038/2016
22/03/2018
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AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

JEAN-CLAUDE ROGER GOMBERT

V.

REPUBLIC OF CÔTE D'IVOIRE

APPLICATION NO. 038/2016

Joint Separate Opinion of Justice Ben KIOKO, Vice President and Justice Angelo V. MATUSSE

1. We agree with the Majority Judgment, of which we are both part, in all respects that the Application, as filed by Mr. Jean-Claude Roger Gombert against the Republic of Côte d'Ivoire, is inadmissible on the grounds that the dispute has been "settled" within the meaning of Article 56 (7) of the African Charter on Human and Peoples' Rights. The provision prescribes that an Application filed before the Court should "not deal with cases which have been settled ...in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter."

2. We have, however, felt the need to make our position known with regard to the issue of the identity of the Applicant and his company AGRILAND which pursuant to Article 56 (1) or Rule 40 (1) of the Rules is an important admissibility criterion. This is an issue that arose several times in the Judgment.

3. We are of the opinion that the Court should have addressed the issue at the onset and given an elaborate explanation as to why the Applicant and AGRILAND are deemed to be the same person for the purposes of the Application. Though the Applicant and the company are two separate persons, the Court opted to lift the corporate veil of AGRILAND and take the two as one without adequately expatiating on how it arrived at this conclusion. In our considered view, the justifications the Court gave to support its positions are insufficient for the following reasons.

4. First, the Court only mentioned the fact that the Applicant and his company, AGRILAND[1], are two different personalities at a later stage in the judgment. Given the importance of clearly identifying the identity of the Parties for the Court's assessment of the Application, this exercise should have been made and clearly spelt out at earlier, at least, at admissibility stage (paragraphs. 21-22).

5. Secondly, there are instances where the Court assumed that the Applicant was the one who filed the case before the ECOWAS Court of Justice although it is patently clear from the record that he did not and that it was rather filed by his company, AGRILAND. Had the Court clarified this matter earlier, there would not have been such confusion as to the true identity of the Applicant.

6. Lastly, the issue of identity of Parties is something, which has been dealt with by other international courts in similar cases. The Court's reticence to do the same and

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Application No. 038/2016. Judgment of 22/03/2018, *Jean-Claude Roger Gombert v. Republic of Côte d'Ivoire*, para. 46.

reach conclusions without having clearly identified the true identity of the Applicant for no cogent reasons is thus at odds with international jurisprudence. We are of the opinion that the Court should have drawn inspiration from similar jurisdictions that have relevant jurisprudence in this regard.

7. In this regard, we refer to two particular cases, namely *Cantos v. Argentina* and *Agrotexim and Others v. Greece.*[2] Both these cases dealt with the issue of the identity of individual shareholders and the company as well as the issue of the corporate veil. In both cases the Inter-American Court of Human Rights and the European Court of Human Rights, respectively, were faced with the conundrum of whether or not individual shareholder(s) can be regarded as being the same person as the company.

8. Although the approaches of both Courts in the cases mentioned above were not the same, they both gave detailed reasons for how they reached their conclusions. [3]

9. The Majority Judgment's failure to elaborate on why the Court reached the decision it did in determining that the Applicant and AGRILAND are deemed to be the same person potentially leaves a wide room for various interpretations.

10. This concern becomes more troublesome when we look into the issue of admissibility in terms of Article 56(6) of the Charter, where the Court held that, local remedies had been exhausted although the Party which exhausted remedies at the local level was AGRILAND, as opposed to the Applicant before the Court.

11. We take cognisance of the fact that at the national level the company or corporate veil is lifted under very strict conditions and therefore the shareholders generally do not bear individual responsibility at that level for any violations by their companies but such shareholders can come before this Court to assert violations of their individual rights if they can demonstrate that the Respondent State had an opportunity to rectify such violation through its domestic judicial procedures.[4] In our considered view, such an approach would ensure that the Court adopts a cautious approach when applying Article 56(6) of the Charter and Rule 40 (1)in such circumstances.

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[2] Inter-American Court of Human Rights, Case of *Cantos v. Argentina* Judgment of September 7, 2001 *(Preliminary Objections) and Agrotexim and Others v. Greece* 14807/89, (1996) EHRR 250, [1995] ECHR 42.

