Court provides that "cases may be brought before the Court on an application addressed to the Court Registry. The Application shall set out the subject matter of the dispute and the parties involved and shall contain a summary of the argument put forward as well as the plea of the Plaintiff."

Similarly, Article 33 of the rules of procedure of the Court, provides that:

An application of the kind referred to in Article 11 of the Protocol shall state:

a- The name and address of the Applicant;

b- The designation of the party against whom the application is made;

c- The subject matter of the proceedings and summary of the plea-in-law on which the application is based;

d- The form of the order sought by the Applicant;

e- Where appropriate, the nature of any evidence offered in support.

The Court holds that the Applicant has complied sufficiently with the requirements of Law for seizing the Court. Accordingly, the claim is considered admissible.

As earlier noted, the Defendant did not take any step in defence of this suit; in consequence of which the Applicant applied for default judgment in accordance with Article 90 of the Rules of this Court. For purposes of clarity, Article 90 of the Rules of the Court is hereby reproduced:

(1) Article 90 (1) if a defendant on whom an application initiating proceedings has been duly served fails to lodge a defense to the application in the proper form within the time prescribed, the applicant may apply for judgment by default.

(2) The application shall be served on the Defendant.

(3) The Court may decide to open the oral procedure on the application.

(4) Before giving judgment by default, the Court shall, after considering the circumstances of case, consider:

a- Whether the initiating application initiating the proceedings is admissible;

b- Whether the appropriate formalities have been complied with and;

c- Whether the application appears well founded;

d- The Court may order preparatory inquiry;

e- A judgment by default shall be enforceable.

Applying these provisions to the facts, the following deductions can be made.

First, the initiating application was filed by the Applicant on the 14th of October, 2013 and entered at the Registry of the Court and certified true copy was served on the Defendant on the 24th October, 2013. The Defendant was obliged by the rules of the Court to lodge its defence and/or enter appearance within one month of the service, if it intends to defend the action.

The Defendant refused and/or neglected to lodge a defense or enter appearance if it intended to defend the suit. The Applicant filed a motion for default judgment on the 29th of November, 2013. The same motion was served on the defendant on the 6th day of December 2013. The Applicant moved his motion for default judgment on the 13th day of March, 2015 and till date the Defendant neither filed any answer to the motion or the substantive suit. The Court will have no choice than to grant the Application of the Applicant. Accordingly, the Court rules that the Applicant has complied with the provisions of Article 90 (i) of the rules of this Court. This is more so in view of the fact that the process was served on the Defendant as required by Article 90 (2).

Based on the circumstances of the case, the Court rules that the documentary evidence available in this suit, coupled with the refusal of the Defendant to file any defence, makes the opening of oral application on the suit unnecessary in accordance with Article 90 (3) of the rules.

Similarly, there will be no need to order for a preparatory inquiry.

The crux of these requirements for a successful application for default judgment is Article 90 (4) of the rules. The Court is enjoined before giving judgment in default to consider:

a- Whether the application initiating the proceedings is admissible;

b- Whether the appropriate formalities have been complied with; and

c- Whether the application appears well founded.

In this direction, the Court holds that the application satisfies conditions (a) and (b) as it was appropriately brought and commenced through required procedure and all the formalities for admissibility were satisfied.

As for third condition, which is to determine whether the application is a well-founded, it is necessary to review the substance thereof.

The Application alleges the violation of his right to fair hearing as provided for by Article 7 of the African Charter on Human and People's Rights to which the Defendant is a party. Article 7 of the said Charter provides as follows:

Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

(b) The right to be presumed innocent until proven guilty by a competent Court or Tribunal;

(c) The right to defense including the right to be defended by counsel of his choice;

(d) The right to be tried within a reasonable time by an impartial Court or Tribunal.

The Court is of the view that the provision relied on by the Applicant is relevant for bringing this action against the Defendant.

Article 1 of the African Charter on Human and People's Rights provides that *"The Member States of the of the Organisation of African Unity (now African Union) shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."*

Article 4 reinforces this obligation imposed on State parties to the Charter by providing that Human beings are inviolable.

Every human being shall be entitled to respect for his life, and integrity of his person. No one may be arbitranly deprived of this right.

The Court holds that the Republic of Sierra Leone, being a party to the African Charter on Human and People's Rights is obliged to preserve and protect the Applicant's right to fair hearing as provided for under Article 7 of the Charter.

Historically, referred to as the rule of natural justice, the rule of fair hearing consists of two basic components, namely,

(i) The rule against bias (*nemo judex in causa sua*) or that no man should be a Judge in his own cause; and

(ii) The right to a fair hearing (*audi alterem partem*) or hear the other side.

In fact, the rule of right to a fair hearing is as old as man himself. Thus, in R.V University of Cambridge (1723) I Str. 557, Justice Fortescue captured the import of the need for a hearing in the following words:

I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam

before he was called upon to make a defence. Adam says God, where art thou? Has thou not eaten of the tree, whereof I commanded thou shouldest not eat? And the same question was put to Eve also.

Thus, in Bentley's case where the University of Cambridge denied a scholar of his degrees on account of a misconduct in insulting the Vice-Chancellor's Court, the Court reinstated him on a mandamus on the ground that deprivation was unjustifiable, because he should have received the notice of the charge against him so that he could make his defence.

These principles are encapsulated in Article 7 of the African Charter. In a nutshell, the rule is that an individual should not be penalized by decisions affecting his rights or legitimate expectations without being given prior notice of the case, a fair opportunity to answer and/or the opportunity to present their own case. The fact that a decision affects rights or interests of a person is sufficient to subject the decision to the procedures required by natural justice.

Accordingly, every person has the right to have a hearing and be allowed to present his or her own case. The English cases of **Ridge *v.* Baldwin (1964)** AC. 40 and **Chief Constable of the Northern Wales Police *v.* Evans (1982)** I WLR 1155 are germane.

Furthermore, the accused must be entitled to a hearing. In doing this, the adjudicator must determine whether the person charged has a proper opportunity to consider, challenge or contradict any evidence and whether he is also fully aware of the nature of the allegations against him or her so as to have a proper opportunity to present his or her own case. This principle has succinctly been summarized in the following words.

The best way of producing a fair trial is to ensure that a party to it has the fullest information of both allegations that are made against him and the evidence relied upon in support of those allegations. Where the evidence is documentary, he should have access to those documents. Where the evidence consists of oral testimony then he should be entitled to cross examine the witnesses who give that testimony, whose identity should be

disclosed. (see **Secretary of State of the Home department *V.* AF (201)** 2 AC. 269) per Philips LJ). The requirement of impartiality and independence of the authority conducting the hearing is also important.

As it is usually said, the doctrine of impartiality denotes that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Accordingly, the adjudicatory authority should not have a pecuniary and personal interest in the conduct and outcome of the proceedings. This is because in such a case he cannot be expected to exhibit the highest point of impartially. Justice must be rooted in confidence, and confidence is destroyed when right thinking members of society go about thinking that the Judge was biased. The test as to whether the adjudicatory authority is partial is not the existence of actual bias but the likelihood of it. The appearance of evil should be treated as evil itself.

This brief jurisprudential excursion unto the judgments of fair hearing is undertaken for the purposes of positing Article 7 of the African Charter on Human and People's Rights the Fundamental basis of the claim of the Applicant in proper perspective. In fact, that Article totally encapsulates the principles of fair hearing enumerated above.

Juxtaposing those principles with the facts of the case, the question that arises and as formulated by the Applicant is "whether the failure of the Defendant to afford the Plaintiff's (Applicant's) the opportunity to defend himself either personally or by legal representation before dismissing him has not violated the Plaintiff's (Applicant's) human right to fair hearing guaranteed by Article 7 of the African Charter on Human and People's Rights."

In order to answer this question, it is necessary to once again review the facts of the case vis a vis the evidence produced by the Applicant in order to arrive at a reasonable conclusion.

First, the Applicant was enlisted in the Defendant's Police Force sometime in 1984 and subsequently promoted to an Acting Superintendent of Police.

During the course of his duty, he had what was termed a "frank discussion" with the then Inspector General of Police, Mr. Waiter Nicol who, on the basis of that, accused him of insubordination. He was also accused of having a link with the RUF, a rebel group then fighting the legitimate government of the Defendant. Without being heard, he was dismissed from the Defendant's Police Force.

In a bid to exhaust local remedies available to him, the Applicant appealed to the Police authorities for a reconsideration of the case. The Authorities found that the dismissal was without a hearing and therefore a flagrant violation of his human rights and termed the dismissal as lacking in legitimacy *(see Annexure A)*.

An analysis of Annexure A, which was made by the agents of the Defendants is very instructive in this regard.

The report noted in part that Mr. Tayyib Bah (the Applicant) … expressed frankly certain issues of concern to the Police at that point in time to late Mr. Waiter Nicol (The Inspector General at the time) which did not go down well with him. He later devised insubordination case against Mr. Tayyib Bah (The Applicant).

The said matter coupled with unproven allegation of his link with the RUF Rebels in respect of which he was neither given the opportunity to defend himself nor was investigation conducted as *required in all allegations* (emphasis ours), led to his immediate dismissal. His appeal against the said dismissal to the Police Council for a review of the case was not countenanced by them"

An analysis of Annexure A suggests and rightly too, that the then Inspector General of Police of the Defendant concocted a discussion in which the Applicant made frank contributions. He used it as a ruse, a basis for the dismissal of the Applicant.

It appears that the said Mr. Nicol (an agent of the Defendant) was the prosecutor and the Judge at the same time. The rudiments of fairness and justice frowns upon such procedure and as well as such high handedness.

Granted that the Applicant was queried with regard to the purported acts of insubordination which he answered to, the reasoning of the Court is supported by the findings of fact contained in Annexure A to the effect that:

1- That a frank discussion between Mr. Tayyib Bah and late Mr. Waiter Nicol was exploited by the latter, as subordination (insubordination) of the former.

2- That Mr. Tayyib Bah was queried for insubordination which he accordingly responded to, and such offence by all standards does not carry dismissal as a punishment.

The Court agrees with conclusion arrived at by the investigating authority in Annexure A and holds that the dismissal of the Applicant was a premeditated decision by the agents of the Defendant devoid of any procedure or hearing. The offence or charge which attracts summary dismissal in law must be serious, cogent and proven. A concocted allegation based on a premeditated decision catalyzed by bad faith and without any known procedure cannot qualify as fair.

In fact, Annexure A succinctly supported the above assertion when it stated that:

> *"no procedure as required for any member of the SPL, more so a very Senior Police Officer that had diligently served the SPL for up to a decade was followed."*

It follows that the Applicant was never given a hearing both at the initial stage of the purported dismissal as well as with regard to the petition against the Police Council's decision to dismiss him.

A further examination of Annexures 8 and C lends credence to the above reasonable conclusion. Specifically, the Office of the Ombudsman (Annexure C) in exercise of its powers under the law having received Annexures A and B (a letter from the Applicant's Counsel) made representations to the Office of the Ministry of Internal Affairs of the Defendant.

Curiously, in answer to the representations, the Defendants, in a letter dated 3rd June 2013 (Annexure D) stated that:

> ***"..... the Police Council considered the above matter at its recent meeting and decided that there was no justifiable ground to reverse the decision dismissing Mr. Mohammed El Tayyib Bah (the Applicant) from the Police Force."***

It appears that the Police Council of the Defendant needed the testimony of spirits or God himself to agree that there were justifiable grounds for a review of a decision arrived at in blatant violation of the fundamental principles of fair hearing.

This Court in **Ugokwe *v.* Okeke (2008) CCJ LR (P1) 149 at 164** had reiterated the principle that parties must be given an opportunity to be heard in any matter affecting their interest, in the following words:

> ***"The right to fair hearing is a human right derived from the concept of fair hearing, in this regard, a fair trial is not only seen as an additional instrument for protection of the rights of defence, Largo sensu, but also in a political context, where the legislative and jurisdiction activity, the judicial organization and even the judicial institutions of the signatory state are subjected to scrutiny as regards requirements of the Community."***

The minimum standards required of all institutions exercising powers that may affect the legitimate interest of the parties or one or more of them is to act fairly. The Court holds that the Defendant and her agents have acted unfairly in not granting the Applicant a hearing before dismissing him from her Police Force.

The Court holds that the Defendant being a state party to the African Charter on Human and People's Rights, is obliged to guarantee the actual implementation of the stipulated rights under the Charter, more particularly the right of the Applicant to have his cause heard and to prevent all acts

and practices which are minimal to those obligations. There are sufficient material evidence lending credence to the accusations levelled by the Applicant against the Defendants. Annexures A, B, C & D are sufficient material evidence to establish the breach of the Applicants right to fair hearing and the Court so hold.

The acts committed by the agents of the Defendant in denying the Applicant the right to a hearing before his dismissal are imputable to the Defendants under the general principles of State responsibility.

In fact, as this Court stated in the case of **Garba *v.* Republic of Benin**,

> ***"to enable the Court find that violations have occurred... the Applicant was expected to file sufficiently convincing evidence and not equivocal evidence."***

The Court holds that evidence adduced by the Applicant (as contained in Annexures A, 8, C and D) is sufficient, compelling and convincing to suggest the truth of the alleged violations of the Applicant's right to fair hearing by the Defendant. This is more so in view of the fact that the Defendant did not take any steps in controverting the cupious allegations of the Applicant against her.

In view of these points, the Court holds that the Applicant has in this proceeding and at any rate, established his claims and there are sufficient grounds for granting the reliefs sought by the Applicant.

Having held that there are sufficient grounds to grant the reliefs sought by the Applicant against the Defendant, the Court is empowered to make consequential orders in that regard.

This is because in general international law, a State that has violated its international obligations is duty bound to make reparation. This Court, in **Karaou *v.* Republic of Niger (2010) CCJ LR (Pt 3) 1 at 17**, observed that:

> ***"The Applicant has gone through untenable physical, psychological and moral harm, as a result of her nine***

years of servitude, justifying the award of a relief in reparation for harm thus suffered."

In the same vein, the Applicant in this case, has suffered, pain, mental, psychological trauma and deprivation. Indeed, as expected, dismissal carries with it some measure of infamy and stigma and deprives the individual the right or benefits accorded by the employment and society at large. It is therefore not surprising that having been dismissed, though wrongly. In the Courts view, the Applicant was rightly rejected at the election on the grounds of being unfit for Public Office.

Above all, having been dismissed from employment, the Applicant has remained unemployable because no one is expected to engage a dishonest employee. All these damages suffered by the Applicant are direct as well as foreseeable consequences of his wrongful dismissal in violation of his right to fair hearing as guaranteed by Art. 7 (1) of the African Charter on Human and People's Rights. For the avoidance of doubt, at this stage of development of International Human Rights Law regime, persons, including States, must be careful with regard to the treatment of their nationals or citizens and other individuals within their territorial jurisdictions. Where their acts or omissions towards such persons violate their rights as enshrined in international instruments, an international tribunal, such as ours, will have no alternative than to hold them answerable for the wrongs. The era of gross impunity by Member States and their Governments in our sub-region shall no longer be tolerated.

In this direction, having regard to Article 4(g) of the ECOWAS Revised Treaty which empowers the Court to apply the African Charter on Human and Peoples Right, more particularly Article 7(I) on the Right to fair hearing and having regard to findings of fact made herein, the Court decides that the Plaintiff has established that his dismissal by the Defendant from its Police Force is illegal, null and void and of no effect, having been done without giving the Applicant a hearing in violation of Article 7(I) of the African Charter.

Accordingly, the Court **DECLARES**:

(I) That the **dismissal** of the Applicant from the Police Force of the Defendant in 1994 and confirmed on 3rd June 2013, is illegal, null, void and of no effect as it violates the Plaintiff's right to fair hearing enshrined in Article 7 of the African Charter on Human and People's Rights.

(II) **Orders** the Defendant to reinstate the Applicant in his appropriate position in the Police Force of the Defendants and pay him all outstanding salaries, benefits, entitlements, including promotion.

(III) **Directs** the Defendant to pay the Applicant the sum of T**wo Hundred Fifty Thousand US. Dollars ($ 250,000.00)** as general damages for the wrong occasioned by their illegal act.

The Defendant shall bear the costs of this Action and the Chief Registrar is directed to assess the costs, taking into account the relevant provisions of Article 66-69 of the Court's Rules of Procedure.

This Decision is given in open Court in compliance with Article 61 of the Rules of Procedure at the Seat of the Court in Abuja, this 4th day of May, 2015 in the Presence of their LORDSHIPS:

1- Hon. Justice Friday Chijioke Nwoke - *Presiding;*
2- Hon. Justice Micah Wilkins Wright - *Member;*
3- Hon. Justice Hameye Foune Mahalmadane - *Member.*

Assisted by **Aboubakar Diakite (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA

MONDAY, 20TH DAY OF APRIL, 2015

SUIT NO: ECW/CCJ/APP/22/14
JUDGMENT NO: ECW/CCJ/JUD/12/15

BETWEEN
1. LES ETABLISSEMENTS VAMO
2. PASCAL KUEKIA } *PLAINTIFFS*

AND
REPUBLIC OF BENIN - *DEFENDANT*

COMPOSITION OF THE COURT:
1. HON. JUSTICE JEROME TRAORÉ - *PRESIDING*
2. HON. JUSTICE HAMÈYE F. MAHALMADANE - *MEMBER*
3. HON. JUSTICE ALIOUNE SALL - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. CLEMENCE TCHAMO MAFETCO - *FOR THE PLAINTIFFS*
2. HIPPOLYTE YEDE (ESQ.) - *FOR THE DEFENDANT*

- Locus standing - Non-exhaustion of local remedy
- Execution of private contract - Lack of jurisdiction.

SUMMARY OF THE FACTS

By a motion registered in the Registry on 2 October 2014, Etablissement Vamo and Mr. Kuekia Pascal sued the Republic of Benin, the Ministry of Youth, Sports and Recreation and the Management office of stade de l'amitie before the ECOWAS Court of Justice for compensation.

Etablissement VAMO that call themselves "Pascal International" stated that they leased for a period of 6 months renewable a portion of the outdoor esplanade of the stade de l'amitie with the management office abbreviated OGESA for a monthly rent of 30,000 F CFA;

Despite the regular payment of rent charges, OGESA decided unilaterally to terminate the contractual relationship on 1 July 2011;

That on 15 July 2011, police officers and agents of the Cotonou City Council invaded the places they occupied and perpetrated acts of vandalism by destroying the facilities and taking all the merchandise there, causing them enormous losses.

The applicants maintained that there is a violation of Articles 11, 17 and 23 of the African Charter on Human Rights and claimed for the total amount of 433,974,450 CFA francs.

The Republic of Benin raised in limine litis the inadmissibility of the action of the Etablissement VAMO and Mr. KUEKIA PASCAL based on the lack of standing of victim of the applicants and the lack of exhaustion of local remedies.

LEGAL ISSUES:

- *Does Etablissement VAMO have standing to appear before the Court?*

- *Can the Court be seised without the exhaustion of local remedies?*

- *Is the litigation arising from the performance of a private contract concluded between an individual and a Member State within the jurisdiction of the Court of Justice?*

DECISION OF THE COURT

The Court admitted the preliminary objections formulated by the Republic of Benin regarding the inadmissibility of the application for lack of standing of Etablissement VAMO, and secondly, for non-exhaustion of local remedies by Mr. KUEKIA Pascal;

Declared them ill founded, rejected them.

As to the merit, admitted the application of Etablissement VAMO and Mr. KUEKIA PASCAL;

Declared lack of jurisdiction with regard to their claims.

THE PARTIES

I.1 PLAINTIFF

- **Les Etablissements VAMO**, a body with legal capacity to sue, has its office located at Messebo, Cotonou, Republic of Benin.

- **Mr. Pascal Kuekia**, promoter and economic operator of the said company, has its address location at Quartier Menontin, Cotonou, Republic of Benin, Tel. 94 92 19 25.

  Plaintiff Counsel: Maître Clémence Tchamo Mafetco, Lawyer registered with the Bar Association of the Republic of Cameroon, Barrister and Solicitor, International Criminal Court, Barrister and Solicitor, Special Tribunal for Lebanon, Barrister and Solicitor, International Criminal Tribunal for the Former Yugoslavia, B.P. 12008 Douala. Tel: 33 43 78 75 / 99 95 49 83/ Fax: 33 42 93 83. The Plaintiff Counsel consents to the use of the address of his law firm for the service of pleadings in connection with the instant proceedings and subsequent procedure.

1.2 DEFENDANTS

- **The Republic of Benin**, legally represented by the Judicial Officer for the Treasury, domiciled at the Treasury of Benin, route de l'aéroport, Cotonou, whose address at Abuja, for the purposes of this proceeding is: The Embassy of Benin in Nigeria, Plot No. 2579 (near Algon Guest House) Yedserram Street, Maitama, Abuja, defended by Maître Hippolyte Yede Lawyer registered with the Court of Appeal Cotonou, Benin; with law firm located at Parcelle "T" du lot 2157, rue pavée du Bénin Marché, Immeuble Gbediga, 03 BP 338 Jéricho, Cotonou; Telefax : (+229) 21 38 01 83, Mobile: +229 90 93 55 07/97 80 55 60; Fax: +229 21 38 01 84, email: h.yede@yahoo.fr, cabinetavocatyede@yahoo.fr

- Ministry of Youth, Sports and Leisure, Headquarters address at Cotonou: 03 BP 2103 Cotonou; Tel; (229) 21 30 36 00 / 21 30 36 14; Fax: (229) 21 38 21 36.

- Administrative Office of the Stade de L'Amitié, a social-, culture- and science-oriented public establishment, Address: Kouhounou, Stade de L'Amitié, 03 BP: 2499, Tel: 21 38 17 47 Cotonou, Benin.

II- FACTS AND PROCEDURE

II-1- Les Etablissements VAMO and Mr. Pascal Kuekia dragged the Republic of Benin, Ministry of Youth, Sports and Leisure, and the Administrative Office of the Stade de L'Amitié to this Honourable Court of Justice with an application for compensation dated 23 October 2014;

II-2- The Application which was filed at the Registry of the Court on 2 October 2014, and served on the Defendants on 10 October 2014;

II.3- The Republic of Benin filed its memorial in defence and preliminary objections *in limine litis* dated 22 October 2014, and a memorial dated 28 October 2014 on the substance of the case, all registered at the Registry of the Court on 12 November 2014;

II.4- The Plaintiff filed two replies dated 27 November and 2 December 2014 respectively, but the date it was received at the Registry of the Court was not mentioned;

II.5- Finally, the Republic of Benin closed the written phase of the procedure via memorial in defence dated 7 January 2015 and a rejoinder against the reply by the Plaintiff on the substance of the case, dated 8 January 2015, all received at the Registry of the Court on 28 January 2015;

II.6- The case was admitted and argued during the Court session of 18 February 2015. The Plaintiff was represented by their Counsel

Maître Clémence Tchamo Mafetco. The Defendants were not represented.

II.7- The case was adjourned for judgement on 20 April, 2015.

III. PLEAS IN LAW AND ARGUMENTS

III.1- Les Etablissements VAMO, also known as Pascal International, argued that it took a lease of six (6) months renewable, for a portion of the out-door esplanade of the Stade de L'Amitié from Office de Gestion du Stade de L'Amitié (OGESA for short), at an average monthly rate of 30,000 (thirty thousand) CFA Francs; that on 19 May 2011, the sum of 120, 000 (one hundred and twenty thousand) CFA Francs was paid to OGESA for the months of June, July, August and September, with the expiry date of the agreement indicated; that against all expectations, OGESA unilaterally decided to terminate contractual relations with its leaseholder by addressing a letter dated 1 July 2011 to him, titled "Eviction";

III.2- The Plaintiff further argued that OGESA arbitrarily decided to terminate the contract; that all the amicable attempts made by the Plaintiff to understand the decision were in vain; that, that was how on 15 July 2011, the Police and Cotonou city officials invaded the premises occupied by the Plaintiff and engaged in acts of vandalism, destroying the installations which had cost years of hard work to erect, and took away all the goods they found there to a destination still unknown; that the persistent attempts by the Plaintiff to retrieve their goods yielded no positive result;

III.3- The Plaintiff contended that the situation has caused them great harm, requiring reparation; that Mr. Pascal Kuekia, the promoter of the company, borrowed money from various banking institutions, and is now unable to repay his loans and therefore being pursued by bailiffs in England; that he was forced to abandon his wife and seven (7) children in England to take up a residence in Togo so as to resolve the matter; that being diabetic, Mr. Pascal Kuekia can

no longer follow up his treatment and he realises that his life is in danger, all due to the bad faith of the officials of the Republic of Benin;

III.4- Regarding the jurisdiction of the Court, the Plaintiff invoked the provisions of Articles 9 (4) and 10 (d) of the Protocol relating to the Community Court of Justice and argued that the judgment in the case of Olajide Afolabi v. Federal Republic of Nigeria highlighted the importance of expanding access to the Court to individuals. Therefore, the Court can be accessed since 2005 by citizens of a Member State, on breach of Protocols, Decisions, Treaties or Conventions adopted by ECOWAS; that in accordance with Article 4 of the ECOWAS Revised Treaty, Member States of ECOWAS recognised the promotion and protection of human rights in accordance with the 1981 African Charter on Human and Peoples' Rights;

III.5- Regarding the admissibility of the Application, the Plaintiff argued that the Republic of Benin, through its officials, violated their fundamental rights, especially those contained in the African Charter on Human and Peoples' Rights; that the Court has jurisdiction to award them compensation in respect of the prejudice they have suffered. (*cf*. Judgment in the case between **Hadijatou Mani Koraou *v.* the Republic of Niger** dated 27 October 2008); that the flagrant violation of rights as contained in the African Charter on Human and Peoples' Rights has done them a lot of harm;

III.6- They submitted that since the Republic Benin was not in favour of any kind of negotiated settlement, the Plaintiff headed to the Court in the Republic of Benin on 9 September 2011. The matter was adjourned more than 25 times. That the last adjourned date was 18 July 2011, after which the matter was adjourned again to an unknown date; that the case has been pending before the courts of Benin for the past four (4) years;

III.7- In support of their argument, the Plaintiff invoked violation of Articles 11, 17 and 23 of the African Charter on Human and Peoples' Rights;

III.8- They stated that the African Charter on Human and Peoples' Rights protects the inalienable human right to property, and that no one can be denied such right except for public utility purposes, and against just prior compensation; that despite the fact that they always fulfilled their obligations in the contractual agreement, the officials of the Republic of Benin savagely invaded the Plaintiff's premises, destroyed their installations, and made away with their goods; that by so doing, they violated their right to property; that Mr. Pascal Kuekia must have been protected by the Republic of Benin, and that he was forcibly removed from the premises simply because he is not a citizen of Benin;

III.9- They asked the Honourable Court to:

- **Declare** that it has jurisdiction to adjudicate on their application for compensation;

- **Declare** their Application admissible on the ground that it met all the conditions regarding the jurisdiction of the Court;

- **Find** that Les Établissements VAMO took a six-month renewable lease on a portion of the out-door esplanade of the Stade de L'Amitié from Office de Gestion du Stade de L'Amitié (OGESA, for short), at an average monthly rate of 30,000 (thirty thousand) CFA Francs;

- **Find** that less than one month after the agreement was concluded, OGESA unilaterally decided to terminate the contract;

- **Find** that during the process of forced and illegal eviction, various acts of destruction and violation of human right were carried out;

- **Find** that their goods were seized by the State security officers and taken away to an unknown destination, and that those properties have still not been returned to them;

- **Find** that this situation causes them huge economic, social and psychological harm;

Consequently,

- **Order** OGESA to pay to them the sum of 433, 974, 450 CFA Francs as damages, as sub-divided below:

  1. Loss suffered by Les Établissements VAMO:

     - Commercial harm - CFA F 280, 000, 000;

     - Material harm;

     • Goods - CFA F 49, 322,000;

     • Basic Business Installations; *(Shed, showcasing, frames Roofing, electrical installation, etc.)*

     CFA F 4,652, 450

     Sub-total: CFA F 333, 974,450

  2. Harm suffered by the Company Rep, Mr. Pascal Kuekia 100, 000, 000 CFA Francs;

Grand Total : CFA F 433,974, 450.

- **Order** the Republic of Benin to pay back in kind or in cash equivalent the value of the goods illegally taken away;

- **Order** OGESA to bear all costs relating to the proceedings;

III.10- The Republic of Benin in its preliminary objection dated 22 November 2014, raised the issue of inadmissibility of the action by Les Établissements VAMO and Mr. Pascal Kuekia on the grounds that the Plaintiff lack locus standi as a victim, in the first place, and that secondly, they have not yet exhausted local remedies;

III.11- The Republic of Benin contended that Article 4 of the Supplementary Protocol on the Community Court of Justice and

Article 10 of Protocol A/P.1/07/91 provide that "*only a person who is a victim of human rights violation*" may come before the Court; that it follows that when an applicant neither justifies a direct and personal legitimate interest nor the status of a victim of human rights violation, its action shall be declared inadmissible; that the action of Les Établissements VAMO is inadmissible because it has neither justified any interest at stake nor locus standi as a victim empowering it to file any application whatsoever in relation to the alleged disputed lease agreement; that indeed, the lease agreement of 1 April 2011 complained of by the Plaintiff was signed between OGESA as lessor and Société Pascal International Sarl (Pascal International Company Ltd.) as lessee, a company distinct from Les Établissements VAMO, the Plaintiff in the instant case, the distinction between Société Pascal International Sarl, and Les Établissements VAMO is not only established by the difference in the nature of their respective business names, but also by their headquarters; that indeed, the distinction between Société Pascal International Sarl, (Pascal International Company Ltd) and Établissements VAMO is proved not only by the difference in their nature and business names respectively but also, by their headquarters; that indeed, whereas Société Pascal International Sarl is a limited liability company with its headquarters at Cotonou at Lot 2133 Menotin, as mentioned in all the court processes of its application officially filed before the Court, Les Établissements VAMO, which is only a business and not an incorporated company, now and then cites its headquarters in Cotonou at Lot 2113, Menotin, as indicated in the initiating application of the instant case, and sooner or later, states that its headquarters is at carré No.166 Messebo, as indicated in the Trade Register attached to the case-file; that legally speaking, only Société Pascal International Sarl, the contracting party to the lease agreement of 1 April 2011, can institute legal action in connection with the lease agreement; that it is as a result of this that the bailiff's reports dated 14, 15 and 18 July 2011 as well as claim for damages dated 9 September 2011 and filed before this Honourable Court in the initiating application of this case by the Plaintiff, were all formalised in the Application

filed by Société Pascal International Sarl; that it is surprising that Les Etablissements VAMO arrogated to itself the powers to institute a legal action for compensation before the Honourable Court, whereas it has neither justified the status of a victim, nor that of an applicant with a legitimate, direct and personal interest in the matter at stake; that to assume a legal identity without proof that Les Etablissements VAMO is commonly known or nicknamed as Société Pascal International Sarl, as a means of rendering the instant action admissible, defies all legal logic; that for these reasons, the Honourable Court must declare the action brought by Les Etablissements VAMO and Mr. Pascal Kuekia inadmissible for lack of locus standi as a victim and for lack of interest in the matter at stake.

III.12- Regarding the second plea in law regarding inadmissibility, the Republic of Benin submitted that the action is not automatically admissible before the Court; that following the Cotonou Treaty of 24 July 1993 (Revised Treaty), the ECOWAS Community adopted Protocol A/SP.1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security on 21 December 2001 in Dakar, which provides under the constitutional convergence principles in its Article 1 that: *"The following shall be declared as constitutional principles shared by all Member States...*; that these principles include Article 1 (h) which provides that: *"The rights set out in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organization shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights. In the absence of a court of special jurisdiction, the present Supplementary Protocol shall be regarded as giving the necessary powers to common or civil law judicial bodies"*;

that in the instant case, Société Pascal International Sarl brought its case before the Court of First Instance of Cotonou for compensation for the prejudice suffered; that Société Pascal International Sarl and Mr. Pascal Kuekia did not deem it fit to wait till the said Court of First Instance of Cotonou had adjudicated on their requests, neither did they exhaust local remedies, before bringing their case before the ECOWAS Court of Justice; whereas Article 39 of Protocol A/SP.1/12/01 of 21 December 2001 proscribes that: *"Protocol A/P.1/7/91 adopted in Abuja on 6 July 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed"*; that it was in line with these provisions that the Supplementary Protocol A/SP.1/01/05 amending the Preamble and Articles 1, 2, 9, 22 and 30 of Protocol A/P.1.7/91 relating to the Community Court of Justice, Article 4 (1) of the English version of the said protocol was adopted in Accra on 19 January 2005; that it is therefore possible henceforth for individuals to access the ECOWAS Court of Justice for human rights violation which occur in all the Member States, subject to exhaustion of local remedies, as provided for in Article 39 of Protocol A/SP.1/12/01 of 21 December 2001 on Democracy; that since the Plaintiff did not justify either in theirs pleadings or exhibits that they have exhausted local remedies, the Honourable Court must declare that their Application is manifestly inadmissible;

III.13- The Republic of Benin therefore asked the Honourable Court, in its preliminary objection to:

- **Admit** its orders sought in Defence as filed in the preliminary objections;

- **Find** that Les Etablissements VAMO lacks locus standi as a victim to enable it file an action before the Court;

- **Find** that the initiating application filed by Mr. Pascal Kuekia does not fulfil the requirements of the provisions of the Protocols adopted by the Community, in terms of access to the ECOWAS Court of Justice, because he had already filed the case before the national courts for damages;

Consequently,

- **Declare** the Application of Les Etablissements VAMO and Mr. Pascal Kuekia premature and thus inadmissible;

III. 14- In its memorial on the substance of the case, the Republic of Benin pleaded that a lease agreement was signed on 1 April 2011 between Société Pascal International Sarl and Office de Gestion du Stade de L'Amitié (OGESA), a social-, culture- and science-oriented public establishment which is a body under the Ministry of Youths, Sports and Leisure (MYSL); this agreement was concluded for a period of six (6) months renewable, for the purposes of making use of a portion of the out-door esplanade of the Stade de L'Amitié Cotonou; since Stade de L'Amitié was chosen as the venue for all the activities to be organised in connection with the visit of His Holiness Pope Benedict XVI, OGESA sent a notification letter to the leaseholders requesting them to vacate the premises on or before 8 July 2011; Société Pascal International Sarl failed to comply with the time-limit ordered by OGESA and it was evicted on 15 July 2011;

III. 15- The Republic of Benin asserted that Société Pascal International Sarl and Mr. Pascal Kuekia, claiming breach of contractual agreement and relying on the provisions of Article 1382 of the Civil Code, first of all sued the Defendants before the Cotonou Court of First Instance, seeking general damages in the the sum of one hundred million (100,000,000) CFA Francs; that without waiting for the said court to determine the case, Mr. Pascal Kuekia and Les Établissements VAMO deemed it fit and rightful to institute the instant case before this Honourable Court, alleging violation of of Articles 11, 17, and 23 of the African Charter on Human and

Peoples' Rights and requesting that the Defendants pay them a total sum of Four Hundred and Thirty-Three Million, Nine Hundred and Seventy-Four Thousand, Four Hundred and Fifty (433, 974, 450) CFA Francs, whereas no violation of the provisions cited above can neither be cited against OGESA nor the Ministry of Youths, Sports and Leisure, let alone the Republic of Benin;

III.16- The Republic of Benin contended that Article 11 of the African Charter provides for freedom of assembly and its reservation; that Article 17 provides for right to education, right to take part in the cultural life of the community, promotion and protection of traditional values recognized by the community; that Article 23 provided for right to peace and security of States on one hand, and on the other hand, strengthening solidarity and friendly relations among States; that as a result, there are no legal grounds for justifying the action filed by the Plaintiff before this Honourable Court; that in the instant case, the violations alleged by the Plaintiff do not correspond to the reality of the facts, whereby the issue solely concerns termination of a lease agreement followed by eviction of the lessee, which falls within the purview of general commercial law, under the OHADA laws (OHADA is a French acronym which stands for: Uniform Acts of the Organization for the Harmonization of Business Law in Africa);

III.17- The Republic of Benin concluded that since Les Etablissements VAMO is neither being a party nor a beneficiary of the agreement, it cannot in any way make any appropriate claim for any compensation whatsoever as arising from termination of the agreement; that the Honourable Court may find that the documents filed in support of the initiating application of the instant case are not authentic in any way whatsoever and cannot be relied on to buttress the Application brought, which is, itself, inconsistent, lacking solid grounds;

III.18- In its substantive defence statement, the Republic of Benin asked the Court to:

- **Find** that there was no violation of the provisions of Articles 11, 17, and 23 of the African Charter on Human and Peoples' Rights in the instant case;

- **Find** that the orders sought by the Plaintiff are without merit because of their inconsistences, unsubstantiated and non-objective nature.

- **Find** that the legal entity of the Republic of Benin on which the Ministry of Youths, Sports and Leisure depends, is different from OGESA, which is a party to the lease agreement made with Société Pascal International Sarl.

Consequently,

- **Adjudge** and **declare** that there was no violation of Articles 11, 17, and 23 of the African Charter on Human and Peoples' Rights in the instant case;

- **Adjudge** and **declare** that the orders sought by Les Établissements VAMO and Mr. Pascal Kuekia are groundless;

- **Order** the Plaintiff to bear all costs.

IV- REASONING

Regarding the Defendant's preliminary objection as to inadmissibility of the Application

IV.1- In its pleading dated 22 October 2014, the Republic of Benin argued that the action filed by Les Établissements VAMO is foreclosed on the ground of the Plaintiff's lack of locus standi; it asked the Court to find that Les Établissements VAMO has no status of victim for bringing the action before the Court on the basis of the lease agreement of 1 April 2011;

IV.2- The Defendants replied that Les Établissements VAMO and Société Pascal International Sarl, are one and same company in the legal action filed against OGESA and in all other instances; that after the registration of Les Établissements VAMO at the trade registry at Abomey, its representative, Mr. Pascal Kuekia, while travelling back to England, gave power of attorney to Mr. Justin Agassounon to act in the interest of all his business activities; that it was on the basis of that power of attorney that the authorised representative signed the lease agreement with the corporate name, not with the business name of Les Établissements VAMO; that when Mr. Pascal Kuekia got wind of it, he asked OGESA to have the corporate name reflected in the lease agreement; that the latter agreed to the request for change; that this was what justified OGESA addressing the letter dated 1 July 2011 and "Eviction" to Les Établissements VAMO; that sufficiently proves that for OGESA and for any person with good faith, Les Établissements VAMO and Société Pascal International Sarl are one and same company;

IV.3- A close look of the private deed N°.019/MCSL/OGESA/DG/DE/SA dated 1 April 2011 titled "*Lease agreement of a portion of the out-door esplanade of the Stade de L'Amitié"* shows that the agreement made was between the Office de Gestion du Stade de L'Amitié (OGESA), represented by its Director General, and Société Pascal International Sarl, represented by Mr. Justin Agassounon;

IV.4- But it is apparent from the documents pleaded in connection with the instant case that Office de Gestion du Stade de L'Amitié (OGESA) wrote a letter dated 1 July 2011 to the lessee, the promoter of Les Établissements VAMO, asking it to "completely evacuate from the place… on or before Saturday, 9 July 2011 as an order by the State";

IV.5- It follows therefore that the Office de Gestion du Stade de L'Amitié (OGESA) recognised that it is Les Établissements VAMO that occupied the rented place;

Under these circumstances, Les Établissements VAMO justify a personal interest in pleading the matter case in court against the Defendants;

It is therefore wrong for the Defendants to argue that Les Établissements VAMO have no locus standi to file its case before this Court;

It shall be ripe and appropriate to receive the objection on inadmissibility filed by the Republic of Benin against Les Établissements VAMO, declare it ill-founded, and dismiss it.

Regarding lack of exhaustion of local remedies by Mr. Pascal Kuekia

IV.6- Regarding the second plea on preliminary objections, the Republic of Benin argued that the action is not automatically admissible before the Court; that following the Revised Treaty of 24 July 1993, the ECOWAS Community adopted Protocol A/SP.1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security on 21 December 2001 in Dakar, which provides for the principles of constitutional convergence under its Article 1;

IV.7- It added that in the instant case, Société Pascal International Sarl filed its case before the Cotonou Court of First Instance for damages for the harms it had suffered; that Société Pascal International Sarl and Mr. Pascal Kuekia could neither wait for the said Court of First Instance to deliver judgment on the orders they had sought, nor exercise and exhaust local remedies before instituting a case before this Honourable Court; that Article 39 of Protocol A/SP.1/12/01 of 21 December 2001 prescribes that: *"Protocol A/P.1/7/91 adopted in Abuja on 6 July 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights, after all attempts to resolve the*

matter at the national level have failed." That in accordance with these provisions, Supplementary Protocol A/SP.1/01/05 amending the Preamble and Articles 1, 2, 9, 22 and 30 of Protocol A/P.1.7/91 relating to the Community Court of Justice and Article 4 paragraph 1 of the English version of the said protocol was adopted in Accra on 19 January 2005; that henceforth, it is possible for an individual to access the ECOWAS Court of Justice on application for human rights violation which occur in any ECOWAS Member State, but subject to exhaustion of local remedies, as provided for in Article 39 of Protocol A/SP.1/12/01 of 21 December 2001 on democracy; that given that Plaintiff has not justified through its pleadings or exhibits that it has exhausted local remedies, the Court cannot manifestly declare their Application admissible;

IV.8- There is no question that, Protocol A/SP.1/12/01 of 21 December 2001 on Democracy and Good Governance provided in its 39 that: *"Protocol A/P.1/7/91 adopted in Abuja on 6 July 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed."*;

IV.9- But Supplementary Protocol A/SP.1/01/05 amending the Preamble and Articles 1, 2, 9, 22 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 paragraph 1 of the English version of the said protocol provided for only two (2) conditions precedent in its Article 10 (d) for valid access to the Community Court of Justice: firstly, the application shall not be anonymous, and secondly, the application shall not be made whilst the same matter has been instituted before another International Court for adjudication;

IV.10- But in the instant case, the application brought by Les Établissements VAMO and Mr. Pascal Kuekia is neither anonymous nor pending before another International Court of competent jurisdiction;

IV.11- Morever, the Community Court of Justice has never observed exhaustion of local remedies as a condition precedent for receiving applications;

Indeed, the Court held that the Community legislator did not make the rule of preliminary exhaustion of local remedies a precondition for admissibility of applications before the Court (Judgment N°. ECW/CCJ/JUD/06/08 on **Hadijatou Mani Koraou *v.* Republic of Niger**);

IV.12- Similarly, in Judgment No. ECW/CCJ/JUD/07/11 of 8 July 2011 on **Ocean King Ltd *v.* Republic of Senegal, paragraph 41**, the Court stated that

> ***"… this Court has decided in a plethora of cases including Prof. Etim Moses Essien v. Republic of the Gambia and Another, (suit No. ECW/CCJ/APP/05/05, judgment delivered on 29 October, 2007), Musa Saidykhan v. Republic of the Gambia (Suit N°. ECW/CCJ/APP/11/07, judgment delivered on 16 December, 2010) and Hadijatou Mani Koraou v. Republic of Niger (supra) that the exhaustion of local remedies is not a condition precedent for institution of an action for the relief of violation of human rights before it."***;

IV.13- It therefore becomes apparent that the principle of exhaustion of local remedies before instituting an action before International Courts is not applicable before this Honourable Court;

In these circumstances, the objection on the basis of lack of exhaustion of local remedies cannot succeed;

It is appropriate to declare as groundless the Defendant's objection that the Application filed is inadmissible for lack of exhaustion of local remedies.

Regarding application for compensation filed by the Plaintiff

IV.14- Les Établissements VAMO and Mr. Pascal Kuekia asked the Court to order the Republic of Benin, Ministry of Youths, Sports and Leisure and Office de Gestion du Stade de L'Amitié (OGESA) to compensate them to the tune of Four Hundred and Thirty-Three Million, Nine Hundred and Seventy-Four Thousand, Four Hundred and Fifty (433,974,450) CFA Francs;

IV.15- The Plaintiff invoked violation of Articles 11, 17 and 23 of the African Charter on Human and Peoples' Rights to justify their claims;

IV.16- The Republic of Benin argued that the provisions of the African Charter on Human and Peoples' Rights invoked by the Plaintiff do not correspond to the facts; that in the instant case, one is solely concerned with the termination of a lease agreement followed by eviction of the lessee; that such facts come under general commercial law, under the OHADA laws (OHADA is a French acronym which stands for: Uniform Acts of the Organization for the Harmonization of Business Law in Africa);

IV.17- Article 9 of Supplementary Protocol A/SP.1/01/05 of 19 January 2005 provides that:

"1. The Court has competence to adjudicate on any dispute relating to the following:

a) the interpretation and application of the Treaty, Conventions and Protocols of the Community;

b) the interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;

c) the legality of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;

d) the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS;

e) the provisions of the Treaty, Conventions and Protocols, Regulations, Directives or Decisions of ECOWAS Member States;

f) the Community and its officials; and

g) the action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions.

2. The Court shall have the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any Community institution or Community officials in the performance of official duties or functions.

3. Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose.

4. The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.

5. Pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Treaty, the Court shall have power to act as arbitrator for the purpose of Article 16 of the Treaty.

6. The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement.

7. The Court shall have all the powers conferred upon it by the provisions of this Protocol as well as any other powers that may be conferred by subsequent Protocols and Decisions of the Community.

8. The Authority of Heads of State and Government shall have the power to grant the Court the power to adjudicate on any specific dispute that it may refer to the Court other than those specified in this Article."

IV.18- It is undeniable that the Court has sometimes upheld its jurisdiction by the mere fact of invocation by the applicant, of violation of human rights, without prejudging the merits in the facts of the case;

Such was the case in Judgment N°. ECW/CCJ/JUD/01/12 of 26 January 2012 in Case Concerning **El Hadj Mame Abdou Gaye *v.* Republic of Senegal** whereby the Court reiterated its case-law concerning its jurisdiction, and where it held that the mere allegation of human rights violation in an application suffices, for the purposes of upholding its own formal jurisdiction, without making any preliminary declaration on the truth in the facts of the case.

IV.19- The provisions invoked by the Plaintiff are as follows:

Article 11 of the African Charter on Human and Peoples' Rights:
"Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others";

Article 17 of the African Charter on Human and Peoples' Rights:

1. Every individual shall have the right to education.

2. Every individual may freely, take part in the cultural life of his community.

3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Article 23 of the African Charter on Human and Peoples' Rights:

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.

2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter";

IV.20- It is undisputable that in the initiating application of the instant case, the Plaintiff maintained that *"the African Charter on Human and Peoples' Rights protects man's inalienable right to property and that the right to property shall be guaranteed and that it may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws";*

But it should be noted, on one hand, that the cited Articles (Articles 11, 17, 23), have nothing to do with expropriation for public-utility purposes, and on the other hand, that the facts upon which the Plaintiff relied in their argument cannot be construed as expropriation for public-utility purposes;

IV.21- Upon scrutiny, none of the provisions relied on appeared to take care of the allegations of the Plaintiff;

On the contrary, a close look of the facts as narrated by the Plaintiff shows termination of a lease agreement followed by the eviction of the leaseholder, destruction of installations and the carting away of goods;

Indeed, the facts are presented as difficulties resulting from the execution of a lease agreement concluded between a Department of the State of Benin (Office de Gestion du Stade de L'Amitié (OGESA) and Les Établissements VAMO and Mr. Pascal Kuekia, who managed their business activities at the rented premises;

IV.22- It is therefore a lease for professional purposes which came to an unhappy end resulting from implementation of the terms involved;

Moreover, the Plaintiff were so much conscious of that as to title their application as "a request for compensation";

IV.23- However, professional leasing is governed by OHADA laws (OHADA is a French acronym which stands for: Uniform Acts of the Organization for the Harmonization of Business Law in Africa);

Article 101 the Uniform Acts provides that:

The provisions of this section shall be applicable to all leases concerning immovable property under the following categories:

1) Premises or buildings for commercial, industrial, handicraft or professional purposes;

2) Accessory premises, constituting the adjoining structure to a structure put up for commercial, industrial or handicraft purposes or any other business purpose, on condition that such accessory premises belong to different owners, and that the hiring is done on the basis of the joint-use purposes

for which it is intended for the tenant, and that such arrangement be notified to the lessor at the time the lease agreement is concluded;

3) Bare land on which building have been contracted before or after the conclusion of the lease agreement, for industrial, commercial, handicraft or other professional purposes, if the buildings were erected or used with the express consent of the owner or brought to his attention and expressly certified by him;

IV.24- The Republic of Benin is a stakeholder of the 17 October 1993 Treaty on Harmonization of Business Law in Africa;

Article 13 of the said Treaty provides that litigants relying on the Uniform Acts shall plead their case before the courts of first instance of the domestic courts;

Indeed, it textually provides that disputes relating to the application of the Uniform Acts shall be settled at the courts of first instance and brought for appeal before the courts of States Parties.

IV.25- Nowhere in the provisions of Article 9 of Supplementary Protocol A/SP/01/05 of 19 January 2005 is it mentioned that one of the areas of the jurisdiction of the Court shall be in the instance where a dispute arises from the execution of a private contract concluded between an individual and a Member State;

Clearly, an application for compensation is not within the jurisdiction of the Court;

IV.26- In the light of the foregoing, it is clear that the facts stated by the Plaintiff cannot be construed as violation of human rights and the Court therefore has no jurisdiction to adjudicate on such matter;

Hence, the Court cannot rule on the claims brought by the Plaintiff;

The Court therefore declines jurisdiction.

Regarding costs

IV.27- Article 66(2) of the Rules of the Community Court of Justice, ECOWAS, provides that: *"The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings";*

Therefore, the Plaintiff's action fails;

Furthermore, the Republic of Benin expressly asked the Court to order the Plaintiff to bear all costs;

The Plaintiff shall therefore bear the costs.

FOR THESE REASONS

The Court,

Adjudicating publicly and after hearing both parties, in a matter on human rights violation, in first and last resort;

As to formal presentation of the Application

- **Admits** the preliminary objections raised by the Republic of Benin for inadmissibility of the Application and lack of locus standi of Les Établissements VAMO, and for non-exhaustion of local remedies on the part of Mr. Pascal Kuekia;
- **Declares** the action groundless, and rejects it.

As to the merits of the case

- **Admits** the Application of Les Établissements VAMO and Mr. Pascal Kuekia;
- **Declares** that it has no jurisdiction to adjudicate on their claims;
- **Orders** them to bear the costs.

Thus made, declared and pronounced in a public hearing at Abuja, by the Community Court of Justice, ECOWAS, on this day, the 20th day of April 2015;

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORÉ** - *Presiding;*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member;*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 30TH DAY OF JUNE, 2015

SUIT NO: ECW/CCJ/APP/24/12
JUDGMENT NO: ECW/CCJ/JUD/13/15

BETWEEN
MR. BOURAMA SININTA & 119 ORS. - *PLAINTIFFS*

AND
REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDENT*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MARIAM DIAWARA** - *FOR THE PLAINTIFFS*
2. **DIRECTORATE OF STATE LITIGATION** - *FOR THE DEFENDANTS*

- Human Rights violation - Right to property
- Applicability of the Universal Declaration of Human rights
- Jurisdiction - Admissibility - Res judicata

SUMMARY OF FACTS

The Applicants, Mr. Bourama Sininta and 119 others applied to the Community Court of Justice, ECOWAS for a principal application for the purpose of finding the violation of their rights, including the right to property, the equality of all before the law, and the equal protection of the law. They also filed an application to submit their motion for expedited procedure. They state that the Republic of Mali dispossessed them of their parcel of land subject of land title N°. 16551 for the benefit of an economic operator without paying them a fair and prior compensation.

In response, the Republic of Mali ruled that the Application is inadmissible and, in essence, disputed the Applicants' allegations which, according to it, have no customary rights over the disputed plot which remains the exclusive property of the State.

LEGAL ISSUES

- *Are the provisions of the Declaration of the Human and the Citizen Rights applicable before the ECOWAS Court of Justice?*

- *Does the customary law invoked confer on the Applicants a deed of land ownership on the parcel in question?*

DECISION OF THE COURT

The Court held that the Declaration of the Rights of Man and of the Citizen is not applicable to it, that the customary law as it appears from the legislative provisions of Mali does not confer on the owner a right of ownership but a simple right of use.

Accordingly, it declares the Application ill-founded, dismisses the Applicants' claims and ordered them to bear the cost.

COMMUNITY COURT OF JUSTICE

Delivered, in the case of **Mr. Bourama SININTA and 119 others** ***against*** **the Republic of Mali**, in a finding of violation of customary property rights, equality of all before the law, and equal protection of the law, the decision which reads as follows:

I- PARTIES

I.1. APPLICANTS: Mr. Bourama SININTA, Mama FOFANA, Sinaly KONTA, Lassiné NIARE, Karim FOFANA, Sékou Amadou KONTA, Ba Moulaye FOFANA, Ba Zoumana NIARE, Mady FOFANA, Séko MININDIOU, Mady TANGARA, Bachaka NIARE, Tiémoko KONATE, Ousmane SAMAKE, Bachaka NIARE, Mamoutou NIARE, Seko NIONO, Ba Oumarou KOITA, Mama SININTA, Papou TOURE, Issa KONTA, Sénou SANGALE, Karim DEMBELE, Kassim TRAORE, Yassouma TRAORE, Lassina TRAORE, Bassidi Damadi TRAORE, Bassidi Damadi TRAORE, TOMOTA, Modibo TOMOTA, Ousmane TOMOTA, Dramane SANOGO, Adama NABO, Bakira TRAORE, Bakira KANE, Bakira CAMARA, Mamadou SININTA, Djikiné COULIBALY, Bakoroba COULIBALY, Minkora COULIBALY, Sétigui COULIBALY; Ali TOMOTA, Boureima TOMOTA, Amsa TOMOTA, Moussa MADJE, Balla DIARRA, Bakary TOMOTA, Alassane DJENEPO, Yacouba NIONO, Modibo DIARRA, Solomane DIARRA, Adama MAIGA, Sory DIENTA, Konoba DIENTA, Bazoumana DIENTA, Zoumana KOITA, Bana O TRAORE, Bouba TRAORE, Bakoroba BERTHE, Madou TRAORE, Aguibou KOITA, Sékou DJENEPO, Baba NIARE, Mady KANE, Bachaka FOFANA, Kassim SININTA, Moussa KEITA; Seko FOFANA, Sékou CAMARA, Boubacar BALLO, Yaya SENGO, Salia DIARRA, Siaka Niaré, Mady KANTE, Ibrahim SINITA, Mmamadou DIANE, Bakou DIARRA, Karim FOFANA, Bakary TOMOTA, Mama TRAORE, Yacou BALLA, Mady SACKO, Mamadou TRAORE, Adama COULIBALy,

BAKARY DJENEPO, Souleymane TANGARA, Mamadou SYLLA, Bamayi TRAORE, Mama DIARRA, Aba TRAORE, Dogoni TRAORE, Drissa SANOGO, Moh TANGARA, Abdoulaye TANGARA, Sidiki KONYA, Bayani KONTA, Madou BERTHE, Mamou SYLLA, Boubacar SAMAKE, Zoumana SININTA, Karamoko NIARE, Modibo DJIRE, Bakary NIARE, Baba FOFANA, Moussa SININSE ou, Papa KISARLE , Alassane KEITA, Kotié DIARRA, Sidiki Konta, Mamadou BALLO, Kassim TRAORE, Adama TIENTA, Békéné DIAKITE, Chaka NIARE, Salia DIARRA, Mamoutou SYLLA, and Bakary NIARE, all domiciled in Badalabougou (Bamako) and represented by Maître Mariam DIAWARA lawyer, with office address at Rue 603, Porte 116, BP 696, Darsalam Bamako, Mali, Tel/fax: 00223 20228133-0022366748123;

I.2- DEFENDANT: The Republic of Mali through the Ministry of Housing, Land Affairs and Urban Planning, represented by the Directorate General of State Litigation;

II- FACTS AND PROCEDURE

II.1. Mr. Bourama SININTA and 119 others took the Republic of Mali to the Court of Justice in order to have the violation of their rights, particularly their property rights, to equality of all before the law and equal protection of the law established;

II.2. The Applicants applied to the court by an Application dated 05/12/2012 registered at the registry on 20 December 2012;

II.3. By another application dated 05/12/2012, also registered at the Registry on 20 December 2012, they requested the Court to have their case heard under an expedited procedure in accordance with Article 59.1 of the Rules of Procedure of the Court;

II.4. The two Applications were served on the Republic of Mali on 25/01/2013;

II.5. The Republic of Mali filed its statement of defense on 12 February 2013;

II.6. The Applicants replied to it by submissions dated 04 September 2013.

The case was heard and debated at the hearing of 11 February 2015;

The parties were represented;

II.7. The case was reserved for Decision on 23 April 2015;

On this date, the deliberation was adjourned to 18 May 2015, and then to 10 July 2015.

III- ARGUMENTS AND CLAIMS

III.1. On the jurisdiction of the Court, Mr Bourama SININTA and 119 others relied on Article 9.4 of the Supplementary Protocol A/SP.01/01/2005 of 01/19/2005 amending Protocol of A/P.1/7/91; They argued that they also avail themselves of the jurisprudence of the Court, particularly in Judgment N°. ECW/CC/JUD/02/10 of 14/05/2010, in that the mere invocation of claims of human rights violations, guaranteed by international legal instruments, committed on the territory of an ECOWAS Member State induces the jurisdiction of the Court;

III.2. On the admissibility of their application, they relied on the provisions of Article 10 of the Supplementary Protocol A/SP.01/01/2005 of 01/19/2005;

III.3. The Applicants stated that they are owners of the customary property rights on the surface area, which is the subject of land title N°. 16551 of Bamako, transferred to Mr. Moussa Baba TOUNKARA, an economic operator, for the construction of a hotel complex; that they were thus deprived of these rights by the Republic of Mali to the benefit of Mr. TOUNKARA without fair and prior compensation;

III.4. They advanced that they are Bozo fishermen, settled long before independence on the banks of the Niger River in Badalabougou, in the city of Bamako; that they benefit from customary rights on the lands they occupy; that without their knowledge the National Director of Lands has registered the said lands and ceded them to Mr. Moussa Baba TOUNKARA;

III.5. They maintained that their right is based on the provisions of Article 127 of Law N°. 86-91/AN-RM of 1 August 1986 on the Land and Property Code, which are worded as follows:

> "*Unregistered land, held by virtue of customary rights, exercised collectively or individually, is part of the private property of the State.*
>
> *The exercise of customary rights is confirmed as long as the State does not need the land on which they are exercised";*

III.6. They considered that the violation of their right to customary property resulted from the non-observance of the provisions of article 133 of the same law, which states that:

> *"When the State wishes, for a reason of general interest or public utility, to dispose of land on which customary rights are exercised, these are expropriated by an order of the Minister in charge of lands, specifying the reason relied upon by the administration.*
>
> *The decree is preceded by a public and contradictory inquiry intended to ascertain the existence of the rights, to determine their exact substance and the identity of the persons exercising them. Holders of customary rights are entitled to compensation for buildings, real estate developments and plantations. The amount will be fixed in accordance with the provisions of Article 130 above. If the compensation is collective, the amount of the compensation is divided between each of the co-owners.*

When the State wishes to dispose of land with a view to allocating it to a decentralised local authority, the compensation of the holders of customary rights is the responsibility of the latter';

III.7. In support of their allegations, they cited Law N°. 8691/AN-RM of 1 August 1986 on the State and Land Code, Articles 127, 129 and 133; the African Charter on Human and Peoples' Rights, Articles 3 and 14; and the Declaration of Human and Citizens' Rights of 1789, Article 17;

III.8. Finally, they asked the Court to:

1. **As to Form**:

- **declare** their application admissible;
- **retain** its jurisdiction to hear cases of violation of the human rights they plead ;

2. **As to merits of the case:**

- **find** that the Republic of Mali violated the human rights pleaded by them, in particular their right to property and to equality before the law, guaranteed by articles 3 and 14 of the African Charter on Human and Peoples' Rights, and by article 17 of the Universal Declaration of Human and Citizens' Rights of 1789 ;
- **order** the Republic of Mali to put an end to the violation of their rights, in particular by complying with the provisions of Article 133 of Law N°. 8691/ ANRM of 12/07/1986 on the State and Land Code of the Republic of Mali;
- **liquidate** the expenses and order the Republic of Mali to pay them;

III.9. In its defense brief, the Republic of Mali argued that all the problems relating to land tenure in the Republic of Mali are solved by Order N°. 00-27/P-RM of 22 March 2000, amended and ratified by Law N°. 02-008 of 12 February 2012, itself amended by Law N°. 2012-001 of 10 January 2012;

III.10. He added that this order in its Article 276 abrogates all previous contrary provisions, in particular: law N°. 86-91/AN-RM of 1 August 1986 relating to the State and Land Code and order N°. 92-042/PCTSP of 3 June 1992 amending law N°. 86-91/ANRM of 1 August 1986; that consequently, the domestic legal provisions invoked by the Applicants are no longer applicable;

It concluded that the application against the state was inadmissible.

III.11. Addressing the merits of the case, the Republic of Mali contested the allegations of the Applicants and affirmed that it did not recognise any customary law on the parcel of land in question;

The State maintained that the disputed area is its property and that there can be no doubt as to its ownership;

III.12. Having explained that the plot of land transferred to Mr. Moussa Baba TOUNKARA constitutes the land title N°. 16551 resulting from the division of the land title N°. 4678; that the latter also resulted from the division of the land titles N°. 521 and N°. 1456 registered respectively on 5 October 1928 and 5 May 1949 in the name of the French State; that at independence, it inherited the said lands from the former coloniser;

III.13. However, the State of Mali pointed out that the Applicants can in no way prove the existence of land rights nor contest either by administrative act or on the basis of a judicial procedure attesting to their ownership, the violation of which can lead to the current referral to the Court ;

III.14. The Respondent state pointed out that the Applicants failed to mention the legal proceedings initiated before the national courts;

III.15. Thus, it indicated that following Order N°. 1631 of 30 December 2010, the Court of First Instance of the Commune V of the District of Bamako ordered their expulsion from land title N°. 16551, that on their appeal they argued their case through two lawyers before the Court of Appeal of Bamako which, following decision N°. 95 of 1 April 2011, upheld the disputed order; that following appeal Decision N°. 01 of 25 January 2012, Counsel for the Applicants filed an appeal in cassation against the Decision of the Court of Appeals;

III.16. The State argued that it is easy to see that there is no violation of human rights on its part; therefore, requested the Court :

As to Formal presentation, state what is required by law as to the admissibility of the action.

As to merits of the case:

- **Declare** that there is no violation of human rights;
- **Dismiss** the appeal as unfounded;
- **Order** the Applicants to bear the cost;

IV-MOTIVATION

On the closing of the deliberations and the reopening of the oral proceedings

IV.1. Article 58 of the Rules of the Community Court of Justice - ECOWAS provides that ***"the Court may order the reopening of the oral proceedings"***;

IV.2. The Court emphasised that the case had already been debated and the matter was reserved for decision at the hearing of 27/02/2014;

As of that date, the decision was not made and the record does not indicate that the case was dismissed;

However, there was a change in the composition that had previously heard the case;

In such a case, judicial practice would dictate that the deliberations be set aside;

IV.3. It is up to the Court to order it, either at the request of the parties or of one of them, or *ex officio*;

In order to allow the new composition of the Court to regularly hear the case, the fulfilment of this formality is imposed on it;

IV.4. In these conditions, it was important for the Court to order, *ex officio*, that the deliberations be adjourned and that the oral proceedings be reopened;

On the motion for expedited procedure

IV.5. Mr. Bourama SININTA and 119 others requested the Court to order the implementation of the Expedited Procedure in accordance with Article 59 of the Rules of Court as a matter of urgency;

They justified the urgency by the fact that Mr. Moussa Baba TOUNKARA, beneficiary of land title N°. 16551, requested and obtained their expulsion by Decision N°. 95 of 1 April 2011 of the Court of Appeal of Bamako confirming the interim order N°. 1631 of 30 December 2010 of the Court of First Instance of Commune V of the District of Bamako; that he wanted to proceed with their expulsion thus continuing to violate their rights;

IV.6. The Republic of Mali did not make any observations on the expedited procedure filed by the Applicants. ;

IV.7. Article 59.1 of the Rules of Procedure of the Community Court of Justice - ECOWAS provides that**: "On application by the Applicant or the Defendant, the President may exceptionally decide, on the basis of the facts before him and after hearing the other party, that a case is to be determined pursuant to**

an expedited procedure derogating from the provisions of these Rules, where the particular urgency of the case requires the Court shall give its ruling with the minimum of delay";

Point 2 of the Article requires that the request to submit a case to an expedited procedure be made by a separate document at the time of the filing of the application or the statement of defence;

IV.8. The application for expedited proceedings was filed with the Court Registry, by separate document, on 23 September 2014, at the same time as the motion to institute proceedings;

It therefore appears that the application was made in the form and within the time frame required by the Rules;

It is then admissible and the Court should have considered it;

Indeed, the reason put forward by the Applicants, namely the imminence of their expulsion, justifies the need to decide on the measure requested;

An application for expedited procedure tends to have the case tried in relatively short periods of time;

In this case, the case, having been directly enlisted on the merits, was debated and reserved for deliberation;

It then follows that the motion for expedited proceedings has become moot;

On the Application to hear witnesses

IV.9. The Applicants, by motion dated 04 September 2013, requested the Court to hear witnesses, notably the National Director of Lands and the Mayor of the Commune V of the District of Bamako and that of the Applicant Bourama SININTA;

IV.10. It is undeniable that both Protocol A/P.1/7/91 (Article 17) and the Rules of Court (Article 43) allow the hearing of witnesses;

But in this case, the hearing of the National Director of Lands and Cadastre, the Mayor of Commune V of the District of Bamako and Moussa SININTA, one of the Applicants, is not necessary for the manifestation of the truth;

The request for an investigation is therefore not appropriate;

It should then be said that there are no grounds for ordering the hearing of witnesses;

On the objection of inadmissibility raised by the Republic of Mali

IV.11. The Republic of Mali argued that Law N°. 86-91/AN-RM of 1 August 1986 on the State and Land Code cited by the Applicants is no longer in its legal order because it was replaced by Order N°. 00-27/P-RM of 22 March 2000, modified and ratified by Law N°. 02-008 of 12 February 2012; that therefore, the application should be declared inadmissible;

IV.12. On this objection, the Applicants replied that their dispute arose in 1996; that at that time, the applicable law was that N°. 86-91/AN-RM of 1 August 1986; that this law still serves as a legal basis for their claims; that the order cited by the Republic of Mali cannot serve as a legal basis for a dispute prior to its entry into force;

IV.13. It is undeniable that Law N°. 86-91/AN-RM of 1 August 1986 on the State and Land Code no longer appears in the legal system of the Republic of Mali;

Indeed, the order N°. 00-27/P-RM of 22 March 2000, modified and ratified by the law N°. 02-008 of 12 February 2012 in its Article 276 provides: **"the present law repeals all previous provisions contrary to it, in particular..."**.

