

UGANDA / JUDGMENT

Noudehouenou v Republic of Benin (Application No. 032/2020) [2021] AfCHPR 63 (22 November 2021)

[2021] AfCHPR 63

COURT

African Court on Human and Peoples Rights

BEFORE

Aboud P, Anukam J, Ben Achour J, Bensaoula J,
Chizumila J, Kioko J, Mengue J, Mukamulisa J,
Ntsebeza J, Sacko J, Tchikaya VP

CASE / FILE NUMBER

Application No. 032/2020

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| AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE
L'HOMME ET DES PEUPLES | |

THE MATTER OF

HOUNGUE ÉRIC NOUDEHOUEYOU

V.

REPUBLIC OF BENIN

APPLICATION NO. 032/2020

RULING

(PROVISIONAL MEASURES)

22 NOVEMBER 2021

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

In the Matter of:

Houngue Éric NOUDEHOUE NOU

Represented by:

Me Nadine Dossou SAKPONOU, Lawyer at the Bar of Benin, Robert DOSSOU Lawyers' Association (SCPA;

Versus

REPUBLIC OF BENIN

Represented by:

Mr. Iréné ACOMBLESSI, Judicial Officer of the Treasury

After deliberation,

renders the following Ruling:

THE PARTIES

Mr. Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin. He seeks the stay of execution of the judgment delivered against him in a civil case on 5 June 2018, by the Cotonou Court of First Instance (hereinafter referred to as the "Cotonou CFI").

The Application is brought against the Republic of Benin (hereinafter referred to as "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to 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") on 22 August 2014. It further made the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration") on 8 February 2016, by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organisations. On 25 March, 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases or on new cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its filing^{[[1]]}(#footnote-1).

SUBJECT OF THE APPLICATION

In the main Application, the Applicant alleges that following a civil procedure in which he had voluntarily intervened, , the Cotonou Court of First Instance rendered on 5 June 2018, without his knowledge, a judgment in the case opposing Collectivité Houngue Gandji, Akobande Bernard, Mrs Anne Pogle, née Kouto as plaintiffs and Gabriel Kouto, as defendant.

The Applicant submits that the judgment of the Cotonou Court of First Instance, of which was never notified to him, infringed on his right of ownership. Part of its operative section reads as follows:

For these reasons,

Ruling publicly, adversarially, in civil matters of land and state property law and in the first instance;

Homologates the framework agreement dated 4 October 2016, the amicable settlement dated 4 April 2016 and the minutes dated 4 May 2017 and makes them enforceable;

Acknowledges that Houngue Gandji group has withdrawn its action;

Note that Mrs Anne Pogle née Kouto and Gabriel Kouto are presumed owners of the "S" plots of Lot No. 3037 of Agla estate, plotted under number 1392 and "R" of Lot No. 3037 of Agla estate, plotted under number 1462 F;

Note that the DJA-VAC association represented by Koty Bienvenue acquired landed property of 4ha 62a 58ca from the Houngue Gandji group;

Confirms the property rights of: Pedro Julie on Plots Numbers 403h and EL 404h at Agla estate;

Mrs Anne Pogle, née Kouto on Plot "S" of Lot 3037 of Agla estate, under number 1392 F;

Kouto Gabriel on Plot "R" of lot 3037 of Agla estate under number 1462 F;

DJA-VAC association on land the size of 4ha 62a 58ca;

Dismisses the Application by Trinnou D. Valentin, Houenou Eleuthère, Alphonse Adigoun and Houngue Eric and orders them to pay costs;

Notifies the parties that they have a period of one (01) month to appeal.

He submits that he is bringing this Application for the purpose of praying this Court to:

Order the Respondent State to remove "the obstacles to the exercise of his right to evidence" and to "ensure the enjoyment of his right to search for, obtain and produce all documents (...) for the exercise of his right to appeal and his right to defence in the proceedings concerning him" before this Court;

Order the Respondent State to "stay the execution of the judgment of the Cotonou Court of First Instance until the Court delivers its final judgment";

In the alternative, "grant it the benefit of the Court's legal aid fund for all acts and procedures that the Court deems necessary to suspend the judgment of the Cotonou Court of First Instance, in view of the continued violations of the decisions of the Court by the Respondent State.

