ECW/CCJ/JUD/03/05 Jerry Ugokwe v. Nigeria

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS) HOLDEN AT ABUJA, NIGERIA ON THE 7TH OCTOBER, 2005

SUIT No. ECW/CCJ/APP/02/05

JUDGMENT No. ECW/CCJ/JUD/03/05

BETWEEN

HONOURABLE DR. JERRY UGOKWE - ***Plaintiff***

V.

THE FEDERAL REPUBLIC OF NIGERIA - ***Defendant***

2. HONOURABLE DR. CHRISTIAN OKEKE *(Applicant for intervention)*

COMPOSITION OF THE COURT

HON. JUSTICE HANSINE N. DONLI - PRESIDING

HON. JUSTICE AWA NANA DABOYA - MEMBER

HON JUSTICE EL MANSOUR TALL - MEMBER

ASSISTED BY Mr. Tony Anene -Maidoh - Chief Registrar

COUNSEL TO THE PARTIES

Wale Adebayo, Kayode Ajulo - for the Plaintiff

Ayodele Akande - for the Defendant

Fedelie A. Obateru - for the Intervener

Judgment of the Court

1. The Applicant, Hon. Dr. Jerry Ugokwe, a Nigerian Member of Parliament, resident at Zone B - Block 22, Flat 1, Apo Legislative Quarters, at Abuja - Nigeria, is represented by his counsel Adebayo Adewole Esq., living at 1st Floor Maim Court - Plot 252 A, Herbert Macaulay Way, Central Business District, Abuja - Nigeria.
2. The Defendant, the Federal Republic of Nigeria, admitted in the person of the Hon. Attorney General and Federal Minister of Justice, is represented by Mr. Ike Chukwu Maledo of the Office of the Attorney General and Minister of Justice - Federal Secretariat, Maitama, Abuja; and by Akande Ayodeji Esq.
3. The intending Intervener, Hon. Justice Okeke, living at No. 8 Eket Close, Area 8, Garki, Abuja - Nigeria, has as his counsel, Jude Okeke Esq., the latter having chosen as residence the same address as his client, i.e. No. 8 Eket Close, Area 8, Garki, Abuja - Nigeria.
4. All the Parties have appeared in Court with their respective lawyers, or were duly represented. It shall be appropriate to adjudicate upon their submissions, after all the Parties involved in the case have duly been heard just like the lawyers, all the parties have acted in accordance with Article 28 (3) of the Rules of the Court.

