African Court on Human and Peoples' Rights

Fidele Mulindahabi v. Republic of Rwanda

Application No. 007/2017

Separate Opinion appended to the Judgment of 4

July 2019

1- I share the majority opinion regarding the jurisdiction of the Court and the admissibility of the Application.

2- On the other hand, it is my opinion that the manner in which the Court dealt with the issue of "default" goes counter to:
- the provisions of Rule 55 of the Rules,
- Article 28 paragraph 6 of the Protocol,
- its jurisprudence and comparative law.

3- Indeed, Rule 55 of the Rules stipulates:

I. In its paragraph 1 that:

4- "Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all the other documents pertinent to the proceedings".
It is clear under this paragraph 1 of the Rule that the decision to render a judgment in default must meet certain criteria, namely:
- absence of one of the parties,
- failure to defend the case,
- application by the other party,
- notification of the application to the defaulting party,
- communication of other procedural documents

5- The essential element of this paragraph is that the default must be pronounced **"at the request of the other party".** Thus, entering a judgment in default can only be a matter of form but not one of procedure which requires an in-depth discussion on the evidence and a legal basis. However, it does not emerge from

the file record or from the Applicant's prayer that he requested the Court to render a judgment in default.

6- The Court not only inserted its decision to render the judgment in default in the Procedure before the Court section, but also provided no legal basis for this decision to render the judgment in default without the request of the other party, only declaring in its paragraph 15 of the Procedure before the Court that “On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final 45 days extension and that, after that deadline, it would enter a **ruling in default in the interest of justice in accordance with Rule 55 of its Rules…”.** It concludes in paragraph 19 of the same section that cconsequently, “the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules.”

7- The Court makes no reference to the basis of "this interest of justice" or how rendering a judgment in default was fundamental to the Court, especially since such judgments are not subject to opposition or appeal, or how such a decision could refer to Rule 55 of its Rules which does not provide for the said discretionary power.

8- Furthermore, the reference to the *Ingabire* judgment in no way constitutes a basis for this Judgement in default because at no time in the body of the Judgment nor in its operative part was there a question of a judgment in default as no party requested such a judgment, and paragraph 17 referenced declares that "therefore, in the interests of justice, the Court considers this claim for reparation **in the absence of a response from the Respondent State”.**

9- Rendering a judgment in the absence of the defendant is in no way the legal definition of default which, under the terms of the aforementioned Article 55, meets the conditions which must be ascertained by the Court.

10- It is clear, and as mentioned above, that the judgment in default must respond to certain conditions and that the Court is obliged to have a basis for any decision it renders, especially when the decision runs counter to the clear provisions of one of the Rules; that in making such a ruling, the Court breaches the provisions of Article 28 paragraph 6 of the Protocol which obliges it to provide reasons for its Judgements.

II. In comparative law, abundant jurisprudence upholds this reasoning; for example, Judgment of 30 November 1987 in the matter of H. v. Belgium in which the European

Court of Human Rights recognized for the first time the right to reasons for judicial decisions in these terms: “this very imprecision (imprecision of the legal notion of "exceptional circumstances" called for a motivation of the two contested decisions on the point under consideration. Yet, this is confined to taking note of the absence of such circumstances without explaining how the circumstances invoked by the person concerned did not possess an exceptional character (paragraph 53); and in the judgment of 16 December 1992 in the matter of Hadjianastassiou v. Greece, the Court holds that “the obligation to provide reasons constitutes a minimum guarantee, limited to the requirement of sufficient clarity of the reasons on which the judges base their decisions” (translation)

III. **In its paragraph 2,** Rule 55 clearly specifies that "Before acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law.”

It is indisputable that this paragraph 2 establishes other conditions which orientate the Court on the form and substance of the judgment in default that it will render.

- The court must and above all ensure that it not only has jurisdiction,
- But also, that the application is admissible,
- And that the findings are founded in fact and in law.
-

It is therefore incontestable that taking the decision to render a judgment in default requires a clear motivation and cannot in any case rely on a line in the section, Procedure before the Court, disregarding the conditions set forth under Rule 55 cited above.

In my humble opinion, it emerges from a reading of this paragraph 2 of Rule 55 that the judgment in default cannot be rendered if the Court:

- Declares that it lacks jurisdiction
- Declares the application inadmissible,
- Or that the claims are unfounded.

It is clear that on reading the above-mentioned Rule, default is in no way part of the procedure and remains a question of form which the Court has to determine in relation to its jurisdiction, the admissibility and the basis of the claims of the Applicant.

And even if the Court opts to use its discretionary power to take on the case *suo motu* and to rule in default, it cannot do so in view of this point of law - one of the elements of the procedure - and content itself with grounding its decision on the interest of

justice without specifying and explaining how rendering a judgment in default is in the interest of justice.

IV. **In comparative law,** numerous human rights jurisdictions deal with judgment in default as a decision of form which comes well after jurisdiction and admissibility.

Citing only one rendered by the Court of Justice of the Economic Community of West African States on 16/02/2016 – Judgement No. ECW/CCJ/JUGG/03/16, the Court in its Section lll on reasons for the decision, states that: as regards the form, after addressing admissibility of the Application and Jurisdiction, examined the question of **default** against the Republic of Guinea and thereafter, on the merits, addressed the allegations of human rights violations.

And subsequently in its operative part it declares: the Court ruling publicly, in default against the Republic of Guinea, in the matter of human rights violations in the first and last instance, as regards form…(translation)

In so doing, the Court rendered a judgment bereft of legal basis and contrary to the provisions of the above-cited Rules regarding judgment in default, especially as this provision on default does not feature in its operative part.

Bensaoula Chafika
Judge at the African Court on Human and Peoples' Rights