

UGANDA / JUDGMENT

Tivane v Mozambique (Communication 434 of 2012) [2017] ACHPR 139 (23 October 2017)

[2017] ACHPR 139

COURT

African Commission on Human and Peoples Rights

CASE / FILE NUMBER

Communication 434 of 2012

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Communication 434/12: Filimao Pedro Tivane (represented by Dr. Simeao Cuamba) v. Mozambique

Summary of the Complaint

- 1. The Complaint is submitted against the Republic of Mozambique¹ (the Respondent State or the State) by Dr. Simeao Cuamba (the Complainant) on behalf of Filimao Pedro Tivane (the Victim).
- 2. The Complainant submits that on 22 December 1975 the Victim bought a house in the city of Maputo from Maria Alves Morreira Cravo for one million, five hundred thousand (1,500,000) escudos, and the transaction was registered with the Deeds Office in Lourenço Marques, currently Maputo. The Complainant asserts that the sum was paid promptly upon signing of the agreement of sale, and following this the seller handed the house over to the Victim, who began living in it, thereby acquiring full ownership.
- 3. The Complainant avers that on 14 January 1976 a senior official of the party-led State Committee, accompanied by police agents, arrested the Victim without a warrant and forcibly took him to the "Sacuzo Concentration Camp in Sofala Province and subsequently to the Intoculo Concentration Camp in Nampula Province, (these camps are commonly known as re-education centres),"² where he remained in detention until 03 August 1988. The Complainant submits that at the time of the Victim's arrest, the Respondent State took possession of the Victim's house and leased it to the Embassy of the Union of Soviet Socialist Republic (USSR).

- 4. The Complainant submits that the Victim was still the owner of the house when the State took possession of it, given that Decree-Law no. 5/76 on the nationalization of income generating buildings was approved and came into force on 05 February 1976; that is twenty one (21) days after the expropriation of the Victim's house. The Complainant notes that Article 12 of Decree-Law no. 5/76 stipulated that the State enjoyed the right of preference in the buying and selling of privately owned buildings.
- 5. The Complainant further submits that, following his release, the Victim applied to buy the same house, and was granted permission by the State on 07 August 1989. However, the Complainant submits that as result of pressure exerted by the Victim on the aforementioned Embassy to vacate the house and return it to him, in 1992 the State reversed its decision and registered the house as its own property.
- 6. The Complainant submits that, in 2007, the Victim filed a civil suit against the State in the Judicial Tribunal of the City of Maputo in Case no. 127/07, asking the Court to declare the registration of the house in the name of the State null and void. The Complainant further submits that on 08 July 2008, the Court ruled in favour of the

¹ Mozambique ratified the African Charter on Human and Peoples' Rights 22 February 1989

² Complaint, paragraph 3

Victim. As a result, the Complainant avers that, in view of the Court's decision, the Deeds Office cancelled the registration under the name of the State, the deed of sale was drawn on 04 March 2009, and the house was re-registered in the name of Maria Alves Moreira Calvo. The Complainant submits that this was followed by registration of the property in the name of the Victim.

- 7. The Complainant submits that on 25 March 2009, the Victim gave notice requesting the State to return the house to him within 30 days; however, the State responded that it would only return the house against a judicial order executing the Court's judgment. The Complainant submits that in response the Victim filed an application against the State in the 4th Division of the Judicial Court of the City of Maputo seeking execution of the judicial order for the return of the house on 08 June 2009, which was officially received on 10 June 2009.
- 8. The Complainant submits that the State approached the Attorney General of the Republic and recommended that he should prevent execution of the judicial order by making use of the special prerogative conferred by Law no. 22/07 and Decree-Law no. 1/05, thereby applying to the Supreme Court for a stay of the ruling and annulment of the judgment in Case no. 127/07. The Complainant submits that on 21 October 2009, the Attorney General filed an application with the 1st Division of the Supreme Court, registered as Case no. 159/09.