Summary Presentation of the Facts

5. By Application dated 9th May, 2005, lodged at the Registry of Court on 12th May, 2005, and served on all the opposing Parties, the Applicant asserts having been declared elected as a Member the House of Representatives of Idemili North, South Federal Constituency of Nigeria, on the 16th of April, 2003 by the Independent National Electoral Commission; that not satisfied the said declaration, Dr. Christian Okeke filed a petition (an appeal) at the Governors' and House of Representatives Tribunal (Electoral Tribunal) at Awka to contest the declaration that Jerry Ugokwe was duly elected by the Independent National Electoral Commission.
6. The aforementioned Tribunal, before which the matter was brought, delivered its judgment on 30th November, 2004, annulling the election of the Applicant. The latter filed an appeal dated 10th December, 2004 against the Decision of the Tribunal; the Appeal Court, by its Judgment of 5th May, 2005, dismissed the Appeal and confirmed the earlier decision against which the appeal was filed. This is the reason why the Applicant, Dr. Jerry Ugokwe has brought the case before the ECOWAS Community Court of Justice that his right to fair hearing has been infringed upon by the Electoral Tribunal and by the Federal Appeal Court of Nigeria.
7. By a second Application dated the same day, on 9th May, 2005, and lodged at the Registry of the Court on 12th May, 2005, the Applicant asked for a special interim Order for restraining the Independent National Electoral Commission (considered hereby under the person of the Federal Republic of Nigeria) from invalidating the certificate of attestation declaring him elected as Member of the National Assembly for his electoral constituency; nor grant the said certificate to another person; nor, take any steps towards replacing him with another person, under the pretext of executing any decision pending the determination of the case. Furthermore, he is seeking an order preventing the Federal National Assembly from relieving him of his position as Member of the said Assembly representing Idemili North Zone of the constituency.
8. The lawyer of the Defendant, Mr. Ayodeji Akande Esq., filed an Application dated 13th June, 2005, whereby he raised the issue concerning the incompetence of the Court to adjudicate on the matter.
9. The Counsel of the Intervener, Mr. Jude Okeke Esq., filed his Application dated 1st June, 2005, applying to be joined to the suit as a defendant. He stated therein that on 12th and 16th April, 2003, he stood for office for the election of Members of the House of Representatives to the Idemili North Zone, in the South Federal Constituency of the Anambra State of Nigeria; that he won the elections, and that he received from the hands of the Electoral Officer in charge of the constituency in question, a certificate of return proving that he had been elected; but that this certificate of return was later invalidated by the Permanent Representative of the Electoral Commission for Anambra State. That he was replaced by the latter, whereas the Applicant was not a candidate to the said elections.
10. The Intervener contends that he filed an appeal at the Elections Tribunal against the cancellation of his certificate of attestation, and against his replacement by the Applicant; that the Tribunal decided the case in his favour by declaring him elected; but that, not satisfied with the Judgment delivered by the Elections Tribunal, the Applicant filed an appeal at the Court of Appeal on the same matter. That the Court of Appeal delivered a Judgment confirming the decision of 5th May 2005; that it is against this particular decision of the Federal Court of Appeal, which sat at Enugu, that the Applicant appeared before the ECOWAS Community Court of Justice - to make claims against the Federal Republic of Nigeria. That, following these facts, the Attorney General and Minister of Justice of Nigeria addressed a letter to the Speaker of the House Representatives, informing him of the order not to swear him in until the case is fully settled by the Community Court of Justice, ECOWAS.
11. In not being served as a Party to the present case, the Intervener submits being affected by the filing of this suit before the Court, and requests to be joined to the proceedings as Intervener-Defendant.

Arguments of the Parties

12. The lawyer for the Applicant, Wole Adebayo Esq., claimed that the Applicant appeared before the Court on the strength of several Articles reflected in its legal document and contained in (i) the Protocols on the ECO WAS Court of Justice, (ii) African Charter on Human and Peoples' Rights (iii) Universal Declaration of Human Rights (iv) Section 36 of the 1999 Constitution of the Federal Republic of Nigeria. He submitted the following grievances:

13. The Federal Republic of Nigeria has infringed upon his right to fair hearing, which is a human right guaranteed by Article 7 of the African Charter of Human and Peoples' Rights, on one hand, and by the Universal Declaration of Human Rights, on the other hand; and finally, turn was by Section 36 of the 1999 Constitution of the Federal Republic of Nigeria.

According to the lawyer, this violation has been committed by the National Assembly of the Federal Republic of Nigeria and the Tribunal, by refusing to grant to the Applicant the right to fair hearing in the Case Concerning Tribunal, **Dr. C. C. Okeke v. Independent National Electoral Commission and Others, No.EPT/AN/NA/6/2003;**

14. The lawyer for the Applicant draws attention to the provisions set out in Article 9 (4) of the Supplementary Protocol, to the effect that ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State"***; as well as to Article 10 (d) which provides that "Access to the Court is open to ... individuals on application for relief for violation of their human rights;..."; as well as to provisions contained in Article 7 of the African Charter on Human and Peoples' Rights, in the Universal Declaration of Human Rights, and in Article 36 of the 1999 Constitution of Nigeria. To buttress the arguments, the Applicant is asking the ECOWAS Community Court of Justice to:

1. Declare null and void, the procedures and the Judgment delivered by the Elections Tribunal and by the Court of Appeal Court of Nigeria;
2. Enjoin the National Electoral Commission not to invalidate his election as a Member of the National Assembly of Nigeria;
3. Enjoin the National Assembly not to proceed to replace him with another person.

From all the foregoing, the Applicant is requesting the ECOWAS Community Court of Justice to consider the various instances of violation, and to grant him relief.

15. In reply to the arguments of the Applicant, the counsel to the Defendant, to fair Mr. Akande Ayodeji Esq., raised a **Preliminary Objection**, describing the Application as misconceived. He cited Articles 9 and 10 of the Supplementary Protocol and made it known that the case in point is an electoral dispute, with another Application still pending before the High Court of Nigeria.

