African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411

In the Applications for intervention by Wilson Barngetuny Koimet and 199 others and Peter Kibiegon Rono and 1300 others in the matter of African Commission on Human and Peoples' Rights v Republic of Kenya

Order, 4 July 2019. Done in English and French, the English text being authoritative.

Judges: BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, and ABOUD

Recused under Article 22: KIOKO

The Court had in a merits judgment held that Kenya had violated the Charter in relation to the Ogiek Community. The Court declared the Applications for intervention inadmissible as, under the Rules of Court, individuals were not allowed to join ongoing proceedings.

Procedure (joinder, 4; intervention, 14-16)

I. Brief background

1. On 26 May 2017, the Court delivered its judgment on merits in an Application filed by the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") against the Republic of Kenya (hereinafter referred to as "the Respondent State"). In its judgment, the Court found that the Respondent State had violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") in its relations with the Ogiek Community of the Greater Mau Forest.

2. The Court reserved its determination on reparations while permitting the parties to file submissions on reparations. The parties have filed their submissions on reparations and pleadings were closed on 20 September 2018. The matter is currently under deliberation by the Court.

3. On 16 April 2019, the Court received two Applications: the first Application was filed by Wilson Barngetuny Koimet and 119 others, being residents of Amalo, Ambusket and Cheptuech in the Respondent State and the second Application was filed by Peter Kibiegon Rono and 1300 others, being residents of Sigotik, Nessuit, Ngongongeri, Kapsita and Marioshoni also being locations within the Respondent State. (hereinafter these

individuals will collectively be referred to as "the Applicants").

4. Given that the two Applications deal with the same subject matter and are requesting similar reliefs, to wit, whether the Applicants can be allowed to intervene in the present case, the Court holds that it will deal with both Applications at the same time.

II. Subject matter of the Applications

A. Facts of the matter

5. In the Application filed by Wilson Barngetuny Koimet and 119 others, the Applicants aver that they are the registered owners of land in Amalo, Ambusket and Cheptuech since 1958. It is their further averment that their lands fall within the Greater Mau Forest Complex, which was the subject matter of the case between the Applicant and the Respondent State.

6. In the Application filed by Peter Kibiegon Rono and 1300 others, the Applicants state that they are residents and legal owners of parcels of land in Sigotik, Nessuit, Ngongongeri, Kapsita and Marioshoni. They further state that their lands are part of the land that formed the dispute between the Applicant and the Respondent State before this Court.

7. In both Applications, the Applicants raise the following issues:

i. The Court's Judgment of 27 May 2017 is likely to affect their interests as owners of land within the Greater Mau Forest Complex even though it was delivered without according any of them an opportunity to be heard.

ii. Members of the Ogiek Community misled the Court and obtained the Judgment of 27 May 2017 through fraud and concealment of material facts, for example, that some members of the Ogiek Community have over the years sold their land to non-Ogiek, including the intended intervenors.

iii. The Court's Judgment on merits has disadvantaged and prejudiced them since the Court made findings without according them an opportunity to be heard.

iv. The Court's Judgment on reparations is likely to irreparably and fundamentally violate their rights, especially if it is made without hearing them.

v. It is in the interests of justice to allow the Applicants to join the present case since this would enable them to protect their rights.

B. The Applicants' prayers

8. The Applicants pray the Court to order:

"1. THAT this matter be certified as urgent and service be dispensed with in the first instance.

2. THAT this Honourable court be pleased to enjoin the applicants herein as interested parties in this matter.

3. THAT this Honourable court be pleased to make any order and or give any directions as it may deem just and fair in the interests of justice."

9. The Court observes that although there are two Applications, the reliefs sought by the Applicants are framed exactly as reproduced above in both Applications.

III. Admissibility of the Applications

10. The Court notes that the issue for determination is whether or not the Applicants' claims are admissible. In resolving this issue the Court must determine whether or not the Charter, the Protocol, the Rules and other applicable rules permit the granting of the prayers made by the Applicants.

11. The Court observes that Article 5(2) of the Protocol provides as follows: "When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join."

12. The Court notes that Article 5(2) of the Protocol is reiterated in Rule 33(2) of the Rules which provides as follows: "In accordance with article 5(2) of the Protocol, a State Party which has an interest in a case may submit a request to the Court to be permitted to join in accordance with the procedure established in Rule 53 of these Rules."

13. The Court further notes that Rule 53 of the Rules provides as follows:

"1. An application for leave to intervene, in accordance with article 5(2) of the Protocol shall be filed as soon as possible, and in any case, before the closure of written proceedings.