III. ALLEGED VIOLATIONS

The Applicant alleges violation of the following rights:

The right to property, protected by Article 14 of the Charter;

The rights to equality before the law and equal protection of the law, protected by Article 3(1) and (2) of the Charter and the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR ");

The right to have one's cause heard, protected by Articles 7 of the Charter, 14(1) of the ICCPR and 8 of the Universal Declaration of Human Rights.

IV. SUMMARY OF THE PROCEDURE BEFORE THE COURT

The Application was filed on 15 October 2020. It was served on the Respondent State on 20 October 2020, giving it ninety (90) days to respond.

On 8 June 2021, the Applicant filed the instant Application for provisional measures which was duly notified to the Respondent State, which was given fifteen (15) days from the date of receipt to file its response.

As of 6 July 2021, when the time for filing the response to the Application for provisional measures elapsed, the Registry had not received any response from the Respondent State.

V. *PRIMA FACIE* JURISDICTION

The Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 51 of the Rules of Court (hereinafter referred to as "the Rules")^[2] that in matters of provisional measures, the Court need not be satisfied that it has jurisdiction on the merits of the case but merely that it has *prima facie* jurisdiction.

Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as the Republic of Benin has ratified the African Charter, the Protocol and deposited the Declaration provided for in Article 34 (6) thereof; and insofar as he alleges violations of rights protected by human rights instruments.

He further submits that although the Respondent State withdrew its Declaration on 25 March 2020, this withdrawal only took effect on 26 March 2021.

The Respondent State did not respond to this point.

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Article 3(1) of the Protocol provides:

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

Furthermore, Rule 49(1) of the Rules provides that “[t]he Court shall ascertain its jurisdiction ...” However, with respect to provisional measures, the Court need not ensure that it has jurisdiction on the merits of the case, but merely that it has **prima facie** jurisdiction. ^{[[3]]}(#footnote-3)

In the instant case, the rights the Applicant alleged to have been violated are all protected by the Charter and the ICCPR, instruments to which the Respondent State is a Party.

The Court further notes that the Respondent State has ratified the Protocol and it has also deposited the Declaration.

The Court observes, as mentioned in paragraph 2 of this Ruling, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.

The Court also recalls that it has held that the withdrawal of a Declaration filed in pursuant to Article 34(6) of the Protocol has no retroactive effect and has no bearing on pending cases and new cases filed before the withdrawal comes into effect, ^{[[4]]}(#footnote-4) as is the case in the instant case. The Court reiterated its position in its Ruling of 5 May 2020 **Houngue Eric Noudehouenou v. Republic of Benin**, ^{[[5]]}(#footnote-5) and held that the Respondent State’s withdrawal of the Declaration would take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal has no bearing on its personal jurisdiction in the instant case.

From the foregoing, the Court finds that it has **prima facie** jurisdiction to hear the instant Application for provisional measures.

IV. PROVISIONAL MEASURES REQUESTED

The Applicant requests the Court to order the Respondent State to "remove the hindrances to the exercise of the right of evidence" and to "ensure the enjoyment of the right to search for, obtain and produce all documents (...) necessary for the exercise of the rights of appeal and defence in the proceedings concerning him" before this Court.

Furthermore, that by failing to comply with three Orders for provisional measures ^{[[6]]}(#footnote-6) and four judgments ^{[[7]]}(#footnote-7) of this Court, the Respondent State has made it "absolutely impossible for him to obtain documents that are necessary for his human rights".

In this regard, he notes that there is an urgent need to preserve his right to a fair trial and that the violation of Article 4 ^{[[8]]}(#footnote-8) and Article 7 ^{[[9]]}(#footnote-9) of the ICCPR is imminent.

The Applicant states that it was after a third party initiated a procedure before the Cotonou Court that he obtained, on 1 June 2021, a copy of the certificate of non-appeal and non-opposition of the Cotonou CFI's judgment and a copy of the order authorizing the sale issued on 24 February 2020 (hereinafter referred to as the "authorization of sale"). According to him, the urgency and irreparable harm he suffered "was not brought to his attention until September 2020".

