ECW/CCJ/JUD/01/04 Afolabi Oladjide v. Nigeria

In the Community Court of Justice of the Economic Community of West African States (ECOWAS) Holden at Abuja, Nigeria

Between Mr. Olajide Afolabi - Plaintiff
v.
Federal Republic of Nigeria - Defendant

Composition of the Court

Hon. Justice H.N. Donli - President

Hon. Justice Awa Daboya Nana - Member

Hon. Justice Aminata Malle - Member

Assisted By

Tony Anene-Maidoh - Chief Registrar

Counsel to the Parties

1. **Mr. Alex Ikay Molokwu - for the Plaintiff**

2. **Mr. R. J. K. Ehicheoya - for the Defendant**

Judgment of the Court

Facts of the Case

1. On August 9, 2003, the Applicant, Mr. Afolabi, a businessman, concluded arrangements with his customers in Benin Republic wherein, he agreed with them to purchase goods and take delivery of them on the date stated.
2. He set out on his journey and upon reaching the Seme border, between the Republic of Nigeria and Benin Republic, he found that the Border had been ordered closed, by the Federal Ministry of Foreign Affairs through a press statement that the Federal Government of Nigeria had deemed it necessary to close the border until the condition precedent for the opening of the border had been fulfilled by the Republic of Benin.
3. The Applicant, Mr. Olajide Afolabi could not proceed on his journey to Benin Republic despite his pleas to the security agents at the border about his firm commitment pursuant to his contractual obligation in Benin Republic, he was turned back.
4. Having had heavy loss for the said failure to fulfill his bargain, he as a Community citizen, filed the action in this Court of Justice, pursuance of Article 9 of the Protocol A/P.1/7/91 and Article 56 (now Article 76) of the Revised Treaty.
5. Article 15 (2) of the Revised Treaty stated that the status, composition, powers, procedure and other issues concerning the Court of Justice shall be set out in a Protocol relating thereto.
6. Also Article 9 of Protocol A/R1/7/91 of the Community Court of Justice relating to the competence of the Court provides thus:

"-"1. The Court shall ensure the observance of law and the principles of equity in the interpretation and application of the provision of the Treaty.

2. The Court shall also be competent to deal with disputes referred to it, in accordance with the provisions of Article 56 of the Treaty, by Member States or the Authority, when such disputes arise between the Member States or between one or more Member States and the institutions of the Community on the interpretation or application of the provisions of the Treaty.

3. A Member State may, on behalf of its nationals, institute proceedings against another Member State or Institution of the Community, relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the dispute amicably have failed.

4. The Court shall have any power conferred upon it, specifically by the provisions of this Protocol."
7. With the requirements boldly stated in Article 9 of the said Protocol the Applicant, Mr. Olajide Afolabi, being aggrieved instituted this action, claiming the relief stated hereunder:

(a) Declaration that the unilateral closure by the Federal Republic of Nigeria of her border with Benin Republic from 9th to 15th of August, 2003, is unlawful and a breach of Article 3(2)(d)(iii) and Article 4 (g) of the Revised Treaty of the Economic Community of West African States (ECOWAS) dated 24th July, 1993, and to which Nigeria is a signatory.

(b) A Declaration that closure by the Federal Republic of Nigeria of her border with Benin Republic from the 9th to 15th of August, 2003, is a violation of the Plaintiff's Right to Freedom of movement of his person and goods, Rights of egress and ingress as guaranteed by the Revised Treaty of the Economic Community of West African States, 1993, the Protocol on the Free Movement of Persons and Goods and Article 12 of the African Charter on Human and Peoples' Rights adopted by the Federal Republic of Nigeria in 1990.

(c) A Mandatory Order of injunction restraining the Federal Republic of Nigeria from further closure of her border with Benin Republic.

(d) Costs of N5,000,000.00 (Five Million) Naira against the Applicant/ Defendant, the Federal Republic of Nigeria"

