African Court on Human and Peoples' Rights

Akwasi Boateng and 351 others

v.

Republic of Ghana

Application No. 059/2016

Dissenting opinion attached to the Judgment of 27 November 2020.

1. I disagree with the majority decision for two basic reasons:

a) The first one relates to the statement of facts, which has many grey areas.

b) The second relates to the treatment of temporal jurisdiction in which the specific characteristics of the victims and the subject of the dispute were overlooked.

a) On the facts

2. I am of the view that the contradictions observed in the statement of the facts as submitted by the Applicants deserved the Court's attention in terms of further information, interlocutory judgment or simply by granting the Applicants' request for leave to file additional evidence instead of dismissing it on the ground that they did not specify the nature of the new evidence[1].

[1] § 21 – 23 of the Judgment

3. Indeed, it emerges from facts, **not refuted by the Respondent State by the way,** that the Applicants, residents of 7 villages led by 48 chiefs, are an indigenous population of the Twifo area in the Central Region of Ghana. In 1884, that is, during colonial times, a dispute broke out between the Applicants, led by Chief Kwabena Otoo, and the Morkwa community, led by Chief Acwaise Symm. These disputes, according to the Applicants, were settled in 1894 by the Colonial Regional Court of the Gold Coast which ordered the Applicants' Chief to pay compensation or indemnity of two hundred fifty (250,00) pounds to the Court.[2]

4. However, the records do not show "the manner in which this decision was obtained"[3] or what was the effect of such a conviction on the property being claimed. However, the Applicants state that owing to the inability of their Chief to pay the amount imposed, the lands were sold at a public auction on 8 May 1994, which resulted in the violation of their right to property, since neither they nor their descendants can enjoy their lands any longer.[4]

5. **A question arises on this point: How, after Ghana's independence in 1957, can a decision taken during colonial times be enforced through an auction in 1894? This date warranted investigation.**

6. It further emerges from the facts that on 5 May 1894, these lands were fraudulently acquired by another clan led by Chief Morkwa (Respondent in the Application) who sold them to Respondents J. E. Ellis and Emmanuel Wood (paragraph 5), who are businessmen that the Court has exonerated by not considering them as Respondents.

7. However, statements from these persons would have been useful to the Court in ascertaining the veracity of the situation of the disputed lands. It is important to

[2] § 4 of the Judgment
[3] § 4 of the Judgment
[4] § 4 of the Judgment

note, as the Applicants submitted without being refuted by the Respondent State, that they are still on the land and that they are the custodians thereof.

8. In 1964, their new Chief asked for reparations from the Respondent State but nothing was done about it. As a result, they asked for restitution in 1972 but no action was taken. As a result of all these attempts, the Respondent State delegated the civilian branch of the military regime to investigate the allegations of harassment made by the Applicants. The Attorney General was also tasked to investigate the alleged sale of the land.[5]

9. In his report, the Attorney General recommended to the Respondent State to confiscate the land on the ground that he found no evidence of a court judgment ordering an auction of the lands.[6]
   This is another contradiction in relation to some facts stated above, on which the Court could have lingered and requested the parties to file more information.

10. A public hearing was necessary or, failing that, additional information or a judgment for more fairness and justice, especially as the Applicants maintain that they still live on the land that belonged to their ancestors, stating that the land is their main means of subsistence and that the village chiefs are the custodians thereof, not the owners. Besides, to this day, they pay rents and fees to the Regional Lands Commission in Cape Coast."

11. Following these developments, the Respondent State has passed a set of laws whose effect is to confiscate the lands.

[5] § 8 of the Judgment
[6] § 10 of the Judgment

12. In relation to these laws, the Respondent State enacted the State Lands-Hemang Acquisition- Instrument, 1974 (Executive Instrument, 61) on 12 June 1974, vesting a Hundred and Ninety Thousand, Seven Hundred and Eighty Four acres (190,784) of the Twifo-Hemang land to the Respondent State. The Hemang Acquisition Instrument, 1974, a law that was passed shortly afterwards, repealed the initial instrument 61, cited above, and backdated the land acquisition to February 21, 1973.

13. The Hemang Lands (Acquisition) Decree of 1975 (NRC Decree 332), strengthened the legal basis for the acquisition and maintained the date of acquisition of the land as 2 May, 1975.

