

TANZANIA / JUDGMENT

kchou v republic of tunisia application 0062022 2023 afchpr 20 30 august 2023

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AFRICAN UNION UNION AFRICAINE UNIÃO AFRICANA AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES APPLICATION FOR INTERVENTION BY BRAHIM BELGUITH IN THE MATTER OF SALAHEDDINE KCHOUK V. REPUBLIC OF TUNISIA APPLICATION NO. 006/2022 ORDER (INTERVENTION) 30 AUGUST 2023

The Court composed of: Imani D. ABOUD, President; Modibo SACKO, Vice President; Ben KIOKO, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, and Dennis D. ADJEI - Judges; and Robert ENO, Registrar.

Pursuant to Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"), Judge Rafaâ BEN ACHOUR, a national of Tunisia, did not hear the application. Application filed by BRAHIM BELGUITH Self-represented In the matter of: SALAHEDDINE KCHOUK Represented by: Mohamed Ali Abbes, Advocate at the Cassation Court of Tunisia Versus REPUBLIC OF TUNISIA Represented by Ali Abbès, State Litigation Officer after deliberation, 1 issues the present Order: I. THE PARTIES

1. Mr. Brahim BELGUITH (hereinafter referred to as "the Applicant") is a Tunisian national. He submits that his Application for leave to intervene seeks to prevent this Court from issuing a decision in the Application No. 006/2022 (hereinafter referred to as "the Main Application")¹ which will be in conflict with its previous decision in Application No. 017/2021.² He also seeks leave to access the record.
2. Mr Salaheddine KCHOUK (hereinafter referred to as the "Applicant in the Main Application") is a Tunisian national. In the Main Application No. 006/2022, he alleges that the Republic of Tunisia (hereinafter referred to as "the Respondent State"), by promulgating Decrees Nos. 54 and 55 of 2022 on combating offences relating to information and communication systems as well as the amended and supplemented Organic Law No. 2014-16 of 2014 on elections and referendums, violated the rights to equality between men and women, equal opportunity, freedom of expression, inviolability of the home and confidentiality of correspondence, the right to have one's cause heard, the right to self-determination (Articles 2, 3, 7, 13 and 20 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter")),

and Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as “the ICCPR”).³ 1 Salaheddine Kchouk v. Republic of Tunisia, Application No. 006/2022. 2 Brahim Ben Mohamed Ben Ibrahim Belguith v. Republic of Tunisia, ACtHPR, Application No. 017/2021, Judgment of 22 September 2022. 3 The Respondent State became a party to the International Covenant on Civil and Political Rights on March 18, 1969. 2

3. The Respondent State became a party to the Charter on 21 October 1986 and to the Protocol on 5 October 2007. The Respondent State also deposited, on 2 June 2017, the Declaration provided for under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non- Governmental Organisations. II. SUBJECT MATTER OF THE APPLICATION FOR INTERVENTION
4. In his Application for Intervention, the Applicant seeks leave to intervene in the Main Application in accordance with Rule 61(1) of the Rules. The Applicant submits that the purpose of his intervention is to avert a potential contradiction between the judgment to be rendered in Application No. 006/2022 and the judgment in Application No. 017/2021 of 22 September 2022, in which the Court ordered the repeal of certain decrees and the return to constitutional democracy.
5. In his earlier submission, the Applicant characterized his Application to intervene as an Application to act as amicus curiae in the Main Application. III. SUMMARY OF THE PROCEDURE BEFORE THE COURT
6. On 25 October 2022, the Registry of the Court received the Main Application No. 006/2022 Salaheddine Kchouk v. Republic of Tunisia, which was served on the Respondent State on 16 November 2022.
7. On 21 December 2022, the Registry received the Application for Intervention, which was transmitted to the Parties on 20 January 2023 for their submissions. 3
8. On 2 March 2023, the Respondent State filed its Response to the Application for Intervention, which was transmitted by the Registry on the same day to the Applicant in the Main Application and the Applicant seeking intervention, for information.
9. On 8 March 2023, the Applicant for intervention submitted his Reply to the Response of the Respondent State, which was served on the same day on the Respondent State and the Applicant in the Main Application.
10. On 23 March 2023, the Respondent State filed a further Response to the Reply by the Applicant for intervention which was transmitted to the Applicant in the Main Application and the Applicant for intervention for information purposes. On 27 March 2023, the Registry received a further Reply of the Applicant for intervention to the further Response of the Respondent State. On 14 July 2023, the further Reply was served on the Respondent state and the parties for information.

