THE COMMUNITY COURT OF JUSTICE OF THE

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

In the Matter of

CHEIHK GUEYE V. REPUBLIC OF SENEGAL

Application No: ECW/CCJ/APP/21/16 Judgment NO. ECW/CCJ/JUD/21/20

JUDGMENT

ABUJA

20 September 2020

IN THE MATTER OF

Mr. CHEIKH GUEYE……..APPLICANT

AND

REPUBLIC OF SENEGAL……...RESPONDENT

COMPOSITION OF THE COURT:

Hon. Justice Gberi-Be OUTTARA…….Presiding

Hon Justice Dupe ATOKI……...Member/Judge Rapporteur

Hon. Justice Keikura BANGURA……..Member

Assisted by

Tony ANENE-MAIDOH…….. Chief Registrar

REPRESENTATION OF PARTIES:

Maitre Abdoul Hmaid NDAIYE …… For the Applicant

Maitre Papa Moussa Felix SOW…… For the Respondent

JUDGMENT:

This is the judgment of the Court.

DESCRIPTION OF PARTIES

1. Cheikh Gueye **(**hereinafter referred to as "the Applicant") is a Community citizen of the Republic of Senegal.

2. The Respondent is the Republic of Senegal, a Member State of the Economic Community of West African States (ECOWAS) and a signatory to its Protocols and Conventions.

INTRODUCTION

3. These proceedings arise from allegations of the Applicant that the Respondent violated his right to property, when it auctioned his property without any prior notice or compensation, contrary to Article 14 of the African Charter on Human and Peoples' Rights (the African Charter) and Article 17 of the Universal Declaration of Human Rights (UDHR). He also alleged the violation of the right to fair hearing when Respondent failed to serve him a hearing notice regarding the auction proceedings. The Applicant therefore prays the Court to find the Respondent liable for these violations and award compensation for same.

SUMMARY OF PROCEDURE BEFORE THE COURT

a. The application was filed at the Registry on 12 July 2016 and served on the Respondent on 13 July 2016.
b. On 16 August 2016, the Respondent filed their defence, which was served on the Applicant on 22 August 2016.
c. On 15 November 2016, the Applicant filed his reply, which was served on the Respondent on 17 November 2016.
d. The Respondent filed a rejoinder on 7 February 2017 and it was served on the Applicant on 09 February 2017.

4. On 22 January 2018, The Court received a correspondence from the Applicant informing the Court of a change of his counsel.
5. On 25 April, Pleadings were closed and hearing commenced

APPLICANT'S CASE

a) *Summary of Facts*

6. The Applicant in his application dated 12 July 2016, claims ownership of a building situated at Fass Delorme with land title number 11766, acquired on April 22, 1963 (Land Registry Title document Exhibit (1) annexed). It came to his knowledge at the point of an attempted sale of the said building by The Islamic Bank of Senegal (hereinafter referred to as The Bank) in the exercise of their right as a mortgagee same being security for a loan of 3, 250, 000 CFA Francs it granted to one Mr. Saer Diop an employee of The Bank. Though the Applicant was not a party to the mortgage loan, which was granted upon presentation by Mr. Saer Diop of a letter of proxy purportedly written by him, he believes that the status of Mr. Saer Diop in The Bank facilitated the implementation of the scheme.

7. On 9 March 2004, the Dakar Regional Court approved the auction and awarded the forced sale of the land to one Madame Salimata Siama for 14,000,000 (fourteen million) CFA Francs without the production of the said letter of proxy (Exhibit 2-copy of the award judgment was annexed). The Bank collected the entire sale price of the building from the auction whereas the alleged debt was about 3,250 000 (three million, two hundred and fifty thousand) CFA Francs without interest.

8. The Applicant states that he did not participate in any of the processes leading to the sale of his property, including the signing of the mortgage agreement. As a Notary Public witnessed the mortgage agreement in his absence upon a presentation of a letter of proxy purportedly written by the Applicant. These facts remain uncontroverted by the Bank. All services of notices regarding the sale were effected by substituted service on the Town Council on the pretext that he could not be located, despite his popularity in the city of Diourbel. Therefore, he only became aware of the whole process on the 13 January 2006 during an attempt to evict him.