Law N°. 86-91/AN-RM of 1 August 1986 on the State and Land Code, the order N°. 92-042/PCTSP of 3 June modifying the N°. 86-91/AN-RM of 1 August 1986";

But, is the mention of a repealed national law a source of inadmissibility of an Application?

The Court pointed out that the admissibility of an application before it is not determined by the national laws of the Member States;

The conditions for the admissibility of an application for a human rights violation before the Community Court of Justice - ECOWAS are set by the provisions of Article 10.d of the Supplementary Protocol (A/SP.1/01/05) amending Protocol (A/P.1/7/91) on the Community Court of Justice;

These conditions are the non-anonymity of the application and the absence of prior referral to another competent international court;

However, in the present case, the application of Mr. Bourama SININTA and 119 others is neither anonymous nor pending before another international court;

Moreover, the objection raised by the Defendant is not among the grounds for inadmissibility;

Its objection should be declared ill-founded and rejected;

On the violation of customary property rights

IV.14. The Applicants considered that their human rights, particularly their property rights, were violated by the Republic of Mali through its state-owned domain service;

IV.15. They considered that the violation consists of the non-observance by the Republic of Mali of law N°. 86-91/AN-RM of 1 August 1986 on the State and Land Code in the Republic of Mali, article 14 of the African Charter on Human and Peoples'

Rights and Article 17 of the Universal Declaration of Human and Citizens' Rights;

IV.16. The texts relied on by the Applicants respectively provide:

Article 14 of the African Charter on Human and Peoples' Rights: *"The right to property is guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws"*;

Article 17 of the Universal Declaration of the Rights of Man and of the Citizen of 1789: *"Property is an inviolable and sacred right, no one can be deprived of it, except when the public necessity, legally established, obviously requires it, and under the condition of a fair and preliminary compensation"*;

IV.17. What is the right of ownership recognised and guaranteed by the legal instruments cited?

The Court points out that the Declaration of the Rights of Man and of the Citizen of 1789 is a national norm, of French origin, possibly taken up by other national legal orders;

It is therefore not applicable before the Community Court of Justice;

Indeed, before the Court only the international instruments to which the Defendant State is a party are applicable, in accordance with established jurisprudence (*cf.* the case of **Pascal A. BODJONA against the Republic of Togo** - Ruling N°. ECW/CCJ/JUD/06/15 of 24th April, 2015);

In the said judgment, the Court held that in its analysis it ***"will therefore refer exclusively to norms of international law, norms that are in principle binding on the States that have subscribed to them..."***;

IV.18. From the provision of the African Charter on Human and Peoples' Rights, it appears that the right to property is a fundamental right that can only be challenged by public necessity or by general interest after fair and prior compensation;

IV.19. However, in order to benefit from this provision, it is important that the Applicants justify their right of ownership and the behaviour of the Republic of Mali, which would prevent them from enjoying it in accordance with the law;

The Court noted that customary law as reflected in the statutory provisions in Mali does not confer a right of ownership on its holder;

It is analyzed as a simple right of use;

IV.20. The Court noted that the Applicants could not produce any administrative title recognizing their right to the zone in which the parcel of land subject to land title N°. 16551 of Bamako is located;

However, it is a principle of law that any claim articulated by a Plaintiff regarding the violation of human rights must be substantiated;

Moreover, the jurisprudence of the Court in this area is unequivocal;

Indeed, in the case of **DAOUDA GARBA V. THE REPUBLIC OF BENIN** (Ruling N°: ECW/CCJ/JUD/01/10 of 17 February 2010), the Court relied on the subject in paragraph 35 in the following terms:

> ***"It is a general rule of law that during a trial the party making the allegations must provide proof thereof. The constitution and the demonstration of proof therefore is the responsibility of the parties in litigation. They must use all legal grounds and provide evidence to support their claims. This evidence must be convincing in order to establish a correlation between it and the alleged facts..."***;

IV.21. The Court noted, on the other hand, that the Republic of Mali justified its rights on the said parcel by producing proof of its ownership, namely the registration documents of the zone since 5 October 1928 and 5 May 1948 in the name of the French State of which it holds its rights;

IV.22. It appears, then, that the Republic of Mali is the owner of the rights pertaining to the parcel in question;

Consequently, the transfer he made in favour of Mr. Moussa TOUNKARA cannot constitute a violation of the Human Rights of the Applicants;

On the violation of the principle of equality of all before the law and equal protection of the law:

IV.23. The Applicants considered that there was a breach of equality of all before the law without specifying in what manner this breach of the principle consists;

IV.24. They alleged violation of Article 3 of the African Charter on Human and Peoples' Rights and Article 6-1 of the European Convention on Human Rights;

IV.25. The provisions relied on by the Applicants are worded as follows:

African Charter on Human and Peoples' Rights:

Article 3: *"1. Every individual shall be equal before the law.*

2. "Every individual shall be entitled to equal protection of the law"

The European Convention on Human Rights:

Article 6: "1-*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of any dispute concerning his civil rights and obligations or of any criminal charge against him.*

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.";

IV.26. The Defendant indicated that the Applicants voluntarily silenced the proceedings initiated before the national courts;

IV.27. The principle of equality of all before the law means that the law is the same for all citizens and that it applies indiscriminately to all;

No individual or group of individuals should therefore benefit from privileges not guaranteed by law.

Equal protection of the law consists in ensuring the protection of the law for every citizen.

IV.28. Is it possible to retain in this case that the principle of equality before the law and equal protection of the law were affected in relation to the Applicants?

IV.29. The Court must first point out that the European Convention on Human Rights cannot be invoked before it, for the simple reason that neither the respondent State nor the member States of the Community of West African States (ECOWAS) in general are not parties to this international treaty;

IV.30. Upon examination of the documents in the file, the Court noted that the Applicants were brought before the national courts by the new purchaser of the parcel of land covered by land title N°. 16551 of Bamako, and that they were able to exercise the remedies provided by law against the decisions delivered against them;

IV.31- In addition, the Applicants were unable to justify that they were discriminated against in the transfer of the parcel of land covered by the 16551 land title of Bamako;

Indeed, they did not even claim to have acquired the said parcel and to have registered a refusal by the Republic of Mali to transfer it to them;

IV.32. In the light of the foregoing, it appears that the claims of the Applicants are unfounded; It is then appropriate to dismiss them;

- On costs

Article 66.2 of the Rules of Procedure of the Court of Justice of the ECOWAS Community provides that: **"Any unsuccessful party shall be ordered to pay the costs, if there is an agreement to that effect"**

In the present case, the action of the Applicants did not prosper;

Moreover, the Republic of Mali expressly requested that they be ordered to pay the costs;

The costs should therefore be borne by them;

ON THESE GROUNDS

The Court, Sitting in a public hearing, in first and last resort, after hearing both parties, in respect of human rights violation;

On the closing of the deliberations and the reopening of the oral proceedings;

- **Admits** the motion for expedited procedure made by Mr. Bourama SININTA and 119 others;

- **Holds** that it has become moot;

- **Finds** that there is no need to order the hearing of witnesses;

- **Admits** the plea of inadmissibility presented by the Republic of Mali based on the authority of *res judicata*.

- **Declares** it unfounded, dismisses it;

- **Admits** the application of Mr. Bourama SININTA and 119 others;

- **Declares** it to be ill-founded;

- **Dismisses** the Applicants of their claims;

- **Order** the Applicants to bear the costs.

THUS ADJUDGED, PRONOUNCED AND SIGNED, IN PUBLIC HEARING, AT THE SEAT OF THE COURT, IN ABUJA, THIS DAY 30 JUNE 2015;

AND THE FOLLOWING APPENDED THEIR SIGNATURES:

- Hon. Justice Jérôme TRAORE - *Président;*

- Hon. Justice Yaya BOIRO - *Member;*

- Hon. Justice Hamèye Founé MAHALMADANE - *Member;*

Assisted by **Athanase ATANNON (Esq.),** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

THIS THURSDAY, 30TH JUNE 2015

SUIT NO: ECW/CCJ/APP/25/12
SUIT NO: ECW/CCJ/APP/02/13
JUDGMENT NO: ECW/CCJ/JUD/14/15

BETWEEN
ASSOCIATION OF RETIRED VOLUNTARY WORKERS (ATVR) - *PLAINTIFF*

AND
THE REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDENT*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MARIAM DIAWARA (ESQ.)** - *FOR THE PLAINTIFF*
2. **THE DIRECTORATE GENERAL OF STATE LITIGATION** - *FOR THE DEFENDANT*

-Violation of the right to equality before the law
-Violation of the right to information.

SUMMARY OF FACTS

The Republic of Mali, with the assistance of the World Bank, initiated in 1985 a program of voluntary departure of retired civil servants with a view to reducing public service costs. To encourage these officers to join the program, the State made certain commitments. In view of the inaction of the State, the Association of Retired Workers (ATVR) sued the state to the courts to produce the framework agreement signed between it and the World Bank. The Applicant, faced with the refusal of the Republic of Mali to produce the said report despite the decisions handed down by the courts, appealed to the Court of Justice with the view that it finds the violation by the Republic of Mal of their rights to the equality before the law and information.

The Republic of Mali, for its part, asked the Court to declare inadmissible the action of the ATVR because of the transaction agreed on between the parties. In the alternative, the State of Mali asked that the Applicants be dismissed all their claims.

LEGAL ISSUES

1. *Does the Court have jurisdiction to hear the Application submitted to it by the Applicant?*

2. *Can the Application for expedited procedure be successful?*

3. *Does the Applicant have standing?*

DECISION OF THE COURT

The Court in its decision, considered that it has jurisdiction to hear the Application because the expression violation of man mentioned

in the Application means violation of human rights and that it is a slip of the tongue. It concluded that the application does not have any particular urgency for it to be submitted to the expedited procedure.

The Court, considering the documents in the file, considered that there was a transaction between the parties and that the action of the Applicants must be declared inadmissible for lack of right to act.

DELIVERS THE FOLLOWING JUDGMENT:

Between

THE ASSOCIATION OF VOLUNTARILY RETIRED WORKERS (ATVR), PLAINTIFF, a body having the legal capacity to act as a representative for its members (402 members), and for and on behalf of the Chairman of the Executive Board of ATVR, Mr. Mohamed EL Béchir Ben Abdallah, whose headquarters is located at Bourse de Travail, Bamako.

Plaintiff Counsel: Maître Mariam Diawara, Barrister-at-Law, Darsalam, rue 603, Porte 116, BP 696 Bamako, Republic of Mali.

And

THE REPUBLIC OF MALI, DEFENDANT, represented by the General Directorate, State Litigations Department, Bamako, Mali.

THE COURT,

Having regard to the 24 July 1993 Revised Treaty establishing the Economic Community of West African States (ECOWAS);

Having regard to the 10 December 1948 Universal Declaration of Human Rights;

Having regard to the 27 June 1981 African Charter on Human and Peoples' Rights;

Having regard to the 19 January 2005 Supplementary Protocol A/P.1/7/91 on the Community Court of Justice, ECOWAS;

Having regard to the 3 June 2002 Rules of the Community Court of Justice, ECOWAS;

Having regard to the Applications on human rights violation as submitted by the Association of Voluntarily Retired Workers (ATVR) of the Republic of Mali, namely:

- Application dated 4 of April 2012 and registered at the Court on 20 December 2012 asking the Curt to find that the Republic of Mali violated the rights of ATVR;

- Application dated 6 February 2013 and registered at the Court on 15 February 2013 seeking an expedited procedure and an expert's report establishing the entitlements and various benefits provided for in the disputed framework agreement, which, according to the Plaintiff, must be produced by the Republic of Mali among the pleadings for the court case;

Having regard to the pleadings and orders filed by the Parties and annexed to the case-file of the procedure;

Having heard the submissions of both Parties;

Having deliberated on the Parties' submissions in accordance with the law.

PRESENTATION OF THE FACTS AND PROCEDURE

Whereas it is established from the pleadings filed in connection with the procedure before the Court, that during the course of the year 1985, the Republic of Mali, with the financial support of the World Bank, initiated a programme for the voluntary retirement of certain civil servants, with a view to reduce the financial burden of the civil service; that to that end, Act N^{O}: 91-002/ANRM of 24 January 1991, creating a system of voluntary retirement for civil servants in the civil service, was passed into law, under General Civil Service Act, the Judicial Act and the Labour Act, for the benefit of civil servants;

To encourage the civil servants to subscribe to this programme, the Republic of Mali made certain commitments, notably regarding:

- Paying back the social security contributions of voluntarily retired workers who had not been in continuous active service for 15 years before their voluntary retirement;

- Payment of retirement benefits using the legal age limit as the starting point;

- Payment of additional amounts for beneficiaries on levels A, B and C, in accordance with the measures of assistance provided for under the framework of the national social security;

In the year 2000, the ATVR dragged the Republic of Mali before the Industrial Court, and thereafter, before the Bamako Court of Appeal. Each of these courts ordered the Republic of Mali to produce the framework agreement which was signed between the World Bank and the Republic of Mali, but to no avail.

On 20 December 2012, confronted with delays in the proceedings of the domestic courts, ATVR brought their case before the ECOWAS Court of Justice, via an application dated 4 April 2012 asking the Court to find that the Republic of Mali violated its rights, notably, the right to equality before the law and the right to information, in that the Republic of Mali had not honoured its commitments as contained in the framework agreement reached with the World Bank.

By the above-mentioned Application, ATVR asked the Court:

In terms of formal presentation,

- To **declare** that the Court has jurisdiction to hear the case on human rights violation brought before it, as invoked by the Plaintiff;

- To **rule** that a national or an international expert be appointed to establish the entitlements and benefits accruing to the subscribers of the programme (members) under the framework agreement signed between the Republic of Mali and the World Bank;

- To **order** the Republic of Mali to file among the pleadings of the case before Court, the framework agreement, and also order preliminary measures or instructions.

In terms of the merits of the case,

- To **find** that the Republic of Mali violated the human rights invoked by the Plaintiff, notably the right to equality before the law as guaranteed by Article 3 of the African Charter on Human and Peoples' Rights;

- To **order** the Republic of Mali to cease the violation of the rights of the ATVR members, especially by availing them of the benefits provided for in the framework agreement signed with the World Bank;

- To **pay** to each ATVR member the sum of 10,000,000 CFA Francs, for all the harms suffered by them;

- To **order** the Republic of Mali to bear all costs relating to the instant procedure.

By a supplementary application dated 6 February 2013 filed before the Court, ATVR further asked for an expedited procedure for examining his case, in line with the provisions of Article 59 of the Rules of the Court, given the precarious financial situation of its members;

On its part, the Republic of Mali asked the Court to declare inadmissible the application filed by ATVR, on the ground that there is already an agreement reached between them as parties in the matter at stake;

Alternatively, the Republic of Mali asked the Court to rule that the Republic of Mali has observed all its commitments, and to dismiss all the claims made by the Plaintiff.

AS TO FORMAL PRESENTATION

1. Regarding the jurisdiction of the Court

Before putting up any defence on the merits of the case, the Republic of Mali sought to justify its claim that the Honourable Court lacks the jurisdiction to hear the case, on the ground that the Court cannot adjudicate on cases of "human violation", as mentioned in the above application dated 4 April 2012, but rather on cases of "human rights violation";

ATVR, through its Counsel, Maître Mariam Diawara, Lawyer registered with Bar Association of Bamako, submits that the said plea-in-law is frivolous, and claims that the application it filed before the Court is indeed for "human rights violation", and thus left the Court to rule on that point as it may deem fit, within the powers conferred on it;

The Court notes that by the expression "human violation", as contained in the said application, ATVR meant "human rights violation", as could be deduced from the ensuing submissions it had made;

At any rate, it is a case of obvious slip, which has no effect on the powers conferred on the Court for adjudicating on the matter submitted before it, pursuant to the provisions of Article 9, (4) of the Supplementary Protocol of 2005, which provides that: "The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State."

Hence, the objection raised in that regard is dismissed as ill- founded.

2. Regarding the application for expedited procedure

The Court holds that the matter before it no longer carries any urgency, within the meaning of Article 59 of the Rules of the Court, and that whatever the case may be, all the points in dispute in the instant case are scheduled for deliberation on the merits;

Therefore, the Application for expedited procedure has become purposeless and must be dismissed.

3. Regarding the order of estoppel sought on the ground that the Applicant lacks locus standi

Whereas the Republic of Mali raised the issue of inadmissibility of the Application on the strength of an agreement reached between the Parties; that indeed, according to the Republic of Mali, following lengthy negotiations between ATVR and the Republic of Mali, through the National Labour Union of Mali (UNTM), it was decided through a mutual agreement, that the dispute shall be terminated, through a Memorandum of Understanding dated 18 July 2007 and signed by the Parties. The Defendant is of the view that the agreement certifies that Republic of Mali had taken cognisance of the demands of the workers concerned, in terms of having to pay them their entitlements in accordance with the commitments it had made to the World Bank, for which 35.1 Billion CFA Francs had been granted, as can be seen from the letter dated 20 December 2006 from the World Bank filed among the pleadings in the case-file, and as claimed by the Applicant. Therefore, the provisions of the Malian Civil Code are to be applied, to the extent that the transactions made between the Parties must be viewed in the light of those provisions, as a way by the Republic of Mali to fulfil the obligations binding on it;

Whereas ATVR objected to that argument, claiming that the Memorandum of Understanding relied on by the Republic of Mali dated 18 July 2007 cannot be enforced against it, since it was neither invited nor represented during the negotiations that led to the signing of the document; that as an association of workers retired from the public service, it does not have any link with the Labour Union of Mali (UNTM), as claimed by the Republic of Mali; that for that reason, there can be no confusion nor diversion of the instant matter;

The Court notes first and foremost that it has been admitted in the course of the proceedings that the Memorandum of Understanding dated 18 July 2007, signed within the framework of implementation of Act N^{O}. 91-002/ANRM of 24 January 1991, which created a voluntary retirement system for the civil service, as a result of a tripartite negotiation between the Government of the Republic of Mali, the Employers' Council

of Mali and the Labour Union of Mali, with the latter playing the role of legal representatives of ATVR, so as to terminate the claims made by ATVR;

The Memorandum of Understanding shows that the Voluntarily Retired Workers who met the requirements will enjoy and continue to enjoy their pension entitlements.

Moreover, within the framework of the national social security scheme and the assistance measures undertaken, Two Billion Five Hundred Million CFA Francs (CFA F 2,500,000,000) must have been paid to the Voluntarily Retired Workers in 2007 and 2008;

In the instant case, it is has been admitted in the course of the proceedings that in implementing the Memorandum of Understanding, the Republic of Mali indeed discharged its obligations towards 1,073 Voluntarily Retired Workers by paying them their pension contributions in full, notably from 4% employee salary contribution and 8% employers' contribution, as provided for in Act N°. 91-002/ANRM of 24 January 1991 on Voluntary Retirement;

As regards payment of retirement benefits starting from the legal age limit, it is has been admitted from the proceedings and pleadings relating to the proceedings, notably letters of discontinuance of the ATVR Council dated 31 January 2007, that the Republic of Mali did carry out its commitments and that 1,206 Voluntarily Retired Workers from the Civil Service and the Military were paid their due pension funds, representing a total of 1, 208, 227,572 CFA Francs;

The Court equally finds, regarding the assistance measures provided for in the said Memorandum of Understanding and in connection with the national social security scheme, that the Republic of Mali indeed disbursed an amount worth 2,500,000,000 CFA Francs in two instalments, representing One Billion on 19 November 2007 and One and a Half Billion on 12 April 2008, all through the intermediary of Maître Tidiani

Dem, a notary appointed by the Commission instituted by the former Executive Board of Voluntarily Retired Workers;

Whereas moreover, the payment of this amount was confirmed by a complaint letter on diversion of funds dated 27 January 2010 written by the Chairman of the Executive Board of the ATVR, Mr. Mohamed El Béchir Ben Abdallah and addressed to the Public Prosecutor against the said notary and others;

Whereas this observation is supported by the fact that even in his complaint letter duly signed by him, Mr. Mohamed El Béchir Ben Abdallah clearly stated the following*: "On 19 November, One Billion CFA Francs was lodged with the Ministry of Labour and Civil Service for the 2007 fiscal year for Voluntarily Retired Workers. On 12 April 2008, One and Half Billion was transferred into the account of the Ministry of Labour and Civil Service for the 2008 fiscal year, for ATVR. These sums were paid to the notary, Maître Tidiani Dem on regular basis, who was unilaterally appointed by the Commission instituted by the former Executive Board in charge of the management of the social security fund assigned to the Voluntarily Retired Workers by the Government of the Republic of Mali and the Ministry of Civil Service…"*

Whereas again, the Court finds that the notary mentioned above was voluntarily designated by the Voluntarily Retired Workers for the purposes of receiving the amount indicated above, and that the Republic of Mali was not associated with that arrangement;

Whereas in the light of the foregoing, the Court holds that there was a transaction between the Parties and therefore, the action of the Plaintiff must be declared inadmissible for lack of locus standi.

4. Regarding the counter-claim

Whereas the Republic of Mali avers that apart from the fact that the legal action brought against it by the Plaintiff is both frivolous and an abuse of

court process, the action amounts to negligence within the meaning of Article 127 of General Rules of Obligations of the Republic of Mali and that in that respect, the Republic of Mali asks the Court to order the Plaintiff to pay it the sum of 10,000, 000 CFA Francs as compensation for all the harms it has suffered;

Whereas the Plaintiff asks the Court to dismiss that counter-claim, alleging that the Republic of Mali failed to justify that request;

Whereas in taking into account the circumstances surrounding the case, the Court holds that the action of the Plaintiff, even though doomed to fail, is neither frivolous nor an abuse of court process, does not amount to negligence, to the extent that it would warrant the damages claimed by the Defendant;

Whereas the counter-claim made by the Republic of Mali is thus dismissed.

5. Regarding costs

Whereas the Plaintiff is unsuccessful in the instant case, and pursuant to Article 66 of the Rules of the ECOWAS Court of Justice, shall bear the costs as requested by the Republic of Mali.

FOR THESE REASONS

The Court,

Adjudicating publicly, after hearing both Parties, in a matter on human rights violation, in first and last resort;

As to formal presentation:

- **Declares** that it has jurisdiction to adjudicate on the case;
- **Adjudges** that the application for expedited procedure is purposeless;

- **Admits** the order for estoppel sought by the Defendant on the ground that the Applicant lacks locus standi, and declares that the order sought by the Defendant, as to the action brought by the Applicant being foreclosed, is well grounded;

- **Declares**, consequently, that the action brought by ATVR is inadmissible;

- **Dismisses** the request by the Republic of Mali seeking damages;

- **Orders** the Applicant to bear the costs.

Thus made, declared and pronounced in a public hearing at Abuja, on the day, month and the year stated above.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- Hon. Justice Jérôme TRAORE - *Presiding;*

- Hon. Justice Yaya BOIRO - *Member;*

- Hon. Justice Hamèye Founé MAHALMADANE - *Member.*

Assisted by: **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON 30TH DAY OF JUNE 2015

SUIT NO: ECW/CCJ/APP/16/13
JUDGMENT NO: ECW/CCJ/JUD/15/15

BETWEEN
ELI HAGGAR & 166 FORMER EMPLOYEES OF SOCIÉTÉ NIGÉRIENNE DES PRODUITS PÉTROLIERS (SONIDEP) - *PLAINTIFFS*

AND
1. THE REPUBLIC OF NIGER;
2. SOCIETE NIGERIENNE DES PRODUITS PETROLIERS (SONIDEP) } *DEFENDANTS*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDENT*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MAZET PATRICK (ESQ.)** - *FOR THE PLAINTIFF*
2. **AISSATOU ZADA (ESQ.)** - *FOR THE 1ST DEFENDANT*
3. **MARC LE BIHAN (ESQ.)** - *FOR THE 2ND DEFENDANT*

-Violation of human rights
- Violation of the right to an employment
- Violation of the right to a fair trial

SUMMARY OF FACTS

The Applicants, all former workers of SONIDEP, alleged that, in the face of the financial difficulties of the company, an agreement was negotiated and 167 staff members agreed to leave to allow the company to exist. They added that after their departure the company proceeded to recruit, thus casting doubt on the difficulties raised in negotiating the departure of the 167 former employees. They concluded that the dismissal was vitiated by fraud and that it constituted a violation of their right to employment. They requested that the Court should declare that there was a violation and draw the necessary conclusions.

The Republic of Niger and SONIDEP replied that the restructuring plan was adopted in order to cope with the financial difficulties the company was undergoing and that the plan concerned workers due for retirement, those undergoing training and those on leave. They also added that each of the ex employees was compensated. They requested the Court to find that no violation was committed and to reject the Application of the Applicants

LEGAL ISSUES

1. *Is the Application brought before the national courts a source of inadmissibility of an Application by the Community Court of Justice?*

2. *Are all the conditions of admissibility met?*

DECISION OF THE COURT

In its Decision, the Court rejected the objection by the Defendants to declare the Application of the Applicants inadmissible, since the

submission of a case to a national court does not relieve the Court of jurisdiction to hear a case, and consequently the action for inadmissibility by the Defendants must be dismissed.

The Court concluded on the merits that the Application of the "167 former staff members of SONIDEP" did not meet an essential condition prescribed for admissibility by Article 10 of the Supplementary Protocol of 19 January 2005, namely that the application was not anonymous and that the alleged representatives did not have the capacity to act in the name and on behalf of the applicants. In these circumstances, their action cannot be received and should be declared inadmissible on the grounds of the anonymity of the Application and the lack of capacity of the representatives.

JUDGMENT OF THE COURT

The Court thus constituted delivered the following Judgment, in the case of the «**167 ex-employees** of the **Société Nigérienne des Produits Pétroliers (SONIDEP)**», represented by Eli HAGGAR and Boubacar KANFIDENI against the **Republic of Niger** and the **Société Nigérienne des Produits Pétroliers (SONIDEP)**, through which Applicants/Plaintiffs sought from the Court to find a flagrant violation of their human rights, and to award costs against the defending Member State:

I. PARTIES

I.1. **APPLICANTS**: **167 ex-employees** of the **Société Nigérienne des Produits Pétroliers (SONIDEP)**, represented by Eli HAGGAR and Boubacar KANFIDENI, assisted by their Counsel MAZET PATRICK (Esq.), Lawyer registered with the Bar in Niger, BP: 20 Niamey-Niger Tel: 96.70.3181/ 92.7031.8, Rue Kalley-Amirou;

I.2. **DEFENDANTS**:

- **The Republic of Niger**, represented by the Secretary General to the Government, whose Conusel is Aissatou ZADA (Esq.), Lawyer registered with the Bar in Niger; BP: 10148 Niamey, Tel: 00227.20.74.05.58 ;

- The **Société Nigérienne des Produits Pétroliers (SONIDEP)**, whose Counsel is Marc LE BIHAN (Esq.), Lawyer registered with the Bar in Niger, BP: 343 Niamey;

II- FACTS AND PROCEDURE

II.1. In the course of the year 1997, while invoking the difficult financial position of the company, the **Société Nigérienne des Produits Pétroliers (SONIDEP)**, proposed a programme called

"***negotiated lay-off***" with its employees. It finally secured a Protocol Agreement with 167 of its former employees, in this regard, on 3 April 1998.

II.2. Many years after, while sensing that they had been dubbed by their former employer, these former employees, resolved to put the said Protocol Agreement asunder;

It was in the framework of this move that they brought a case before this Honourable Court, against the Republic of Niger and **SONIDEP**.

II.3. Thus, through an Application dated 5 August 2013, they filed a case against the **Republic of Niger** and the **Société Nigérienne des Produits Pétroliers (SONIDEP)**, seeking that this Honourable Court should find the violation, by the Defendants, of their right to gainful employment.

II.4. Service of the initiating Application was done on the Defendants on 19/09/2013;

II.5. The defence writs were respectively filed, by the Republic of Niger and SONIDEP, at the Registry, on 21 and 24 October 2013.

II.6. The case came up for hearing on 24 April 2015;

The parties were in attendance;

II.7. The case was slated for deliberation, for judgment to be delivered, at the seat of the Court in Abuja on 18 May 2015; But, instead of this date, the deliberations were shifted to 30 June 2015;

III. PLEAS-IN-LAW AND CLAIMS

III.1. Applicants averred that during the course of the year 1997, the **Société Nigérienne des Produits Pétroliers (SONIDEP)** presented an alarming state of its financial position, to them; this was with a view to facing the looming danger; they further stated

that SONIDEP claimed that far reaching and pressing solutions needed to be worked out, in order, not only to avoid the company going under, but also to make it become better performing; thus, SONIDEP went on a great sensitization of its employees, with strong support from the Staff Representatives, to convince them on the need to carry out some reforms; they further claimed that it was within the framework of these reforms that SONIDEP proposed to them, a "***negotiated lay-off***" of some of its employees;

III.2. They claimed that they adhered to this proposal; and that, to finalise the proposed measure, a Protocol Agreement on "***negotiated lay-off***" was drafted and signed by both SONIDEP the concerned workers;

III.3. They added that, it was in these circumstances that 167 workers accepted to make the sacrifice, by negotiating their departure; they however stated that all the proposed measures promised them, which convinced them to accept the meagre severance allowances paid them, at the time of departure are yet to be given to them; they claimed that this was more surprising, as the World Bank released a sum of thirty billion CFA Francs, in loan, to cover the operation;

III.4. After their lay-off, SONIDEP rather went on a massive recruitment drive, to get them replaced; the new entrants are majorly parents, friends and past workers of SONIDEP;

III.5. It thereafter dawned on them that all what they were promised was total lies; the whole picture presented to them was fake; that SONIDEP rather exploited the sacrifice made by its former workers, for other purposes;

III.6. Applicants claimed that there was vice of consent, especially fraud, or willful representation, owing to lies, by which SONIDEP conned them to adhere to the proposed plan;

III.7. They concluded that they were sacked by SONIDEP; and that such sack was carried out in irregularity; that they took their case before the national courts, but these courts failed to adjudicate fairly;

III.8. They claimed they approached the Industrial Court in Niamey, in a case seeking reparation against their former employer; and that via judgment N°: 85/2005 of 20 September 2005, the said Court declared its lack of jurisdiction to entertain the case; that they appealed against this decision of the Industrial Court, and that in Judgment n°130 of 5 June 2006, the Appeal Court in Niamey upheld the attacked decision; but, upon further move, the Supreme Court, in Judgment N°: 08-113 du/S of 8 May 2008, annulled, and set aside the judgment by the Appeal Court, while ordering the case to be re-examined by another panel of judges, properly constituted at the Appeal Court; that upon being properly composed, the Appeal Court again struck out all their claims; and that upon a second appearance before the Supreme Court, their case was thrown out;

III.9. They claimed that SONIDEP used fraudulent means, to push them to lose their jobs;

III.10. They averred that these acts constitute flagrant violation of their right to gainful employment, thus, both SONIDEP and the Republic of Niger violated their right to work since 1998, and this is the ground for their present case before this Honourable Court, from which they seek redress for the violation of their human right;

III.11. In support of their claims, they invoked the International Covenant on Economic, Social and Cultural Rights of 1966, Article 6, of the African Charter on Human and Peoples' Rights, Articles 4 and 7 of the International Covenant on Civil and Political Rights, the Revise Treaty of ECOWAS, and Regulations, Conventions, Directives and Protocols on the Court, which are annexed to it;

III.12. They solicited from the Court, to order for the respect for the law, the principles of equity and the protection of human rights, and:

- To **declare** their Application as admissible, as to form;
- To **adjudicate** on the instant case, by declaring its jurisdiction to entertain it;
- To **declare** that their lay-off was carried out in irregularity;
- To **declare** that the said lay-off constitutes a violation of the rights to gainful employment;
- To **order** both SONIDEP and the Republic of Niger to pay them reparation, for the violation of the rights to gainful employment, such reparation that cannot be evaluated for less than five billion CFA Francs;

III.13. At the court hearing, Counsel for Applicants averred that the reparations sought was re-evaluated to the tune of ten billion CFA Francs;

III.14. The Defendants claimed, in their rejoinder dated 11 October 2013, which was filed at the Registry on 21 October 2013, by the Marc LE BIHAN and Co. Law Firm, that in the years 1996 - 1997 International Financial Institutions, especially the World Bank proposed to the authorities of Niger Republic, the privatisation of some State owned companies, among which was SONIDEP; thus SONIDEP adopted a Plan for restructuring, in order to face the financial difficulties that it was going through; this plan was adopted with the aim of avoiding massive lay-offs, and negotiations were engaged with different stakeholders; a committee was set-up to draft a contract-plan called "Negotiated Lay-off" Committee, which had Mr. Boubacar KANFIDENI as one of its Members; part of the proposals made by the said committee was that in carrying out the "negotiated lay-off" plan, priority must be given to the employees who were almost ripe for retirement, staff who were on one training or the other, and those who were already on

approved leaves; thus, Mr. Eli HAGGAR who had already been granted a training leave, since 1996 was naturally to be affected by the restructuring plan, and would have to proceed on the negotiated lay-off; other employees have made their intention on voluntary retirement known, and made express requests in this regard; this was what led to the signing of a Protocol Agreement with all stakeholders on 3 April 1998;

III.15. They added that all employees who opted, and got approval for voluntary retirement were paid their severance allowances, at the same time as those who were admitted to retirement on the "Negotiated Lay-Off" Plan, and that they all left the services of SONIDEP voluntarily and free from any indebtedness towards their former employer;

III.16. They also declared that the recourse to negotiated lay-off, as a means of bringing the work contract between the two parties to an end was right under the law, having regard to the interpretation of Article 1134 of the civil code, which provides for the revocation of any agreement by mutual consent of parties; hence, it was on the strength of this fundamental law of contract that the Industrial Court, in its judgment n° 85/2005 of 29 September 2005, declared its lack of jurisdiction, and referred both parties to take their case to the appropriate quarters; and that upon appeal by Applicants, the Appeal Court in Niamey upheld the attacked judgment, in all its content, following Judgment n° 130 of 05/06/2006; and that upon further step, up to the Supreme Court, Applicants got the Appeal Judgment squashed, through Judgment n° 08113/S du 08 May 2008, with an order by the Supreme Court that the Appeal should be re-examined, at the lower Court, by a properly constituted panel of judges; they further averred that after the referral, the Court of Appeal of Niamey declared that Applicants' lay-off was right under the law, and consequently struck out Messrs. Eli HAGGAR, Boubacar KANFIDENI and others' claims; they also claimed that since a further appeal by Barrister MAZET was not introduced within the stipulated legal time, the ***Cour d'Etat***

applied the extant laws, by declaring that Applicants' further appeal was devoid of any useful purposes;

III.17. They averred that Applicants were accorded all the guarantees that are inherent in a fair hearing; that they were represented by an experienced Counsel, with more than ten years post call to the bar; that they were never put in a situation that could prevent them from being aware of the extant laws; that they enjoyed an effective access to the law, before the national Courts of the Republic of Niger, and that for the Supreme Court to have declared their further appeal devoid of any useful purposes, was a negligence from their own part;

III.18. The Defendants further argued that Applicants have maliciously evoked many provisions in international legal instruments including Articles 4 and 7 (1) of the African Charter on Human and Peoples' Rights, and Article 6 of the International Covenant on Economic, Social and Cultural Rights of 1966; that the termination of the work contract between the SONIDEP and its former employees was done freely, and pursuant to conditions as stipulated by civil law; that the Honourable Court can easily verify that it was not a case of sack, but a termination of work contract through a "Negotiated Lay Off"; that the former employees were at liberty to validly refuse signing the Protocol Agreement that led to the "Negotiated Lay Off"; that there was no pressure mounted on them, nor fraud; that the former employees had the opportunity of being represented by the Executives of their Unions, and Staff Representatives, that severance allowances were paid to them, and that some of them even went ahead in setting-up companies, with their revenues; but that some of them now seem to accuse SONIDEP of being the source of their inadequate preparation to face the hard realities of the business world; that SONIDEP cannot be responsible for the individual failure of some of them;

III.19. They raised an objection, as to inadmissibility of the Application, before soliciting from the Court:

- To **note** that Applicants were not sacked by SONIDEP;
- To **note** that the work contract that was brought to an end was negotiated, pursuant to the provisions of Article 89 (2) of the Industrial Code;
- To **note** that the Protocol Agreement entered into by both parties was pursuant to the provisions of the extant laws of Niger Republic, especially Article 1134 of the Civil Code;
- To **note** that Applicants had access to fair hearing, which is guarantee for the administration of justice in a democratic nation State;
- To **note** that there was no case of human rights violation;
- Consequently, the Court shall **strike out** the case introduced by Applicants, which is an abuse of Court process;
- To **order** that Applicants bear all the costs;

III.20. The same Defendants, through their Counsel, Aïssatou ZADA (Esq.) in her « Memorial in defence » of 17 October 2013, which was filed at the Registry on 24 October 2013 raised an objection as to inadmissibility, owing to the fact that Applicants failed to establish any human right violation;

III.21. They claimed that after taking their case before the national courts, to try and put asunder a Protocol Agreement that they freely entered into, signed and executed, by both parties, Applicants now come before the Community Court of Justice, ECOWAS to cover for a lost ground, owing to a grave procedural negligence; that, indeed after taking their case to the Industrial Court in Niamey, the latter declared its lack of jurisdiction over the case ; this decision was upheld by the Court of Appeal in Niamey, in judgment dated 5 June 2006; that following a further appeal to the Supreme Court, they were referred to the Appeal Court, for re-examination, wherein the Appeal Court later adjudged their sack to be right under the laws, and struck out all their claims; that nevertheless, after another

appeal to the Supreme Court against the fresh decision of the Appeal Court, the Supreme Court finally adjudged that their case was devoid of any useful purposes, owing to a serious negligence on the part of Applicants; thus, it can now be deduced that no human right violation can be found by the Honourable Court; that Applicants cannot claim that they did not have access to fair hearing; that they thought they could enforce their rights before the national courts, but saw their hope dimed, simply because of a gross mistake on the part of their Counsel; that neither SONIDEP, nor the Republic of Niger, not even her national Courts can now be blamed for their travails;

III.22. As to the merit of the case, they averred that the restructuring of SONIDEP led to the signing of a Protocol Agreement, which was entered into by all stakeholders, who were all duly paid their severance allowances; that moreover some of Applicants went ahead to invest in the private sector, as the Protocol was fully executed in good faith, and all allowances fully paid; that as the Appeal Court declared in its Judgment N^{O}: 051 of July 2009 *"the former employees erred by claiming that the Protocol Agreement of 3 April 1998 was not executed, to the letter, by SONIDEP; that SONIDEP paid all severance allowances to each of its former employees, hence the work contract that existed between both parties is to be adjudged to have been properly brought to an end, in a legitimate manner"*, and above all, they have exhausted all local remedies;

III.23. They solicited from the Court:

As to form,

1. To **declare** the case filed by Eli HAGGAR and others as inadmissible, because there was no human rights violation;

As to merit,

2. To **declare** that Applicants are ill-founded, and order them to bear all the costs;

IV- GROUNDS

On inadmissibility of the case filed by Applicants, as sought by Defendants.

IV.1. The Defendants raised an objection as to inadmissibility of the initiating Application filed by Applicants, on the ground that Applicants have already had access to justice, before the national courts;

IV.2. Counsels to the Republic of Niger and SONIDEP averred in their writs that after Applicants have already tried in vain, to put asunder the Protocol Agreement before the national courts, they are now embarking on the same journey; that they have already exhausted local remedies against judgments already delivered by the national courts;

IV.3. Thus, they raised objection as to inadmissibility of the Application filed by the former employees of SONADEP, against them, on the ground that there was no human rights violation;

IV.4. But, the issue to be determined is whether taking a case before the national court constitutes a source of inadmissibility of Applications by this Honourable Court;

IV.5. The Supplementary Protocol (A/SP.1/01/05) of 19 February 2005 amending Protocol (A/P.1/7/91) on the Community Court of Justice, ECOWAS only provides for two (02) impediments to its proper access, pursuant to its Article 10.d: these are that the Application must not be anonymous, and that it should not have been filed before any other international Court of competent jurisdiction;

IV.6. Thus, having prior access to a national court, cannot be ground for inadmissibility before the Community Court of Justice, ECOWAS, more so when it is a case over which the Community Court has jurisdiction;

IV.7. As it were, the Court has always received Applications, and gone ahead in declaring its jurisdiction, even if such cases were taken, *ab initio*, before a national court;

Such was the case, during the procedure in the **El Hadj Mame Abdou GAYE *versus* the Republic of Senegal** (Judgment N°. ECW/CCJ/JUD/01/12 of 26 January 2012);

The Court then declared that:

> ***"taking a case before a national court does not have any influence over its jurisdiction in human rights violation matters, and recalled that the only impediment to that jurisdiction is as provided for under Article 10 (d) (ii) of the Supplementary Protocol on the Court, which forbids it to entertain a case already pending before an international court of competent jurisdiction"***;

IV.8. In these circumstances, the objection as inadmissibility, raised by Defendants, owing to the fact that Applicants had already taken the case before the national courts, cannot prosper;

It behoves the Court to declare it as ill-founded, and reject it;

On the consideration of the admissibility of the Application

IV.9. Article 10 of the Supplementary Protocol (A/SP.1/01/05) of 19 January 2005 amending Protocol (A/P.1/7/91) on the Community Court of Justice, ECOWAS provides that:

"Access to the Court is open to the following:

d) individuals on application for relief for violation of their human rights; the submission of application for which shall:

i) not be anonymous; nor

ii) be made whilst the same matter has been instituted before another International Court for adjudication";

IV.10. Thus, on the strength of the combined effect of Articles 9 (4) and 10(d) of the Supplementary Protocol (A/SP.1/7/05) amending Protocol (A/P.1/7/91) on the Court, the Court has jurisdiction to entertain cases of human rights violations that occur in any Member State, on condition that such an Application should not be anonymous, and that such a case should not have been filed before another international Court of competent jurisdiction;

IV.11. The Court notes that the initiating Application was filed for, and on behalf of "167 former employees of the **Société Nigérienne des Produits Pétroliers (SONIDEP)**, represented by Eli Haggar, Boubacar Kanfidéni…";

IV.12. The 167 former employees of **SONIDEP** who brought the case before the Court were not officially identified in the Application;

The list marked *"**list of the former employees, who opted for voluntary retirement, from SONIDEP**"*, which was attached to the Application only had forty-five (45) names, without further clarifications;

Another list marked ***"The Scheme on Negotiated Lay-off/ SONIDEP: Cost Implications"***, which was equally attached to the Application also had one hundred and forty-one (141) names, forty-five of which already featured on the first list referred to above;

Furthermore, up till this date, no exhibit in the case file enables the Court to identify Applicants individually;

Indeed, neither the initiating Application, nor any other document have furnished the personal identities, and addresses of Applicants, on the territory of the Republic of Niger;

No useful information concerning them is inscribed anywhere;

An initiating Application that does not feature essential information, such as name(s) and address' of Applicant(s), as provided for under Article 33.1a) of the Rules of the Community Court of Justice, ECOWAS must be considered as an anonymous Application;

It therefore follows that the Application by the « 167 former employees of **SONIDEP** » must bear the fate reserved for anonymous Applications;

IV.13. Moreover, it was stated in the initiating Application that the "167 former employees of the **Société Nigérienne des Produits Pétroliers (SONIDEP)**" are represented by Messrs. HAGGAR and KANFIDENI;

IV.14. On this issue, the Court pointed out, in the case of **Bakary SARRE and 28 others against the Republic of Mali** (Judgment N°. ECW/CCJ/JUD/03/11 of 17 March 2011; § 37) it declared that:

> ***"….the admissibility of an Application is linked, among other criteria, to the status of the victims. This condition necessarily entails that the Applicant, acting on personal grounds, as a result of a legally protected injured interest, reserves the right to come before a judge to have his claims examined; alternatively, an Applicant, authorised to act, by virtue of a power of attorney, on behalf of another person, or a group of people, whose legally protected interests have been harmed, shall exercise the power of representation in the action, so as to ensure that the claims brought by another person, or a group of persons succeeds. Bringing an action before a court of law is a vested power, and it is up to the holder of that prerogative, either to execute it himself or to entrust the power to a third party within the limits permitted by the national laws";***

IV.15. In the instant case, the holders of the power of attorney failed to prove holding such power;

Indeed, no power of attorney was filed, as evidence that was issued to the purported holders of such power;

They failed to justify, before the Community Court of Justice, ECOWAS that they hold any title that authorises them to represent Applicants;

It therefore follows that they lack locus standi, to act on behalf of Applicants;

IV.16. From the developments discussed above, it appears, on the one hand that the Application filed by the «167 former employees of the ***Société Nigérienne des Produits Pétroliers (SONIDEP)***» does not meet one of the essential conditions, as prescribed for its admissibility, under Article 10 of the Supplementary Protocol (A/SP.1/01/05) of 19 January 2005, relating to the Application not being anonymous, and, on the other hand, the supposed representatives of Applicants lack quality to act, for and on behalf of Applicants;

IV.17. In these circumstances, their Application cannot be favourably admitted;

There is need to declare as inadmissible, the anonymous Application, and the lack of quality to act by the representatives of Applicants;

As to costs:

IV.18. Article 66.2 of the Rules of the Community Court of Justice, ECOWAS provides that: "*The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings*";

In the instant case, the Application filed by Applicants does not succeed;

Furthermore, the Republic of Niger expressly solicited that the Court should order the unsuccessful party to bear the costs;

Therefore, there is need to do justice to this Order;

FOR THESE REASONS

The Court, sitting in a public hearing, on a human rights violation matter, and after hearing both parties, in first and last resort,

- **Notes** the objection to admissibility raised by Defendants, which was premised on the fact that Applicants had access to the national courts;

- **Declares** the objection as ill-founded, and **rejects** it;

- **Declares** the Application filed by the "167 former employees of the *Société Nigérienne des Produits Pétroliers (SONIDEP)*" as inadmissible, for being anonymous, and for their representatives lacking quality to act, for and on their behalf;

- **Orders** Applicants to bear all the costs;

THUS MADE, ADJUDGED AND PRONOUNCED IN A PUBLICE HEARING, AT SEAT OF THE COURT, AT ABUJA, THIS 30TH DAY OF JUNE 2015;

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding;*
- **Hon. Justice Yaya BOIRO** - *Member;*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

THIS 13TH DAY OF JULY 2015

SUIT N°: ECW/CCJ/APP/19/15
JUDGMENT N°: ECW/CCJ/JUD/16/15

BETWEEN
CONGRES POUR LA DEMOCRATIE ET LE PROGRES (CDP) & ORS. - *PLAINTIFFS*

AND
BURKINA FASO - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE YAYA BOIRO** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ABOUBACAR DIAKITÉ (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MOUSSA COULIBALY (ESQ.)** *&*
   FLORE MARIE ANGE TOE (ESQ.) - *FOR THE PLAINTIFF*
2. **SAWADOGO MAMADOU (ESQ.)** - *FOR THE DEFENDANT*

- Human rights violation - Jurisdiction - Admissibility

SUMMARY OF THE FACTS

The political party known as the Congrès pour la Démocratie et le Progrès (CDP) and others filed before the ECOWAS Court of Justice to find the violation of their rights by the State of Burkina Faso.

The circumstances of the dispute are as follows: Burkina Faso is, on 30 and 31 October 2014, the scene of violent demonstrations organised to defeat the draft amendment of the Constitution. The President of the Republic eventually resigns and a political transition, supported by the international community, is set up, to pacify the country and lead it to democratic elections.

The National Council of Transition (CNT), with legislative powers, then initiated reforms, including the revision of the electoral law. The new text adopted (Law N°. 005-2015) provides for a new case of ineligibility of anyone who supported an unconstitutional change that undermines the principle of democratic change, including the limitation of the number of presidential tenure leading to an insurrection or any other form of uprisings.

The Applicants complained that the new law violated their right to participate freely in elections, which is contrary to Burkina Faso's international commitments.

The respondent State argued that the Court has no jurisdiction on the ground that the alleged infringement is hypothetical, if any, and therefore cannot be brought before the Court. It further objects to the CDP on the grounds that participating in the management of public affairs is an individual and subjective right and not a collective right. In essence, Burkina rejected any violation and submitted that the right invoked by the Applicants, namely free participation in elections, is neither absolute nor systematic.

LEGAL ISSUES

- *Is the Court competent to hear the present case?*

- *Is the Application to intervene filed by Falana and Falana's Chambers Law Chambers admissible before the Court?*

- *Was the Applicants' right to participate freely in elections violated?*

DECISION OF THE COURT

The Court rejects the objections raised by Burkina, upholds its jurisdiction and declares the Application admissible, as well as the defence statement.

It declared the Application to intervene by Falana and Falana's Chambers inadmissible.

It says that the amended Electoral Code of Burkina Faso violates the right of free participation in elections and therefore orders that all obstacles resulting from this modification be lifted by the respondent State.

JUDGMENT OF THE COURT

I. THE PARTIES AND THEIR REPRESENTATION

1. The Application was lodged at the Registry of the Court on 21 May, 2015 by a group of political parties and a group of Burkina Be citizens.

   The following parties constituted the group of political parties in question:

   - Le Congrès pour la Démocratie et le Progrès (CDP), represented by its chairman, KomboigoWend-Venem Eddie Constance Hyacinthe;
   - Le Rassemblement pour le Sursaut Républicain (RSR), represented by its chairman, Kaboré René Emile ;
   - L'Union Nationale pour la Démocratie et le Développement (UNDD), represented by its chairman, Yaméogo Hermann;
   - Le Rassemblement des Démocrates pour le Faso (RDF), represented by its chairman, Yaméogo Salvador Maurice ;
   - L'Union pour un Burkina Nouveau (UBN), represented by its national chairman, Ouédraogo Yacouba;
   - Nouvelle Alliance du Faso (NAFA), represented by its chairman Ouédraogo Rasmané ;
   - L'Union pour la République (UPR), represented by its chairman, Coulibaly Toussaint Abel.

   As for the group of Burkina Be citizens, they are identified by the following names:

   - Koné Léonce;
   - Tapsoba Achille Marie Joseph;

- Sampebre Eugène Bruno;
- Sawadogo Moussa;
- Nignan Frédéric Daniel;
- Sankara Sidnoma;
- Yaméogo Noel;
- Daboue Badama ;
- Dicko Amadou Diemdioda;
- Barry Yacouba;
- Traoré Amadou;
- Sanogo Issa;
- KaboréSaïdou.

The Applicants were represented by the following lawyers:

- Maître Moussa Coulibaly, lawyer registered with the Bar Association of Niger;
- La Société Civile Professionnelle d'Avocats (SCPA) Ouattara-Sory et Salambéré, lawyers registered with the Bar Association of Burkina Faso;
- Maître Flore Marie Ange Toe, lawyer registered with the Bar Association of Burkina Faso.

2. The Defendant in the case was Burkina Faso, represented by Maître Savadogo Mamadou and by Kam et Some SCP Law Firm, all lawyers registered with the Bar Association of Burkina Faso. Burkina Faso filed a Memorial in Defence, lodged at Registry of the Court on 29 June, 2015.

II - THE FACTS AND PROCEDURE

3. Following violent demonstrations which occurred in Burkina Faso on 30 and 31 October 2014, culminating in a number of deaths and destruction of public and private properties, the President of the

constituted Republic (Burkina Faso) till then, whose project of constitutional amendment had thus been denounced by the demonstrators, resigned from his functions. Attempted coups d'état immediately followed the power vacuum, before a political transition, supported by the international community in general and ECOWAS in particular, was put in place, to restore peace in the country and to lead it to democratic and transparent elections.

4. The national front, which brought together all the active political forces of Burkina Faso, within that context, adopted on 13 November 2014, a Charter of Political Transition, and put in place a National Council of Transition (CNT). Vested with legislative powers, the Council thus carried out a number of reforms, among which a reform of the electoral law. It was in that connection that the Council adopted on 7 April 2015, Law No. 005-2015 amending Law N°. 014-2001/ AN of 3 July 2001 on the electoral code. Among the persons rendered ineligible, that is to say not qualified to run for the elections, the new Article 135 added, outside the nominally identified as:

   - Private individuals deprived of their rights of eligibility by judicial decision, in compliance with the laws in force;
   - Persons vested with the functions of a judicial council;
   - Individuals sentenced for electoral fraud;

   a new category characterised as *"... all persons who had supported anti- constitutional change, in violation of the principle of democratic change, notably in violation of of the principle of limitation of the number of terms of political presidential power, leading up to an uprising or any other form of upheaval."*

5. In practical terms, the adoption of such amendment of the law appears to have had the consequence of excluding from the electoral process persons affiliated to the ousted political power, the above-cited provisions having been interpreted as targeted at such persons. It was under such conditions that certain political parties and a number of Burkina Be seised the ECOWAS Court of Justice with their case,

for the purposes of asking the Court to find that the new authorities violated their rights, and consequently, to order the revocation of the disputed legal provision.

6. The Applicants lodged two applications at the Registry of the Court, on the same date - 21 May 2015: a substantive application and an application for expedited procedure, in accordance with Article 59 of the Rules of Procedure of the Court.

7. An application for intervention was filed before the Court on the eve of the hearing of the case - 29 June 2015. The application originated from the law firm Falana and Falana's Chambers .

III - ARGUMENTS OF THE PARTIES

8. The Applicants aver that the new law adopted by the Burkina Faso Council of Transition violates their right to participate freely in elections. This right is notably provided for by the following texts:

   - Articles 2 (1) and 21 (1),(2) of the 1948 Universal Declaration of Human Rights, which provide respectively that: *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (...) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives (...) Everyone has the right of equal access to public service in his country.";*

   - Article 26 of the 1966 International Convenant on Civil and Political Rights, adopted by the United Nations: *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection*

against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.";

- Articles 2 and 13 (1) and (2) of the African Charter on Human and Peoples' Rights: *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. (...) Article 13(1) and (2) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. 2. Every citizen shall have the right of equal access to the public service of his country.";*

- Articles 3(7), 3(11), 4(2), 8(1), 10(3) of the African Charter on Democracy, Elections and Governance, which provide respectively that the States Parties undertake to promote *"... Effective participation of citizens in democratic and development processes and in governance of public affairs (...) Strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law (...) State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people (...) State Parties shall eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance (...) State Parties shall protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society.";*

- Article 1 (i) of the 2001 ECOWAS Protocol on Democracy and Good Governance *"...Political parties shall (...) participate freely and without hindrance or discrimination in any electoral process. The freedom of the opposition shall be guaranted."*

9. In its Memorial in Defence, **Burkina Faso** avers that the Court has no Jurisdiction to adjudicate on the case, that the Application lodged is inadmissible, and that it is equally ill-founded.

10. In terms of lack of jurisdiction of the Court, the Defendant State claims that there is no concrete case of human rights violation filed before the Court by the Applicants, but that at best, what is filed before the Court is only a probable or hypothetical case of human rights violation; and that the Court has always declared that it has no remit for adjudicating on cases of that nature.

11. As to the inadmissibility of the matter before the Court, Burkina Faso avers that the right at stake, concerning participation in the management of public affairs, is *"an individual and subjective right"*, and not a collective right. Thus, Burkina Faso claims that at least the portion of the Application submitted by the political parties must be declared inadmissible.

12. Finally, as to the claim that the Application is ill-founded, as made by Burkina Faso, the latter maintains that the right to participate in elections *"... is not a right of an abslute nature"*, and that a State may institute restrictions thereto. The resultant effect of the argumentation of the Defendant State is that the exclusion of a number of organisations and citizens from the current electoral process could be justified by the support they may have provided for the former authorities of the country during the draft constitutional amendement process to perpetuate the political power already in place. The Defendant State further claims that the said constitutional amendment process, perceived as "anti-constitutional" in the Law of 7 April 2015, was the source of the upheavals which led to the fall of the Government.

IV - ANALYSIS OF THE COURT

13. As to formal presentation,

The Court has already adjudicated on the preliminary objection raised by the Applicants regarding the alleged late lodgement of the Defence by Burkina Faso. Indeed, according to the Applicants, Burkina Faso, which received the Application on 28 May 2015, should have responded thereto within thirty days, at the latest - that is before 27 June 2015, from their point of view. However, in compliance with the provisions of Article 75(2) of the Rules of the Court, the Court held the view that all the time-limits of the procedure were frank and proper, and that since the last day for the lodgement was a day on which there was no official work at the Court, Monday, 29 June 2015 was indeed the last day for the Defendant State to lodge its Memorial in Defence. Now, it was on that very day that the lodgement was effected. Therefore, the preliminary objection regarding late lodgment of the Memorial in Defence is hereby dismissed.

14. The Court has equally adjudicated on the request for intervention, as filed by the law firm "Falana and Falana's Chambers". The Court has equally ruled that by virtue of Article 21 of the 1991 Protocol on the Court, the right of intervention is open to States only. Consequently, the Court has declared inadmissible the application for intervention submitted before it.

15. As regards the allegation by Burkina Faso that the Court lacks jurisdiction to adjudicate on the case before it, as a result of the non-concrete nature of the claims of violation brought by Burkina Faso, the Court has always held that it only makes rulings, in principle, on cases of human rights violation which are concrete, real and proven, and not on violations claimed to be possible, contingent or potential. One may thus be tempted, in the instant case, to question whether or not the matter before the Court is indeed well grounded, because as at the time the Court was seised with the case, no violation had as yet been committed, nor had any case of actual rejection of

candidature been brought before the Court, and no individual candidature had been set aside in accordance with the new provisions; that, in a word, there is no real prejudice caused.

16. It would amount to consigning its own time-held case law to oblivion if the Court should rule that it may legitimately entertain violations which have not yet occurred, but are very imminent. In the instant case, the alleged violation has not yet been committed, but could very soon be. Going by the indications provided to the Court, the electoral process is to open seventy (70) days before the scheduled date for voting (*i.e.* 11 October 2015), on the fateful day of 1 August 2015. The Court was therefore seised with the case on grounds of urgency. In the present circumstances of the case, if the Court were to wait for the applications of candidature to be possibly rejected before acting, if it had to wait for the exhaustion of the effects of any transgression before stating the law, its jurisdiction in a context of urgency would have no sense, because the electoral rights of the presumed victims for participating in the electoral race would inexorably be breached.

17. At any rate, this position of the Court, regarding the nature of harms it entertains, was clearly stated in its judgment on **Hissène Habré *v.* Republic of Senegal**, delivered on 18 November 2010. The Court recalls therein its case law in Case Concerning **Hadidjatou Mani Koraou *v.* Republic of Niger**, where it ruled that it has no jurisdiction to examine cases of violation in abstracto, but concrete cases of human rights violation. Therefore, in principle, a human rights violation is found *à posteriori*, by way of the evidence that the violation in question has already occurred (§48). The Court has further ruled however that it may occur that in specific circumstances, the risk of a future violation confers on an Applicant the status of a victim (§49). Thus, there may be reasonable and convincing indications of the probability of the occurrence of certain actions (§53). Given such specific circumstances, which the Court considers akin to the conditions surrounding the instant case, the Court can perfectly adjudicate on the case.

18. It is therefore wrong for Burkina Faso to claim that the Court cannot make any pronouncement on the case because none of the rights at stake has as yet been violated.

19. As far as the powers of the Court are concerned, it must equally be stated that even if it is out of question that the Court plays the role of a policeman in the elections organised by the Member States, it could legitimately entertain cases where it appears to the Court that the electoral process was vitiated by human rights violations, and the Court does have the remit to adjudicate on human rights violations.

20. As to the claim of inadmissibility of the matter before the Court, regarding the right at stake - the right to participate in elections and in the management of public affairs - that it is a personal right and not a right of a political party, the Court must first of all recall that it is not seised in the instant matter by political parties only, but equally by citizens of Burkina Faso. But even if it were seised by associations of a political nature, the Court is of the view that nothing would prevent it from sitting on the case, for the reason that such restriction on the enjoyment of such right may breach the rights of a political party, which is a body whose mission consists precisely of insisting on citizens' right to vote in political elections and to participate in the management of public affairs. Not only that the texts governing the Court do not exclude legal entities from bringing cases before the Court - on condition that they come before the Court as victims (Article 10 (d) of the 2005 Protocol on the Court), but it would be purely artificial and unreasonable for the Court to deny political parties the right to bring their cases before it, once the rights relating to their assigned mission of participating in the electoral race are violated.

21. Hence, the claim in respect of inadmissibility of the Application, as maintained by Burkina Faso, is hereby dismissed.

22. **As to the merits of the case,**

The issue submitted before the Court is relatively simple. Essentially, it is a matter of determining whether the amendment of the Burkina

Faso electoral law, in regard to how it was applied, disregarded the right of certain political parties and citizens to compete in a voting process and to participate in elections.

23. To answer this question, the Court must first of all recall a number of principles deriving from the texts governing it, and from its case law.

24. The first of these principles, which assumes a particular significance in the case submitted before the Court, is the Court's refusal to assume the role of a judge over the domestic law of the Member States. The Court has indeed always recalled that it is not a body set up with a mandate for settling cases whose subject matter is the interpretation of the law or the Constitution of the Member States of ECOWAS. Two effects arise therefrom.

25. The first is that the present judicial argumentation must be devoid of every form of reliance on the domestic law, be it on the Constitution of Burkina Faso, or on any norms whatsoever related to the Constitution of Burkina Faso. In their written pleadings, the Applicants indeed made reference to both the Constitution of Burkina Faso (Article 1) and the Charter of Transition (Article 1). Such references shall be deemed as inappropriate before the judges of the ECOWAS Court of Justice. As an International Court, its mandate is restricted to sanctioning States' disregard for the obligations arising from the international texts binding on them.

26. The second effect is that there can be no question, in the instant case, of seeking to examine the meaning which must be ascribed to the new Article 135 of the Burkina Faso Electoral Code. It is tempting, given the relative ambiguity of the text complained of, to engage in a legal exegesis of the Burkina Faso Electoral Code, to ascribe to it a certain meaning, or to orient the construction of that domestic law along a given path.

27. The Court cannot of course undertake such a task, which would be diametrically opposed to its principled position recalled above. The Court still holds that, neither in the instant case nor in the ones which

preceded it, will its function consist of seeking to discover the intention of the national lawmaker, or of competing with the domestic courts, within their own scope of jurisdiction, which, precisely, consists of interpreting their own national texts. But the Court assumes its rightful powers where the interpretation or application of the national text aims at depriving the citizens of rights embedded in international instruments to which Burkina Faso is a party.

28. The Court holds that there is no doubt that the exclusion of the political parties and citizens from the forthcoming electoral race is discriminatory and hardly justifiable in law. It may certainly occur that in specific circumstances, the laws of a country may debar access of certain citizens or organisations from certain elective functions. But the restriction of such right of access to public responsibilities shall be justified, notably as a result of having committed particularly serious crimes. It is therefore not a matter of denying that the current authorities of Burkina may, in principle, have the powers of restricting access to the right to vote, but it is the ambiguous nature of the criteria of exclusion, and the expeditious and widespread application thereof, which the Court considers contrary to the texts. Forbidding any organisation or person from presenting its candidature for elections, on the grounds of being politically close to an ousted regime, whereas the person concerned has not committed any particular offence, is tantamount, in the view of the Court, somewhat, to an offence for holding an opinion, which is obviously unacceptable.

29. The exact scope of the law on restriction of access to the electoral race must therefore be properly appreciated. Such law must not be used as a means for discriminating against political minorities

30. In that regard, the argument regarding illegality of the anti-constitutional change of government, extended to the Applicants, on the basis of the new electoral code, is untenable. Without going into an argumentation on the very manner in which the previous regime attempted to amend the Constitution, the Court recalls that the sanction of an anti-constitutional change of government goes against

regimes, States and possibly their leaders, and does not concern the rights of ordinary citizens. Neither the spirit behind the sanction of anti-constitutional change of governments, nor the general developing trends in international law, which seek to make Human Rights a sanctuary, disregards the reasoning of States and regimes, and does not permit an inconsiderate and indiscriminate application of the coercive measures capable of being envisaged in such circumstances.

31. If, therefore, the principle of constitutional and political independence of States incontestably implies that States are at liberty to determine the regime and political institutions of their choice, and to adopt the laws they deem fit, that liberty shall be exercised in conformity with the commitments the States have undertaken in that regard. Now, there is no doubt that such commitments do exist, the impressive list of texts invoked by the Applicants attesting to that fact. Within the specific context of ECOWAS, we shall content ourselves with reference to the following provisions of the 2001 Protocol on Democracy and Good Governance:

- **Article 1(g): "The State and all its institutions belong to all the citizens; therefore, none of their decisions and actions shall involve any form of discrimination, be it on an ethnic, racial, religion or regional basis.";**

- **Article 1(i): "Political parties shall (…) participate freely and without hindrance or discrimination in any electoral process. The freedom of the opposition shall be guaranteed.";**

- **Article 2(3): "Member States shall take all appropriate measures to ensure that women have equal rights with men to vote and be voted for in elections, to participate in the formulation of government policies and the implementation thereof and to hold public offices and perform public functions at all levels of governance."**

32. The Court is of the view that the exclusion in question in the instant case is neither legal nor necessary for the stabilisation of the democratic order, contrary to the allegations of the Defendant. The restriction operated by the Electoral Code, as things stand, does not only have the effect of preventing the Applicants from submitting themselves as candidates, but significantly limits the choices offered to the electoral body, and thus adulterates the competitive nature of the elections.

