

COMMUNITY COURT OF JUSTICE,

ECOWAS

COUR DE JUSTICE DE LA COMMUNAUTE, CEDEAO

TRIBUNAL DE JUSTICA DA COMUNIDADE DA CEDEAO



10, DAR ES SALAAM CRESCENT,

OFF AMINU KANO CRESCENT,

WUSE II, ABUJA – NIGERIA

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

**HOLDEN AT ABUJA IN NIGERIA**

**THIS 13TH DAY OF JULY 2015**

**SUIT NO°ECW/CCJ/APP/19/15**

**Judgment N° ECW/CCJ/JUG/16/15**

**BETWEEN**

**Congrès pour la Démocratie et le Progrès (CDP)**

**APPLICANT**

**AND**

**Burkina Faso**

**DEFENDANT**

**BEFORE THEIR LORDSHIPS**

**-Hon. Justice Yaya Boiro**

**Presiding**

**- Hon. Justice Hamèye Founé Mahalmadane**

**Member**

**- Hon. Justice Alioune Sall**

**Member**

**Assisted By Maître Aboubacar Diakité**

**Registrar**

## **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 Republicain (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 ;
- SankaraSidnoma ;
- Yaméogo Noel ;
- DaboueBadama ;
- 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 No. 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 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 Covenant 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 2001ECOWAS 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 guaranteed.”*

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 absolute 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 amendment 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 unacceptable.

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. Lithuania*, 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 Concerning 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 No. 005-2015/CNT amending Law No. 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 No. 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**

**Hon. Justice Hamèye Founé Mahalmadane**

**Hon. Justice Alioune Sall**

**Assisted by Maître Aboubacar Diakité**

**Registrar**