14. The Hemang Land (Acquisition) (Amendment) Law,1982 was passed seven years later (1989), after the Respondent State had become party to the Charter, amended NRC Decree 332, reducing the area of the land expropriated by the State from 190,784 acres to 35,707.77 acres. According to the Applicants, it also retroceded all the lands expropriated by the Respondent State, but the law was not enacted until after "the enactment of PNDC Law No. 294 repealing Law No. 29 which once again returned the Twifo Hemang lands to the domain of the State".

15. PNDC Law 294 of 1992, which was passed after the Respondent State became party to the Charter denied the Twifo Community access to any legal recourse to reclaim the land. Indeed, Section 3 of the law provides that "A Court or tribunal does not have jurisdiction to entertain an action or any proceedings of whatever nature for the purpose of questioning or determining a matter on or relating to the lands, the acquisition or the compensation specified in this Act".

16. These laws, especially those of 1989 and 1992 passed after the Respondent State had ratified the Charter, were worth careful examination for a good appreciation of the facts and the submissions made.

b) Temporal jurisdiction and the specificity of the dispute.

17. The Court holds that the laws enacted by the Respondent State to compulsorily acquire the disputed lands constituted an instantaneous act and furthermore, came into force before the Respondent State became a party to the Charter and Protocol and therefore, the Court did not have temporal jurisdiction to hear the matter.

18. There is no doubt that the Respondent State became a party to the African Charter on Human and Peoples' Rights on 1 March, 1989, to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 16 August, 2005. There is also no doubt that the Respondent State on 10 March, 2011 deposited the Declaration provided for in Article 34(6) of the Protocol, by which it accepted the Court's jurisdiction to receive applications from individuals and non-governmental organizations.

19. While it is clear that the laws of 1974 and 1975 were passed before the Respondent State became a party to the African Charter on Human and Peoples' Rights, the laws of 1982 (passed 7 years later) and 1992 were passed after the Respondent State became a party to the Charter, contrary to the Court's statement.[7] At the time of the passing the law of 1992, the State was bound by the obligations imposed by the Article 14 of the Charter, including the protection of the rights of peoples, minorities and indigenous populations[8], especially as it does not contest the facts alleged by the Applicants.

[7] § 51 of the Judgment
[8] §§ 2 and 3 of the Judgment

20. The Applicants pray the Court to order the repeal of all instruments, including PNDC Law No. 294, which vested the Twifo Hemang Community Lands to the Respondent State.

21. It is clear that any law passed is an instantaneous act in material terms but has lasting effects in time. Having become party to the Charter, the Respondent State was obliged to find a lasting solution to the Twifo community dispute to protect their rights that guarantee them dignity, identity as well a social, cultural and economic wellbeing by ending the spoliation of their land started by the colonial government.

22. By promulgating the laws of 1982 and 1992 (which only reinforced and approved previous laws) after becoming party to the Charter, the Respondent State not only violated the principles of the Charter, and therefore its obligations, but also the fundamental rights to which every citizen is entitled and the right to seek redress before the competent courts (see the content of the law that prevented any action against the act of appropriation[9] (paragraph 13 and 14), which, in my opinion, constitutes abusive and unjust harassment.[10]

23. Even if they remain an instantaneous act, the enacted laws are still in force because, to this day, the situation of the Twifo community remains unresolved, their claims having been expeditiously dispatched through confiscation, especially as the laws were passed by an “act of the prince" in relation to a community in search of a solution to a serious identity situation, thereby preventing the victims from seeking appropriate recourse with a view to challenging this arbitrary act that they find unjust.

[9] §§ 13 and 14 of the Judgment
[10] See 52 of the Judgment

24. The Court has jurisdiction, even if it begins from the date the Respondent State became party to the Protocol and the Declaration and the Court will have jurisdiction as long as the violation continues in its effects since 1989, when the Respondent State had already violated the rights protected by the Charter. The Court should have made a distinction between the impugned acts and the very special status of the victim.

25. In its ruling of 21 June 2013 on preliminary objections in ***Norbert Zongo, Abdoulaye Nikiema a.ka. Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des droits de l'homme et des peuples v. Burkina Faso*** the Court held that under the Protocol, the Court does not have jurisdiction over acts of violations that occurred before the State concerned became a party to the Protocol and deposited the Declaration, except in cases where such violations are of a continuing nature.[11]

26. In the same case, the Court adopted the definition of the notion of a continuous violation in Article 14(2) of the draft articles on the international responsibility of States that commit internationally illegal acts, adopted in 2001 by the International Law Commission: " The breach of an international obligation by an act of a State having a continuous character extends over the entire period during which the act continues and remains inconsistent with the international obligation"[12].

