

UGANDA / JUDGMENT

Mustafa v Republic of Malawi
(Application No. 008/2023) [2024]
AfCHPR 38 (18 March 2024)
[2024] AfCHPR 38

COURT
African Court on Human and Peoples Rights

BEFORE
Aboud P, Adjei J, Anukam J, Ben Achour J,
Bensaoula J, Kioko J, Mengue J, Ntsebeza J, Sacko
VP, Tchikaya J

CASE / FILE NUMBER
Application No. 008/2023

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| AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS | | |

| COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES | | |

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THE MATTER OF

FLORA MUSTAFA

V.

THE REPUBLIC OF MALAWI

APPLICATION No. 008/2023

RULING

(PROVISIONAL MEASURES)

18 MARCH 2024

The Court Composed of: Imani D. ABOUD, President; Modibo SACKO, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa NTSEBEZA and Dennis D. ADJEI – Judges; and Robert ENO, Registrar.

In accordance with 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 the Court ("hereinafter referred to as the Rules"), Justice Tujilane R. CHIZUMILA, member of the court and a national of Malawi, did not hear the Application.

In the matter of:

Flora MUSTAFA

Represented by:

Advocate Felisah Kilembe, Managing Partner, Tembenu, Kilembe and Company

Versus

REPUBLIC OF MALAWI

Not represented

After deliberation,

Renders this Ruling:

THE PARTIES

Ms. Flora Mustafa (hereinafter referred to as "the Applicant"), is a national of Malawi and the third widow of the late Seleman Mustafa. She alleges the violation of her right to a fair trial during the proceedings on inheritance at the national courts.

The Application is filed against the Republic of Malawi (hereinafter referred to as "Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 23 February 1990. On 9 October 2008, it became a party to the Protocol and deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") accepting the jurisdiction of the Court to receive cases from individuals and Non-governmental Organisations.

SUBJECT OF THE APPLICATION

Facts of the matter

It emerges from the record that the Applicant, who is the third widow of Mr. Seleman Mustafa (deceased) was evicted together with her children from the matrimonial property (SAL 176) and the business property SAL 177 by the second wife of the deceased, that is, Ms Emily Mustafa after the death of their husband. The Applicant therefore went to live in one of the other properties of the deceased and filed a complaint to the District Commissioner alleging that the second wife was benefitting from all the proceeds of the business property SAL 177 and also that she found a will of the deceased which bequeathed the properties SAL 176 and 177 to the children of widows equally.

Upon receiving the complaint, the District Commissioner instructed Ms Emily Mustafa to submit to him, all the proceeds from the business property – SAL 177. This led her to filing a case at the High Court claiming that the deceased died *intestate*. She also alleged that she was the sole owner of the properties 176 and 177 since she had acquired and managed the properties jointly with the deceased and she therefore, deserved all the proceeds from the property SAL 177. In its decision, the High Court of Malawi held that the deceased died *intestate* and it therefore appointed an administrator to administer the estate.

Ms. Emily Mustafa appealed to the Supreme Court of Appeal of Malawi. On 6 June 2021, the Supreme Court of Appeal agreed with the High Court that the deceased died *intestate*, but reversed the decision to appoint an administrator and held that properties SAL 176 & 177 were not part of the inheritance properties as Ms. Emily Mustafa, who was the joint owner of the properties, automatically became the sole owner through survivorship.

The Applicant being dissatisfied with the decision filed an application for review of the decision of the Supreme Court of Appeal, which on 14 July 2021 dismissed the said application noting that it would provide the reasons for the dismissal at a later date. The Applicant alleges that the Supreme Court has not provided any reasons for its judgment on review, to this date.

Alleged violations

In the main Application, the Applicant alleges as follows:

The violation of her right to a fair trial as protected under Article 7(1) and 14 of the Charter;

The violation of the right to challenge the evidence of Ms. Emily Mustafa protected under Article 8 of the Universal Declaration on Human Rights (hereinafter referred to as “UDHR”); and Article 7(1) of the Charter;

The violation of the Applicant’s right to be provided with the reasons for the decision on the review by the Supreme Court of Appeal contrary to Article 8 of the UDHR; and Article 7(1) of the Charter.

SUMMARY OF THE PROCEDURE BEFORE THE COURT

On 12 October 2023, the Applicant filed the main Application together with a request for provisional measures.

On 20 October 2023, the Applicant was granted legal aid *suo motu* through the Court's Legal aid scheme.

The Application was served on the Respondent State on 17 February 2024 for its response within ten (10) days for the request on provisional measures and, ninety (90) days for the main Application. The Respondent State neither responded to the request for provisional measures nor the main Application.

***PRIMA FACIE* JURISDICTION**

Article 3(1) of the Protocol provides that

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.