Preliminary Objection and Submission of Counsel

8. The Respondent upon the receipt of the claim so filed against it, by the Applicant/Plaintiff, filed a Preliminary Objection dated November 27, 2003 and stated the terms of the objection thus: ***"An order striking out the suit for want of jurisdiction. And such further order or other orders as this Honourable Court may deem fit to make in the circumstance"***
9. In support of the Preliminary Objection, are documents marked A, and C, amplifying the terms in their written submission which brought out more explicitly the concerns of the Applicant and their positions regarding the propriety of the suit in question. He emphasized on the strict application of Article 9 (3) of the Protocol that gives the Court the competence to adjudicate upon the matter.
10. The Learned Counsel to the Respondent Mr. J. K. Ehicheoya, submitted in the Reply to the written submission of the Respondent that their objection was not on *locus standi* but the jurisdiction of the Court to entertain the suit filed by Olajide Afolabi, the Applicant.
11. He reiterated that the Applicant has no right of direct access to this Court. He further submitted that the right of access is not the same as right or interest in the subject matter in dispute and lack of access to Court is not only in relation to lack of *locus standi*. He relied on **Faloye v. Omoseni (2001) 9 NWLR (PT717) 190; Lawal v. Oke (2001) 7 NWLR PT (711) 88.**
12. He further contended that under Article 9 of the Protocol, the only instance a national will have access to the Court is when his Country brings action on his behalf. He sealed his argument when he punctuated the argument of the Respondents submission by stating that no specific provision of the Protocol vested the Court with powers to adjudicate in respect of suits filed by nationals or individuals except as provided by Article 9 of the Protocol.
13. On the point relating to inherent jurisdiction, he emphasized that jurisdiction is statutory and specifically conferred. He submitted that the Court cannot under inherent jurisdiction exercise powers not otherwise expressly stated in the Treaty or the Protocol. He urged the Court to strike out the suit for want of

jurisdiction with substantial cost.
14. The Reply to the Preliminary Objection by the Learned Counsel to the Applicant Mr. Alex Ikay Molokwu brought out novel points for consideration, in view of the complex situation of the suit. Learned Counsel opposed the Preliminary Objection and set out the pleas of facts and law dated November 28, 2003 with particular reference to the use of the word "may" in Article 9 (3) of Protocol A/P.1/7/ 91. He submitted that the use of the word "May" in Article 9 (3) was directory and not mandatory.
15. He stated that a situation where a party is instituting action against his Country, the Member State cannot represent the party because the Member State cannot be both the Plaintiff and the defender and that the provision of Article 9 (3) will only apply as it is where the Member State is not his country.
16. In his written submission dated February 12, 2004, Learned Counsel, relying on Article 9 (3) submitted that the Applicant has right of appearance in this Court to litigate the claim.
17. He argued that the issue which borders on jurisdiction is predicated upon the legal issue of *Locus Standi* as to whether the Plaintiff has a *Locus Standi* to maintain this action.
18. He argued that the issue of Article 9 (3) of the Protocol calls for the interpretation of the word "may" as to determine whether the peculiar case of the Applicant is outside the ambit of the provision or open to interpretation in favour of the Respondent. He referred to the canons of interpretation and the case of **R v. Banbury** (*inhabitants*) **1834 lA & E 136 at 142** wherein Parke J ruled: *"The rule of construction is* ***"to intend the Legislature to have meant what they actually expressed."***
19. According to Lord Green M.R. There is one rule of construction for statutes and other documents; it is that you must not imply anything in them which is inconsistent with the words expressly used. He further referred to **Re A Debtor N° 335 of 1947, 1948 2 All ER 533 at 536.**
20. On the meaning of the word 'May', Learned Counsel submitted that "May" always mean permissive or enabling expression and referred to**Bakare v. The Attorney General of the Federation & 2 ORS (1990) 5 NWLR (PART 152) page 516 at 545 paragraphs E-G** held that: ***"AIthough the word may always means 'May' it is a permissive or enabling expression... Also as pointed out in Halsbury's Laws of England 3rd Edition Volume 433 the use of the word 'may' prima facie conveys that the authority which has the power to do such act has an option either to do it or not to do it"***
21. He submitted that the interpretation adopted by the Respondent would amount to shutting out the Applicant with legitimate claim from pursuing his entitlement before a Court. He submitted that this is the appropriate Court as a Community citizen.
22. On the issue of jurisdiction, he submitted that jurisdiction is usually a creation of statute. He urged the Court to hold that the Court has jurisdiction to hear the case.
23. On the issue of whether only Member States may maintain an action before the Court, Learned Counsel submitted that the provision of Article 9(3) of the Protocol did not specify that only Member States have access to the Court and referred us to Article 34
× 1. Only states may be parties in cases before the Court. 2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative. 3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.
of the Statute of the International Court of Justice which specified that only Member States have access to the Court.
24. He urged the Court to hold that since Article 9 (3) of the Protocol did not specify clearly as stated in Article 34, the framers of Article 9 of the Protocol intended to exclude such inclusion of the words in Article 9(3) of the Protocol.
25. On the application of Article 9 (1) of the Protocol regarding ensuring the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty, Learned Counsel brought into focus that this Court possessed an inherent jurisdiction to take such action as may be required in order to ensure settlement of the matters in dispute.