2. The application shall state the names of the Applicant's representatives. It shall specify the case to which it relates, and shall set out:

a. The legal interest which, in the view of the State applying to intervene, has been affected;

b. The precise object of the intervention; and

c. The basis of the jurisdiction which, in the view of the State applying to intervene exists between it and the parties to the case.

3. The application shall be accompanied by a list of the supporting

documents attached thereto and shall be duly reasoned

4. Certified copies of the application for leave to intervene shall be communicated forthwith to the parties to the case, who shall be entitled to submit their written observations within a time-limit to be fixed by the Court, or by the President if the Court is not in session. The Registrar shall also transmit copies of the application to any other concerned entity mentioned in Rule 35 of these Rules-
5. If the Court rules that the application is admissible it shall fix a time within which the intervening State shall submit its written observations. Such observations shall be forwarded by the Registrar to the parties to the cases who shall be entitled to file written observations in reply within the timeframes fixed by the Court.
6. The intervening State shall be entitled, in the course of oral proceedings, if any, to present its submissions in respect of the subject of the intervention."

14. From the totality of the above provisions, it is clear that neither the Protocol nor the Rules provide a mechanism permitting a third party, which is not a State party, to intervene in on-going proceedings. Additionally, it is also clear that even where States are permitted to intervene in on-going proceedings, this has to be done before the close of pleadings — Rule 53(1) of the Rules.

15. The Court wishes to observe that the genesis of the case between the Commission and the Respondent State lies in an Application that was filed before it on 12 July 2012. Before that, a communication had been lodged before the Commission on 14 November 2009. As earlier pointed out, the Court's judgment on merits was delivered on 26 May 2017. From the time the judgment on the merits was delivered, to the time the Applicants lodged their Applications for intervention, a period of one (1) year and eleven (1 1) months elapsed. It is also notable that a period of six (6) years and eight (8) months elapsed between the time the case was filed before the Court to the filing of the Applications for intervention. The Court takes judicial notice of the fact that the litigation between the Commission and the Respondent State has continued to generate media attention within the Respondent State such that its subsistence can safely be assumed to be common knowledge, at least within the Respondent State particularly in the areas where the present Applicants reside. Against this background, the Applicants have not proffered any explanation for the delay in filing their Applications.

16. Consequently, the Court, bearing in mind the provisions of the Protocol and the Rules, holds that there is no basis for admitting the Applications for intervention and accordingly dismisses them.

IV. Costs

17. The Court recalls that in terms of Rule 30 of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs." In the present case, the Court, decides that each party shall bear its own costs..

V. Operative part

18. For these reasons
The Court
By a majority of Nine (9) for, and One (1) against (Judge Bensaoula dissenting):
i. Declares that the Applications are inadmissible;
On costs
ii. Orders that each party shall bear its own costs

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Dissenting opinion: BENSAOULA

1. I reject in its entirety the operative part and the grounds of the order made by the Court with regard to the application filed by the applicants Wilson Barngetuny Koimet and 119 others and Peter Kibiegon Rono and 1300 others.

2. It should be noted that the Court in considering the inadmissibility of the Application on the basis of Article 5(2) of the Protocol on the pretext that only a State Party which considers to have an interest in a case can submit an Application to the Court to intervene and not individuals, misinterpreted the article referred to above and completely far from the spirit of the text and principles that the Charter defends.

3. Indeed, on reading Article5(2) of the Protocol:

- In its paragraph 1 the legislator determined the entities that have a standing to seize the Court citing them as:
- The Commission, the State Party that seized the Commission, the State Party against which a complaint has been lodged, the State Party of which the national is a victim of a violation of human rights and African Inter-Governmental Organizations.
- But in paragraph 2 this right of referral is also granted to the

State Party which considers itself to have an interest in a case pending before the Court within the context of an application because it has not itself seized the court and having an interest in a matter that an individual or a State may have started.

- In its paragraph 3 the legislator also gives *locus standi* of referral to the Court to individuals and NGOs with this condition referred to in article 34(6) of the Protocol concerning the declaration.

The reflection of the Court goes in the direction or if the legislator had wanted to grant the right to intervene to individuals and NGOs, it would have explicitly stated it in paragraph 3 as it was in article 5(2) Protocol.