[3] *Cantos v Argentina*,(Preliminary Objections), Para 27- 31 and *Agrotexim and Others v. Greece* paras. 62 and 66.

[4] Application No 006/2012. Judgment of 28/05/2017, *African Commission on Human and Peoples' Rights v Republic of Kenya*, para. 94.

12. Furthermore, the fact that the shareholders can come before the African Court to assert violations of their individual rights is an illustration of how the corporate veil can be lifted and based on this the identity of the shareholders and the company in question will be deemed to be the same.

13. It is based on the above mentioned consideration that the Court held that local remedies had been exhausted because the Applicant and his company AGRILAND are one person. Furthermore, since the Applicant and AGRILAND were found to be one person it would have not been necessary for the Applicant to institute a case in local courts based on the same facts and arising from the same matters as the case that was instituted by his company AGRILAND.

14. Now moving on to the issues of the identity of the parties as one of the conditions to be fulfilled for *res judicata* to apply under Article 56(7), it is important to note the positions of the aforementioned jurisprudence of the Inter-American Court of Human Rights and European Court of Human Rights.

15. In the case of *Cantos v Argentina* the Inter-American Court of Human Rights stated the following:

> "Argentina asserts that legal entities are not included in the American Convention and, therefore, its provisions are not applicable to them, since they do not have human rights. However, the Court observes that, in general, the rights and obligations attributed to companies become rights and obligations for the individuals who comprise them or who act in their name or representation."[5]

16. In the case of Agrotexim and Others v Greece the European Court of Human Rights noted the following:

> "The Applicants complaint was based exclusively on the proposition that the alleged violation of the Brewery's right to the peaceful enjoyment of its possessions had adversely affected their own financial interests because of the resulting fall in the value of their shares. The Applicants considered that the financial losses sustained by the company and the latter's rights were to be regarded as their own, and that they were therefore victims, albeit indirectly, of the alleged violation. In sum, they sought to have the company's corporate veil pierced in their favour."[6]

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[5] *Cantos v. Argentina* Judgment of September 7, 2001 *(Preliminary Objections)*, para. 27.

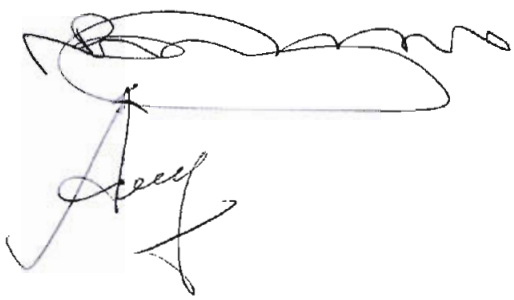
[6] *Agrotexim and Others v. Greece* 14807/89, (1996) EHRR 250, [1995] ECHR 42, para. 63.

17. The European Court of Human Rights further noted that "the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances."[7]

18. Based on the above cited passages we are of the opinion that one of the reasons why the Applicant's identity was said to be the same as that of his company in this case is because the corporate veil had been lifted and as a result of this, the rights and obligations which were attributed to the company became the rights and obligations for the Applicant, which in turn meant that the two have the same identity. These are the same observations that were made by the Inter-American Court on Human Rights and the European Court on Human Rights in the above mentioned passages. It is therefore our opinion that the above mentioned views should have been adopted and explicitly stated in the judgment of the majority.

19. One last thing we would like to make emphasis on regarding Article 56(7) of the Charter is the fact that the reason why the corporate veil was lifted and the identity of the Applicant and his company was considered the same in the national level is because it was noted in the judgment (in the Applicants prayers) that the Applicant holds ninety five percent (95%) of the company and is the President, Chief Executive Officer, founder and majority shareholder of AGRILAND.[8] This is to say that the company's losses are his losses and the company's gains are also his gains. We feel that the judgment should have emphasised this point and clarified it.

Ben KIOKO, Vice-President



Angelo V. MATUSSE- Judge

[7] *Agrotexim and Others v. Greece* 14807/89, (1996) EHRR 250, [1995] ECHR 42, para. 66.
[8] Application No. 038/2016. Judgment of 22/03/2018, *Jean-Claude Roger Gombert v. Republic of Côte d'Ivoire*, para.15(iii) and para. 48.