- 9. The Complainant submits that on 20 November 2011, the 1st Division of the Supreme Court annulled the decision of Case no. 127/07 on the grounds that it was patently illegal. The Complainant further submits that the Victim was not summoned to argue his case before the Supreme Court, because he was not regarded as a party to the case.
- 10. The Complainant avers that on receipt of the judgement from the 1st Division of the Supreme Court, the 4th Division of the Judicial Court of the City of Maputo informed the Victim of the decision. In response, the Victim filed an application in the Judicial Court of the City of Maputo to withhold execution of the Supreme Court's judgment in order to refer the matter to the Constitutional Council, to examine the case and to declare the rulings conferring on the Attorney General, and on the Divisions of the Supreme Court, special powers to annul judgments as unconstitutional. The Complainant avers that in response, the Judge dismissed the application in an Order issued on 19 March 2012. The Complainant further avers that the Judge stated inappropriately that the application should have been filed with the Supreme Court.
- 11. The Complainant submits that, having exhausted judicial avenues to reinstate his rights over the house, the Victim applied to the Ombudsman requesting him to ask the Constitutional Council to assess and declare the unconstitutionality of Law no.22/07 and in his reply of 13 July 2012 the Ombudsman found the Victim's application inadmissible.

Articles alleged to have been violated

12. The Complainant alleges that the Respondent State violated Articles 7(1)(c) and 14 of the African Charter on Human and Peoples' Rights (the African Charter).

Prayers

13. The Complainant seeks the following:
 - (a) Declare ex officio the nullity of the Supreme Court's Judgment for being unlawful (Civil Code Article 286);
 - (b) Return the house to the Victim;
 - (c) Pay the Victim compensation in Mozambique currently equivalent to four million, five hundred thousand dollars (USD 4,500,000) for actual and moral damages and for profit loss (sic) incurred since January 1976; and
 - (d) Revoke the legal norms enunciated above conferring a special prerogative which is patently unconstitutional and inhuman.

Procedure

- 14. The Complaint was received on 19 September 2012, and receipt was acknowledged on 14 November 2012. The Communication was seized during the 13th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights (the Commission), which was held from 19 to 25 February 2013, in Banjul, The Gambia.
- 15. On 27 February 2013, the Complainant was informed of the Commission's decision to be seized of the matter and was requested to present evidence and arguments on admissibility within two months, while the Respondent State was informed of the seizure via a Note Verbale dated 27 February 2013, which also transmitted the Complaint and Seizure decision to the State.
- 16. Between 27 May 2013 and 02 April 2014, the Secretariat sent two updates on the progress of the Communication to the parties, and requested the Complainant to submit arguments on admissibility.
- 17. A letter was hand delivered to the Commission on 02 May 2014, dated 26 July 2013, during the 55th Ordinary Session, held from 28 April to 12 May 2014 in Luanda, Angola, in which the Complainant requested an extension of time to submit on Admissibility, in accordance with Rule 113(2) of the Commission's Rules of Procedure.
- 18. On 04 June 2014 the Secretariat received the Complainant's submissions on Admissibility, which were transmitted to the Respondent State on 31 July 2014 via email.
- 19. Through a Note Verbale dated 11 March 2015, the Secretariat made a final request for the Respondent State to submit its arguments and evidence on admissibility,

which was transmitted via DHL.³ However, no response was received and in light of this the Commission took a decision to proceed with the decision on Admissibility.

- 20. Informational letters were sent to the parties, following the 56th and 57th Ordinary Sessions.

Admissibility

The Complainant's Submissions on Admissibility

- 21. The Complainant submits that the Communication satisfies all the Admissibility requirements set out in Article 56 of the African Charter and presents arguments in support of that submission.
- 22. With regards to Article 56(1) of the African Charter, the Complainant submits that the identity of the author has been indicated, therefore satisfies this requirement.