27. However, in the instant case, the Court has distorted this definition since the laws enacted by the Respondent State were specific in scope because their purpose

[11] Right-holders of the late ***Norbert Zongo, Abdoulaye Nikiema a.k.a. Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkina des droits de l'homme et des peuples v. Burkina Faso*****, Judgment (Preliminary objections) (21 June 2013) 1 ACLR 204, §§ 61-83**

[12] **Ibid. § 73 ;**

was to resolve the Twifo Hemang community land disputes.[13] (Paragraph 53 of the Judgment).

28. In support of its ruling, the Court reference a ruling of the European Court of Human Rights issued on 8 March, 2006 in *Blečić v. Croatia*,(Application No. 59534) where the European Court held that "deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuous situation of 'deprivation' ... does not therefore create a permanent situation.»[14] (Paragraph 58 of the Judgment).

29. My criticism of the Court in this comparison is the specificity of the facts of the two litigations compared. While one concerns the rights of an individual, the other concerns the rights of a whole community, a minority people in search of identity and dignity, a minority catered for by the Charter as seen in its very title!

30. It is unjust to use specific laws to resolve an identical situation through an act of confiscation that does not in any way resolve the situation of the Respondents nor that of future generations. Additionally, the law has not only robbed the Respondents of their rights to property without compensation or indemnity, but also their basic right to seek redress in the courts to reclaim the alleged rights.

31. There is abundant case law in this respect. In many of its cases, including *Minority Rights International v. Kenya* (Communication 276/03 of 25/11/2009), the Commission held that the Kenyan government had violated the Charter, in particular the right to property, to the free disposal of natural resources and to social and cultural development cited in Article 14 of the Charter, which obliges the Respondent State not only to respect the right to property but also to protect same.

[13] **§ 53 of the Judgment ;**
[14] **[14]§ 58 of the Judgment ;**

32. There are many cases in which the Court has held that confiscation, plunder of property, expropriation or destruction of land constitute a violation of Article 14 and **especially any restriction of property rights, which are continuing acts!**

33. The Inter-American Court of Human Rights has also considered the expropriation of the traditional lands of indigenous communities in numerous cases and has required the establishment of national laws and procedures to make their rights effective, and where the only remedy available is the cessation of the acts, these acts are considered continuous.

34. As the Court has held regarding spoliation of indigenous peoples' lands. The act can only be considered as continuous!

35. Like the Banjul Commission, the African Court has already held that expropriation of land or restricting on the rights to property are continuing acts. It also on this basis asserted its jurisdiction to examine the applications, as was the case in the matter of Ogiek Community (*African Commission on human and Peoples' Rights v. Republic of Kenya)*[15] in which it considered that although the alleged violations started when the Respondent State was not a party to the Charter "the violations alleged by the fact of the expulsion"[16] of the Ogiek community continue, as do the failures of the Respondent to honour its international obligations under the Charter".[17]

36. Finally, I will quote the dissenting and individual opinion of **C**heng Tien-**H**s attached to the Judgment of the International Criminal Court rendered on 14 June1938 in which he held that "For the monopoly, though instituted by the dahir of 1920, is still existing to-day. It is an existing fact or situation. If it is wrongful, it is wrongful not

[15] African Commission on Human and Peoples' Rights v. Kenya (26 May 2017) 2 ACLR 9, §§ 64-66
[16] Ibid. § 65;
[17] Ibid. § 66;

merely in its creation but in its continuance to the prejudice of those whose treaty rights are alleged to have been infringed, and this prejudice does not merely continue from an old existence but assumes a new existence every day, so long as the dahir (royal decree) that first created it remains in force".[18]

37. It is estimated that there are about 50 million indigenous people in Africa and many of them face multiple challenges including the despoilment of their lands, territories and resources. Their identity and history are inseparable from their territory and even if recognition of indigenous peoples in the laws and constitutions of most countries remains a challenge at the regional level, the inclusion of "peoples' rights" in the African Charter on Human and Peoples' Rights is a starting point for the recognition of these peoples.

38. Consideration for these peoples starts by the effective management of their disputes by focusing on facts that often lead us to allegations of violations that go back in time and that undoubtedly deserve to be elucidated.

39. The abundant case law in this context proves to us that continuous violations will remain so as long as the act by which the violation began is still present through its effects and will always lead to claims and litigation, although States will always attempt to use the dates of accession to human rights instruments to escape being held accountable for human rights violations.

Judge Bensaoula Chafika

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