9. Following his knowledge of the auction of his property, he filed a case against the Bank, its Director General-Mr. Azhar Khan, Mr. Saer Diop and Mrs. Salimata Siama, before the Criminal Court for the offences of fraud, and forgery of administrative documents, wherein he claimed the sum of 80 million CFA Francs for damages. However, on 21 November 2006, they were acquitted of the alleged offences while the Court rejected his claims for damages. Upon appeal, the Appellate Court in a judgment dated 28 July 2014, set aside the judgment, not on the substance but on the improper composition of the lower Court and ordered a retrial. A further appeal was filed before the Court of Cassation but it was dismissed.

b) *Pleas in Law*

10. The Applicant alleges that the Respondent a violated his right to property under Articles 14 and 17 of the African Charter and the UDHR respectively, by unlawfully auctioning his property without his approval or knowledge. Article 14 of the African Charter provides, "*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws*." Article 17

of the UDHR is in *pari materia* with the aforementioned provision of the African Charter.

11. The Applicant also alleges that the Respondent violated his right to a fair hearing under Articles 7 and 10 of the African Charter and the UDHR respectively, by failing to notify him of the auction proceedings prior to the sale of his property. Article 7 of the African Charter provides as follows:

> *"Every individual shall have the right to have his cause heard. This comprises:*
>
> *a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
>
> *b) The right to be presumed innocent until proved guilty by a competent court or tribunal;*
>
> *c) The right to defence, including the right to be defended by counsel of his choice;*
>
> *d) The right to be tried within a reasonable time by an impartial court or tribunal"*

c) Reliefs Sought

12. Based on the facts mentioned above, the Applicant seeks the following reliefs from the Court;

a) To adjudge and declare that Senegal has violated Articles 9, 15 and 91 of its Constitution;

b) To adjudge and declare that Senegal breached Articles 7 and 14 of the African Charter on Human and Peoples' Rights;
c) To hold that Senegal has violated, Articles 10 and 17 of the Universal Declaration of Human Rights;
d) To order Senegal to pay Mr. Cheikh Gueye the sum of 115 million FCFA as pecuniary damages.
e) To order Senegal to pay 30 million FCFA as moral damages.

RESPONDENT'S CASE

a) Summary of facts

13. The Respondent in its defence raised a number of objections on the admissibility of the application as follows: a) Failure of Applicant's counsel to adduce authorization that enables him practice in Senegal contrary to the provisions of Article 28(3) of the Rules of Court; b) Failure of Applicant's counsel to state an address for service at the seat of the Court contrary to Article 33(2) of the Rules of Court; c) Incompetence of the Court to review the decision of the Respondent's national Court.

14. On the merit, the Respondent cited the discrepancy between the name appearing on the synopsis page of Annexure 1 and on all other processes leading to the judgment of 4 March 2009, that is, **Sickhe Gueye** and the Applicant's name in this case, which is **Cheikh Gueye.**

15. It is the contention of the Respondent that under this circumstance, the Applicant cannot claim to be the owner of the property with Title No. TF N°1766/DG, which was auctioned at the Tribunal, without a judicial rectification of his first name. The

Respondent therefore urged the Court to declare the Application inadmissible, for lack of standing to appear before this Court.

16. In its response to the allegation of violation of the right to a fair hearing during the various proceedings of the Court, the Respondents aver that the Applicant was ably represented at each stage of the various court proceedings by lawyers, who ensured the defence of his interest. Therefore an allegation of violation of his right to a fair hearing is not sustainable and should be dismissed. Furthermore, the Respondent contends that the Applicant has not demonstrated any aspect of a fair hearing that has been violated by the Respondent and that even if there was, the Applicant should have sought for reparation at the national courts in line with the code of obligations of Governments.

17. Regarding the judgment approving the auction, the Respondent argued that the Applicant's claims are irrelevant and that in any case, this Court lacks the jurisdiction to examine the decisions of national courts.

18. On the right to property, the Respondent reiterated the fact that the Applicant not being the owner of the auctioned property cannot claim a violation of his right therein. Additionally, they argued that the same constitution which guarantees the right to property also grants prerogative to the National Assembly to determine the regime of the property, the real rights and civil and commercial obligations, labour law, the right to form workers' association, as well as social security.

b) Pleas in law.