The Applicant requests the stay of execution of the judgment of the Cotonou CFI, arguing that urgency arises from the enforceability of the said judgment insofar as he has produced the certificate of non-opposition or appeal thereof. He further submits that it is on this basis that the authorization of sale of the building was delivered. He further submits that he is unable to participate in the proceedings of domestic courts to present his arguments, his evidence and to obtain a fair trial.

He argues that staying the execution of the judgment of the Cotonou CFI will put an end to the irreparable harm that he could suffer and guarantee the equality of the parties, their interests and the effectiveness of the Court's final judgment.

According to the Applicant, irreparable harm "results from domestic law" which, "by interfering with his rights protected by Articles 1, 2, 5, 7, 8, 14 and 17 of the Charter, Article 27 of the Protocol, Articles 2, 7 and 18 of the ICCPR, and Article 1(h) of the ECOWAS Democracy Protocol, causes him irreparable harm that cannot be reversed even if the final decision on the merits favours him".

He submits that the said provisions of domestic law are, in particular, Articles 30 to 34^[10] (footnote-10), 528 and 530^[11] (footnote-11) of the Land Code as well as Articles 547 and 570 of the Code of Civil Procedure.

In the alternative, the Applicant requests the Court to "grant him the benefit of the Court's legal aid fund for any acts and proceedings that the Court may deem necessary for the stay of execution, in view of the continued violations of the Court's decisions by the Respondent State.

The Applicant asserts that in the absence of a ruling staying the execution of the Cotonou CFI judgment, he will suffer irreparable harm.

He underlines, to this effect, that the current illegal occupants of the building in question will counter-argue that failure to diligently comply with Court's directives is synonymous with acquiescence to the execution of the judgement of the TPI of Cotonou.

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The Court notes that Article 27(2) of the Protocol provides that:

[i]n 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 recalls that urgency, which is consubstantial with extreme gravity, means that an "irreparable and imminent risk that irreparable harm will be caused before it renders its final judgment".^{[[12]](#footnote-12)} The risk in question must be real, which excludes a purely hypothetical risk and which explains the need to cure it immediately.^{[[13]](#footnote-13)}

With respect to irreparable harm, the Court considers that there must be a "reasonable probability of occurrence" having regard to the context and the Applicant's personal situation.^{[[14]](#footnote-14)}

The Court notes that the two conditions that must be satisfied under the above-mentioned Article, is that of extreme gravity or urgency and irreparable harm which are cumulative, to the extent that where one of them is absent, the measure requested cannot be ordered.

In light of the foregoing, the Court will examine the measures requested to determine whether they meet the required conditions.

On the measure to "remove obstacles to the exercise of the right to evidence" and to "the enjoyment of the right to search for, obtain and produce all documents (...) necessary for the exercise of the rights of appeal and defence in the proceedings concerning the Applicant" before this Court

The Court emphasises that an application for provisional measures is necessarily made in the context of a specific procedure on the merits to which it is attached, and therefore cannot be general in nature and extend to other procedures on the merits.

The Court notes that the provisional measure requested by the Applicant extends to all the procedures that he has initiated and that are pending before the Court. The measure is, in fact, intended to enable him to exercise certain rights "in the procedures concerning him before the Court".

The Court notes that, in addition to the instant procedure, the Applicant has filed three Applications before the Court, which are pending.^{[[15]](#footnote-15)}

In view of the general nature of the measure requested, which the Applicant intends to extend to all the pending procedures to which he is a party before the Court, the Court cannot grant it.

In any event, the Applicant has not demonstrated, even for the instant procedure, that the requirements of Article 27(2) of the Protocol have been met. Accordingly, the Court dismisses the prayer for the measure requested.

ii. Stay of execution of the Cotonou CFI judgment

The Court notes that in the instant case, it is true that the certificate of non-opposition and non-appeal produced by the Applicant attests that the judgment of the Cotonou Court of First Instance is enforceable. As such, it is synonymous with urgency, consubstantial with extreme gravity in the sense that objectively, there is no longer any obstacle to the execution of the said judgment. This execution can, so to speak, take place at any time before the Court renders its judgment.

Therefore, the existence of a real and imminent risk is established[[16]](#footnote-16). This risk is exacerbated by the order authorizing the sale dated 24 February 2020, issued in execution of the judgment of the Cotonou Court of First Instance and on which the Applicant relies.

Regarding the requirement on irreparable harm, the Court considers that it is also met.