11. The Applicant in the Main Application did not respond to any of the pleadings on intervention. IV. ON THE APPLICATION FOR INTERVENTION
12. In his pleadings of 8 March 2023, the Applicant for intervention avers that the Respondent State has misunderstood the amicus curiae procedure as it considered that he seeks to intervene in the Main Application. He further avers that the Respondent State's representative, who has neither standing nor authority to mischaracterise his application, contradicts himself by implicitly acknowledging the purpose of the said application. 4
13. The Respondent State for its part contends that an amicus curiae application is an application by a third party who is neither a party to the main case, nor an intervenor, but who seeks to raise a legal question of general interest or submit an expert opinion. It points out that an amicus curiae cannot under any circumstances become an intervenor and thus join as a party in proceedings pending before this Court.
14. The Respondent State further submits that the intention of the Applicant for intervention is to develop a defence strategy in respect of the Main Application, and that in any event, the Application to intervene violates the right to equality and the adversarial principle, and is thus prejudicial to its interests of the Respondent State.

* * *

15. The Court notes that in the Application to Intervene, the Parties are in disagreement regarding the subject matter of the Application, with the Applicant arguing that it is an amicus curiae Application while the Respondent State contends that it is an Application for leave to intervene. The Court observes that, in such instance, it must determine the purpose of the Application, on the understanding that, in any event, it is not bound by the Parties' characterisation thereof.
16. The Court further observes that such a determination ought not be based on the divergent positions of the Parties, but rather on the pleadings filed by the Applicant. The Court also points out that, determining the nature of the Applicant's Application does not prejudice its decision on the admissibility or inadmissibility of the Application.
17. The Court notes that the amicus curiae procedure, is governed by Rule 55(2) of the Rules, which states that "[t]he Court may, for purposes of obtaining information, request any person or institution of its choice to express an opinion or submit a report to it on any specific point". As regards intervention, it is governed by Rule 61 of the Rules. In particular, Rule 61(1) and (2) provides that "[a] State Party may, in accordance with Article 5(2) of the Protocol, seek to intervene in a case", and that "[t]he Court may, in the interest of justice, authorise any other person who has interest in a case to intervene".

18. It emerges from these provisions that the main difference between an amicus curiae and an Intervening Party is that the former has to be characterised by the neutrality of the applicant since he must “express an opinion”, whereas the latter is driven by the interest he has in a matter.
19. The Court notes that in the Application to intervene, the Applicant argues that he wishes to avoid the Court rendering conflicting decisions in respect of the judgment delivered in Application No. 017/2022 and that to be delivered in the Main Application No. 006/2022.
20. The Court notes in this respect that the Applicant is himself the author of Application No. 017/2022. From this point of view, it is indisputable that he cannot be considered neutral as is required of an amicus curiae, since his Application for Intervention seeks to ensure that the judgment to be delivered in the Main Application should not contradict the judgment delivered in his favour in Application No. 017/2022.
21. Consequently, the Court holds that the Application to intervene is not an amicus curiae application, but rather an application for leave to intervene, the admissibility of which the Court must examine. 6 V. ADMISSIBILITY OF THE APPLICATION FOR LEAVE TO INTERVENE
22. In his Application, the Applicant avers that he wishes to avoid inconsistency in the decisions of this Court. He specifies that he thus intends to protect both a public interest relating to the government of his country and a private interest with regard to the decision rendered by this Court in a previous application.
23. The Applicant further submits that as a lawyer practicing in the Respondent State, he is duty-bound, under Article 105 of the Respondent State’s Constitution and Article 1 of Decree No. 79 of 2011 regulating the Bar, to defend human rights and freedoms.
24. Finally, the Applicant considers that his Application meets the requirements, both in terms of standing and in terms of interest, as he is a person whose rights have been violated. *
25. The Respondent State contends that intervention presupposes that the Main Application and the Application for leave to intervene have the same purpose, which is not the case in the instant matter.
26. According to the Respondent State, an Applicant for leave to intervene cannot, submit new applications in relation to the Main Application as this would change the factual and legal basis of the Main Application. It contends that in the instant matter, the Application for Intervention violates “his right to defence”.
27. It further contends that the Application for Intervention is predicated on the fact that the Main Application lacks basis in law and in fact. It further argues that 7 the purpose of the said Main Application was for the assessment of the legal and constitutional viability of the two decrees whose annulment is sought.