33. Finally, the argument advanced by the Defendant State, according to which the disputed measure may not be considered as discriminatory, because actors of the Political Transition may themselves be affected by the restriction of the right to participate in the elections, is of course unacceptable to the Court. It goes without say indeed, that the reasons behind the restriction are not the same for all, without discrimination. While it is a matter of ensuring that the actors of the Transition disregard the principle of equality of candidates, by using their presence and position in the State as a means of taking "undue advantage" over competitors, it becomes a different matter when considering those deemed to be close to the ousted regime; the latter were sanctioned for the opinions they had held in the past. In the specific case of those considered close to the ousted regime, the objective behind their restriction was to stigmatise them and shame them, one trait obviously absent for the actors of the Political Transition. The defence of Burkina Faso, in regard to this point, is therefore inacceptable.

34. The position adopted by the Court, moreover, rhymes with the view taken by other judicial or quasi-judicial institutions when they had had to handle similar cases.

35. In its General Observation 25, adopted under paragraph 4 of Article 40 of the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee declared that: *"The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote*

have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office." ***(Published on 27 August 1996).***

36. The European Court of Human Rights recalls in its Judgment of 6 January 2011 in Case Concerning **Paksas *v.* Lituania**, that

> ***"In the Court's view, it is understandable that a State should consider a gross violation of the Constitution or a breach of the constitutional oath to be a particularly serious matter requiring firm action when committed by a person holding that office. (...) However, that is not sufficient to persuade the Court that the Applicant's permanent and irreversible disqualification from standing for election as a result of a general provision constitutes a proportionate response to the requirements of preserving the democratic order."***

The Court thus reaffirmed that the free expression of the opinion of the people in choosing their legislative body must at all times be preserved. (§104 and 105, also see ECHR Judgments, 22 September 2004, Case Conserning **Aziz *v.* Cyprus**).

37. For all these reasons, and without any grounds for adjudicating on the "consensual" nature or otherwise of the amendment of the electoral law adopted before the elections, the Court holds that the rights of the political parties and of the Burkina Be in question, who are unable to present themselves for the elections as a result of the amendment

of the electoral law (Law N°. 005-2015/CNT amending Law N°. 014-2001/AN of 3 July 2001), must be restored back to them. The Court states moreover that the international instruments invoked in support of the Application are indeed binding on Burkina Faso.

38. The Court holds that it is reasonable, in the prevailing conditions, that Burkina Faso bears the costs.

FOR THESE REASONS

The Court,

Adjudicating in a public session, after hearing both Parties, in a matter on human rights violation, in first and last resort,

As to formal presentation:

- **Dismisses** the preliminary objections concerning lack of jurisdiction of the Court and inadmissibility of the Application, as raised by Burkina Faso;

- **Declares** that it has jurisdiction to examine the Application submitted before it;

- **Declares** admissible the Application submitted before it;

- Equally **declares** admissible the Memorial in Defence filed by Burkina Faso;

- **Declares** inadmissible the application for intervention filed by the law firm Falana and Falana's Chambers;

As to merits:

- **Adjudges** that the Burkina Faso Electoral Code as amended by Law N°. 005-2015/CNT of 7 April 2015, is a violation of the right to free participation in elections;

- **Orders** Burkina Faso therefore to remove all the hindrances to the participation in elections, resulting from the said amendment;

- **Asks** Burkina Faso to bear the costs.

Thus made, declared and pronounced publicly by the ECOWAS Court of Justice, at Abuja, on the day, month and year stated above.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- Hon. Justice YAYA BOIRO - *Presiding;*
- Hon. Justice Hamèye Founé MAHALMADANE - *Member;*
- Hon. Justice Alioune SALL - *Member.*

Assisted by **Aboubacar DIAKITÉ (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICEOF THE ECONOMIC OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

TUESDAY 6TH OCTOBER 2015

SUIT NO: ECW/CCJ/APP/18/13
JUDGMENT NO: ECW/CCJ/JUD/17/15/REV

BETWEEN
KODJOVI AGBELENGO DJELOU & 2 ORS. - *PLAINTIFFS*

AND
THE REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE H. FOUNÉ MAHALMADANE** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTED TO THE PARTIES:

1. **AFANGBEBEDJI K. JIL-BENOÎT (ESQ.)** - *FOR THE PLAINTIFFS*
2. **TCHITCHAO TCHALIM (ESQ.)** *AND*
   EDAH N'DJELLE (ESQ.) - *FOR THE DEFENDANT*

- Calculation of time - Arbitrary arrest and detention - Torture and inhuman, cruel and degrading treatment - Damage to honour and reputation - Damages and interests

SUMMARY OF FACTS

The appointees Djelou Kodjovi Agbelengo, notary, Akumani Koffi Ametowoyona, clerk, and Dame Alipu Ablavi Seniedjo (wife of the said notary) were arrested by the Prosecutor of the Republic at the Court of First Instance Court Premiere classe Lomé, following a complaint filed by Mr. Amevor Koffi Ganyikou for having committed forgery in building registration; and a second complaint filed by Mrs. Adabatou Djignodi against Mr. Djelou Kodjovi Agbelengo who would not have an agreed sum. But a Judgment of the first instance of 29 May 2013 freeing them confirmed by a judgment of the Court of Appeal dated 15 January 2015.

On 25 September 2013, the three persons filed before the Community Court of Justice against the Republic of Togo for violating their human rights, including: arbitrary arrest and detention, cruel inhuman and degrading treatment, violation of honour and reputation. Therefore, they are claiming damages and interests.

The Respondent State claimed to have acted in accordance with the Togolese law which allowed it to be arrested, held in custody and held in connection with an investigation, and that the newspapers which made the publication claimed to be disparaging and infamous, are independent.

LEGAL ISSUES

- *Did the Republic of Togo violate all of the rights enumerated by the Applicants?*

- *If so, are they entitled to compensation?*

DECISION OF THE COURT

- *Held that the acts of torture, inhuman, cruel or degrading treatment invoked by the Plaintiffs were not proven;*

- *Held however, that the Plaintiffs were arbitrarily arrested and detained;*

- *Held that their honour and reputation were damaged.*

- *Therefore grants them damages as follows: 35,000,000 FCFA to Master Djelou Kodjovi Agbelengo, 3,000,000 FCFA to Akumani Koffi Ametowoyona and 2,000,000 FCFA to Dame Alipui Ablavi Senyiedjo.*

DELIVERS THE FOLLOWING JUDGMENT:

BETWEEN

1. **Kodjovi Agbelengo Djelou, a Notary**
2. **Koffi Ametowoyona Akumani, Clerk**
3. **Ablavi Senyiedjo Alipui**

- Applicants

Counsel for the Applicants: **Maître Jil-Benoit Kossi Afangbedji** Lawyer registered with the Bar Association of Togo, 99 rue de l'Entente, near Festival des Glaces, B.P. 12250 Lomé, Togo.

AND

The Republic of Togo

Address of Defence Counsel: *Lomé, au Palais de la Présidence 2 Avenue du Général de Gaulle*, Lomé, Togo, represented by the Attorney General and Minister of Justice, in charge of inter-institutional relations, whose address is at his office in Lomé.

- Defendant

Address for service on Defence Counsel

- Maître Tchichao Tchalim, Lawyer registered with the Bar Association of the Republic of Togo, Office Address: 77, rue N'koyiyi à Lomé, 08 B.P. 80928, Lomé;
- Maître Edah N'djelle, Lawyer registered with the Bar Association of the Republic of Togo, Office Address: rue de la Gare routière d'Agbaledo, beside la Pharmacie Lumière, B.P. 30225 Lomé;

Having regard to the ECOWAS Revised Treaty of 24 July 1993;

Having regard to the Protocol of 6 July 1991 and the Supplementary Protocol A/SP.1/01/05 of 19 January 2005, both relating to the Community Court of Justice;

Having regard to the Rules of the ECOWAS Court of Justice of 3 June 2002;

Having regard to the Universal Declaration of Human Rights of 10 December 1948;

Having regard to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

Having regard to the African Charter on Human and Peoples' Rights of 27 June 1981;

Having regard to the Application dated 23 April 2013 filed by the Applicants mentioned above;

Having regard to the Memorial in Defence dated 2 December 2014 lodged by the Republic of Togo;

Having regard to the Rejoinder dated 28 January 2015 lodged by the said Applicants;

Having regard to the pleadings filed in connection with the instant procedure;

After hearing the Parties through their respective Counsel;

Presentation of facts and procedure

1. Whereas it follows from the pleadings filed in connection with the instant procedure, that following a complaint dated 9 March 2006 made by Mr. Koffi Ganyekou Amevor and addressed to the Public

Prosecutor at the Court of First Instance Premiere Classe of Lomé, the following were arrested one after the other and brought to the headquarters of the Criminal Investigations Department (CID) (Direction Générale de la Police Judiciaire): Djelou Kodjovi Agbalengo, a notary; Akumani Koffi Ametowoyona; Mrs. Ablavi Senyiedjo Alipui (wife of the said notary), for the purposes of investigation for acts of forgery, falsification of documents and possession of stolen goods.

2. The notary, Maître Djelou Kodjovi Agbelengo, was specifically accused of forgery, for registration of a property inherited by the complainant from his late father, Dégbé Amevor, with the name of his wife (registered under Togo Land Registry No. 29079). At the same time, Mrs. Djigbodi Laba née Adabatou, filed another complaint against Maître Djelou Kodjovi Agbelengo asserting that Maître Djelou Kodjovi had paid only half of the amount of CFA F 4, 000, 000 which he had agreed with her late husband for the purchase of a plot of land.

3. During the month of September 2006, Maître Djelou Kodjovi and his Clerk Koffi Akumani were released on bond. For Mrs. Ablavi Alipui, she was released after 72 hours after being taken into custody on the account of her advanced stage of pregnancy.

4. By Judgment dated 29 May 2013, the accused persons mentioned above were freed by the Criminal Trial Chamber 1 of the Court of First Instance Première Classe of Lomé. The Judgment awarded damages in favour of the accused persons, to be borne by the complainants. By Judgment No. 008 dated 15 January 2015, on appeal filed by the complainants Koffi Amevor and Mrs. Adabatou Laba née Djigbodi, the Criminal Chamber of the Court of Appeal, Lomé confirmed the decision in its entirety upon a referral.

5. Meanwhile, on 2 September 2013, the notary mentioned above, his clerk Koffi Akumani, and his wife Ablavi Senviedjo Alipui, had filed before the ECOWAS Court of Justice through their Counsel

mentioned above, an application dated 23 September 2013 asking the Court to declare:

- That they were arbitrarily arrested and detained in contravention of and disregard for Article 15 (1) of the Togolese Constitution of 14 October 1992, Article 9 of the Universal Declaration of Human Rights of 10 December 1948, Article 9 (1) of the International Covenant on Civil and Political Rights of 16th December 1966 and Article 6 of the African Charter on Human and Peoples' Rights of 27 June 1981;

- That the Applicants were subjected to psychological or mental torture, cruel, inhuman or degrading treatment in violation of Article 21(2) of the 14 October 1992 Constitution of Togo, Article 5 of the Universal Declaration of Human Rights of 10 December 1948, Article 7 of the International Covenant on Civil and Political Rights of 16 December 1966, and Article 1 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, and Article 5 of the African Charter on Human and Peoples' Rights.

- That the arbitrary arrest and detention constituted cruel, inhuman and degrading treatment, which they were victims of, seriously damaging their dignity and reputation;

That the Republic of Togo should be ordered to pay the following amounts:

- To Maître Kodjovi Agbelengo Djelou: the sum of CFA F 500, 000,000 for arbitrary arrest and detention, One billion CFA Francs for damages against his dignity and reputation, and 500,000,000 for torture, which he was a victim of;

- To Koffi Akumani: the sums of 200 million CFA Francs, 500 million CFA Francs and 100 million CFA Francs respectively for his arbitrary arrest and detention, harm done against his dignity and reputation, and torture;

- To Mrs. Ablavi Alipui: the sums of 500,000,000 CFA Francs, 500,000,000 CFA Francs and 200,000,000 million CFA Francs respectively for her arbitrary arrest, harm done against his dignity, and torture;

- Furthermore, to order the Defendant to bear all costs.

As to formal presentation of the Application

6. Whereas before going into the merits of the case, the Applicants, through their Counsel, raised an objection drawn from the lateness of lodgment of the defence by the Republic of Togo; in support of their plea, they argued that following their Application, registered at the Registry of the Court on 25 September 2013, the Republic of Togo only lodged its defence at the Registry of the Honourable Court on 11 December 2013, in violation of the provisions of Article 35 of the Rules of the Court, which provide that: "Within one month after service on him of the application, the defendant shall lodge a defence…"

7. Whereas it is understood that following a letter dated 26 September 2013, sent through DHL, the application filed by the Applicants was served by the Registry of the Honourable Court on the Presidency of the Republic of Togo, and not on the Minister of Justice and Keeper of the Seals of the Republic of Togo, who is particularly in charge of relations with other institutions of the Republic of Togo and representation of the Republic of Togo before judicial institutions.

8. Whereas furthermore, it is understood that the Application in question was then transmitted by the Presidency to the Ministry of Finance of the Republic of Togo, and that it was by coincidence that the Minister of Justice became aware of it.

9. Whereas therefore, the Republic of Togo is justified in claiming that the violation of deadline as imposed by Article 35 of the Rules of the Court is not proved.

10. Whereas it follows that the objection raised by the Applicants must be rejected.

As to the merits of the case

11. Whereas the substantive case concerns four points, namely: arbitrary arrest and detention, harm done to the dignity and reputation of the Applicants, and cruel treatment, as alleged by the Applicants, and compensation for the said harms.

Regarding arbitrary arrest and detention

12. Whereas in order to justify their application, the Applicants, through their Counsel, alleged that the Republic of Togo disregarded and violated their fundamental rights, especially, their right to freedom of movement, on the basis of a mere complaint filed against them by the Public Prosecutor at the Court of First Instance Première Classe of Lomé.

13. Maître Agbelengo Kodjovi Djelou, and his clerk Maître Koffi Ametowoyona Akumani, who is considered as his accomplice, argued further that in spite of the declaration of their innocence and the production of a title deed to the property, which is the subject matter of the dispute between them and Koffi Ganyekou Amevor, they were handcuffed and subsequently incarcerated under horrible conditions, before being dramatically brought, time and time again, before the said Court for questioning.

14. In spite of their bad state of health, Mr. Kodjovi Djelou and Koffi Akumani argued that the request to be freed was unsuccessful and that they were only freed after a handwriting expert confirmed the signatures of the complainant Koffi Amevor on the deeds of the sale of the plot of land as produced by Mr. Kodjovi Djelou and Koffi Akumani. The Applicants submitted that by this attitude, the judicial authorities of the Republic of Togo violated national and international legal instruments mentioned above particularly, Article 15 (1) of the Togolese Constitution in force, Article 9 of the Universal Declaration

of Human Rights and Article 6 of the African Charter on Human and Peoples' Rights, in that these texts prohibit all forms arbitrary harm to freedom.

15. They also maintained that they are not criminals and that contrary to the affirmations of the Republic of Togo, their bail would neither have endangered public safety nor the effective conduct of the trial, which eventually resulted in nothing but their release pure and simple, as evidenced by the decisions invoked above by the Court of First Instance Première Classe of Lomé and the Court of Appeal of Lomé.

16. Whereas the Republic of Togo, through its Counsel, objected that the arrest and detention of the Applicants were carried out in accordance with the laws of Togo; whereas indeed, the four conditions required by law for the pre-trial detention of an accused are not cumulative, and that in the instant case, at least two of those conditions were met, for example, the existence of strong indications of culpability and the risk that the freedom of the Applicants could hinder the course of justice, either by their fleeing or by their tampering with evidence of their culpability, or by putting pressure on witnesses or victims;

17. Regarding Mrs. Ablavi Senyiedjo Alipui, the Republic of Togo argued that notwithstanding the gravity of offences levelled against her, she was freed during the preliminary investigation phase, taking into account the advanced stage of her pregnancy, proving thereby, if the need should arise, that common sense and reason guided the conduct of the criminal trial.

18. For Maître Agbelengo Kodjovi Djelou, the Defendant added that it is evident that their arrest and preventive detention did not violate any law, in that the deed of sale which was produced for registration of the plot of land constituting the subject-matter of the dispute, was not authentic, and besides, was obtained under dubious conditions. That the same holds with respect to confirmatory judgment of 18 January 2002 in respect of land registry, as submitted by the

Applicants, wherein it was noted that the judgment was delivered after hearing both parties, including Mr. Dégbé Amevor, who has however been deceased since 15 July 1997.

19. For the Republic of Togo, the arrest and detention of Kodjovi Djelou and his clerk Koffi Akumani was meant to ensure the good conduct of investigations. That, indeed, the said clerk showed the kind of person he was by fleeing after the arrest of Maître Kodjovi Djelou, and was only apprehended after thorough investigations by the Police. That in the case of Maître Kodjovi Djelou, he demonstrated the kind of character he was made of through the manifest fabrication of evidence, notably the doctored handwritings.

20. The Republic of Togo concluded that all the measures taken against the Applicants respected the rules provided for in the circumstances, especially the Code of Criminal Procedure and the international legal instruments invoked above; that in the same vein, their bail was decided in accordance with the law and by a competent courts of law.

21. Consequently, in the absence of proofs of arbitrary arrest and detention, the Defendant is asking the Court to reject the allegations of the Applicants.

22. In this respect, the Court recalls that if by principle, the Court has no powers to review the reasoning for a decision made at the level of a Member State of ECOWAS, whereas the Court neither assumes the role of a national judge in a broader sense, nor that of an Appeal Court or a Cassation Court, it nevertheless remains important that it is the responsibility of the Court to derive all the consequences arising from human rights cases brought before it.

23. Therefore, the question which arises, is less that of whether the arrest and detention which were carried out took place within the framework of a judicial process, than that of having to examine whether in principle and in general, the alleged deprivation of freedom is justified in respect of human rights protection.

24. It follows from the pleadings filed in connection with the instant procedure, especially the Application dated 23 September 2013, the Memorial in Defence dated 2 December 2014, and other documents filed before the Court, that Maître Kodjovi Agbelengo Djelou, as a notary, and Mr. Koffi Ametowoyona Akumani, as clerk, were forcibly arrested, handcuffed and imprisoned as from April 2006, on the basis of a mere complaint lodged against them, and in connection with the exercise of their functions, before being freed at the end of month of September 2006.

25. It is also undisputed that Mrs. Ablavi Senyiedjo Alipui, wife of Maître Kodjovi Agbelengo Djelou, came under police arrest for the same reasons, before being freed after 72 hours, upon consideration of the advanced stage of her pregnancy.

26. It is also understood from the hearing of the instant case, that following his arrest, Maître Kodjovi Agbelengo Djelou was detained for twelve days at a police facility before being transferred to a prison, and subsequently taken to the Court of First Instance Première Classe of Lome in a handcuff for interrogation.

27. Contrary to the affirmations of the Republic of Togo, a close look at the pleadings of the case does not reveal any need for the arrest the Applicants, with no established antecedents of dishonest behaviour.

28. That however, the innocence of the Applicants was established by judgment N°. 0902 of 29 May 2013 by the Court of the First Instance Première Classe of Lomé, which was upheld by the Court of Appeal of Lomé in Judgment N°. 008 of 15 January 2015, and even by the admission of the complainant Mr. Koffi Amevor before Maître Télé Nikita Yakass, a notary at Lomé, that he was misled by his colleagues, following a report dated 7 July 2004 submitted in the case-file of the instant procedure.

29. Again, at our hearing sessions, it has not been revealed that at the time of arrest, the Applicants were in possession of the final Judgment N°.084 of 18 January 2002 delivered by the Court of First Instance

Première Classe of Lomé in the case between Mr. Dogbé Amevor (late father of the complainant Koffi Ganyekou Amevor) and Mrs. Ablavi Alipui, by which Mrs. Ablavi Alipui was declared the legitimate owner of the plot, which constitutes the subject-matter of the dispute now before us.

The Court notes that the said judgment has acquired the force of *res judicata*, therefore it was not subject to any appeal by Mr. Koffi Ganyekou Amevor as heir of his late father Dogbé Amevor, and therefore, the fraudulent nature of the deed of sale, as produced by the notary, has not been established and cannot not therefore, in any case, justify that the Applicants be denied their freedom.

30. The Court therefore holds that the Togolese judiciary wiping out all the procedures instituted against the Applicants, together with the compensations due them, is sufficient proof that the fate marked out for the Applicants was unjustified.

31. Considering the circumstances, the Court holds that the prolonged detention of the Applicants resulted from the malfunction of the public service of the Judiciary, which is incontrovertibly blamable on the Republic of Togo.

B- Regarding torture and inhuman, cruel and degrading treatment

32. Whereas generally, the onus is on an Applicant to provide evidence for his allegations; whereas in applying this principle, the ECOWAS Court of Justice has consistently held (see for example its judgment dated 17 February 2010 in case concerning **Daouda Garba *v.* Republic of Benin**) that all cases of human rights violation brought before it by an applicant must be described in specific terms, with sufficiently convincing and unequivocal evidence.

33. Similarly, the Court recalled its case-law in the case concerning **Hadijatou Mani Koraou *v.* Republic of Niger** where it affirmed that the Court does not have the mandate to examine cases of human rights violation in abstracto, but rather in concrete cases of human

rights violation. In principle therefore, an occurrence of human right violation of is found à posteriori by way of the evidence that such violation already taken place.

34. In the instant case, the Applicants do not prove that they have suffered acts of torture or inhuman, cruel and degrading treatment, within the meaning of the International Convention Against Torture; they only limit themselves to pleading laconic medical certificates made in 2011 and 2013 which do not state precisely, at any rate, any causal link between their condition of health and the ill-treatment they allege.

35. Furthermore, Koffi Ametowoyona Akumani, contrary to his statements, does not provide evidence for the severe beatings he alleges to have received at the hands of certain police officer named Ohin, whose identity is highly contested by the Republic of Togo as a member of the Togo Police Force.

36. Therefore, it must be noted that the acts of torture, inhuman, cruel or degrading treatment, as invoked by the Applicants, are not proven.

C- Regarding harms done to the dignity and reputation of the Applicants

37. Whereas it sufficiently demonstrated from analyzing the pleadings of the case and from the hearings, that Maître Kodjovi Agbelengo Djelou (a notary) and his clerk Koffi Ametowoyona Akumani, were arrested, handcuffed and imprisoned for at least five months on no valid ground and in disregard to their profession, and that Mrs. Ablavi Alipui was equally brought under detention for three days during the preliminary investigation, before being freed for reasons relating to her advanced stage of her pregnancy;

38. Whereas the matter was reported by the local press, which published defamatory articles of such nature as to seriously harm the credibility of the Applicants and the image of their notary consultancy, as evidenced by a publication on page 4, N°. 404 of the 21 July 2006 edition of Nouvel Echo (pleaded in the case-file) entitled:

"Un notaire vereux en prison, Me Djelou ou la honte des auxiliaires de justice" (a rogue notary in prison, Maître Djelou or the shame of auxiliary legal officers;

39. That it follows that the Applicants mentioned above argued that they were victims of that incident since their dignity and reputation have been soiled, within the meaning of Article 12 of the Universal Declaration of Human Rights of 10 December 1948, and Articles 10, and 17 of the International Covenant on Civil and Political Rights of 16 December 1966, which provide that all persons lawfully denied their freedom shall be treated with humanity and the inherent dignity of the human person, and shall not in any case be subjected to unlawful attacks on his honour and reputation.

D- Regarding compensation

40. Whereas regarding compensation, it should be recalled that in their written submissions, the Applicants prayed for a compensation for the harms suffered; they thus argued that in apart from the ill-treatment and humiliation they suffered, during the trial, they were compelled to sell off their completed and uncompleted real properties to pay for the bond required by the Court in respect of their bail, and they had to bear the cost of hiring handwriting experts for the documents allegedly forged, and they also had to make part-payments for reimbursements to numerous clients, who had made deposits for the services provided by their notary consultancy, but who eventually withdrew those orders and demanded the refund of their moneys.

41. Furthermore, Maître Kodjovi Agbelengo Djelou and his clerk Koffi Ametowoyona Akumani argue that following their arrest, their condition of health worsened, as attested to by the medical certificates pleaded in the case file, and that their children were expelled from school. Finally, they aver that for almost a decade, they have received no consultancy services from clients, as their source of revenue, to cater for the needs of their families.

42. Whereas the Republic of Togo dismissed Applicants' requests, as made above, on the ground that they are not justified and that in the any case, their arrest, placement in police custody and prison detention were measures provided under the law, and that those measures should not in any way constitute grounds for claiming attacks on their honour or humiliation.

43. Regarding the alleged denigrating and derogatory articles Maître Kodjovi Agbelengo Djelou allege to have suffered from, the Republic of Togo maintained that the publications concerned were made in a an independent newspaper with no link to the Republic of Togo.

    As regards the drubbing complained of by Koffi Ametowoyona Akumani, the Republic of Togo claims that it has no memory of any CID police officer called Ohin who may have been involved in the preliminary investigation procedure.

44. Whereas in accordance with the provisions of the texts cited above, namely Article 2 (3a) of the International Covenant on Civil and Political Rights, that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; whereas furthermore, Article 9 (5) provides that *"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."*

45. Whereas in the light of the foregoing, the Court has sufficient grounds to award the following sums of money to the Applicants, in reparation for the harms they suffered:

    - 3, 5000, 000 CFA Francs to Maître Kodjovi Agbelengo Djelou;
    - 3,000,000 CFA Francs to Mr. Koffi Ametowoyona Akumani;
    - 2,000, 000 CFA Francs to Mrs. Mrs. Ablavi Senyiedjo Alipui;

46. Whereas there are grounds to ask Republic of Togo to pay the said sums as ordered, and to dismiss any other claims brought by the Applicants;

As to costs

47. Whereas the Republic of Togo having come out unsuccessful, in compliance with the provisions of Article 66 of the Rules of the Court, the Republic of Togo shall bear the costs;

FOR THESE REASONS,

The Court,

48. **Adjudicating** in open court, after hearing the Parties, in respect of human rights violation in first and last resort;

As to formal presentation of the Application

- **Dismisses**, as unjustified, the objection regarding late lodgment of the Memorial in Defence of the Republic of Togo, as raised by the Applicants;

As to merits of the case

- **Adjudges** that the acts of torture, inhuman, cruel or degrading treatments as alleged by the Applicants are not proven;

- **Adjudges** that the Applicants were arbitrarily arrested and detained;

- **Adjudges** also that the Republic of Togo harmed their honour and dignity;

- **Declares** that the Republic of Togo is to be blamed for the harm suffered by the Applicants, and consequently orders the Republic of Togo to pay the following sums:

    - 3, 5000, 000 CFA Francs to Maître Kodjovi Agbelengo Djelou;

- 3,000,000 CFA Francs to Mr. Koffi Ametowoyona Akumani;

- 2,000, 000 CFA Francs to Mrs. Ablavi Senyiedjo Alipui;

- **Dismisses** the other claims of the Applicants;

- **Orders** the Republic of Togo to bear the cost.

Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS on the day, month and year stated above.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORÉ -** *Presiding;*
- **Hon. Justice Yaya BOIRO** - *Member;*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*

Assisted by **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

THIS WEDNESDAY, 7TH OCTOBER, 2015

SUIT N°: ECW/CCJ/APP/17/13
JUDGMENT N°: ECW/CCJ/JUD/18/15

BETWEEN
MESSRS. WIYAO GNANDAKPA & 7 ORS. - *PLAINTIFFS*

AND
THE REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **AJAVON ATA MESSAN ZEUS (ESQ.)** - *FOR THE PLAINTIFFS.*
2. **TCHITCHAO TCHALIM (ESQ.)** - *FOR THE DEFENDANT.*

-Violation of human rights -Arbitrary detention -Torture

SUMMARY OF THE FACT

Mr. Wiyao Gnandakpa and 07 others, all former members of the Togolese army, by Application dated 19 September 2014 seised the Community Court of Justice, ECOWAS. They claim to have been arrested in the 2000s for violating the internal and external security of the Republic of Togo and were detained for several months in several different places, where they claim to have been subjected to torture and inhuman and degrading treatment, before being released on 04 August 2006 by presidential pardon.

On 17 February the Applicants unsuccessfully filed an appeal for the purpose of obtaining compensation for the damages suffered by them and the regularisation of their administrative situation, including reinstatement into the ranks of the Togolese armed forces. Faced with the inertia of the public authorities, the applicants sued to the Republic of Togo before the Community Court of Justice, ECOWAS to find and adjudge that their detention was arbitrary and that they suffered torture and other inhuman and degrading treatment and in consequent to reinstate and compensate them.

LEGAL ISSUE

- *Can the arrest and detention of the Applicants for 2 to 4 years followed by their release by presidential pardon be considered arbitrary?*

- *Are acts of torture and other inhuman and degrading treatment proven?*

DECISION OF THE COURT

The Court found the evidence adduced by the Applicants to be insufficient and dismissed their claims.

JUDGMENT OF THE COURT

I- PARTIES

2. Messrs. Wiyao Gnandakpa, Bassabi Y. Nikabou, Akossi Gnalo, Matoukou Koui, Ayouba Gnanghan, Kao Patalousim, Yao Donko Okoroka, Nassam Ounadan, and the beneficiaries of the late Wandoua Dena,

All former members of the Togolese Armed Forces, domiciled in Lomé, Togo;

Having as Counsel, Maître Ajavon Ata Messan Zeus, lawyer at the Court of Appeal of Lomé, 1169, Avenue Calais, Lomé Togo;

- Plaintiffs/Applicants, on the one hand,

And

THE REPUBLIC OF TOGO

whose address is: Palais de la Presidence Lomé, 2, Avenue du Général de Gaulle, Lomé-Togo, represented by its Legal Representative, Minister of Justice, and Minister in charge of relations with State Institutions of the Republic, residing in Lomé, Rue de l'Entente, who, for the purposes of the present procedure, uses the address of its Counsel, Maître Tchitchao Tchalim, lawyer registered with the Bar in Lome, residing at 77, rue N'koyiyi in Lome, 08 BP: 80928, Lome, as addess for service

- Defendant on the other hand.

THE COURT,

- Having regard to the Revised Treaty Establishing the Economic Community of West African States (ECOWAS) of 24 July 1993;

- Having regard to The Universal Declaration of Human Rights of 10 December 1948;

- Having regard to the African Charter on Human and Peoples' Rights of 27 June 1981;

- Having regard to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984;

- Having regard to the Protocol of 06 July 1991 and the Supplementary Protocol of 19 January 2005 on the ECOWAS Court of Justice;

- Having regard to the Rules of the ECOWAS Court of Justice of 3 June 2002;

- Having regard to the Application dated September 19, 2014 from the above-named applicants;

- Having regard to the defense dated February 16, 2015 from the State of Togo;

- Considering the documents in the file;

- Having heard the parties through their respective counsels, and,

- Having deliberated in accordance with law.

II- PRESENTATION OF FACTS AND PROCEDURE

1. Messrs. Wiyao Gnandakpa, Bassabi Y. Nikabou, Akossi Gnalo, Matoukou Koui, Ayouba Gnanghan, Kao Patalousim, Yao Donko Okoroka, Nassam Ounadan, and late Wandoua Dena claimed that they were arrested during the decade of years 2000, on the charges of attack to undermine the internal and external security of the Togolese State, and that they were all detained, for several months, in various detention camps of the Togolese National Gendarmerie in

Kara, The Air Regiment Cantonment of Kara, the Lome National Gendarmerie Cantonment, the premises of the National State Security Agency, and the Lome Prison, where the claimed they were subjected to torture, degrading punishment and inhuman treatments, before they were freed on 4th August 2006, by the State Prosecutor at the Tribunal of First Instance in Lomé. According to them this release is confirmed by the certificate of Release N°. 3975 dated 4th August 2006, and signed by the Prosecutor, wherein it is specified that "the named Bonfoh Bassabi Yokoti Nikabou prosecuted for attack against the internal and external security of the State was released by presidential pardon on 12th July 2005."

2. On February 17, 2014, the aforementioned persons and the heirs of late Wandoua Dena unsuccessfully formulated, through their counsel, Maitre Ajavon Ata Messan Zeus, a graceful appeal dated 10th November 2013, in order to obtain compensation for the prejudices suffered by them, and to regularise their administrative situation, in particular as it relates to their reintegration into the the ranks of the Togolese Armed Forces.

3. In the face of the inertia of the Togolese Authorities, the above-mentioned Plaintiffs/Applicants filed an Application, through their Counsel, on 18th December 2014, at the Registry of the Honourable Court, and solicited that may it please the Court, as follows:-

   - To **declare** as admissible the Application filed by them;

   - To **declare** that they were arrested and detained for 2 to 4 years in the premises of the Togolese National Gendarmerie in Kara, The Air Regiment Cantonment of Kara, the Lomé National Gendarmerie Cantonment, the premises of the National State Security Agency, and the Lomé Prison;

   - To **declare** that they were subjected to acts of torture and other cruel, inhuman and degrading treatment during their arrest;

   - To **declare** that this situation is, from all evidence, and on the one hand, a violation of the provisions of Articles 1, 15 and 21

of the Togolese Constitution of 14 October 1992, Articles 5 and 9 of the International Covenant on Civil and Political Rights, Articles 4, 5 and 6 of the African Charter on Human and Peoples' Rights, Article 9 of the Universal Declaration of Human Rights, as well as Article 1 of the UN Convention against torture and other inhuman, cruel, and degrading treatments or punishments;

- To **order** reparation for the harm caused to them pursuant to the provisions of Article 9, paragraph 5 of the International Covenant on Civil and Political Rights;

Consequently:

- To **order** the Republic of Togo to take all necessary and urgent measures for their rehabilitation, their reintegration into their various military cadres, and to draw all the financial consequences that result from it;

- To **order** the Republic of Togo to pay each of Plaintiffs/ Applicants the sum of 20,000,000 FCFA, for acts of arbitrary arrest and detention for 2 to 4 years, and 30,000,000 FCFA, for acts of torture and other inhuman, cruel and degrading treatment inflicted on them;

- To **order** the Republic of Togo to bear all costs.

III- LEGAL ANALYSIS BY THE COURT

As to formal presentation

4. Whereas the above-mentioned application is introduced under the conditions required by Articles 33 and following of the Rules of the Court, and that it should be declared as admissible.

As to merit

On arbitrary arrest, detention and torture

5. Whereas in support of their claims, Plaintiffs/Applicants averred, through their Counsel that, after many years of detention, for various offences (attempts at undermining both internal and external security of the Togolese State, sharing of intelligence with the enemy, and failure to submit official report), they were, against all expectations, issued, individually, an Attestation of Release, by the State Prosecutor in the Tribunal of First Instance in Lomé, during the months of August 2006 and April 2008, whose content reads thus: *« **…was set free on Presidential Pardon on 12th July 2005 …**»*

6. According to Plaintiffs/Applicants, this attitude of the Togolese Republic undoubtedly constitutes typical cases of arbitrary arrest and detention, in the light of the provisions of the afore-mentioned texts.

   They added that during their detention in the premises of the Kara national gendarmerie camp, about 400 kilometres away from Lomé, they were subjected to acts of torture and other inhuman and degrading treatment; as proof, they still have visible aftereffects on their bodies, as attested to by the medical certificates attached to the file; They further asserted that the perpetrators of the said acts of torture are none other than Colonels Atcha Titikpina, Gnassingbé Ernest and Bika, Commandants Yark Damehame and Badabon, Lieutenant Pali, Chief Karinka Paul, Corporal Kpandabolo and other officers of the Togolese Armed Forces.

7. Also, Plaintiffs/Applicants consider that apart from the fact that the acts to which they were subjected, on behalf of the afore-mentioned persons violate the provisions of both national and international texts referred to above, those acts also constitute an infringement upon the physical integrity of their persons; worse, the pardon granted to them is not justified since this measure can only be applied to

individuals who were prosecuted, and have been convicted, as their case does not fall into this category.

8. Whereas on its part, the Republic of Togo, through its Counsel, argued that the claims made by Plaintiffs/Applicants were ill-founded, vague and confusing; citing an example where Plaintiffs/Applicants averred, twice, that between years 2000 and 2001, they were suspected to have acted in a way as to undermine the state security, which led to their arrest, and their homes being searched, without availing the Court any further details as to the place of their arrest and detention.

9. In regard to allegations on detention, the Defendant State argued that the vagueness of Plaintiffs' claim is worse, as they cited various places of detention, without mentioning, who, among them was subjected to preventive detention, and in which places of such detention. Defendant argued further that Plaintiffs/Applicants equally claimed, in a not too truthful manner, that they were transferred to the **prison civile** in Lomé, without being taken before a State prosecutor, prior to this; furthermore, they failed to prove that they were really subjected to torture and other cruel and inhuman treatments, but only contented in producing some medical certificates, ten years after their purported release from detention; medical certificates that they got issued to them at **clinique Saint Antoine de Lomé** in December 2013 and January 2014; Also, Plaintiffs/Applicants compounded the confusion they created by alluding to a relax that they enjoyed (a move that only the Tribunal has the exclusive power to grant) and a Presidential Pardon, which is a measure over which only the Head of State has the power to grant; finally, Plaintiffs/Applicants declared that they were indicted on charges of undermining both internal and external State Security, sharing State Intelligence Report with the enemy, and failure to file Duty Report, whereas they earlier claimed that they were never taken before a judge; Defendant concluded by averring that, it clearly shows that the confusion created by Plaintiffs/Applicants was perfect, and therefore, there is need to reject, out right, their claims, as ill-founded.

10. Whereas it is a general rule in law that the onus of proof lies on Plaintiff, for the claims made by him, and pursuant to this principle, the ECOWAS Court of Justice, has always held (see for example its Judgment of 17 February 2010, in the case of **Daouda Garba against Republic of Benin**), that whenever a Plaintiff is making human rights violation claims before it, such claims must be specific, and supported by unequivocal, and sufficiently convincing proofs.

11. In the instant case, the Court notes, at the end of the proceedings, and on the basis of the exhibits filed alongside the pleadings that Plaintiffs/Applicants have not produced any evidence as to their arrest and detention by the Togolese judicial authorities. Moreover, they simply state that they were victims, during the 2000s, of detention in the premises of the Kara National Gendarmerie Cantonment, about 400 kilometres away from Lomé, where they suffered acts of torture and other cruel, inhuman and degrading treatments, as evidenced by the visible scars on their bodies and the medical certificates attached to the file.

12. The Court observed that in addition to the fact that the medical certificates filed, were seriously contested by the State of Togo, as they concerned only six Plaintiffs/Applicants (out of a list of eighteen) and were not drawn-up, and produced until December 2013 and January 2014, while the arrests and alleged acts of torture are believed to have been committed between 2000 and 2001.

13. As regards the proof of their release, Plaintiffs/Applicants only produced a "C**ertificate of Release**" dated 4th August 2006 concerning the named Bonfoh Bassabi Yokoti Nikabou, in which it is mentioned that the latter "***was released by presidential pardon on 12th July 2005.***" This certificate, which was registered under N°. 3975/PR/2006 is also contested by the State of Togo on the grounds that it is improbable given that a public prosecutor's office cannot issue such a document in 2006, to give effect to a Presidential Pardon which would have intervened since 12th July 2005. On this issue, the Court observes that Plaintiffs/Applicants have not been

able to produce, to date, the other certificates of discharge concerning them even if their counsel had undertaken to do so, at the Court's hearing of 25th April 2015.

14. In addition, the Court notes that Plaintiffs/Applicants produced no evidence to justify the transmission, To Whom It May Concern, of their correspondence (appeal) relating to their rehabilitation and compensation, dated 10th November 2008 and 25th May 2009, respectively addressed to the President of the Togolese Republic and to the representative of the European Union.

15. On the strength of the foregoing, the Court believes that, from the look of things, Plaintiffs/Applicants produced no sufficient proofs of a likely violation of their human rights, especially the rights to freedom and liberty, the right to honour and personal integrity, within the meaning of Articles 5 and 9 of the International Covenant on Civil and Political Rights, Article 9 of the Universal Declaration of Human Rights, Articles 4, 5 and 6 of the African Charter on Human and Peoples' Rights and Article 1 of the UN Convention against torture.

16. Furthermore, the Court notes that, in support of their claims, Plaintiffs/Applicants invoked a certain number of national texts, in particular the Constitution of the Republic of Togo. It must, however, rule out such references from the outset, pursuant to its case law, wherein it always holds that it is not a judge of the constitutionality or the legality of acts or actions undertaken by Member States. The Court only refers to the international instruments that bind these States, which justifies that in human rights violation litigations before it, only these instruments can cited before it.

17. It therefore follows that the claims made by Plaintiffs/Applicants must be struck out.

As to costs

18. Whereas Plaintiffs/Applicants are unsuccessful, and that pursuant to the provisions of Article 66 of the Rule of procedure of the Court

there is need to order them to bear all costs, as applied for by the State of Togo.

FOR THESE REASONS

The Court, sitting in a public hearing, after hearing both parties, on a human rights violation matter, and after deliberating in accordance with the law, and in last resort,

As to formal presentation:

- **Declares** the Application filed as admissible;

As to merit:

- **Declares** that the evidence adduced to, by Plaintiffs/Applicant as insufficient proof for their claims;

***Consequently*,**

- **Dismisses** the claims made by Plaintiffs/Applicants;

As to costs

- **Orders** Plaintiffs/Applicants to bear all costs.

THUS MADE, ADJUDGED, AND PRONOUNCED IN A PUBLIC HEARING AT THE SEAT OF THE COURT IN ABUJA, ON THIS 23RD DAY OF APRIL 2015;

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding;*
- **Hon. Justice Alioune SALL** - *Member;*
- **Hon. Justice Yaya BOIRO** - *Member.*

Assisted by **Athanase ATANNON (Esq.)**- *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, OCTOBER 14TH, 2015

SUIT NO: ECW/CCJ/APP/04/15
JUDGMENT NO: ECW/CCJ/JUD/19/15

BETWEEN
HOPE DEMOCRATIC PARTY & ANOR. - *PLAINTIFFS*

AND
FEDERAL REPUBLIC OF NIGERIA & 5 ORS. - *DEFENDANTS*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON, (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **CHIEF A. A. OWURU** *AND* **OKECHUKWU EHOGU (ESQ.)** - *FOR THE PLAINTIFFS:*
2. **TAIWO ABIDOGUN, (ESQ), T. A. GAZALI & U. A.LAWAL** *AND* **I. I. HASSAN (ESQ.)** - *FOR THE 1ST & 2ND DEFENDANTS*
3. **PROFESSOR JOASH OJO AMUPITAN, (SAN),** *WITH* **FEMI ALEMEDE, (ESQ.)** - *FOR THE 3RD & 4TH DEFENDANTS*
4. **CHIEF ADEGBOYEGA S. AWOMOLO, (SAN)** *AND* **AKINYOSOYE AROSANYIN (ESQ.)** - *FOR THE 5TH DEFENDANT.*
5. **NWODIBO EKECHUWU (ESQ.)** - *FOR THE 6TH DEFENDANT.*

-Equal participation in Government
-Inpersonam jurisdiction
-Who can sue and be sued
-Cause of Action.

SUMMARY OF FACTS

The Plaintiffs brought an Application before this Court for the breach of their rights to equality before the law, equal participation in Government amongst other rights. That in furtherance of the 2015 presidential elections, illegal campaign funds were raised to the tune of 21.27 Billion mostly by top government functionaries towards the 3rd Defendants Presidential campaign. The Plaintiffs contend that the act was contrary to the provisions of the 1999 Constitution, Electoral and extant laws which forbids the acceptance of any anonymous monetary donations or gifts of any kind and any other donations exceeding 1,000,000.00 (One Million Naira) from individuals, and 1,000,000,000.00 (One Billion expenditure from Presidential candidates.

That the motive behind the presidential fund raising dinner organized by the Defendant was to assault the sensibilities of the voters, force the voters into submission and run the Plaintiffs out of the election. That the Defendants failure to observe, protect and enforce regional laws and protocol violates the rights of the Plaintiffs and Prevents them from participating on equal footing in the presidential election which enables voters to freely choose representatives to participate in the government of Nigeria.

The Defendants denied all the allegations stated in the Plaintiffs Application and brought a preliminary objection to the jurisdiction of this Court on grounds that the action is not against the community or its institutions and that it is frivolous, ill-conceived and amounts to an abuse of court process.

LEGAL ISSUES

1. *Whether or not this Court has in personam jurisdiction over the Defendants?*

2. *Whether or not the Community Court has jurisdiction to entertain a suit filed by an individual against another individual or against a corporate entity, not a Member State of ECOWAS?*

3. *Whether or not the Plaintiffs' suit discloses a cause of action against the Defendants?*

DECISION OF THE COURT

The Court held:

- *That the 1st Plaintiff is not competent to bring suits before the ECOWAS Court as this Court lacks the competence to hear cases of human rights violations brought by organizations.*

- *That since the 1st Plaintiff lacks human rights, this case is inadmissible*

- *That the action had become devoid of purpose since the 3rd Defendant did not win the election.*

JUDGMENT OF THE COURT

3. SUBJECT MATTER OF THE PROCEEDINGS

3.1. The 3rd Defendants open violation of the laws and presiding over the raising of over N21.27 Billion as Presidential Campaign Fund on 20th December, 2014 over and above the N1 Billion prescribed by law as Presidential Campaign Expenditures as ceiling, is an act of political intimidation and a violation of the laws and rights of the Plaintiffs, corrupting and manipulating the February 14, 2015 presidential elections against the Plaintiffs' interest and participation.

3.2. Plaintiffs' right to equality before the law and participation in government through freely chosen representatives to protect its political interest in government in accordance with the provisions of the law is being grossly violated as the 3rd Defendant N21.27 Billion Presidential Fund raiser above the N1 Billion expenditure allowed by law not being investigated, confiscated and prosecuted as required by the Nigerian Electoral Laws.

3.3. The non-prosecution, conviction and disqualification of the 3rd and 4th Defendants, who knowingly acted in subversion and violation of the Electoral Laws and monetizing the presidential campaign leading to reports of vote buying, corruption of the polity and electoral officials, violates Plaintiffs' rights to equal participation and likely election of its candidates at the February 14, 2015 presidential election in Nigeria.

3.4. The Defendants' acceptance and use of the sum of N21.27 Billion above the stipulated One Billion Naira is unlawful and wrong and an act of political intimidation and violation of Plaintiffs' rights to compete on equal ground.

3.5. The Plaintiffs and their supporters have been subjected by the Defendants to unimaginable political intimidation/exclusion, psychological trauma victimization and humiliation which affected

their participation at the February 14, 2015 presidential elections, and right to compete in getting their candidates freely elected at that presidential election on equal and level playing grounds.

3.6. The restitution and payment of US$300 Million damages to the Plaintiffs as Exemplary Damages against the Defendants for the losses suffered over the violation of their rights.

3.7. The Plaintiffs and their supporters have been subjected by the Defendants to unimaginable political intimidation/exclusion, psychological trauma victimization and humiliation which affected their participation at the February 14, 2015 presidential elections, and right to compete in getting their candidates freely elected at that presidential election on equal and level playing grounds.

3.8. This Court compelling the confiscation and deposition into Court the sum of N21.27 Billion Presidential Campaign Fund as illegally accepted by and in possession of the 3rd and 4th Defendants and due sanctions thereof.

4. SUMMARY OF PLEAS-IN-LAWS ON WHICH APPLICATION IS BASED

4.1. The Plaintiffs are entitled and have the rights to be allowed to freely choose or have their candidate at the presidential elections to be freely chosen in accordance with the provisions of the law, devoid of any form of political intimidation, undue advantage by the ruling political party and their presidential candidate at that election.

4.2. That acts of political intimidation and usurpation of all state apparatus in favor of a sitting President and a nominated candidate at a president election is a violation of the Plaintiffs right to participate in that election on ground of equality before the laws of the land.

4.3. That acts of encouraging political intimidation and non-investigation and prosecutions of the ruling party's presidential candidates

acceptance and possession of N21.27 Billion over and above the prescribed N1 Billion in contravention of the Electoral Laws is a violation of the Plaintiffs' right to freely contest and be freely chosen in accordance with the laws at the said presidential election.

4.4. Human Rights of citizens of member states are to be protected and enforced and are entitled to commensurate damages thereof.

4.5. Rights to participate in Government are a right guaranteed by the regional laws and African Charter on Human and Peoples' Rights.

4.6. No candidate at any election, no matter the status is allowed to place himself or his political party over and above the laws to the disadvantage of the other candidates as inflicted on the Plaintiffs by the Defendants.

4.7. The law requires that candidates at elections are governed by the same laws on equal basis so as to preserve their rights of equality before the law. See Section 91, 93, 100 (2) of the Electoral Act 2010, Sections 38(2) of companies of allied Matters Act (CAMA). The 1999 Constitution, Section 11(b).

See Article 3, 13 and 19 African Charter on Human and Peoples' Right.

6. FACTS AND PROCEDURE

6.1. NARRATION OF FACTS BY THE PLAINTIFFS

6.1.1. The 1st and 2nd Plaintiffs are a registered political party in Nigeria and Vice-Presidential candidate for the February 14, 2015 presidential election.

6.1.2. The Plaintiffs have constitutional right in Nigeria to sponsor candidates and contest elections at all levels including the presidential election of February 14, 2015.

6.1.3. The Plaintiffs aver that their rights as guaranteed by the provision of theAfrican Charter on Human and Peoples' Rights to equality before the laws andparticipate freely in government through freely chosen representatives in accordancewith the laws has been grossly violated by the Defendants since the 5th Defendant Notice of Election on February 14, 2015 general elections including the presidential election scheduled for February 14, 2015.

6.1.4. The 1st Defendant is a member state of the Economic Community of West African States who has subscribed to protect and ensure due compliance and enforcement of the provisions of the African Charter. While the 2nd Defendant is the chief law officer in Nigeria charged with the duties of prosecuting offenders and violators of the laws in Nigeria in collaboration with the 6th Defendant as investigating authority.

6.1.5. The 3rd Defendant is the present sitting elected President of Nigeria and the nominated presidential candidate of the 4th Defendant registered political party in Nigeria in the February 14, 2015 presidential election as scheduled.

6.1.6. The 5th Defendant is the electoral umpire and agency of Government charged with the responsibility of conducting elections and monitoring compliance of electoral laws by registered political parties in Nigeria.

6.1.7. On the 20th December, 2014, the 3rd Defendant as leader of 4th Defendant organized and held a fund raising dinner for the presidential election campaign in the nation seat of power called Aso Villa Banquette Hall, which was televised live across the nation and beyond, where he knowingly and with the due connivance with other Defendants received anonymous monetary donations from guests present who where majorly government contractors, Governors of States and Executives of Government parastatals and agencies, donations totalling N21.27 Billion for his campaign towards the February 14, 2015 Presidential election.

6.1.8. The names of such illegal donors to the 3rd Defendant Campaign Funds included N50 Million from a purported Governors' Forum by Governor Isa Yuguda, NDDC N5 Million, Mrs. Bola Shagaya friends of the First Lady N5 Billion, Mr. Tunde Ayeni N2 Billion, Gas Sector N5 Billion, Transport and Aviation Sector N1 Billion, Real Estate N4 Billion, Food and Agriculture N500 Million, Construction Sector N310 Million, Road Construction N250 Million, Sifax Group and Shelter Development Limited N250 Million.

6.1.9. The Plaintiffs aver that the 1999 Constitution, Electoral and extant laws forbid the acceptance of any anonymous monetary donation or gift of any kind, and any other donations exceeding N1 Million from individuals and N1 Billion expenditure for presidential candidates.

6.1.10. The Plaintiffs further state that the said 3rd Defendant President Fund Raising Dinner was designed to openly assault the sensibilities of and cow intended voters into submission and intimidates the impoverish general public and run the Plaintiffs politically out of the contest when it exceeded the stipulated ceiling of N1 Billion for each presidential candidate at that election including the Plaintiffs.

6.1.11. The Plaintiffs' state that the 3rd Defendant Presidential Candidate Fund Raising of N21.27 Billion violated the rights of the Plaintiffs of equality before the law and to freely choose representative in a level playing field for all the presidential candidates at the election in accordance with the provision of the law.

6.1.12. The Defendants deployed this unwholesome violation to the disadvantage and detriment of the Plaintiffs as reports of vote buying and obscene television adverts and bill boards of 3rd Defendant far exceeding N15 Billion worth is unleashed to intimidate and manipulate the February 14, 2015 presidential election in which the Plaintiffs are participants.

6.1.13. The law requires the 1st Defendant Member State, the 2nd, 5th and 6th Defendants to investigate and inquire into the 3rd and 4th Defendants' violation and desecration of the laws and prosecute and convict them appropriately in accordance with the laws.

6.1.14. The Defendants have conspired to violate all known laws of the land in their quest to create unequal access to and standing of candidates before the in the ensuring electoral process and contest of the scheduled presidential election in February 14, 2015 to the Plaintiffs' disadvantaged and eventual losses at the said presidential election as scheduled.

6.1.15. The Plaintiffs have suffered irreparable and immeasurably as their supporters and sponsors have been intimidated and scared off by the Defendants' brazen violations of the laws and rights of the Plaintiffs. The Defendants have in addition deployed and appropriated State institutions and enlisted officers of government agencies into the 3rd Defendant's Presidential Campaign Committees.

6.1.16. The Defendants obligations to observe, protect and enforce the compliance to the regional laws and protocol relating to the Plaintiffs human rights had been relegated, assaulted, violated and stripped bare to the humiliation and detriment of Plaintiffs right to participate on equal footing in the presidential election to enable voters in Nigeria to freely choose representatives to participate in the Government of Nigeria.

6.1.17. The Defendants have ensured and allowed the Courts in Nigeria to be under lock and keys since the 2nd of January, 2015 following Judicial Workers strike due to the continued impunity of the Defendants violating and neglecting the principles of the rule of law and separation of power in Nigeria, which prevents and denies the Plaintiffs' access to justice over Defendants rights abuses against them at election period as it only favors the Defendants' plan to manipulate the presidential election in their favor if not restrained and made to face sanctions in the interest of the regional growth, democratically and economically.

6.1.18. The Plaintiffs further state that they are being humiliated out of the February 14, 2015 presidential contest before the election date by the Defendants sheer crude methods and violation of their rights to freely participate following the Defendants impunity of receiving publicly N21.27 Billion as against the laws without commiserate prosecution and conviction and or disqualification as required by the laws in Nigeria against the offending 3rd and 4th Defendants by appropriate State authorities.

6.1.19. The Defendants desperation and activities engendering violence and intimidation of the Plaintiffs opponent in the polity in spite of the peace accord as brokered by the respected former Secretary General of the United Nations, Kofi Annan, have remained unabated as the 3rd and 4th Defendants of the ruling political party in Nigeria have not relented in deploying in clear abuse of powers, all state apparatus including security operatives and agencies of the Nigerian Government to partisan position to the detriment of the Plaintiffs in the absence of a level playing field towards the presidential election.

6.1.20. The Plaintiffs avers that the Defendants have by acts of intimidation and violent disposition towards the electioneering process engendering insecurity thereby preventing and scaring off Plaintiffs' contestants at the presidential election of February 14, 2015 and making it difficult for the Plaintiffs to freely choose their representatives and participate in the Government of Nigeria.

6.1.21. The Plaintiffs will at the hearing and trial of the case rely on and show evidence in proof of their case of restitution and damages over losses of the gross violation of their right to freely contest at the February 14th 2015 presidential election as occasioned by the Defendants.

6.1.22. The Plaintiff states that this court has the powers and jurisdiction to entertain and grant the reliefs sought herein.

FORM OF ORDER (RELIEFS) SOUGHT BY APPLICANT

6.1.23. A Declaration that the 3rd Defendants open violation of the Laws and presiding over the raising of over N21.27 Billion as Presidential Campaign Fund on the 20th December, 2014 over and above the N1 Billion prescribed by law as Presidential Campaign Expenditures as ceiling, is an act of political intimidation and a violation of the laws and rights of the Plaintiffs, corrupting and manipulating the February 14, 2015 presidential elections against the Plaintiffs' interest and participation.

6.1.24. A Declaration that Plaintiffs right to equality before the laws and participation in Government through freely chosen representatives to protect its political interest in Government in accordance with the provisions of the law is being grossly violated as the 3rd Defendant N21.27 Billion Presidential Fund raiser above the N1 Billion expenditure allowed by law not being investigated, confiscated and prosecuted as required by the Nigeria Electoral Laws.

6.1.25. A Declaration that the non-prosecution, conviction and disqualification of the 3rd and 4th Defendants, who knowingly acted in subversion and violation of the Electoral Laws and monetizing the presidential campaign leading to reports of vote buying, corruption of the polity and Electoral Officials, violates Plaintiffs' rights to equal participation and likely election of its candidates at the February 14, 2015 presidential election in Nigeria.

6.1.26. A Declaration that the Defendants' acceptance and use of the sum of N21.27 Billion above the stipulated One Billion Naira is unlawful and wrong and an act of political intimidation and violation of Plaintiffs' rights to compete on equal ground.

6.1.27. A Declaration that the Plaintiffs and their supporters have been subjected by the Defendants to unimaginable political intimidation/ exclusion, psychological trauma, victimization and humiliation which affected their participation at the February 14, 2015 presidential

elections, and right to compete in getting their candidates freely elected at that presidential election on equal and level playing grounds.

6.1.28. An Order directing the restitution and payment of US$300 Million damages to the Plaintiffs as Exemplary Damages against the Defendants for the losses suffered over the violation of their rights.

6.1.29. An Order of this Court compelling the confiscation and deposition into Court the sum of N21.27 Billion Presidential Campaign Fund as illegally accepted by and in possession of the 3rd and 4th Defendants and due sanctions thereof.

6.2. PROCEDURE

6.2.1. The initiating Application (Document number 1) was lodged in this Court on January 23, 2015 and was accordingly served on the Defendants.

6.2.2. The Defendants filed their respective Statements of Defense in response to the Originating Application, raising several very important issues of both law and fact.

In addition to their Statements of Defense, the Defendants respectively filed Preliminary Objections to the suit of the Applicants, challenging this Court's jurisdiction and competency to entertain this suit, as well as questioning the Applicant's own ability to bring this suit, and requesting this Court to dismiss this suit.

6.2.3. It is a general principle of law that all courts, including the ECOWAS Community Court of Justice, when their competency or jurisdiction is called into question, must stop everything and determine its own competency or legal authority to hear the particular case. This case presents no exception to this fundamental principle of law.

6.2.4. ***"The issue of jurisdiction is serious and exceptional in all matters so much that it cannot even be compromised by parties or the court. Parties cannot individually or by consent or agreement confer a right on an issue bordering on jurisdiction. The competence of a court to adjudicate upon a matter is a legal and constitutional prerequisite without which a court is a lame duck. Courts are creatures of statutes and their jurisdiction is confined, limited and circumscribed by the statutes which created them. A court cannot in essence give itself or expand its jurisdictional horizon by misappropriating or misconstruing statutes."*** **EFCC *vs.* Ekeocha (2008) 14 NWLR (pt.1106) 161 CA, at 178.**

6.2.5. ***"Jurisdiction is fundamental to any judicial proceeding. It must be clearly shown to exist at the commencement of or during the proceedings otherwise such proceedings no matter how well conducted and any judgment arising therefrom no matter how well considered or beautifully written will be a nullity and a waste of time…"*** **Edet *vs.* State (2008) 14 NWLR (pt. 1106) 101 CA at pages 66-67 para. GB ratio 4.**

6.2.6. Therefore, for purposes of this Ruling/Judgment, we shall dwell on only the legal issue of jurisdiction and or competency of this Court and of the ability of the Applicant to bring this suit against these Defendants. The outcome of this Ruling will lead the Court to determine if we can hear or entertain this suit and also the Applicant's status and ability to bring this suit. This then will enable us to determine whether or not the human rights of the Applicant were indeed violated by any conduct (acts or omission) of these Defendants, either individually or collectively.

6.3. OBJECTIONS BY THE 4th DEFENDANT

6.3.1. That the case of the Plaintiffs should be dismissed in its entirety, same being frivolous, ill-conceived and an abuse of the process of this Honorable Court.

6.3.2. The Court should decline jurisdiction in this matter as none of the claims could be brought within Article 9 of the Supplementary Protocol of the Court.

6.3.3. That the Court should decline jurisdiction in this matter because the real issue in controversy is between the Plaintiffs and the Peoples Democratic Party, 4th Defendant, which is an individual party and not a State Party or against the Community or its Institution. Or, in the alternative,

6.3.4. An Order striking out the name of the 4th Defendant from this suit on the ground that the Court has no jurisdiction over it not being a State Party.

6.4. PRELIMINARY OBJECTIONS OF THE 6th DEFENDANT TO THE PLAINTIFF'S ORIGINATING APPLICATION

6.4.1. That the grounds upon which this Defense is made, the Plaintiffs have woefully failed to establish any statutory duty which the 6th Defendant has refused or neglected to perform in the mode prescribed by law.

6.4.2. The 6th Defendant contends that contrary to the averment in Paragraph 3 of the Plaintiffs' Summary of Facts, the 6th Defendant never violated the Plaintiffs' human rights to equality before the law and participation in government, through freely chosen representatives in accordance with the laws, since the 5th Defendant's Notice of Election on February 14, 2015 or at any time at all.

6.4.3. Contrary to averment in paragraph 7 of the Plaintiffs' Summary of Facts, the 6th Defendant never connived with any of the other Defendants or anybody at all to receive anonymous monetary donations from guests present, and puts the Plaintiffs to strictest proof thereof.

6.4.4. The 6th Defendant avers that the issues raised in paragraphs 11 and 12 of the Plaintiffs' Summary of Facts are within their peculiar knowledge.

6.4.5. The 6th Defendant contends in reference to paragraph 13 of the Plaintiffs' Summary of Facts that the Plaintiffs never reported to him any violation and desecration of the laws against the 3rd and 4th Defendants that would have warranted investigation, prosecution and conviction, in accordance with law.

6.4.6. That the 6th Defendant denies entirely the averments in Plaintiffs' Summary of Facts in paragraph 15, 16, 17, 18, 19 & 20 and puts the Plaintiffs' to the strictest proof thereof.

6.4.7. The 6th Defendant contends contrary to paragraph 21 of the Plaintiffs' Summary of Facts that he has not occasioned any losses by the Plaintiffs and has not violated their rights to freely contest the February 14, 2015 presidential election or any election and are therefore not entitled to any restitution and damages and urge this Honorable Court to so hold.

6.4.8. The 6th Defendant contends that this Court does not have the powers and jurisdiction to entertain and grant the reliefs sought herein.

Orders Sought

6.4.8. An Order of this Honorable Court striking out the name of the 6th Defendant herein on grounds of Misjoinder and that this Honorable Court lacks the jurisdiction to hear and determine this suit as presently constituted against the 6th Defendant.

6.4.9. And for such further Orders as this Honorable Court may deem fit to make in the circumstances of the case.

Summary of Plea-in-Law

6.4.10. The Applicants in brining this matter before this Court have failed to exhaust the local remedies available under Articles 50 and 56(5)

of the African Charter on Human and Peoples' Right which is the International norm under which this Action is brought before this Court

6.4.11. This Court lacks jurisdiction to entertain this matter. This Honorable Court made it clear in **ESSIEN V. REPUBLIC OF GAMBIA**, N^{O}.1 (2009) CCJELR (PT.2) (PP. 15 -16) para 45 -5.

6.4.12. The citizens of Nigeria, including the Plaintiffs have a duty to report cases of commission of crime to the Police for investigation.

6.5. PRELIMINARY OBJECTIONS OF THE 4TH DEFENDANT

6.5.1. That this Honorable Court lacks the jurisdiction or competence to entertain the suit on the ground that the real issue in controversy is between The Plaintiffs and the Peoples Democratic Party (4th Defendant/Applicant) which is an individual party and not a State Party and the action is not against the Community or its Institution.

PLEAS OF FACT AND LAW RELIED UPON

6.5.2. On 20th December, 2014, the 4th Defendant/Respondent organized a fund raising dinner for the building of its corporate headquarters in Abuja and for its operational expenses. The Plaintiffs/Defendants brought this action seeking for a Declaration that the fund raising dinner organized by the 4th Defendant/Respondent was in breach of section 91(2-7) of the Electoral Act of 2010 (as amended) and that their rights to equality under Article 3 of the African Charter on Human and Peoples' Rights were violated. They further claim the sum of $300 Million as Exemplary Damages against the Defendants for losses suffered as a result of the violation of their rights.

6.5.3. The 4th Defendant/Applicant denies any violation of the rights of thePlaintiffs/Defendants and is also contending that the parties before the Court are not subject to the jurisdiction of the Community Court of Justice of ECOWAS under Article 9 (4) of

the Protocol Relating to the Court of Justice as amended by Protocol A/SP.1/01/15 and seeks for the dismissal of this case in line with Article 88 of the Rules of Procedure of Court of Justice of ECOWAS.

ORDER SOUGHT BY THE 4TH DEFENDANT/APPLICANT

6.5.4. An Order striking out this suit for want of jurisdiction because the real issue in controversy is between the Plaintiffs and the Peoples Democratic Party (4th Defendant/Applicant) which is an individual party and not a State Party or against the Community or its Institution, or in the alternative.

6.5.5. An Order striking out the name of the 4th Defendant/Applicant from this suit on ground that the Court has no jurisdiction over it not being a State Party.