Under Rule 49(1) of the Rules of the Court "the Court shall conduct preliminary examination of its jurisdiction...". However, with respect to the provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, only that it has **prima facie** jurisdiction. ^{[[1]](#footnote-1)}

In the instant case, the Applicant alleges the violations of rights protected under the Charter to which the Respondent State is a party. The Court further notes that, as recalled at paragraph 2 of the present Ruling, the Respondent State is a party to the Protocol and has filed the Declaration.

The Court finds, therefore, that it has **prima facie** jurisdiction to hear the request for provisional measures.

PROVISIONAL MEASURES REQUESTED

The Applicant prays the Court to order the Respondent State, to stay the execution of the decision of the Supreme Court of Appeal, pending determination of her main Application. In this regard, the Applicant argues that if the decision of the Supreme Court of Appeal is not stayed, the properties SAL 176 and 177 will be sold permanently before the determination of the main Application which would result in irreparable harm.

The Applicant further argues that Ms. Emily Mustafa who is the decree holder is a housewife and was relying on the deceased to cater for her daily needs and will therefore not be in a position to pay back the money if the properties are sold.

According to the Applicant, the properties which are the subject of the Application were her only source of income and therefore she is in financial distress which further demonstrates that her situation is of urgency and extreme gravity requiring a Ruling on provisional measures.

The Respondent State did not file any submissions with respect to the request for provisional measures.

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The Court notes that, pursuant to Article 27(2) of the Protocol:

In cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.

The Court observes that, pursuant to Rule 59(1) of the Rules:

...the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.

It is for the Court to decide in each case if, in the light of the particular circumstances, it should make use of the power vested in it by the aforementioned provisions.

The Court notes that, urgency refers to “imminent risk”, while extreme gravity, means risk of serious damage. The Court emphasizes that the risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it immediately. ^{[[2]](#footnote-2)} Furthermore, the Court observes that irreparable harm is damage that cannot be sufficiently redressed or compensated through any subsequent reparation.

The Court underscores that the requirements of urgency or extreme gravity and irreparable harm, are cumulative, so that if one of them is lacking, the provisional measures requested cannot be ordered.

In determining requests for provisional measures, therefore, the Court relies on the principles outlined above and notes, particularly, the fact that provisional measures are of a preventative nature and thus can only be granted if a Party fulfils all the prerequisites.

In the instant case, the Court notes that, following the decision of the Supreme Court of Appeal, Ms Emily Mustafa has been accorded the right to properties SAL 176 and SAL177. Therefore, given that the Applicant has no control over the properties, there is a real risk that the said properties might be sold by Ms Emily Mustafa. In this regard, the Court finds that the condition of urgency has been fulfilled.

Likewise, it is noted that since the Applicant relies on the properties SAL 176 and SAL177 for her daily needs, the deprivation thereof poses a situation of extreme gravity. The Court thus finds that the condition of extreme gravity has been fulfilled.

However, the Court notes that the Applicant has not demonstrated with evidence that Ms Emily Mustafa will sell the properties which are the subject of the main Application. In this regard, the Applicant has not furnished the Court with proof such as a notice of sale or advertisement of a sale or auction notices in relation to the properties SAL 176 and SAL 177.

The Court further notes that the Applicant claims that Ms Emily Mustafa will not be able to compensate her, if the former sells the property before the determination of the main Application. However, the Court notes that, in the instant Application, any compensation due to the Applicant would be made by the Respondent State and not Ms Emily Mustafa, thus her financial status is immaterial to the implementation of any decision on the main Application. Therefore, the Court finds that the Applicant has not proven that she will suffer irreparable harm if the decision of the Supreme Court of Appeal is not stayed pending the determination of the main Application.

Consequently, the Court finds that the conditions set out under Article 27(2) of the Protocol have not been fully met and therefore, dismisses the request for provisional measures.

For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudice the findings of the Court on its jurisdiction, the admissibility of the Application and merits thereof.

OPERATIVE PART

For these reasons,

THE COURT,

Unanimously,

Holds* that the Court has **prima facie jurisdiction;*

**Dismisses* the request for provisional measures.*

Signed by:

Imani D. ABOUD, President;

And Robert ENO, Registrar.

Done at Arusha, this Eighteenth Day of the month of March in the Year of Two Thousand and Twenty-Four, in English and French, the English version being authoritative

1. **Komi Koutche v. Republic of Benin** (provisional measures) (2 December 2019) 3 AfCLR 725, §11. [↑](#footnote-ref-1)
2. **Houngue Éric Noudehouenou v. Republic of Benin**, ACtHPR, Application No. 04/2020, Ruling of 15 August 2022 (provisional Measures); **Ajavon Sebastien v. Republic of Benin**, ACtHPR, Application No. 062/2019, Ruling of 17 April 2020 (provisional measures), § 61. [↑](#footnote-ref-2)

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