19. The Respondent raised objections on the admissibility of the application based on the fact that it is not in compliance with Rules 28(3) and 33(2) of the Court.

20. Rule 28(3) provides as follows:

> "*The lawyer acting for a party must lodge at the Registry a certificate that he is authorized to practice before a court of a member State or of another State, which is a party to the Treaty*."

21. Rule 33(2) provides as follows:

> "*For the purpose of the proceedings, the application shall state an address for service in the place where the Court has its seat and the name of the person who is authorised and has expressed willingness to accept service."*

C) Reliefs sought.

22. Based on the above grounds, the Respondent seeks the following reliefs from:

a. To declare the application inadmissible;
b. To order the Applicant to pay the sum of one hundred million (100,000,000) CFA Franc as reparation for the prejudice suffered owing to the vexatious and frustrating procedure, pursuant to Article 66.5 of the Rules of Court.

APPLICANT'S REPLY TO DEFENCE OF THE RESPONDENT

23. Responding to the allegation of non- conformity with Rule 33(2) of the Rules of Court to provide an address for service at the seat of the Court, the Applicant, while not contesting the lapse, denies that it renders the application inadmissible. He argues that under Article 33(6) of the Rules of Court, only a Judge can declare an application inadmissible for want of compliance with Article 33(2) of the Rules of Court. It is therefore premature at this stage for the Respondent to seek to declare the application inadmissible.

24. In regard to the objection of non- conformity with Rule 28(3) of the Court, which requires the presentation of a qualifying certificate to practice in Senegal, the Applicant stated that his counsel though a lawyer registered with the Bar in Paris has the express authorization to practice abroad by the Lawyers' Privilege Council in Paris while still a Member of the Bar in Paris. He states that the authorisation enables him to register and practice in Senegal with the Law Firm of Cabinet SCP M'baye Dieng & Associes, registered with the Bar in Dakar (Copy of the said authorization to practice abroad was annexed).

25. On the alleged violation of the right to a fair hearing, the Applicant restated the fact that he was never informed of the proceedings which led to the forced sale of his building to Mrs. Salimata Siama and that the right to a fair trial guarantees that no one should be judged without having been heard.

26. On the right to property, the Applicant states that it is undisputable that he is the owner of the building located at Fass Delorme, which he acquired on April 22, 1963. Since the building had never been alienated by him, it remains his exclusive property, and the sale judgment and the various court decisions that illegally and unfairly appropriated his property to a third party comes to naught. He concluded by

restating that these violations have generated pecuniary and moral damages for which he is entitled.

RESPONDENT'S REJOINDER TO APPLICANT'S REPLY

27. The Respondent filed a rejoinder wherein it reiterated its stance in the defence earlier filed and urged the Court to grant its earlier request.

JURISDICTION:

28. Objection on material jurisdiction. The Respondent contends that the Court is not vested with jurisdiction to adjudicate on the application, as it seeks the Court to sit as an appellate Court and pronounce itself on matters already considered and concluded by the Supreme Court of the Respondent. They therefore challenged the jurisdiction of the Court in that regard. The Applicant did not address this concern raised by the Respondent.

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29. The Court reiterates that its jurisdiction has been clearly spelt out in Article 9(4) of the 2005 Supplementary Protocol, which empowers the Court to hear allegations of violation of human rights that occur in Member States. Being a creation of Statute, jurisdiction cannot be assumed or ousted by implication. It must be expressly conferred. To this end, the Court is bound to exercise its powers within its scope of jurisdiction.