6.5.6. For such further Order(s) as this Honorable Court may deem fit to make in the circumstance.

6.6. PRELIMINARY OBJECTIONS OF THE 1ST AND 2ND DEFENDANTS

6.6.1. The Community Court of Justice of ECOWAS lacks the requisite jurisdiction to hear this matter. Plaintiffs' suit relates to an alleged breach of the Nigerian Electoral Act 2010 as amended by the 3rd Defendant which prohibits donations to a candidate beyond One Billion Naira (N100,000,000.00); a matter not within the jurisdiction of this Honorable Court to entertain and / or determine.

6.6.2. Lack of cause of action against 1st and 2nd Defendant/Objector. The entirety of the Plaintiffs Notice of Registration of Application discloses no cause of action against the 1st and 2nd Defendants/ Objectors.

6.6.3. That the 1st and 2nd Defendants/Objectors while arguing this Preliminary Objection, shall rely on all Court processes as filed in this suit by the Plaintiffs.

ORDER SOUGHT

6.6.4. An Order of this Honorable Court striking out this suit for want of jurisdiction

6.6.5. An Order of this Honorable Court striking out the name of the 1st and 2nd Defendants/Objectors from this suit.

6.7. PLAINTIFFS REPLY TO THE 4TH DEFENDANT'S DEFENSE AND 6TH DEFENDANT'S OBJECTION

6.7.1. The Plaintiffs avers that paragraphs 3 - 31 and Order sought in the 4th Defendant's Statement of Defense are false and untrue.

6.7.2. The Plaintiffs' case is squarely about the abuse of power on the part of the 3rd Defendants in using the symbol, State House of Government and Seat of Power to organize a Presidential Fund Raising Dinner, where Government departments, contractors and agencies were coerced to donate N21.27 Billion of Tax payers money in violation of the law and right of the Plaintiffs to participate in the Government to the detriment of the aspiration and electioneering campaign of the Plaintiffs towards the 2015 presidential elections in Nigeria.

6.7.3. The Plaintiffs' case is supported by the corroboration of the evidence as shown by the 4th Defendant attached exhibits on the purported and redesigned invitation card and purported programme of event of the 20th December, 2014 shown to have as venue, the Banquet Hall, State House, Aso Rock Villa, Abuja for a supposed Peoples Democratic Party Fund Raising Dinner, using the State House, which the 3rd Defendant as the President is said to be an invitee to the State House sitting on the High Table as Chief which statement the Plaintiffs aver is untrue.

6.7.4. The 4th Defendant has not denied that the 3rd Defendant is the leader of the Party (4th Defendant) and is the Presidential Candidate of the 4th Defendant in the 2015 presidential election who used

the Banquet Hall of the State House to organize, after being duly nominated as a Presidential Candidate the same month, a general fund raising dinner for party office building, election for local government and other offices not yet in sight, other than the pressing immediate and urgent presidential election, as there was no other Presidential Election Fund Raising Dinner shown to have been organized outside the 20th December, 2014 event held in the Banquet Hall of the State House raising N21.27 Billion.

6.7.5. The Plaintiffs maintain that the Presidential Fund Raising Dinner of the 3rd Defendant was covered live by television and reporters of print and electronic media.

6.7.6. That contrary to the 4th Defendant averment in Paragraph 3 of the Statement of Defense, the 5th Defendant was forced by the 3rd Defendant to postpone the scheduled February 14, 2014 presidential election to 28th March, 2015 using his appointed aides, the National Security Adviser and the Chief of Defense Staff (security chiefs) who blackmailed the 5th Defendant of their inability to guarantee security for the election when even international election observers and preparation for elections on the part of other contestants including the Plaintiffs were concluded.

The forced postponement of the February 14, 2014 presidential election as scheduled was to enable the 3rd Defendant the manipulation of the election of 2015 in his favor to the detriment of the Plaintiffs.

6.7.7. The Plaintiffs will at the trial show further evidence that the 3rd Defendant has since the forced postponement of elections been engaged in clandestine move of bribing religious leader of CAN, traditional rulers and corrupting and monetizing the polity to the humiliation and detriment of the Plaintiffs.

6.7.8. The Plaintiffs case against the 3rd Defendant as both the Presidential Candidate of the 4th Defendant who as sitting President and Commander-In-Chief of the Armed Forces, controls and epitomizes

the authority of state, Nigeria, the authority he now abuses to the detriment of the Plaintiffs who are sponsoring Political Party and Presidential candidates at the 2015 presidential election.

6.7.9. The 3rd Defendant's political intimidation against the interest and aspiration of the Plaintiffs to freely contest the 2015 Presidential election has cost the Plaintiffs the confidence of their followers, supporters and voting populace who are scared off by the uncompromising, bullish and savage attitude of the 3rd Defendant and 4th Defendant to the prospect of losing the presidential election as they violate all known electoral laws in the land even as they seek to truncate the presidential election as scheduled by the 5th Defendant and create uncertainties to the detriment of the Plaintiffs.

6.7.10. The 3rd and the 4th Defendants have encouraged hate advertisement and documentaries against members of the opposition including the Plaintiffs and courted religious and ethnic division in Nigeria to ensure they do not lose the 2015 presidential election which has heated the entire polity and caused fear amongst the voting populace to the Plaintiffs detriment, outside the 1st , 2nd and 3rd Defendants inability to contain and flush out insurgents in the Northern part of Nigeria to date, now affecting the Presidential election to the Plaintiffs detriment.

6.7.11. The Plaintiffs losses over the 3rd Defendant continued engineering of political uncertainties over the rescheduled Presidential elections and insecurity and inability to guarantee fair play and obedience to electoral laws are estimated well over $150 Million, most of which the Plaintiffs borrowed to prosecute the Presidential election out of its funds.

6.7.12. The Plaintiffs' inclusion of the 4th Defendant in the present action is only as the 3rd Defendant's sponsoring political party. The 4th Defendant is only attempting to divert attention from its 3rd Defendant presidential candidate and the elected sitting President at the 2015 presidential election.

6.7.13. The 4th Defendant is not entitled to the Orders it seeks as they are ungrantable in the circumstances of this case as a relevant and necessary party to this suit.

6.7.14. The 6th Defendant is not entitled to the relieves sought in objection as they are also a necessary party to this suit who have a duty to ensure due obedience to law and order and provide needed security as the civil authority saddled with the duty to ensure a free, fair and orderly conduct of the presidential election in Nigeria and the observers of all the electoral laws to prevent any violation of the Plaintiffs' right to full participate and freely chose its representatives into government without any obstruction or intimidation of any kind which duty its has neglected, refused and failed to perform.

6.7.15. The Nigerian Judicial Workers strike was induced by the unwillingness of the 1st, 2nd and 3rd Defendants to allow due financial autonomy and the independence of the Judiciary in Nigeria.

6.7.16. The Plaintiffs will at trial contend that its case is fully made out and established against the Defendants.

6.8. PLAINTIFFS' REPLY TO THE 4TH AND 5TH DEFENDANTS PRELIMINARY APPLICATIONS

6.8.1. This Application is based on the failure of the Nigerian State to appropriately uphold the rule of law and protect the rights of the Plaintiff from being violated and trampled upon and refused to allow the Plaintiff's right of equality before the law and to participate at electioneering processes that prevents their participation in the Government of Nigeria through due election of their representatives at such elections.

6.8.2. The use of the State House as the symbol of Government of Nigeria to organize a presidential fund raising dinner under any guise for the 3rd Defendant is a violation of the Plaintiffs' right to freely participate at the 2015 presidential election as the said raising of N21.27 Billion further violated the Plaintiffs' right to elect their

representatives into the Government of Nigeria on the basis of equality of presidential candidates before the laws of the land.

6.8.3. The Application touching on the violation of rights of the Plaintiffs' presidential candidates and the 3rd Defendant as the personification of the Presidency in which Nigeria is the constituency as provided by law is a typical case involving the critical state actors of which the presidential aspirations and rights of the Plaintiffs and the 1st, 2nd and 3rd Defendants who represents the State as the major violators of the Plaintiffs human rights as guaranteed by the African Charter are the real issues at stake.

6.8.4. It is undisputed fact that a fund raising dinner held in a State House after the nomination of the 3rd Defendant who is the 4th Defendant's presidential candidate at the 2015 presidential elections has no other implication other than an abuse of use of the State Power in violation of the rights of the Plaintiffs and intimidations to scare off a balance competition and the voting populace in their favor to the Plaintiffs' detriment.

6.8.5. The abuse of the use of the state power to intimidate the Plaintiffs right to freely participate in that election is complete with the listing of state agencies, contractors and parastatals to donate to the 3rd Defendant rival Plaintiffs' presidential candidate at the 2015 presidential election using the State House Banquet Hall in full glare of the world and live to intimidate the Plaintiffs out of the presidential contest as scheduled.

6.8.6. The 1st, 2nd and 3rd Defendants who symbolize the State are the ones sued as the principal violators and abusers of the state powers and who reside at the State House by virtue of their election thereto and not the 4th defendant who is joined as a nominal party and sponsoring political party of the 3rd Defendant candidacy at the 2015 presidential election.

6.8.7. This case is not between the Plaintiffs and the 4th or 5th Defendants as none of them live in the State House and could have had access

to the State House to organize any fund and could have had access to the State House to organize any fund raising dinner without the invitation and authority of the 3rd Defendant presidential candidate and the other way round as no political party is allowed to use the State House for fundraising more so at election time without intending to intimidate and violating the rights of the other opponents including the Plaintiffs to participate on the basis of equality before the law.

6.8.8. This is a typical case of violation of human rights with the principal (3rd) Defendant state actors as principal violator to humiliate the Plaintiffs opponent at the scheduled 2015 presidential election in Nigeria amongst other violation traceable to him.

The Grounds of Objection

6.8.9. The grounds of preliminary objection are clearly misconceived and should be discountenanced as lacking in merit and only diversionary to the real issue for adjudication by this Honorable Court.

6.8.10. The decision of the Court in **Social and Economic Right Action Centre (SERAC) and Another *vs.* Nigeria (2001) AHRLR 60 (ACHPR 2001)** and similar such cases have sought to reinforce member state citizens access to justice for the protection of human and people's rights in the African context.

6.8.11. The problem of Africa being one of leadership and abuse of powers by elected leaders resulting to flagrant violation of human rights and rights of citizen of member states to freely participate in the government of their States and countries, more so on acknowledged violation of Plaintiffs' right by the 3rd Defendant notable State actor.

6.8.12. The Defendants cited case of **Peter David *vs.* Ambassador Ralph Uweche (2010) CCJELR 213** is not applicable in the instant case as the facts and parties are not related. This is between affected individuals and the State and its elected representative as principal State actor.

On the Court's Jurisdiction

6.8.13. The Community Court of Justice established by Article 15 of the ECOWAS treaty is the main judicial organ of the Community.

6.8.14. The Supplementary Protocol (AP/SP.1/01/05) modified the ECOWAS Treaty and conferred on the Court competence to determine cases of human rights violation that occur in any member state of the Community.

6.8.15. The Protocol on Democracy and Good Governance imposes on the States the obligation to apply the African Charter on Human and Peoples' Rights as well as other international instruments in their respective States.

6.8.16. There is no doubt about the Court jurisdiction over the 1st Defendant, Nigeria by virtue of its being a signatory to the ECOWAS Treaty and other Community Instrument including the Protocol on Democracy and Good Governance to adjudicate any case of alleged violation of human rights for which it should be held accountable.

6.8.17. The act of violation of Plaintiffs' human rights by the sitting President and presidential candidate in Nigeria using the State House is an act of the State liable to due adjudication by this Court and due sanction, more so, where an illegal donation of N21.27 Billion was accepted and kept by 3rd Defendant in the State House thus deliberately monetizing the polity with the report of alleged bribing of clericsreligious leaders of CAN and Traditional Rulers and other vote buying accusations to the detriment of the Plaintiffs.

6.8.18. Plaintiffs urge this Honorable Court to dismiss the 4th and 5th Defendants'Preliminary Objection with heavy cost and proceed to expeditiously hear the Plaintiffs' case as presented before it.

6.9. PLAINTIFFS' RESPONSE TO THE 1ST AND 2ND DEFENDANTS PRELIMINARY APPLICATIONS

6.9.1. That the Court lacks jurisdiction because it is erroneously assumed by them that the Plaintiffs' suit borders on a purported breach of the Nigerian Electoral Act, 2010 without any reference to the stated violation of Articles 3 and 13 of the African Charter on Human and Peoples' Rights.

6.9.2. That there is a lack of course of action against the 1st and 2nd Defendants contrary to paragraphs 7 and 16 of the Originating Application touching on their connivance and encouragement in the acts of violation of the Plaintiffs' rights and their obvious failure to ensure due compliance with regional protocols and treaties entered into by them.

6.9.3. The 1st and 2nd Defendants are in complete misapprehension of the Plaintiffs' case and so is their Preliminary Application/ Objections.

Plaintiffs' Case As Stated

6.9.4. The Plaintiffs' case is clearly predicated on the wanton violation of Article 3 and 13 of the African Charter on Human and Peoples' Rights, which provides as follows:

Article 3:

A). Every individual shall be equal before the law,

B). Every individual shall be entitled to equal protection of the law;

Article 13:

Every citizen shall have the right to participate freely in the Government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.

Every citizen shall have the rights to equal access to the public service of his country.

Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

6.9.5. The 1st and 2nd Defendants wrongly imagined that the Electoral Act as a municipal law can be isolated from the International Laws where its breach results to acknowledged Human Rights violations by the state actors.

Plaintiffs' Legal Argument

6.9.6. It is a well-established law in the Nigerian legal jurisprudence, that any municipal law which is in conflict with the Charter is void. **(*see* ELEGUSHI VS. ATTORNEY GENERAL, FEDERATION (2000) FWLP, pt.1 pg. 89.**

6.9.7. Therefore as a corollary, any State act in conflict with civilized standards as guaranteed by the African Charter on Human and Peoples Rights (ratification and enforcement) Act of which Nigeria is a signatory is liable to adjudication by Regional and International Courts as established to which Nigerian Government and its State actors and agencies are bound and answerable to.

6.9.8. In this respect, we commend to this Court the reference to Article 4 of the Revised Treaty of ECOWAS, under which the 1st Defendant signatory State pledged allegiance to the Principles of recognition, promotion and protection of human and peoples' right in accordance with provisions of the African Charter on Human and Peoples' Rights.

6.9.9. The erroneous impression the 1st and 2nd Defendants want to convey is that the act under review is a local issue, when it acknowledged it was committed by the principal State actors who appropriated the Nigerian House, (Aso Villa) and permitted and caused to be

organized an illegal and obscene fund raising donation of over N21 Billion as a presidential candidate of the 4th Defendant, which act we submit violates not just the Nigerian Electoral Laws, which is an off shoot of the African Charter but in specific terms, Article 13 and 3 of the African Charter on Human and Peoples' Right of which Nigeria is a notable signatory.

6.9.10. We submit that the Defendants humiliated and intimidated the Plaintiffs and violated the Plaintiffs right to equal access and use of public property was further violated when at such fund raising dinner caused to be organized by the 3rd Defendant had as donors, Government agencies, Government Contractors and elected Governors and other with tax payers funds illegally donated to the 3rd Defendant, which acts violated the human rights of the Plaintiff as presidential candidates to the equality before the law as guaranteed by the African Charter.

The Court's Power Of Inquiry

6.9.11. This Court is invited to inquire into whether the 1st, 2nd and 3rd Defendants have not violated the rights of the Plaintiffs as guaranteed by the regional protocols and treaties as entered into by the signatory state Nigeria and by its principal state actors, it agents and organs.

6.9.12. This Court, like its international counterpart including the ICJ is imbued with enormous powers to ensure entrenched enforcement, for some form of political rectitude among signatory nations in the areas of abuse of power and violation of member citizens' human rights and not to be viewed lightly as a mere routine Court only for police and immigration rights violation purposes only and neglecting the more serious issues of the abuse of the undue appropriation of State apparatus and properties to disadvantage and violation of rights of opposing/opponent political parties at the time of elections as exemplified in this case leading to serious violation of the Plaintiffs human rights and the African Charter and Regional Protocols.

6.9.13. The Regional Protocol on Good Governance, specifically, is completely violated by 1st, 2nd and 3rd Defendants' Member State and principal agents and State actors.

6.9.14. **Conclusion:** Plaintiffs urge this Court to dismiss the 1st and 2nd Defendants' Preliminary Objections with heavy costs and proceed to expeditiously hear the Plaintiffs case as presented before this Honorable Court.

7. ISSUES PRESENTED FOR DETERMINATION

7.0. The above claims and counterclaims of the parties have raised some very important and interesting issues, but we are however left with the foundational question to be answered by this Court, as follows: *"Whether or not this Honorable Court has the jurisdiction to hear this suit?"*

In order to answer this question, there are however, sub-issues which border on thismain issue:

7.1. Whether or not this Court has in personam jurisdiction over the Defendants?

7.2. Whether or not the Community Court has jurisdiction to entertain a suit filed by an individual against another individual or against a corporate entity, not a Member State of ECOWAS?

7.3. Whether or not the Plaintiffs' suit discloses a cause of action against the Defendants?

8. DISCUSSIONS

8.1. The first issue we shall consider herein is whether or not this Court has in personam jurisdiction over the Defendants? We say NO.

8.1.1. Just for the sake of emphases and due to the importance of the question of jurisdiction, we shall reproduce what we earlier declared in this Ruling/Judgment, that ***"the issue of jurisdiction is serious and exceptional in all matters so much that it cannot even***

***be compromised by parties or the court. Parties cannot individually or by consent or agreement confer a right on an issue bordering on jurisdiction. The competence of a court to adjudicate upon a matter is a legal and constitutional prerequisite without which a court is a lame duck. Courts are creatures of statutesa and their jurisdiction is confined, limited and circumscribed by the statutes which created them. A court cannot in essence give itself or expand its jurisdictional horizon by misappropriating or misconstruing statutes.*" EFCC *vs.* Ekeocha (2008) 14 NWLR (pt.1106) 161 CA, at 178, supra.**

8.1.2. ***"Jurisdiction is fundamental to any judicial proceeding. It must be clearly shown to exist at the commencement of or during the proceedings otherwise such proceedings no matter how well conducted and any judgment arising therefrom no matter how well considered or beautifully written will be a nullity and a waste of time…"*** **Edet *vs.* State (2008) 14 NWLR (pt. 1106) 101 CA at pages 66-67 para. GB ratio 4**, supra.

8.1.3. The Revised Treaty of ECOWAS establishing the Community Court of Justice provides that the Court shall have the jurisdiction to hear cases brought against Member States of ECOWAS and Community Institutions. **Haruna Warkani & 3 Ors *vs.* ECOWAS Commission & Anor.;** *See also*, **Supplementary Protocol (A/SP.1/01/05) Community Court of Justice, Article 9; Jurisdiction of the Court.**

Jurisdiction Over The Defendants

8.1.4. Going further, we shall examine each of the Defendants to determine their being subject to the jurisdiction of this Court, or the case falling within its competency. We observe:

(a) The 1st Defendant is the Federal Republic of Nigeria. We find that the Federal Republic of Nigeria is a Member State

of ECOWAS and as such is a proper party against whom suits can be brought for violating the human rights of the Applicant.

8.1.5. In the instant case, the allegations of violation do not state what specific action the Federal Republic of Nigeria committed or omitted. The originating Application states the following against the 1st Defendant:

> *"The 1st Defendant is a Member State of the Economic Community of West African States who subscribed to protect and ensure due compliance and enforcement of the provisions of the African Charter."*

See count four of the complaint.

8.1.6. Further as to the 1st Defendant, the Plaintiffs state:

> *"The law requires the 1st Defendant member state, the 2nd, 5th and 6th Defendants to investigate and inquire into the 3rd and 4th Defendants violation and desecration of the laws and prosecute and convict them appropriately in accordance with the laws."* **See count 13 of the complaint.**

8.1.7. The complaint merely states who the 1st Defendant is and what its functions and duties include as a sovereign state. In count 13, supra, the Plaintiffs say the 1st Defendant did not investigate, prosecute and convict those persons the Plaintiffs accused of illegally raising funds for their political activities. The Complaint however does not state that the Plaintiffs lodged their complaint and the 1st Defendant refused, failed and neglected to investigate the said complaint. Neither did the Plaintiffs say they reported the illegal fund-raising to any competent authority of the 1st Defendant and that such persons did not act; nor do they say whether they were prevented from pursuing their complaint, and if so, by whom, and what next step they took to pursue their rights.

8.1.8. So, the Court finds that the 1st Defendant is a proper party before this Court, but we do not find any wrong doing committed by the said 1st Defendant; accordingly, the complaint is dismissed as to the 1st Defendant for being frivolous, speculative and uncertain, and vague and indistinct.

8.1.9. The 2nd Defendant: Attorney General of the Federation - The complaint states:

> *"The 2nd Defendant is the chief law officer in Nigeria charged with duties of prosecuting offenders and violators of the laws in Nigeria in collaboration with the 6th Defendant as investigating authority."* **See count four of the complaint.**

8.1.10. Further as to the 2nd Defendant, the Plaintiffs state:

> *"The law requires the 1st Defendant member state, the 2nd, 5th and 6th Defendants to investigate and inquire into the 3rd and 4th Defendants violation and desecration of the laws and prosecute and convict them appropriately in accordance with the laws."* **See count 13 of the complaint.**

8.1.11. We note that these are the only references to the 2nd Defendant. As we stated in regards to the 1st Defendant, the Plaintiffs do not state that they reported any crime or other action to the 2nd Defendant or any other Defendant for that matter, and that such person (Defendant) failed to take any action toward the complaint nor do the Plaintiffs say what if anything or who prevented them from lodging and or pursuing their complaint of criminality.

8.1.12. The second observation we make here is that the 2nd Defendant is a functionary of the Government, that is, a cabinet minister in the government. In such an instance, he is not amenable to the jurisdiction of the Community Court of Justice.

See, **Center for Democracy and Development and Center for Defense of Human Rights and Democracy, Plaintiffs, *vs.* Mamadou Tandja and the Republic of Niger, Defendants, as reported in 2011 CCJELR 105**.

8.1.13. The 3rd Defendant: Dr. Goodluck Jonathan - The complaint states:

> *"The 3rd Defendant is the sitting elected President of Nigeria and the nominated presidential candidate of the 4th Defendant, a registered political party in Nigeria in the February 14, 2015 presidential election as scheduled."* **See count 5 of the complaint.**

8.1.14. Further as to the 3rd Defendant, the complaint states in counts 7-11, as follows:

> "7. On the 20th December, 2014, the 3rd Defendant as leader of 4th Defendant organized and held a Fund Raising Dinner for the Presidential election Campaign in the nation seat of power called Aso Villa Banquette Hall, which was televised live across the Nation and beyond, where he knowingly and with the due connivance with other Defendants received anonymous monetary donations and from guests present who where majorly government contractors, Governors of states and Executives of Government parastatals and agencies donations totally N21.27 Billion for his campaign towards the February 14, 2015 Presidential election.
>
> "8. The names of such illegal donors to the 3rd Defendant Campaign Funds included N50 Million from a purported Governors' Forum by Governor Isa Yuguda, NDDC N5 Million, Mrs. Bola Shagaya friends of the First Lady N5 Billion, Mr. Tunde Ayeni N2 Billion, Gas Sector N5 Billion, Transport and aviation Sector N1 Billion, Real Estate N4 Billion, Food and Agriculture N500 Million, Construction Sector N310 Million, Road Construction N250 Million, Sifax Group and shelter Development Limited N250 Million.

"9. The Plaintiffs aver that the 1999 Constitution, Electoral and extant laws forbids the acceptance of any anonymous monetary donation or gift of any kind. And any other donations exceeding N1 Million from individuals and N1 Billion expenditure for Presidential candidates.

"10. The Plaintiffs further state that the said 3rd Defendant President Fund Raising Dinner was designed to openly assault the sensibilities of and cow intended voters into submission and intimidates the impoverish general public and run the Plaintiffs politically out of the contest when it exceeded the stipulated ceiling of N1 Billion for each Presidential candidates at that election including the Plaintiffs.

"11. The Plaintiffs' state that the 3rd Defendant Presidential candidate Fund Raising of N21.27 Billion violated the rights of the Plaintiffs of equality before the law and to freely choose representative in a level playing field for all the Presidential candidates at the election in accordance with the provision of the law."

8.1.15. All these are allegations of the conduct of an individual, and we have already declared that this Court does not exercise jurisdiction over the persons of individuals.

Therefore, the complaint as to this individual is hereby dismissed; that he is the President is irrelevant as to the admissibility of this case against and individual. 8.1.16. The 4th Defendant: People's Democratic Party -

The complaint states: "The 3rd Defendant is the sitting elected President of Nigeria and the nominated presidential candidate of the 4th Defendant, a registered political party in Nigeria in the February 14, 2015 presidential election as scheduled." **See count 5 of the complaint.**

8.1.17. As can be seen regarding the 4th Defendant, the Complaint only mentions ***in passing*** that the 4th Defendant is a registered political party in Nigeria in the February 14, 2015 presidential elections. It does not say anything further as to what specific act the 4th Defendant committed, which constituted a violation of the Plaintiffs' human rights. Of course, the more substantial issue is that the 4th Defendant is not a Member State of ECOWAS and as such not amenable to the jurisdiction of the Community Court of Justice. This legal inhibition thus renders this suit inadmissible, and therefore we are compelled to dismiss this case as to the 4th Defendant. **Chief Frank Ukor *vs.* Rachad Laleye and Alinnor ECW/CCJ/APP/01/04; Moussa Leo Keita *vs.* Republic of Mali, ECW/CCJ/APP/05/06.**

8.1.18. Next, we go to the 5th Defendant: The Independent National Electoral Commission. The complaint states in count 6 that:

> "6. The 5th Defendant is the Electoral umpire and agency of Government charge with the responsibility of conducting elections and monitoring compliance of electoral laws by registered Political Parties in Nigeria."

8.1.19. Again, and as stated in respect of other Defendants, the complaint does not state in clear terms what acts of the 5th Defendant in keeping with its mandate spelled out above constituted a violation of the human rights of the Plaintiffs, which are cognizable before this Court.

8.1.20. Further, as stated in respect of other Defendants, the Plaintiffs have not said that they reported any violation of their human rights to the 5th Defendant and the said 5th Defendant, within the context of its mandate, failed, refused and or neglected to investigate Plaintiffs' complaint, and if Plaintiffs did not report such conduct, what prevented them from doing so.

8.1.21. The other important point to raise is that the 5th Defendant is a functionary of the government and not a member of ECOWAS,

and hence not subject to the jurisdiction of the Community Court of Justice. Accordingly, and as with other Defendants, this case is inadmissible as to the 5th Defendant and is hereby dismissed.

8.1.22. Finally, we come to the 6th Defendant: Inspector General of Police - As to the 6th Defendant, the Plaintiffs state in their complaint that:

"The law requires the 1st Defendant member state, the 2nd, 5th and 6th Defendants to investigate and inquire into the 3rd and 4th Defendants violation and desecration of the laws and prosecute and convict them appropriately in accordance with the laws." **See count 13 of the complaint.**

8.1.23. The only thing the Plaintiffs did here is to state who the 6th Defendant is and what it or he is supposed to do. The Plaintiffs have not said that they reported any criminality to the Police for which the Police failed, refused and or neglected to investigate; the Plaintiffs also did not say what (if any) prevented them from reporting such misconducts to the Police. Nothing specific is stated as to the conduct of the Police for which the Police have been sued in this Court.

8.1.24. More importantly, the Police are a state entity or organ and not a Member State of ECOWAS, and hence not amenable to the Community Court of Justice. This case is thus rendered inadmissible and is hereby accordingly dismissed as to the 6th Defendant.

COMPETENCY OF PLAINTIFFS TO BRING SUIT

8.1.25. Another aspect of the competency of this Court to hear this case relates to the Plaintiffs ability to bring this suit. We note that the 1st Plaintiff is a political party engaging in local political activities in Nigeria. Under the jurisprudence, this Court lacks the authority to hear matters brought by organizations such as political parties.

The only aspect of the competency of this Court an individual applicant can come to this Court under is its human rights mandate;

thus, the question is, what human rights does the 1st Plaintiff possess for and which the violation thereof would be cognizable before this Court? In our view, there is none; and as such, this case is rendered inadmissible as to the 1st Plaintiff.

8.1.26. This leaves only the 2nd Plaintiff before the Court as a party plaintiff. Our task now is to see what human rights of the 2nd Plaintiff were violated by the Defendants. The Plaintiff states his own case as him being intimidated by the actions of the Defendants in carrying out a fund-raising program where the Defendants raised over 21.27 Billion Naira, and this act of raising such huge amount constitutes a violation of his human right to equality before the law. First of all, this is a question of fact to be established, and if so established, then, the determination made as to whether the raising of funds by one political party violates the human rights of other political players in the electioneering process. But before getting to this fact-finding determination, the Defendants have raised the legal hurdle of lack of jurisdiction to hear the case, which enjoins this Court to stop and determine the legal issue first and if answered in the direction of the Plaintiff, then go into the factual aspect.

8.1.27. The Court takes note that the Plaintiff has based his suit on violations of his right to vie for political office under provisions of the Nigerian Electoral Laws. This Court has held that it will not interfere with matters of enforcement of domestic laws of member States. Thus the Court "declared that it had no jurisdiction to examine the constitutionality or legality of acts which come under the domestic norms and laws of the authorities of Member States (vis-à-vis violation of provisions of the African Charter on Human and Peoples' Rights as raised by the Plaintiffs) and that the Plaintiffs had no locus standi to bring the case before the ECOWAS Court of Justice." "The Court also declared the Application filed against Mamadou Tandja, a natural person, as inadmissible, and the claims brought by the Plaintiffs, as frivolous." **Center for Democracy and Development and Center for Defense of Human Rights and Democracy, Plaintiffs, *vs.* Mamadou Tandja and the Republic of Niger, Defendants, supra.**

8.1.28. Thus, in answering issue number one, the 4th Defendant relied on **Article 9 (4) of the Supplementary Protocol of (2005) of ECOWAS as amended by Protocol A/SP.1/01/15**. Also, the case: **Peter David *vs.* Ambassador Ralph Uwechue, 2010 CCJELR 213,** and the Court concurs with the 4th Defendant.

4th DEFENDANT/APPLICANT'S WRITTEN BRIEF IN SUPPORT OF THE PRELIMINARY OBJECTION

8.1.29. The subject-matter of this suit is in respect of a fund raising dinner organized by the 4th Defendant/Applicant in Abuja on 20th December 2014 for the building of its corporate headquarters in Abuja and for its operational expenses. The fund raising dinner was solely organized by the 4th Defendant/Applicant and not the Federal Republic of Nigeria and as such the dispute arising thereto is not one between the Plaintiffs and the state Party but is between the Plaintiffs and the Peoples Democratic Party who are individuals and not subject to the jurisdiction of the ECOWAS Court of Justice.

8.1.30. The Plaintiffs/Defendants alleged that the amount realized at the fund raising (N21.27 Billion) exceed the maximum limit of One Billion Naira election expenses allowed under Section 91 (2 – 7) of the Electoral Act 2010 (as amended) for a Presidential candidate and that donors exceeded the limit of One Million Naira donation per individual or entity. They also alleged political intimidation, planned manipulation of the February 14, 2015 Presidential election, vote buying and corruption of electoral officers against the 3rd Defendant/Respondent and 4th Defendant/Applicant. They further contended that State apparatus and media have been used to the advantage of the 3rd Defendant/Respondent against other political parties and that the 3rd Defendant/Respondent had expended N15 Billion in television adverts, bill boards and votes buying. Plaintiffs thereby alleged that their rights to equality under Article 3 of the African Charter on Human and Peoples' Rights have been infringed upon.

8.1.31. The 4th Defendant/Applicant is contending that the issues raised by the Plaintiffs/Defendants do not fall within the jurisdiction of the Community Court of Justice under Article 9(4) of the Protocol Relating to the Court of Justice as amended by Protocol A/SP.1/01/15 because the subject matter of this case is between individuals and not among State actors. Further, since the alleged violation of the Plaintiffs rights were committed by individuals and not State actors, the ECOWAS Court being an International Court does not have jurisdiction over matters involving individuals. 4th Defendant/Applicant therefore sought for the Court's intervention, through this Preliminary Objection, in accordance with Article 88 of the Rules of Procedure of Court of Justice of ECOWAS.

1ST AND 2ND DEFENDANTS WRITTEN ADDRESS IN SUPPORT OF NOTICE PRELIMINARY OBJECTION

8.1.32. The Preliminary Objection is challenging the competency of this Honorable Court for lack of jurisdiction to try this suit on the basis that the said suit is predicated on alleged breach of the Nigerian municipal law that is the Electoral Act of 2010 as Amended which is not actionable before this Honorable Court. And the Plaintiffs' claim discloses no cause of action against the 1st and 2nd Defendants/Objectors.

8.1.33. In arguing issue number one, the 1st and 2nd Defendants rely on the following laws: **Article 9 of the Supplementary Protocol [A/SP.1/01/05]** amending the Protocol **[A/P1/7/91]** of the Community Court of Justice, ECOWAS **Article 9 (a - g) and (2 - 8). Inakoju *vs.* Adeleke (2007) All FWLR [PT353] p 3 @ 87**; also, **The Registered Trustees of the Social Economic Rights and Accountability Project [SERAP] and Federal Republic of Nigeria on page 201, paragraph 1.** 8.1.34. In arguing issue number two 1st and 2nd Defendants rely on the following laws: **Adekoya *vs.* Federal Housing Authority (2008) 11 NWLR (PT. 1099) 539 at 551, paras, D - F;** also in **Fred Egbe *vs.* Hon. Justice J. A. Adefarasin (1987) 1 NWLR (PT.47) 1 at 20.**

8.1.35. The 1st and 2nd Defendants concluded that the 1st and 2nd Defendants are neither necessary nor proper parties in this suit as there is nothing claimed against them in this suit. There is neither factual nor documentary evidence to support any claim against the 1st and 2nd Defendants in the Plaintiffs' suit.

9. CONCLUSION

9.1. In argument before this Court, the Court asked the counsel for the Plaintiffs if, given the trend of events as they turned out eventually, whether he had considered discontinuing this suit since indeed the incumbent president and his political party, against whom the Plaintiffs had complained for violating his human rights to contest the 2015 presidential elections on a level playing field, had in fact lost the elections and conceded defeat to his main rival. Counsel responded in the negative, saying that he wanted this Court to rule on the issue so as to serve as a deterrent to other wouldbe violators of the elections law on fairness and equality before the law.

9.2. This Court takes recourse to its previous decision in the **Mamadou Tandja** case, supra, at pages 118-117, which we herein quote verbatim:

> **"B. AN ACTION HAVING BECOME DEVOID OF PURPOSE**
>
> "33. At the hearing of 3rd December 2010, the lawyer for the Republic of Niger asked the Court to terminate the proceedings, for according to him, the Application had become devoid of purpose, considering the developments in the political situation in Niger, which had surpassed those stages. He thus maintained that the claims of the Plaintiffs can no more be granted. Indeed, he contended that the referendum the Plaintiffs wanted debarred had been conducted and that the Constitution had been adopted and promulgated; that subsequently, a coup d'etat had occurred;

that the authorities of Niger's transition have drawn up a programme for restoring democracy, after adopting and promulgating a new Constitution."

"34. As for the Plaintiffs, they declared that they wanted their applications to be maintained, on the grounds that the decision of the Court will contribute towards dissuading other leaders who may have the intention of tampering with the Constitution of their country, so as to perpetuate themselves in power."

"35. The Court notes that on 18th February 2010, a coup d'etat occurred in Niger following which a Supreme Council for the Restoration of Democracy (CSRD) and institutions for transition were put in place for a return to constitutional rule in Niger. The said Council established a programme in three dimensions. For the implementation of the programmes under the first dimension, an independent National Electoral Commission proposed an Elections Calendar, according to which elections leading to the return to civil rule would be organized."

"By the said calendar, elections shall take place from 31st October, 2010 to 6th April, 2011. These shall include a Constitutional Referendum, local legislative and presidential elections. As for programmes under the second dimension, a Commission for Good Governance, and the Fight against Financial Crimes was created in May 2010. Finally, for the programmes under the third dimension, a Council for Reconciliation and Consolidation of Democracy was equally created."

"36. The Court notes that, with regard to the implementation of the programme of restoration of democracy, local elections were organized on 8th January 2011; legislative elections followed on 31st January 2011, while Mr. Mahamadou

Issifou of the le Parti Nigerien pour la Democratie et le Socialisme (PNDS) was elected President of the Republic of Niger, following a two-round Presidential election held on 31st January 2011 and 12th March 2011. He was sworn in on 7th April 2011."

"37. With regard to these latter events which occurred, and as exposed above, the Court concludes that the Plaintiffs' claims seeking various orders of injunction to restrain Mr. Mamadou Tandja from organizing the criticized referendum, modifying the Constitution and quelling protestation marches have become devoid of purpose, pursuant to Article 88(2) of its Rules cited above."

9.3. The facts in this cited case are wholly analogous to those in this instant case. We note that the case was filed against President Goodluck Jonathan and his People's Democratic Party for having conducted a fundraising rally in violation of the Electoral Laws of Nigeria by exceeding the maximum amount which can be raised by a political party. The complaint was that this gave the President and his ruling party an undue advantage to the detriment of the Plaintiffs and other candidates in the 2015 elections. The trend of events has shown that President Goodluck Jonathan did not win the elections and has already conceded defeat to his rival Gen. Mohammedu Buhari; in fact, Gen. Buhari has already been inaugurated into office as President of the Federal Republic of Nigeria.

9.4. Therefore, just as this Court determined in the ***Mamadou Tandja*** case, this present case is devoid of purpose since President Goodluck Jonathan and his PDP did not win the elections, hence this instant case has lost its meaning and is hereby ruled to be devoid of purpose, and hence dismissible.

9.5. Be it reminded that since our handling of this case is still on issues of law raised by the Defendants in opposition to this case, we

reiterate that by this Ruling, the Court does not go to or comment on the merits of the complaints as laid in the Originating Application in that once the Court's jurisdiction is questioned, the Court must first examine and determine that it has jurisdiction before it can reach the meritsof the controversy before it.-

9.6. Therefore in light of the fact that the Plaintiffs sued individuals and persons not within the competency of this Court's personal jurisdiction, and also because this Court exercises jurisdiction over persons who are State Parties to the ECOWAS Treaty, or who are members of ECOWAS, or ECOWAS Institutions, this Court is legally stripped of the right and authority to go into the substance of the allegations of the complaint because any action taken by the Court without authority/jurisdiction, is legally void, hence the case has to end at this preliminary stage without discussing the merits.

9.7. In other words, if this Court was not prevented by the limitations of the Treaty and Protocol and case law in terms of its jurisdiction over certain categories of persons, then we would have had to conduct a hearing and take evidence to determine whether any conduct of the Defendants, either individually or collectively, violated any human rights of the Plaintiffs.

9.8. In short, the substance of the Defendants' contention is that the claims of these Plaintiffs are brought against the wrong persons as Defendants; and secondly, that the complaint does not state a cause of action against the Federal Republic of Nigeria, who is the only person sued, who is a proper party before this Court. The Court finds that this suit is vexatious and was brought for the mere purpose of harassing and embarrassing the Defendants.

10. DECISION

The Court, adjudicating in a public sitting, after hearing both parties, in last resort, after deliberating in accordance with the law;

As to Motions for Extension of Time,

10.1. **Declares** that all the Motions for Extension of Time are granted.

As to Eligibility/Competency of Plaintiffs

10.2. **Declares** that the 1st Plaintiff is not competent to bring suits before the ECOWAS Community Court of Justice.

As to Defendants being Proper Parties Defendant before the ECOWAS Community Court of Justice

10.3. (a.) On the competency of this Court to entertain this suit because it is brought against persons who are not subject to the jurisdiction of this Court, it is hereby declared that the Defendants' Motions for Preliminary Objections are granted for the reasons stated herein. Accordingly, the claims against them severally and jointly are denied and the case dismissed; that 2nd through 6th Defendants not being competent parties Defendants before the ECOWAS Community Court of Justice, the case against these Defendants is ruled inadmissible against them, and they are dropped as improper parties before this Court, and the case accordingly dismissed severally and jointly.

10.3. (b.) Declares that the 1st Defendant is the only proper party Defendant in this case, but that the Plaintiffs have not alleged and proven any violation, misconduct or wrongdoing committed against the Plaintiffs by the said 1st Defendant, and as such, there being no proper cause of action against the 1st Defendant, the case is rendered inadmissible and is hereby dismissed and the claims denied.

As to the case being devoid of purpose

10.4. As stated supra, just as this Court determined in the **Mamadou Tandja case**, this present case is devoid of purpose since President Goodluck Jonathan and his PDP did not win the elections, hence

this instant case has lost its meaning and is hereby ruled to be devoid of purpose, and rendered dismissible, and hereby dismissed.

As to costs

The Court rules that there shall be no costs assessed for or against the parties.

Thus made, adjudged and pronounced in a public hearing at Abuja, this 14th day of October, A.D. 2015 by the Court of Justice of the Economic Community of West African States.

THE FOLLOWING JUDGES HAVE SIGNED THIS JUDGMENT:

Hon. Justice Friday Chijioke NWOKE - *Presiding;*
Hon. Justice Micah Wilkins WRIGHT - *Member;*
Hon. Justice Alioune SALL - *Member.*

Assisted by **Athanase ATANNON, Esq.** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, 20TH OCTOBER, 2015

SUIT NO: ECW/CCJ/APP/03/12
JUDGMENT NO: ECW/CCJ/JUD/20/15

BETWEEN
LA RENCONTRE AFRICAINE POUR LA DEFENSE DES DROITS DE L'HOMME (RADDHO) - *PLAINTIFF*

AND
THE REPUBLIC OF SENEGAL - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDENT*
2. **HON. JUSTICE MARIA DO CEU SILVA MONTEIRO**-*MEMBER*
3. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
4. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
5. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION OF THE PARTIES:

1. **AMADOU ALY KANE (ESQ.)** *AND*
   HORACE ADJOLOHOU (ESQ.) - *FOR THE PLAINTIFF*
2. **MAFALL FALL,**
   STATE JUDICIAL AGENT - *FOR THE DEFENDANT*

-Violation of human rights - Protocol on Democracy and Good Governance, art. 1 (b), 1 (c), 1 (d), and 2 (1) - Elections - Validation of candidature - Failing an object - Stay of proceedings - Article 88-2 Rules of Court - Costs

SUMMARY OF FACTS

On 17 February 2012, the Plaintiff (RADDHO) applied to the ECOWAS Court of Justice for a human rights complaint against the Republic of Senegal and requested that it be submitted to the expedicted procedure.

It states that on 27 January 2012, the validation of the candidacy for the presidential election (26 February 2012), of the outgoing President Mr. Abdoulaye Wade by the constitutional council, led to large-scale demonstrations, the repression of which by the police caused to be wounded and some dead among the protesters.

That a dozen people were killed, and journalists wounded during these demonstrations, eventually banned by the respondent state throughout the country.

The Respondent State, for its part, supports the dismissal of the Application, on the basis of the Plaintiff's lack of interest in the proceedings, having never appeared to support it, and asks the Court to dismiss the Plaintiff outrightly from the cause list for lack of interest.

LEGAL ISSUES

- *Can the repeated absences of the Plaintiff at the Court's hearings in support of its claim for a conviction for human rights violations justify its dismissal for lack of interest?*

- *Do the measures taken by the respondent State render the Plaintiff's action irrelevant?*

DECISION OF THE COURT

In its Decision, the Court finds that the Plaintiff's action has become devoid of purpose in view of the measures taken by the respondent State to secure and implement the measures requested.

That, therefore, there is no longer any need to rule on a lack of purpose under Article 88 (2) of the Rules of Court, since the Plaintiff never appeared in support of her Application despite the many referral in his favour, and pay the costs.

JUDGMENT OF THE COURT

The Court thus constituted delivers the following Judgment;

I- PROCEDURE

1. On 17th February 2012, ***la Rencontre Africaine pour les Droits de l'Homme (RADDHO)***, brought a human rights violation case against the Republic of Senegal before the ECOWAS Court of Justice;

2. By separate Application dated the same day, Plaintiff/Applicant sought the admission of the case to an expedited procedure;

3. On 22nd February 2012, notification of the two Applications was done on the Republic of Senegal, by the Registry;

4. On 9th March 2012, the Republic of Senegal filed its Memorial in Defence, at the Registry of the Court;

5. On 12th March 2012, ***la RADDHO*** introduce a Memorial in Reply, and on 12th April 2012, it further filed other Rejoinders;

6. On 4th May 2012, parties at cause were heard, within the framework of the Application for expedited procedure, and the Court adjourned the case for deliberations for 11th June 2012;

7. In Ruling dated 6th July 2012, the Court deliberated on the Preliminary Objections raised by the Republic of Senegal in the following terms:

   « - ***Declares*** *as admissible the human rights violation case filed by* ***la RADDHO*** *against the State of Senegal,*

   - ***Orders*** *the continuation of the case on its merits,*

   - ***Withholds*** *its pronouncement as to costs* » ;

8. On 19th February 2015, the case came-up for hearing, and parties pleaded it; ***la RADDHO*** failed to appear in Court that date, but forwarded a correspondence to the Court, seeking a postponement to a later date;

9. After hearing Counsel to the Republic of Senegal, the Court Decided to proceed with the case that day;

10. Following oral observations made by Counsel to the Republic of Senegal, with convincing proofs adduced, in support of his arguments, wherein he sought that the case be struck out, the Court adjourned the case for deliberations;

11. By correspondence dated 14th April 2015, ***la RADDHO*** requested the suspension of the deliberations into the case, as well as an adjournment of the hearing slated for the 23rd April 2015;

12. When came this date, the Court further postponed the deliberations to 18th May 2015;

13. The deliberations was further shifted, twice, to 30th June 2015, and 20th October 2015;

II- FACTS: CLAIMS AND PLEAS-IN-LAW BY PARTIES

14. By initiating Application dated 17th February 2012, ***la Rencontre Africaine pour les Droits de l'Homme (RADDHO)***, brought a case before the ECOWAS Court of Justice, against the Republic of Senegal, and sought from the Court, as follows:

    - « A **Declaration** that the decision by the Constitutional Council of Senegal to uphold the candidature of President Abdoulaye WADE is a violation of the principles as enshrined under the ECOWAS Protocol on Democracy and Good Governance, as well as the spirit and letters of the provisions of the Constitution of Senegal, and that such approval of candidature constitutes a threat and impediment to peace and security in Senegal;

- A **Declaration** that the use of live ammunition, by the Senegalese Police Force, on the protesting Senegalese citizens violates Article 22 of ECOWAS Protocol on Democracy and Good Governance, as well as Article 4 of the African Charter on Human and Peoples' Rights;

- An **Order** on the Republic of Senegal, to prevail on its Police Force to stop using live ammunition, in dispersing the protesters, and to desist from using any act of violence to disperse the protesters;

- An **Order** on the Republic of Senegal to put on hold the Presidential Elections slated for 26th February 2012, until the Republic of Senegal brings before the Court proof of its resolve to shift the said Elections to such a time that would ensure inclusive negotiations with opposition political parties, relevant stakeholders in Civil Society Organisations, and to guarantee sustainable peace, before, during and after the proclamation of Election Results;

- An **Order** on the Republic of Senegal, to carry out an investigation on the cases of death and the wounded from among the protesters, and to fish out and prosecute the police officers that were involved in the use of live ammunitions, to effect reparation for the prejudices suffered by the victims of human rights violation, following the protests organised in Senegal, since the announcement of the decision of the Constitutional Council»;

15. In support of its claims, ***la RADDHO*** averred that on 27th January 2012, the Constitutional Council of Senegal took a decision to uphold the candidature of the outgoing President, Mr. Abdoulaye WADE in the Presidential Elections slated for 26th February 2012; and that following this decision, huge protests took place, and were repressed by the Police Personnel, who were suspected to have used live ammunitions in dispersing the protesters; it added that during this repression, casualties of wounded and death were recorded, from among the protesters; it further gave details of the casualties as one

of the protesters was run over by a moving Police Van, and between six (6) to ten (10) others were killed; before finally adding that the real number of the wounded was yet to be ascertained;

16. It equally claimed that journalists were also victims of the police repression, and some of them (journalists) received threatening correspondences from politicians; and that some of the journalists that sustained injuries include Malick Rokhy BA, a correspondent of ***Agence France-Presse***;

17. ***La RADDHO*** further claimed that the State of Senegal equally took measures to prohibit protests on the Senegalese territory;

18. By separate Application dated 17th February 2012, ***la RADDHO*** pleaded with the Court to admit its cases to an expedited procedure, on the grounds that there was dire need for its claims to be examined on their merit, before the election slated for 26th February 2012, as there was also need to put an end to the continued deterioration of human rights situation in Senegal;

19. In support of its claims, ***la RADDHO*** cites the violation of the following instruments:

    - Article 4 (g) of the ECOWAS Revised Treaty;

    - Articles 1(b), 1(c), 1(d), and 2(1) of ECOWAS Protocol on Democracy and Good Governance;

    - Articles 4, 7, 10, 11 and 13 of the African Charter on Human and Peoples' Rights;

    - The UN Code of conduct for Peace Keepers;

    - UN Resolution 34/169 of the General Assembly of 17th December 1979;

    - And the Constitution of Senegal;

20. Indeed, ***la RADDHO*** claimed that the validation of the candidature of the outgoing President, Mr. WADE, by the Constitutional Council of Senegal, to enable him vie for third term in office constitutes, on the one hand, a violation of Senegal's obligations under the Revised ECOWAS Treaty of 1993, and, on the other hand, a violation of the relevant provisions of the ECOWAS Protocol on Democracy and Good Governance, especially its Articles 1 (b), and 2(1);

21. In regard to human rights violation, ***la RADDHO*** claimed that the use of live ammunitions on the protesters violates the provisions of Article 22 of the Protocol on Democracy and Good Governance, which forbids the use of live ammunitions, in a bit of dispersing gatherings or non- violent protests; and that under the said Protocol police officers are obliged to use only minimal and proportional force; and that further to this, such actions (use of live ammunitions) contravene international norms, such as the UN Code of Conduct for Law Enforcement Agents and Peace Keepers, UN Resolution 34/169 of the General Assembly of 17th December 1979, under which the use of exaggerated force, by police, in dispersing protesters, is restrained; that the use of live ammunitions equally violates the provisions of Article 4 of the African Charter on Human and People's Rights, which guarantees the right to life and Article 7 of the Constitution of Senegal, which provides that the human person is sacred and inviolable, and that the State has the obligation to respect and protect it at all times;

22. ***La RADDHO*** finally claimed that, by prohibiting peaceful protests and popular gatherings, the State of Senegal equally violates Articles 10 and 11 of the African Charter on Human and Peoples' Rights, which guarantees freedom of association and the right to associate freely with other persons;

23. In its Memorial in defence filed at the Registry of the Court on 9th March 2012, the Republic of Senegal sought from the Court as follows:-

As to Form;

- To **declare** the initiating Application filed by ***la RADDHO*** as inadmissible;
- To **withhold** jurisdiction over the said case;

As to merit;

- To **strike out** the case as ill -founded;

24. The State of Senegal averred that the issue surrounding the validity of Mr. Abdoulaye WADE's candidature was already overtaken by events, since the said elections took place in the most transparent circumstances, which was applauded Election Observers;

25. It also argued that in regard to the issue of human rights violation Plaintiff/Applicant did not bring any proof for its imaginary, worrying and false allegations its spread, by mentioning an unknown number of death casualties; that Plaintiff/Applicant also failed to name the victims, but was really all interested in the invalidation of Mr. WADE's candidature;

26. Senegal also argued that the ECOWAS Court of Justice cannot give injunctions to Member States, without infringing upon their sovereignty; Senegal averred that it views it as an anomaly for the Community Human Rights Judge dishing out injunctions to the Government of Senegal, to put on hold its Elections or to initiate proceedings against persons; it added that the Justice System in Senegal validly receive orders on initiating proceedings only on from the Senegalese Authorities as provided for in the Code of Penal Procedure of Senegal, and other legal instruments;

27. Senegal then concluded that the initiating Application filed by ***la RADDHO*** should be declared as inadmissible, because it is ill-founded;

28. At the hearing of 19th February 2015, Counsel to the Republic of Senegal sought for an outright striking out of the case; that this plea

is justified by the fact that ***la RADDHO***, which initiated the proceedings since February 2012 has never showed-up in Court to plead it;

29. Senegal also averred that it did not wait for the instant case to be instituted before the ECOWAS Court of Justice before it initiated necessary procedures in apportioning blame to whosoever was concerned, in regard to taking care of those who sustained injuries and death casualties that were recorded, during the pre-election protests; it mentioned, as proof of this fact that a judicial enquiry was carried out on some security personnel and preliminary investigations are currently under way regarding other similar cases; that some of these cases were examined already, as prison terms were pronounced on some guilty officers;

30. Therefore, Senegal claimed that in regard to the evolution of the political situation in the country, and the judicial proceedings initiated by the Senegalese Government, ***la RADDHO***'s claims should be declared as devoid of any useful purposes;

31. Senegal has produced, in support of its claims, an unquantifiable documentary evidence composed, among other things, of a Report on the Indemnity Files for the Victims of Pre-Electoral Violence, Copies of Verbatim of preliminary Investigations, referrals on initiating proceedings, as well as copies of Verbatim of interrogations, forwarded to the Investigating Judge …

III-GROUNDS FOR THE DECISION

Whereas under Article 88 (2) of the Rules Of the Community Court of Justice: «*The Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case or declare, after hearing the parties, that the action has become devoid of purpose and that there is no need to adjudicate on it..*» ;

32. Whereas in the instant case the Court notes, on the one hand, that the issue of the validity of Mr. Abdoulaye WADE's candidacy.

Abdoulaye WADE, and, on the other hand, the issue of the 26th February 2012 Elections have been overtaken by events;

33. Whereas the Presidential Elections held at the slated date, and a new President was democratically elected, in the person of Mr. Macky SALLs;

34. Whereas therefore all claims made by Plaintiff/Applicant have become devoid of any useful purpose;

35. Whereas ***la RADDHO*** equally sought an order, from the Court, on the State of Senegal, to end the repression of protests, to open an investigation on the alleged cases of death casualties, or injuries sustained, among the protesters, and also to pay compensations;

36. Whereas the Court notes that in the instant case, a judicial enquiry was conducted, following the protests, and certain Members of the Security Personnel were indicted for serious presumptions of fatal beating, voluntary wounds and murder; whereas these indictments attest to the fact that the Senegalese Authorities were conscious of shedding light on cases of registered death and injury sustained during the protests;

37. Whereas moreover, it can be deduced that from the evidence filed by the State of Senegal, a committee was put in place, which made proposals as to paying compensations to the identified victims, all these steps equally demonstrate the good intention to make reparation for all prejudices suffered by the victims;

38. Whereas therefore, the State of Senegal undertook necessary measures, not only to carry out investigations into the unfortunate events, but also to make reparations for all the prejudices suffered by all the identified victims;

39. Thus, the actions taken by the State of Senegal are in tandem with the measures sought by Plaintiff/Applicant, which are to be seen as already carried out and enforced;

40. On the strength of the foregoing, the Court notes that the case filed by ***la RADDHO*** has become devoid of any useful purposes, and consequently, it behoves the Court to declare that there no more need to adjudicate on it, for lack of any useful purposes, pursuant to Article 88 (2) of the afore-stated Rules;

IV-AS TO COSTS

42. Whereas under Article 66 (12) of the Rules of the Court: « *Where a case does not proceed to Judgment the costs shall be in the discretion of the Court.* »;

Whereas in the instant case, ***la RADDHO*** fell in Court;

Whereas it shall be judicious to order it to bear all costs;

FOR THESE REASONS

The Court, sitting in a public hearing, after hearing both parties, in a human rights violation matter, in first and last resort;

- **Declares** that there is no need to adjudicate on the claims made by ***la RADDHO*** for lack of useful purpose;

- **Orders *la RADDHO*** to bear all costs;

Thus made, adjudged and pronounced in a public hearing in Abuja, by the Community Court of Justice, ECOWAS, on the day, month and year stated above;

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

Hon. Justice Jérôme TRAORE - *Presiding;*
Hon. Justice Maria Do Ceu Silva MONTEIRO - *Member;*
Hon. Justice Micah Wilkins WRIGHT - *Member;*
Hon. Justice Yaya BOIRO - *Member;*
Hon. Justice Alioune SALL - *Member.*

Assisted by **Aboubacar Djibo DIAKITE, Esq.** - *Registrar.*

[ORIGIAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON FRIDAY, THE 23RD DAY OF OCTOBER, 2015

SUIT NO: ECW/CCJ/APP/23/14
JUDGMENT NO: ECW/CCJ/JUD/21/15

BETWEEN
ALTERNATIVE CITOYENNE & ANOR. - *PLAINTIFFS*

AND
THE REPUBLIC OF BENIN - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE TRAORE JÉRÔME** - *PRESIDENT*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE**-*MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **JOSEPH DJOGBENOU (ESQ.)** - *FOR THE PLAINTIFF.*
2. **THE STATE JUDICIAL AGENT IN THE PUBLIC TREASURY OFFICE** - *FOR THE DEFENDANT.*

-Violation of the Protocol on Democracy and Good Governance -Supplementary to the Protocol on the Mechanism for Prevention -Management - Conflict Resolution - Peacekeeping and Security and the ECOWAS Treaty - Electoral Disputes - Admissibility

SUMMARY OF FACTS

By motion dated 13th October 2014, the Political Party called "Alternative Citoyene" and Mr Roch Gnahoui David seised the Court to find that the Republic of Benin violated the ECOWAS Protocol on Democracy and Good Governance.

The Applicants considered that the Constitutional Court of Benin, by its Decision DCC 14-103 of 27th May 2014, violated the principle of the prohibition of any undemocratic mode of continuation of power enshrined in Articles 1 and 2.2 of the ECOWAS Protocol for good governance. In addition, they criticise the Government of Benin for violating the principle of sound management of the State apparatus by not providing the institutions responsible for the preparation of the electoral process with the necessary financial and material resources.

The Applicants asked the Court to order the Republic of Benin to remove all obstacles that block the process of updating and correcting the LEPI, to convene the electorate for the holding of elections for the renewal of Local and communal councils and finally to publish the electoral list, through its competent institutions, under the electoral laws.

LEGAL ISSUE:

- *Is the Application admissible?*

DECISION OF THE COURT

It follows from Article 10-a of the Supplementary Protocol of 19 January 2005 that only a Member State or the President of the ECOWAS Commission may bring such an action before the Court, which the Court affirmed in the ***Hissène HABRE v. Republic of Senegal*** *Judgment of 18th November 2010, in which it held that* ***"in the case of breach of a Community obligation by a Member State the Applicant ... is not entitled to bring a case before the Court under of Article 10 of the Supplementary Protocol".***

The Court held the action brought by Alternative Citoyenne and Rock Gnahoui David inadmissible for lack of quality and ordered the Applicants to pay the costs.

JUDGMENT OF THE COURT

I- PROCEDURE

1. On 13th October 2014, the political Party known as « ALTERNATIVE CITOYENNE » and Mr. ROCH GNAHOUI DAVID, brought a case before the ECOWAS Court of Justice;

2. On 14th October 2014, notification of the initiating Application was done on the Republic of Benin, by the Registry;

3. On 12th May 2015, the Chief Registrar of the Court issued a Certificate of non-compliance, to note the failure of the Republic of Benin to file its Memorial in Defence;

4. The hearing was slated for 7th October 2015, for the oral procedure. Following the oral submissions, the case was adjourned for deliberations, for judgment to be entered on 23rd October 2015.

II- FACTS- CLAIMS AND PLEAS-IN-LAW BY PARTIES

5. By Application filed at the Registry of the ECOWAS Court of Justice on 13th October 2014, the political Party known as «ALTERNATIVE CITOYENNE» and Mr. ROCH GNAHOUI DAVID, brought a case before the ECOWAS Court of Justice, against the Republic of Benin, and requested from the Court as follows:

   - To **adjudicate** on the case, within reasonable period, due to the circumstances;

   - To **declare** and **adjudge** that the Republic of Benin, through its State Institutions violated the provisions of Protocol A/SP.1/ 12/01 of ECOWAS on Democracy and Good Governance, Supplementary to Protocol on Mechanism of Prevention, Management, Conflict Resolution, Peace and Security, and the ECOWAS Treaty signed on 24 July 1993 at Cotonou, under which is the said Supplementary Protocol;

- To **order** the Republic of Benin to remove all impediments to the process of reviewing and up-dating of the LEPI (Permanent Electoral List);

- To **order** the Republic of Benin to empower the Electoral Body in Benin, to organize elections into the Local Councils and Communes;

- To **order** the Republic of Benin to call on its competent institutions to publish the electoral lists;

- To **orde**r the Republic of Benin to bear all costs;

6. In support of their claims, Plaintiffs/Applicants claim that the Institutions of the Republic of Benin, namely the Constitutional Court, the Parliament, the COS LEPI and the Government, which, through their actions, have violated the principles enshrined under Protocol (A/SP.1/12/01) on Democracy and Good Governance; that is the principle that forbids any undemocratic means of coming to, or keeping oneself in power, the principle of "strict respect for democratic principles", the principle of efficient management of State Apparatus, the principle of regular organisation of elections within legal and constitutionally approved periods, and the principle on the need for good public administration;

7. They claim that in regard to the Constitutional Court, through its Decision **DCC 14-103 of 27 May 2014**, it violated the principle of interdiction of any undemocratic means of accessing power, or holding on to it, as enshrined under Articles 1 and 2.2 of the afore-mentioned Protocol; it has equally violated the principle of good management of public affairs of the State, as provided for under Article 33 of the Supplementary Protocol, when the Constitutional Court held that Law N°. 2013 - 07 of 4th June 2013, which elongate, sine die, the term of office for the Local Councilors, which nevertheless came to an end since June 2013, as in conformity with the Constitution;

8. In regard to Parliament, they averred that, by carrying out, with delay, its constitutional responsibilities of putting in place the appropriate legal framework that governs the holding of timely elections at the Local and Municipal Council level, the Parliament did not allow the said elections to be held on the constitutionally approved dates and times, thus violating the principle of timely holding of the elections, as well as the principle of banning any undemocratic means of accessing power or holding on to it;

9. They also stated that by the failure of the **COS LEPI**, to put in place a system that could guarantees its good functioning, in order to reach, within reasonable period, its set objectives, the COS LEPI disregarded the principle on the rule of law, which implies good administration of the State, thus preventing the elections from holding on the constitutionally approved dates and times, as well as the provisions of the Electoral Law; by such failure, the COS LEPI has indisputably violated the Principle on holding Elections within the period approved under the Constitution and the principle on good public administration;

10. In regard, to the government itself, it is accused of violating the principle of efficient management of State Apparatus, when it failed to empower State Institutions in charge of the preparation for the Electoral Process adequate financial and material means, to function appropriately;

11. Whereas having been notified on the initiating Application filed, the Republic of Benin failed to file its Memorial in Defence, as can be attested to by a "Certificate of Non-Compliance (failure to file a process)" dated 12th May 2015, issued by the Chief Registrar of the Court;

III- GROUND FOR THE DECISION

1. On admissibility

12. Whereas under Article 10 a- of the Supplementary Protocol (A/SP.1/01/05) of 19th January 2005 amending Protocol (A/P.1/7/91)

on the Community Court of Justice: « (Access to the Court is open to the following)

> ***Member States, and unless otherwise provided in a Protocol, the Executive Secretary, where action is brought by a Member State to fulfil an obligation***;

13. Whereas Plaintiffs/Applicants essentially cite the violation, by the Republic of Benin, through its Institutions, of the provisions of Protocol A/SP.1/42/01 of ECOWAS on Democracy and Good Governance, Supplementary to Protocol on Mechanism of Prevention, Management, Conflict Resolution, Peace and Security, and by extension, violating the ECOWAS Revised Treaty signed on 24 July 1993 at Cotonou, under which is the said Supplementary Protocol.

14. Whereas they seek various orders from the Honourable Court, on the State of Benin, as follows:

- An **Order** on the removal of all impediments to the process of reviewing and up-dating of the LEPI (Permanent Electoral List);
- An **Order** on the Republic of Benin to empower the Electoral Body in Benin, to organize elections into the Local Councils and Communes, in order to renew the Mandate of the Councilors;
- An **Order** on the Republic of Benin to publish the Electoral Lists;

15. Whereas in the instant case, Plaintiffs/Applicants came before the Honourable Court, and plead with the Court to find the failure of the Republic of Benin towards its obligations under the provisions of the Protocol onDemocracy and Good Governance; and therefore, this is an action on the failure of a Member State towards its obligations under the Protocol;

16. Whereas under Article 10- a of the Supplementary Protocol of 19 January 2005, only a Member State or the President of ECOWAS

Commission can bring such a case before the Court; whereas the Court held this position in its Judgment of 18 November 2010, in the procedure of **Hissène HABRE *v.* State of Senegal**, when it declared that:

> ***" in regard to failure, by a Member State towards its obligations, Plaintiff/Applicant (…) lacks locus standi to bring a case before the Honourable Court, pursuant to Article 10 of the Supplementary Protocol."***,

and in its Judgment of 19 July 2013, in the procedure of **Karim M. WADE v. STATE OF SENEGAL**, where the Court declared under paragraph 89 of the said Judgment that:

← attend to this

> ***"it has jurisdiction to examine any dispute relating to failure by a Member State (…) Nevertheless, the Court finds that under the provisions of Article 10 of the Supplementary Protocol on the Court, actions for failure by a Member State to fulfil its obligations may only be brought by a Member State or by the President of ECOWAS Commission. Consequently, an Application lodged on such subject-matter by an individual or corporate body other than a Member State and/or the President of the Commission, shall be declared inadmissible for lack of locus standi."***

17. Whereas, within the meaning of the above-mentioned Article 10-a, it behooves the Court to declare the instant case inadmissible, for lack of *locus standi*;

2. As to costs

18. Whereas under Art 66.2 of the Rules of the Community Court of Justice, ECOWAS: *« The unsuccessful party shall be ordered to bear costs …»*

19. Whereas in the instant cased Plaintiffs/Applicants have not been successful;

20. Whereas it behooves the Court to order them to bear costs.

FOR THESE REASONS

The Court,

Sitting in a public hearing, in first and last resort, in a default Judgment in regard to the Republic of Benin, in a procedure on failure by Member States to fulfil their obligations:

- **Declares** the action filed by Alternative Citoyenne and Rock GNAHOUI David as inadmissible, for lack of *locus standi*;

- **Orders** Plaintiffs/Applicants to bear all costs.