- 23. The Complainant avers that the rights claimed under the African Charter refers to the right to property, thereby complying with the requirement that Communications shall be compatible with the Charter of the African Union (sic) and the African Charter, as stipulated in Article 56(2) of the African Charter.
- 24. In relation to Article 56(3) of the African Charter, the Complainant submits that the Communication is not written in disparaging or insulting language directed against the Respondent State and the African Union institutions.
- 25. The Complainant submits that the Communication is not based exclusively on news disseminated through the mass media as it includes briefs from the Judicial Tribunal of the City of Maputo and the Supreme Court, and therefore meets the requirement of Article 56(4) of the African Charter.
- 26. Regarding Article 56(5) of the African Charter, the Complainant submits that local remedies were exhausted with regards to the dispute between the Respondent State and the Victim, with a favourable decision reached on 08 July 2008. The Complainant further submits that, as the judgment was in the process of being executed with a view to reinstating the property, the Victim was informed by the Tribunal dealing with the case that the Supreme Court annulled the decision of the lower court following an application filed by the Attorney General, who made use of his special prerogative powers.
- 27. The Complainant submits that in the special prerogative suit, the Attorney General acted as the plaintiff, and the Judge who passed the sentence as the respondent.

DHL Tracking Number MZ-MPM-MPM, delivered on Monday 23 March 2015.

Complainant Submissions on Admissibility, paragraph 7

- 28. The Complainant avers that the annulment decision was immediately executed without the presence of the Victim, and further that the suit was referred to the 4th Division of the Judicial Court to inform the Victim that the application had been dismissed. The Victim filed an application with the 4th Judicial Tribunal of the City of Maputo for a stay of the Supreme Court's decision, in order to refer the matter to the Constitutional Council to assess the unconstitutionality of the law, which granted the special prerogative powers to the Attorney General; however, this application for stay of the Supreme Court's decision was dismissed.
- 29. Accordingly, the Complainant submits that domestic remedies have been fully exhausted, thereby fulfilling the requirements of Article 56(5) of the African Charter.
- 30. With regards to Article 56(6), the Complainant submits that the Communication was submitted nine months after every domestic remedy had been exhausted, and concludes by stating that the case has never been submitted to any other international institution with a human rights mandate in accordance with the requirements of Article 56(7) of the African Charter.

The Commission's Analysis on Admissibility

- 31. The Commission recalls that Article 56 of the African Charter sets out seven requirements that a Communication brought under Article 55 of the African Charter must satisfy in order to be Admissible. Those requirements apply conjunctively and cumulatively.⁵ It is the Complainant's submission that the present Communication satisfies all the requirements for Admissibility under Article 56 of the African Charter.
- 32. Despite the fact that the Commission requested the Respondent State to submit its arguments and evidence on admissibility in accordance with Rule 105(2), no response has been received. In such cases, the Commission has held that in the absence of a substantive response from the Respondent State it must decide on the facts provided by the Complainant. ⁶ Accordingly, the Commission undertakes the following analysis on admissibility on the basis of the information supplied by the Complainant.
- 33. In relation to the requirement in Article 56(1) of the African Charter, which provides that Communications should indicate their authors even if the latter requests anonymity, the Commission notes that the identity and the address of the Complainant is indicated in the Communication, and accordingly finds that the Communication satisfies Article 56(1) of the African Charter.
- 34. In accordance with Article 56(2) of the African Charter, the Communication must show a *prima facie* case and must be compatible with both the AU Constitutive Act

⁵ See Communication 304/2005 - FIDH & Others v Senegal (2006) ACHPR, para 38.

⁶ See Communication 25/89, 47/90, 56/91, 100/93, Communication 60/91, Communication 159/1996,

Communication 276/03 and Communication 292/04

and the African Charter. In this regard, the Commission notes the Complainant's submission that the Communication meets these requirements.