Deliberation

26. The Court examined all the issues canvassed by the parties including the salient points in relation to the Preliminary Objection herein.
27. We are not in doubt that on the point arising from the application of Article 9 (1) of the Protocol with particular reference to the application of equity, the well stated principle of law that cannot be faulted is that equity follows the Law but not otherwise.
28. The position stated above being so apt, that equity cannot stand where there is a law on the matter and that inherent jurisdiction confers no jurisdiction on the Court, the argument on the application of Article 9 (1) is devoid of substance.
29. Consequently, the question which we have now to determine in order to resolve the controversy in the Preliminary Objection is whether this Court has jurisdiction to adjudicate on the substantive matter instituted by Mr. Olajide Afolabi, the Applicant, in this case.
30. Let it be stated that the question of competence is a serious one and the Courts which guard their jurisdiction jealously would always examine an application of this nature carefully as not to allow arbitrary ousting of its powers.
31. In clear terms the only question for us to determine herein is whether this Court has jurisdiction to adjudicate on the suit instituted by the suit instituted by the Applicant.
32. 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 the law and upon fulfillment of any condition precedent to the exercise of jurisdiction.
33. The position of law which cannot be overstated is that any defect the in competence is disastrous, for the proceedings are nullities, no matter how well conducted and decided, the defect is extrinsic to the adjudication. In the instant case the action was filed by the of Applicant who is an individual and the contention of the respondent on is that only a Member State may file the action on his behalf.
34. This contention brings us to examine Article 9 (3) of the Protocol of the Court. Looking at the cardinal principles of interpretation in ore relation to the said Article, does it call for resort to interpretation? When does the Court fall back on the rules of interpretation particularly the interpretation of Treaty?
35. In a study by **FITZMAURICE** of the decisions of the International Court of Justice involving the interpretation of Treaties, his analysis detects five principles as follows:

i) Actuality (or textual interpretation)
ii) Natural or ordinary Meaning;
iii) Integration (or interpretation of the treaty as a whole);
iv) Effectiveness (*ut res magis valeat quam pereat*);
v) Contemporaneity (interpretation of texts and terms in the light of their normal meaning at the date of the conclusion) see Law of Treaties by McNair at page 364.
36. A very full statement on the first and second principles enunciated above from Cross on Statutory Interpretation, third edition by John Bell and George Engle in the Sussex Peerage Case page 50 stated: ***"... if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense... But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting that intention to call in aid the ground and cause of the making of the statute ..."***
37. This point leads us to consider the principles of another rudiment of interpretation called the Mischief Rule. This rule allows for a departure from the literal rule when the application of the statutory words in the ordinary sense would be repugnant to or inconsistent with some other provision in the statute or even when it would lead to what the Court considers being an absurdity. The usual consequence of applying the mischief Rule is that words which are in the statute are ignored or words which are not there are read in.
38. Apart from absurdity that the expounding of the legislation may produce in applying the literal rule, it

may be contradictory and inconsistent therefore the aid of the rule will apply. In ***Mitchell v. Torup (1786) Park 227 at 233 Parker CB*** said: ***"in expounding Acts of Parliament where words are expressed, plain and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the Act by reason of some subsequent clause, from whence it might be inferred that the intent of the Parliament was otherwise."***

39. The Learned counsel to the Applicant in this case made it clear that the provision of Article 9 (3) was clear and unambiguous which was conceded by Learned Counsel to the Respondent. However, the contention of the Applicant, when he placed premium on the word 'May' was that the word in its literal and natural sense is directory and not mandatory.

40. His further contention that where the Applicant is suing his Member State, to give the words their natural connotation would produce a situation where the Member State is the Plaintiff and the Defendant.

41. He continued that such a situation would not be legally possible. He then called for the aid of the principles of equity in Article 9 (1) of the Protocol. On the other hand, Learned Counsel for the Respondent urged the Court not to resort to redrafting of the provision that is clear that only Member States are parties before the Court by the provision of Article 9(3) of the Protocol.

42. In this regard, reference was made to Article 34

× 1. Only states may be parties in cases before the Court. 2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative. 3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

of the Statute of the International Court of Justice wherein it specified that **"Only States may be parties in cases before the Court."**For him, where in Article 9(3) it is not so stated, such provision may not be read into the provision of the Article in question, as the Applicants Counsel tried to do in this case.