THUS ADJUDGED AND MADE IN A PUBLIC HEARING AT ABUJA, FEDERAL REPUBLIC OF NIGERIA ON THE DAY, MONTH AND YEAR MENTIONED ABOVE.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice Jérôme TRAORE** - *Presiding;*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member;*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by **Aboubacar Djibo DIAKITE (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICEOF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 23RD DAY OF OCTOBER, 2015

SUIT NO. ECW/CCJ/APP/05/13
JUDGMENT NO. ECW/CCJ/JUD/22/15

BETWEEN
MAMADOU BABA DIAWARA - *PLAINTIFF*

AND
REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MARIAM DIAWARA (ESQ.)** *AND*
   AQUEREBURU (ESQ.) - *FOR THE PLAINTIFF.*
2. **IBRAHIM TOUNKARA** *AND*
   MOUSSA KODIO - *FOR THE DEFENDANT*

-Voluntary intervention -Interference in the judicial process
-Arrest and arbitrary detention
-Compensation.

SUMMARY OF FACTS

By Application dated 19th February 2013, Mamadou Baba Diawara, former General Manager of the banque de l'habitat of Mali (BHM), states that he is being sued as well as Ismaila Haidara Chief Executive Officer of the West African Investment Company (WAIC) by the public prosecutor's office of the Court of First Instance of Commune III of Bamako; they were charged with infringement of public property and misappropriation of public funds and sentenced by the Assizes Court to 15 years imprisonment, reimbursement of the misappropriated amount and damages.

On appeal the Judgment is quashed and annulled, the Applicant and Ismaila Haidara regained freedom following judgment of 27th May 2009. At the same time that the Prosecutor signed the provisional release order, the minister of justice instructed the same Attorney General to lodge an application for review of the Judgment.

As for the Banque de l'Habitat of Mali (BHM), it seised the Supreme Court for purposes of re-opening of proceedings of the same judgment; which it did to dismiss the case and the parties before the said Court.

On 17th October 2011, the Criminal Division dismissed the appeals of Mamadou Baba Diawara and Ismaila Haidara;

Following the cassation ruling of 27th May 2009, the Attorney General and the Advocate General at the Supreme Court were removed from office by decrees dated 15th June 2009, of the President of the Republic of Mali, who is publicly moved by this decision.

On 25th October 2013, the banque de l'habitat of Mali (BHM) filed an Application for intervention dated 18th October 2013 with the Registry of the Court.

In a Judgment dated 19th January 2015, the Supreme Court of Mali, in the light of an expert report, acknowledged the Applicant's innocence by considering that the actions of the latter "cannot characterise the crime of breach of public property".

The Applicant submits that the circumstances of the present case not only reveal an interference with political power in the functioning of the judicial institution but also reveal criminal and personal circumstances of arrest and arbitrary detention.

The Applicant therefore seeks the condemnation of the State of Mali to the sum of 10 billion FCFA for all causes of damages suffered.

For Mali, the Applicant is being prosecuted for financial malpractice and sentenced by the Assize Court. All the remedies have been exhausted and the conviction of the Applicant was final; it emphasised that the Court of Justice is not an appellate court for decisions made by the national courts of Member States.

LEGAL ISSUES:

- *Is the Application for voluntary intervention by the Banque de l'Habitat of Mali (BHM) justified by the fact that in a judgment of 19th January 2015, the Supreme Court of Mali completely exonerated the Applicant Mamadou Baba Diawara?*

- *Is the detention of Mamadou Baba Diawara arbitrary?*

- *Is Mamadou Baba Diawara entitled to damages?*

- *Can the counter-claim of the Republic of Mali be satisfied?*

DECISION OF THE COURT:

The Court declares admissible the Application submitted by Diawara against the State of Mali;

Declares that it is not necessary to rule on the Application for intervention by the Banque de l'Habitat of Mali.

Held that the detention of Mamadou Baba Diawara is arbitrary and ordered the State of Mali to pay him the sum of 35 million FCFA for all damages suffered;

Held that the Plaintiff did not commit any abuse of the right to act and accordingly dismisses the counter-claim of the State of Mali.

JUDGMENT OF THE COURT

I - THE PARTIES AND THEIR REPRESENTATION

1. Mr. Mamadou Baba Diawara, a citizen of Mali, who was then being held in prison at the Maison Centrale d'Arrêt De Bamako, filed the Application initiating these proceedings on 19 February 2013. He is being represented before the Court by Mariam Diawara, a lawyer registered with the bar of Mali, residing in Bamako, and by Aquereburu et associés, a lawyer registered with the bar of Togo.

2. The Defendant is the Republic of Mali, represented by the Directorate General of State Litigation.

II - FACTS AND PROCEDURE

3. The Applicant, Mr. Mamadou Baba Diawara, was Director General of the Banque de l'Habitat du Mali (BHM). He was the subject of a judicial investigation opened by the Office of the Public Prosecutor at the court of first instance of Bamako's commune III, together with Mr. Ismaïla Haïdara, who was Chairman and Managing Director of the West African Investment Company (WAIC), and they were both charged with offences against public property and misappropriation of public funds.

4. Brought before the Assize Court, they were respectively sentenced to life imprisonment and fifteen (15) years of criminal imprisonment by a judgment of 17 July 2008. Another judgment handed down by the Court on the same day condemned the two Defendants to pay the Banque de l'Habitat of Mali the sums of six billion two hundred and thirteen million six hundred and eighty-three thousand and ninety-one (6,213,683,091) francs as principal and seven hundred million (700,000,000) francs in damages.

5. The Defendants appealed to the Court of Cassation against this decision of the Assize Court, and the Court of Cassation quashed

and annulled the contested judgments and ordered the release of Mr. Diawara and Mr Haïdara, by a judgment of 27 May 2009.

6. In execution of this Judgment, the Prosecutor General of the Supreme Court, on 28 May 2009, issued a release order in favour of the two persons concerned the day after the decision was rendered.

7. At the same time, the Minister of Justice, asked the Prosecutor General of the Supreme Court to file an appeal for review of the Judgment, in accordance with the provisions of the Code of Criminal Procedure of Mali.

   BHM also applied to the Supreme Court to have the same judgment quashed.

8. By Judgment of 18 December 2009, the Supreme Court decided to quash the Judgment of 27 May 2009 of its Criminal Division and referred the case and the parties back to the said Court.

9. On 17 October 2011, the Criminal Division rejected the appeals filed by Mr. Mamadou Diawara and Mr Ismaïla Haïdara.

10. In the meantime, and based on the release order given by the Prosecutor General of the Supreme Court on 28 May 2009, the Governor of the Bamako prison decided to release Ismaïla Haïdara. For this act, he was found guilty of complicity in an attempted escape and sentenced by the Court of First Instance of commune III of Bamako on 4 May 2010. The same decision also convicts Ismaïla Haïdara for escape.

11. However, this judgment was appealed and by decision of 27 August 2012, the Bamako Court of Appeal overturned this decision and found the prison governor not guilty of the charges of complicity in an escape, which he was accused of.

12. In parallel to the criminal proceedings concerning the alleged misappropriation of funds, the present case has experienced some developments in administrative litigation. Indeed, following the

decision of the Supreme Court (of 27 May 2009) which quashed the conviction of Mr. Diawara and Mr. Haïdara (decision of 17 July 2008), the Public Prosecutor and the Attorney General of the Supreme Court were relieved of their duties by decrees dated 15 June 2009, after the President of the Republic of Mali publicly expressed his displeasure at the decision of the Supreme Court to quash the decision of the Assize Court. These decrees were challenged by the two senior magistrates before the Administrative Division of the Supreme Court, which upheld them by annulling the decrees in question, by judgment of 13 September 2012.

13. On 19 February 2013, Mr. Mamadou Baba Diawara filed an Application for an expedited trial before the Community Court of Justice (ECOWAS). Then on 3 July 2013, he filed another Application for provisional measures. However, by letter dated 4 September 2014 and received at the Court on 25 September, the latter waived the proceedings for the purpose of indicating provisional measures.

14. On 25 October 2013, BHM represented by Brysla, law firms registered with the bar of Mali, filed with the Registry of the Court an application for intervention dated 18 October 2013.

15. Finally, in a Judgment of 19 January 2015, the Supreme Court of Mali, in the light of a new expert report, recognised the innocence of the Applicant, considering that his actions *'cannot characterise the crime of damaging public property'*.

III - ARGUMENTS OF THE PARTIES

16. The Applicant considers that the circumstances of the present case did not only reveal the interference by the political authorities in the functioning of the judiciary, but also, in criminal matters and in relation to the personal situation of Mr. Diawara, an arbitrary arrest and detention.

17. He pointed out that the cassation ruling by the Supreme Court was strongly criticised by the President of the Republic of Mali, Mr. Amadou Toumani Touré. The latter demanded in a television broadcast that the trial be resumed and that the accused be maintained in detention. In this regard, Mr. Diawara attached to his file the tape on which these remarks were allegedly recorded. He also referred to the fact that the political power has, by decree, dismissed the public prosecutor and the attorney general of the Supreme Court and threatened to strike off judges from the bench.

18. He further notes that he remained in detention from 28 May 2009, when the Supreme Court ordered his release, until 18 December 2009, when the Supreme Court overturned the judgment of 27 May 2009 and referred the case back to the Criminal Division of the Supreme Court. He also drew the attention of the Court to the fact that his co-detainee, Mr. Ismaila Haidara, was released during this period.

19. In his pleadings and additional submission, filed with the Registry of the Court on 10 and 19 February 2015 respectively, the Applicant considers that his detention was arbitrary and that the Republic of Mali violated the following provisions

    - Articles 3 and 9 of the Universal Declaration of Human Rights, which state respectively: *"Everyone* has the right to life, liberty and security of *person"; "No one shall be arbitrarily arrested, detained or exiled"*;

    - Articles 9(1) and 10(1) of the International Covenant on Civil and Political Rights, which state: *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one may be deprived of his liberty, except for reasons and in accordance with the procedure provided for by law"*; *"Anyone deprived of their liberty is treated with humanity and with respect for the inherent dignity of the human person";*

- Articles 6 of the African Charter on Human and Peoples' Rights according to which: *"Every individual shall have the right to liberty and to the security of his Person. No one may be deprived of his freedom except on the grounds and on the conditions as previously defined by law: particularly, no one may be arbitrarily arrested or detained"*

20. The Applicant therefore requests that the Republic of Mali be ordered to pay the sum of ten (10) billion CFA francs *"for all causes of damage"*.

21. Returning to the facts, the Republic of Mali, in its statement of defence of 9 April 2013, received at the Registry on 17 April 2013, recalls that it was as a result of financial misappropriations that the Applicant was arrested, tried by the Assize Court in a mobile court in Segou and sentenced to life imprisonment and ordered to pay back more than six (6) billion CFA francs misappropriated. For Mali, all avenues of appeal were exhausted and the conviction of the Applicant is final following judgments of the Supreme Court.

22. According to Mali, the referral of the case to the Community Court of Justice by the Applicant, who refuses to accept his conviction by the competent judicial authorities, is a manoeuvre aimed at making the Community Court of Justice a court of appeal against decisions rendered by the national courts of ECOWAS Member States.

23. In its supplementary submission in reply, filed on 9 March, 2015 following the Judgment of the Supreme Court exonerating Mr. Diawara, the Republic of Mali first contests the notion of "arbitrary detention" relied upon by the Applicant. This notion refers to a lack of legal grounds, according to Mali.

    However, the arrest of the Applicant cannot be said to lack a legal ground, since it was carried out in accordance with judicial decisions. Furthermore, according to the Republic of Mali, it is not for the ECOWAS Court, in accordance with its own jurisprudence, to assess national judicial decisions.

IV - ANALYSIS OF THE COURT

24. The Court must first of all rule on the application for intervention by the BHM (A). It must then examine the arguments of the Applicant, which concern the alleged interventions of the political authorities in the case (B), the allegation of arbitrary detention (C) and the relief sought (D). The Court must also rule on the counterclaim made by the Republic of Mali (E).

A. On the intervention of BHM

25. BHM bases its claim on the fact that the provisional release of the Applicant and the payment of the damages sought will have the effect of calling into question his rights under Judgments 211 and 212 of 17 July 2008 of the Bamako Assize Court, and judgments 461 and 97 of 28 December 2009 and 17 October 2011 of the Supreme Court of Mali.

26. This application for intervention therefore only makes sense in a context where there is a likelihood that the national judicial decisions that convicted the Applicant, both civil and criminal, will be called into question. A new development in this regard is the Supreme Court ruling of 19 January 2015, which fully exonerates Mr. Diawara. At the time of the ruling of the ECOWAS COURT, the courts in Mali overturned all of his convictions.

27. In this context, the Court considers that there is no longer any need to rule on the application for intervention by the BHM. In fact, since the Supreme Court exonerated the Applicant, the BHM did not come forward in the present proceedings.

    The Court considers, in view of the development of the case, that there is no need to rule on the application for intervention by BHM.

B. On the alleged intervention of political power in the case

28. In his written submissions, the Applicant regularly refers to the remarks allegedly made by the President of the Republic of Mali

himself the day after the decision by which the two accused, Mr Diawara and Mr Haïdara, should have been released (cassation judgment of 27 May 2009). The Applicant even produced the tape containing the statements made by the Head of State, according to which, under the terms of the application, he undertook *"to use all his powers to keep the Applicant in prison".* In the view of the Applicant, *"all these elements constitute a body of serious evidence of unjustified intervention by the executive in the functioning of the judiciary, of pressure on judges and of the partiality of the judiciary".*

29. In support of this argument, he also cites the Supreme Court Ruling of 13 September 2012, which annuls the presidential decrees relieving the Attorney General and the Public Prosecutor from their duties. According to the Supreme Court, the two senior magistrates *"were relieved of their duties in reaction to a Ruling by the Criminal Division of the Supreme Court which overturned, without referral, the Judgments convicting Mamadou Baba Diawara and Ismael Haïdara in the case of the Public Ministry and BHM against the aforementioned, as evidenced by the words of the President of the Republic reported by the press".*

30. It would not occur to the Court to deny the possibly political background of the criminal trial that took place before the Malian courts, if only because it concerned a misappropriation of public funds, involving moreover colossal sums (more than six (6) billion CFA francs). The intervention of the President of the Republic of Mali and the involvement of the public authorities of that state are undoubtedly part of this context.

31. This commitment on the part of the political authorities is undeniable, but the Court must recall here that its task is to rule on concrete acts of violation of human rights, on measures that affect people's rights, or that affect them. It cannot dwell too much on mere statements, even if they may contradict the principle of judicial independence; it does not judge words or intentions, but legal acts or material actions

that infringe the rights of the individual. In these circumstances, it cannot infer a violation of rights from mere declarations; it expects any party submitting an application to establish that the violation of its right was real, concrete and effective, in short, that any declarations were followed by facts, corroborated by specific violations of the rights of the individual.

32. In its judgment of 23 March 2012, **"Barthélémy Dias v. Republic of Senegal"**, the Court clearly stated that:

> ***"the statements made by the political authorities in Senegal against Plaintiff, relating to the acts that led to the trial of the plaintiff are personal opinions, which only their authors are to be held responsible (...). The Court is of the opinion that such opinions, even from leading authorities as in the present case, are not such as to compromise the independence and impartiality of the judge in charge of the case..."***

33. The Court remains faithful to this view. In the present case, too, the Court considers that it is not required to infer a violation of human rights from mere statements. In this case, it would not make much sense for it to simply assess statements about the independence of the judiciary; its task is not to provide an abstract and general opinion on other opinions, but to sanction, on the basis of specific facts, violations of human rights.

34. The very proof of the non-impartiality of the judges was not provided. Indeed, in order to assess this impartiality, the Court has to look at subjective considerations, referring to what the judge(s) thought in his or her own mind during the trial. It must then focus on objective considerations that lead it to examine whether the court offered statutory and functional guarantees that would remove any doubt about its impartiality.

In the first case, the Applicant cannot deny the impartiality of the judges if he does not provide proof of real bias. In the second case,

the objective assessment of the impartiality of the members of the Criminal Chamber leads to the question of whether, independently of their conduct, certain verifiable facts give rise to suspicion of their impartiality.

35. In neither case did the Applicant provide the Court with tangible evidence of his allegations.

36. The Court must therefore reject the allegation of political intervention in the case before it.

C. On the allegation of arbitrary detention

37. There is no doubt in the opinion of the Court that the case before it has undergone an essential twist, a major development, with the judgment of 19 January 2015 clearing the Applicant of all the charges that were brought against him.

38. It is important in this respect to quote literally from the decision. According to the Supreme Court, and on the basis of a new expert report, *"(...) In any case, the actions of Mamadou Baba Diawara cannot characterise the crime of damaging public property for lack of guilty intent, since the report establishes that all the sums disbursed benefited the programme (...). In view of all the above, any accusation of damage to public property against Mamadou Baba Diawara is now erroneous, as the facts are no longer characterised (...).*

As the facts of damage to public property are no longer established, it is therefore important to annul the criminal conviction judgment no. 211 of 17 July 2008 and consequently the civil judgment no. 212 delivered on the same date by the Bamako Assize Court and to state that this annulment will be made without referral in application of the provisions of article 551 in fine of the CCP, which provides that "if the annulment of the Judgment with regard to a convicted person leaves

nothing remaining that can be classified as a crime or offence, no referral will be made". (pp.10 and 11 of the Judgment).

39. It is obviously not the task of the Court to assess the grounds or motivation of a national judicial decision. As it has always stated, it is neither a judge of national legality in the broad sense, nor a court of appeal or cassation of decisions rendered by the domestic court. It is therefore not for it to give any opinion on the proceedings that took place in Mali.

40. But the Court has the right, and the duty, to establish the human rights consequences of a national decision. In this case, it is a declaration of innocence, issued by a High Court of the Republic of Mali. It was the Supreme Court that decided that the Applicant was innocent of everything he was accused of, and therefore quashed the proceedings against him.

41. This annulment, contrary to what the respondent State claims in its supplementary submission in reply, is in itself a disavowal - of the previous proceedings - as much as an admission - that the Applicant was the victim of arbitrary detention -. By annulling all the proceedings against Mr. Diawara, the court in Mali is simultaneously and necessarily admitting that the grounds on which he was detained are erroneous, that his imprisonment was therefore arbitrary.

42. The question is therefore not, as the Malian State claims, whether or not the past imprisonment of Mr. Diawara was based on a judicial decision, but whether, in principle and in general, this deprivation of liberty was justified by guilt. In other words, the Court must take into account the last judicial truth stated, not those that precede it. By answering the previous question in the negative, in its final Judgment of 19 January 2015, the courts in Mali have themselves invalidated some of their own decisions and, so to speak, admitted their past mistakes. The Community Court of Justice, ECOWAS can only take note of this and then take it into account in its subsequent assessment of the human rights violation.

43. In doing so, it is in line with its jurisprudential tradition.

44. Thus, in the judgment **"Agba Sow Bertin v. Republic of Togo"** - Judgment of 11 June 2013 - the Court deplored the fact that ***"despite the judgments of the Indictment Division and the Supreme Court of Togo, Agba Sow Bertin* has *been kept in detention (...)"*** (§28). The same decision recalls that the The United Nations Working Group on Arbitrary Detention found that ***"That it is manifestly impossible for a State to invoke any legal basis which justifies the deprivation of liberty in the event of the continued detention of a person who has been released by a court decision"*** (§30).

45. In its Judgment of 3 July 2013, **"Mr. Kpatcha Gnassingbe and others v. Republic of Togo"**, the Court ***"acknowledges that the respondent State has recognised the facts (...). The Court holds that such recognition by the State (...) entails the full and complete liability of the respondent State"*** (§42).

46. In this case, the innocence of Mr. Diawara has been acknowledged. The Republic of Mali was therefore responsible for the violation of the rights invoked by the Applicant, all of which are opposed to arbitrary detention.

The compensation sought

47. In his pleadings, the Applicant asks the Court to order the Republic of Mali to pay him the sum of ten (10) billion CFA francs for *"all causes of damage"*.

    In accordance with established jurisprudence, the Court considers that it has a discretionary power to assess the compensation for damages resulting from the violation of a right, subject, however, to the production by the Applicant of a certain number of elements capable of objectifying the claim. In its assessment, the Court may also take into account considerations of fairness, as it stated in its

Judgment of 28 January 2009, **"Djot Bayi Tabia and 14 others *v.* Federal Republic of Nigeria"**:

> ***"The principle that 'every person whose rights have been violated is entitled to fair and just reparation' may be upheld by the Court here..., it is important to grant reparation of an equitable nature to all Applicants who are entitled to it"*** (§41).

48. In the present case, the Applicant does not provide the Court with the data to enable it to formulate the amount claimed. However, taking into account its discretionary powers and its jurisdiction, as well as the duration of the arbitrary detention - almost six (6) years - the Court considers it reasonable to set the compensation due at the sum of thirty-five (35) million CFA francs, all damages included.

D. On the counterclaim made by the Republic of Mali

49. In a counterclaim formulated at the outset of the proceedings, the Republic of Mali asked the Court to rule that the proceedings initiated before it constituted an abuse of rights and to order the Applicant to pay the symbolic franc.

50. The Court considers, however, that it is the right of the Applicant to institute any legal proceedings for the redress of any damage he considers to have suffered, and that in the circumstances of the case there is nothing extravagant about the fact that Mr Diawara believes that his rights may, at one time or another, have been disregarded by the political, administrative or judicial authorities of Mali. This right of the Applicant is even more justified when, as is apparent from the latest developments in the case at national level, a court has declared his innocence. Not only is there, in the opinion of the Court, no abuse of rights on the part of the Applicant, but he is even entitled to bring an action for compensation for the violation of which he was the victim.

51. In the circumstances, the Court rejects the counterclaim by the Defendant that Mr. Diawara be ordered to pay the symbolic franc.

FOR THESE REASONS

The Court, adjudicating in a public hearing, after hearing both parties, on the subject-matter of human rights, and after deliberating in accordance with the law, as a last resort, as to formal presentation:

- The Court **declares** admissible the Application submitted by Mr. Baba Diawara against the Republic of Mali;

- **Declares** that it is not necessary to rule on the application for intervention by BHM

As to the merits of the case:

- **Declares** that the detention of Mr. Diawara was arbitrary;

- Consequently, **orders** the Republic of Mali to pay him the sum of thirty-five (35) million CFA francs, for all damages;

- **Declares** that the Applicant did not commit any abuse of the right to act and consequently rejects the counterclaim of the Republic of Mali;

- **Orders** the costs to be borne by the Republic of Mali.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

1. **Hon. Justice Jérôme TRAORÉ** - *Presiding;*
2. **Hon. Justice Yaya BOIRO** - *Member;*
3. **Hon. Justice Alioune SALL** - *Member.*

Assisted by: **Athanase ATANNON (Esq.)** - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 23RD DAY OF OCTOBER 2015

SUIT NO: ECW/CCJ/APP/25/13
JUDGMENT NO: ECW/CCJ/JUD/23/15

BETWEEN
HEIRS OF IBRAHIM MAINASSARA BARÉ - *PLAINTIFFS.*

AND
REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORÉ -** *PRESIDING*
2. **HON. JUSTICE MARIA DO CEU SILVA MONTEIRO -** *MEMBER*
3. **HON. JUSTICE YAYA BOIRO -** *MEMBER*
4. **HON. JUSTICE HAMÈYE F. MAHALMADANE -** *MEMBER*
5. **HON. JUSTICE ALIOUNE SALL -** *MEMBER*

ASSISTED BY:
ABOUBACAR DIAKITÉ (ESQ.) - REGISTRAR

REPRESENTATION TO THE PARTIES:

1. **ABDOURAHAMAN CHAIBOU (ESQ.)** *AND*
   YERIM THIAM (ESQ.) - *FOR THE PLAINTIFFS.*
2. **AMADOU GARBA MAMANE (ESQ.)** *AND*
   IBRO ZABAYE - *FOR THE DEFENDANT*

-Violation of human rights
-Admissibility of the Application -Right to compensation

SUMMARY OF FACTS

General Ibrahim Mainassara Baré, former President of the Republic of Niger was killed by gunshots fired from a pickup truck equipped with a heavy machine gun. His heirs, being unable to obtain justice in Niger, brought the matter before the Community Court of Justice, ECOWAS. They accused the Republic of Niger of the extremely incomplete nature of the investigation that was carried out, and the unfair and illegal effects of the amnesty law that was applied to them before the courts of Niger. They maintained that the right to life is inherent in the human person. This right shall be protected by law. No one shall be arbitrarily deprived of his life. The applicants cited the International Covenant on Civil and Political Rights and Articles 3, 4, 5 and 7.1 of the African Charter on Human and Peoples' Rights. The latter provision provides that: Every individual shall have the right to have his cause heard, the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.

For its part, the Republic of Niger did not file a statement of defence before the Court, which delivered the default Judgment against it.

LEGAL ISSUES:

- *Is the Application admissible?*

- *Was the right to life of the late General Ibrahim Mainassara Baré violated?*

- *Are the Applicants entitled to compensation?*

DECISION OF THE COURT

Formal presentation

- *The Court declared the Application admissible, pronounced the proceedings in default against the Republic of Niger in accordance with Articles 35 and 90 of the Rules of Court.*

Merits of the case

- *Held that the right of the Applicants to justice was violated, held that the right to life of President Ibrahim Baré Mainassara was violated, therefore Orders the Republic of Niger to pay the following sums by way of compensation due to the heirs of President Ibrahim Baré Mainassara for all damages:*

  Seventy-five million (75) CFA francs to the widow of the deceased, fifty million (50) CFA francs to each of the (5) children of the deceased, ten million (10) CFA francs to each of the (11) brothers and sisters of the deceased, making a total of four hundred and thirty-five million CFA francs.

JUDGMENT OF THE COURT

I – THE PARTIES AND THEIR REPRESENTATION

1. The initiating application was received at the Registry of the Court on 12 December 2013. It was filed by heirs of the late Ibrahim Mainassara Baré, namely:

   - Dame Baré, née Aissatou Clémence Habi, widow of the said Ibrahim Mainassara Baré;

   Children of the said Ibrahim Mainassara Baré:

   - Samira Ibrahim Baré;
   - Alia Ibrahim Baré;
   - Abdel Nasser Baré;
   - Hannatou Baré;
   - Djibril Baré;

   Brothers and sisters of the said Ibrahim Mainassara Baré:

   - Amadou Mainassara Baré;
   - Oumarou Mainassara Baré;
   - Djibrilla Mainassara;
   - Yahaya Mainassara Baré;
   - Souleymane Mainassara Baré;
   - Rabi Mainassara Baré ;
   - Absatou Mainassara Baré ;
   - Haoua Mainassara Baré ;
   - Hadiza Mainassara Baré ;
   - Mariama Mainassara Baré.

2. The Applicants were represented by Maître Chaibou Abdourahaman, Lawyer registered with the Bar Association of Niger, and Maître Yerim Thiam, former President of the Bar Association of Senegal.

3. The Defendant was the Republic of Niger, represented by the Secretary General of the Government, with its headquarters located at the *Palais de la Présidence* (Presidency), on *Avenue de la Présidence*, Niamey.

II – PRESENTATION OF THE FACTS AND PROCEDURE

4. The Applicants submitted that on 9 April 1999, General Ibrahim Mainassara Baré, President of the Republic of Niger as at that time, who was at the military airport of Niamey for an official journey within the country, was gunned down by shots fired from an artillery-equipped pick-up, while he was inspecting a guard of honour and getting ready to get onto his helicopter.

5. According to the witness report compiled by Amnesty International (NGO) and filed by the Applicants, the aide-de-camp of the President, present on the tarmac at the time of the incident, allegedly stated that after the first shots, the soldiers shouted: "He is still alive". It was then that the attackers opened fire again and mortally hit their target, killing him, together with three others who were in his company. The same witness account alleges that the attack was launched following two shots fired into the air by Squadron Leader Daouda Mallam Wanké, Head of the Presidential Guard Regiment, apparently the signal for executing the operation.

6. In the aftermath of these events, the town of Niamey was immediately cordoned off by armoured military vehicles, blocking access to the Presidency. Around 3 p.m., the then Prime Minister announced on the radio that the President of the Republic had fallen victim to an unfortunate accident and declared that the National Assembly had been dissolved. After 48 hours of power vacuum, the Squadron Leader, Head of the Presidential Guard Regiment, declared himself Head of State and Chairman of a so-called *Conseil de Réconciliation Nationale*.

7. By correspondence dated 27 May 1999, the Mainassara Baré family brought a case before the Public Prosecutor at the Niamey *Tribunal*

de Première Instance (Court of First Instance) and lodged a complaint against certain unnamed persons, for murder.

8. Upon receiving a certain communication from the Public Prosecutor, the Commander of the Niamey Gendarme Unit produced a summary report dated 9 August 1999 on the inquiry findings, on the basis of which one could essentially affirm that two warning shots were fired by certain "operatives" who had come to arrest the President, and that the President may have been killed because his body guards resisted the arrest, instead of surrendering.

III – ARGUMENTS OF THE PARTIES

9. Essentially, the Applicants advance their arguments around two points: the extremely defective nature of the inquiry which was carried out, and the unjust and illegal effects of the amnesty law, as applied against them before the law courts of Niger.

10. Regarding the first point, the Applicants argue first of all that despite the two months available to the gendarmerie, the inquiry was conducted within the space of only two days, since the first report on the inquiry sessions was dated 6 August 1999, whilst the other reports were transmitted on 9 August 1999. Clearly, according to the Applicants, no serious and in-depth inquiry could have been carried out over such a short period of time.

11. Another deficiency of the inquiry was alleged as resulting from the fact that the military investigators omitted to take into account the video recordings filmed by the National Television Agency, who were present on the grounds where the incident occurred, whereas obviously, the viewing of those films would have enabled them to establish the falsehood in the declarations made by the officers and soldiers who had maintained in the course of the hearing of their statements, that after the first two warning shots, the first shots were fired by certain operatives among the body guards of President of the Republic.

12. Similarly, the President's car, riddled with bullet marks, was never examined, whereas it was parked in the garage of the Army Equipment Department. The Applicants contend that a much more extensive investigation would certainly have yielded decisive leads towards establishing the truth.

13. Finally, the Applicants argue that the military investigators omitted to invite the President's widow for a hearing, and equally abstained from hearing several witnesses who could confirm that the late President Mainassara Baré was shot dead even before his body guards had any time to respond, and that the security agents put in charge of his safety were not carrying any arms which could effectively neutralise those used by the assailants. The witnesses in question are notably: members of the President's body guard, his aide-de-camp, operatives among the guard of honour, those who were allegedly asked to arrest the President, the crew of the helicopter, the doctor who issued the alleged certificate of death, and finally the Chief of Defence Staff of the Armed Forces.

14. All these defaults unquestionably establish, according to the Applicants, that the inquiry was not satisfactorily done.

15. The second point in the argumentation of the Applicants relates to effects of the amnesty as arising from Article 141 of the Fifth Republican Constitution of Niger, promulgated soon after the coup d'état by Decree No. 99-320 of 9 August 1999 adopted by Squadron Leader Daouda Mallam Wanké, Chairman of the *Conseil de Réconciliation Nationale* (National Reconciliation Council). In an extraordinary manner, the findings of the inquiry, in relation to the death of President Maïnassara, was transmitted to the Public Prosecutor on the same day the Constitution was promulgated. For the Applicants, such coincidence could not be due to an accident, but the result of a deliberate decision to shield the perpetrators of the coup from court proceedings.

16. The heirs of Ibrahim Mainassara Baré contend that at least in two instances, the application of the amnesty rules, to insulate the coup

plotters, translated into the failure of the proceedings they had initiated before the law courts of Niger.

17. In the first instance, they filed two notices of complaint dated 14 October 1999, in response to which the Public Prosecutor adjudged that no proceedings shall be instituted in that regard, as a result of the amnesty provisions covering the matters brought therein, since those provisions had entered into force, following the signing of Decree No. 99-320 promulgating the Fifth Republican Constitution. Their complaint got no further response, and remained still born.

18. The Applicants affirm having initiated a new procedure on 19 November 1999, bringing their complaint by way of constituting a civil party and lodging the complaint before the Dean of Investigating Judges of Niamey. By an order dated 12 May 2000, the said senior investigating judge ruled that the matter was not triable. The stay of proceedings, as subsequently pronounced by the Criminal Chamber while awaiting the decision of the *Conseil Constitutionnel* (Constitutional Council), eventually came to a dead end, according to the Applicants, because at a certain stage, the case-file for the procedure got lost.

19. The Applicants aver in their pleadings that a last complaint was lodged by the widow of the late Mainassara Baré, on her own behalf and on behalf of her children, who were minors, and the Applicants claim that this final complaint was equally declared inadmissible on the grounds of the bar placed on all public proceedings regarding the matter brought, as a sequel to the adopted amnesty law.

20. Following these ups and downs, the heirs of Mainassara Baré brought their case before the ECOWAS Court of Justice for human rights violation.

21. For the Applicants, these successive denials brought to bear on them remain unjustified since the amnesty provided for under Article 141 of the Constitution and under Act 2001-01 of 24 January 2000 apply solely to the coup plotters of 27 January 1996 and 9 April 1999,

and as such, the amnesty provisions shall not be extended to cover the perpetrators of the murder crimes which preceded the military take-over.

22. Finally, the heirs of Mainassara Baré rely on the case law of the Constitutional Court of Niger itself, in claiming unconstitutionality of the amnesty measures. Indeed, when seised with the issue concerning extension of the effects of the amnesty provisions to cover facts related to the coup d'état which occurred on 18 February 2010 (Act 2011-03 of 26 May 2011), the Constitutional Court, in Judgment No. 015/11/CCT/MC of 10 November 2011, as delivered by the transitional *Conseil Constitutionnel*, declared that the disputed provisions were inconsistent with the Constitution. But, when the said Constitutional Court had been seised in 2002 with a matter of the same nature on amnesty provisions after the coup d'état against President Mainassara Baré, the Constitutional Court of Niger at that time decided the contrary, holding that Act 2001-001 of 24 January 2000 was consistent with the Constitution, and that the *Conseil Constitutionnel* had placed a bar on bringing proceedings against the killers of the late President Mainassara Baré (Judgment No. 2002-013 of 7 August 2002 of the Constitutional Court). For the heirs of Mainassara Baré, the said case law of 2010 supersedes that of 2002, and that their rights were denied in 2002 when the assassins of their relative (the late Mainassara Baré) were not prosecuted. Such contradicting jurisprudential postures, according to the Applicants, amount to inequality of citizens before the law.

23. On the basis of the murder of the late President Mainassara Baré, and confronted with the impossibility of gaining access to justice, for reparation of the harms they claim have been committed against them, the Applicants rely on the following provisions, in bringing their case before the ECOWAS Court of Justice :

    - Article 3 of the Universal Declaration of Human Rights: **"Everyone has the right to life, liberty and security of person."**;

- Article 2 (3) a, b, c of the International Covenant on Civil and Political Rights, in the terms of which each State party to the Covenant undertakes:

  "(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

  (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

  (c) To ensure that the competent authorities shall enforce such remedies when granted.";

- Article 6 of the International Covenant on Civil and Political Rights *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."*;

- Article 3 of the African Charter on Human and Peoples' Rights: *"Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.";*

- Article 4 of the same Charter: *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.";*

- Article 5 of the same Charter: *"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."*;

- Article 7(1)-a of the same Charter: *"Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.";*

24. Consequently, the Applicants ask the Court for a declaration that the Republic of Niger violated the various rights invoked in their pleadings, and to order the Republic of Niger to take all the measures or steps "to identify and punish all the perpetrators, accomplices and accessories of the assassination" of the late President Mainassara Baré. They equally ask the Court to order the Republic of Niger for reparation of the harms done against the relatives of the late Mainassara Baré (forebears, spouse, children, brothers and sisters).

25. **The Republic of Niger, on its part,** did not file any defence before the Court. A clearly perceptible line of defence is nevertheless observable from the attitude of its domestic courts, which consists of invoking, invariably, the amnesty measures decided by the national authorities of Niger. The substantial effect of such measures is, ostensibly, to nip in the bud every form of judicial inquiry or investigation regarding the 9 April 1999 coup d'état.

IV- ANALYSIS OF THE COURT

AS TO FORMAL PRESENTATION

26. From the outset of the oral procedure, the Court had to make a pronouncement in respect of the fact that the Republic of Niger, Defendant in the instant case, did not file a memorial in defence.

27. In that regard, it must be recalled that in the terms of Article 35 of the Rules of the Court, the defendant shall lodge a defence within one month of service of the application on him.

28. The Republic of Niger, which was duly served the initiating application, sought leave of the Court, through its Counsel, to extend to 23 April 2015, the time for filing its written pleadings.

29. On the date the Court resumed sitting after the adjournment, though the Defendant State was duly represented, it did not produce any memorial in response.

30. Now, in the terms of Article 90 of the Rules of the Community Court of Justice of ECOWAS, if a defendant on whom an application initiating proceedings has been duly served fails to lodge a defence to the application in the proper form within the time prescribed, the applicant may apply for judgment by default.

31. When the Court resumed hearing of the case, Maître Yerim Thiam and Maître Abdourahamane Chaibou, each, asked in turns, on behalf of the heirs of Mainassara Baré, that the matter be heard by default.

32. Realising that the conditions for applying the above-cited provision had been met, the Court upheld the default situation against the Republic of Niger and decided to adjudicate on the merits of the case by considering the merits contained in the claims formulated by the Applicants.

AS TO MERITS

33. Upon scrutiny, it is apparent that the Application submitted before the Court makes reference, as indicated above, to the disregard for three rights: the right of equality before the law, – whose violation is made manifest by the contradicting rulings of the Constitutional Court; the right of access to justice, – which was flouted by the fact that every court action initiated by the heirs of Mainassara Baré was blocked on the basis of the amnesty laws decreed; and the right to life and physical integrity, – which obvious negation is constituted by the assassination of the late President Maïnassara Baré.

A response must be provided to each of the three arguments.

A. Disregard for the principle of equality before the law

34. The Applicants invoke first all, in support of their claims, violation of the principle of equality before the law. The violation in question must have originated from the disparity between Judgment No. 2002-013/CC of 7 August 2002 delivered by the Constitutional Court, and Judgment No. 015/11/CCT/MC of 10 November 2011 delivered by the transitional *Conseil Constitutionnel.*

35. The first judgment was delivered against the heirs of Mainassara Baré. The domestic judge of Niger held in that decision, that the extension of the effects of the amnesty provisions to cover events closely related to the coup d'état which cost President Baré his life, was in perfect agreement with the Constitution, and that no proceedings may thus be instituted against the persons presumed or perceived to have taken part in that action.

36. The second judgment was equally delivered within the context of another amnesty, the one which followed the 18 February 2010 coup d'état. The judge at the Constitutional Court of Niger took the reverse stand of the 2002 judgment, declaring in that instance, that "*the events closely related to the coup d'état*" shall not be included in the actions covered by the amnesty.

37. These distortions in the case law, which must have harmed the heirs of Mainassara Baré, amounted to violation of the right to equality before the law, in the opinion of the Applicants, since the two applications in the two cases were not accorded the same treatment.

38. At this juncture, the Court shall recall a fundamental principle of its jurisprudence: in referring, in principle, to the international norms subscribed to by States, this Court neither assumes the role of a judge over the constitutionality or legality of the measures adopted by those States. In the instant case, it has no mandate to arbitrate between the two domestic court proceedings, and it shall not interfere in the problems of interpretation of the Constitution of Niger, or of the amnesty law of Niger. Therefore, any position taken by the Court

on the variations experienced regarding the case law of Niger, in respect of its amnesty laws, would inescapably draw the Court towards putting itself out as a judge over the legality of those laws, in the wider sense. The Court would indeed be led thereby, at least implicitly, to make a declaration as to whether or not one mode of interpretation is more in accord with the legal doctrine and tradition of Niger or not, and thus, finally make a value judgment on the decisions made by the judge in the domestic court of Niger. Such approach would be directly opposed to the well-established jurisprudence of the Court.

In the judgment on **Jerry Ugokwe *v.* Federal Republic of Nigeria** dated 7 October 2005, the Court declared that:

> "***Appealing against the decision of the National Court of Member States does not form part of the powers of the Court;"*** (§32).

In the judgment on **Alhaji Hammani Tidjani *v.* Federal Republic of Nigeria and Others** dated 28 June 2007, the Court held that:

> "***Admitting this Application will amount to this Court interfering in the criminal jurisdiction of the Nigerian Courts, without justification.***" (§45).

In the judgment on **Alimu Akeem *v.* Federal Republic of Nigeria** dated 28 January 2014, the Court recalls that:

> "***It is trite that in those cases where the subject-matter of the dispute essentially had to do with a re-examining of judgments already delivered by the domestic courts, the Honourable Court held that they be dismissed …"*** (§ 42).

39. Finally, in its judgment on **Convention Démocratique et Sociale Rahama *v.* Republic of Niger** dated 23 April 2015, the Court indicated that:

> "***On the basis of the principle behind this standpoint, it can be deduced that the requests of CDS Rahama***

concerning the decisions of the local courts of Niger cannot be granted, the reason being that the Court has no remit for examining such decisions; and more generally, after decisions are made by the domestic courts of Niger, the Court has no jurisdiction to examine whether those local courts of Niger adhered or not to their jurisprudence or generally, to the national law of Niger. " (§51).

40. It can thus be deduced from the foregoing points that the Court has no jurisdiction to examine violation of the right to equality before the law, as brought by the Applicants.

B. Violation of the right of access to justice

41. The heirs of Maïnassara Baré equally insist on their right of access before a judge in a law court, and to have their case heard in court.

42. As far as that claim is concerned, the Court must indeed take cognisance of the fact that all the attempts made until then by the Applicants to have their case heard in the courts of Niger had proved unsuccessful.

43. It shall not be superfluous, at this stage, to recall the steps taken by the Applicants.

44. Before the judicial authorities, a first complaint was lodged before the Public Prosecutor on 27 May 1999. On 14 October of the same year, the matter was shelved and died prematurely.

45. On 19 November 1999, a complaint was lodged, once again before the Dean of Investigating Judges, with the complainant constituting a civil party. On 12 May 2000, the case brought by the complainant was adjudged not triable, in the terms that: *"The benefits of amnesty which the sovereign people of Niger intended, concerning acts committed and perpetrators of those acts, must be legally upheld".*

46. Seised as a court with jurisdiction to hear the case, the Criminal Chamber of the Court of Appeal of Niamey, by a judgment of 28 May 2002, decided to stay proceedings pending a decision on the matter by a judge of the Constitutional Court, the latter having been seised with a matter against the amnesty law. It is known that the judgment delivered favoured extension of the effects of the amnesty provisions to cover "*matters closely related to the coup d'état*".

47. On 19 November 2010, the case brought by the Mainassara Baré family was once again declared foreclosed by the investigating judge, on the grounds that, this time, the persons against whom the matter was filed in the complaint were only triable by court martial, and not in an ordinary civil or criminal court.

48. Further, on 24 May 2011, the Criminal Chamber of the Court of Appeal of Niamey, seised a second time, recalled that: *"Since the effects of Act 2000-01 of 24 January 2000 which had granted amnesty on issues relating to the assassination of General Mainassara Baré continued to subsist, it was in order to adjudge that public proceedings seeking penalties in connection with his assassination (...) had become extinguished by the amnesty provisions."*

49. The last step taken before the judicial authorities was on 2 May 2012. It took the form of addressing a letter to the Public Prosecutor at the Court of Appeal of Niamey, recalling, at any rate, other correspondences which had remained without response (correspondences dated 14 November 2008, 9 March 2010, and 18 May 2011).

50. Besides, in terms of initiatives taken before non-judicial authorities, it shall be appropriate to mention a letter dated 1 December 1999 addressed to the then Chairman of ECOWAS, and another letter written to General Salou Djibo, Chairman of the Supreme Council for Restoration and Democracy (CSRD), dated 15 December 2010; both mails requested the opening of an independent inquiry into the death of the late President Baré.

51. In as much as in every instance a response was given to the heirs of Mainassara Baré, it consisted of invoking the effects of the amnesty law, the Court is of the view that it is precisely upon this very point that the determination of the case must be anchored. The issue before the Court to determine is therefore quite simple and may be formulated as follows - Does a legally instituted amnesty shut the door to every form of judicial investigation? - Does it foreclose or constitute an estoppel to every form of attempt to seek information on a matter, purely speaking, - in terms of seeking the truth or enquiring about the facts thereon?

52. The Court cannot share such a tyrannical concept of effects of an amnesty measure. The Court recalls that it has had occasion in the past to consider, regarding the same State - Niger -, the scope of such a law. Indeed, in Case Concerning **Sidi Amar Ibrahim and Others *v.* Republic of Niger** (Judgment of 8 February 2011), the Court was called upon to examine the effects of Order No. 2009-19 of 23 October 2009 on amnesty, concerning events which had occurred between 2005 and 2009. Even if the Court had recognised the existence of the order, and accepted the decision taken by the authorities of Niger to set aside every form of judicial proceedings on the matters at stake, the Court nevertheless made a pronouncement as to the inefficacy of the amnesty law in situations of serious and widespread violation of fundamental human rights (§51).

53. The Court considers, today, that it shall be appropriate to raise the requirements of the law on amnesty, and prop up level of acceptability of amnesty laws.

54. Amnesty laws cannot constitute an unreasonable cover-up for the past, an estoppel which may automatically be invoked against every legitimately inquiring mind attempting to know the truth. An amnesty law shall leave intact a victim's right to know the truth, and this is so relevant in the instant case, where such right is held by persons with whom the deceased victim had particularly close bonds of

relationship. The Maïnassara Baré family did not see any of their numerous requests for inquiry being taken into account. The Court deplores the fact that their pain and desire for legitimate information - which should be the same for any other victim in similar circumstances - were not properly handled.

55. It shall be appropriate therefore, in such context, to affirm victims' right to the truth. In concrete terms, it translates into an obligation on State authorities to conduct inquiries and investigations into incidents and events in cause, and to guarantee, even if not a publication of findings thereon, at least free access to such findings. This is a minimal obligation, which the Republic of Niger completely defaulted on in the instant case. By so doing, the Defendant State trampled on the Applicants' right of access to justice. It is therefore in order that the Applicants cite, in support of their claims, the following provisions, all binding on the Republic of Niger:

    - Article 2 (3) a, b, c of the International Covenant on Civil and Political Rights as cited above;

    - Article 7(1) of the African Charter on Human and Peoples' Rights, equally cited above.

56. A very significant point must however be made at this stage.

57. The Court is of the view that if the necessity to forget or to forgive, on a massive scale, may be imperative and applicable to a society at a given time in its history, such necessity cannot imply that one must treat with scorn, the right to know, the right of access to the truth, which victims in a cause are entitled to. The Court is not ignorant in any way whatsoever of the sovereign right of a State to adopt, in a given situation, measures of amnesty. Equally, the Court is not seeking to cripple the effects deriving from amnesty provisions, but it holds that the scope of an amnesty measure is limited within the confines of the criminal issues at stake, and should not in any way affect the civil reparation for the victims of the incidents involved. In other words, the Court finds that amnesty laws do not wipe off criminal accusations, but they leave unimpaired victims' right to reparation,

no matter the form such reparation may take. Before this Court therefore, amnesty laws must be properly situated within their exact confines, i.e. within the limits of incriminating charges and criminal proceedings, to the exclusion of individuals' civil rights.

58. This principled position respects the imperatives of pacification and social cohesion, the ultimate goal of amnesty measures, and it equally takes into account the fate of victims of facts surrounding amnesty measures. It would be very wrong and unfair to completely ignore the situation of persons who have suffered from the events in cause, under the pretext that State authorities have decreed that the events have been wiped out of existence just at the stroke of the pen, or that in fact they are deemed to have never existed. For the Court, amnesty does not justify inertia, and respect for victims' rights is not incompatible with the necessity of social reconciliation.

59. All things well considered, the position adopted by the Court is in agreement with that of other international bodies, both judicial and quasi-judicial, entrusted with the mandate of the observance of human rights.

60. In its Resolution 2002/79 of 25 April 2002 (§2) and Resolution 2003/72 of 25 April 2003 (§2), the United Nations Commission on Human Rights emphasised that: "… *amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes and urges States to take action in accordance with their obligations under international law*".

61. For the United Nations High Commissioner for Human Rights: "*The amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes …*" (cited from Judgment of 24 February 2011 (§199), Merits and Reparations, by the Inter-American Court of Human Rights in *Case Concerning* **Gelman v. Uruguay**).

62. The United Nations Special Rapporteur on Torture, in his 5th Report, while taking note of certain amnesty measures certain States desired to adopt, stated that: "*The Special Rapporteur is aware of suggestions according to which nationally granted amnesties could be introduced as a bar to the proposed court's jurisdiction. He considers any such move subversive not just for the project at hand, but of international legality in general. It would gravely undermine the purpose of the court, by permitting States to legislate their nationals out of the jurisdiction of the Court*." (UN Doc. E/CN.4/1998/38, 24 December 1997) (§220).

63. The United Nations Special Rapporteur on Impunity equally observed that: ***"…the perpetrators of the violations cannot benefit from the amnesty while the victims are unable to obtain justice by means of an effective remedy."*** (cf. the above-cited judgment of the Inter-American Court of Human Rights, §200).

64. The Inter-American Court of Human Rights, in **Gomes Lund v. Brazil** (Judgment of 24 November 2010, Preliminary Objections, Merits, Reparations and Costs), held, in principle, that the amnesty laws violated the Pact of San José, in as much as ***"they placed a ban on every form of investigation regarding serious human rights violations and sanctions against the perpetrators of those crimes, and thus impeded the right of the victims and their families from knowing the truth on what occurred, so as to obtain commensurate reparation, and thereby prevented the judiciary from the full, effective and timely discharge of its duties on the relevant cases"*** (§226).

65. The African Commission on Human Rights has equally had occasion, at least twice, to make a pronouncement on the scope of amnesty laws adopted by the States parties.

66. In its Decision 246/2002 (§98), the African Commission on Human Rights ruled as follows: "… ***the African Commission holds that by granting total and complete immunity from prosecution which foreclosed access to any remedy that might be available***

to the victims to vindicate their rights, and without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the Respondent State did not only prevent the victims from seeking redress, but also encouraged impunity (…). ***The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy***".

67. Then in *Case Concerning* **Zimbabwe Human Rights NGO Forum *v.* Zimbabwe** (Communication 2545/2002) (§211), the African Commission on Human Rights declared that: ***"… this Commission is of the opinion that by passing the Clemency Order No. 1 of 2000, prohibiting prosecution and setting free perpetrators of "politically motivated crimes", including alleged offences such as abductions, forced imprisonment, arson, destruction of property, kidnappings and other human rights violations, the State did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims of crimes (…) from seeking effective remedy and compensation"***.

68. The ECOWAS Court of Justice generally agrees with that way of seeing things. To buttress the foregoing points, the Court, in concluding, must add another point of a more general outlook, which is a principle solidly established in international law, according to which a State may not invoke its domestic law - its amnesty law, in this instance – as a means to renege on its international obligations, as may be stipulated in treaties and conventions. This principle, which has acquired the nature of customary law, and may thus be cited as binding on States, is notably stated by Article 27 of the 1969 Vienna Convention on the law of treaties: "***A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty***..."

69. For all these reasons, it is appropriate to conclude that in assigning to amnesty measures an interpretation which translates into a true denial of justice against the members of the Mainassara Baré family, the State organs of Niger violated their right to a hearing in Court.

C. Violation of the right to life, and the necessity for sanctions

70. The Applicants equally invoke violation of the right to life and physical integrity of the late President Mainassara Baré, whose heirs they are. In support of such claim, they invoke the provisions already cited: Article 3 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Civil and Political Rights, and Articles 4 and 5 of the African Charter on Human and Peoples' Rights.

71. The Court observes that there is no doubt that the late President Mainassara Baré's right to life and physical integrity was violated to the highest degree, since he was killed. Now, it is established that it was the duty of the Republic of Niger to ensure his protection, in his capacity as President of the Republic. Manifestly, the Republic of Niger failed in its duty. Consequently, the Court finds that omission and holds that the Republic of Niger must be sanctioned.

D. Regarding reparation

72. The Court therefore holds that reparation is due the Applicants. Such reparation shall be fair, as best as possible, and shall not be merely "symbolic". It must not be forgotten, notably, that owing to the death of her husband, the widow of the late President Mainassara Baré found herself, and continues to find herself confronted with the necessity of bringing up a family entirely made up of children, coupled with the fact that the family she is to care for has had to move away from Niger. These factors constitute avenues for significant expenditure, and the Court must obviously take all that into account in assessing the harms suffered by the heirs of the late Ibrahim Mainassara Baré.

The Court equally holds that considering all the circumstances surrounding the instant case, it is just that the Defendant State be asked to bear the costs.

FOR THESE REASONS

The Court,

Adjudicating in a public hearing, in a judgment by default against the Defendant State, in first and last resort, in a matter on human rights violation;

In terms of formal presentation

- **Declares** the Application by the heirs of Maïnassara Baré admissible;

- **Pronounces** judgment in default against the Republic of Niger, in compliance with Articles 35 and 90 of the Rules of the Court;

- **Declares** that it has no jurisdiction to adjudicate on violation of the right to equality before the law, as brought by the Applicants;

In terms of merits

- **Adjudges** that the Applicants' right of access to justice was violated by the Republic of Niger;

- **Adjudges** that the right to life of President Ibrahim Baré Maïnassara was violated;

- **Orders** the Republic of Niger therefore to pay the following sums to the heirs of the late President Ibrahim Baré Maïnassara, in reparation for all the harms done against them:

    • Seventy Five (75) Million CFA Francs to the widow of the late President Ibrahim Baré Maïnassara;

- Fifty (50) Million CFA Francs to each of the five (5) children of the late President Ibrahim Baré Maïnassara;
- Ten (10) Million CFA Francs to each of the eleven (11) brothers and sisters of the late President Ibrahim Baré Maïnassara;
- **All adding up to a total of Four Hundred and Thirty Five Million CFA Francs (CFA F 435,000,000**);

- **Dismisses** all other claims brought by the Applicants;

- **Asks** the Republic of Niger to bear the costs.

AND THE FOLOWING HEREBY APPEND THEIR SIGNATURES:

Hon. Justice Jérôme TRAORÉ - *Presiding;*

Hon. Justice Maria do Ceu Silva MONTEIRO - *Member;*

Hon. Justice Yaya BOIRO - *Member;*

Hon. Justice Hamèye Founé MAHALMADANE - *Member;*

Hon. Justice Alioune SALL - *Member.*

Assisted by: **Aboubacar DIAKITÉ (Esq.)** - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, 30TH NOVEMBER, 2015

SUIT NO: ECW/CCJ/APP/10/12
JUDGMENT NO: ECW/CCJ/JUD/24/15

BETWEEN
STELLA IFEOMA NNALUE & 20 OTHERS - *PLAINTIFFS*

AND
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ABOUBAKAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **CHINONYE E. OBIAGWU (ESQ.)** -*FOR THE PLAINTIFF*
2. **I. T. HASSAN (ESQ.)** - *FOR THE DEFENDANT*

- Pendency of same case before domestic courts
- Locus Standi - Standard of proof

SUMMARY OF FACTS

The Plaintiffs, in their capacity as dependents, relations and children of Five (5) persons who were unlawfully killed by officers of the Nigerian Police Force while being detained in Oragbemi Police Station, State C.I.D, in Edo State of Nigeria on 16th October, 2010, instituted this action against the Defendants for the violation of their fundamental rights, as guaranteed under Article 1, 4, 5, 6 and 7 of the African Charter on Human and Peoples Rights. The Plaintiffs alleged that the failure of the Defendant to protect the rights of the deceased persons or take measures to give effect to the rights as provided in the African Charter of Human and Peoples Rights, has deprived them of their breadwinners and their daily living support.

The Defendant on his part alleged that the Court does not have jurisdiction to entertain the instant suit on the grounds that the same case is pending before the Federal High Court of the Defendant and the subject matter of the proceedings which is unlawful killings, is a criminal matter, which the Court lacks jurisdiction to entertain. The Defendant further argued that the Plaintiffs lack the locus standi to institute this action on behalf of the deceased persons.

LEGAL ISSUES:

1. *Effect of previous proceedings instituted before domestic courts*

2. *Legal capacity of Plaintiffs for bringing an action on behalf of deceased persons*

3. *Weight of the evidence adduced by the Plaintiff.*

DECISION OF THE COURT

The Court held that the instant case and the case pending before the Federal High Court of Nigeria are independent of each other, they do not overlap and cannot be confused for each other. The Court thus held that the objection of the Defendant was ill-founded and declared the instant suit admissible.

The Court held that close relatives of the deceased victims are entitled to bring actions before the Court against the Member States for the enforcement of the rights of the deceased.

The Court declared that the evidence adduced by the Plaintiffs which may enable it to order an extensive investigation into the alleged killings of the deceased are lacking in the instant suit. The Court however ordered the Defendant to throw light on those instances of disappearance, failing which, the Plaintiff may subsequently make a complaint against the Defendant before the Court.

JUDGMENT OF THE COURT

I. THE PARTIES AND THEIR REPRESENTATION

The Application was lodged before the Court on 6 September 2012 by twenty-one (21) persons in their capacity as dependants, relations and children of 5 persons presented as deceased, namely the late Messrs. Ndubuisi Christian Nnalue, Godwin Chigbo lsidienu, Chukwudi Eke, Uche Onuwuesi and Chinedu Onwe.

The Defendant is the Federal Republic of Nigeria.

II. SUMMARY OF THE FACTS AND PROCEDURE

In the terms of the Application filed by the Plaintiff, the five deceased persons mentioned above allegedly died after they were *"taken into police custody by officers of Nigerian Police Force at Oregbemi Police Station and State C.I.D., Benin, Edo State, Nigeria, on 13 October 2010, and subsequently executed in the early morning of 16 October 2010 by the said officers while under their custody."*

The Plaintiff equally averred that the deceased persons have not been seen by their families nor has any information been received concerning their whereabouts, since their arrest and detention; and that that was why in their capacity as dependants, relations and children of the presumed dead persons, they sued the Federal Republic of Nigeria before the ECOWAS Court of Justice, asking the Court to find that their fundamental rights, as guaranteed under Articles 1, 4, 5, 6 and 7 of the African Charter on Human and Peoples' Rights, are violated.

At the time the case came before the ECOWAS Court of Justice, the Federal Court of Nigeria had already been seized with the same case in 2011 and the reliefs sought before the said the Federal Court of Nigeria were dismissed.

Before the ECOWAS Court of Justice, the case was heard during two court sessions, one on 9 February 2015, and the other on 14 October 2015.

At the first court hearing, the Court made an order thatthe Federal Republic of Nigeria must produce the arrest warrant and other documents relating to the arrest and interrogation of the persons considered to have "disappeared", the order having been served on the Parties on 17 February 2015.

At the hearing of 14 October 2015, the Federal Republic of Nigeria did not put in an appearance, nor did it produce the documents demanded by the Court. At that same hearing, Plaintiff Counsel made further pleadings, by affirming:

1. That he had abandoned his statement concerning "illegal killing", as previously alleged to have been committed by the Federal Republic of Nigeria, and that hence, he was only going to make mention of a "suspicious disappearance" of the persons cited as deceased;

2. That his request was limited to asking the Federal Republic of Nigeria to conduct the necessary inquiries and investigations into the matter brought, so that he would be enlightened as to the fate of the persons in contention;

3. That at that stage of the procedure, at any rate, he was not asking for any financial compensation.

III. ARGUMENTS OF THE PARTIES

The Plaintiff purport to be dependents of the deceased or missing persons for their daily living and support, that they had thus been permanently denied their breadwinner, and complain of "failure of the Defendant (Federal Republic of Nigeria) to protect the rights of the deceased persons or to take measures to give effect to the rights provided under the African Charter on Human and Peoples' Rights." They rely on Articles 1, 4, 5, 6

and 7 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter 10 (Laws of the Federation of Nigeria) 1990 and on Article 3 of the ECOWAS Treaty, claiming that all the provisions therein were violated by the Federal Republic of Nigeria, by the involvement of its police officers and security agencies in the acts perpetrated against the alleged deceased persons.

The Plaintiff therefore seek the following orders from the Court:

- A **Declaration** that the Defendant failed in its obligation to respect the rights of the deceased persons- notably the right to life;

- A **Declaration** that the failure and/or refusal by the Federal Republic of Nigeria to investigate, discipline and prosecute the police officers "involved in the arbitrary arrest, torture and unlawful killing" of the deceased persons, constitutes a violation of certain specific rights, notably as stated in the African Charter on Human and Peoples' Rights;

- An **Order** directing the Federal Republic of Nigeria to set up an independent panel of inquiry to look into the extra judicial killing of the deceased persons;

- An **Order** directing the Defendant *"to tender an apology to the Plaintiff by publishing the said letter of apology in five national dailies."*

In response to the affirmations made in the Application filed by the Plaintiff, the Defendant invokes Preliminary Objections and reacts to the merits of the case by denying the facts alleged by the Plaintiff. That response was contained in the Notice of Preliminary Objection dated 18 December 2012 and filed at the Registry of the ECOWAS Court of Justice on 21 January 2013. The notice was accompanied by an address in support of the Preliminary Objection.

In the first document of the Preliminary Objection referred to above, the Federal Republic of Nigeria asserts that the suit filed before the ECOWAS Court had earlier been filed by the Plaintiff before the Federal High Court sitting in Benin, Edo State, Nigeria; that the suit before the Federal High Court is still pending and so the case before the ECOWAS Court will amount to abuse of court process, since the Plaintiff cannot maintain the same matter based on the same facts before two different courts, and that in the event that it is determined that the suit before the Federal High Court was decided against them, the Plaintiff cannot come to re-litigate the same issue before the Community Court, as the Community Court has no appellate jurisdiction over the Federal High Court of Nigeria.

In another breath, the Federal Republic of Nigeria contends that the Court cannot adjudicate on the dispute brought before it by the Plaintiff, on the ground that **"the unlawful killing of the deceased persons is a criminal offence and the Honourable Court has no jurisdiction over criminal matters."**

Likewise, the Defendant pleads that indeed none of the Plaintiff's rights is violated; that even if one is to suppose that the matter concerns the right to life, only persons alive, by definition, may claim such right, and that *"the Plaintiff having acknowledged the fact that the deceased persons were murdered, their (i.e. the deceased's) right to life have thus become extinguished and are unenforceable by the Plaintiff or any other person."* (Pages 10 and 11 of Defendant's Address in Support of Preliminary Objections).

For these three reasons, the Federal Republic of Nigeria urged the Honourable Court to dismiss the Plaintiff's Application, as filed before the Court.

IV. CONSIDERATION AND ASSESSMENT OF THE WEIGHT OF THE ARGUMENTS ADVANCED BY THE PARTIES

From the exchange of written pleadings and arguments between the Parties, three strands of argumentation sort themselves out in the dispute

brought before the Court, for consideration by the Court. These three points are:

A. The divergent stands adopted by the Parties as to the scope and effect of the previous pleadings instituted before the domestic courts ·of Nigeria;

B. Legal capacity of the Plaintiff for bringing an action as heirs or presumed successors, given that the direct victims of the alleged violation are"deceased"·

C. The weight of the pieces of evidence adduced by the Plaintiff, in the light of the fact that the very allegations of "disappearance" and "murder" are challenged by the Defendant.

A- Effect of previous proceedings instituted before domestic courts

In its written pleadings dated 18 December 2012 and lodged before the Court on 19 December 2012, the Defendant, namely the Federal Republic of Nigeria, raised a preliminary objection wherein it argued that the action brought before the ECOWAS Court of Justice should be inadmissible since the Plaintiff had already filed the same suit before the Nigerian courts (Federal High Court), and that in the event that it is determined that the suit before the Federal High Court was decided against them, the Plaintiff cannot come to re-litigate the same issue before the Community Court. On their part, the Plaintiff maintained that the issues, subject-matter, claims and parties in the suits before the High Court of Benin (subsequently struck out), before the Edo State High Court (re-filed and still pending), and before the ECOWAS Court of Justice, are substantially different, and that based on the same set of facts, the Plaintiff can maintain separate and different suits against different Defendants for different reliefs and in different courts, and as such, their action before the ECOWAS Court of Justice does not amount to abuse of court process or *estoppel res judicata*.

The Court therefore considers that its duty is to examine whether the two suits have the same subject-matter. lt is apparent, in that regard, that if

the facts in issue remain incontrovertibly the same, the substance of the actions filed before court greatly differ. The Plaintiff's action before the judge in the domestic courts of Nigeria was to seek criminal investigation and prosecution of the alleged killers and compensation for the loss of their breadwinners, whereas the object of matter before the ECOWAS Community Court of Justice is to ask the Court to find that there is an occurrence of human rights violation, and to seek reparation for the harm done, if the Court should so find.

The texts relied on in pleading the two cases are equally different.· Before the national courts of Nigeria, the request sought application of the provisions of the domestic criminal law of Nigeria, whereas before the ECOWAS Court, the request was to urge the Court to find an occurrence of the alleged human rights violation, essentially derived from the African Charter on Human and Peoples' Rights, which Nigeria is party to.

The two proceedings thus instituted are therefore independent of each other; they do not overlap, and one cannot be confused for the other. Similarly, the Court is of the view that in entertaining the instant case, the Community Court of Justice, ECOWAS is not acting as an appellate court, since the case filed before it does not have the same substance as the suit filed before the judge in the domestic court of Nigeria. The concept of "appeal" presupposes that the same case is transferred to a higher court, so as to adjudicate on the same facts and to examine the same arguments of the parties; but such is not the case here.