The lawyer to the Federal Republic of Nigeria thus raises the issue of incompetence of the application on grounds of lack of jurisdiction of the Court.

16. The lawyer to the Intervener, Mr. Jude Okeke, observed that the Applicant, Jerry Ugokwe took part in all the proceedings of the Tribunal, and of the Court of Appeal; that he was never deprived of a fair hearing; that the Tribunal of the National Assembly and of the House of Representatives is a legal jurisdictional institution; he relied on the Case Concerning **Al Hajl Aminu Mohammed Dan Bauchi v. Al Haji Usman Matori, No. FHC/J/C5/68/2004**. Equally cited by the Intervener to show the bad faith; the Intervener asserts that the suit filed by the Applicant is vexatious, because it is made with the intention of obstructing his swearing in, whereas he, the Intervener, is the true winner of the election, as confirmed b the Court of Appeal in Nigeria responsible for resolving electoral disputes. That in this regard, the Community Court of Justice is without jurisdiction to adjudicate upon the case.

The Intervener therefore requested to be joined to the proceeding as Intervener -Defendant, and cited to support his Application for Joinder, Article 10(c) and (d) of the Supplementary Protocol which provides as follows:

"(c) Individuals and corporate bodies in proceedings for the determination of the legality of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies; 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;"
Consequently, he urged to join the action as an interested party.
17. To support his argument, the Intervener cites the Case Concerning **ODELEYE V. ADEPEGBA, 2001 5 NWLR PT 706, P33** of the Court of Appeal of Nigeria where it was stated that there is an interest in the action as follows;

There is an interest in the case, whenever;

(a) The examination of a dispute between two parties directly and adversely affects the legitimate rights of a third party or his pecuniary interests; it is within the powers of the Court to allow that party to be joined as an intervener.

(b) A person may be authorised to join a proceeding whenever he deems himself as having suffered a wrong or when he has been wrongfully deprived of something, or when the decision of a court is likely to affect him or infringe upon his rights.

(c) A person is deemed to have an interest in a case, sufficient enough for him to intervene as a party, when it has been established that there exists a connection, a correlation or inter- dependence between the applicant and the case to which the application is related.

(d) A person may be authorised to join a proceeding as a defendant, against the will of the applicant.

(1) When the circumstances surrounding the case oblige the party to be authorised to join the proceedings, in order for the case to be duly examined; or

(2) When the request of the applicant or defendant, as regards the dispute, may not be examined in an efficient and efficacious manner without the involvement of the intervener"

Analysis of the Court

Concerning the Jurisdiction

18. The close examination of the various pleas of action of the parties lead to the questions on whether electoral disputes, which is the main issue at the centre of the litigation, is subject to the legal order applicable to the community. In other words, the Court will delve into the provisions of ECOWAS Treaty, Protocols, Conventions and text relating thereto to examine same so as to know if the Court can adjudicate on issues relating to elections and disputes arising thereof.
19. Research shows that, in the current stage of legal texts applicable to ECOWAS, no provision, whether general or specific, gives the Court powers to adjudicate on electoral issues or matters arising therefrom. However, a dispute having a bearing on other rights of the parties may be referred to in any internal or related dispute relating to electoral issues like the present one. In such an instance, the ECOWAS Court of Justice, in accordance with Article 19 (1) of the 1991 Protocol, and particularly, with reference to Article 38 (1) (c)
× 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: c. the general principles of law recognized by civilized nations;
of the Statute of the International Court of Justice could apply the general principles of law recognized by civilized nations.
20. But the Treaty, which is the fundamental law of ECOWAS, particularly the Protocols relating to the ECOWAS Court of Justice, only invests the Court with specific powers and prerogatives, insisting always on its mandate concerning the observance of law in their interpretation and application.
21. This is why, besides the electoral problem, there are grounds for us to ponder, in a second instance, on the competence of the Court when the Applicant raises the legal plea on right to fair hearing. The right to fair hearing is a human right derived from the concept of fair hearing; in this regard,

"A fair trial is not only seen as an additional instrument for the protection of the rights of defence, largo sensu, but also in a political context, where the legislative and jurisdictional activity, the judicial organization, and even the Judicial Institutions of the Signatory State are subjected to scrutiny, as regards requirements of the Community."