43. The Applicant also referred to Article 9(1) of the Protocol to ensure the Respondent is not shut out before this Court, when he has a substantial claim against the Respondent.

44. Learned Counsel made a point on the application of the principles of equity to the case. What is the import of Article 9(1) of the Protocol in respect of the application of the principles of equity to aid a situation that is not within the perimeters of the provision of Article 9(3) of the Protocol?

45. Article 9(1) of the Protocol states: ***"I. The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty."***

46. It is trite law that, Equity aids the vigilant and follows the law and acts as shield not a sword. In Black's Law Dictionary Seventh Edition, the word 'equity' is defined thus:

"1. Fairness; impartiality; evenhanded dealing....."

2. The body of principles constituting what is fair and right; natural law;

3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances. The judge decided the case by equity because the statute did not fully address the issue..."

Findings of the Court

47. By the question put to this Court, the Respondent seeks for an Order to strike out the suit instituted by the Applicant on the grounds that the suit having been filed by a national of the Federal Republic of Nigeria against the Federal Republic of Nigeria as a Community citizen in pursuant to Article 9(3) of the Protocol of the Court, that requires only a Member State to institute action on behalf of its nationals, gave course for this proceedings and the arguments as to whether the Court lacks jurisdiction to hear and determine the suit.

48. The said Article states that ***"A Member State may, on behalf of its nationals, institute proceedings against another Member State or institution of the Community...***" Are these words ambiguous or obtuse as to warrant the resort to the rules of interpretation?

49. The use of the word **'May'** connotes an elective/permissive stance that would enjoin the State to exercise its discretion either to act on behalf of the nationals or not. As it was put in the case of **Becke v. Smith, Parke B** (*as he then was*) said; ***"it is a very useful rule, in the construction of a statute, to***

adhere to the ordinary meaning of the of words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further"

50. In 1992, **Lord Griffiths, in Pepper v. Hart (1993), All ER 42 at 50** stated: ***"The days have long passed when the Court adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Court now adopts a purposive approach which seeks to give effect to the true purpose of legislation and is prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. In Stradling versus Morgan, a restrictive interpretation of statute was adopted, whereas, in Heydon's case, extensive interpretation was applied to give way for other interpretations."***

51. In **Beck v. Smith, Park B** (*as he then was*) said: ***"It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the word used and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself."***

52. The contracting parties to the Protocol are the Member States of the Economic Community of West African States (ECOWAS). The Court is to collect from the nature of the subject, from the words and from the context of the Protocol, the true intent of the contracting parties, when the provisions of a statute are apt and clear.

53. Would a reasonable man say from reading Article 9(3) of the Protocol that the nationals are *prima facie* excluded from institutingproceedings against Member States? Strictly speaking, when the meaning of the Treaty is clear, it is applied not interpreted. Interpretation is a secondary process which only comes into play when it is impossible to make sense of the plain terms of the Treaty, or when they are susceptible of different meanings.

54. The context of the Article in question, as a whole, being so clear even though giving effect to the words used in their natural and ordinary sense, that is Fitzmaurice principles No. 2 stated in the preceding paragraph, the Contracting parties in our view envisaged only Member States, despite what may look like being harsh on individuals or nationals of the Community.

55. The Court is not here to change the provision of the Protocol but to apply it when it is clear or interpret it when it is abstruse and ambiguous. The Applicant from his application is raising a serious claim touching on free movement and free movement of goods and his rights to challenge an infringement upon his person.

56. What the Applicant's counsel is asking us in the given circumstance relates to his urging us to adopt not a narrower purposive approach, but to hold that the provision if applied as it is would exclude him from pursuing his case before this Court. His reference to Article 9 (1) of the Protocol which has bearing with Article 164 of the Statute of Court of Justice of the European Communities is a general provision which activist judges apply to shape a Statute to define the role of the Court very broadly in the interest of justice. Article 164 provides that ***"the Court of justice shall ensure that in the interpretation and application of this Treaty, the law is observed."*** The Court has applied this provision to extend its review on jurisdiction to cover bodies which were not listed in the Treaty. The provision has also been used to fill in gaps in Treaties but some of the decisions attracted criticisms. We therefore do not want to tow the same line.