28. According to the Respondent State, the Application for leave to intervene is an attempt to amend the Main Application in fact and in law, which will in effect, replace the Applicant in the Main Application with the Applicant for leave to intervene.
29. According to the Respondent State, the Applicant's ground for intervention, namely, the need to avoid conflicting decisions, which is based on an alleged link between the Main Application and the judgment delivered in his favour by this Court in Application No. 17/2021, is only intended to suggest that the two cases have the same purpose. In this context, the Respondent State contends that, in fact, there is no such link.
30. The Respondent State further contends that since the delivery of the Judgment in Application No. 017/2021, it has undergone fundamental changes, both in terms of its Constitution and in terms of its laws. As an example, it cited the referendum of 25 July 2022, which led to the adoption of the 2022 Constitution repealing the 2014 Constitution, and the legislative elections of 17 December
2022. Therefore, the Respondent State argues that, for the Court to find otherwise, would affect its right to defence and compromise the integrity of the decision to be rendered.
31. Accordingly, the Respondent State submits that the Application for leave to intervene be dismissed.

* * *

32. The Court notes that Rule 61(2), (3) and (6) of the Rules provides as follows: 8 “The Court may, in the interest of justice, authorise any other person who has interest in a case to intervene”. The Application to intervene shall indicate:
- a) the names and addresses of the Applicant or his/her representatives, if any;
 - b) the Applicant's interest in the case;
 - c) the purpose of the intervention; and;
 - d) a list of all supporting documents. (...) Where the Court rules that the Application is admissible, it shall fix a time limit within which the intervening party shall submit its written observations.
33. It emerges from these provisions that intervention, which is an incidental procedure, aims to protect a legal interest that may be affected by the decision to be rendered. In this respect, the Court notes that by the words “any other person who has interest in a case to intervene”, the Rules refer to any third party other than the parties to the main proceedings.
34. The Court notes that the question of whether the Applicant has an interest in a particular case, within the meaning of Article 5(2) of the Protocol and Rule 61(2) of the Rules, is examined in the light of the nature of the issues raised in the case and the possible consequences of the Court's decisions⁴

35. The Court observes that the Main Application relates to alleged violations of the rights to non-discrimination, equality before the law, and the right to participate freely in government, among others, as a result of the Respondent State's promulgation of Decrees Nos. 54 and 55 of 2022. 4 Bernard Anbataayela Mornah v. Republic of Benin and Others (25 September 2020) (intervention by Mauritius) 4 AfCLR 586, §16. 9
36. The Court further observes that the Applicant for intervention alleges a close link between his Application and the operative part of the judgment delivered on 22 September 2022 in Application No. 17/2021 by which the Court ordered the Respondent State to repeal Presidential Decrees Nos. 2021-117 of 22 September 2021 and Decrees Nos. 69, 80, 109 of 29 July and 24 August 2021 and Decrees Nos. 137 and 138 of 11 October 2021, and to restore constitutional democracy within two (2) years of notification of the judgment.
37. The Court notes that, in fact, the Application for leave to intervene seeks to alter the purpose of the Main Application, and to bring it into line with "the position of the Court already revealed in the judgment delivered in Application No. 17/2021".
38. The Court underscores that, the Applicant for intervention is attempting to contradict the Applicant in the Main Application and correct his Application by aligning it with his understanding of, and interests in, the Court's previous judgment in Application No. 17/2021.
39. With regard to the argument that the intervention is sought in order to avoid conflicting decisions, the Court underscores that it cannot be the basis of an application for leave to intervene as such an application is premised on an Applicant having an interest in the matter. In the instant case, the Court finds that the requirement relating to the purpose of the intervention and the interest to act has not been met.
40. Accordingly, the Court holds that the Application for Intervention inadmissible. 10 VI.
OPERATIVE PART
41. For these reasons, THE COURT, Unanimously,
 - i. Dismisses the Application for leave to intervene. Signed: Judge Imani D. ABOUD, President of the Court And Robert ENO, Registrar. ~- Done at Arusha, this Thirtieth Day of the month of August in the year Two Thousand and Twenty-three, in Arabic, English and French, the Arabic text being authoritative. 11

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