

ECW/CCJ/JUD/03/07 Moussa Léo Kéita v. Mali

In the Community Court of Justice of the Economic Community of West African States (ECOWAS)

Holden at Bamako, Mali

This, 22nd day of March 2007

Between

Mr. Moussa Léo Kéita - Applicant

And

The State of Mali - Defendant

Composition of the Court

Hon. Justice Hanisne N. Donli - President

Hon. Justice Awa Nana Daboya - Member

Hon. Justice Dirarou S. Sidibe - Member

Athanase Atannon, Esq. - Registrar

Counsel to the Parties

Maître Mamadou Konaté, Jurifis Consult - For the Applicant

Mr. Moussa Kodio (Judge) Directorate General of the State Department for Disputes - For the Defendant

Judgment

1. On 15 May 2006, Moussa Léo Kéita, a retired civil servant whose address is BP 757, Bamako Mali, filed an Application at the Court of Justice of ECOWAS. The Application was registered at the Registry of the Court on 12 July 2006.
2. This Application was accompanied by the following exhibits:
 - An extract from the 11 May 1969 issue of the *Washington Post* newspaper containing some specimens of artifacts belonging to the Applicant and an evaluation of the artifacts as done by James M. Silberman, valued at \$65,960.
 - Certification No. 9/Dir.R/MN dated 24 November 1972, from the National Museum of Mali relating to the collection of artifacts in the custody of Moussa Léo Kéita.
 - A letter from Moussa Léo Kéita dated 4 September 1972, addressed to Mali's Minister of Foreign Affairs and Cooperation; another, dated 9 January 1978 addressed to the same Authority; and then that of 3 August 1989, for the same purposes. Through these letters, the Applicant sought to reclaim his collection of artifacts.
3. The Application as well as the exhibits accompanying it was served on the Secretariat of the Directorate General of the State Department for Disputes on 11 September 2006, by the Chambers of Diawoye Kanté Esq., a Court Bailiff at Bamako.
4. Through this Application, Moussa Léo Kéita set out his submissions that he was the owner of a collection of artifacts from his country, which he exhibited at the Embassy of Mali, to make Mali more known to the Americans at the time he was representing his country as Ambassador Extraordinary Plenipotentiary from 1965 to 1969. According to the Applicant, the collection contained 110 articles originating from all the regions of Mali. These artifacts were evaluated in 1965 at 65,960 US Dollars by an expert known as Silberman of the Smithsonian Institute, USA.

- 5.** Posted to Egypt in 1969 in the same capacity, he had to leave his materials at the Embassy. In 1972, he demanded these materials, but was met with a refusal from the Government of Mali, the latter challenging the ownership of the materials.
- 6.** After several complaints in 1972, 1978 and 1989, the Government of Mali finally consented to acknowledge the Applicant's ownership of the artifacts and to hand them over to him.
- 7.** But as time went on, they became damaged by bad weather and exposure at the basement of the Embassy.
- 8.** That was why he asked for remedy from the State of Mali. The latter maintained total silence and did not react to his request. He also had to approach the Judiciary of his country, to seek reparation for the injury suffered.
- 9.** Having taken note of the damage done to his materials, and faced with the tacit refusal of the Government of Mali to grant him remedy, Moussa Léo Kéita decided to bring his case before the Administrative Chamber of the Supreme Court, by Application dated 19 April 1999.
- 10.** The State of Mali believed it was not under an obligation to appear before this Court, in the course of the preliminary procedure, and was ordered by the Judgment of 8 March 2001 to pay the sum of 30 million CFA Francs as damages to the Applicant. Four years after the issuing of this Order, Mali had not paid the amount ordered.
- 11.** Rather, it contended having filed on 9 April 2001, before the Administrative Chamber, an Application for revision of the Judgment ordering the payment of damages. By another Judgment dated 21 October 2001, the Administrative Chamber of the Supreme Court of Mali reduced the initial amount of 30 million CFA Francs to the sum of seven (7) million, for the following reasons:
- That Mali, which had its own currency, joined the CFA Zone in 1985.
 - That there was also a devaluation of the CFA Franc in 1994.
- 12.** Even then, the latter amount was not paid to the Applicant, who thought that he had to bring his case before the Community Court of Justice for the purposes of remedying the wrongs caused him.
- 13.** Reacting to the Application of Moussa Léo Kéita, Mali's State Department for Disputes rejected his allegations, claiming that if the items had remained in the basement of the Embassy of Mali, it was because Moussa Léo Kéita did not possess an official document from the State of Mali for repatriating his collection, whereas American legislation required such document for the movement of the artifacts on its territory.
- 14.** Moreover, the said State Department explains that in reality, the Applicant had abandoned his collection in the basement of the Embassy and did not entrust it to anybody's care, not even to his successor.
- 15.** It was therefore by mere chance that the collection was discovered in 1971 during a mission of the Inspectorate General of the Administrative, Financial and Economic Affairs, at Washington.
- 16.** Thus, after an auditing, the administrative authorities handed over the said items to the Applicant against an acknowledgement of receipt.
- 17.** As regards the Application, the State Department for Disputes concluded its views that it should be purely and simply rejected on the grounds that:
- The Court of Justice of ECOWAS is incompetent to adjudicate on the case, having regard to Articles 9 and 10 [sic] of the 2005 Supplementary Protocol on the said Court.
 - The defect of status of the Applicant.