- 35. The essence of Article 56 is that the Commission considers communications only if they are compatible with the African Charter.⁷ In relation to the African Charter, compatibility requires that the alleged violation should relate to a right recognized in the Charter (**compatibility ratione materiae**), to an alleged violation by a State Party to the Charter (**compatibility ratione personae**), and to events that occurred within a State Party after the Charter came into force (**compatibility ratione temporis**).⁸
- 36. In relation to the present Communication, the Commission notes that it alleged that Articles 7(c) and 14 of the African Charter have been violated, and the Respondent State is a State Party to the African Charter; accordingly the Communication falls within the Commission's competence **ratione materiae** and **ratione personae**.

- 37. With regards to **ratione temporis** competence, the Commission notes that the Respondent State became a State Party to the African Charter on 22 February 1989, whereas the Victim's property was expropriated on 14 January 1976, in violation of Article 14 of the African Charter. In light of this, it appears that the alleged violation of the Victim's right to property does not fall within the Commission's competence **ratione temporis**, given that State Parties are only bound to guarantee the rights provided for in the African Charter after their ratification of the treaty.
- 38. In this regard, and in accordance with the Vienna Convention on the Law of Treaties, the Commission previously held that, "The events which occurred before the date of ratification of the African Charter are outside the African Commission's competence **ratione temporis**. The African Commission is only competent **ratione temporis** to consider events which happened after that date or, if they happened before then, constitute a violation continuing after that date."⁹
- 39. In the present communication, the violation of the Victim's rights with regards to expropriation of his property occurred in 1976; that is prior to the coming into force of the African Charter and the ratification of the African Charter by the Respondent State. Accordingly the Commission needs to determine whether violation of the Victim's right to property constitutes a continuing violation.
- 40. In this regard, the Commission would like to refer to a decision of the Inter-American Court of Human Rights, in the **Case of the Moiwana Community v. Suriname**, ¹⁰ in which the victims were forcibly displaced from their ancestral lands before Suriname accepted the jurisdiction of the Inter-American Court. The Court

⁷ Malcom Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights: The System in Practice*, Cambridge University Press, 2008, pg.95

⁸ Solomon T. Ebobrah , 'The Admissibility of Cases before The African Court on Human and Peoples' Rights: Who Should do What?' (2009) MLJ Vol.3, Issue 1, Pg.94

⁹ Communication 251/02: Lawyers of Human Rights v. Swaziland (2005) ACHPR, para 44

¹⁰ Case of the Moiwana Community v. Suriname, Inter-American Court of Human Rights Judgment of June 15, 2005

held that, although it did not have jurisdiction over the original displacement because of temporal limitations on its jurisdiction, the community's inability to return to its lands subsequent to Suriname's acceptance of the Court's jurisdiction constituted a continuing violation over which the Court did have jurisdiction.¹¹

- 41. In the same vein, the Commission notes that the Victim was unable to return to his house after it was allegedly illegally expropriated by the Respondent State, a situation, which continued after the coming into force of the African Charter with respect to the Respondent

State upon its ratification of the Charter, and is still ongoing to date. In light of this therefore, the Commission finds that the alleged violation of Article 14 of the African Charter constitutes a continuing violation, which falls within the Commission's competence **ratione temporis**.

- 42. With regards to the alleged violation of Article 7(1)(c) of the African Charter, the facts indicate that the Victim filed an application against the Respondent State on 08 June 2009 to execute the judicial order for the return of the house, following which his rights under Article 7(1)(c) were allegedly violated; therefore the alleged violation of Article 7(1)(c) occurred when the African Charter was already in force in Mozambique, and in this instance the Commission's competence **ratione temporis** is indisputable. Accordingly the Communication falls within the Commission's competence **ratione temporis**.
- 43. In light of the above, given that Communication is compatible with the AU Constitutive Act and the African Charter and that it indicates a **prima facie** violation of the African Charter, the Commission finds that the Communication satisfies Article 56(2) of the African Charter.
- 44. With respect to Article 56(3) of the African Charter, which provides that Communications shall be considered if they are not written in disparaging or insulting language directed at the State concerned and its institutions or to the Organization of African Unity, the Commission does not find any insulting or disparaging language in the Communication, and accordingly the Commission finds that Article 56(3) of the Charter is satisfied.
- 45. In relation to Article 56(4) of the African Charter, the Commission notes the Complainant's submission that the Communication includes briefs from the Judicial Tribunal and the Supreme Court. In light of the fact there is no evidence that any of the information provided is based exclusively on news disseminated through the media, the Commission consequently finds that the requirement of Article 56(4) has been met.
- 46. Article 56(5) requires that Communications be submitted after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