30. While this Court has jurisdiction over human rights violations that occur in Member States of the ECOWAS, it has consistently held that it does not have the

jurisdiction to act as an appellate court over decisions of domestic courts of Member States. This has been established in a plethora of decisions including the case of *DR. MAHAMAT SEID ABAZENE v. THE REPUBLIC OF MALI & 2 ORS, JUDGMENT NO.* ECW/CCJ/JUD/02/10, where the Court held that the Community Court of Justice, ECOWAS, *is not an Appeal Court before which cases decided by the courts in Member States could still be brought*. See also *AGRILAND CO. LTD v. THE REPUBLIC OF COTE D' IVOIRE, JUDGMENT NO* ECW/CCJ/JUD/07/15 @ pg. 14 and *CHEICK ABDOULAYE MBENGUE v. REPUBLIC OF MALI, ECW/CCJ/APP/08/11 @ pg. 12.*

31. However, the Court's jurisdiction must not be interpreted in an absolute manner as clearly stated in the case of *MR. KHALIFA ABABACAR SALL & 5 ORS v. REPUBLIC OF SENEGAL* ***unreported*** *ECW/CCJ/JUD/17/18* @ page 27. Where the Court held that,

> "*…it is not a court of appeal or of cassation of the decisions of the national courts, and such decisions cannot hinder its intervention when it comes to facts within its jurisdiction, namely a violation of a fundamental right. Only the previous referral to another international court, with like jurisdiction, can frustrate its regular referral. However, although it is not inclined to examine national judicial decisions, its jurisdiction must not be interpreted that in an absolute manner.*"

32. This position has been reiterated in several jurisprudence of the Court, but has been succinctly put as follows;

> *"…though it has jurisdiction over human rights violation that occur in Member States of ECOWAS, it does not have the jurisdiction to act as an appellate court of the domestic courts*

> *of Member States. Thus, when human rights applications are brought before the Court, it will inquire into the human rights allegations but will resist any invitation to act as an appellate court to the domestic courts of Member States as it clearly does not have that jurisdiction*."

See *OCEAN KING NIGERIA LTD v. REPUBLIC OF SENEGAL ECW/CCJ/JUD/07/11-REV @ page 11*.

33. Reiterating the above, the Court held that, *"it is not an appellate court and will only admit cases from national courts where human rights violations were alleged in the course of the proceedings.* See *JUSTICE PAUL UUTER DERRY & 2 ORS v. THE REPUBLIC OF GHANA* ***unreported*** *ECW/CCJ/JUD/17/19 @ Pg. 28.* This issue was finally put to rest when the Court held that;

> *"… It has severally drawn a distinction between its lack of jurisdiction to examine the decisions of national courts and its jurisdiction to hear cases of human rights abuses arising therefrom. The Court has consistently held that it cannot sit on appeal over decisions of national Courts of Member States."*

See *FINANCE INVESTMENT & DEVELOPMENT CORPORATION (FIDC) V. REPUBLIC OF LIBERIA* ***unreported*** *ECW/CCJ/JUD/23/18 @ pg. 11***.**

34. This exercise of the Court's mandate is not to pronounce on the propriety or otherwise of the substance of the decision rendered by the Member State but to examine the processes leading to the decision with the view to finding whether any protected substantive or procedural rights of the Applicant were violated. Such a mandate should not be construed either in form or substance as amounting to

exercise of appellate function by this Court as being strenuously contended by the Respondent.

35. The Court therefore dismisses the Respondent's objection to the jurisdiction of the Court as constituting itself as an appellate court.

ADMISSIBILITY

36. On Non-Compliance with the Rules of Court: The Respondent raised objections on the admissibility of the application.

37. The first contention of the Respondent is in regard to the omission of an address at the seat of the Court, which was not provided in the application filed by the Applicant thereby rendering same inadmissible for being in contravention of Article 33(2) of the Rules of Court.

38. The Applicant disagrees that the omission is fatal to his case on the ground that it is the responsibility of the Registry to inform Applicant of the defect and request his compliance within thirty (30) days. He contends that he did not receive any notification from the Registry. He further argues that only a Judge can make a final decision regarding the inadmissibility or otherwise after a notification and failure to comply has been established.

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39. The Registry having accepted their failure to notify the Applicant and the omission being a procedural lapse that does not go to the substance of the case, the Court dismisses the Respondent's objection on this ground and declares the application admissible and so holds.

40. The second objection of the Respondent is premised on Article 28(2) of the Rules of Court, which require a lawyer acting on behalf of a party to lodge at the Registry, an authorisation to practice before a court of a Member State. The Applicant's lawyer is cited as resident in Paris and in the absence of such certification, the Respondent argues that the application is defective and should be declared inadmissible by the Court. Indeed such authorisation was not annexed to the originating application, however upon the objection raised, the Applicant filed a document in support.

