

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

TANGANYIKA LAW SOCIETY AND THE LEGAL AND HUMAN RIGHTS CENTRE &
REV. CHRISTOPHER MTIKILA V. THE UNITED REPUBLIC OF TANZANIA

(APPLICATIONS NO 009/2011 AND 011/2011)

SEPARATE OPINION OF JUDGE GERARD NIYUNGEKO

1. I agree with the decision of the Court in the matter of *Tanganyika Law Society and the Legal and Human Rights Centre & Rev. Christopher Mtikila v. the United Republic of Tanzania* as set out in paragraph 126 of its judgment of 14 June 2013. I however do not share its views on the two following issues: the order of treatment of the issues regarding the Court's jurisdiction and the admissibility of the application on the one hand, and the Court's grounds and reasoning in deciding whether or not, it had *ratione temporis* jurisdiction on the other.

I. The order of treatment of issues relating to the jurisdiction of the Court and the admissibility of the application

2. After summarising the respective submissions of the parties on the admissibility of the application and on the *ratione temporis* jurisdiction of the Court (paragraphs 80 and 81), the Court ruled in the same order on the two issues (paragraphs 82 to 88). In like manner, the Court presented its decisions on these issues, following the same order (paragraph 126 of the judgment).



102

3. It should be noted that it is the first time in *the practice of the Court* that it is dealing with a matter by first considering the admissibility of the application. In all its earlier decisions since 2009, it had always endeavoured to ensure *in limine* that it had jurisdiction to hear the matter, whether or not a party raised an objection in that regard¹. In the circumstances, one would have expected that, in the judgment on this matter, the Court would have explained, be it in passing, the reasons for this change in approach. Failure to do so would leave the impression of inconsistency and lack of coherence. Unfortunately, nothing is explained in this regard in the judgment. One of the consequences will be that with the unexplained changes or fluctuation in the Court's practice, parties will be in the dark as to which legal issue to begin with henceforth, when they have to file an application or make submissions before the Court. This may create unnecessary confusion.

4. In any case, this change in approach poses a *problem of principle*: is it possible for the Court to begin with the consideration of the admissibility of an application before ensuring that it does have the jurisdiction to deal with the application? In our opinion, the answer to this question is 'no' and for a certain number of reasons.

Firstly, one should not lose sight of the fact *that the jurisdiction of the Court is neither all-embracing nor automatic in nature; it is a jurisdiction that has been attributed, subject to conditions, and therefore limited by definition*. A judge vested with such jurisdiction cannot start considering any aspect of an application without ascertaining whether or not he or she does have jurisdiction.

Secondly, it should be realised that *whereas jurisdiction relates to the powers of the judge, the admissibility of the application is one limb of the application same as the merits*. In such circumstances, can a judge embark on the consideration of an aspect of an application before determining whether he or she is in a position to consider the entire application? Is there any sense in dealing with what he or she is requested to do before finding out whether he or she can or cannot do it? Logic and common sense would require that the Court should first and foremost ensure that it has jurisdiction before considering the admissibility of the application.

5. This position is further buttressed, if need be, by *the manner in which Rule 39 of the Rules of Court is crafted*. That Rule prescribes that the Court should deal with these issues in this order: 'Preliminary examination of the *competence* of the Court and of *admissibility* of applications' » (italics added). This provision clearly shows what was the initial intent of the Court on the order of consideration of issues relating to jurisdiction and admissibility.

¹Decisions of the Court can be found on the Court's website : www.african-court.org

6. In actual fact, the only stage in the procedure which should take precedence over the determination of the Court's jurisdiction is the *receipt and registration of the application by the Registry*, after ensuring that its contents comply with the provisions of Rule 34 of the Rules of Court. *Receiving* the application should not however be equated to the *admissibility of the application* which lies within the jurisdiction of the Court and is therefore considered later by the latter, pursuant to Article 56 of the Charter and Rule 40 of the Rules of Court.

7. In the light of the above considerations, the Court ought to and should in future dispose of its jurisdiction before dealing with the application submitted for consideration, except cogent reasons exist for it to deviate from that normal procedure.

II. Determining the *ratione temporis* jurisdiction of the Court

8. On the jurisdiction of the Court, the Respondent State had challenged the *ratione temporis* jurisdiction of the Court, drawn from the fact that the alleged violation (prohibition of independent candidates in presidential, legislative and local elections) occurred, in its case, before the entry into force of the Protocol establishing the Court (paragraph 80(3) of the judgment).

9. As stated in the judgment of the Court, the 2nd Applicant objects to the above submissions of the Respondent as follows:

"...a distinction has to be made between normative and institutional provisions. The rights sought to be protected were enshrined in the Charter to which Respondent was already a party at the time of the alleged violation; *although the Protocol came into operation later, it was merely a mechanism to protect those rights*. The Charter sets out rights while the Protocol provides an institutional framework for enforcement of those rights. The Applicant stated that it is not the ratification of the Protocol that establishes the rights, rather these rights existed in the Charter and the Respondent has violated them and continues to do so. The issue of retroactivity therefore does not arise" (italics added) (Paragraph 81(3)).