The Court thus holds that the thesis that the two suits are totally identical, cannot be upheld; and hence, the Court holds that the Plaintiff's right to bring their case before the ECOWAS Court of Justice cannot be contested. **For that reason, the Court rules that the preliminary objection thus raised by the Federal Republic of Nigeria is ill-founded, and the Court receives the action brought by the Plaintiff as admissible.**

B- Legal capacity of Plaintiff for bringing an action on behalf of deceased persons

Another argument raised by the Defendant is that the Plaintiff cannot claim any form of "right to life" before the ECOWAS Court, particularly as a result of the fact that the victims are "deceased". In its Notice of Preliminary Objection, the Federal Republic of Nigeria submitted that: "Having acknowledged the fact that the deceased persons were murdered, their (the deceased's) rights to life were thus extinguished and are unenforceable by the Plaintiff or any other persons ... And the Honourable Court will have no jurisdiction to entertain the suit." Further, in its written pleadings, the Federal Republic of Nigeria equally contended that: "Since the Plaintiff maintain that the deceased were killed, the aforesaid deceased's right to life is unenforceable. The Honourable Court cannot enforce an unenforceable right."

The Defendant's reasoning thus tends to deny the heirs and close· relatives of the "deceased" every right to bring any claim whatsoever before the Court, notably in so far as it concerns "right to life."

Such view on the issue is inconsistent with the practice of several international courts, before which the right of persons close to people considered "deceased" or "disappeared", is well established. A number of international institutions may be cited in that regard:

- The UN Committee on Human Rights (Communication No. 1912/2009, Views adopted by the Committee at its 106th Session, 15 October - 2 November 2012);

- The lnter-American Court of Human Rights (**Velasquez Rodriguez *v.* Honduras**, 29 July 1988);

- European Court of Human Rights (Judgments on **Kurt *v.* Turkey**, 20 May 1998, and **Cakici *v.* Turkey**, 8 July 1999).

Before all these Courts, it is upheld that close relatives of "deceased" victims are entitled to bringing such cases before Court. The ECOWAS Court of Justice is therefore quite surprised by the Defendant's argument that such a right may only be claimed by such holders as are alive, and not dead. When it becomes impossible for him whose right is violated to insist on that right or to seek redress, either because he is deceased or prevented in one way or the other from doing so, it is perfectly normal that the right to bring his case before the law courts should fall on other persons close to him. It would amount to the scope of human rights being shrunk considerably, with the beneficial effects of the legal provisions endorsing human rights having been reduced, if the judicial recognition of human rights is conditioned upon the physical presence of claimants before the relevant litigating bodies.

Similarly, it would amount to a dangerous acceptance of the serious offence of murder, if one should endorse the idea that, somehow, a "deceased" person loses all his rights, and cannot bring his case before court, not even through persons close to him. The Court is of the view that to endorse that line of reasoning would be synonymous with opening up the highway to impunity, in an era where committing "murder", and its corollary of torture, constitute violations of the imperative norms of international law (*jus cogens*).

It is worthy to recall, at this juncture, a number of initiatives or legal instruments adopted by the United Nations, notably those directly related to the issue of "disappearance" of persons:

- United Nations Declaration on Protection of All Persons from Enforced Disappearance, adopted by the General Assembly (including the State of Nigeria) on 18 December 1992, whose Article 17 (1) states: **"Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these remain unclarified.";**

- Report of the Working Group on Enforced or Involuntary Disappearances, under the Human Rights Commission of the United Nations;

- Report of the United Nations Working Group on Arbitrary Detention, under the same United Nations Human Rights Commission.

The Court is of the view that the provisions relied on by the Plaintiff are perfectly relevant for bringing an action against the Federal Republic of Nigeria. As a reminder, the provisions in question are the following:

> **Article 1** of the African Charter on Human and Peoples' Rights: **"The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."**
>
> **Article 4** of the said Charter: **"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."**
>
> **Article 5** of the said Charter, which provides that: **"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."**
>
> **Article 6** of the said Charter, in whose terms: **"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."**

> **Article 7** of the said Charter, which states that: **"Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal."**

The Court holds that the Federal Republic of Nigeria, as party to the African Charter on Human and Peoples' Rights, is under obligation to preserve human lives, prohibit the practice of torture, respect the integrity of human beings (Article 5), and respect the freedom and security of human beings (Article 6). The Court holds that every State Party to the said Charter, and more generally, any State Party to any legal instrument prescribing respect for right to life, physical integrity of human beings and prohibition of torture, remains under obligation to employ all the means at its disposal to prevent all acts and practices which tend to go contrary to those obligations. The State shall **guarantee** the actual implementation of the stipulated rights, notably within the context such as submitted before this Court in the instant case, where it is against the State's agents, i.e. against persons acting directly under the State's authority - State police and security forces - that the complaints are made. That hierarchical relationship of authority creates, at any rate, a presumption of default on the part of the State in its obligations. Contrary to the affirmation made by the Federal Republic of Nigeria, in its written pleadings, it is indeed possible to sue a State for the "murder" or "disappearance" of human beings whose right to life the State is under obligation to protect.

In that connection, it is not the first time the ECOWAS Court is entertaining an action filed on behalf of a "deceased" person, or for a person placed in a situation which makes it practically impossible for him to claim his rights. In Case Concerning **Chief Ebrimah Manneh *v.* Republic of Gambia**, whose Judgment was delivered on 5 June 2008 in regard to a

journalist who had been held in The Gambia's prisons- with the said journalist finding himself in a situation where it was impossible for him to plead, himself, for his rights- the Court ruled that: **"... the Republic of the Gambia releases Chief Ebrimah Manneh, Plaintiff herein from unlawful detention without any further delay ... that the human rights of the Plaintiff be restored, especially his freedom of movement."** (Paragraph 44 (i) and (ii)).

In conclusion, the Court shall set aside the Defendant's argument that the interests and rights of all deceased" person cannot be defended before court, not even where there is a proven violation of the deceased person's right. The resultant effect is that, the Plaintiff's application before the Court for violation of the rights of persons presumed dead, is admissible and actionable.

C- The weight of the evidence adduced by the Plaintiff

Having examined the legal capacity for suing, both from the status of the Plaintiff and from the previous procedure already followed, the Court shall now turn its attention to the merits of the case. It is appropriate, at this stage, to recall the circumstances of the cause being pleaded before this Court.

The Plaintiff, numbering 21, who are relations, heirs or dependents of the presumed victims, allege the "enforced disappearance" of 5 persons- Ndubuisi Christian Nnalue, Godwin Chigbo lsidienu, Chukwudi Eke, Uche Onuwuesi and Chinedu Onwe, who were allegedly detained and "executed" (Plaintiff Argument in Support of Application) by the Police Force of Edo State in the morning of 15 October 2010, an act perpetrated by the policemen who arrested them. The Plaintiff therefore sought the following reliefs before the ECOWAS Court of Justice in the suit filed against the Federal Republic of Nigeria:

- A **Declaration** that the Defendant failed in its obligation to respect the rights of the deceased persons- notably their right to life;

- A **Declaration** that the failure and/or refusal of the Defendant to investigate, discipline and prosecute the police officers "involved in the arbitrary arrest, torture and unlawful killing" of the deceased persons constitute violation of a number of rights provided notably under the African Charter on Human and Peoples' Rights;

- An **Order** directing the Defendant to set up an independent panel of inquiry to look into the extra judicial killing of the deceased persons;

- An **Order** directing the Defendant "to tender an apology to the Plaintiff by publishing the said letter of apology in five national dailies."

Before taking a closer look at the substance of these requests, the Court must recall two essential provisions which govern the procedure followed before it.

Firstly, Article 11of the 6 July 1991Protocol A/P.1/7/91, in whose terms: **"Cases may be brought before the Court by an application addressed to the Court Registry. This application shall set out the subject matter of the dispute and the parties involved and shall contain a summary of the argument put forward as well as the plea of the plaintiff.**

Secondly, Article 33 of the Rules of Procedure of the Court, which states that:

> **" An application of the kind referred to in Article 11 of the Protocol shall state: (a) the name and address of the applicant;**
>
> **(b) the designation of the party against whom the application is made;**
>
> **(c) the subject-matter of the proceedings and a summary of the pleas in Jaw on which the application is based;**

(d) the form of order sought by the applicant;

(e) where appropriate, the nature of any evidence offered in support."

Considering the reliefs sought by the Plaintiff and the provisions referred to above, the Court must find whether the case-file before it carries sufficiently convincing proofs of evidence and pointers enabling the Court to proceed to examine the Application further. The Court notes, in that regard, that even if the Application puts forward indisputably serious facts, the submissions therein do not contain sufficient material evidence which may lend credence to the accusations made against the Nigerian Police Force. Throughout the entire proceedings on the matter brought before the Court, the Court observes that there are only two testimonies, one made by the an officer of People's Rights Organization, which, in reality, is a letter addressed to the Attorney General and Minister of Justice (Letter dated 13 December 2010), and another from Mr. Victor Okakah, implicated in a car accident after which certain presumed victims may have had a dispute with law enforcement agencies and judicial officers. But, no proofs of evidence directly related to what fate may have befallen the persons pleaded in the case as victims of "murder" or "enforced disappearance" seem to emerge from the said testimony; the deposition referred to particularly concern the accident in question. In the view of the Court, the outcome of an analysis of that situation is that, the items of evidence which may enable the Court to order an extensive investigation into the matter are lacking.

The Court would however want to state a point at this stage that it is conscious of how difficult it may be for a litigant to bring evidence on "murder" or on "enforced disappearance." In principle, the total absence of information or an intelligence report on the victims, makes it difficult to establish the facts alleged. It is all the more so when the offence is committed by State Security Agencies, i.e. indirectly by the State. In terms of having to tender evidence therefore, one cannot make demands requiring the same degree of evidence as applicable to other cases. The Court even admits herein that it would be satisfied with indicia, that is to

say, ordinary items of evidence which constitute pointers or leads to concrete evidence.

In the instant case, the Court is of the view that the rule governing the burden of proof must be relaxed, a burden which lies, in principle, on the Plaintiff. Considering however, that the Plaintiffs find themselves in a near-impossible situation of being able to produce any evidence whatsoever, the Court holds that it is only the Defendant State which is in a position to furnish the materials of evidence needed by the Court; that is the time-held practice before the international courts any time there is an issue regarding "enforced disappearance". It is up to the State, vested with the public authority from which the Police Force derives its powers, to account for all that concerns the safety and physical integrity of the persons in question. That duty becomes all the more binding, as in the instant case, when the persons considered to have "disappeared" had been held on the premises of the Police Force.

It was at any rate in that connection that the Court, by an order at its hearing of 9 February 2015, asked the Defendant State to produce a certain number of documents; but that order has not been complied with till today.

It shall be appropriate for the Court to sanction the Federal Republic of Nigeria, since it has not only failed to produce the documents requested by the Court, but also has not deemed it fit to even put in an appearance at the court hearings. The Federal Republic of Nigeria is thus ordered to throw light on those instances of disappearance, failing which the Plaintiff may subsequently make a complaint thereon against them before this Honourable Court.

The Court holds that it is reasonable, in the light of the prevailing circumstances, to ask the Federal Republic of Nigeria to bear the costs.

FOR THESE REASONS

THE ECOWAS COURT OF JUSTICE,

Adjudicating in a public session, after hearing both Parties, in first and last resort, in a matter concerning human rights violation,

In terms of formal presentation

- **Declares** that the Application filed by the Plaintiff is admissible;

In terms of merits

- **Orders** the Republic of Nigeria to produce, latest three months, the arrest warrant for the disappeared persons; and conduct appropriate inquiries on the said disappeared persons, and thereafter, submit the inquiry report to this Court;

As to costs

- **Orders** the Federal Republic of Nigeria to bear the costs.

Thus made, declared and pronounced in a public hearing at Abuja, by the ECOWAS Court of Justice, on the day, month and year stated above.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

1. **Hon. Justice Friday Chijioke NWOKE** - *Presiding;*
2. **Hon. Justice Micah Wilkins WRIGHT** - *Member;*
3. **Hon. Justice Alioune SALL** - *Member.*

Assisted by **Abubacar Djibo DIAKITE (Esq.)** - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN IN ABUJA, NIGERIA

ON THE 30TH DAY OF NOVEMBER, 2015

SUIT NO: ECW/CCJ/APP/06/14
JUDGMENT NO: ECW/CCJ/JUD/25/15

BETWEEN

1. **HANS CAPEHART WILLIAMS SR.**
2. **MARDIA PAYKUE WILLIAMS**

} *PLAINTIFFS*

AND

1. **REPUBLIC OF LIBERIA**
2. **REPUBLIC OF GHANA**
3. **ATTORNEY GENERAL OF THE REPUBLIC OF LIBERIA**
4. **ATTORNEY GENERAL OF OF THE REPUBLIC OF GHANA**
5. **PROF. DR. JOSEFA JAMENEZ HERNANDEZ** *(FOR AND ON BEHALF OF THE MANAGEMET OF THE POLICE HOSPITAL, ACCRA GHANA)*

} *DEFENDANTS*

COMPOSITION OF THE COURT:

1- **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2- **HON. JUSTICE JEROME TRAORE** - *MEMBER*
3- **HON. JUSTICE YAYA BOIRO** - *MEMBER*

ASSISTED BY:

TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **ONYEKACHI M. ALIUCHA (ESQ.), G. C. OGBUINYA (ESQ.), CLLR. I. M. DEAN & CLLR. S. L. LOFENK** - *FOR THE PLAINTIFFS.*
2. **CLLR. BOAKAI N. KANNEH, CLLR. AUGUSTINE FAYIAH, CLLR. SERENA F. GANWOLO** - *FOR THE 1ST & 3RD DEFENDANTS.*
3. **DOROTHY AFRIYE ANSAH** - *FOR THE 2ND, 4TH & 5TH DEFENDANTS.*

- Exhaustion of local remedies - Admissibility of Application - Pendency of action - Non-Ratification of protocol - Necessary parties

SUMMARY OF FACTS

The Plaintiffs were charged in Liberia with the murder of their ward, Miss Meideh Togba, who was found hanging in the bathroom of their home on November 30th, 2007. The first autopsy conducted on the deceased stated the cause of death as asphyxia secondary to suicide and hanging. The second autopsy (review report), which was conducted by the 5th Defendant, revealed that body parts of the deceased were missing including the vaginal wall components, trachea and bronchial airways and that the deceased was sexually molested and strangled.

The Plaintiffs sought the opinion of foreign doctors whose reports discredited the review report of the autopsy made by the 5th Defendant.

During the trial, the 5th Defendant was neither present before the court to submit the review report nor subjected to cross examination but a report was submitted by someone uninvolved in the case and the report was admitted into evidence. The Court convicted and sentenced the Plaintiffs to death based on the review report which it referred to as the best among the autopsy reports.

The Plaintiffs contended that their conviction and sentence based solely on the review report induced and procured by the 5th Defendant occasioned a miscarriage of justice. It was also the contention of the Plaintiffs that the High Court of Ghana had ruled the autopsy report as reckless, negligent and a baseless conclusion in medical terms.

The Plaintiffs urged the court to hold that their conviction and sentence amounts to the violation of their right to life, freedom of

movement and fair hearing and order for their release. They also demanded the sum of USD $250, 000,000 as compensation for damages.

The Defendants denied all the allegations and in addition raised a preliminary objection on the Court's competence to entertain the action based on the fact that the subject of the application is the same as an appeal pending before the Supreme Court of Liberia and as such the contention of the Plaintiffs are premature. That the Plaintiffs did not exhaust all local remedies before coming to the Court. They contended further that the Supplementary Protocol of the Court has not been ratified by the Defendant.

LEGAL ISSUES:

- *Whether from the totality of the facts put forward by the Plaintiffs, the present matter falls within the subject-matter jurisdiction of this Court?*

- *Whether the 2nd - 5th Defendants are necessary parties to this suit?*

- *Whether the Plaintiffs have the competence to institute this action without first exhausting the local remedies available to them?*

- *Whether the pendency of the appeal against the conviction of Plaintiffs at the supreme court of Liberia is a bar to the present application?*

- *Whether the non-ratification of the Supplementary Protocol of the Court renders it inapplicable to the 1st Defendant?*

- *Whether the present action falls within the intendment of Article 9(1) (g) of the 2005 Supplementary Protocol of the Court?*

DECISIONS OF THE COURT

The Court held:

- *That the subject-matter of the case falls within its jurisdiction since the substance thereof is predicated on the purported violations of the rights of the Plaintiffs as enshrined in the African Charter on Human and People's Rights and other international human rights instruments the 1st and 2nd Defendants are parties thereto.*

- *That the action of the Plaintiffs fail as none of their rights under the African Charter on Human and People's Rights or any other known international human rights instruments have been violated by the Defendants.*

- *The Court declared that the 3rd, 4th and 5th Defendants are not proper parties before the Court.*

- *The Court declared that the Plaintiffs pay the sum of USD $5,000 to the Republic of Ghana.*

JUDGMENT OF THE COURT

1- SUBJECT-MATTER OF THE PROCEEDINGS:

The Plaintiffs who are Liberian Citizens were charged before the first judicial Court Circuit Criminal Assizes B, Monrovia, Republic of Liberia for murder of their ward, one Ms Meideh Togba, who was found hanging in one of the bathroom of their home.

There were three independent autopsy reports on the cause of death. The first report which was in favour of the Plaintiffs, attributed the cause of death to asphyxia secondary to suicide and hanging, respectively. The second report titled "Review of *Post Mortem"* conducted on the deceased Ms Meideh Togba by the fifth Defendant, an agent of the 2nd Defendant, at the request of the 1st Defendant, contradicted the first report and revealed that body parts of the deceased including vaginal wall, components, trachea and bronchial airways were missing and concluded that the deceased was sexually molested and strangled.

The Plaintiffs being dissatisfied with the review Report engaged the services of three medical Doctors from the Nebraska Institute of Forensic Science to conduct yet another independent examination as to the cause of death. The Plaintiffs were tried convicted of the offence and sentenced to death, on the strength of the review autopsy which the Court curiously admitted in preference to the two others.

It was based on this conviction that the Plaintiffs approached this Court on the grounds *interalia* that their trial and conviction violated Articles 4, 6, and 7 of the African Charter on Human and Peoples Rights, and Article 10 of the Universal Declaration of Human Rights.

2- **THE PLAINTIFFS' CASE:**

The case of the Plaintiffs is that on the 30th of November, 2007, the deceased was found hanging in one of their bathrooms by their son, Nans

Williams Junior aged (8) eight years. At that point in time, the Plaintiffs were all sitting together in the living room and hall way waiting for electricity to be restored when they heard the alarm raised by their son. The deceased was rushed to the hospital but was pronounced dead on arrival.

An initial autopsy was carried out on the corpse and the verdict was that death was caused by asphyxia, secondary to suicide and hanging respectively. The first Defendant (The Republic of Liberia) not being satisfied with the result of the autopsy, through the Embassy of the 2nd Defendant in Monrovia requested the assistance of the 2nd Defendant to assist her with a team of investigators and pathologists to establish the circumstances surrounding the death of the deceased. Consequently, a team of police investigators including Dr. Anthony S. Quayee (a Pathologist) was sent to Liberia. The 5th Defendant requested for a review autopsy on the corpse of the deceased.

On the 18th of January, 2008, the team submitted its report titled "Review of Post Mortem on the deceased Meideh Togba" (Annexure H4). The report stated that:

> *Various body parts of the deceased including the vestibular minor labial tissues, vaginal wall components of the external genitals and parts of the respiratory system were missing and concluded that the deceased was sexually violated and strangled before the hanging.*

The Plaintiffs posited that the 5th Defendant's report was reckless and negligently fabricated as it could not have reached that decision when the report also stated that the deceased entire vaginal cavity was missing and thus not examined.

The Plaintiffs engaged the services of three medical doctors from Nebraska Institute of Forensic Science, United States of America in a bid tb counter the review report. The doctors conducted a thorough autopsy on the exhumed remains of the deceased on 24th May, 2008. Their report disputed and discredited the review report by 5th Defendant as being substandard due to its failure to examine vital organs of the deceased and

concluded that there was neither physical nor empirical medical evidence to support throttling or manual strangulation injuries to the deceased neck as the thyroid bone was not broken.

During the trial, the 5th Defendant neither appeared before the Court to tender the review report nor subjected to cross examination. Rather, the report was tendered through someone, who never participated in the review process and was curiously admitted in evidence. The Court convicted the Plaintiffs based on the review report which it referred to as the best among the autopsy reports. Accordingly, the Plaintiffs are contending that their conviction and sentence based essentially on the review report occasioned a miscarriage of justice, induced and procured by the 5th Defendants' autopsy report. It was equally the contention of the Plaintiffs that the High Court of Justice of Ghana had ruled that the autopsy report of the 5th Defendant is reckless, negligent and a baseless conclusion in medical terms. Relying interalia on the breach of their rights to fair hearing, the Plaintiffs brought this application seeking the following orders and reliefs from the Court, namely;

1. *That the conviction and sentencing of the Plaintiffs to death by hanging is* a *result of the reckless, baseless and negligent review of autopsy report of the 5th Defendant.*

2. *A declaration that the conviction and sentence of the applicants to death by hanging resulting from the autopsy report of the 5th Defendant amounted to the violation of their rights to life, freedom of movement and fair hearing.*

3. *A declaration that the Applicants continued incarceration! detention amounted to the violation of their fundamental human rights to freedom of movement.*

4. *An order that the Applicants be released and their rights restored.*

5 *An order directing the first Defendant to pay the sum of USD,* 250,000,000.00 *(Two hundred and fifty million United*

States Dollars) as compensation to the Applicants for subjecting them to inhuman treatment and the deprivation, humiliation and denial of their human rights and freedom.

6. *A declaration that the 2nd, 4th and 5th Defendants should pay the sum of USD250,000,000.00 (two hundred and fifty million United States Dollars jointly and severally as compensation for damages to the Applicants for treatment, deprivation, humiliation resulting from their unlawful and unjust conviction and sentence to death by hanging.*

3. THE DEFENDANTS' CASE:

In answer to the claim, the 1st and the 3rd Defendants denied all the allegations of the Plaintiffs and raised a preliminary objection on the jurisdiction and competence of the Court to entertain the action on the following grounds, namely;

1. *That the subject matter of the application i.e. the conviction and sentence of the Plaintiffs is the same as an appeal pending before the Supreme Court of Liberia and so far as the appeal is pending the Plaintiffs' contention of deprivation of their right to life is premature.*

2. *That the Supplementary Protocol of the Court A/SP.1/01/05 has not been ratified by the 1st Defendant as provided for by its constitution and therefore inapplicable to it.*

3. *That Article 9(1) (g) of the Supplementary Protocol of this Court relied upon by the Plaintiffs is inapplicable as it only applies to Community Institutions and their officials.*

4. *That the laws relied upon by the Plaintiffs are inapplicable as the Defendants did not violate any of the rights of the Plaintiffs. Accordingly, the Plaintiffs have not been arbitrarily deprived of their right to life but have been arrested, detained and tried in accordance with the*

provisions of law by an impartial tribunal as recognized by Articles 4, 6 and 7 of the African Charter on Human and Peoples Rights.

5. *That the Court lacks jurisdiction to entertain the suit which is based on ordinary crime and within the exclusive competence of the domestic Court of the 1st Defendant.*

Similarly, the 2nd, 4th and 5th Defendants entered their defense through a joint statement of defense filed on the 13th of June 2014; in their defense they contended as follows;

1. *That the Plaintiffs were tried and convicted of the offence for which they were charged on the 19th of March 2010. They also contended that every opportunity was given to the Plaintiffs to defend themselves at the trial and that the 1st Defendant not having participated in the trial makes no admission as to the corrections or otherwise of the judgment.*

2. *That the Court lacks jurisdiction to entertain this case because the suit is grossly misconceived as its jurisdiction is invoked improperly as the Court does not exercise appellate jurisdiction over the domestic Court of Member States.*

3. *That the Plaintiffs did not exhaust local remedies before coming to the Court and that the 2nd Defendant cannot be held responsible for the act of its officials, done pursuant to a request of the 1st Defendant a sovereign State.*

The 1st and the 3rd Defendants subsequently brought an application to enter a new plea pursuant to Articles 37 (2) & (3) of the Rules of this Court. They contended that the Supreme Court of Liberia had entered final judgment in the appeal by the Plaintiffs, pending before it whereby it ordered the immediate release of the Plaintiffs from detention and the restoration of their civil rights to liberties and all other constitutional and statutory rights.

Accordingly, the effect of the Supreme Court ruling is that it raises the issue of res judicata with regard to the current claim judging from the order sought by the Plaintiffs. Consequently, there is no basis for the claim by the Plaintiffs that their civil rights to liberty and life is being violated by the Defendants.

In answer to the new plea in law raised, the Plaintiffs submitted that since the Defendants have raised the issue of jurisdiction, they cannot bring the present application or raise new issues until the question of jurisdiction is disposed of unless they first withdraw their objection based on jurisdiction. It is worthy to mention that the Plaintiffs, despite the close of pleadings, continued to bring frivolous applications which are in most cases repetitions and thus not relevant for the determination of the present suit.

4. ANALYSIS OF THE ISSUES FOR DETERMINATION AND LEGAL ARGUMENTS OF THE PARTIES.

From the facts of the case and the arguments of the parties, it is deducible that it raises pertinent preliminary questions of jurisdiction, admissibility and the merits of the case. It is trite law that when in an action before a Court, the jurisdiction to entertain the suit is questioned, the objection has to, be disposed of first before delving into the. merits.

In other words, a Court or other tribunal seised with a case must determine its competence to entertain the suit before discussing the merits of the case. Jurisdiction is the foundation for the exercise of the judicial power of a Court or tribunal. Where there is lack of jurisdiction, a decision on the merits will tantamount to an exercise in futility because you cannot place something on nothing and expect it to stand.

Accordingly, it is necessary to consider the following questions raised by the Defendants in this suit, namely,

1. *Whether the Plaintiffs have the competence to institute this action without first exhausting the local remedies available to them.*

2. *Whether the pendency of the appeal against the conviction of Plaintiffs at the Supreme Court of Liberia is a bar to the present suit.*

3. *Whether the non-ratification of the Supplementary Protocol of the Court renders it inapplicable to the 1st Defendant.*

4. *Whether the present action falls within the intendment of Article 9(1) (g) of the 2005 Supplementary Protocol of the Court.*

5. *Whether the 2nd, 3rd, 4th and 5th Defendants are necessary parties to this suit, and*

6. *Whether from the totality of the facts put forward by the Plaintiffs, the present matter falls within the subject-matter of the jurisdiction of this Court.*

These issues will now be considered seriatim;

1. *As a rule of customary and general international law, the rule on the exhaust local remedies flows from the basic rule of international law providing that States have no right to encroach upon the preserve of other States internal affairs.*

It is predicated on the doctrine of sovereignty and equality of States in international law. This rule allows states to use their internal legal mechanisms including constitutional procedures to solve their own internal problems before international mechanisms can be invoked.

However, it is also the rule that where such internal mechanisms or remedies are either nonexistent, or unduly or unreasonably prolonged or where it is devoid of providing effective relief, resort to such measures as a condition precedent to the presentation of international claims will not be required. Similarly, the rule can be expressly or impliedly made inapplicable by the provisions of a treaty.

Articles 9(4) and 10(d) of the 2005 Supplementary Protocol of this Court (the basis of its human rights jurisdiction) provides as follows:

> *The Court has jurisdiction to determine cases of violation of human rights that occur in any member State.*

With regard to access, Articles 10 (d) of the Supplementary Protocol also provides for the conditions for the admission of human rights claims before the Court. Namely, the application must not be anonymous and must not be pending before another International court for adjudication. Exhaustion of local remedies is not a sine qua non for the presentation of claims before this Court.

As admitted even by the 2nd, 4th and 5th Defendants, citing the case of **Ocean King Nigeria LTD *vs.* Republic of Senegal,** the Court has consistently maintained that an Applicant in cases of human rights violation brought before the Court, is not obliged to exhaust local remedies before accessing the Court. **(***See also* **Musa Saidy Khan *vs.* The Republic of Gambia (2010) CCJ ELRP).**

In Kadijaton Mani Karaou *vs.* Republic of Niger, The Defendant (The Republic of Niger) raised a preliminary objection challenging the admissibility of the Plaintiffs' application on the ground that non -exhaustion of local remedies on the one hand and that the case brought before the Court was pending before the National Courts of Niger, the Court held that there are no grounds for considering the non-exhaustion of local remedies as a lacuna which must be filled within the practice of the Court, for the Court cannot impose on individuals more onerous conditions and formalities than those expressly provided for by Community texts.

To hold otherwise will tantamount to additional violation of the rights of such individuals. In dismissing the preliminary objection raised by the Defendant (and rightly so in our considered view), the Court held that by the provision of this Article 10(d) (11) of the Supplementary Protocol of 2005, the Community lawmakers of Economic Community of West African States (ECOWAS) intended to remain within the strict confines of what international practice has declared appropriate to abide by. That

it is not the duty of this Court to add to the Supplementary Protocol condition(s) which are not provided for by the texts.

As earlier noted, the application of the local remedy rule can be expressly or impliedly excluded by a treaty and this appears to be what the 2005 Supplementary Protocol conferring human rights jurisdiction on the Court appears to have done. Accordingly, not having made provisions for particular conditions in respect of admissibility of an application, the Court cannot impose heavier ones these of. It is therefore unnecessary to over flog this issue of non-requirement of exhaustion as a condition precedent to claim for human rights violations brought before this Court.

From the arguments and contents of the statement of defense and legal arguments filed by the 2nd, 4th and 5th Defendants, it appears that the Court is being invited to over-rule itself on its position on the non-requirement of the exhaustion of local remedies. We are of the opinion that there is no cogent and convincing reason or circumstances adduced by the Defendants to warrant such a course of action.

In the same vein, the question on whether the pendency of the appeal against the Plaintiffs conviction is a bar to the present application is answered in the negative. The limits to this Court's jurisdiction in an action against a member State for human rights violation are as contained in Article 10(d) above and as elucidated by the jurisprudence of this Court in the various cases cited above. These provisions are clear, lucid and unambiguous and cannot admit of any extraneous consideration. This Court has clearly stated that the pendency of an action before national Courts in cases of human rights violation is not a bar to the exercise of the jurisdiction of this Court.

In Valentine Ayika *vs.* Republic of Liberia (Suit N°: ECW/CCJ/APP/07/11), the Defendants raised a preliminary objection to the admissibility of the claim on the ground that a similar case is pending before the Supreme Court of Liberia in respect of the subject-matter of the suit. The Plaintiff relied on the provisions of Article 10(d) of the 2005 Supplementary Protocol and argued that the provision only applies as a

bar to proceedings before the Court where the same issue is pending before another International Court or Tribunal. In upholding the Plaintiff's contention, the Court held that the Supreme Court of Liberia as well as any other Domestic Court in member States do not qualify as international Courts within the meaning of Article10 (d) (ii) of the Protocol.

Accordingly, this ground of objection as well as others enumerated above cannot be sustained and the Court so holds.

The 1st Defendant contends that the non-ratification of the Supplementary Protocol of 2005 granting the Court Jurisdiction to hear cases of violation of human rights occurring in ECOWAS Members States by her renders the treaty inapplicable to her. Treaty is a very important source of international law.

In a nut shell, within the ambit of the Vienna convention on law of Treaties 1969, a treaty is a written agreement between States touching a particular subject matter in which they signify their intention to be bound by the provisions. Treaties are known by variety of names, ranging from Convention, International Agreements, Declarations, Covenants, Protocols or their Supplements to mention but a few.

Treaties are binding only on parties to them. They come into effect either by mere signatures or ratification or by both depending on the provisions thereof. Supplementary Protocol A/SP.1/01/05 of 2005 which confers jurisdiction on this Court with regard to human rights violation occurring in Member States of ECOWAS qualifies as a Treaty. The Court takes judicial notice of the fact that the 1st Defendant is a signatory to the treaty, By Article 11(1) of the Supplementary Protocol.

> *This Supplementary Protocol shall enter into force provisionally upon signature by Heads of States and Government. Accordingly, the signatory Member States and ECOWAS hereby undertake to start implementing <u>all</u> (emphasis ours) provisions of this Protocol.*

It follows that since the 1st Defendant signed the treaty in question, it cannot be seen to argue that it is not bound because of non-ratification.

The Court is not oblivious of the provisions of Art. 11(2) which declares that the Supplementary Protocol shall definitely (emphasis ours) enter into force upon ratification by at least nine (9) signatory States in accordance with the constitutional procedure of each Member State.

Consequently, even if the 1st Defendant did not ratify the treaty, it is bound by its provisions upon signature, provided at least Nine member States (which may exclude the 1st Defendant have ratified it.) Accordingly, the plea of the 1st Defendant that non -ratification obviates it from liability also fails, and the Court so holds.

The Defendants or some of them have also contended that the present action falls within the provisions and intendment of Article 9(1) of the Supplementary Protocol of 2005 and therefore not maintainable by the Plaintiffs, not being a Community Institution. The said Article 9(1) (g) of the Supplementary Protocol vests the Court with the competence to adjudicate on any matter relating to an action for damages against a Community institution or an official of the Community for any act or omission in the exercise of their official functions.

The ECOWAS Revised Treaty of 1993, and the Protocol A/P.1/7/91 of 1991 relating to the Community Court of Justice defines "Community" to mean the Economic Community of West African States, (ECOWAS) while Community Institutions are set out in Article 6 of the Revised Treaty of ECOWAS 1993, None of the Defendants in this case falls within the ambit of a Community Institution or Community Official.

The action is brought against the 1st and 2nd Defendants as Member States of ECOWAS as well as their officials. Article 9 (1) (g) of the Supplementary Protocol exists for a particular purpose *i.e.* it covers jurisdiction with regard to actions for damages instituted against or occasioned by acts or omissions of Community Institutions or official(s).

In interpreting similar provision, the European Court of Justice in case N° 5/71 in action for damages arising from acts of an Institution of the European Community (as it was then called) held that the object of this

provision is merely to compensate a party for damages arising from action or omission of a Community institution or its official(s) and nothing more.

Accordingly, in so far as Article 9 (1) g) gives the Court jurisdiction over actions for damages arising from acts or omissions of Community lnstitution (s) and their officials, the present action not being against such parties cannot be maintained under this Article.

However, the mere fact that an action was brought under a wrong section of a law does not deprive it of any merit, if there is another provision under the law under which it can be accommodated. This is a Court of Justice not one of technicalities. In this direction, it needs to be noted that the Plaintiffs also relied on Article 9(4) of the Supplementary Protocol which posits the human rights jurisdiction of the Court.

This Court has held in a plethora of cases that it has jurisdiction to entertain any case of alleged violation of human rights which occurred in member States, provided that the Member State in question is a party to the International human rights instrument(s) in which the violation can be derived or accommodated. Thus, State responsibility is founded on an international obligation assumed by the State *(see the cases of* **Bakery Sarre *vs.* Republic of Mali (2011) CCJ 57; Mamadou Tandja *vs.* General Salou Djibo and Anor. (2010) CCJ LR 109** and **Hissen Habre *vs.* Republic of Senegal (2010) CCJ LR 65.)**

In the light of the above analysis and decided cases, it is the law that the subject matter of this action falls within the jurisdiction of this Court since the substance thereof is predicated on the purported violations of the rights of the Plaintiffs as enshrined in the African Charter on Human and Peoples Rights and other International human rights instruments to which the 1st and the 2nd Defendants are parties. The Court therefore declares that it has jurisdiction to entertain this matter.

In order to strengthen the jurisprudence of the Court in the area of practice and procedure, it is pertinent to determine whether the 2nd, 3rd,4th and 5th Defendants are necessary parties to this suit. In other words will their presence contribute to the dispensation of the justice of this case? It appears a pronouncement on this matter will go a long way to sanitize the

types of processes that are brought before this Court and the persons who are brought as parties. For the avoidance of doubt, Article 9(4) clearly provides that the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.

This provision envisages that it is the Member State whose action or omission resulted in the violation of the rights of the individual as enshrined in human right instruments that is the appropriate Defendant. In other words, it is the State as an entity in international law that assumes responsibility; officials of such states or component parts or government are mere agents whose acts are attributable to their States in international law in appropriate circumstances.

Individuals, component parts of a State and other institutional categories are not necessary parties before the Court. Matters relating to human rights violations between individuals belong to the national or domestic Court of Member States. It is only a member State under these arrangements that can be sued as a Defendant. Individuals of any category or creed are not recognized as Defendants in a human rights actions before the Court.

Accordingly, the 3rd, 4th, 5th Defendants have no business of being parties to this suit. In this regard, the names of the 3rd, 4th and 5th Defendants are hereby struck out of the proceedings for not being appropriate parties. With regard to the 2nd Defendant it is absurd that the Plaintiffs also instituted this action against it.

From the facts without alluding too much law it is obvious it was the 1st Defendant who invited the 2nd Defendant to assist in carrying out some assignments with regard to the case.

The 2nd Defendant is neither the originator of the case nor did she in any manner whatsoever contribute to the violation of the rights of the Plaintiffs directly or indirectly. At best he merely acted as an agent to a named principal; the Republic of Liberia. The principle of the law of agency provides that as long as an agent acts within the ambit of his conduct, actual, usual or ostensible, the Principal answers for any act of misfeasance

or non -feasance the agent committed. It is therefore sad that the 2nd Defendant who merely answered the call of a neighbouring State for assistance should be joined in this suit. It is condemnable, irresponsible and devoid of any logic and reason.

Accordingly, it is the opinion of this Court that the Plaintiffs have merely wasted the time and the scarce resources of the 2nd Defendant, it is indeed a conduct to be frowned at.

Having arrived at this stage, the Court needs to consider whether from the totality of the facts and circumstances adduced by the Plaintiffs, the subject-matter (or human rights) jurisdiction of this Court have been successfully invoked.

In doing this, it is necessary to examine the entire cause of action. It consists of all those things necessary to give a right of action to a Plaintiff See: **Hernaman *vs.* Smith (1855) 10 Exch. 659 at 666.** Similarly, in **Dillion *vs.* Macdonald (1902) 21 NZ LR,** the Court of Appeal held that a cause of action is the act of the Defendant which gives the Plaintiff the cause for complaint.

In the Nigerian case of **Attorney General of the Federation *vs.* Abubakar (2007) 10 NWLR (pt. 1841 p10.** a cause of action was defined as a set of circumstances giving rise to an enforceable claim. It is the fact or combination of facts which give rise to a right to sue and it consists of two elements namely; the wrongful act of the Defendant which gives the Plaintiff his cause of complaint and the consequent damage. What then are the set of circumstances that gave rise to this case? What particular act of the Defendants are the Plaintiffs complaining about. A facsimile examination of the facts and circumstances of the case leads to the following deductions:

(1) The facts of the case arose from the death of Ms Togba in a bathroom in the Plaintiffs house.

(2) The production of conflicting post-mortem examination reports of the body of the deceased to ascertain cause of death.

(3) The Plaintiffs arrest, detention and charge, trial and conviction and sentencing of the Plaintiffs for the murder of the deceased.

The Plaintiff's case arose out of the trial process which culminated in their conviction and sentence to death by a Court of first instance in Liberia, for which they appealed to the Supreme Court of Liberia as deciphered subsequently during the process of hearing this suit. Their bone of contention is that the trial Court erred in law in admitting an autopsy report allegedly fabricated by the 5th Defendant and it was based on the contents of the report (Annexure H 4) that they were convicted. In their belief the Court should have relied on the original report (Annexure H1 and 2) which concluded that death was due to asphyxia secondary to suicide and hanging respectively; thus, exonerating the Plaintiffs from complicity in the death of the deceased.

Thus, the crux of the Plaintiffs claim; i.e. their cause of action is the alleged wrongful admission of evidence. i.e Annexure H4 titled "Report of Review of postmortem conducted on the deceased Meideh Togba" by the trial Court which according to them was tantamount to a denial of their rights to fair hearing/ trial as enshrined in Article 7 of the African Charter on Human and Peoples Rights.

In other words, the Plaintiffs are asking this Court to review the decision of the national Court of the 1st Defendant by upholding their contention that wrongful admission of evidence by the trial Court which led to their conviction and sentencing was reckless, baseless and negligent based on the autopsy report of the 5th Defendant. The Court has repeatedly in a long line of cases held the view and rightly so, that it cannot review the decisions of national Courts of Member States. It is not an appellate Court and has no supervisory authority over the national Courts of Member States of ECOWAS. *See:* **Jerry Ugokwe *vs.* Federal Republic of Nigeria (2004-2009) CCJLR 63 at 74-75** and **Hammani Tidjani *vs.* Federal Republic of Nigeria (2004-2009) CCJLR 77 esp. at 88-90.**

In **Moussa Leo Keita**, in deciding on the issue of the subject-matter of jurisdiction, this Court pointed out that it is only the non-observance of any of the texts applicable by it that justifies and found the legal proceedings before it and went on to hold that it does not have the competence to review decisions of domestic Courts. The Court went further to hold that in the absence of any proof of a characteristics violation of a human rights, the action must be declared inadmissible.

The purport of the decision in **Leo Keita's case** is that it is not enough for applicant to state that his human rights have been violated for the Court to assume jurisdiction. The allegation must disclose evidence of a characteristic violation.

In **Bakary Sarre *vs.* Mali** this Court in considering the preliminary objection raised by Mali Stated;

> ***"The competence of the Court to adjudicate in* a *given case depends not only on its texts but also on the substance of the initiating application. The Court accords every attention to claims made by applicants, the pleas-in-law invoked, and in an instance where human rights violation is alleged, the court equally considers how the parties present such allegations. The court therefore, looks to find out whether the human rights violation as observed constitutes the main subject matter of the application and whether the pleas-in-law and evidence produced essentially go to establish such violation."***

The Plaintiff in this case premised their pleas in law on alleged violation of Articles 4, 6 and 7 of the African Charter on Human and Peoples Rights.

Article 4 provides that *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".*

Article 6 provides, *"every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reason and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"*.

Article 7 of the African Charter provides:

1. ***Every individual shall have the right to have his cause heard.***

   This comprises:

   a. *The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.*

   b. *The rights to be presumed innocent until proved guilty by a competent Court or tribunal.*

   c. *The right to defense, including the rights to be defended by counsel of his choice;*

   d. *The right to be tried within* a *reasonable time by an impartial court or tribunal.*

2. ***No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.***

The Plaintiff in their narration of facts supporting their claim stated clearly the events that led to their arrest and trial which has been reproduced above. Subsequent to their arrest and after the close of investigation in which the Plaintiffs participated as they were allowed to conduct their own post mortem examination of the deceased, they were formally charged for the murder of the deceased. The Plaintiffs fully participated in the trial

and were represented by a counsel of their choice. The trial Court at the close of the case reviewed the evidence before it, found the Plaintiff guilty for the murder of the deceased and sentenced them to death.

Following the conviction and sentence, the Plaintiffs appealed to the Supreme Court against the judgment and sentence. Plaintiffs did not in their narration of facts allege that they were hindered from either defending themselves during the trial or appealing against the judgment in accordance with the laid down rules.

From the reading of Article 4 of the African Charter, deprivation of life is allowed and it is only when the deprivation is arbitrary that it constitute a violation thereof. The death penalty is provided for and applicable under the laws of Liberia. Imposition of death penalty therefore will not amount to a violation of that article if in so doing due process was followed.

Articles 6 of the African Charter is also not absolute and allows for deprivation of liberty for reasons and conditions previously laid down by the law. The check here also is ARBITRARINESS.

Arbitrary is defined in Black's Law Dictionary 5th edition as something done without fair, solid and substantial cause or without cause based upon the law. An act is therefore arbitrary when it is not done in accordance with the principles of law.

In **Hamani Tidjani *vs.* Federal Republic of Nigeria (2004-2009 CCJELR 77),** this Court in considering whether it is competent to entertain an action brought under article 6 of the African Charter stated that: *"The combined effect of article 9(4) of the Protocol of the Court as amended, Article 4(g) of the Revised Treaty and Article 6 of the African Charter on Human and Peoples' Rights is that the Plaintiff must invoke the Court's jurisdiction by;*

(i) Establishing that there is a right recognized by Article 6 of the African Charter on Human and Peoples' Right;

(ii) That this right has been violated by the Defendants or any of them;

(iii) That there is no action pending before another international Court in respect of the alleged breach of his right, and

(iv) That there was no previously laid down law that led to the alleged breach or abuse of his rights and freedom from arbitrary arrest."

The Court in **Tidjani's case** above having been satisfied that the Plaintiff was given opportunity to appeal against the decision complained of concluded that in so far as there are avenues open to the applicant to seek redress within the established and recognized hierarchy of Courts, it is immaterial that the processes are flawed or abused in some ways provided due process was followed.

The Plaintiffs has not claimed that their arrest and detention were carried out without due process nor did they allege that there were charged for a non-existing offence.

The arrest detention trial, conviction and sentence of the Plaintiffs having been done in accordance with the laid down laws and the Plaintiff having been afforded opportunity to appeal against same Plaintiffs' case has not disclosed any element of possible violation of Articles 4 and 6 of the African Charter. The Court so holds.

Turning now to Article 7 which has been reproduced above, the essential ingredients are the right to appeal, the right to be presumed innocent until proven guilty, the right to defense by counsel of your choice, the right to be tried within a reasonable time by impartial court, and freedom from retroactive punishment. Though the Plaintiff alleged a violation of this Article by the Defendants they were not specific as to which of the ingredients were violated.

As explained earlier, the Plaintiffs by their presented facts participated all through the proceedings and even testified on their behalf. They were represented by a counsel of their choice and no allegation of bias was levelled against the trial Court. Furthermore, their trial was for an offence which at all times material was known in law and legally punishable under

the law. There is therefore no material to indicate a possible violation of Article 7.

There is therefore no factual indication of violation of any of the articles to arouse this court's jurisdiction under Article 9(4) of the Supplementary Protocol.

The Plaintiffs' present application hinges on alleged wrongful admission of an otherwise admissible evidence to wit: the autopsy report prepared by the 5th Defendant. This contention even if substantiated is an irregularity in proceedings which is an issue for appeal.

It is also on record that the Plaintiffs have rightly appealed against the decision to the Supreme Court of Liberia - a Court of competent jurisdiction which form the materials before the Court has discharged and acquitted the Plaintiffs.

This Court cannot determine whether or not the procedure adopted by the trial court in deciding to admit that piece of evidence is correct or not without reviewing that judgment. Furthermore, the order sought by the Plaintiffs as reproduced above is for a reversal of the said judgment which this Court has no competence to do.

In **Bakary Sarres** case where a similar application was brought, this Court after analyzing the case of the Plaintiffs and finding that the applicants seek that the Court sit afresh, by examining Judgments N° 116 of the Supreme Court of Mali and order a reversal of the pronouncement made by the said Supreme Court in connection with the administrative proceedings concluded:

> ***"That it can be deduced from the application filled by Mr. Bakery Sarre and 28 others against The Republic of Mali..... seeks to project the Court of Justice of ECOWAS as a court of cassation over the Supreme Court of Mali. Viewed from that angle, the Honourable Court declares that it has no jurisdiction to adjudicate on the matter."***

In line with the above reasoning and in view of the above analysis, the Court holds that the action of the Plaintiff's fails as none of their rights under the African Charter on Human and People's Rights or any other known International human rights instruments have been violated by the Defendants.

FOR THESE REASONS,

Adjudicating in a public session after hearing both parties, in first and last resort, the Court in terms of technicalities:

- **Declares** that it has competence to examine violations of human rights alleged by the Plaintiffs against the 1st Defendant (The Republic of Liberia).
- **Declares** that the 3rd, 4th and 5th Defendants are not parties to these proceedings.

IN TERMS OF MERITS

Adjudges in regards to other aspects of the Application that the 1st and 2nd Defendants have not violated the human rights of the Plaintiffs under any International Human Rights Instrument, in particular, their rights to life, liberty and fair trial and the Plaintiffs' case is hereby dismissed.

1. The Plaintiff's and the 1st Defendant should bear their own costs.
2. The Plaintiff should pay to the 2nd Defendant, the Republic of Ghana, the sum of USD 5,000. (Five thousand United States Dollars) as costs.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

1. **Hon. Justice Friday Chijioke NWOKE** - *Presiding;*
2. **Hon. Justice Jerome TRAORE** - *Member;*
3. **Hon. Justice Yaya BOIRO** - *Member.*

Assisted by: **Tony ANENE-MAIDOH (Esq.)** - *Chief Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON THIS THURSDAY, 1ST OF DECEMBER 2015

SUIT N°: ECW/CCJ/APP/21/13
JUDGMENT N°: ECW/CCJ/JUD/26/15

BETWEEN
MONSIEUR MAMADOU MOUSTAPHA KAKALI - *PLAINTIFF*

AND
THE REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE YAYA BOIRO** - *PRESIDENT*
2. **HON. JUSTICE MARIA DO CÉU SILVA MONTEIRO-***MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ABOUBAKAR DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MAMADOU NANZIR** - *FOR THE PLAINTIFF*
2. **MAHAMAN HAMISSOU** - *FOR THE DEFENDANT*

- Violation of human rights - Violation of the right to a fair trial

SUMMARY OF FACTS

The Applicant, Mamadou M. Kakali, claims that he was appointed Sultan of Damagran by decree N°. 286 of 23rd July 2001, replacing Mr. Aboubacar Sanda, who was convicted.

That afterwards, Mr. Aboubacar Sanda was granted freedom and reinstated in his functions of Sultan. Thus the Applicant was notified that he could not be appointed, let alone remain legally the Sultan of Zinder. He subsequently filed an appeal for a stay of execution of the order reinstating Mr. Aboubacar Sanda Sultan of Zinder and two actions for excess of power. All his appeals were rejected. He considers that the conditions under which he was dislodged from his Palace constitute a violation of his rights. This is why he decided to appeal to this Court to condemn the Republic of Niger for violating his rights.

The Republic of Niger challenged the Applicant's arguments and observes that all the proceedings were followed and complied with by the court of Niger and that the force used to evict him from his home was justified by the fact that he had received notification of the judgment of the Supreme Court. For all these reasons, the Republic of Niger asked the Court to dismiss the Applicant's Application as unfounded.

LEGAL ISSUES

3. *Can the defence filed out of time benefit from the derogation of Article 35 (2) of the Rules of Court to be declared admissible?*

4. *Did the Applicant receive a fair trial?*

DECISION OF THE COURT

In its decision, the Court pointed out that in order to benefit from the derogation of Article 35 (2), a request must be justified and in good time, which was not the case of the State of Niger, the Court then dismissed the defence.

The Court considers that the Applicant did not provided any tangible proof of the violation of his right to a fair trial. Moreover, the Applicant wants the Court to assess and criticise the decisions rendered by the courts of Niger whereas the Court is not a court to reformulate or overturn the decisions rendered by national court.

By these reasons, the Applicant's claims were dismissed.

The Court thus constituted delivered the following Judgment:

I - Parties and their representation

The initiating Application in the instant case was filed at the Registry of the Court on 7th November 2013. It was filed by Mr. Mamadou Moustapha Kakali, a Niger national, who presented himself as the Sultan of Zinder. He is represented by Mahamadou Nanzir (Esq.), Lawyer registered with the Bar in the Republic of Niger.

The Defendant is the Republic of Niger, which is represented by Mahaman Hamissou (Esq.), Lawyer registered with the Bar in Niamey. Despite a correspondence dated 13 November 2013 forwarded to it, dated 13 November 2013, intimating it of a case that was brought against it, and through which it was requested to respond within the legal time-limit of thirty (30) days, the Republic of Niger could only produce a Memorial in defence, well beyond this period; it eventually filed a defence, which was received at the Registry of the Court on 2nd October 2015. By correspondence which was received by the Registry on 5th October 2015, Counsel to Defendant pleaded with the Court, ''*to kindly excuse him for that procedural fault*'', for which ''*he is solely responsible.*''

II – Facts and procedure

The filing of the instant case before the ECOWAS Court of Justice was sequel to a protracted legal procedure before the national court of Niger Republic.

The Plaintiff/Applicant, Mr. Mamadou Moustapha Kakali, was appointed the Sultan of Damagram, via Order n° 286 of 23rd July 2001. He took over from Mr. Aboubacar Sanda, who had been deposed, via an Order signed by the Minister of Internal Affairs (Order of 9th June 2001), following his indictment, and his being found guilty, in a Magistrate Court's Judgment dated 10th September 2002.

Mr. Aboubacar Sanda was to be released later, by the Court of Appeal in Niamey (Judgment of 28th July 2008) and succeeded in quashing, first, the Order that deposed him from the throne (Supreme Court Judgment dated 23rd October 2002), before being re-instated as the Sultan of Zinder (Order dated 29th June 2011, by the Minister of Internal Affairs.)

Parallel to all this, and on the same date of 29th June 2011, Plaintiff/ Applicant, Mamadou Moustapha Kakali was summoned by the Minister of Internal Affairs in Niamey, to be notified that he *« had not been appointed Sultan of Zinder, talk less of remaining, legally, in that position».* Following this development, Plaintiff/Applicant filed, at least three cases: Application seeking stay of action on the enforcement of the Order dated 29th June 2011 (which was rejected by the Supreme Court), and two Applications, denouncing an abuse of powers, seeking the annulment of Administrative Decisions, which formed the subject-matter of joinder of procedures, in the Administrative Chamber of the ***Cour d'Etat***, which rejected both (Judgment of 29th May 2013).

It was in these circumstances that Mr. Mamadou Moustapha Kakali decided to file a case before the Court of Justice, ECOWAS on 7th November 2013, pleading with the Court:

- To **adjudge** and declare that the Republic of Niger has violated Article 4 of the Revised Treaty of ECOWAS of 24th July 1993, and Articles 3 and 4 of the Supplementary Protocol A/SP.1/01/ 05, and, consequently, the African Charter on Human and Peoples' Rights, especially in its afore-mentioned Articles;

- To **adjudge** and declare that the Republic of Niger has violated his right to effective remedy, *« especially dude to the fact that the* ***Cour d'Etat*** *of the Republic of Niger has, by its Judgment 13-033 of 29 May 2013, refused to adjudicate on the writs filed by Applicant »*;

- *«To* ***enjoin*** *the Republic of Niger to respect the rights of Sultan Mamadou Moustapha, alias, especially, by beginning to avail him the right to have a revision of his trial for abuse of powers»*;

- To **order** the Republic of Niger to pay him the sum of fifty million (50.000.000) CFA francs "*as damages*"

III – Arguments and Pleas-in-law by parties

Applicant/Plaintiff claims that the various administrative interference seeking to either depose him, from the throne, or to enthrone afresh his predecessor were moves that amount to "an abuse of powers" and should therefore be annulled. He also criticizes the judgment rendered by the ***Cour d'Etat*** which, *"by annulling his election to the throne, under the pretext of enforcing a judgment by the Supreme Court", "has thus transformed itself into an Election Tribunal, even ten years after such an election has been conducted, and result announced"*. Still while criticizing judicial decisions that were rendered, Plaintiff/Applicant claims that certain decisions *"lack legal grounds"*, or, better still were *"materially impossible"* to enforce. In conclusion, these irregularities must have violated his *"right to fair hearing"*, still according to Plaintiff/ Applicant.

Plaintiff/Applicant equally claims that the circumstances in which he was dislodged from his "Palace" constitute a violation of hi rights. Indeed, the Governor of the Zinder region had ordered the palace to be "cordoned off" before enjoining the two state owned public utility companies, to stop supplying the palace in electricity and water. Thus, Mr. Kakali claims that both himself and members of his immediate family were treated as "*criminals*"

As for Defendant, **the Republic of Niger,** in its rejoinder, it argued against Plaintiff/Applicant's claims, in three points.

Under point one, Defendant claims that the trials, in which Mr. Kakali was adequately involved, took place, within the framework of normal court proceedings; it adds that, with regard to the *Cour d'Etat*, these proceedings perfectly respected the provisions of **Order 2010-16 of 15 April 2010** determining the Organisation, Duties and Functioning of that Court.

Secondly, Defendant contests the claims that the national judge has failed to adjudicate properly on the reliefs sought by Plaintiff/Applicant; Defendant thereafter cites very lengthily the litigating judgment rendered on 29 May 2013, by the *Cour d'Etat,* to prove that the national judge has adequately done justice to all claims made by Mr. Kakali.

Finally, Defendant argues that if Plaintiff/Applicant was dislodged from his home, it was due to the fact that he precisely behaved in a way as to show that the Supreme Court Judgment of 23rd October 2002 (referring to the setting aside of the dethronement of Plaintiff's predecessor), which was notified to him, was not binding on him.

For all the above reasons, the Republic of Niger pleads with the ECOWAS Court of Justice, to reject, as ill-founded, the case filed by Mr. Mamadou Moustapha a.k.a. Kakali.

IV - Legal Analysis by the Court

As to form

To begin with, the Court wishes to point out that the instant case brought before it delves on human rights violations in an ECOWAS Member State. The case also invokes a legal instrument, which the Republic of Niger has ratified – the African Charter on Human and Peoples' Rights -. Pursuant to its established case law, the Court believes that all these suffice for it to declare its jurisdiction over the present litigation.

Thereafter, the Court must make a pronouncement as to admissibility of the writs filed by the Republic of Niger.

It was brought to the attention of the Court that the Republic of Niger, Defendant in the instant case, was notified of a case brought against her, since November 13th, 2013, that is the same day that the initiating Application was received at the Registry of the Court. However, the Republic of Niger could only file a defence well beyond the legal time-limit; this was on 2nd October 2015. As it were, in an accompanying correspondence to the said defence writ, Defendant "*humbly*" requested

that the Court should "*kindly excuse it for that procedural fault*", for which "*it is solely responsible.*" Within the same time frame, Defendant solicits a *"derogation, pursuant to the provisions of Article 35 of the Rules of the Court".*

The Court wishes to recall that, pursuant to Article 35 of its Rules, it is *"Within one month after service on him of the application that the Defendant shall lodge a defence."* As in this case, despite notification done on it, of the said initiating Application, the very day it was filed at the Registry of the Court, the Republic of Niger only replied on 2nd October 2015, that is more than twenty months later Thus, it is very clear that Defendant filed its defence beyond the legal time-limit.

Nevertheless, the Republic of Niger solicits a derogation, pursuant to paragraph 2 of Article 35, which provides that *"The time limit laid down in paragraph 1 of this Article may be extended by the President on a reasoned application by the Defendant.*"

Yet, the Court observes that such a derogation must, not only be requested for, at a very useful point in time, it should also have legal grounds. Whereas there has never been a request, made by the Republic of Niger, within the purview of paragraph 2 of Article 35, this means that such a request ought to have been made immediately notification of the initiating Application was done onto Defendant. It was only during the time it was filing its defence, almost after two years after notification of the initiating Application was done that the Defendant sought to draw the benefit of derogation. It goes to show that such an undertaking cannot be said to be in respect for the provisions of Article 35 of the Rules of the Court.

For this singular reason, this request should be rejected, the defence so filed declared inadmissible, and a default judgment entered against the Republic of Niger.

As to merit:

The initiating Application filed before the Court, by Mr. Mamadou Moustapha a.k.a. Kakali refers to the Constitution of the Republic of Niger (p.3 and 4) and to various provisions of the African Charter on

Human and Peoples' Rights. It invokes mainly the violation of the right to fair hearing, and in it, certain reliefs are sought. On each of these reliefs sought, the Court must consider the merit of the arguments by parties.

To start with, with regard to the legal instruments cited in support of the initiating Application, the Court must point out the irrelevance of the provisions of the Constitution of Niger Republic in the instant case. Indeed, in human rights violation litigations, the Court only applies the rules in international law, such rules that ECOWAS Member States have ratified, and which have become binding on them. In principle, the Court does not refer to the national laws of Member States, in adjudicating on any case brought before it. For a long time, the Court has had the opportunity to reiterate this position in a number of its judgments:

- Judgment of 11th June 2010, *«**Peter David**»* : ***"The International human Rights Protection Law, before international courts are essentially based on treaties that were ratified by Member States, as principal subjects of international law."***

- Judgment of 8th November 2010, *«***Mamadou Tandja *v.* Republic of Niger***»*, §18.1: ***"It is admitted, as a general principle that proceedings on human rights violations are brought against States, and not against individuals. Indeed, it is the responsibility of States to protect human rights."***

- Judgment of 24th April 2015, *«***Bodjona *v.* Republic of Togo***»*, § 37 : The Court ***"shall lean, exclusively on international norms, which are binding, in principle, on Member States that have ratified them."***

It therefore follows that the Court must set aside, in its legal analysis, any reference made to the constitution law of the Republic of Niger; it shall only be concerned with the other instrument invoked by Plaintiff/Applicant: the African Charter on Human and Peoples' Rights, especially in its Articles 7 and 26.

These two Articles provide, respectively:

Article 7:

Every individual shall have the right to have his cause heard. This comprises:

a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b) the right to be presumed innocent until proved guilty by a competent court or tribunal;

c) the right to defence, including the right to be defended by Counsel of his choice;

d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 26:

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

All through his initiating Application, Mr. Kakali insists on various aspects of the judicial procedures of the Republic of Niger, which he considers as constituting great violations of his right to fair hearing.

Even, if it is assumed that the afore-mentioned provisions relate to the notion of fair hearing, the Court must point out that the description done to the judicial procedures, that were carried out in Niger Republic, do not, in anyway depict a disregard for such right. Indeed, the concept of fair hearing covers various aspects, among which the following are the major ones:

- the principle of the presumption of innocence, until the culpability of the accuse dis legally established;
- the right of all accused persons to have ample time, and facility to prepare for his defence;
- the right to defend oneself, or to enjoy the assistance of any counsel of one's choice;
- the principle of non-retroactivity of the penal law;
- the right to seek for reparation, in case of judicial error.

Whereas, on none of the above cited aspects has Plaintiff/Applicant availed the Court of any tangible proof, that could support his human rights violations, or ill-treatments claims. It is clear from the case file that the judicial procedures that took place in the Republic of Niger were conducted pursuant to constitutional norms of that country, and Plaintiff/Applicant had the opportunity to access the courts in that country, at his convenience, and as such, had the opportunity to defend his case before them. Consequently, the Court strongly believes that, in reality, the right to fair hearing was not violated.

The truth of the matter is that, it appears the claim of violation of the right to fair hearing was simply used, with a view to criticize the judgments rendered by the national courts, on their merit. Further opinion that the Court can make of the initiating Application filed before it is that it relates rather more to the conception and the legal basis for the judgements and rulings rendered by the national courts. It only suffices to refer, not only to the arguments by Plaintiff/Applicant, but also to the reliefs sought by him, at the end of his arguments.

Thus, he wrote, in his Application that: *"Judgment n° 13-033 of 29 May 2013 (...) deliberately chose to ignore some facts, which, if taken into consideration could have simply swung the tide of judgment in favour of Plaintiff ..."* (p.4); that *"at no time did the Court care to base its judgment on this fact"* (p.4); that *"The State has created a situation of **fait accompli** which judgment n° 0018 of 23 October 2002 has hardly settled"* (p.5); that *"paragraph 3 of page 11"* of the judgment delivered by the **Cour d'Etat** shows that the **Cour d'Etat** was *"partial"* (p.6), that the ECOWAS Court of Justice has the responsibility to *"sanction the Minister of Internal Affairs, by ordering the annulment of the judgment seeking the re-enthronement of Aboubacar Sanda"* (p.7), or further that various orders signed by the same Minister *"constitute an abuse of powers"* (p 9).

If there is any further doubt, on this, it only suffices to refer to the reliefs sought by Plaintiff/Applicant, in his initiating Application, to really point out that he was seeking, from the ECOWAS Court of Justice, a reformation or annulment of judicial pronouncements made by the national courts. Thus, he requests the ECOWAS Court, to sanction the fact that *"the **Cour d'Etat** of the Republic of Niger has, through its Judgment n°13-033 of 29 May 2013, refused to adjudicate properly on the claims made by Plaintiff"* and that the ECOWAS Court should *«enjoin the Republic of Niger" "to order for the revision of the trial on abuse of powers".*

Thus, it is highly certain that Plaintiff/Applicant seeks from the ECOWAS Court, an interference into the national judicial matters, to become, in some sort, an Appeal, a Cassation Court, or better still, a Court of revision for the judgments delivered by the national courts. The Court cannot, of course accede to such requests, pursuant to its well established case law.

In its Judgment in the **«Jerry Ugokwe *v.* Nigeria»** case of 7th October 2005, the Court declared that:

> ***"Appealing against the decisions of the national Courts of Member States does not form part of the powers of the Court"*** (§32).

In its Judgment in the «**Moussa Léo Keïta v. Republic of Mali**» delivered on 22nd March 2007, the Court ***"DECLARES its lack of jurisdiction to adjudicate on the decision made by the Supreme Court of Mali"*** (§ 39).

In its Judgment in the *«***Al Hadji Hammani Tidjani *v.* Federal Republic of Nigeria anor***»* of 28 June 2007, the Court declared that ***"…admirtting this Application will amount to this Court interfering in the criminal jurisdiction of the Nigerian courts, without justification"*** (§45).

In its Judgment in the «**Bakary Sarré and 28 others v. Republic of Mali**», the Court concluded that ***"it can be deduced from the Application filed by Mr. Bakary Sarré and 28 others against the Republic of Mali that the said Application substantially seeks to obtain from the Court of Justice of ECOWAS, a reversal of Judgments n°188 and 116 delivered by the Supreme Court of Mali, and it equally seeks to project the Court of Justice of ECOWAS as a Court of Cassation over the Supreme Court of Mali. Viewed from that angle, the Honourable Court declares that it has no jurisdiction to adjudicate on the matter"*** (Judgment of 17 March 2011, § 31).