18. A first transit session of the Court on this Case was held at Bamako on 2 October 2006. On preliminary grounds, the issue of competence of the Court was put forth by the State Department for Disputes, which asked for a written Reply from the Applicant. The latter applied for adjournment for that purpose. The Case was thus adjourned to 4 October for a Rejoinder from the Applicant, who on that date, was represented by a lawyer.

19. From the Application instituting proceedings, founded on the remedying of wrongs caused him by the State of Mali, the resultant Rejoinder opted for the violation of Human Rights which had allegedly been committed by the State of Mali against the Applicant.

Appreciation of the Arguments of the Parties

20. In his Application instituting proceedings, Moussa Léo Kéita does not found his claims on a precise text of law nor on the positive law of the Community. He simply invoked the wrongs caused him by the State he had loyally served in the course of his whole active life. He deemed himself victim of an injustice caused him by the said State and asked for reparation.

21. The Reply of the State of Mali sets forth, for the first time, issues of law in that it raises the question of incompetence of the Court to adjudicate on the dispute submitted before it, and on the point that, it refuses to recognise Moussa Léo Kéita as being qualified to appear before the Community Court.

22. The said Rejoinder of the Applicant (who was represented by a lawyer during the first hearing of the Court) shifted the terrain of the legal debate to that of violation of Human Rights as provided for in Articles 9 and 10 [sic] of the 2005 amended Protocol.

A) As to the Competence of the Court of Justice of ECOWAS

23. The Application instituting proceedings does not talk about the personal or material competence of the Court. Only the Reply, the Rejoinder, and the Reply to the Rejoinder do mention it. Hence, one needs to ask whether the Court of Justice of ECOWAS can adjudicate upon the Application thus filed, or else, whether it has to take account of the supplementary Application deposited at the hearing of the 4 October 2006 in the form of a Rejoinder from the Applicant.

24. The reply to this question can be found in Article 37 of the Rules of the Court of Justice, which provides as follows:

a) In reply to a rejoinder a party may offer further evidence. The party must, however, give reasons for the delay in offering it.

b) No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

25. The Defendant's Reply and his further Reply to the Applicant's Rejoinder conclude upon the inadmissibility of Moussa Léo Kéita's appeal, as drawn from the incompetence of the Court, within the meaning of Articles 9 and 10 [sic] of the 2005 Supplementary Protocol, which provide as follows:

New Article 9: Jurisdiction of the Court

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.*

Article 10: Access to the Court

1. *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;*

26. Thus, as regards material competence, the applicable texts are those produced by the Community for the needs of its functioning towards economic integration: the Revised Treaty, the Protocols, Conventions, and subsidiary legal instruments adopted by the highest authorities of ECOWAS. It is therefore the non-observance of these texts which justifies and founds the legal proceedings brought before the Court.

From this standpoint, the Court has to determine the extent to which the Application instituting proceedings makes a demand on the application of *these* texts. In reality, it makes no demand on any Community text.

Moussa Léo Kéita complains of being a victim of injustice committed by his State, and of the malfunction or poor running of the justice system of his country. In this perspective, the Community Court of Justice is powerless: it cannot adjudicate upon the decisions of the national courts. Within the meaning of the aforementioned Article 10 [sic], the Community Court of Justice can only intervene when such courts or parties in litigation expressly so request it **within the strict context of the interpretation of the positive law of the Community**. Hence, the objection raised by the Defence regarding the *ratione materiae* competence of the Court must be declared admissible.