10. Relying apparently on those arguments of the 2nd Applicant to counter that objection, the Court dismissed it notably on the two grounds set out below:

« The rights alleged to be violated are protected under the Charter. By the time of the alleged violation, the Respondent had already ratified the Charter and was therefore bound by it. The Charter was operational and there was therefore a duty on the Respondent as at the time of the alleged violation to protect those rights.

At the time the Protocol was ratified by the Respondent and when it came into operation in the respect of the Respondent, the alleged violation was continuing and is still continuing:

independent candidates are still not allowed to stand for the position of President or to contest Parliamentary and Local Government elections...» (paragraph 84 of the judgment).

11. The second reason advanced by the Court (the continuing nature of the violation) is in order and raises no particular difficulty. However, the first reason (the prior ratification of the Charter) is difficult to grasp and creates confusion when considered against the specific objection raised by the Respondent State. In fact, whereas the objection by the Respondent State is based, as far as it was concerned, on *the date of entry into force of the Protocol* to establish the Court, the Court's response is to invoke *the date of entry into force of the Charter* which was not an issue for the Respondent State. And one does not quite see what the Court draws as conclusion from the date of entry into force of the Charter, regarding the Respondent State's argument of non-retroactivity of the Protocol.

12. In my opinion, in order to fully address the argument raised by the 2nd Applicant, the Court ought to have been unequivocal on this point and should have indicated that though the Respondent State was already bound by the Charter, the Court lacked temporal jurisdiction with respect to it as long as the Protocol conferring jurisdiction on it was yet to become operational (unless of course the argument of the alleged continuing violation is invoked). That clarification is all the more necessary as, in regard to the application of the principle of the non-retroactivity of treaties, the 2nd Applicant seems to be making a distinction between treaties of a normative nature and those of an institutional nature (*supra*, paragraph 9).

13. Such distinction however- which seems to suggest that only the date of entry into force of treaties guaranteeing substantial rights is relevant (as opposed to treaties setting up monitoring institutions)-, is not grounded anywhere in international law. Indeed, to take the instant case as an example, even though the Protocol establishes an institutional mechanism for the protection of substantial rights guaranteed under the Charter, it still remains « a treaty » within the meaning of the Vienna Convention on the Law of Treaties of 23 May 1969. Article 2. 1 a) of this Convention provides that « 'treaty' means an *international agreement concluded between States* in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and *whatever its particular designation* »(italics added). As can be seen, on the one hand, any international agreement in written form between States can be considered as a treaty regardless of whether they set substantive norms or establish institutional mechanisms; on the other, its name is of no consequence.

14. Given that the Protocol establishing the Court is a treaty within the meaning of the Vienna Convention, all provisions of the convention are therefore applicable to it. The relevant provision applicable to the issue under consideration is Article 28 which deals with the principle of non-retroactivity of treaties as follows: « Unless a different intention

appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that

party ».

To circumvent the application of the principle of non-retroactivity of the treaties in the instant case, the 2nd Applicant relies neither on a different intention of the parties arising from the Protocol itself, nor on a different intention otherwise established.

15. In fact, to determine the *ratione temporis* jurisdiction of the Court, in a matter such as this one, there must be *cumulative* consideration of the dates of entry into force in regard to the Respondent State, of the African Charter on Human and Peoples' Rights, the Protocol establishing the Court and the optional declaration recognizing the jurisdiction of the Court to receive applications from individuals and non-governmental organizations as provided for in Article 34(6) of the Protocol. If the alleged violation had occurred prior to any of these crucial dates, the principle of non-retroactivity would have applied in full force, regardless of whether the alleged violation took place after the other dates.

16. In the instant case, and in relation to the issue under consideration, the need to take into account the date of entry into force of the Protocol with regard to the Respondent State is all the more crucial as it is indeed the Protocol that specifically conferred the contentious jurisdiction on the Court (See Articles 3 and 5 of the Protocol). How could one consider an objection challenging the jurisdiction of the Court while disregarding the date of entry into force of the Protocol conferring the said jurisdiction on the Court? To me, that is simply inconceivable.

17. Once again, in my opinion, to adequately respond to the specific argument raised by the 2nd Applicant, the Court ought to have clearly endorsed the Respondent's position, and indicated that the relevant date to be considered with regard to the Respondent in determining its *ratione temporis* jurisdiction in this matter, should be that of the entry into force of the Protocol establishing the Court, then subsequently rely on the continuing nature of the alleged violation in order to determine its jurisdiction.

Judge Gérard NIYUNGEKO

Robert ENO, Registrar