41. In his reply, the Applicant annexed a document issued by the Paris Bar authorising his lawyer to practice abroad and in particular with the law firm of *SCP MBAYE DIEND & ASSOCIATES* in Dakar Senegal. Attached was also an agreement between the said law firm and the lawyer on the use of their office facilities.

42. In a rejoinder, the Respondent raised further objection to the effect that even though the said lawyer is authorised to practice abroad, an authorisation from the Bar of Senegal is vital.

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43. The Court takes judicial notice of the long practice of reciprocity of rights of practice by lawyers, between France and Republic of Senegal premised *on Article*

46 of the Convention on Cooperation in Judicial Matters between the Government of the French Republic and the Government of the Republic of Senegal of March 29, 1974. This cooperation removes barriers to legal practice as lawyers from both countries have automatic right to practice in each other's jurisdiction. The Applicant's lawyer being registered in Paris is by implication authorised to practice in Senegal without further registration with the Bar of Senegal as alleged by the Respondent.

44. Consequently, the Court dismisses the objection of the Respondent and hold that the Application is deemed admissible.

MERITS

Alleged violation of the right to property:

45. The Applicant's bases his case on the violation of his right to property under Article 14 of the African Charter, due to the unlawful auctioning of his building by agents of the Respondent. Article 14 of the Charter provides as follows:

> "*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."*

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46. In analyzing this provision, which is in *pari materia* with Article 1 of Protocol No. 1 to the European Convention on Human Rights, the Court cites the European Court decision wherein it broke down the required component of the right as follows;

"*Article 1 of Protocol No. 1 to the Convention, which guarantees in substance the right to property, comprises three distinct rules. The first one, which is expressed in the first sentence of the first paragraph, lays down the principle of peaceful enjoyment of property in general. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognizes that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule"*

See *GOGITIDZE AND OTHERS v. GEORGIA, Application no. 36862/05), 12 May 2015* and among others, *IMMOBILIARE SAFFI v. ITALY [GC]*, no. 22774/93, § 44, ECHR 1999-V.

47. Thus flowing from the above rules, in determining whether the Respondent violated this right, the facts must establish the following:

a) That the Applicant has proved a proprietary right or possession of the said property;

b) That there was an interference with the possession by the Respondent;

c) That the interference was for public interest;

d) That the interference was in accordance with the appropriate laws.

a. *Proof of a proprietary right or possession of the said land*.

48. The Applicant claims that he owns the building situated at Rue 22 Prolongee at Fass Delorme Dakar Senegal with Title No 11766, granted to him on April 1963. That the auction of the said building by the Respondent based on a loan granted to Mr. Saer Diop by the Bank, same being without his knowledge or approval, is a violation of his right to property contrary to Article 14 of the African Charter. Since he did not part with possession of the said property to any one, his ownership remains sacrosanct.

49. The Respondent contests this, claiming that name in the Lands Register (annexure 1) and on all other processes leading to the judgment of 4 March 2009, is **Sickhe Gueye**, while the Applicant's name in the application before this Court is **Cheikh Gueye**. It is the stand of the Respondent that without a judicial rectification of his first name, the Applicant's claims over the property with Title No. TF N°1766/DG that was auctioned at the Tribunal is not tenable. Consequently, since he has no standing to institute the action, his claim being inadmissible should be dismissed.

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50. One of the requisite conditions to maintaining an action before this Court is that the Applicant must establish a standing to institute the case as a victim pursuant to which it has held that,

> *"Cases shall be brought before the Court by natural or legal persons endowed, within the framework of their national laws, with the required legal capacity, and who in addition, shall* ***justify their condition of being a victim****."(*Emphasis added*).*

See CDD AND CDHRD v. MAMADOU TANDJA AND NIGER, (2011) CCJELR Pg. 103

51. To qualify as a victim, the Applicant must be able to establish that he or she has suffered a personal loss and has an interest that is direct and ascertainable. In other words **"***To claim to be a victim, there must exist a sufficient direct link between an applicant and the prejudice he deems to have suffered as a result of the alleged violation.**"*** *see AZIAGBEDE KOKOU & 68 ORS V. REPUBLIC OF TOGO ECW/CCJ/JUD/07/13 Page 175 @24.*

52. The Court further reiterated this fact when it held that,

> *"Generally, and from a legal standpoint, the necessity for an Applicant to provide justification of interest in a case is attested to be the adage that where there is no interest, there is no action, and also an interest is the measuring rod for an action. In other words, an application is admissible only when the applicant justifies that he brings a case before a Judge for the purposes of protecting an interest or defending an infringement of such.* ***Such an interest must be direct, personal and certain***." (Emphasis added).