57. On the application of equity, the Court commented generally on the is a point supra and in addition the Court now holds that the application of le to the principles of equity in the sphere of international law is unclear. In Cases and Materials on International Law by Martin Dixon & Robert McCorquodale page 45, it is observed that: ***"The fact that tribunals often invoke equity does not necessarily mean that equity is a formal source of law and that it is desirable to apply equity. As stated in Hansbury and Martin on Modern Equity 16th Edition by Jill E. Martin page 27 "Clearly equity may not depart from statute law ...save in exceptional circumstances"***

58. Consequently, the Court rejects the arguments on the application of equity in the instant case for the reasons stated herein.

The Grounds for the Decision

The Decision of the Court

59. The counsel to the Applicant contended that this Court has jurisdiction him to hear the substantive case on the ground of the peculiar nature of the suit wherein the Applicant instituted proceedings against his

State which hitherto would have represented him. Article 9 (3) being unambiguous and requires that the Court gives effect to the plain words or terms of the fine Protocol, irrespective of the fact that it failed to meet the circumstances of the Applicant's case.
60. Finally, every provision of the Community law must be placed in its context and applied or interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof on and to its state of evolution at the date on which the provision in question is to be applied.
61. In the light of all those considerations, the answer to the question submitted to the Court must be that the first paragraph of Article 9(3) of the Protocol is to be applied as meaning that this Court is competent to hear disputes instituted by a Member State on behalf of its nationals against another Member State or institution of the Community and not otherwise, as in the case.
62. By the examination of the said Protocol, the Applicant cannot bring proceedings other than as provided in Article 9(3) of the Protocol. This view proves the point that the Applicant in this case cannot bring the proceedings against his Country or Member State which by law is saddled with the responsibility of instituting proceedings on his behalf.
63. Even though the said Article 9 (3) is not in *pari material* with Article 34
× 1. Only states may be parties in cases before the Court. 2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative. 3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.
of the International Court of Justice Statute, the clear intendment excludes persons not mentioned therein.
64. The Court in answer to the application for striking out the proceedings instituted by the Applicant on October 10, 2003 must grant same. In the circumstance, the Preliminary Objection is upheld based on the consideration above.
65. After examining the arguments of both Learned Counsel and the authorities regarding the issue, the Court states that the issue before it is that of competence to adjudicate on the proceedings institute by the Applicant against the Respondent and not on *Locus standi per se*, which the Applicant's Counsel contended vigorously before us.
66. In the final analysis, the opposition to the Preliminary Objection cannot stand. Consequently, the proceedings instituted by Applicant must fail.

Costs

67. By Article 66 of the Rules of the Court, an order may be made regarding the award of costs. The Court hereby exercises discretion not to make an order as to cost. Costs shall be borne by the parties.

The Operative Part of the Judgment The Court (First Chambers)

Declaration and Decree

68. Consequently the substantive proceedings instituted by the Applicant, Afolabi against the Federal Republic of Nigeria, Respondent, as set hereunder have failed in their entirety;

a) The application wherein the Applicant sought the declaration that the unilateral closure by the Federal Republic of Nigeria of her border with Benin Republic from the 9th to 15th of August 2003 is unlawful and a breach of Article 3(2) (d) (iii) and Article 4 (g) of the Treaty of the Economic Community of West African States (ECOWAS) dated 24 July, 1993, and to which Nigeria is a the signatory; and

b) A declaration that the closure by the Federal Republic of Nigeria of her border with Benin Republic from the 9th to 15th of August 2003, is a violation of the Plaintiffs rights to freedom of movement of his persons and goods, rights of egress and ingress as guaranteed tee by the Revised Treaty of the Economic Community of West African d States 1993, the Protocol on the free movement of persons and goods and Article 12 of the African Charter on Human and Peoples' adopted by the Federal Republic of Nigeria in 1990.

c) A mandatory order of injunction restraining the Federal Republic on of Nigeria from further closure other borders with Benin Republic;

d) Costs of N5,000,000.00 (five Million) Naira against the Applicant/Defendant, the Federal Republic of Nigeria.
69. Costs shall be borne by the parties.

The Court strikes the proceedings for lack of jurisdiction to hear the parties on the suit.

Members of the Court who participated in the judgment.

Hon. Justice H. N. Donli - Presiding
Hon. Justice Awa Daboya Nana - Member
Hon. Justice Aminata Malle - Member
Judgment Read in Open Court at Abuja, Nigeria,

On 27th April 2004

Hon. Justice Hansine Napwaniyo Donli *(President)*

Tony Anene-Maidoh
(Chief Registrar)