¹¹ Ibid., Para 43. See also, Jo M. Pasqualucci, **The Practice and Procedure of the Inter-American Court of Human Rights**, Cambridge University Press, 2003, Pg.141

- 47. From the facts provided, the judgment passed by the Supreme Court in **suit no. 159/09** filed by the Attorney General, effectively annulled the decision on **suit no. 127/07**. The Attorney General acted on the basis of the special prerogative power conferred by Law no. 22/07 and Decree-Law no. 1/05, through which the Attorney General applied to the Supreme Court without the presence or submissions on the case from the Victim. In response to this, the Victim sought to refer the matter to the Constitutional Council to obtain an assessment and declaration on the unconstitutionality of the norm which granted the special prerogative powers to the Attorney General. The Victim then filed for a stay of the decision in the 4th Judicial Tribunal of the City of Maputo; however this application was dismissed,

with the Judge stating that the application should have been filed with the Supreme Court.

- 48. The Commission notes that it is a generally accepted principle in international law that before an international body is approached, the applicant must exhaust all available legal domestic remedies. ¹² The Commission further notes that in order to meet the exhaustion requirement, a victim must have obtained a final decision from the highest court to which recourse is available.¹³
- 49. In this regard, the Commission notes that the Constitutional Council of the Republic of Mozambique is a sovereign public office with special jurisdiction to administer justice in matters of a legal-constitutional nature,¹⁴ which has the power, *inter alia*, to evaluate and declare the unconstitutionality of laws and the illegality of normative acts of State offices.¹⁵ Judgments of the Constitutional Council are binding on all citizens, institutions and other legal persons, they are not subject to appeal and they prevail over other decisions.¹⁶
- 50. For making a finding on the submissions of the Complainant with respect to exhaustion of local remedies, it is necessary at this point to address two inter-related issues. The first is whether, having regard to the constitutional arrangement of Mozambique's judicial system, the Complainant could have sought remedy from the Constitutional Council with respect to either or both of the rights of the African Charter allegedly violated. Assuming that such a recourse was a legal possibility, the second issue is then whether the Complainant actually brought the case before the Council.
- 51. With regards to the alleged violation of Article 7, the Complainant avers that this violation is the result of the special prerogative power which is conferred on the

¹² Chidi Anselm Odinkalu and Camilla Christensen, 'The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures,' Volume 20 Human Rights Quarterly 1998, Pg.256. **See also**, Communications 54/91 - Malawi African Association v. Mauritania; 61/91 - Amnesty International v.

Mauritania; 98/93 - Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO v. Mauritania; 164/97, 196/97 - Collectif des Veuves et Ayants-droit v. Mauritania; 210/98 Association Mauritanienne des Droits de l'Homme v. Mauritania.

¹³ Communication Procedure, Information Sheet No.3, pg.6

¹⁴ Id, Article 241(1),

¹⁵ Id, Article 244(1)(a); **See also** Article 6, The Organic Law of the Constitutional Council, Law № 06/2006

¹⁶ Id, Article 248

Attorney General by Law no. 22/07 and Decree-Law no. 1/05, through which the Attorney General applied to the Supreme Court without the presence or submissions on the case from the Victim. As such, this violation on Article 7 could be remedied through rectifying the law on which the special prerogative power of the Attorney General is founded. The Victim could have done this by filing application challenging the constitutionality of the law before the Constitutional Council. The Victim did not file such an application. The Complainant has not provided explanation on why the Victim did not pursue this avenue. Indeed, from the Complainant's submission, it was indicated that the victim was cognizant of the availability of that avenue and applied for stay of execution of the Supreme Court's decision 'in order to approach the Constitutional Council'. Accordingly and in the absence of a submission by the Complainant that remedies were not available or effective, the Commission finds that the exhaustion of remedies requirement has not been met with regards to the alleged violation of Article 7.