See *ODAFE OSERADA V. ECOWAS COUNCIL OF MINISTERS, ECOWAS PARLIAMENT & ECOWAS COMMISSION, ECW/CCJ/JUD/01/08 @ 27***.**

53. As stated *ibid*, the Applicant did not counter the allegation of discrepancy in name and the onus rests on him to substantiate his interest in the said building. It is trite that he who alleges must prove.

> *"It is a general rule in law that in the course of a trial, the party making the allegations must prove it. The constitution and demonstration of the evidence therefore falls on the concerned parties. They must use all the legal means and provide evidence*

to support their claims. Such evidence must be convincing to establish a connection between them and the claimed facts"

See *DAOUDA GARBA V. REPUBLIQUE DU BENIN ECW/CCJ/JUD/01/10 - CCJLR 2010, p. 12 par.35.*

54. Since the Applicant is alleging the violation of his right to property, the hallmark of a successful claim in this wise is the proof of ownership. Every Applicant whether a natural or legal person must be able to demonstrate the existence of a proprietary right over the property at stake in order to qualify as a victim under the African Charter. See *LA SOCIETE BEDIR SARL V. REPUBLIC OF NIGER, ECW/CCJ/JUD/11/20.*

55. The Court will at this point review all the facts before it to enable it come to a finding whether the Applicant has established a proprietary interest in the disputed property. The Court recognises the fundamental rule of evidence of burden of proof which mandates who ever asserts a fact to establish same. In this wise, it behooves on the Applicant who claims ownership of the disputed property to place before the court sufficient evidence to support his proprietary interest in the said property. The only such document presented to the Court is the Certificate of Occupancy No 11766 (exhibit1), which as contended by the Respondent is inconsistent with his name.

56. While the absence of a resolution of the discrepancy in names alleged by the Respondent raises a dent in the effective establishment of the Applicant's proprietary interest over the disputed property, the facts before the Court present a number of similarities between **Siekhe Gueye** and the Applicant named **Cheikh GUEYE** creating a misgiving as to the existence of both parties in question. This therefore requires an all-inclusive analysis of these similar facts to assist the Court in a considered determination of the application.

57. The Court notes the following similarities gathered from the facts before it:

a. *The date of birth*: both parties were born on the same day, month and year. The synopsis from the land registry document attached to the initiating application of the Applicant (Exhibit 1) states that the land was "*relinquished through sale to Mr. Siekhe Gueye, Muslim, Male married according to Islamic rites, living at Diourbel in St. Louis Senegal where he was born on* ***28 July 1930*** *(emphasis provided).* Similarly, the first page of the initiating application of the Applicant (Doc1) states as follows: *FOR Mr. Cheikh GUEYE* ***born 28 July 1930*** *at St. Louis, living in the quartier Cheikh Ibra Fall, Abdoulaye Diop Diourbel*.

b. *Residence*: From (a) above, a further similarity is that both parties reside in St. Louis, Diourbel Senegal.

c. *Registration details of property.* The synopsis of the land registry document described the property as having been carved out of a whole property registered under Title No 4459/DG and conferred on one Siekhe Gueye via a deed of sale by one El Hadji Mamadou Assane Ndoye in April 1963. Consequent on which the carved out plot was captured under a distinct title **No 1176** (emphasis provided) (Exhibit 1*).* The Applicant's claim is also in respect of the land with the same registration details. See (Document 1 page 2) under Summary of Facts*: "A Senegalese citizen, Mr.* ***Cheikh Gueye*** *claims that he owns a building at Fass Delorme. The Land which land title bears* ***number 11766*** *was acquired April 1963"* Noteworthy is the fact that the