Then, in its Judgment in the «**Mme Isabelle Manavi AMEGANVI v. Republic of Togo**», the Court considered that ***"the request for re-instatement constitutes an appeal against Decision n°E018/10 of 22 November 2010, by the Constitutional Court of the Republic of Togo, which is a national court of a Member State; its is a court, to which the ECOWAS Court, pursuant to its well established case law, is neither an Appeal Court nor a Court of Cassation, and whose decision consequently, cannot be revoked by the ECOWAS Court"*** (Judgment of 13 mars 2012, § 17).

The same thing it is in its Judgment in the *«***Mr. Alimu Akeem *v.* Federal Republic of Nigeria***»* of 28 January 2014, when the Court recalls that ***"it is well established case law that cases, whose subject-matters***

relate fundamentally on the reversal of decisions already given by national courts of Member States, the ECOWAS Court has always rejected such cases" (§ 42).

Finally, In its Judgment in the «**Convention Démocratique et Sociale Rahama *v.* Republic of Niger**», dated 23 April 2015 the Court emphasises, once more that ***"the existing doctrine must, not only be recalled that, when it is requested, expressly, from the ECOWAS Court of Justice, to invalidate, or to reverse judicial pronouncements earlier made, it imposes a refusal, even without expressing it clearly, to the reversal, or setting aside of a decision made by the national courts"*** (§ 49). Furthermore, the Court is of the opinion that ***"it results from this principled position that the requests made by CDS Rahama regarding the decisions made by the national courts in Niger, cannot be considered, since the ECOWAS Court neither has the power to examine them, nor generally can have an opinion on the respect for the jurisprudence of these national courts themselves, nor even the internal law of the Republic of Niger generally"*** (§53).

It can be deduced from all the above decisions that the Court cannot admit the requests made by Mr. Mamadou Moustapha Kakali, seeking to reverse the decisions made by the national courts of Niger.

In these circumstances, the Court believes that he should equally bear all the costs.

FOR THESE REASONS

The Court, sitting in a public hearing, in a default judgment against the Defendant State, in first and last resort, and in a human rights violations case,

As to form

- **Declares** its jurisdiction over the instant case;

- **Declares** inadmissible, the Memorial in Defence filed by the Republic of Niger on 2nd October 2015;

- **Enters** the default judgment against the Republic of Niger, pursuant to Articles 35 and 90 of its Rules.

As to merit

- **Declares** that the ECOWAS Court of Justice does not have power to reverse the decisions of national courts;

- Consequently, **rejects** all claims made by Plaintiff/Applicant;

- **Orders** Plaintiff/Applicant to bear all the costs

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

1. **Hon. Justice Yaya BOIRO** - *President*
2. **Hon. Justice Maria Do Céu Silva MONTEIRO** - *Member*
3. **Hon. Justice Alioune SALL** - *Member*

Assisted by **Aboubakar DIAKITE (Esq.)** - *Registrar*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON TUESDAY 1ST DAY OF DECEMBER, 2015

SUIT NO: ECW/CCJ/APP/03/13
JUDGMENT NO: ECW/CCJ/JUD/27/15

BETWEEN
FAROUK CHOUKEIR & ANOR. - *PLAINTIFF*

AND
REPUBLIC OF COTE D'IVOIRE - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE YAYA BOIRO** - *PRESIDING*
2. **HON. JUSTICE MARIA DO CEU SILVA MONTEIRO** - *MEMBER*
3. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **BAKOH KOSSI (ESQ.)** - *FOR THE PLAINTIFF.*
2. **BLESSY CHRYSOSTOME (ESQ.)** - *FOR THE DEFENDANT.*
3. **IBRAHIMA NIANG (ESQ.)** - *INTERVENER.*

- Violation of human rights
- Violation of the right to an impartial and fair trial

SUMMARY OF FACTS

The Applicants, Farouk CHOUKIER SITEX-CI SARL, claim to have opened a bank account with the Société Générale de la banque de Côte d'Ivoire (SGBCI) SA, and that the bank later proceeded to unilaterally close their account by giving it formal notice to pay a sum for which they found unjustified according to them, the court ordered a chartered accountant to list the accounts that existed between the parties, but that this preliminary ruling was served to SITEX-CI SARL and Mr. Farouck Choukier four years after its pronouncement. They considered that all its dysfunctions of justice led to the cessation of activity of their company, resulting in the unemployment of their staff and the devaluation of the shares of its manager. They requested the Court to declare that the Republic of Côte d'Ivoire violated their rights.

The Republic of Côte d'Ivoire denied all the allegations advanced by the Applicants and considered that neither the right to a fair trial nor the principle of impartiality was violated and asked the Court to dismiss all the claims as unfounded.

LEGAL ISSUES

1. *Can voluntary action be admitted?*
2. *Was the trial fair and impartial?*

DECISION OF THE COURT

In its Decision, the Court of Justice dismissed the intervention of SITEX-CI on the ground that it is difficult to dissociate the interests of that company from the interests of Mr. Farouk Choukier, its manager and representative.

The Court concluded that the Application for the conviction of Côte d'Ivoire could not succeed because there was no evidence in the case file to justify the violation of the principle of impartiality, nor any evidence objectively establishing any breach of the principle.

The Court therefore orders the Applicants to bear the entire costs.

JUDGMENT OF THE COURT

I. PARTIES AND THEIR REPRESENTATIVES

- **THE APPLICANT Farouk CHOUKIER** of Ivorian nationality, Director of the Company - SITEX-CI - Residing at Rue du Commerce, residence Nabil, Cote d'Ivoire, represented by AQUEREBURU & PARTNERS, Tax and Legal Counsel, Immeuble Alice 777 Avenue Kleber DADJO, BP 8989.

- **VOLUNTARY INTERVENER: Société - SITEX-CI SARL**, whose registered office is at Vridi, Abidjan 15 BP 635, Abidjan 15, represented by Ibraima NIANG, Lawyer registered at the Bar Association of Cote d'Ivoire, Immeuble DC "FADIKA" Avenue du General de Gaulle, ancienne rue du Commerce, an extension of the Plateau, Abidjan 06 BP 6131.

- **DEFENDANT: Republic of Cote d'Ivoire**, represented by Jean-Chrysostome BLESSY, Lawyer at the Supreme Court, business address located at Bietry, Rue des Majorettes, Immeuble "le BIMBOIS 11 Abidjan.

11. PROCEDINGS

1. At the onset, this is an. application against the Republic of Cote d'Ivoire filed at the Registry of the Court on 15 February 2013 by Mr. CHOUKIER Farouk, Director of la Société SITEX-CI and the company itself- SITEX-CI Ltd.

2. The Applicant filed a motion for expedited procedure in the Registry of the Court on 15 February 2013.

3. On 21 February 2013, Mr. Farouk CHOUKIER filed with the Registry of the Court, an additional Application.

4. On 27 February 2013, la Société SITEX-CI withdrew from case.

5. La Société Ivoirienne de Textiles - SITEX-CI SARL, filed an voluntary application for intervention which was filed at the Registry of the Court on 12 March 2013.

6. The Republic of Cote d'Ivoire filed its defence, registered in the Registry of the Court, on 22 April 2013.

7. The Republic of Cote d'Ivoire, having being served with the voluntary application for intervention filed by SITEX SARL, by the Registry of the Court on 26 March 2013, replied that it would not make a written submission, but that it will make oral submissions at the hearing.

8. Mr. CHOUKIER Farouk, Director of the Company, produced a reply on 3 May 2013.

9. La Société lvoiriene de Textiles- SITEX-CI, produced a reply on 9 May 2013.

10. On 3 October 2013, according to the minutes of the proceedings, the court admitted the voluntary application for intervention.

11. On 13 November 2013, the Republic of Cote d'Ivoire produced a rejoinder.

III. THE CIRCUMSTANCES OF THE CASE

- The facts relied upon by the Applicant

12. As part of its commercial relations, La Société Ivorienne de Textiles- SITEX-CI opened a bank account in the books of la Société Générale Bank of Cote d'Ivoire (SGBCI) SA;

13. That during the month of February 1995, la Société Générale Bank of Cote d'Ivoire (SGBCI) SA, informed la Société SITEX- CI SARL of unilateral closure of its account, by notifying the latter to pay a sum amounting to 561048 .810 (five hundred sixty-one forty-eight million miles eight hundred and ten francs CFA), representing the

debit balance of the account, and the amounts of 282,009.779 (Two Hundred and Eighty-Two million Nine Thousand Seven Hundred and Seventy-Nine CFA francs);

14. That, by formal notice dated 29 June 1997, la Société SITEX-CI SARL was put on notice to pay the outstanding debit balance, and the Applicant, in his capacity as guarantor, to pay the sum of 282,009.779 (Two Hundred Four-Twenty-Two Million Nine Thousand Seven Hundred and Seventy-Nine CFA francs);

15. Acknowledging not owing the said amounts, la Société SITEX-CI asked la Banque de Cote d'Ivoire (SGBCI) SA, for an audit of the account. An action which was however abandoned as usual;

16. That despite this, la Société SGBCI SA, requested and obtained two orders of injunction for payment against the Applicants;

17. That the Applicants opposed the two orders of injunctions for payment which were withdrawn;

18. That SGBCI Société SA sued la Société SITEX SARL and Mr. Farouck CHOUKEIR before the Court of First Instance of Abidjan, asking for the payment of various sums of money totalling 845,058,589 (eight hundred and forty-five million fifty-eight thousand, five hundred eighty-nine CFA francs);

19. That having joined the two procedures, the Court of First Instance of Abidjan, by interim Judgment N°: 731 dated 20 November 1996, ordered the services of an expert accountant so as to detail out the accounts that may have existed between the parties and to produce a final balance;

20. That the interim judgment was only served to SITEX-CI SARL, and to Mr. Farouck CHOUKIER, in the year 2000, which is four years after its delivery;

21. That the Applicants considering that the time of the proceedings has elapsed, decided by application dated 8 October 2000, to request the Court of First Instance of Abidjan to find the expiry of the case, and that by Decision N°: 126/2001 dated 31 May 2001, the Court dismissed their Application and ordered the Applicants to pay la Société SGBCI Company SA, the sum of 505 323 169 (505 000 000, 323 000 169 CFA francs);

22. That the Applicants filed an appeal and that by Judgment N°: 635/03 dated 23 May 2003, the Civil and Commercial Chamber of the Abidjan Court of Appeal reversed the judgment delivered by the Court of first instance and after adjudicating anew found that the proceeding has expired;

23. That SCBCI appealed against the judgment of the Court of Appeal of Abidjan, and the Criminal Chamber of the Supreme Court of Cote d'Ivoire, by Decision N°: 659/98/ of 11/12/2008, quashed the Judgment of the Abidjan Court of Appeal and by citing upheld Judgement N°: 126/01 dated 31 May 2001;

24. In turn, the Applicants filed two appeals against Judgment N°: 659/2008, by relying on Article 28 of the law of Cote d'Ivoire N°: 97-243 dated April 1997 regulating the composition, organization, powers and functioning of the Supreme Court on appeal in cassation, as well as Articles 20, 24 and 25 of the Code of Civil Procedure for action for withdrawal;

25. That by letter dated 19 February 2008, Counsel to la Société SGBCI withdrew the appeal proceedings against the Decision of 23 May 2003, asking the Supreme Court of Cote d'Ivoire that a time limit that will allow his client to engage a new counsel should be granted;

26. They note that the name of Mr. Felix Acka, Solicitor of Bar Association of Cote d'Ivoire appeared in the Judgment, as if he had been properly engaged as counsel to SGBCI;

27. That the Applicants requested the President of the Criminal Chamber of the Supreme Court of Cote d'Ivoire, the authorization to precede with a *subpoena* to produce documents at the Registry of the Supreme Court;

28. That, according to the orders in the *subpoena*, forwarded by the Bailiff, there was no trace in the casefile on the proceedings establishing, the regular engagement of Mr. Felix Acka;

29. That the appeal for withdrawal against Judgment of 659/2008 dated 11 December 2008 was still pending, the Applicants filed a formal Application on 8 July 2009, in which they requested for the recusal of some members on the bench who would examine the motion for withdrawal on the ground that the said judges heard the case when it came before the court of first instance, having also sat on the panel that delivered Judgement N°. 659/08 of 11 December 2008;

30. That by correspondence dated 15 February 2009, the President of the Supreme Court of Cote d'Ivoire, forwarded the motion for recusal to the President of the Criminal Chamber, asking the latter to stay proceedings, pursuant to Article 130 of the Code of Civil, Commercial and Administrative Procedure pending completion of the recusal process;

31. That, despite this legal condition and the injunction of the President of the Supreme Court, the Chamber composed of Judges who had foreknowledge of the dispute dismissed the application for recusal dated 11 November 2010;

32. That in the case between SITEX SARL and Mr. Farouck CHOUKIER of la Société SGBCI SA, the Judge DIETAI Marcel presided on the panel that delivered judgment N°. 126/2001 dated 31 May 2001, as President the Court of First Instance of Abidjan;

33. That this Judge as well as Justices VE-BOUA and GNAGO DACOURY, who were part of the panel that delivered the Supreme

Court Judgment dated 11 December 2008 were also part of the panel that dismissed the Application for recusal initiated by the Applicants (*see* Decision N°: 126/2001 dated 31 May 2001, Supreme Court Judgment N°: 659/08 dated 11 December 2008, dismissing Judgement N°: 654/10 dated 11 November 2011);

34. That the economic impact on the activity of SITEX-CI SARL originates from the proceeding for foreclosure initiated by la Société SGBCI SA, which resulted in the closure and cessation of activity of the company, thus'· leading to unemployment of employees and the devaluation of the shares of its Manager, an Applicant in the present case;

35. Accordingly, the Applicant is seeking the following:

- That the Court **find** that the Republic of Cote d'Ivoire violated their rights, including the right to an impartial justice and fair hearing, as stated in the Universal Declaration of Human Rights, the African Charter on Human Rights, and the Constitution of Cote d'Ivoire;

- **Find** that the said violation has severely damaged the economic conditions of the Applicant;

- That the Court should **order** the Republic of Cote d'Ivoire to pay 1, 000; 000, 000, FCFA francs (one billion CFA francs), representing the amount unduly withheld by la Société SGBCI SA, as well as 7, 000, 000, 000, CFA (seven billion CFA francs) by way of damages for other forms of harm and damages;

- That the Court should **order** the Republic of Cote d'Ivoire to bear all costs, of which includes the legal fees for the benefits of Aquerrebus & Partners.

The facts relied upon by the voluntary intervener

In his voluntary application for intervention, la Société SITEX-CI SARL adheres to and adopts the facts alleged in the initial application, in the fact presented in itself, which are reproduced here in full.

As such, he is asking that the Republic of Cote d'Ivoire should be ordered to pay the sum of CFA 6, 700, 000, 000.00 (six billion seven hundred million' CFA francs).

The facts relied upon by the Defendant

36. That the name of the judge DIETAL Marcel is among the members of the panel that heard the case at first instance;

37. That, among the judges who formed the second civil panel of the criminal chamber of the Supreme Court that adjudicated on the case were:
    - Mr. ADAM Seka Julien, Presiding;
    - Mr. SIOBLO Douai Jules, Judge Rapporteur;
    - Mr. VE BOUA, Judge;
    - Mr. GNAGO Dacoury, Judge;
    - Mr. OUAKA Adon, Judge;

38. That the Société Générale des banques de Cote d'Ivoire - SGBCI, from the proceedings of Court of First Instance had constituted Mr. FADIKA DELAFOSSE, F. KADIKA, C. KACOUTIE and A. ANTHONY DIOMANDE, Barristers-at-Law domiciled at Boulevard Carde, Avenue du Docteur Jarnot, Immeuble Harmonie, 01 BP 297 Abidjan 01;

39. That the said Counsel by pleading dated 21 September 2005, followed by a scheduled hearing on 22 November 2005, initiated an appeal against Judgment N°: 635 delivered on 23 May 2003 by the Abidjan Court of Appeal.

40. That during the month of February 2008, the law firms FADIKA DELAFOSSE, F. KADIKA, C. KACOUTIE and ANTHONY DIOMANDE (FDKA) withdrew from the case;

41. That seised with an appeal, the Criminal Chamber of the Supreme Court appeal with the abovementioned composition, delivered its Judgement N°: 659/08 on 11 December 2008;

42. That la Société SITEX-CI and Mr. Farouk CHOUKHEIR appealed against this Judgment N°: 659/08 delivered on 11 December 2008, and by order N°: 55 dated 15 June 2009, they obtained a stay of execution with the same pleas in law before the same panel of the Supreme Court, pursuant to Article 28 of Law N°: 97-243 of 25 April 1997;

43. On 23 November 2012, the panel of judges of the Criminal Chamber of the Supreme Court declared the appeal filed by la Société SITEX-CI and Mr. Farouk CHOUKER inadmissible.

44. That the Applicants filed an appeal to overturn the said judgment, stating that SGBCI did not apply for the replacement of its counsel, who had unilaterally withdrawn from the case, which led to the inadmissibility of the appeal filed by SGBCI, due to the exclusive nature of the representation of parties before the Supreme Court;

45. Meanwhile, la Société CI-SITEX and Mr. Farouck CHOUKER filed an application to the President of the Supreme Court seeking recusal of five judges of the second civil panel of the Criminal Chamber of the Supreme Court, who made Judgment N°. 659/08 dated 11 December 2008, namely: Justices ADAM Seka Julien - Presiding SIOBOLO Douai Jules, Judge-Rapporteur, VE BOUA, Gnago Dacoury and OUAKA Adon;

46. That the President of the Supreme Court by a correspondence dated 15 August 2009 addressed to the President of the Criminal Chamber, asking him to stay proceedings pending decision on the recusal of the aforementioned;

47. That after more than a year, *i.e.* 11 November 2010, the Second Civil panel of the Criminal Chamber delivered its Judgment N°. 654, despite the motion for recusal and regardless of the directives of the President of the Supreme Court, which again led to the Applicants filing an appeal for recusal;

48. By Order N°: 012/2012 dated 24 January 2012, the President of the Supreme Court ordered a stay of execution of Judgment N°: 654 dated 11 November 2010 till final determination by the constituted panel;

49. That till date, the application seeking to overturn Judgment N°: 654 of 11 November 2012 initiated before the constituted panel of the Criminal Chamber of the Supreme Court is still pending;

50. The Defendant concludes by requesting the Court to declare:

    - That the principle of impartiality and the right to a fair hearing had not being violated;

    - The outright dismissal of all the Applicant's claims. as they are ill founded.

Legal issues raised by the parties

51. The Applicant, Farouck CHOUKHEIR, exposing his claims, considers that the dispute in question does not constitute an outright violation of the principle of impartiality inherent in justice and the right to a fair hearing. Indeed, he invokes some international norms, other national, as well as numerous precedents:

    - Article 4 of the Revised Treaty, Article 9 paragraph. 4 and 10 al. d) of ECOWAS Protocol A/SP.01/01/05;

    - Article 10 and 22 of the Universal Declaration of Human Rights;

    - Article 14 of the International Covenant on Civil and Political Rights;

- Preamble and Article 3, 7 and 45 of the African Charter on Human and Peoples Rights;
- Article 6-1of the European Convention on Human Rights;
- Article 20 of the Constitution and Article 28 of Law N°: 97-243 of 25 April 1997, amended and supplemented by Law N°: 94-440 of 16 August 1997 of the Republic of Cote d'Ivoire;
- Judgment of **Cubler *vs.* Belgium** dated 26 October 1984, Judgment **Perote Pellon *vs.* Spain** dated 25 July 2002, etc.

The voluntary intervener in the submissions, reproduced exactly the points of law and the legal provisions cited by the principal Applicant.

That the Applicant considers that it is the duty of the Supreme Court to determine in a sovereign manner, if the denounced situation is enough to compromise the impartiality of the judges and as such justifies their replacement;

That the Republic of Cote d'Ivoire considers that this notion of impartiality is reflected in the provisions of international conventions invoked, as well as in its Constitution;

The Republic of Cote d'Ivoire emphasized that the doctrine and jurisprudence are unanimous and that the principle of impartiality must be assessed objectively, that is to say, according to the functions and acts performed previously by the Judges of the composing Court;

IV. ANALYSIS OF THE COURT

Preliminary Issues

As to the Application for expedited procedure:

On 15 February 2013, the Applicant filed an application for an expedited procedure at the Court, pursuant to Article 59 of RCJ.

Which provides that *"On application by the Applicant or the Defendant, the President may exceptionally decide, on the basis of the facts before him and after hearing the other party, that a case is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules, where the particular urgency of the case requires the Court shall give its ruling with the minimum of delay".*

However, it appears from the text that the admissibility or otherwise of such an application must be a prerequisite in furtherance of the procedure.

Therefore, in considering the case before us, all procedural steps have been exhausted even without examining the application for an expedited procedure, this was no longer relevant.

THEMA DECIDENDUN

The appreciation of the sub Judice case raises three fundamental questions:

a) The request to sentence resulting from the voluntary application for intervention prompted by la Société SITEX-CI SARL.

b) The request to condemn the Republic of Cote d'Ivoire presented by Mr. Farouk CHOUKHEIR;

c) Request to bear the cost**.**

a) As to the Voluntary Application for Intervention filed by la Société SITEX SARl.

La Société SITEX-CI SARL, in its voluntary application for intervention expressed its adherence to the facts relied on by the originating application and requested that the Republic of Cote d'Ivoire should be ordered to pay the sum of 6,700. 000.000.00 fcfa (six billion seven hundred million CFA francs).

From now on, it should be noted that voluntary application for intervention initiated by la Société SITEX-CI was admitted by the Court at the hearing of 3 October 2014, as determined by the minutes of proceedings.

Indeed, the notion of voluntary application for intervention, as a party was originally an exclusive prerogative of Member States, as provided for in Article 21 of Protocol (A/P.1/7/91). Amended by Articles 3, 4 and 9 of the Protocol (A/SP.1/01/05), which also gives individual or legal entity the opportunity of access to the ECOWAS Court of Justice.

Thus, Article 89 of the Rules of the Court of Justice sets out the formal conditions that allow this collateral issue.

It is certain that the voluntary intervention mechanism, naturally cannot prosper if it opposes substantial interests or of processual side of the party who wishes to intervene. Therefore, the intervener should assert its own right and parallel to that of the Applicant. Herein, the intervention must be the act by a person who is not a party to the case, which is a third party.

Yet, in this case, la Societe SITEX-CI SARL, as mentioned above, was one of the Applicants at the origin of the case before the Court, having subsequently withdrew on 27 February 2013.

In addition, a majority shareholder of la Société SITEX-CI happens to be Mr. Farouk CHOUKIER (*see* Doe. 1, social contract), Administrator of the company and Applicant in the present case.

In this perspective, we can hardly separate the interests of la Société SITEX-CI, SARL, in its capacity as voluntary intervener from the interests of Mr. Farouk CHOUKIER, manager and representative thereof.

For these reasons, the application seeking for condemnation sought by the intervener company is dismissed.

b) On application for the condemnation of the Republic of Cote d'Ivoire proffered by Mr. Farouk CHOUKIER.

Regarding this claim, the approach of the Court will duel essentially on the initial application and other documents filed by the Applicant, Mr. Farouk CHOUKIER Director of la Société SITEX-CI, who made the following demands:

- That the Court of Justice find that the Republic of State of Cote d'Ivoire violated his rights, including the right to an impartial and fair hearing, as set out in the Universal Declaration of Human Rights, the African Charter Human Rights and the Constitution of Cote d'Ivoire;

- That the Court finds that the said violation has severely damaged the economic conditions of the Applicant;

- That the Court Order the Republic of Cote d'Ivoire to pay the sum of 1, 000, 000, 000 CFA francs (one billion CFA francs), representing the sums unduly deducted at SGBCI, SA, as well as 7, 000, 000, 000 CFA francs (seven billion CFA francs) in damages and interest as compensation for all other forms of harm and damage combined;

For the Applicant, the violation of his rights is as a result of the failure of the public service judiciary, proceeding from the refusal of the Criminal Chamber to comply with the orders of the President of the Supreme Court who ordered the stay of proceedings pending a decision on the application for recusal.

He also believes that ignoring the injunction and examining the application for withdrawal, with a composition counting among its members a judge who was part of the panel that heard the case in the first instance, in this case, Justice Marcel DIETA (Judgment N°: 654/10 dated 11November 2010 and Judgment N°: 126/2001 of 31 May 2001), the Judges VE-BOUA GNAGO DACOUPY (Case N°: 659/08 of 11 December 2008 and N°: 654/10 of 11 November 2010) violates the principle of impartiality,

guaranteed by way of recusal. Indeed, he relied on Article 128, paragraph 5 of the Code of Civil, Commercial and Administrative procedure in support of his application for recusal.

In support of his argument, he cites the judgment of the European Court of Human Rights of 6 May 2003, the case of Kleny and others against the Netherlands, which refers to the conditions of impartiality as provided for in Article 6 paragraph 1of the European Convention on Human Rights.

Furthermore, the additional request raises the question of the compatibility of Article 28 of Law N°: 97-243 of 25 April 1997 with the international obligations of Cote d'Ivoire. He believes that the text of this article constitutes an obstacle to the exercise of his right of appeal to the Supreme Court. He equally raises the question of the violation of his right to equality of arms and to a fair hearing.

On its part, the Republic of Cote d'Ivoire does not refute the Applicant's allegations as to stay the proceedings determined by the President of the Supreme Court. For the Defendant, what matters is proof of the impartiality of judges in question and not the appeal for recusal presented before the national court.

The Republic of Cote d'Ivoire states that it was the Court that was seised, that it is for it to determine sovereignly if the complained situation is enough to compromise the impartiality of the judge or judges and thus justify their replacement. Therefore, in any case, it is for the party invoking it to provide evidence that the Judge violated the principle of impartiality.

In this regard, the position of this Community Court is constant. It is not within its jurisdiction to monitor the compliance of national legislation with international obligations of Member States, or to assess the decisions of their Courts.

- The Case of **Hadijatou Mani Kourao against the Republic of Niger** of 27 October 2008, the Court states that it does not have the mandate to examine the laws of the Member States.

- The Case of **Moussa Leo Keita against the Republic of Mali**, the Community Court of Justice determines that it is neither a court of appeal nor a court of cassation *vis-a-vis* national courts. The Court confines itself to examine, whether in the actual case, there had been a violation of human rights and sanction it when necessary.

In the light of the need for impartiality set out in Article 6 of the European Convention on Human Rights, a judge who ruled on a case in the first instance cannot be part of the panel that will hear the appeal or cassation case.

No. 1 of this Article provides that, *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*·

The impartiality of the Judge also has it bases from the provisions of Article 10 of the Universal Declaration of Human Rights, which states that *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"*.

Similarly, Article 14 of the International Covenant Relative to Civil and Political Rights states *"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations..."*

In the present case, the Republic of Cote d'Ivoire noted that the issue, for which the panel of the Criminal Chamber was called upon to rule, is not related to the substantive issues that Justice Dietai Marcel sat on. Therefore, the Applicant cannot validly claim that the judge was a likely partiality risk to justify his replacement.

We therefore confirm the names of Judges who were part of the panel of Judges that heard the case from the first instance:

- Court of First Instance of Abidjan, Judgment N°: 126/2001 dated 31 May 2001, includes the names of Mr. DIETAI MARCEL (President of the Court), DANIOGO N'GOLO KOFFI KOUADIO, SANSAN KAMBILE and Mrs. N'DRI BERTINE, assistant Judge;

- Court of Appeal (Court of Appeal of Abidjan), Judgment N°: 653 dated 23 May 2003, Ruling by Mr. SEKA ADON JOHN BATISTE (First President), Judges, KOUAME YAO AUGUSINE and KOUASSI BROU BERTIN;

- Supreme Court Criminal Chamber, Supreme Court Judgment N°: 659/08 of 11 December 2008 only contained the name of ADAM SEKA Julien (Presiding) and Justices SIOBLO DOUAI JULES (Rapporteur); VE BOUA, Gnago DACOURY, Ouaka ADON;

- Supreme Court, Criminal Chamber, Judgement N°: 654/10 of 1 November 2010, application for withdrawal of the Judgment N°: 659/08, ADAM SEKA JULIEN (Presiding) Judges GNAGO DACOURY (Rapporteur) VE BOUA, DIETAI MARCEL EZOUEHU B. PAULETIE.

- Supreme Court Criminal Chamber, Judgement N°: 754/12 dated 23 November 2012 (Court Judgment N°: 659/08 of 11 December 2008) Judges CHANTAL CAMARA (President of the Criminal Chamber Presiding) Judges BOGA TAGRO VE BOUA (Rapporteur), Mrs. TIMITE SOPHIE, MM. SIOBLO DOUAI, ADJOUSSOU YOUKOUN, AGNIMEL MELEDJE, KOUAME KRAK, GNAGO DACOURY, OUAKA ADON, KOUDOU GBIZIE, YAPI N'KONOND, YAO KOAKOU PATRICE;

Whereas, in line with the above, the Judge DIETAI MARCEL, was not part of the panel that made the cassation Judgment N°: 659/08 dated 11 December 2008, which contradicts the allegations of the Applicant, which cannot therefore in any way claim violation of the principle of impartiality.

Thus, in accordance with Article 6 of the ECHR cited and interpreted by the European Court of Human Rights, whereas from the subjective point of view, there are no elements in the file, such as to justify the violation of the principle of impartiality, likewise, no evidentiary element objectively established any breach of the principle.

Rather, the record shows that the judges in question only integrated the colleague who ruled on the appeals initiated before the Civil Chamber of the Supreme Court and delivered two judgments, namely, Judgment N°: 654/10 dated 1November 2010, Application for recusal and Judgment N°: 754/12 dated 23 November 2012 (Court Judgment N°: 659/08 of 11 December 2008) which have no connection with the subject of the dispute initially tried in the first instance and the decision of the Supreme Court.

Consequently, the Applicant's Application cannot prosper.

c) As to the application of sentence as to the cost.

As the intervening company, SITEX-CI SARL, and Mr. Farouk CHOUKIER, requires that the Republic of Cote d'Ivoire be ordered to bear the cost to benefit their lawyers.

As to cost, the terms of Article 66 of the Rules of the Court of Justice, and in this case, we are interested in the following standards:

1. A decision on costs in the judgment or order which closes the proceedings.

2. The unsuccessful party shall bear the costs, if is concluded as such.

Thus, the unsuccessful parties shall in accordance with the above legal provisions, be ordered jointly and severally to pay the costs.

DECISION

The Community Court adjudicating publicly after hearing both parties in a first and last resort.

On preliminary issues

- **Declares** the Application by Mr. Farouk CHOUKIER, Director of la Société BSITEX-CI, SARL admissible;
- **Declares** the voluntary Application for intervention by la Société SITEX-CI, SARL admissible;
- **Dismisses** the Application for expedited procedure as it was no longer relevant.

As to the Merit of the case

- **Dismisses** the application of la Société SITEX-CI SARL resulting from voluntary intervention;
- **Dismisses** the Application of Mr. Farouk CHOUKIER for lack of evidence
- **Condemns** la Société SITEX-CI SARL and Mr. Farouk CHOUKIER to bear the costs.

Signed by:

- **Hon. Justice Vaya BOIRO** - *Presiding ;*
- **Hon. Justice Maria do Ceu SILVA MONTEIRO** - *Member;*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member.*

Assisted by **Aboubakar Djibo DIAKITE (Esq.)** - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, 2ND DECEMBER, 2015

SUIT NO: ECW/CCJ/APP/01/14/SUPP
JUDGMENT NO: ECW/CCJ/JUD/28/15

BETWEEN
DR. ROSE MBATOMON AKO - *PLAINTIFF*

AND
THE WEST AFRICAN MONETARY AGENCY (WAMA) & 5 ORS. - *DEFENDANTS*

COMPOSITION OF THE COURT:
1. HON. JUSTICE FRIDAY CHIJIOKE NWOKE - *PRESIDING*
2. HON. JUSTICE MARIA DO CEU SILVA MONTEIRO - *MEMBER*
3. HON. JUSTICE JEROME TRAORE - *MEMBER*
4. HON. JUSTICE MICAH WILKINS WRIGHT - *MEMBER*
5. HON. JUSTICE ALIOUNE SALL - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **ALEXANDER OKETA** - *FOR THE PLAINTIFF.*
2. **L.M. FARMAH** *AND*
OSMAN I. KANU - *FOR THE DEFENDANTS.*

- Review of Court Judgments
- Article 25 1991 Protocol
- New facts - Ingredients

SUMMARY OF THE CASE

The Plaintiff was a staff of the 1st Defendant, whose appointment was terminated without notice vide a letter dated 26th February, Consequently, the Plaintiff brought an action before this Court seeking certain reliefs and Judgment was given. However, the Plaintiff, being dissatisfied with the Judgment, brought an Application for review on the ground of newly discovered fundamental contradictions in the Judgment.

The Defendant's submitted that the issues raised by the Plaintiff are the same issues pleaded in her pleadings upon which judgment had already been given and are neither new facts nor of such a nature as to be a decisive factor as required by Article 25 of the Protocol A/P.1/7/91 of this Court. That the condition for revision is based entirely on the discovery of new and decisive facts which must not have been considered during the trial or the hearing of the suit provided always that such ignorance was not due to negligence. Further the Defendant's submitted that what the Plaintiff is trying to achieve is a retrial of the same issues which is tantamount to asking Court to sit on appeal over its own Judgment.

LEGAL ISSUE:

Whether or not the criteria set out in Article 25 of the Court Protocol A/P.1/7/91 are applicable to the instant case and thus renders the Application of the Applicant admissible?

DECISION OF THE COURT

The Court held:

- *The Application inadmissible as the conditions precedent to the invocation of the benefits of Article 25 of the Protocol were not satisfied by the Applicant; no new issues of law or fact which would warrant this Court reviewing and/or revising its previous judgment were presented in this new Application and all issues raised in this new Application seeking the revision of the Court's earlier decisions were included from the very inception of the filing of the case and the Court has passed on the issues and rendered Rulings/Judgments and made awards to the Applicant.*

JUDGMENT OF THE COURT

3. SUBJECT-MATTER OF THE PROCEEDINGS

3.1. An application to supplement Judgment after review of ECW/CCJ/JUD/01/13 and subsequent judgment on the various applications emanating from the said judgment delivered on April 4, 2014 and served on the Plaintiff/Applicant herein on the 13th of June 2014.

3.2. The instant application is not a proceeding to set aside or stop the execution of the Judgment. It is an application by the Plaintiff/Applicant for this Hon. Court to deliver its omitted Ruling on Suit No. ECW/CCJ/APP/15/11/REV.2 dated 29th April 2013 and being Application to review decision on its Judgment delivered on the 11th ebruary 2013 based on observation of some discovered facts which came to the Applicant's knowledge only after delivery of said judgment and upon the receipt of the certified true copy on 13th February 2013.

4. ARTICLES RELIED ON

1. Articles 60 (h, j, k, and 1), 64, 92, and 93 of the Rules of the Community Court of Justice, ECOWAS.

2. Article 25 of the Protocol (A/P.1/7/91 on the ECOWAS Community Court of Justice.

5. DOCUMENTS SUBMITTED I NATURE OF EVIDENCE IN SUPPORT

1. The Protocol of the Community Court of Justice as amended.

2. The Rules of the Community Court of Justice, ECOWAS.

3. ECOWAS Revised Treaty.

4. Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty.

5. The African Charter on Human and People's Rights.

6. Protocol A/P.1/7/93 Relating to the West African Monetary Agency (WAMA).

7. WAMA Conditions of Service for Professional Staff.

8. ECOWAS Official Journal Vol. 58 (CCJ) 3.

9. Certified True Copy of Judgment of the Community Court ECW/CCJ/JUD/01/13 dated 11th February 2013.

10. Certified True Copy of Judgment of the Community Court ECW/CCJ/JUD/03/10 dated 8th July 2010.

6. FACTS AND PROCEDURE

6.1. NARRATION OF FACTS BY THE APPLICANT

1. The Plaintiff was a staff of the 1st Defendant (an autonomous agency of ECOWAS). The Plaintiff was employed vide a letter from the 1st Defendant, dated 6th August, 2013.

2. The Plaintiffs appointment was thereafter terminated without Notice vide a letter from same 1st Defendant dated 26th February, 2009 without due process of law. The 1st Defendant relied on unproven allegations of gross incompetence and other sundry personal issues contained in secret documents unknown to the Plaintiff as grounds for termination of the Plaintiffs employment.

3. The Plaintiff was not aware of the existence of these secret documents and allegations and was never given a hearing let alone a fair one. The Defendants were the accusers and the judge at the same time.

4. The Plaintiffs hard earned reputation was grossly injured and irreparably shredded by the unsubstantiated allegation that the Plaintiff was an incompetent staff of the 1st Defendant. The Plaintiff has not recovered and cannot gain employment with this tattered

reputation and her built up career in the financial world was irreparably damaged unjustly by the Defendants. The Plaintiff is a certified Banker and Financial Economist.

5. In addition to the wrongful termination of the Plaintiff's employment with the 1st Defendant, the Plaintiff was unlawfully ejected from her official residence about five months after the unlawful termination of employment and all her properties and personal effects unlawfully ·seized and detained in her residence.

6. Furthermore, the Defendants wrote Petition to the Police in Sierra Leone alleging that the Plaintiff was not a diplomat, but a criminal impersonator. The Plaintiff was publicly humiliated, arrested and detained along her movable properties by agents of the 5th and 6th Defendants.

7. The Plaintiff suffered serious damages, unnecessary expenses, untold hardship and mental trauma, ill health, gross violations of fundamental rights to privacy, dignity of human person and unlawful detention of the Plaintiff/Applicant's properties, internal displacement and public humiliation as a result of the wrongful acts of the Defendants.

8. The Plaintiff alleged that there were newly discovered fundamental contradictions in the Judgment, which necessitated the Applicant's Application for review and supplemental Jjudgment.

9. The Plaintiff avers that if these discovered contradictions were taken into consideration, they would be a decisive factor indeed and that if such facts had been taken at the time of the Judgment, it would have affected the decision of the Court in favor of the Plaintiff/ Applicant.

6.2. CONTRADICTIONS ALLEGED BY PLAINTIFF

1. The Plaintiff avers the first contradiction is that the Court considered Plaintiff's claims as being presented separately, while the Plaintiff avers that her claims were consolidated.

2. The second contradiction is the question whether other claims flow from a breach of terms of employment should not arise, because it is not supported or assumed by the Application before the Court.

3. The Plaintiff avers that the third contradiction is "of the Judgment asking "are such claims legitimate?" clearly and simply portray instant negative connotations.**"*The claims that flow directly from the termination of the contract and covered by the provisions of the WAMA Regulations are legitimate but where the claims are not within the flow of damages as a result of the termination***. *(See Paragraph 45 of COURT'S JUDGMENT")*

4. The Plaintiff avers that the fourth contradiction is that the case decided was only for unlawful dismissal, despite the preponderance of contrary facts in the application of the same Judgment. The Court indicated the Plaintiff cannot claim back her unlawfully seized prope11ies and other claims to recover damages.

5. The Plaintiff avers that the fifth contradiction is that ***"part of this claim by the Plaintiff had been paid to the Plaintiff through her GTB account" has no support in any documents before the Court and is a contradiction. The Court held inter alia thus: The above claims have been found to be outside the service period and therefore extraneous to the claims allowable in a contract of service after such contract had been terminated by the employer as in the instant case. We in line with trite law on such contracts disallow all the claims stated above in Paragraph 54 therein and hold that the claims failed to succeed.*** *(See Paragraph 50 - 52 of COURT'S JUDGMENT")*

6. The Plaintiff avers that the sixth contradiction is that "to basically apply the principle that the defendants are only liable for the wrongful dismissal in damages and nothing more when the Plaintiff with statutory cover is unlawfully dismissed has no basis in law and is

thus a fundamental contradiction to be reviewed for supplemental judgment. **"*For the hiring or renting hotel expenses after termination, this Court is of the opinion that such claims being outside the claimable claims, where a contract of service is terminated, the Plaintiff cannot succeed and we disallow same.*** *(See Paragraph 55 of COURT'S JUDGMENT")*

7. The Plaintiff avers that the seventh contradiction is that the Application before the Court did not in any way tie the claims for hiring or renting hotels expense to the unlawful termination of Plaintiffs contract. These claims were clearly and unambiguously tied to a separate illegality, i.e., the unlawful eviction of the Plaintiff from her residence where she had been a paying tenant.

8. The Plaintiff avers that the eighth contradiction is that the Court disallowed claims contrary to its own cited position of law under paragraph 59 on page 28 of the same Judgment and reiterated in the consolidated Ruling of 4th April 2014. By this position of the law, these claims stand proven since they were not disputed or in dispute by the Defendants. The Plaintiff further avers that the Court contradicted when it ruled thus: ***"under head II of particulars of special damages, the Court notes with particular reference to per diem at $287.5 per day claimed by the Plaintiff from March 2009 till judgment that per diem are only earned by staff who travelled outside the host country of the first Defendant on an approved official assignment and cannot be earned outside the termination of appointment of the Plaintiff so therefore the claims stand as unproved.*** *(See PARAGRAPH 56 OF COURT'S JUDGMENT.")*

9. The Plaintiff avers that the ninth contradiction is that in the Court's own cited position of the law under paragraph 59 on page 28 of the same Judgment and reiterated in the consolidated Ruling of 4th April 2014, when the Court ruled thus: ***"a claim for defamation of character in that the Defendant portrayed the Plaintiff***

as incompetent and that she was reported as a criminal at the Police Office in Sierra Leone was defamation of character was not sufficiently proved. No evidence was adduced as to allegation and the proof thereof before this Court. The said claim therefore failed in its material particular.
(See PARAGRAPH 60 OF COURT'S JUDGMENT.")

10. The Plaintiff avers that the tenth contradiction is in the Court's own cited position of the law under paragraph 59 on page 28 of the same Judgment and reiterated in the consolidated Ruling of 4th April 2014. The Court in paragraph 62 of the Judgment ECW/CCJ/JUD/01/13 acknowledged ***"the Defendants made no challenge to the claim in their Pleadings. The Plaintiff contends that by this position of the Court, Plaintiff's claim stands proven since it was uncontroverted by the Defendants, but yet the Court ruled that the Plaintiff's claim was not sufficiently proven. Plaintiff contends that there was no further proof required since the Defendants did not controvert said claim"***. The Court ruled thus: ***"all other claims by the Plaintiff fell outside her entitlements after the termination of her appointment except the above stated amounts.*** *(See PARAGRAPH 65 OF COURT'S JUDGMENT.")*

11. The Plaintiff avers that the eleventh contradiction is that the Court's position here contradicts its own cited position of the law on its Ruling in Paragraph 63 of the same judgment and an earlier decision of the Court in a similar case of unlawful dismissal in respect of **EDOH KOKOU vs. ECOWAS COMMISSION**, ECW/CCJ/APP/05/09 and ECW/CCJ/JUD/03/10, delivered on 8th day of July, 2010. The same settled principles generally stipulate that ***"an employee, who is unjustly dismissed from work protected by statute shall be entitled to his full back wages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement***

and that when reinstatement is not practicable, the employee is entitled to separation pay". There is a contradiction herein that the award of claimed back wages, benefits and entitlements of the Plaintiff are omitted and the impression created that she is not entitled to same.

6.3. PROCEDURE

6.3.1. The initiating Application (Document number 1A) and a Summary, Document number 1B), were lodged in this Court on July 4, 2014.

6.3.2. The 1st and 2nd Respondents filed their Reply to the Plaintiff/ Applicant's Application (Document number 2), on January 22, 2015.

6.3.3. There is no indication that the other Defendants/Respondents ever filed any responsive pleading to the Application or any other paper for that matter.

6.4. CONTENTIONS OR REPLY OF THE DEFENDANTS/ RESPONDENTS (WEST AFRICAN MONETARY AGENCY)

The 1st and 2nd Defendants/Respondents react as follows on the above-mentioned application, as follows:

1. The instant Application by the Plaintiff/Applicant/Judgment/Creditor is an abuse of Court process, a mirage, incompetent and inadmissible before this Honorable Court for the following reasons:

    a. Non compliance with Article 25 of the Protocol A/P.l/7/91 and Article 92 of the Rules of the Community Court of Justice, ECOWAS;

    b. In short, there are no new facts and therefore in contravention of Article 25 of the Protocol A/P.1/7/91 of the Community Court of Justice.

c. Abuse of Court process by the filing of this Application on repetitive issues for interpretation and revision of the same Judgment without more.

2. Legal argument: the Defendants/Respondents cited Article 25 (1) of the Protocol A/P.l/7/9lof the Community Court of Justice provides: ***"an application for revision for a decision may be made only when it is based upon the discovery of some facts of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the court and also to the Party claiming revision, provided always that such ignorance was not due to negligence".***

3. Article 25(2) of the said Protocol provides: The proceeding for revision shall be opened by a decision of the Court expressly recording (a) the existence o[the new ***fact, recognizing that it has such (b) a character as to lay the case open to revision and declaring (c) the application admissible on the ground.*** The Defendants/Respondents submit that the Plaintiff/Applicant has not revealed any new facts of such a nature as to be a decisive factor warranting any interpretation or to review Judgment of this Honorable Court.

4. The 1st and 2nd Defendants/Respondents submit and say that issues raised by the Plaintiff/Applicant are not new, but the same issues pleaded in her Pleadings and Judgment given on the same and therefore are not new or even of any decisive factor as required by Article 25.

5. The Defendants/Respondents submit that what the Plaintiff/ Applicant is trying to achieve is a retrial of the same issues by virtue of this Application calling upon the Court to sit on an appeal of its own judgment.

6. It is the submission of the Defendants/Respondents that the failure to comply with a condition precedent to the institution of an action before this Court makes the application incompetent and

inadmissible. They maintained that the condition for revision is based entirely on the discovery of new and decisive facts which must not have been considered during the trial or the hearing of the suit and such ignorance was not out of negligence.

7. The 1st and 2nd Defendants/Respondents concluded by saying that it was at the Hearing, the Defendants/Respondents applied to this Honorable Court for the Plaintiff/Applicant to remove her properties from their residence to which she responded that she has no money to travel to Sierra Leone. Therefore, for the Plaintiff/Applicant to now claim as a new fact that her properties are unlawfully detained is misleading to this Honorable Court.

7. ISSUES PRESENTED FOR DETERMINATION

7.1. On the 04th day of July, 2014, Applicant filed her Application praying this Court to deliver its Ruling on Omitted Suit No: ECW/CCJ/APP/15/11/REV.2 dated 29th April 2013 being application to review Judgment No: ECW/CCJ/JUD/01/13 and to Supplement Judgment No: ECW/CCJ/JUD/01/13 and Consolidated Ruling No: ECW/CCJ/JUD/01/13/REV., as follows, to wit:

7.1.1. Omitted Orders sought by the Applicant are as follows, to wit:

1. A declaration that the termination of the Plaintiff's Contract of Employment with the 1st Defendant being found to be unlawful, it is wrongful, irregular, illegal, invalid, inconsequential and null and void and of no effect whatsoever.

2. A declaration that the conduct of the Defendants in this case amount to a gross violation of the Plaintiff's human rights as guaranteed under Articles 1, 2, 3, 4, 5, 6, 7, 14, 15, 16, 18(3), 24, 25, 26, 27 and 28 of the African Charter on Human and Peoples' Rights, and a gross violation of Article 4(g, h and i) and in implementation of application of Article 10, No. 3(f) of the Revised Treaty of ECOWAS and the Protocol on Observance of Law and Justice.

3. An Order compelling the Defendants to forthwith release the Plaintiff/ Applicant's properties (household, electronic, educational, documentary commutations, etc) and those of International Charity - Jewels of God International Ministry, and to pay special damages totaling $349,552.

4. An Order compelling the Defendants to pay the Plaintiff the sum of One Hundred Thousand United States Dollars ($100,000.00) as general and aggravated Damages for unlawfully rejecting the Plaintiff and detaining her properties.

5. An Order compelling the Defendants to pay the Plaintiff the sum of $742,712 as due entitlements in back wages based on her expected retirement at 55 years. In the alternative, the Defendants to pay the Plaintiff claimed back wages and omitted uncontroverted entitlements till point of judicial finality, but currently estimated to be $437,241.55 as at July 2014 as due entitlements.

6. An Order of this Court compelling the Defendants herein to jointly and severally pay over to the Plaintiff the sum of Five Million United States Dollars ($5,000.000.00) as General Damages.

7. An Order of perpetual injunction restraining the Defendants, their agents, servants, assigns, privies, or howsoever called from further harassing, molesting, intimidating, arresting and /or detaining the Plaintiff.

8. An Order of mandatory injunction compelling the Defendants to put up a widely read publication/advertorial in the internet and a newspaper that enjoys wide readership in the Republic of Sierra Leone and the Federal Republic of Nigeria apologizing to the Plaintiff for violating her human rights. Interest in the following manner to wit:

    - Interest on (3) and (5) above at 10% per annum
    - Interest on (4) and (6) above at 25% per annum

9. A declaration that the Plaintiff is entitled to the Costs of One Hundred and Fifty Thousand United States Dollars ($150,000.00) against each of the Defendants herein jointly and severally.

7.2. On the other hand, as stated herein above, the Defendants contended that the issues raised by the Plaintiff/Applicant are not new, but the same issues pleaded in her Pleadings and Judgment already given on the same and therefore are not new or even of any decisive factor as required by Article 25. Further, the Defendants/Respondents submit that what the Plaintiff/Applicant is trying to achieve is a retrial of the same issues by virtue of this Application calling upon the Court to sit on an appeal of its own judgment, which is not legally provided for.

7.3. QUESTION

The above claims and counterclaims of the parties have raised some very important and interesting issues, but we are however left with the foundational question to be answered by this Court, as follows.

7.3.1. Whether or not the criteria set out in Article 25 of the Revised Treaty are applicable to the instant case and thus renders the Application of the Applicant admissible?

8. DISCUSSIONS

8.1. The sole legal question this Court shall answer is whether or not the criteria set out in Article 25 of the Revised Treaty are applicable to the instant case thus rendering the Application of the Applicant admissible? We answer in the negative.

8.1.1. Our decision in this case is and has to be anchored on the governing law on the subject of revision of judgments/rulings, namely: **(1.) Article 25(1) of the 1991 Protocol on the Community Court of Justice, (2.) Articles 92 and 93 of the Rules of the Court**, and of course, (3.) some case law.

- **Article 25(1) of the 1991 Protocol**: "An application for revision of a decision may be made only when it is based upon a discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Court and also to the party claiming revision, provided always that such ignorance was not due to negligence."

- **Article 92 of the Rules of the Court**: "An application for revision of a judgment shall be made within three months of the date on which the facts on which the application is based came to the applicant's knowledge."

- **Article 93(2) of the Rules of Court**: "In addition, the application for revision shall (a)...; (b)....;(c)...; (d) indicate the nature of the evidence to show that there are facts justifying revision of the judgment, and that the time limit laid down m Article 92 has been observed."

8.1.2. We will now use these laws and apply the facts of this case in our decision.

8.1.3. In the Originating Application and its Summary, both filed July 4, 2014, the Applicant has listed eleven (11) counts in which she outlined what she termed as Contradictions in this Court's previous Rulings/Judgments. See pages 9 - 15 (nine to fifteen) of the Originating Application - Document number 1A, and pages 2 - 4 (two to four) of the Summary - Document number 1B. Additionally, the Applicant has enumerated 9 (nine) counts containing what she has called Omitted Orders, which she now requests this Court to issue. See pages 22 - 23 (twenty-two-twenty-three) of the Originating Application - Doc. 1A and pages 6 - 7 (six-seven) of the Summary - Doc. 1B.

8.1.4. A careful review of the initial Application and all other documents requesting relief by the Applicant, it is observed that all these claims/ issues were indeed raised and included in the submission made to

the Court for its determination. The Court has passed on the issues and rendered Rulings/Judgments and made awards to the Applicant. It is observed that the subsequent filing of this instant Application is only to show that the Plaintiff is/was not satisfied with the Court decision and seeks to have the Court reverse/review its earlier decision and rule in the manner the Applicant would have the Court to do. This is reprehensible and unacceptable to say the least.

8.1.5. This Court does not sit in an appellate jurisdiction and thereby subject its decisions to review/reversal; this is a trial court, from which there is no appeal. The framers of the law determined that the Court, being made up of mortals as judges, would have the occasion to re-consider its decision if it believes that it has made some palpable error, but that is not a license for litigants to question the wisdom of the Court by challenging the decisions of the Court and pressurizing the Court to change its position simply because the party involved does not like or agree with a position which has been taken by the Court. That was not the purpose for which Article 25 was inserted in the Protocol on the Community Court of Justice.

8.1.6. More besides, there has to be an end to litigation; the Court cannot indulge litigants to importune the Court with endless litigation simply because they do not agree with the position adopted or assumed by the Court on an issue. It is not for the party to insist on the Court ruling in a certain way only to satisfy that party before the case can end.

8.1.7. Looking to the jurisprudence of this Court, the decision in this case is controlled by and finds total support in this Court's Ruling in the case, **Musa Saidykhan *vs.* The Republic of The Gambia**, Case N°: ECW/CCJ/APP/11/07, Ruling N°: ECW/CCJ/APP/RUL/03/12, delivered 7th February 2012. The legal issue, the legal reasoning, and the entire disposition of this case is wholly analogous to this instant case, because of which we shall quote the relevant portion the Court's Ruling in the cited case.

"12. A critical reading of the provisions quoted above indicates that there are three conditions precedent to a successful application for review of a judgment/decision of this Court. The three conditions are as follows:

a. An application for review must be made within five years of the delivery of the judgment/decision which is sought to be reviewed.

b. The party applying for a review must file his application within three months of his discovering the fact/facts upon which his application is based.

c. An application for a review must be premised on the discovery of facts that are of a decisive nature, which facts were unknown to the Court or the party claiming revision provided that such ignorance was not due to negligence."

"13. Thus, for an application for review to succeed in this Court, the party making the application should satisfy all these three conditions precedent…"

The Court, in the cited case, applied each of the three criteria to the facts of the application for revision and came out with its findings and conclusion. The Court continued in the cited as follows:

"17. A careful reading of **Article 25 of Protocol A/P.1/7/91** reveals clearly that facts contemplated by the said Article are facts that were in existence at the time of the decision but were unknown to both the Court and the party claiming revision. It also reveals that the facts in question are facts that could have had a decisive influence on the judgment. Can a judgment of the Court be said to be a fact that could have had a decisive influence on that same Judgment? The answer is obviously in the negative. Again, can one say a judgment of the Court is a fact that was in existence before

that same Judgment was delivered? The answer is certainly not in the affirmative."

"18. The Defendant/Applicant in claiming that the amount of damages awarded to the Plaintiff/respondent is excessive having regard to the evidence before the Court is simply claiming that the judgment is erroneous. It is trite learning that if a judgment is erroneous, it is a ground for appeal but not for review as contemplated by **Article 25 of Protocol A/P.1/7/91 and Article 92 of the Rules of this Court.**"

"**Article 19(2) of Protocol A/P.1/7/91** makes it clear that judgments of this Court are final and binding, subject to the provisions of a review. The decisions of this Court are thus not subject to appeal. The Court will not welcome any attempt to use the limited review process as an appeal process, and thereby circumvent the fact that these decisions are final." **See pages 4 - 7 of that Ruling.**

9. CONCLUSION

9.1. The provision of Article 25 of the Protocol on the Community Court of Justice is not a license for automatic review of decisions made by the Court; the Applicant must show clearly a mistake of law or of fact which was not then known to the Applicant which, if it had been known, would have led the Court to produce a different disposition of the case.

9.2. In this instant case, it is crystal clear that all issues raised in this new Application seeking the revision of the Court's earlier decisions, were all included from the very inception of the filing of this case and the Court considered the totality of the case and made a determination. We do not feel there is any legal reason to justify the reversal/ review of the Ruling/Judgment and alter the awards made by this Court. Therefore, the Application is not admissible and the claims sought should be denied, and the original judgments and rulings of this Court ordered enforced without any further delay.

9.3. Having said the above, there are a few observations the Court would like to make as we conclude this Judgment.

9.4. First and foremost, this case is a case for alleged violations of human rights and as such was brought under the human rights jurisdiction of this Court, as the Applicant herself cited and relied on the African Charter on Human and Peoples' Rights. Therefore, a complaint for human rights violation is properly brought against States parties to the Charter and not other kinds of persons.

9.5. In this instant case, let us look at who the Defendants are; those persons against whom the complaint has been filed are:

1. The West African Monetary Agency;
2. The Director General, WAMA;
3. The President, ECOWAS Commission;
4. The Chairman, Committee of Governors, ECOWAS Member Central Banks;
5. Attorney General of the Republic of Sierra Leone;
6. The Republic of Sierra Leone.

9.6. In principle, therefore, and in conformity with the jurisprudence of this Court, the Applicant, relying on the African Charter on Human and Peoples' Rights, should have brought her case against a State, in this case, the Republic of Sierra Leone, if at all said State was involved in the controversy of this case.

9.7. The Application being filed against all the entities who are not States, then the complaint should have been one for damages for acts or omissions of a Community Institution or Official in the performance of official duties or functions: (Article 9(2) of the 2005 Protocol on the Community Court of Justice or for annulment of the measures taken against her by her employer (Article 10 (c) of the 2005 Protocol) and not for human rights violation because one cannot

bring a complaint for human rights violation against the ECOWAS Commission and other Community Institutions, as these entities are not parties to the African Charter; only States are.

9.8. We herein mention only in passing that the initiating Application ought not to have been entertained by this Court in the form it was in to begin with, but our predecessors already admitted the case and even adjudicated upon it, however, it was important to point this out.

9.9. As we have stated earlier in this Judgment, there is or was absolutely no basis for this application for revision filed by the Applicant based on the governing laws for revision: **Article 25(1) of the 1991 Protocol, Article 92 of the Rules of the Court, and Article 93(2) of the Rules of Court.**

9.10. Further to this, the Application is also not in conformity with the provisions of these governing laws for the following reasons:

9.10.1. First, the Application does not show any evidence anywhere whether three months had not elapsed from the date the Applicant had knowledge of the alleged "NEW FACT."

9.10.2. Secondly, and more importantly, such new fact is not demonstrated. We observe that the Application goes back to requests made 'in the previous trial proceedings and appears to criticize the approach taken by the Court; but the said Application does not disclose any new fact which was unknown to both the Applicant and the Court at the time of the previous Judgment. In the words of the Applicant as found on pages 4 and 5 of her Application, she indicates what she considers the new fact:

> *"…treated all the issues brought by the Plaintiff/ Applicant as being tied to unlawful dismissal when they were not, rather than multifaceted and independent, but consolidated issues with common Defendants as separately identified, acknowledged and clearly*

summarized in paragraph 31 pages 12-15 of the judgment ECW/CCJ/JUD/01/13 is the surprising new fact that came to the knowledge of the Plaintiff/ Applicant only after receipt of copy of subject judgment ECW/CCJ/JUD/01/13 on 13th February 2013."

9.11. As we have stated supra, this suit is nothing more than the Plaintiffs attempt to criticize the Court's Ruling which she seeks to have revised to conform to what she wants. In fact, if we look more closely, we realize that the Plaintiff is seeking justification from the Court on certain points and asking the Court to increase her monetary award. She in a clever way attempts to have this Court review the previous judgment in an appeal sitting, which we do not have the right, the power, the authority or the mandate to do, and certainly we do not have the will to engage in such dangerous precedent. She completely strays away from the main issue of NEW FACT.

9.12. The concept of "a new fact" which is of prime importance in a revision proceeding, is defined with rigor and restrictions, both before (a) International Courts and Tribunals other than the ECOWAS Court, and (b) before the ECOWAS Court itself.

9.13. **(a) Before International Courts and Tribunals other than the ECOWAS Court**

- The Administrative Tribunal of the United nations, in its Judgment on **Bulsara *vs.* The Secretary General of the United Nations, dated 5 December 1959**, held that applications seeking a decision different from what has already been delivered, or contesting the validity of such a judgment, are inadmissible for the purposes of revision where the discovery of a new fact is a requirement.

- The Administrative Tribunal of the World Bank, in its Judgment on **Van Gent *vs.* IBRD, dated 6 September 1983**, decided that applications contesting a previous

judgment, its validity or soundness, are inadmissible when brought as requests for revision.

- The Treaty for Conciliation, Judicial Settlements and Arbitration signed on 7 July 1965 between **United Kingdom of Great Britain and Northern Ireland and Switzerland**, in its Article 35, states that:

  "An application for revision of a judicial decision or arbitral award may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judicial decision or arbitral award was given, unknown to the International Court of Justice or the Arbitral Tribunal."

9.13 (b) Before the ECOWAS Court:

- The Court held as follows in the Judgment of 17 November 2009 in the case, **Mrs. Tokumbo Lijadu Oyemade vs ECOWAS Council of Ministers and Others**:

  "The existence of new facts presupposes that the party requesting the revision may not have been informed of these facts, but also that these facts should be of a nature as to exert a decisive influence on the decision made by the Court (s45)....These allegations are however not backed by evidence. The newness of a fact cannot be understood in the sense of a mere allegation, but must repose on proven, real and verified facts...(s48)."

9.14. The Court thus concluded that the facts as presented by the Applicant, **Mrs. Tokumbo Lijadu Oyemade**, in her application for revision of Judgment N°: ECW/CCJ/APP/JUD/02/08 of 4 June 2008, were not new facts. Nor could they have exerted any decisive influence on the decision already made by the Court (s49).

9.15. The Court decided in its Judgment of 3 June 2010 in the case, **Federal Republic of Nigeria and Others *vs.* Djot Bayi Talbia**, that the Application for revision was deposited outside the time-limit, and adjudged that even if the Application had been submitted within the prescribed time frame, it still-would not contain any new facts and could not exert any decisive influence on the decision made by the Court on 28 January 2009.

9.16. The Court held as follows in the Judgment of 12 March 2012 in the case, **Isabelle Manavi Amaganvi and Others *vs.* Republic of Togo**:

> ***"...the Court finds that...it has adjudicated exhaustively upon the matter brought before it for determination (s16)....the Court declares that the presumed omission to adjudicate on the issue of reinstatement, as brought by the Applicants, has no grounds ...(s19)."***

9.17. The Court equally declared in its Judgment of 03/07/2013 in the case, **El Hadj Tidjani Aboubacar *vs.* The Republic of Niger**, that it was not unaware of the content and meaning of the notice served by the Director of BCEAO of Niger at the moment it was delivering its judgment of 12 December 2012, which revision had been requested (s28), and that pursuant to Article 25(1) of the Protocol on the Court, the application for revision as submitted by the Republic of Niger was inadmissible (s29)."

10. DECISION

The Court, adjudicating in a public sitting, after hearing both parties, in last resort, after deliberating in accordance with the law;

As to Admissibility of the Suit

10.1. Declares that the Application be ruled inadmissible and hence denied- because the conditions-precedent to the invocation of the benefits of Article 25 of the Protocol have not been satisfied.

10.2. Further to the above, the Court finds and holds that there are no new issues of law or fact in this present Application which were not o also included in the Originating Application which would warrant this Court reviewing, revising, and/or reversing its previous judgment and traversing the awards made in the previous judgment

As to Competency of the Parties

10.3. The Court, on its own motion, determines that it was totally unnecessary to have listed the President of the ECOWAS Commission and the Chairman of the Committee of Governors of ECOWAS member Central Banks as parties Respondent/ Defendant, because they are not proper parties against whom complaints for human rights violations can be brought. Accordingly, the names of the 3rd and 4th Respondents/Defendants are hereby struck out and removed from this case and they are hence dropped as misjoined parties.

As to Costs

10.4. The Court rules that costs are and shall be assessed for the Defendants against the Plaintiff/Applicant in accordance with Article 66 of the Rules of this Court.

Thus made, adjudged and pronounced in a public hearing at Abuja, this 02nd day of December, A.D. 2015 by the Court of Justice of the Economic Community of West African States.

THE FOLLOWING JUDGES HAVE SIGNED THIS JUDGMENT

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding;*
- **Hon. Justice Maria do Ceu Silva MONTEIRO** - *Member;*
- **Hon. Justice Jerome TRAORE** - *Member;*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member;*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by **Athanase ATANNON (Esq.)**- *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN IN ABUJA, NIGERIA

ON WEDNESDAY, THE 3RD DAY OF DECEMBER, 2015

SUIT N°: ECW/CCJ/APP/28/14
RULING N°: ECW/CCJ/RUL/07/15

BETWEEN
CROSS OCEANS WEST AFRICA (SL) LTD. & ANOR. - *PLAINTIFFS*

AND
THE PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA & 3 ORS. - *DEFENDANTS*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **VICTOR EMERSON** - *FOR THE PLAINTIFF*
2. **Y.C MAIKYAU (SAN), T. R AGBANYI (ESQ.), NWABUEZE OBASI-OBI (ESQ.)** & **T. A. RAPU** - *FOR THE DEFENDANT.*

-Jurisdiction -proper party

SUMMARY OF FACTS

The 1st Plaintiff is an incorporated Company in Sierra Leone and the 2nd Plaintiff, is the majority owner of the Company. The Plaintiffs brought an Application against the Defendants for the violation of their rights as enshrined under the African Charter on Human and Peoples' Rights, the Revised Treaty of the Economic Community of West African States 1993 and the International Covenant on Civil and Political Rights, 1966 by appropriating their shareholding rights in the 4th Defendant. They were seeking an Order of the Court directing the defendants jointly and severally to pay special and aggravated exemplary damages to the Plaintiffs in the sum of ***$10,468,200 (Ten Million, four hundred and sixty eight thousand, two hundred United States Dollars).*** *At the close of pleading, the Defendants neither entered appearance nor filed their defense. The Plaintiffs brought a motion pursuant to Article 90 (1) of the rules of this Court asking for Judgment to be entered for them in Default of appearance.*

While the motion for default Judgment was still pending before the Court, the 2nd Defendant filed a notice of Preliminary Objection pursuant to Articles 87 and 88 of the Rules of this Court.

The 2nd Defendant sought an Order of the Court to strike out the name of the 2nd Defendant from the suit.