In view of the foregoing, the Court orders the Respondent State to stay the execution of the Cotonou CFI judgment.

iii. The measure relating to the benefit of the legal aid fund

The Court emphasises that the conditions for granting legal aid are governed by the Legal Aid Policy of the Court.

The Court notes that the Applicant's request is vague and that in any case, the measure cannot be granted by way of an order on provisional measures.

Accordingly, the Court dismisses the request.

For the avoidance of doubt, the Court recalls that this Ruling is provisional in nature and in no way prejudices the Court's decision on its jurisdiction, on admissibility and on the merits of the case.

VIII. OPERATIVE PART

For these reasons,

THE COURT

By a majority of Seven (7) in favour and Four (4) against, Judge Ben KIOKO, Judge Rafaâ BEN ACHOUR, Judge Tujilane R. CHIZUMILA and Judge Chafika BENSAOULA Dissenting,

Dismisses the measure seeking to "remove the hindrances to the exercise of the right of evidence" and to "ensure the enjoyment of the right to search for, obtain and produce all documents (...) necessary for the exercise of the rights of appeal and defence in the proceedings concerning the Applicant" before this Court;

Dismisses the request for legal aid;

Unanimously,

Orders the stay of execution of the Cotonou Court of First Instance Judgment of 5 June 2018.

Orders the Respondent State to report to the Court on the implementation of the measure ordered in point (iii) of this operative part, within fifteen (15) days of notification of this Ruling.

Signed:

Imani D. ABOUD, President;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 70 of the Rules, the Dissenting Opinion of Judge Ben KIOKO and the Declarations of Judge Rafaâ BEN ACHOUR, Judge Tujilane R. CHIZUMILA and Judge Chafika BENSAOULA are appended to this Ruling.

Done at Dar es-Salaam, this Twenty Second Day of November of the year Two Thousand and Twenty-One, in French and English, the French text version being authoritative.

1. *Ingabire Victoire Umuhuza v. Republic of Rwanda (*Jurisdiction*)* (Ruling of 3 June 2016) 1 ACtHPR 540 § 67; *Houngue Eric Noudehouenou v. Republic of Benin* ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020. [↑](#footnote-ref-1)
2. This Article of the former Rules of 2 June 2020 corresponds to Rule 59 of the new Rules which came into force on 25 September 2020. [↑](#footnote-ref-2)
3. *Ghati Mwita v. Republic of Tanzania,* ACtHPR, Application No. 012//2019, Ruling of 9 April 2020 (provisional measures), § 13. [↑](#footnote-ref-3)
4. *Ingabire Victoire Umuhuza v. Republic of Rwanda (*Jurisdiction*)* (Ruling of 3 June 2016) 1 ACtHPR 540 § 67. [↑](#footnote-ref-4)
5. *Houngue Eric Noudehouenou v. Republic of Benin,* ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), § 4- 5 and *Corrigendum* of 29 July 2020. [↑](#footnote-ref-5)
6. These are the following Ruling for provisional measures: Application No. 003/2020 - *Houngue Eric Noudehouenou v. Republic of Benin*, Ruling on provisional measures of 5 May, 2020 - Application No. 003/2020 - *Houngue Eric Noudehouenou v. Republic of Benin*, in which the Court ordered "the Respondent State to take all necessary measures to effectively remove all administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming communal, municipal, district, town or village elections for the benefit of the Applicant"; Application No. 004/2020 - *Houngue Eric Noudehouenou v. Republic of Benin* – Ruling for Provisional measures of 6 May 2020, in which the Court ordered the Respondent State to "to stay the execution of the judgment of 25 July 2019 of the Court for Repression of Economic Crimes and Terrorism against the Applicant (...)" ; Application No. 002/2021, *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin* – Ruling for Provisional Measures of 29 March 2021 in which the Court ordered the Respondent State to "stay of execution in respect of Judgments of the Supreme Court of the Respondent State N°209/CA (*COMON SA v. Ministry of Economy and Finance and two (2) others*) and N°210/CA (*Société JLR SA Unipersonnelle v. Ministry of Economy and Finance*) of 5 November 2020, and N°231/CA (*Société l'Elite SCI v. Ministry of Economy and Finance and two others*) of 17 December 2020 until the decision of the Court on the merits"; [↑](#footnote-ref-6)