Applicant supports his claim with Exhibit 1 thus grounding the claim of ownership of both parties on same land and with same registration number.

d. *Size of the property:* An extract from the judgment of the Tribunal Regional Hors Classe of Dakar approving the auction by the Bank (page 1 of Exhibit…) states the subject-matter as follows; *"Application seeking an order from the Tribunal on the auctioning of a mortgage plot of land, bearing as owner Siekhe GUEYE measuring **305 square meters** (Emphasis provided) located at Fass registered under Title No 11766/DG, including the buildings erected on it…"* Similarly, a synopsis of the land registry being the document submitted by the Applicant to support his claim of ownership equally captured the size of the property registered in favour of Siekhe Gueye as *"full ownership of a virgin plot of land measuring three hundred and **Five (305) square meters**..."* In essence, the size of the property auctioned is the same as in the land document annexed by the Applicant.

e. *Location of property*: The disputed property claimed by both parties is located at Fass Delorme, Dakar Senegal

f. *Details of the Property auctioned:* the Applicant has consistently maintained that he is the owner of the property with Title No TF No 11766/DG that was sold by the Regional Court Tribunal Regional Hors Classe of Dakar, during its public auction of 9 March 2004. Confirming this averment, the Respondent stated at page 5 of its defence (Document 2) thus*: "Whereas it is trite that the following auction by the Tribunal Regional Hors Classe Of Dakar on 9 March 2004 in regards to the property Title No **11766/DG** belonging to Siekhe Gueye (and not Cheikh) ……" (Emphasis provided).* Furthermore, the extract from

the judgment of the Tribunal Regional Hors Classe of Dakar (Exhibit 2) approving the auction, states as follows*: "Judgement No 691 of 9 March, ordering the auction sale of plot of land with C. of O. No 11766, a mortgage property seized from Saer Diop but real property of Siekhe Gueye*..." In essence, the registration No of the property auctioned is the same reflected in the land title claimed by the Applicant.

58. From above facts, the Court is confronted with a confounding situation where there abound numerous similarities of facts between the property held by **Siekhe Gueye** who the Respondent puts out as the owner of the disputed property hereinafter referred to as the "alleged owner" and that of the Applicant named Cheikh Gueye.

59. In all these, while the surnames of both parties are the same, the only difference is their first names, which was not resolved by the Applicant. Indeed, the title document (Exhibit 1) indicate that a land was relinquished through sale to one Mr. Siekhe Gueye as owner, the Applicant known as Cheikh Gueye on the other hand contends that he owns the same land and supports this averment with the same (Exhibit 1).

60. The Court is not discounting the discrepancy in the names as identified earlier, which cast a shadow on the claim of ownership by the Applicant with the attendant burden of proof to establish same. However, the similarities extracted from the facts presented before the Court are threads that weave a close knit fabric of ownership in favour of the Applicant whom the Court has come to a conclusion is one and the same with Siekhe. It is impossible for an auctioned property with same registration

details, same size, and same location to belong to two different people who have the same surname, same birth details and who live in same town.

61. The Court struggles to find that there exists a person named Siekhe Gueye other than the Applicant who vanished somewhere in Senegal and cannot be reached even when his property was being auctioned. The Court notes that in all these ongoing, Siekhe never surfaced to personally contest and assert his right over the disputed property. The Court is unable to conclude that the difference in the first names negates the overriding similarities in all these vital indices to confer ownership on the invincible party. As earlier indicated, the onus of proof of ownership lies on the Applicant. However, the proof of a claim is not depended solely on documentary evidence. The Court can equally reach a conclusion on circumstances inferred from facts placed before it if, on a preponderance of evidence they support the claim, the Court will give credence to its totality and make a finding for the party.

62. The Court recalls its decision wherein it held that *"...before it concludes on the issue of occurrence of human rights violation, the concrete proof of the facts upon which the Applicant base their claims must be established with a high degree of certainty, or at least, there must be a high possibility of the claims appearing to be true, upon scrutiny.* See *ASSIMA KOKOU INNOCENT & ORS v. REP OF TOGO (*2013) CCJELR pg. 201 para.59.