B) As to the Status of the Applicant

27. Moussa Léo Kéita is a natural person in Private Law, an ordinary citizen of the State of Mali.

28. Having regard to Articles 9 and 10 [sic] cited above, the persons qualified to appear before the Court of Justice of ECOWAS - in other words, the persons who have the status to bring cases before the Court, are:

- The Member States of ECOWAS
- The Institutions of ECOWAS
- The Staff of ECOWAS
- Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies
- Individuals and corporate bodies victim of violation of Human Rights
- The national courts or the parties concerned, when the Court has to adjudicate on preliminary grounds upon the interpretation of the Treaty, Protocols or Rules

29. Can Moussa Léo Kéita justify his existence with respect to these persons and thereby enter into one of the above-mentioned groups? Yes, in the sense that Moussa Léo Kéita is a natural person in Private Law.

30. But does this status empower him to bring an action, such as this, before the present Court? Unlike other international courts of justice, such as the European Court of Human Rights, the Community Court of Justice, ECOWAS, does not possess, among others, the competence to revise decisions made by the domestic courts of Member States; it is neither a court of appeal nor a court of cassation (*cour de cassation*) vis-à-vis the national courts, and as such, the action of the Applicant cannot thrive.

31. All the same, doesn't the fact that a court, adjudicating in two contradictory decisions, awarding compensation for damages to a party, and thereafter reducing the said compensation, constitute a sufficient ground for requesting for a just and fair reparation? This is what the Lawyer for the Applicant, **Me Mamadou**, affirms when he calls to mind, in his Memorial in Defence, the issue of Human Rights.

C) Competence of the Court as to the Pleas-in-law drawn from Human Rights Violation

32. The Protocol on the Community Court of Justice, ECOWAS as amended, sets out in its Articles 9(4) and 4(d) [sic], the competence of the Court to entertain matters dealing with the violation of Human Rights (cf. supra).

Article 19 of the 1991 Protocol on the Court of Justice of ECOWAS provides that: (...) *The Court shall examine the dispute before it in accordance with the provisions of the Treaty and its Rules of Procedure (...).*

Article 4(g) of the Revised Treaty stipulates that: *THE HIGH CONTRACTING PARTIES, in pursuit of the objectives stated in Article 3 of the Treaty, solemnly affirm and declare their adherence to the following principles:*

g) recognition, promotion, and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;

33. The Court consequently affirms its competence to adjudicate upon questions dealing with the violation of Human Rights. All the same, should one specify the particular human right which has been violated? The African Charter on Human and Peoples' Rights has enshrined rights, which the International Community today agrees to classify into civil and political rights on one hand or economic, social and cultural rights on the other hand, not forgetting other rights regarded as being of the third and fourth generations. Each of these rights have been so described as to bring

out clearly their content, import, and extent of enjoyment so that any act of their violation may be qualified or not as a 'Human Right violation'.

34. In the instant case, the Counsel for the Applicant does not pin point any given right; he does not specify the rights whose violation may have been committed by the State of Mali. At most, he talks of the behavior and attitude of the said State.

35. However, the Court rather deduces from the decision made by the Supreme Court of Mali that, what we have at hand is a case of damages suffered by the Applicant as it regards his artifacts, and for which he was granted reparation. The Court also holds that the said reparation granted by the Supreme Court of Mali which may not have been to the satisfaction of the Applicant constitutes a different issue. In any case, the Court has already responded that it has no jurisdiction to adjudicate upon decisions made by the domestic courts of Members States of the Community.

36. Hence, even if the Community Court of Justice were competent to adjudicate in cases on Human Rights violation, the Applicant has not indicated any proof of a characteristic violation of a fundamental Human Right; and in the absence of any such violation, the Application must be declared inadmissible.

37. All the same, the Applicant's situation as a retired civil servant gives the Court the possibility of exempting him from bearing the costs.

Holding

38. For these reasons

39. The Community Court of Justice, ECOWAS, in a public sitting, after hearing both Parties, in a last resort;

Having regard to the Revised Treaty of ECOWAS;

Having regard to Protocol AP1/7/91 on the Court;

Having regard to the January 2005 Supplementary Protocol;

Having regard to the August 2003 Rules on the Court;

Having regard to the 1948 Universal Declaration on Human Rights;

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

The Court,

Declares that it is incompetent to adjudicate upon the decision made by the Supreme Court of Mali, as to violation of Human Rights;

Declares the Application inadmissible, in regard to an infringement which may be characterised as a fundamental Human Right violation;

Exempts the Applicant from costs;

Done at Bamako on the 22nd day of March 2007

The following Members of the Court participated in the deliberation:

Hon. Justice Hanisne N. Donli - President

Hon. Justice Awa Nana Daboya - Member

Hon. Justice Dirarou S. Sidibe - Member

Athanase Atannon, Esq. - Registrar