7. These are the following judgments: Application 059/2019 - *XYZ v. Republic of Benin*, Judgment of November 27, 2020, the operative part of which reads, inter alia, "Orders the Respondent State to take necessary measures to bring the composition of COS-LEPI into conformity with the provisions of Article 17(1) of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy before any election "; Application 003/2020 - *Houngue Eric Noudehouenou v. Republic of Benin* - Judgment of December 4, 2020, the operative part of which reads as follows: Orders the Respondent State to take all measures to repeal Law 28 No. 2019-40 of 1 November 2019 revising Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws related to the election in order to guarantee that its citizens will participate freely and directly, without any political, administrative or judicial obstacles, in the forthcoming presidential election without repetition of the violations found by the Court and under conditions respecting the principle of presumption of innocence; Orders the Respondent State to comply with the principle of national consensus enshrined in Article 10(2) of the ACDEG for any constitutional revision; Orders the Respondent State to take all measures to repeal Inter-Ministerial Decree 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019; Orders the Respondent State to take all necessary measures to ensure cessation of all effects of the constitutional revision and the violations which the Court has found "; Application 010/2020 - XYZ v. Republic of Benin - Judgment of November 27, 2020 and Application 062/2019 - *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin*. These two judgments have, in part, a similar operative part: "Orders the Respondent State to take all legislative and regulatory measures to guarantee the independence of the Constitutional Court, in particular with regard to the process for the renewal of their term of office (...), to take all measures to repeal Law No. 2019-40 of 1 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws, in particular Law 2019-43 of 15 November 2019 on the Electoral Code, and to comply with the principle of national consensus set forth in Article 10(2) of the ACDEG for all other constitutional revisions". [↑](#footnote-ref-7)
8. Article 4 ICCPR states: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". [↑](#footnote-ref-8)
9. Article 7 ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation". [↑](#footnote-ref-9)

10. Article 30 provides: "Within the meaning of this code, extinctive prescription is the annulment of a pre-existing presumptive right of ownership by peaceful, notorious, uninterrupted and unequivocal possession of ten (10) years"; Article 31: "Prescription is acquired when the last day of the term is over. The period referred to in the preceding article is counted from date to date"; Article 32: "The statute of limitations does not run against the person who is unable to act as a result of an impediment resulting from the law, an agreement or a case of force majeure. The occupation of a building supported by acts of violence cannot be the basis for prescription. Nor can exploitation or occupation as a result of authorization or simple tolerance be the basis for prescription. Those who possess by others cannot prescribe. In any case, the farmer, custodian, guardian, lessee, bailee, usufructuary and all other operators or occupants who precariously hold the owner's property cannot prescribe it. Ascendants, descendants and collaterals of operators or occupants on a precarious basis cannot prescribe either. Between spouses, prescription does not run"; Article 33: "The plea of prescription is of public order. It may be invoked in any case and even ex officio by the judge"; Article 34: "When prescription has expired, the action to claim the property of the presumed pre-existing owner is inadmissible". [↑](#footnote-ref-10)
11. These articles provide: "Article 528: "The execution of a court decision, judgments, or rulings ordering forced eviction shall be preceded by a stage of amicable negotiation with a view to the purchase, by the party taking part in the proceedings, of the occupied property (...)" ; Article 530: "In all cases, the property pre-empted or expropriated in application of the preceding articles shall be the subject of a lease purchase, as a matter of priority, in favour of the parties taking part. The modalities for the implementation of the provisions of this article are fixed by a Cabinet [↑](#footnote-ref-11)
12. *Sébastien Ajavon v. Republic of Benin*, ACtHPR, Application No. 062/2019, Ruling of 17 April 2020 (provisional measures), § 61. [↑](#footnote-ref-12)
13. *Ibid*, § 62. [↑](#footnote-ref-13)
14. *Ibid*, § 63. [↑](#footnote-ref-14)
15. Applications Nos. 004/2020, 020/2020, 028/2020; [↑](#footnote-ref-15)
16. *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin*, ACtHPR, Application No.002/2021, Ruling (Provisional measures) du 29 mars 2021, § 39-40; [↑](#footnote-ref-16)

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Prepared on 13 October 2026 · Esheria