- 52. With respect to the allegation on the violation of Article 14 on the right to property, on the substantive demand of the Victim for asserting title over the property, the Complainant submitted that the matter was exhausted with a favourable decision reached on 08 July 2008. Since it was the Supreme Court that reversed this decision, the Victim may not have appealed on the subject to the Supreme Court itself. It is possible that the civil suit involving the Victim's claim for asserting title over the property itself may not be amenable to be taken for review before the Constitutional Council. Yet given that what led to the Supreme Court's decision recanting the decision of 08 July 2008 on **suit no. 127/07** was the exercise by the Attorney General of the special prerogative power under Law no. 22/07 and Decree-Law no. 1/05, the Victim, as suggested in the Complainants submission, could have filed a constitutionality application on the Attorney General's special prerogative power, which, if successful, could have the effect of setting aside the Supreme Court's decision in **suit no. 159/09** and affirming the lower court decision on **suit no. 127/07**.
- 53. In the present case, the Victim did not refer the matter on the unconstitutionality of the laws in question to the Constitutional Council. No explanation is availed on why the Victim, despite having sought to take the matter to the Constitutional Council, did not actually pursue it. However, in other Communications on file with the Commission, the Constitutional Council received and decided cases from individuals. 17
- 54. In the light of this failure of the Victim with no indication that a redress from the Constitutional Council was not possible or ineffective, the Commission finds on the allegation of violation of Article 14 that Article 56(5) of the African Charter has not been met.
- 55. Article 56(6) of the African Charter provides that the Commission shall consider Communications which "are submitted within a reasonable period from the time

¹⁷ See Communication 460/13 – Francisco Filipe Machado Vasco Mboia Campira (represented by Professor Dr. Gilles Cistac) v. the Republic of Mozambique

domestic remedies are exhausted or from the date the Commission is seized of the matter." The Commission has previously noted, generally, the requirement of timeliness in Article 56(6) of the Charter is dependent on the exhaustion of domestic remedies envisaged in Article 56(5) of the African Charter.¹⁸

- 56. From the facts of the Communication, the Commission notes that on 20 November 2011, the Supreme Court passed judgment annulling the decision of the lower Court. The Victim's application to the 4th Judicial Tribunal of the City of Maputo, requesting a stay of the Supreme Court's decision, was dismissed on 19 March 2012 and the complaint was submitted to the Commission on 19 September 2012; that is six (6) months later. In light of this, the Commission is satisfied that six (6) months constitutes a reasonable timeframe within which to submit a Communication to the Commission. The Commission therefore finds that Article 56(6) of the Charter is satisfied.
- 57. In relation to Article 56(7) of the Charter, the Commission notes that, as stated by the Complainant, the issues and claims in the Communication have not been brought before, or settled by any other international forum. Accordingly, the Commission finds that Article 56(7) of the African Charter has been satisfied.

Decision of the African Commission on Admissibility

- 58. In view of the above, the African Commission on Human and Peoples' Rights decides:
- i. To declare the Communication inadmissible for failure to comply with Article 56(5) of the African Charter;
- ii. To notify its decision to the parties in accordance with Rule 107(3) of its Rules of Procedure.

Done in Banjul, The Gambia, during the 59th Ordinary Session of the African Commission on Human and Peoples' Rights, from 21 October to 04 November 2016.

¹⁸ Communication 322/2006 - *Tsikata v Ghana* (2006) ACHPR para 37

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