Professor Thierry Arnaux - Cours sur la Protection des Libertés et Droits Fondamentaux (*Course on the Protection of Freedoms and Fundamental Rights*), Montchretién.

22. In arguing from this statement, and as applied to the present case, does the fact that the Nigerian Courts invalidated the election of the Applicant constitute a human right violation? The Applicant argued that he had not been given a fair hearing before the Electoral Tribunal. He appealed to the Court of Appeal which confirmed the earlier decision thereby perpetuating the infringement of his right to fair hearing.

23. In the Case Concerning **Bryan v. United Kingdom, 22 November 1995, paragraph 44**, the European Court held that ***"A fair trial is a right which does no more than enable an aggrieved person to have recourse to a supra national court, so that the one who governs him may be condemned if the proof of a violation of his rights is established; the court must have jurisdiction to examine the points of fact and of law in the case which has come before it, in order that it may reform it..."***

In this particular case, does the ECOWAS Court of Justice have the competence to legally entertain the claims of the Applicant when he requests the ECOWAS Court to declare null and void: (i) the proceedings of the national Courts of a Member State of the Community (Nigeria); (ii) or to enjoin the I.N.E.C. of Nigeria to refrain from invalidating his election; (iii) or still, to enjoin the Federal National Assembly of Nigeria not to relieve him of his position as a Member of Parliament?

24. Article 76-2 of the Revised Treaty and Articles 9,10 and 11 set out the extension of the powers of the Court. But the provisions of all these Articles do concern appeals which are only possible within the following contexts:

a. Appeals against the legality of acts, instruments and other decisions of the Community;

b. Appeals against failings in the obligations of a Member State of the Community;

c. Disputes relating to the interpretation and application of the Treaty and related instruments.

25. For clarity, the Defendant and the Intervener raised a serious issue of lack of competence of the Court to adjudicate on the matter. It is trite law that a judgment given without jurisdiction amounts to a nullity no matter how well detailed or conducted the proceedings are.

26. The bone of contention on the issue of lack of jurisdiction relates to the subject matter of the dispute before the Court. Counsel to the defendant argued that the case concerns an election petition under the domain of the national law and the Court of Appeal of Nigeria which concluded on the rights of the parties. The Court of appeal is the final Court in respect of that matter. On the contrary, Counsel to the Applicant was of the view, based on the strength the facts of the case and the complaint about the contravention of fair hearing, emanating from the election petition that the Court of Justice is jurisdictionally competent to deal with the matter. Learned Counsel relied on the provisions of the Supplementary Protocol to substantiate his argument and urged the Court to dismiss the objection and allow the applicant to proceed with the matter.

27. The Court has examined the documentation filed and exchanged by the parties particularly the record of proceedings from the Courts in Nigeria in respect of the adjudication of the matter together with the claims before the Court. There is no doubt that the subject matter relates to an Election matter which ordinarily is subject to the jurisdiction of the National Court. On this note and after a thorough examination of the claim of the Applicant that the clarity of the issue for determination is magnified for the proper understanding that the complaint is in respect of the non compliance with fair hearing in the adjudication of the case before the Election Tribunal and the Court of Appeal that heard the suit.

28. In Articles 9 and 10 of the Supplementary Protocol of the Court regarding the Jurisdiction of the Court or Competence and Access to the Court, these paragraphs of the articles show what areas the competence of the Court extend to.

In paragraph 4 of Article 9 of the Supplementary Protocol, it states:
"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.

In paragraph (d) of Article 10, it is stated therein that:
"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....;"
The combined effect of the provisions indicates that any violation of human rights in any Member State may be brought by individuals or corporate bodies before this Court for adjudication.

The thorny question to pose for consideration is whether there was such violation of fair hearing.
29. In Articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provision of Article 4 paragraph (g) of the Treaty of the Community, the Member States of the Economic Community of West African States (ECOWAS) are enjoined to adhere to the principles including 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter.
30. For further clarity, Article 19 of the Protocol of the Court provides that: **"*The Court shall examine the dispute before it in accordance with the provisions of the Treaty and its Rules of Procedure. It shall also apply, as necessary, the body of laws as contained in Article 38 of the Statutes of the International Court of Justice."***
In Article 38 of the Statute of the International Court of Justice, it is provided therein as follows:

Article 38

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."
31. The vital paragraph in the quotation above is paragraph (c) wherein the Court is empowered to apply the general principles of law recognized by civilised nations. In *Les Verts* case 1998, 97 the European Court of Justice per R. Dehousse, held *inter alia* that the European Economic Community is a Community based on the rule of law and that the acts of the Member States shall be reviewed, and measures adopted shall be in conformity with the basic constitutional charter, the Treaty. In the case of Aegean Sea Continental Shelf **(GREECE V. TURKEY) ICJ Reports 1976 at 15-16** the Court applied the provision of Article 38 (1) (c) of the Statute of the International Court of Justice to protect the rights of an individual in

the interim where the rights are infringed upon in accordance with the principles of law recognised in municipal systems, and jurisprudence of the Court. Applying the above authority by the application of Article 38 (1) (c) and (d) of the said Statute and upon the examination of the provision of Section 36 of the 1999 Constitution of the Federal Republic of Nigeria - the municipal law wherein it granted protection to the Right to fair hearing to an individual and so on. The authorities relied upon by Counsel for the parties include, the **ATTORNEY GENERAL AND 2 ORS V.P.L. AAIDEYAN 1989 4 N.W.L.R PART 118 PAGE 646 AT 666;** wherein the doctrine of fair hearing was adumbrated therein.
32. Appealing against the decision of the National Court of Member States does not form part of the powers of the Court; the distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law. And, if the obligation to implement the decision of the Community Court of Justice lies with the national courts of Member States, the kind of relationship existing between the Community Court and these national courts of Member States are not of a vertical nature between the Community and the Member States, but demands an integrated Community legal order. The ECOWAS Court of Justice is not a Court of Appeal or a Court of cassation.
33. From all the pleas in law invoked by the Applicant, i.e. regarding the Court entertaining matters dealing with electoral disputes or the violation of his right in having his election annulled; and furthermore, as to the orders being sought against the execution of the Judgment already made by the Federal Appeal Court of the Member State of Nigeria - the Court is incompetent.

Concerning the Voluntary Application for Intervention

34. The Intervener asserts that he requested to be joined to the proceeding before the present Court, as a Defendant, on the basis of the principle that he had an interest in the case.

In procedural law, having an interest in a case consists of the advantage the Applicant derives from the recognition that the Judge gives to the legitimacy of his claim; the Supplementary Protocol of the ECOWAS Court of Justice also states this principle when in Article 10 (c) and (d) it provides that ***"Individual and cooperate bodies ... may appear before the Court"***;

In general, "interest in an action" is appreciated with reference to the orders sought in the applications of an Intervener possessing an interest in the resolution of the dispute submitted to the court, and when these orders have no other purpose than to support or reject the order by another party" **>TH SESSION 13 JULY, 1994**.
35. In the instant case, the Intervener has sufficient interest in the Application of the Plaintiff, and his interest in the outcome of the dispute appears certain. This is because validating the Applicant's election, if sanctioned by an Order, results *ipso facto* in the invalidation of the election of the intervener's election. The interest manifested by the Intervener resides in the outcome of the suit.
36. In the present case, and according to the principle that the subsidiary follows from the principal; or still, according to the relationship of cause and effect, the Principal Application communicates its condition to the Intervener's application.

Consequently, since the Court does not have the jurisdiction to consider the Principal Application, the Intervener's Application must fail.

Decision of the Court

37. The Community Court of Justice, in applying the legal provisions mentioned above;
38. In adjudicating in a public hearing, after all the parties have been duly heard, in the first and last resorts;

Inform

38. The Court Declares itself incompetent to adjudicate on the principal Application of Jerry Ugokwe.
40. Consequently, the Court dismisses the Application for Joinder of Dr. Christian Okeke and all other similar Applications.
41. The Parties shall bear the costs.

42. Thus pronounced as Judgment at this public hearing, at Abuja on 7th October, 2005.
43. The following Members of the Court participated in the deliberations of the case:

HON. JUSTICE HANSINE DONLI - PRESIDING

HON. JUSTICE AWA NANA DABOYA - MEMBER

HON. JUSTICE EL MANSOUR TALL - MEMBER

MR. TONY ANENE-MAIDOH - CHIEF REGISTRAR

DONE AT ABUJA ON 7TH OCTOBER, 2005