LEGAL ISSUES:

- *Whether or not the Community Court of Justice has jurisdiction to determine this matter.*

- *Whether or not the 2nd Defendant is a proper party to this suit.*

THE DECISION OF THE COURT

The Court declared that the 2nd Defendant is not an appropriate party to the proceeding and therefore its name was struck out from the suit. Also, that the suit is inadmissible, being that the appropriate parties not having been sued before the Court and the suit was struck out in its entirety.

As to costs the parties shall bear their costs.

RULING ON THE PRELIMINARY OBJECTION OF THE 2ND DEFENDANT

1. SUMMARY OF FACTS

The first Plaintiff described in the originating application as an incorporated Company in Sierra Leone and the 2nd Plaintiff, described as "the majority owner and alter ego" of the 1st Plaintiff brought this application against the Defendants for the violation of their rights as enshrined under the African Charter on Human and Peoples' Rights, the Revised Treaty of the Economic Community of West African States 1993 and the International Covenant on Civil and Political Rights, 1966 by appropriating their shareholding rights in the 4th Defendant.

They therefore sought an order of this Court for the following reliefs:

a. A **Declaration** that the acts of the 1st, 2nd and 3rd Defendants as represented by the 2nd Defendant in deliberately dispossessing the Plaintiffs of their interest in the 4th Defendant amounts to a violation of the Plaintiffs' economic rights and interest as enshrined in the African Charter on Human and Peoples' Rights.

b. A **Declaration** that the 1st to 4th Defendants are jointly and severally liable to the Plaintiff's for the breach of their pre-emptive rights to shares in the 4th Defendant as contained in the Articles of Association and shareholders Agreement between the Plaintiffs and the 4th Defendant by offering and selling such shares to a third party (Majestic Oil Exploration and Refinery Company LTD) without allowing the Plaintiffs to exercise their rights of first refusal.

c. An **order** directing the defendants jointly and severally to pay special and aggravated exemplary damages to the Plaintiffs in the sum of $**10,468,200** (**Ten Million, four hundred and sixty eight thousand, two hundred United States Dollars).**

At the close of pleading, the Defendants neither entered appearance nor filed their defense.

Following the Default of the Defendants in entering appearance or filling a defence, the Plaintiffs brought a motion pursuant to Article 90 (1) of the rules of this Court asking for Judgment to be entered for them in Default of appearance (Doc. N° 2).

While the motion for default judgment was still pending, the 2nd Defendant filed a notice of Preliminary Objection (Doc. N° 3). It appears that on receipt of the second Defendant's notice of Preliminary Objection, the Plaintiff now filed another application to join the Bureau for Public Enterprises as the 5th Defendant in this suit.

All these motions were pending when the case came up for the first time on the 21st of October, 2015. On the said date, the Court decided to take the second Defendants' Preliminary Objection.

The major plank of the 2nd Defendants' objection pursuant to Articles 87 and 88 of the Rules of this Court are as follows:

i. That the 2nd Defendant is not a person known to law, capable of suing or being sued.

ii. That the Honourable Court can only assume jurisdiction over natural or juristic person(s) and that the 2nd Defendant is neither a natural nor juristic person by virtue.

iii. That there is no entity known as the "Director- General Bureau of Public Enterprises" (The Presidency, Nigeria), under S.17 of The Public Enterprises (Privatization and Commercialization) Act, 1999 Chapter P.38 Laws of the Federation of Nigeria (LFN) 2004.

iv. That the 2nd Defendant not being a legal person, no valid order can be made against a non-existent person.

v. That the Court does not have jurisdiction to entertain this suit as presently constituted against the 2nd Defendant.

Accordingly, Counsel to the 2nd Defendant sought an order of the Court interlia striking out the name of the 2nd Defendant from the suit. In arguing the motion, Counsel submitted that sole issue for determination is;

Whether the 2nd Defendant is a juristic person capable of being sued by the Plaintiffs in this suit?

He contended that the 2nd Defendant is a person unknown to law and that S.12 of Nigeria's Public Enterprises (Privatization and commercialization) Act 1999 established the Bureau of Public Enterprises with the power to sue and be sued in its corporate name but that the Plaintiffs have sought to sue the Director General, Bureau of Public Enterprises (The Presidency) a non-juristic person and also unknown to law.

He cited a plethora of authorities decided by Nigeria Superior Courts to buttress his argument that no action can be brought by or against any party other than a natural person or persons save where such party has been expressly or impliedly authorized by statute or by common law as a legal person under the name by which it sues or is sued.

Accordingly, since the 2nd defendant is neither a natural person nor a creation of statute, or law clothed with the capacity to sue or be sued, the present action against him cannot stand. He urged the Court to invoke Article 88(1) of the Rules of this Court and strike out the name of the 2nd Defendant from the present suit. He cited the case of **ALIMU AKEEM V. FEDERAL REPUBLIC OF NIGERIA** Suit N° ECW/CCJ/APP/03/09 delivered in 2011 to buttress his point.

In his reply to the issues raised by the Plaintiffs the Defendant aligned himself to the issue for determination posited by the Plaintiffs, that is,

Whether the 2nd Defendant is a body known to law with the capacity to sue and be sued.

The Plaintiffs submitted that the 2nd Defendant is a statutory body and proper party known to law who can sue and be sued. They further argued that the office is a creation of statute under S.17 of the Public Enterprises (Privatization and Commercialization) Act 1999.

1. ANALYSIS BY THE COURT

This is a Preliminary Objection to the jurisdiction of this Court by the 2nd Defendant on the ground that it is not a proper party to this suit. The plank of that argument is predicated on the fact that the 2nd Defendant is not a juristic person in law. It follows that a non-existent creature has been brought before the Court.

However, the Plaintiffs disputed this contention on the ground that the 2nd defendant is an office created by a statute in Nigeria (The Bureau of Public Enterprises Act 1999) and vested with functions and therefore one that possesses legal personal.

For the avoidance of doubt, the parties have cupiously expounded the jurisprudence of legal personality as recognized by various legal systems of the world.

However, bearing in mind that this is an International Court created by Treaty, its competence and Jurisdiction can only be gleaned from the treaty under which it was created. Being an International tribunal, it only determines issues, both substantive and procedural based on its enabling instrument. It is not a Court for the interpretation of municipal law but international law, except where issues of municipal law have implications for its mandate under treaty. Thus, the submission of the parties though brilliant are not germane to the determination of issue at stake. Accordingly, the Court will have resort to the treaty establishing it.

This Court was established by Protocol A/P.1/7/91 of the Economic Community of West African States, (ECOWAS) on the Community Court of Justice as amended by Supplementary Protocol (A/SP.1/05). Specifically, the human rights mandate of the Court is contained in Article 9 (4) of Supplementary Protocol (A/SP.1/05) which provides as follows;

"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member States"

A literal interpretation of this provision clearly shows that the Court only entertains matters relating to violation of human rights that occur in any Member States. Thus, the appropriate defendants in cases before this Court on violation of human rights are Member States of the Economic Community of West African States (ECOWAS).

The jurisprudence of this Court have reiterated and reinforced the fact that individuals cannot be brought before this Court for human rights violation. In its decision in Suit N°: ECW/CCJ/APP/04/09, **PETER DAVID V. AMBASSADOR RALPH UWECHUE**, the Court held that in a dispute between individuals on alleged violation of human rights, the natural and proper venue before which the case can be pleaded is the Domestic Court of the State party where the violation occurred. It is only when at the national level, there is no appropriate and effective forum for seeking redress against individuals that the victim of such offence(s) may bring an action before an International Court not against an individual rather against the signatory State for failure to ensure the protection and respect for rights allegedly violated.

See also the Decision of the Court in **CDD V. MAMADOU TANJA** (2011) CCJ LR 103 at 115-116.

The question that arises at this juncture is whether the 2nd Defendant is a party to the Treaty of ECOWAS establishing this Court and according it jurisdiction over human rights matters?

The answer is obviously no. the 2nd Defendant is merely an office created by a statute in Nigeria and not a State party to the Protocol and Supplementary Protocol establishing this Court. Accordingly, it cannot be a defendant in a suit for violation of human rights before this Court.

Although this application is brought by this 2nd Defendant, the Court is entitled to invoke its powers under Article 88(1) of the Rules of this Court to determine the status of the other parties.

According to Article 88 (1) of the Rules:

> "**Where it is clear that the Court has no jurisdiction to take cognizance of an action or where the action is manifestly in admissible, the Court may by reasoned order after hearing the parties and without taking any further steps in the proceedings, give a decision".**

From the processes before this Court none of the Defendants before this Court is a Member State or a party to the Treaty establishing the human rights mandate of this Court. The 1st Defendant is the President of the Federal Republic of Nigeria. Although the Federal Republic of Nigeria is a signatory to the Treaty establishing this Court, the office of the President of Nigeria is distinct from the Federal Republic of Nigeria. The 3rd and 4th Defendants are Institutions created by Nigerian law and not State parties to the Protocol establishing this Court. They cannot be appropriate parties to cases on violation of human rights or any other cause before this Court.

In this regard, this Court lacks jurisdiction to entertain the suit of the Plaintiffs as presently constituted. This is because the appropriate parties if any, have not been brought before this Court.

2. FOR THESE REASONS

Adjudicating in a public session after hearing both parties in the first and last resort, the Court in terms of technicalities

- **Declares** that the 2nd Defendant is not an appropriate party to this proceeding and therefore its name is hereby struck out from the suit.

- **Declares** that the suit as presently constituted is inadmissible, the appropriate parties not having been sued before the Court and the suit is hereby struck out.

3. AS TO COSTS

The parties shall bear their costs.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

1- **Hon. Justice Friday Chijioke NWOKE** - *Presiding;*
2- Hon. Justice Micah Wilkins WRIGHT - *Member;*
3- Hon. Justice Yaya BOIRO - *Member.*

Assisted by **Aboubakar Djibo DIAKITÉ (Esq.)** - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY, 3RD DAY OF DECEMBER, 2015

SUIT NO: ECW/CCJ/APP/23/13
RULING NO: ECW/CCJ/RUL/8/15

BETWEEN
MR. JUDE ELUEMUNO AZEKWOH - *PLAINTIFF*

AND
1. FEDERAL REPUBLIC OF NIGERIA
2. NATIONAL JUDICIAL COUNCIL } *DEFENDANTS*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MARIA DO CEU SILVA MONTEIRO** - *MEMBER*
3. **HON. JUSTICE MICAH WILKIGNS WRIGHT** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **BENARD UDEMBA (ESQ.),**
   C. M NWANKWO (ESQ.) - *FOR THE PLAINTIFF*
2. **MRS. RITAMORIS M. SHITTU** - *FOR THE 1ST DEFENDANT*
3. **DR. ABDULKARIM A. KAMA** *AND*
   USMAN ISA (ESQ.) - *FOR THE 2ND DEFENDANT*

-Jurisdiction-Cause of action- Competence of parties

SUMMARY OF FACTS

The Plaintiff brought an Application before the Court for the violation of his right to a fair hearing and appeal in his case to participate in the governance of his country. Plaintiff was a Senatorial candidate for the Delta North Senatorial seat, Delta State of Nigeria a Member State of ECOWAS, A competitor was declared the winner of the Senate seat; the Plaintiff appealed the Ruling and his appeal was denied and dismissed. He appealed to the 2nd Defendant and brought this application before the ECOWAS Court. Plaintiff alleged that no action had been taken on his Petitions and the right intended to be reclaimed and protected is still being usurped and enjoyed by a third party in Nigeria's Senate with the result that his right under the African Charter has not only been violated, he has been cheated and suffered serious damages as a result. The Plaintiff thereafter instituted this suit alleging that the 2nd Defendant's failure and /or refusal to bring forth remedy upon receipt of his Petition is unjust. That his fundamental rights were violated by the failure and refusal of the 2nd Defendant to reconstitute his Appeal. He is seeking the Court Order to declare his right as a Nigerian and ECOWAS Citizen to have his cause heard at the appellate level of Courts and the sum of Ten Million United States Dollars against the 1st Defendant for the violent violation of his fundamental rights provided for under Section 36 of the Constitution of the Federal Republic of Nigeria and Articles 3, 7 and 13 of the African Charter on Human and Peoples' Rights Cap 10 Law of the Federal Republic of Nigeria 2004 amongst others.

The 1st Defendant, the Federal Republic of Nigeria, filed a Motion for Extension of Time along with a Preliminary Objection to the suit challenging the jurisdiction of the ECOWAS Court to determine this matter.

LEGAL ISSUES:

- *Whether the Court has jurisdiction to determine this suit.*
- *Whether or not there exists a cause of action against 1st Defendant.*

THE DECISION OF THE COURT

The Court held, as to Admissibility of the Suit/Competency of the Court that it has no appellate jurisdiction over the Decisions of the Courts of Member States and cannot act as one. That it declines to act outside its mandate as specified in Protocol (A/P.1/7/91) and the Supplementary Protocol (A/SP.1/01/05) which clearly spelt out such mandate.

The Court declared that the Application is hereby ruled inadmissible and hence denied because the subject matter of the dispute which led to the filing of this suit in this Court is an election matter in a Member State and that this Court does not have the competence and jurisdiction over such cases.

Secondly, the Court rejected this case stating that the Defendants have shown to the satisfaction of this Court that the Plaintiff was afforded and enjoyed the benefits of due process of law through the Judiciary of Nigeria and that the matter was decided by the Court of Appeal which is the highest judicial authority on election matters in Nigeria. The Court accordingly, held and declare that it does not have the mandate to examine the laws of Member States of the Community.

***As to Competence of the Parties**, the Court, declared that it was totally unnecessary to have listed the 2nd Defendant National Judicial Council of Nigeria as a party in this suit contrary to the Treaty establishing ECOWAS. Accordingly, the name of the 2nd Defendant is hereby removed from this case and it is hence dropped as a misjoined party and the case dismissed as to it. The Court further declared that the Plaintiff failed to establish a cause of action against the 1st Defendant as a party, for this failure, the Court hereby dismissed the case as to the 1st Defendant.*

***As to Costs**, the Court ruled that costs shall be assessed for the Defendants against the Plaintiff in accordance with Article 66 of the Rules of this Court.*

RULING OF THE COURT

3. SUBJECT MATTER OF THE PROCEEDINGS

The denial by the Defendants of Plaintiff's right to a fair hearing and appeal in his case to participate in the governance of his country. Plaintiff was a Senatorial candidate for the Delta North Senatorial seat, Delta State of Nigeria in the elections of 2011. A competitor was declared the winner of the Senate seat; the Plaintiff appealed the Ruling and his appeal was denied and dismissed. He appealed to the 2nd Defendant and complains to this Court that the 2nd Defendant denied him his right to a hearing.

4. ARTICLES VIOLATED

1. Articles 3, 7, 13 of the African Charter on Human and Peoples' Rights, and Ratification Act, Chapter 10, Laws of the Federal Republic of Nigeria.

2. Sections 36 and 64(1) of the 1999 Constitution of the Federal Republic of Nigeria.

3. Revised Treaty establishing ECOWAS and its amendments.

4. Articles 9(1), 9(4) of the Supplementary Protocol (A/SP.1/01/05) relating to the ECOWAS Community Court of Justice.

5. DOCUMENTS RELIED ON

1. Petition to the Court of Appeal President. (Exhibit A)

2. Petition to the National Judicial Council. (Exhibit B)

3. Petition to the Chief Justice of Nigeria by the Plaintiff. (Exhibit C)

4. Hearing Notice dated 26th September, 2011. (Exhibit D)

5. Revenue receipt dated 27/10/11 for CTC of Court of Appeal proceeding. (Exhibit E)

6. CTC of Court of Appeal proceeding of 2th September 2011. (Exhibit F)

7. CTC of Court of Appeal proceeding dated 19/9/2011 (Exhibit G)

8. Application for CTC of Court of Appeal proceeding by the Plaintiffs' Counsel. (Exhibit H)

9. Motion on Notice dated 29th of September 2011 for relisting of the Appeal at the Court of Appeal, Benin City together with Affidavit in support. (Exhibit J)

10. Verifying Affidavit deposed to on the 31st of October 2011.

6. FACTS AND PROCEDURE

6.1. CONTENTIONS BY THE PLAINTIFF:

6.1.1. Plaintiff avers that he was the candidate of Democratic People Party in the 2011 election in Nigeria and under that platform he contested for the senate seat of the Delta North Senatorial Zone of Delta State of Nigeria.

6.1.2. The Plaintiff avers that his opponent at the election was wrongly returned and he carried his Complaint to Delta State Senatorial Election Tribunal sitting at Asaba, representing the defects and irregularities as they were and urging the Court to declare him as the duly elected Senator for Delta North Senatorial Zone in the election conducted on 9th of April, 2011.

6.1.3. Part of his Complaint at the Election Tribunal at Asaba in Suit No. EPT/DT/S/02/2011 was that the candidacy of his major opponent, Dr. Arthur Ifeany Okowa was disabled in law which was enough for him to be declared winner.

6.1.4. On 2nd of August 2011, the National Assembly Election Tribunal, sitting in Asaba, struck out his Petition on an embarrassing ground that the Pre- trial Session of the Application was not brought by way of Motion.

6.1.5. The Plaintiff avers that he filed Appeal against the decision of the Tribunal on 18th of August 2011 at the Court of Appeal, Benin City in Appeal number CA/B/EPT/230/2011.

6.1.6. The Plaintiff avers that as an Appellant in the Appeal, his Appellant Brief was filed on 19th September 2011 while the 1st and 2nd Respondents in the Appeal filed their Brief of Argument on Friday, 23rd of September, 2011.

6.1.7. The Respondents also filed a Notice of Preliminary Objection to the Plaintiffs Appeal on 23rd of September 2011 contending that the Plaintiffs Brief was filed out of time.

6.1.8. The Plaintiff avers that he was served through his Counsel with the 1st and 2nd Respondents' Briefs of Argument and the said Preliminary Objection on Monday, 26th of September 2011; the same day he got the Hearing Notice for hearing of his Appeal which was slated and fixed on 27th of September 2011.

6.1.9. In serving the Notice of Preliminary Objection, Respondents Brief and Notice of Court of Appeal on 26th of September for the matter that was to come up the next day being 27th of September, the Plaintiff was limited to less than 24 hours.

6.1.10. The Plaintiff avers that his Counsel's insistence to be allowed the necessary three days to which he is entitled to prepare his Reply to processes served him on 26th of September 2011 was rejected by the Court of Appeals on its 27th of September sitting and proceeded with the case without seeing his counter Affidavit and other regularizing processes allowed in law.

6.1.11. Plaintiff avers that the Court of Appeal, Benin City, having refused to enlarge time for his Counsel to do the needful, proceeded on the 27th of September 2011 to hear the Preliminary Objection and on that strength struck out the Appeal.

6.1.12. Plaintiff avers that at the time the Court struck out his Brief and the entire Appeal on 27th of September 2011, he still had four days remaining and within time allowed by law.

6.1.13. On 29th of September 2011, while still within sixty days for Appeal, his Counsel brought Application for Relisting of the appeal but no hearing date was given until 12th October 2011 when the Panel Members prevailed on his Counsel to withdraw the Motion on the ground that sixty days had lapsed and that it can no longer assume jurisdiction.

6.1.14. Plaintiff avers that his Solicitor, Dipo Okpeseyi, Esq (SAN) petitioned the Acting President of the Court of Appeal dated 9th November 2011 complaining of these irregularities.

6.1.15. When it became clear that the Court was not going to reverse this unjust situation without directive from the judiciary's hierarchy, Plaintiff petitioned the Chairman, National Judicial Council through his Solicitor, Dipo Okpeseyi, (SAN) seeking for his intervention so that he could be heard.

6.1.16. When it appeared that nothing was being done about the Plaintiffs Complaint, he sent another Petition dated 27/8/2012 to the Chairman of the National Judicial Council.

6.1.17. One year after, on 24th of September 2013, the Plaintiff sent yet another Petition, making it the third to the National Judicial Council for redress.

6.1.18. Plaintiff avers that no action had been taken on his Petitions and the right intended to be reclaimed and protected is still being usurped and enjoyed by a third party in Nigeria's Senate with the

result that his right under the African Charter has not only been violated, he has been cheated and suffered serious damages as a result.

6.1.19. The Plaintiff thereafter instituted this suit alleging that:

- The 2nd Defendant's failure and /or refusal to bring forth remedy upon receipt of his Petition dated 31/1/12. 27/8/12 and 20/9/12 demanding his Appeal to be reconstituted is unjust;

- That his fundamental rights were violated by the failure and refusal of the 2nd Defendant to reconstitute his Appeal;

- The 2nd Defendant's failure and refusal to reconstitute his Appeal is unjust and amounts to a violation of Article 3, 7 and 13 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

6.1.20. In his Application, the Plaintiff sought the following Reliefs and Orders as herein stated below:

- A declaration that the Plaintiffs right to equality before the law and protection under Article 3 of the African Charter on Human and Peoples' Rights has been violated;

- A declaration of the Plaintiffs right as a Nigerian and ECOWAS Citizen to have his cause heard at the appellate level of Courts was violated and his fundamental right to fair hearing as stated in Article 7 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

- Ten Million United States Dollars against the 1st Defendant for violent violation of the Plaintiff's fundamental rights provided for under Section 36 of the Constitution of the Federal Republic of Nigeria and Articles 3, 7 and 13 of

the African Charter on Human and Peoples' Rights Cap 10 Law of the Federal Republic of Nigeria 2004.

- The declaration that the refusal and or failure of the 2nd Defendant to make directives or otherwise take steps to mitigate breach of the Plaintiffs right at the Court of Appeal in Benin City, and a declaration that the 2nd Defendant's failure and or refusal to bring forth remedy upon their receipt of the Plaintiffs Petition demanding that his Appeal struck out unjustly be reconstituted is continuing violation of the Plaintiff's right under Articles 3, 7 and 13 of the African Charter on Human and Peoples' Rights.

6.2. PROCEDURE

6.2.1. The initiating Application, though dated November 27, 2013, was filed on December 09, 2013 (Document number 1) along with an Application for Expedited Hearing (Document number 2). The papers were served on the Defendants. Due to the failure of the two Defendants to appear and file their respective defenses, the Plaintiff filed on February 03, 2014 a Motion for Judgment by Default (Document number 3).

6.2.2. Subsequently on March 26, 2014, the 1st Defendant, the Federal Republic of Nigeria appeared and filed a Motion for Extension of Time (Document number 4) along with a Preliminary Objection to the suit (Document number 5).

6.2.3. The Plaintiff then filed, on April 28, 2014, a Counter Affidavit to the 1st Defendant's Motion for Extension of Time (Document number 6) along with his Written Address in opposition to 1st Defendant's Preliminary Objection (Document number 7).

6.2.4. On January 06, 2015, the 2nd Defendant, the National Judicial Council, filed a Motion for Extension of Time (Document number 8) and its Statement of Defense to the Plaintiffs case (Document number 9).

6.2.5 The Plaintiff then filed his Counter Affidavit in response to the 2nd Defendant's Motion for Extension of Time (Document number 10) along with his Written Address in reply to the 2nd Defendant's Statement of Defense (Document number 11).

6.2.6. Subsequently on April 09, 2015, the 2nd Defendant filed its Preliminary Objection (Document number 12) praying the dismissal of the suit and dropping its name as a party Defendant.

6.2.7. Finally, the Plaintiff filed his Written Address in opposition to the 2nd Defendant's Notice of Preliminary Objection (Document number 13).

6.3. CONTENTIONS OF THE DEFENDANTS:

6.3.1. We note, as stated herein above, that the 1st Defendant/Applicant, filed only its Motion for Extension of Time and a Preliminary Objection, but did not also file a Statement of Defense to join issue with the Plaintiff on the merits of the suit.

6.3.1.1. In its Preliminary Objections of March 26, 2014 challenging the jurisdiction of the Honorable Court to hear and /or adjudicate the Plaintiffs suit as constituted and conceived, 1st Defendant further contended that:

1. The subject-matter of this suit is based on Election Petition and this Honorable Court lacks the requisite jurisdiction to hear and /or adjudicate on the suit;

2. The decision of the Court of Appeal of Nigeria is final, the same being the final domestic Court having jurisdiction over Election Petitions;

3. This Honorable Court lacks the requisite jurisdiction to adjudicate on this suit, same having been finally disposed of by the Nigerian Court;

4. The claims of the Plaintiff did not disclose any cause of action against the 1st Defendant Applicant.

6.3.1.2. The 1st Defendant cited the following laws:

- Articles 9 and 10 of the Supplementary Protocol (A/AS.1/01/05) Community Court of Justice as well as the case: **Tukur Govt. of Taraba State (1997) 6 NWLR (PT. 510) 594.**

- Articles 9 and 10 of the Supplementary Protocol (A/AS.1/01/05) Community Court of Justice as well as Section 285 (1) (a) & (b) of the 1999 Constitution of the Federal Republic of Nigeria as amended and Section 240 of the same Constitution.

- The case: **Dr. Mahamat Seid Abazene *vs.* The Republic of Mali & 2 Others** (2010) CCJELR P. (5 at P.97 & 106)

- The case: **Mrs. Margarey Okadigbo *vs.* Prince John Okechukwu Emeka & Ors**. (2012) LPELR 7839 SC and several others

6.3.2. On the other hand, and as stated supra, the 2nd Defendant, filed on 6th January 2015, a Motion for Extension of Time along with its Statement of Defense, thus joining issues with the Plaintiff on the merits of the suit, and later on also filed a Preliminary Objection to the Plaintiffs suit.

7. ISSUES PRESENTED FOR DETERMINATION

7.0. Since the Court, in the normal course of things decided to hear the Preliminary Objections before reaching the merits of the case, we shall dwell on the issues and arguments raised by the Defendants in their respective Preliminary Objections and the Plaintiffs responses thereto.

From the above claims and counterclaims of the parties, we glean the following questions to be answered by the Court:

7.1. Whether or not the Plaintiff was afforded due process of law in the domestic judicial system of Nigeria?

(a) Whether Plaintiff had adequate remedies under the legal and judicial system of Nigeria including the opportunity to effectively present his case?

7.2. Whether or not this Court has jurisdiction over the subject matter and the parties of this case?

(a) To hear a matter which has already been handled judicially in a domestic court at the highest level?

(b) To hear matters involving election disputes?

(c) To hear the complaints against Institutions of member States?

(d) Whether or not there exists a cause of action against 1st Defendant?

The Court shall address these questions in the order in which they appear.

8. DISCUSSIONS

8.1. The Defendants joined issues with the Plaintiff by filing their respective Motions for Extension of Time, Preliminary Objections, as well as Statement of Defense, thereby challenging, refuting, controverting, denying, and or justifying the allegations laid in the complaint of the Plaintiff.

8.2. The first question is Whether or not the Plaintiff was afforded due process of law in the domestic judicial system of Nigeria? The short answer to this question is in the affirmative.

8.2.1. Commenting on this issue, the 1st Defendant/Applicant, in its Preliminary Objection, stated:

1. That the subject matter of this suit is based on Election Petition and this Honorable Court lacks the requisite jurisdiction to hear and/or adjudicate on the suit;

2. The decision of the Court of Appeal of Nigeria is final, the same being the final domestic Court having jurisdiction over Election Petitions;

3. This Honorable Court lacks the requisite jurisdiction to adjudicate on this suit, same having been finally disposed of by the Nigerian Court;

4. The claims of the Plaintiff did not disclose any cause of action against the 1st Defendant /Applicant.

8.2.2. Equally commenting on this issue, the 2nd Defendant, in its Statement of Defense, contended that it is the National Judicial Council, a creation of the Constitution of the Federal Republic of Nigeria, 1999 as amended and denies each and every allegation contained in the Plaintiffs entire Pleading as if each of such allegation were herein set out and traversed seriatim.

1. 2nd Defendant also argued that its powers constitutionally exercisable are stipulated in Paragraph 21 (a to i) of the third schedule, Part 1 of the Constitution of the Federal Republic of Nigeria.

2. 2nd Defendant categorically denied all the allegations in paragraphs 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the Plaintiffs pleading under the heading "narration of Facts by the Plaintiff" and 2nd Defendant challenged the Plaintiff and put him to the strictest proof thereof.

3. The 2nd Defendant argued that Plaintiff was afforded the opportunity of participating in the governance of his Country, Nigeria, whereby he participated at the elections conducted on 9th April, 2011 for a seat of Senate for Delta north Senatorial District and lost.

4. It was stated that the Plaintiff and his Counsel are aware of the provision of the Constitution limiting the period of Appeal to 60 days, yet prosecuted his Appeal indolently without seizing the opportunity of fair hearing mechanism embedded in election matters whereof the Plaintiff filed his appeal 16 days after the decision of the Election tribunal appealed against. The Plaintiff was served record of Appeal on 22/8/2011; 6 days after the Plaintiff filed his Notice of Appeal. The Plaintiff had 10 days from date of service to file his argument, but failed and neglected to so do until 10/9/2011, the date the matter was fixed for hearing following which the matter was adjourned.

5. The 1st and 2nd Respondents filed their brief with a Preliminary Objection on the 23/9/2011 and same was duly served on the Plaintiff and matter fixed for hearing on Tuesday, the 27/9/2011 on which date, the Court of Appeal heard submissions of the parties on the Preliminary Objection and sustained it in view of the fact that the Plaintiff did not make any application for extension of time and leave to file his brief of argument out of time.

6. The Plaintiffs 60 days constitutionally provided for hearing and determination of an appeal on Election matter expired/ elapsed on the 2/10/2011. In view of the Supreme Court's interpretation of the Constitutional provision in Section 285(7). The said 60 days cannot be extended and the 2nd Defendant lacks the constitutional power to constitute and or reconstitute panel of the Court of Appeal to determine an election appeal or any appeal at all.

7. The 2nd Defendant claims that she acted on the Complaint of the Plaintiff whereby she forwarded the Complaint to the President of the Court of appeal for response and even copied the forwarding letter to the Plaintiff, but upon considering the response made in line with the Constitutional Provisions and Judicial pronouncement of the apex Court of the land, it became clear that the Complaint of the Plaintiff was without merit and ill conceived.

8. The 2nd Defendant sought the following orders:

    1. An **Order** dismissing the Plaintiff's suit for being vexatious and lacking in merits.

    2. An **Order** awarding cost against the Plaintiff.

8.3. The second question borders on whether or not this Court has jurisdiction over the subject-matter and the parties of this case? The short answer to this question is in the negative.

A. OVER THE SUBJECT-MATTER

8.3.1. Commenting on this issue, the 1st Defendant/Applicant, in its Preliminary Objection, contended:

1. That the subject-matter of this suit is based on Election Petition and this Honorable Court lacks the requisite jurisdiction to hear and /or adjudicate on the suit;

2. The Decision of the Court of Appeal of Nigeria is final, the same being the final domestic Court having jurisdiction over Election Petitions;

3. This Honorable Court lacks the requisite jurisdiction to adjudicate on this suit, same having been finally disposed of by the Nigerian Court;

4. The claims of the Plaintiff did not disclose any cause of action against the 1st Defendant/Applicant.

8.3.2. Equally commenting on this issue, the 2nd Defendant further contended that an Election matter is sui generis. That is, of its own kind or class. It is unique, peculiar and different from other civil matters, hence by Section 285(7) of the Constitution, an Appellant before the Court of Appeal on Election Matter, such as the Plaintiff has 60 days within which to present his Petition, prosecute same and get the Court to deliver its judgment on the case. This provision is made to prevent a situation whereby a Petition against an elective position of 4 years term is dragged and delayed by counsel indefinitely.

8.3.3. Under the laws cited in this case, it is found to be true that in Nigeria, all elections cases terminate in the Court of Appeal, whose judgment is final and binding. It goes without saying that this ECOWAS Court of Justice cannot become seized of this case of the Plaintiff because of this legal inhibition. Therefore, this case is rendered inadmissible and hence dismissible.

ORAL ARGUMENTS

8.4. The Court entertained oral arguments before this BENCH, during which the 1st Defendant contended that this Court lacks jurisdiction over this case because the case is based on election disputes which are the proper domain of domestic courts of Member States.

8.5. In counter argument, the Plaintiff contended that his Application is not based on election dispute but rather the violation of his human rights as a Community Citizen by the denial of his right to be heard, which violation occurred even before the ruling of the domestic court.

B. OVER THE PARTIES

8.6. The 2nd Defendant argued that it is not a proper party Defendant before this Court because it is not a Member State of ECOWAS and secondly because the Plaintiff has not established any cause of action against it.

8.7. In response to the 2nd Defendant, the Plaintiff said while he concedes that the 2nd Defendant is not a Member State of ECOWAS, it was however joined in this suit because of the continuing violation of his rights to which the said 2nd Defendant had remained silent and took no action to protect his rights. He cited the Court to counts 1.4 (c), (d) of his Written Address (Document number 13).

Also, the 1st Defendant argued that because the Plaintiff failed to present any cause of action against the 1st Defendant, it should be exonerated as a party Defendant and the case dismissed.

9. OBSERVATIONS / CONCLUSIONS

9.1. "It is a well-established principle of law that a court is competent when:

1. It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and

3. The case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction."

"The position of law which cannot be overstated is that any defect in competence is disastrous, for the

proceedings are nullities, no matter how well conducted and decided, the defect is extrinsic to the adjudication." **Mr. Olajide Afolabi *vs.* Federal Republic of Nigeria ECW/CCJ/JUD/01/04/04 delivered April 27, 2004, at pages 12-13, paragraphs 32(1)(2)(3), 33**.

9.2. This suit is brought relying on or pursuant to the African Charter on Human and Peoples' Rights (ACHPR), the ECOWAS Treaty and the Protocol on the Community Court of Justice. It must be remembered that only Member States who are parties or signatories to the said Treaty, Protocol and the Charter are subject to the dictates and effect of these legal instruments and are liable for violations thereof.

9.3. In the case, Suit N^{O}: ECW/CCJ/APP/04/09, **Peter David, Applicant vs. Ambassador Ralph Uwechue, Defendant**, Ruling N^{O}: ECW/CCJ/RUL/03/10, at pages 10-11, paragraphs 40, 42, 44, 45, delivered 11th June 2010, this Court ruled as follows:

"40 .... the Court emphasizes that it is an international court established by a Treaty and, by its own nature, it should primarily deal with dispute of international character. Therefore, it essentially applies international law where it has to find out the source of the laws and obligations which bind those who are subject to its jurisdiction."

"42 .... the Court recalls that the international regime of human rights protection before international bodies relies essentially on treaties to which States are parties as the principal subjects of international law. As a matter of fact, the international regime of human rights imposes obligations on States. All mechanisms established thereof are directed to the engagement of State responsibility for its commitment or failure toward those international instruments."

"44. Even before the African Commission on Human Rights, the closest reference to this Court, only States parties to the African Charter on Human and Peoples' Rights are held accountable for the violation of the fundamental rights recognized in the said instrument."

"45. Up till now the responsibility of the individuals at the international level for the violation of human rights is limited to criminal domain, and even in such circumstances, the international courts intervene only on subsidiary grounds, that is to say, where the domestic courts cannot or fail to hold the perpetrators of such violations accountable."

9.4. This Court, as with other treaty-based institutions, is circumscribed by the terms of the treaty which established it and the other legal instruments which pertain to it.

9.5. The Court determined and therefore agreed that the Defendants' Motions for extension of time should be entertained and granted so as to afford the Defendants the opportunity to appear and adequately defend themselves against the claims laid and contained in the Complaint of the Plaintiff.

9.6. Secondly, the Court, as a matter of course, decided to hear and determine the merits of the Preliminary Objections to the suit, considering that the objections border on (a) the competency of this Court to exercise jurisdiction over this case because it involves the alleged violations growing out of elections activities in a Member State; (b) on the ineligibility of the 2nd Defendant being made a party in this case since it is only an agency of a Member State of the Community and not a Member State or signatory of the ECOWAS Treaty and the African Charter; (c) on the fact that the Plaintiff did not disclose any cause of action against the 1st Defendant.

9.7. Thirdly, the Court, after hearing oral arguments of the parties on the Preliminary Objections, determined that this case need not go to trial, and has thus decided to grant the Preliminary Objections.

9.8. In the case, Suit N°: ECW/CCJ/APP/02/05, **Hon. Dr. Jerry Ugokwe, Applicant vs. The Federal Republic of Nigeria, Defendant** and **Hon. Dr. Christian Okeke and Others, Intervenets**, **Judgment N°: ECW/CCJ/JUD/03/05, decided 07th October 2005, at pages 9-16, paragraphs 18 - 33**, this Court ruled as follows:

> "18. The close examination of the various pleas of action of the parties leads to the question on whether electoral disputes, which is the main issue at the centre of the litigation, is subject to the legal order applicable to the Community…"
>
> "19. Research shows that, in the current stage of legal texts applicable by ECOWAS, no provision, whether general or specific, gives the Court powers to adjudicate on electoral issues or matters arising thereof. However, a dispute having a bearing on other rights of the parties may be referred to in any internal or related dispute relating on electoral issues like the present one... "
>
> "20. But the Treaty, which is the fundamental law of ECOWAS, particularly the Protocols relating to the Court of Justice, only invests the Court with specific powers and prerogatives, insisting always on its mandate concerning the observance of law in their interpretation and application."
>
> "21. This is why, besides the electoral problem, there are grounds for us to ponder, in a second instance, on the competence of the Court when the Applicant raises the legal plea on right to fair hearing. The right to fair hearing is a human right derived from the concept of fair hearing...; "

"23 ...In this particular case, does the ECOWAS Court of Justice have the competence to legally entertain the claims of the Applicant when he requests the ECOWAS Court of Justice to declare null and void i) the proceedings of the national courts of a Member State of the Community (Nigeria) ii) or to enjoin the INEC of Nigeria to refrain from invalidating his election iii) or still, to enjoin the Federal National Assembly of Nigeria not to relieve him of his position as a Member of Parliament?

"24. Article 76-2 of the Revised Treaty and Articles 9, 10, and 11 set out the extension of the powers of the Court. But the provisions of all these Articles do concern appeals which are only possible within the following contexts:

a. Appeals against the legality of acts, instruments and other decisions of the Community;

b. Appeals against failings in the obligations of a Member State of the Community;

c. Disputes relating to the interpretation and application of the Treaty and related instruments;"

"25 …It is trite law that a judgment given without jurisdiction amounts to a nullity no matter how well detailed or conducted the proceedings are."

"26. The bone of contention on the issue of lack of jurisdiction relates to the subject matter of the dispute before the Court. Counsel to the Defendant argued that the case concerns an election petition under the domain of the national law and the Court of Appeal of Nigeria which concluded on the rights of the parties. The Court of Appeal is the final Court in respect of that matter. On the contrary, counsel to the Applicant was of the view, based on the strength of the facts of the case and the complaint about

the contravention of fair hearing, emanating from the election petition that the Court of Justice is jurisdictionally competent to deal with the matter."

"27. ....There is no doubt that the subject matter relates to an Election matter which ordinarily is subject to the jurisdiction of the National Court, ... the complaint is in respect of the non-compliance with fair hearing in the adjudication of the case before the Election Tribunal and the Court of Appeal that heard the suit."

"28. ...The combined effect of the provisions indicates that any violation of human rights in any Member State may be brought by the individual or corporate bodies before the court for adjudication. The thorny question to pose for consideration is whether there was such violation of fair hearing?"

"29. In Articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by provisions of Article 4 paragraph (g) of the Treaty of the Community, the Member States of the Economic Community of West African States (ECOWAS) are enjoined to adhere to the principles including "the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behooves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter."

"31. The vital paragraph in the quotation above is paragraph (c) wherein the Court is empowered to apply the general

principles of law recognized by civilized nations ....to protect the rights of an individual in the interim where the rights are infringed upon in accordance with the principles of law recognized in municipal systems, and jurisprudence of the Court."

"32. Appealing against the decision of the National Court of member States does not form part of the powers of the Court; the distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law. And, if the obligation to implement the decision of the Community Court of Justice lies with the national courts of member States, the kind of relationship existing between the Community Court and these national courts of Member States is not of a vertical nature between the Community and the Member States, but demands an integrated Community legal order. The ECOWAS Court of Justice is not a Court of Appeal or a Court of Cassation."

"33. From all the pleas in law invoked by the Applicant, ie., *regarding the Court entertaining matters dealing with electoral disputes or the violation of his right in having his election annulled*; and furthermore, as to the orders being sought against the execution of the Judgment already made by the Federal Appeal Court of the Member State of Nigeria - the Court is incompetent." (Emphases ours) We herein reaffirm this position".

9.6. In view of the fact that this Court is not seized with the jurisdiction to entertain elections disputes arising in Member States and as such are not subject to review by this ECOWAS Court of Justice, especially where they are a result of judicial processes before the Election Tribunal and review by the Court of Appeal in Nigeria, the Court has decided that this case be dismissed and the Defendants discharged.

10. DECISION

The Court, adjudicating in a public sitting, after hearing both parties, in last resort, after deliberating in accordance with the law;

As to Admissibility of the Suit/Competency of the Court

10.1. This Court now holds as follows, just as we ruled in our previous case, Suit N°: ECW/CCJ/APP/04/05, **Chief Frank C. Ukor, Applicant *vs.* Mr. Rachad Laleye, 1st Defendant and the Government of the Republic of Benin,** decided **02nd November 2007 at pages 16-22, paragraphs 27-30**:

> "27. Turning to the issues concerning the question of lack of jurisdiction, brings the Court to consider the jurisprudence on jurisdiction which are replete in the decisions of the Court, nationally and internationally as to when the Court may be said to lack it. On that basis, the cardinal principle of law on jurisdiction which never changes is that jurisdiction or lack of it is fundamental to the proceedings. It is trite law that jurisdiction means simply the power of the court to entertain an action."
>
> "28. ...It is trite that a valid order of the court stands until any person dissatisfied with same makes the move by following the relevant judicial process to set it aside. Consequently, this Court which has no appellate jurisdiction over the decisions of the courts of Member States cannot act as one through this process that counsel for the Applicant/ Plaintiff impressed upon it to enforce."
>
> "29. On this note, this Court declines to act outside its mandate as specified in Protocol (A/P.1/7/91) and the Supplementary Protocol (A/SP.1/01/05) which clearly spelt out such mandate."

> "30. ...even though the Applicant/Plaintiff mentioned Human Rights violations under the provisions of the African Charter on Human and Peoples' Rights as recognized by Article 4(g) of the said Revised Treaty of ECOWAS, the acts complained of are not in themselves violations of Human Rights because the seizure and dispossession of the goods and truck was based on the order of a competent court to wit, court of First Instance Cotonou Benin and that the court followed the procedure and the provisions of Articles 54, 56, 59, 60 and 61 and this Court cannot delve into the propriety of the said order which still subsists. The position of this Court is that being devoid of appellate jurisdiction, only that court can set aside the said orders made and thus make the complaints justiciable…the issues fail to measure as Human Rights violations as to confer upon the Court jurisdiction under Article 9(4) of the Protocol. Consequently, the issues being not justiciable, are accordingly jettisoned."

10.2. The Court declares that the Application be and is hereby ruled inadmissible and hence denied because the subject matter of the dispute which led to the filing of this suit in this Court is an election matter in a Member State and this Court does not have the competence and jurisdiction over such cases.

10.3. The second reason why this Court rejects this case is that the Defendants have shown to the satisfaction of this Court that the Plaintiff was afforded and enjoyed the benefits of due process of law through the Judiciary of Nigeria and that the matter was decided by the Court of Appeal which is the highest judicial authority on election matters in Nigeria. Therefore, the Court is satisfied that once the position of the Plaintiff was a product of a judicial declaration, there can be no intervention by this Court, as this Court does not exercise appellate jurisdiction over matters in which domestic courts of Member States have made judicial pronouncements.

10.4. Accordingly, we hold and declare the following, as we previously did in the case, **Suit N°: ECW/CCJ/APP08/08, Hadijatou Mani Koraou *vs.* The Republic of Niger, Judgment N°: ECW/CCJ/JUD 06/08, decided 27 October 2008, at pages 13, 16, 21, paragraphs 60, 71, 91**, respectively, that

> "60. ....the Court finds that it does not have the mandate to examine the laws of Member States of the Community …"
>
> "91. A detention is said to be arbitrary when it does not repose on a legal basis. Now in the instant case, the arrest and detention of the Applicant were carried out in the implementation of the judicial decision made by the said Konni Criminal Court. This decision constitutes a legal basis, and it does not fall within the jurisdiction of the Court to consider whether such a decision is well founded or ill founded.

10.5 Once again, we are constrained to remind and reiterate as we have declared on so many occasions, that "the Community Court of Justice, ECOWAS is not an Appeal Court before which cases decided by the Courts in Member States could still be brought, in order to determine the jurisdiction of the latter." **Suit N°: ECW/CCJ/APP/11/08 Dr. Mahamat Seid Abazene *vs.* Republic of Mali, The African Union, and the Afro-Arab Cultural Institute. Judgment N°: ECW/CCJ/JUD/05/10, decided 4th March 2010 at page 8, paragraph 28.**

As to Competence of the Parties

10.6. We find and declare the following, as we previously did in the case, **Suit N°: ECW/CCJ/APP/08/09, The Registered Trustees of the Socio-Economic Rights (SERAP) *vs.* The President of the Federal Republic of Nigeria and 8 Others, Ruling N°. ECW/CCJ/RUL/07/10,** decided **10th December 2010, at pages 20 - 23, paragraphs 64 and 71:**

"64. But the conclusion on the jurisdiction of the Court over the Federal Republic of Nigeria does not respond to the objection raised by the Defendants who contend that not being parties to the Treaty or other ECOWAS legal instruments, they cannot be sued before the Court."

> "71. In the context and legal framework of ECOWAS, the Court stands by its current understanding that only Member States and Community Institutions can be sued before it for alleged violation of Human Rights, as laid down in **Peter David *vs.* Ambassador Ralph Uwechue** delivered on the 11th day of June 2010."

10.7. The Court, therefore, determines and declares that it was totally unnecessary to have listed the 2nd Respondent/Defendant National Judicial Council of Nigeria as a party in this suit contrary to the Treaty establishing ECOWAS. Accordingly, the name of the 2nd Respondent/ Defendant is hereby removed from this case and it is hence dropped as a misjoined party and the case dismissed as to it.

10.8. The Court further declares that the Plaintiff failed to establish a cause of action against the 1st Defendant as a party Respondent/ Defendant, when Plaintiff did not and has not shown what role 1st Defendant played or in what way it contributed to the problem which gave rise to this litigation.

10.9. This finding is consistent with our earlier finding in the **Hadijatou Mani Koraou case**, supra, paragraph 71 at page 16, wherein this Court, in exonerating the Member State wrongly sued, said:

> "71. The Court finds that even if the complaint drawn from discrimination - to which the Applicant lays claim for the first time before this Court - is founded, that violation is not attributable to the Republic of Niger but rather to El Hadj Souleymane Naroua, who 'is not a party to the instant proceedings."

For this failure, which is fatal, the Court hereby dismisses the case as to the 1st Defendant.

As to Costs

10.10. The Court rules that costs shall be and are hereby assessed for the Defendants against the Plaintiff/Applicant in accordance with Article 66 of the Rules of this Court.

10.11. **Thus made, adjudged and pronounced in a public hearing at Abuja, this 03rd day of December, A.D. 2015 by the Court of Justice of the Economic Community of West African States.**

THE FOLLOWING JUDGES HAVE SIGNED THIS JUDGMENT:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding;*
- **Hon. Justice Maria Do Ceu SILVA MONTEIRO** - *Member;*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member;*

Assisted by **Tony ANENE-MAIDOH (Esq.)** - *Chief Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON MONDAY, 14TH DAY OF DECEMBER, 2015

SUIT NO: ECW/CCJ/APP/32/15
RULING NO: ECW/CCJ/RUL/09/15

BETWEEN
HAMA AMADOU - *PLAINTIFF/APPLICANT*

AND
THE REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUDGE JÉRÔME TRAORE** - *PRESIDING*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **AMADOU BOUBACAR (ESQ.)**
   THE SECRETAIRE GENERAL
   TO THE GOVERNMENT - *FOR THE PLAINTIFF*
2. **YACOUBA NAMARA, (ESQ.)**
   MOUSSA MAHAMAN SADISSOU (ESQ.)
   MOUSSA COULIBALY (ESQ.) - *FOR THE DEFENDANT*

-Expedited procedure- Interim measure-

FACTS OF THE SUMMARY

As part of the investigation into the Nigerian police's discovery of a child smuggling ring between Benin, Niger and Nigeria, a judicial inquiry was opened by the public prosecutor at the tribunal de grande instance of Niamey. The investigations led to the arrest of several suspects, including the wife of the Applicant, Mr Hama Amadou, then speaker of the National Assembly. After the lifting of his parliamentary immunity, he was charged with complicity in the supposition of children and forgery and the use of forgery in public writing. The search warrant issued for this purpose by the trial judge could not be implemented because the Applicant had already left Niger, thus obliging the trial Judge to issue an arrest warrant against him on 25 September 2014. For this reason, the Applicant by motion dated 27 August 2014 seised the Court because he considers that his parliamentary immunity was unlawfully lifted and his human rights was violated, and that the implementation of the warrant issued against him may exclude him from the scheduled elections on 21 February 2016. The Applicant then asked that his Application be subjected to the expedited procedure and that the Court take interim measures.

LEGAL ISSUES

- *Should this Application be admitted to the expedited procedure while the Applicant is on the run?*
- *Should interim measures be taken to this effect?*

DECISION OF THE COURT

The Court found that there is no particular urgency for the admission of this case to the expedited procedure and rejected the claim as unfounded.

Moreover, on the provisional measures the Court held that the analysis of the subject-matter of the dispute as well as that of the facts and law relied on by the Applicant do not reveal any reason which might justify the taking of provisional measures.

Consequently, the Court dismissed the motion for interim measures.

RULING OF THE COURT

I, the undersigned Honourable Justice Jérôme Traoré, Presiding Judge in the Panel that is examining the present case;

Having regard to Articles 59, 66, 79, 80 and following of the Rules of procedure of the Court;

Whereas by Application filed at the Registry of the Community Court of Justice, ECOWAS on 3rd November 2015, Mr. Hama Amadou, a citizen of Niger Republic, who is represented in the case by Maître Amadou Boubacar, lawyer registered with the Bar in Niger, introduced an action on human rights violation against the Republic of Niger.

Whereas by separate process filed the same day he solicits that the Court should take series of provisional measures, as well as admitting the case to an expedited procedure, pursuant to Article 59 of it Rules.

Facts

From the facts as related in the initiating Application, as well as the Memorial in defence, it could be deduced that within the framework of an investigation on the findings the Nigerian Police of the existence of a Network of Human Traffickers in children between Benin Republic, Niger and Nigeria, a judicial investigation was ordered by the Chambers of the State Prosecutor in the ***Tribunal de Grande Instance de Niamey***.

Subsequent investigations led to the arrest of many suspects, among whom was the wife to Plaintiff/Applicant, who was at that time the President of the National Assembly in Niger.

While taking into cognisance his quality as an MP, at the time of the incriminated acts, the Public Prosecutor forwarded a request to Government, seeking the removal of Plaintiff/Applicant's parliamentary immunity. A favourable reply was given to the request on 27th July 2014, by the Bureau of the National Assembly;

By supplementary indictment dated 15th September 2014, the Public Prosecutor sought leave from the Dean of Investigating Judge to open a judicial investigation against Hama Amadou on charges of complicity in child trafficking, being in possession of fake official documents, and using fake documents.

In this regard, the writ of summons issued by the investigating Judge could not be served on the indicted person, because he had already fled the country, thus, obliging the examining judge to issue a warrant of arrest against him on 25th September 2014.

On the Application seeking the submission of the case to expedited procedure

Whereas in support of his initiating Application of 27th August 2014, Plaintiff/Applicant claims that the Bureau of the National Assembly in Niger has illegally removed his Parliamentary Immunity, thereby making him open to a warrant of arrest to be issued against him, by the Investigating Judge in charge of the case for which he was standing trial.

Whereas he claims that the enforcement of preparative measures taken within the examination of the case could have worsened the violation of his rights, thereby leading to his arrest, with the ultimate motive of excluding him from participating in future elections slated for 21st February 2016.

Whereas the Republic of Niger sought the rejection of the Application made by Plaintiff/Applicant, arguing that the warrant of arrest referred to was issued only after Plaintiff/Applicant chose to run away from the justice system of his country, unlike his other co-indicted persons.

Whereas the Republic of Niger further argued that by issuing the warrant of arrest in a criminal matter, against a run-away Plaintiff/Applicant, the judge in the national court of Niger did not act in a way as to be likely interpreted to mean a violation, or a threat of a possible violation of fundamental rights, which may justify the urgent intervention of the ECOWAS Court of Justice.

Whereas under Article 59 of the Rules of procedure of the Court the President can, exceptionally, approve a request by a party for submitting a case to expedited procedure, when the particular urgency imposes that the Court should examine such a case within the shortest time - limit.

Whereas in human rights procedure the particular urgency that is likely to justify the admission of a case to expedited procedure must proceed from the existence of a special ground justifying the examination of the case within the shortest possible period, either to bring to an end a manifest violation of Plaintiff/Applicant's fundamental rights, or to prevent the risk of an imminent violation of his fundamental rights.

Whereas in the instant case, Plaintiff/Applicant tries to argue that the particular urgency as enshrined under the above – referred provision proceeds from the fear of the enforcement of a warrant of arrest issued against him is likely to deprive him of his right to participate in the elections slated for end of February 2016.

But, whereas the simple invocation of likely consequences of the enforcement of a warrant of arrest, whose illegality is not proven cannot suffice to justify the existence of an imminent violation of the fundamental rights of the run-away Plaintiff/Applicant;

Whereas moreover, it can be deduced from the unchallenged writs filed by the Defendant State that the warrant of arrest under reference had already been effectively enforced since 14th November 2015.

Whereas in these circumstances of contestations, there is need to note that the existence of a particular urgency justifying the admission of the instant case to an expedited procedure is not established, and, consequently, the Application seeking the submission of the case to an expedited procedure is rejected, as it is ill-founded;

On the Application seeking provisional measures

Whereas Plaintiff/Applicant solicits from the Court, to take the following provisional measures against the Republic of Niger, pursuant to Article 79 of the Rules of the Court:

- An **order** on the Defendant State to abstain from taking any measure that would prevent Plaintiff/Applicant to participate in the Elections slated for 21st February 2016;

- An **order** on the Defendant State to abstain from taking any measure aimed at enforcing the warrant of arrest issued against him;

- An **order** on the Defendant State to suspend, without delay all actions on the trial initiated against him, in disregard for his Parliamentary Immunity;

- An **order** on the Defendant State to inform the Honourable Court on any future measures to be taken, to give effect to the present Order.

Whereas in its Memorial filed at the Registry of the Court on 1st December 2015, the Defendant State did not argue against this order sought;

Whereas pursuant to the combined effects of Articles 79 and 80 the President of the Court can order provisional measures, by way of postponement, when the measures appear to be justified, in regard to the subject-matter of the case, the circumstances establishing the urgency, as well as the pleas-in-law made by Plaintiff/Applicant, in support of his Application;

Whereas after careful analysis of the subject-matter of the case, as well as the facts of law invoked by Plaintiff/Applicant do not make any ground appear, that is likely to justify taking such provisional measures;

Therefore, it behoves the Court not to do justice to such claim;

Whereas further, there is need to reserve any pronouncement as to costs, pursuant to Article 66 of the Rules of the Court;

FOR THESE REASONS

The Court,

Adjudicating on an Application seeking to submit a case to an expedited procedure, and an Application seeking provisional measures, and in last resort:

- **Rejects** the Application seeking the admission of the case to expedited procedure, and provisional measures;
- **Orders** the continuation of the procedure;
- **Reserves** its pronouncement as to costs.

- **Hon. Justice Jerome TRAORE** - *Presiding;*

Assisted by **Athanase ATANNON (Esq.)**- *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON THURSDAY, 3RD DAY OF DECEMBER, 2015

SUIT NO: ECW/CCJ/APP/09/14
RULING NO: ECW/CCJ/RUL/10/15

BETWEEN
KHADIJATU BANGURA & 179 ORS. - *PLAINTIFFS*

AND
THE REPUBLIC OF SIERRA - LEONE - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE MICAH WILKINS WRIGHT** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **GARBER MAURICE (ESQ.)** *AND*
   AJOMO IBUKUN (ESQ.) - *FOR THE PLAINTIFF*
2. **OSMAN I. KANU (ESQ.)** - *FOR THE DEFENDANT*

- Violation of the Plaintiffs human rights -Default judgment -Elongation of time to file Defence -Stay of proceedings

SUMMARY OF FACTS

The Plaintiffs filed a case before the ECOWAS Court of Justice on 30th June 2014, on the allegations that the Defendants had violated their right to receive salary arrears, pension, and terminal benefits owed to them. They therefore sought for the Court to order the Defendants to pay certain amounts of money owed them with accrued interest, and also pay damages. They alleged that upon the 1st Defendant's liquidation of Sierra National Airlines, its Airport Authority inherited equipment and machines from Sierra National Airlines on the condition of absorbing 73 of its workers. Thereafter, that the 1st Defendant effected payments on them and subsequently calculated the terminal employment benefits and severance pay for them. That they were unsatisfied with the proposed settlement and as a result took the Defendants to their national court.

LEGAL ISSUES

1. *Whether the Court should grant the application for default judgment filed by the Plaintiffs?*

2. *Whether the Court would admit the Defendants statement of defence lodged after the time limit provided under Article 35 of the Rules of the Court?*

3. *Whether the proceedings before the national court will effect a stay of proceedings before the ECOWAS Court of Justice?*

DECISION OF THE CASE

1. *The Court granted the Plaintiffs motion to withdraw the Application for Judgment in Default of a Defence.*

2. *The Court rejected the objection for the Defendants Defence to be filed and ruled that due to the circumstances of the case, the legal time provided for under Article 35 of the Rules of Court does not constitute an impediment for the Defendants Defence to be admitted as properly filed by the Defendants.*

3. *The Court declared inadmissible the objections raised by the Defendants for stay of proceedings because the initiating application were filed pursuant to Articles 9 and 10 of the 1991 Protocol on the Court as amended.*

RULING OF THE COURT

The Court thus constituted delivers the following Ruling:

Having regard to the ECOWAS Revised Treaty of 24th July 1993 on the Economic Community of West African States;

Having regard to the Protocol of 6th July 1991, and the Supplementary Protocol of 19th January 2005 on the ECOWAS Court of Justice;

Having regard to the Rules of the ECOAWS Court of Justice, of 3rd June 2002;

Having regard to the Universal Declaration of Human Rights of 10th December 1948;

Having regard to the UN Convention against torture and other cruel, inhuman, or degrading treatments or punishments of 10th December 1984;

Having regard to the African Charter on Human and Peoples' Rights of 27th June 1981;

Having regard to the initiating Application filed by the above-mentioned Plaintiffs/Applicants on 2nd June 2014;

Having regard to the Memorial in defence, filed by the above-mentioned Defendants, on 27th January 2015;

Having regard to the annexure, filed in the case file;

Having regard to the Report submitted by the Judge Rapporteur;

Having regard to the submissions made by Counsels to the parties, during their appearance at the hearings;

Facts and procedure

Having regard to the exhibits filed, in the present procedure, which revealed that during the course of the year 2005, the National Commission of Sierra - Leone on privatisation proposed the liquidation of *Sierra National Airlines Ltd,* to the Government of Sierra Leone;

On 5th April 2006, the said liquidation was ordered by the Government; and this decision was adopted by the Parliament on 26th September 2006. Following this adoption, the Sierra-Leone Airports Authority inherited equipment and machines, which belonged to the *Sierra National Airlines,* on the condition that the former shall absorb 73 workers of the latter.

On 2nd August 2010, the State of Sierra - Leone effected payments to the Plaintiffs/Applicants, while insisting that each of the beneficiaries shall sign a document prepared for that purpose.

On 24th September 2010, the Ministry of Labour and Social Security calculated the terminal employment benefits, and the severance pay due to the Plaintiffs/Applicants, former workers of the *Sierra National Airlines Ltd,* and got a figure of 17.177.644.816, 00 Leones.

In August 2012, while feeling not satisfied with the settlement that was proposed to them, Plaintiffs/Applicants decided to take the defendants to court, in Sierra-Leone.

In December 2013, owing to the delay in the judicial procedure, Plaintiffs forwarded a correspondence to the President of Sierra- Leone, on their claims, but to no avail.

On 30th June 2014, Plaintiffs filed a case dated 2nd June 2014 at the Registry of the Community Court of Justice, ECOWAS, and sought from the Court, the following reliefs:

- A declaration that Defendants have violated their rights, notably their rights to draw salary arrears, pension, and terminal benefits due and owed them, in total disregard for the provisions of the

African Charter on Human and Peoples' Rights (articles 5, 7, 14 and 15), the Universal Declaration of Human Rights (article *23,* paragraph 3) and the Constitution of Sierra - Leone of 1991(articles *20,* 21and23, paragraph), which guarantee human dignity, the right to fair hearing, the right to own property and the right to work in equitable and satisfying conditions;

- Consequently, an order that Defendants should pay them the understated amounts of money:
  - Le 17.177.644.816, 00 together with accrued interests;
  - Le 722.755.265, 74 together with accrued interests, as allowances due and owed them by the Sierra-Leone Airports Authority;
  - Le 230.428.235 together with accrued interests, calculated from October 2009, till date, as compensation for the contributory pension to the NASSIT, which is due to, and owed some of them;

Enjoin Defendants to respect the instant laws of Sierra - Leone, by paying them the sum of 24.900.000 USD, which represents the counterpart funding of the defunct *Sierra National Airlines Ltd,* which is due and owed them;

- An order on Defendants, to pay each of them, the sum of one million USD, as damages, and further order Defendants to bear all the costs.

By Application dated 6th August 2014, which was filed on 24th September 2014, at the Registry of the Court, the above- mentioned Plaintiffs/Applicants sought from the Court, a default Judgment, against the Defendants;

As Defendants were informed on the above-mentioned relief, sought in the instant case, on 6th August 2014, Defendants forwarded a correspondence to the Registry of the Court, on 19th August 2014, in which they plead for further elongation of time, to enable them file their defence;

On 5th December 2014, Plaintiffs/Applicants reiterated their request, seeking a default Judgment;

On 27th January 2015, the Defendants filed their Memorial in Defence, which was received on 30th January 2015, at the Registry of the Court;

As to form

1. On the request seeking a default judgment

At the court hearing of 11th February 2015, Plaintiffs reiterated their request seeking to obtain a default judgment, against the Defendants.

However, the Court notes that at the hearing of 14th April 2015, Plaintiffs/ Applicants plaid down this claim.

Hence, it is right for the Court, to accede to their request to withdraw this relief.

2. ***On the objection raised, owing to the lateness in filing the Memorial in defence***

At the hearing of 14th April 2015, Plaintiffs/Applicants argued the rejection of the Memorial in defence filed by Defendants, on the grounds that such filing was at variance to the spirit and letters of Article 35 of the Rules of procedure of the Court, because it was not done within the stipulated one month time -limit that followed service of the initiating Application on them;

Defendants opposed to this objection, claiming that the lateness observed in the filing of their defence was due to a case of *force majeure;*

They indeed further explained that following the outbreak of the Ebola scourge, which hit three West African countries, among which was Sierra - Leone, they were faced with great challenges in communicating with the outside world. Public utilities, including the postal services were paralysed, while flight connections with Freetown were suspended.

The Court notes indeed, that the outbreak of the Ebola epidemics has really perturbed the functioning of public utility services in the countries that were ravaged by the scourge, and that Plaintiffs/Applicants, in a correspondence dated 14th August 2014, brought this happening, and its attendant effects to the attention of the Court, and pleaded with the Court for elongation of time-limit;

The Court further notes that considering the arguments made by Defendants, and owing to the circumstances of the case, the legal time-limit provided for, under Article 35 of the Rules of the Court does not constitute an impediment to admitting the defence as filed by Defendants, in the instant case, in the interest of a good administration of justice.

Therefore, it follows that the objection raised by Plaintiffs should be rejected.

3. On the request for a stay of proceedings

Defendants sought a stay of proceedings from the Court, on the grounds that a case between the two parties, with the same subject-matter, as in the instant case, was still pending before the national courts of Sierra - Leone, and that it would be inequitable, to open parallel proceedings before this Court; they further claimed that the *Sierra National Airlines* was still under compulsory liquidation, and that it is in the interest of a good administration of justice, to stay proceedings against it, while awaiting the end of the liquidation process.

The Court notes that Plaintiffs are right under the law, in opposing the arguments by defendants, when they (Plaintiffs) counter argue that their initiating Application was filed, pursuant to Articles 9 and 10 of the 1991 Protocol on the Court, as amended, which provide, substantially that access to the Court is open to anybody, who is a victim of human rights violations that occur in any ECOWAS Member State, without necessarily exhausting local remedy.

Thus, it follows that the request seeking stay of proceedings, as made by Defendants, should be rejected, and declared as inadmissible;

In furtherance to this, there is need to invite Counsels to the parties in the case, to argue their case, as to the merit.

4. As to costs

The Court adjudges that it is necessary, at this juncture, to reserve its determination as to costs, pending the decision on the merit of the case, pursuant to the provisions of Article 66 of its Rules;

FOR THESE REASONS

The Court,

Sitting in a public hearing, in a first and last resort, and after hearing both parties, in a human rights violation matter,

As to form

- **Approves** Plaintiffs' motion to withdraw their request seeking a judgment by default, to be entered by the Court, against the Defendants;

- **Rejects** the objection raised by Plaintiffs, grounded on the lateness of the defence filed by defendants;

- **Declares** inadmissible the objections raised by Defendants, notably their application for a stay of proceedings;

- **Invites** the parties to argue their case in the merit;

- **Reserves** its determination, as to costs.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding;*
- **Hon. Justice Micah Wilkins WRIGHT** - *Member;*
- **Hon. Justice Yaya BOIRO** - *Member.*

Assisted by **Tony ANENE-MAIDOH (Esq.)** - *Chief Registrar.*

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