It is clear that the Court's interpretation in its judgment of this section is erroneous and even contrary:

- With respect to the principles upheld by the Charter.
- Regarding the very essence of the text.
- To its jurisprudence.
- And to comparative law

Principles of the Charter

Indeed, it remains inconceivable that many of the principles enacted by the Charter such as equality before the law, protection by law, recourse to courts competent to defend rights, applied by the court are flouted by an article of the Protocol!

A restricted reading of Article 5(3) would have as immediate effect non-equality between the State and the individual, a non-protection of this individual and the refusal of *locus standi* to the same individual the right of appeal to a court of competent jurisdiction in. human rights within the context of an application.

Regarding the essence of the text

If in its paragraph 1 the legislator determined the quality of applicants before the court and that of the interveners, in its paragraph 2 it goes in the same direction to determine the quality of individuals and NGOs for this same referral. Although this paragraph does not explicitly mention the right to intervene in relation to individuals and NGOs, it follows from the very logic that intervention is a recourse granted to a third party who has an interest in a matter pending before the Court and cannot be excluded from individuals and NGOs that may also have an interest in intervening in a matter or rights related to applicants' allegations in the pending matter would have been flouted or could be violated.

Its jurisprudence

4. It is unequivocal that in its past case law the Court has already

ruled on this point of law in these terms:
"By letter dated 13 June 2011, the Pan African Lawyers Union ("PALU") applied to the Court for leave to intervene as an *amicus curiae* and at its twenty-fourth ordinary session, the Court granted PALU the request" (Application 004-2011, *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*).

Thus, in granting PALU's application, the Court explicitly recognizes the right of NGOs and individuals to intervene before it as participants. Therefore, intervention is not reserved exclusively to States.

Comparative law

- Article 36 of the European Convention on Human Rights, as amended by Protocol 14 (in force since 1 June 2010), reads as follows:

"1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings".

- The second type of intervention, provided for in Article 36(2), concerns *" any High Contracting Party which is not a party to the proceedings",* but this is not an acquired right: it is the President of the Court who is responsible for authorizing the intervention of this person "in the interest of the proper administration of justice". The initiative can come from either the President of the Court or (in almost all cases) from the person concerned. Since Article 36(2) makes no distinction between natural and legal persons, NGOs naturally fall within the scope of this provision.

On this point the Court could have, instead of completely removing individuals and NGOs from the right to intervene in application of its interpretation of Article 5(2) of the Protocol, used its discretion and declare, for example, inadmissible for lack of interest (essential condition) or for having been filed late granting intervener status to the applicants which would have been more appropriate to the principles of the Charter.

Comparative Jurisprudence:

5. I will cite the references of certain decisions taken in respect of the admissibility of interventions such as the ECHR, the

case of *Lambert and others v France* (Application 46043/14). Intervention of the Human Rights Clinic (NGO) as a third party in the proceedings pursuant to Articles 36(2) of the European Convention on Human Rights and Rule 4(3) of the Rules of Court of the European Court of Human Rights.

- *Tahsin Acarv v Turkey* (preliminary issue), [GC], 26307/95, ECHR 2003-VI: Amnesty International (on whether to strike the Application off the role and on the effectiveness of appeals).
- *Blokhin v Russia* [GC], 47152/06, ECHR 2016: Centre for the Defense of People with Intellectual Disabilities (NGOs) (on how to treat minors with disabilities in conflict with the law);

Regarding Rule 53 of the Rules

6. Articles 8 and 33 of the Protocol clearly specify that "The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before ….The Court shall draw up its Rules and determine its own procedures."

7. In application of the articles cited above, the African Court on Human and Peoples' Rights in Rule 53 devoted to Intervention has only confirmed the erroneous reading of Article 5(6) of the Protocol by insisting in the 6 paragraphs that make up this article that only the State has the *locus standi* to seize the court in the context of an intervention procedure.

8. Therefore, to use this ground as source to further strengthen its position in the order subject of the opinion does not contribute in any way to strengthen the legal basis of its position and that review of this article of this rule would be more in harmony with the principles of the human rights defended by the Court.

9. It is clear from reading the judgment that the Court has cited all the conditions of Article 5(2) of the Protocol repeated in Rule 33(2) and 53 of the Rules in its analysis of those provisions. It passes from one condition to another without recognizing the quality of interveners on the basis of its interpretation of article 53(1) of the Rules that only the State can do it and lingering on the time of deposit of the request for intervention before the closing of the procedure as too late whereas declaring lack of quality as the first and fundamental condition would have been enough. This abundance undermined the clarity and legal basis of the judgment.