63. Reiterating the above, the Court further held that,

> *"To prove an application on preponderance of evidence, the evidence adduced must have reached a high level of standards required to sustain the claim for the violation of human rights. In order to catapult the evidence to the level of high standard of proof of evidence*

in international law practice by high standard of proof or preponderance of evidence required, the evidence must be considered in material particular"

See MOUKHTAR IBRAHIM v. GOVT. OF JIGAWA STATE & 2 ORS (**unreported**) *ECW/CCJ/JUD/12/14 pg. 27 para. 95*.

64. In summarizing these similarities, the following facts come to light: the land registration document referred to as proof of ownership by the Applicant is the same with that of the alleged owner; the title document indicates that the alleged owner was born on the same day, month and year as claimed by the Applicant; the title document indicates that the alleged owner lives in the same town as the Applicant; the registration number indicated in the title document is the same as the land in dispute; the size of the disputed property indicated in the land document is the same as that claimed by the Applicant; the land upon which the auctioned building is situated has the same registration number with that claimed by the Applicant, ditto same size and same location.

65. The Court believes that the aforementioned similarities viewed together with Exhibit 1 are in themselves sufficient, on a preponderance of evidence, to support the Applicant's claim of ownership of the auctioned property and it so holds.

66. At this point, having found that the Applicant has proved the ownership of the auctioned property, the burden now shifts on the Respondent to counter the claim of ownership by the Applicant. The Court recalls its decision wherein it laid an important dictum in this wise as follows *"...as a general rule, the burden of proof lies on the Plaintiff. If that burden is met, the burden then shifts to the Defendant,*

who now has to plead and prove any defence by a preponderance of evidence". See *FESTUS A.O. OGWUCHE v. FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/02/18*.

67. A claim that the Applicant's title is defective based on a discrepancy in the first names of the parties concerned alone is inadequate in this circumstance to convince the Court to believe the Respondent's claim that the Applicant is not the owner of the said property. In addition to the claim of the defective title, a testimony in Court by the alleged owner himself or a close family member to counter the Applicant's claim is indispensable. In the alternative where physical appearance is impracticable, a deposition of a witness statement to that effect is vital to effectively rebut the Applicant's claim.

68. The Court recognises the representative capacity under which the Respondent as a Member State is called upon to account for the acts of its agents, which primarily focuses on the disposal of a property allegedly belonging to Siekhe Gueye. It becomes more crucial that the testimony of the alleged owner of the disputed property is a necessary component of the totality of the Respondent's evidence more so that the documentary evidence is equally challenged. Since the title document that the Respondent relied on is challenged, the burden shifts on them to convince the Court otherwise either by way of oral testimony of the alleged owner or via a witness statement.

69. The challenge faced by the Respondent in producing the alleged owner- Siekhe Gueye to testify is not farfetched. Having held that the aforementioned similarities can only lead to a conclusion that Siekhe and Cheikh are one and the same person, it follows that an invincible person cannot be produced. The Respondent has failed to adduce further evidence to convince the Court to believe their claim. In this

regard, the Court has held that *"As always, the onus of proof is on a party who asserts a fact and who will fail if that fact fails to attain that standard of proof that will persuade the court to believe the statement of the claim"* See *FEMI FALANA & ANOR V REPUBLIC OF BENIN & 2 OR ECW/CCJ/JUD/02/12 PG. 34.*

70. Indeed, having failed to attain that standard of proof, the Respondent's claim fails, the facts surrounding the claim of the Applicant being more persuasive, the Court holds that the Applicant has established a proprietary interest in the auctioned property.

71. Another issue the Court must address is the argument of the Respondent that the Applicant having known that his property was being mortgaged and took no step to assert his ownership is statute barred and he has lost the property. The basic principle of law regarding proof of ownership is that title and possession go hand in hand. However, under certain circumstances, long uninterrupted possession of property can confer ownership over and above a titleholder. In a recent case, the English Court had this to say,

> "*However, in the English common law tradition, courts have long ruled that when someone occupies a piece of property without permission and the property's owner does not exercise their right to recover their property for a significant period of time, not only is the original owner prevented from exercising their right to exclude, but an entirely new title to the property "springs up" in the adverse possessor. In effect, the adverse possessor becomes the property's new owner. Over time, legislatures have created statutes of limitations that specify the length of time that owners have to recover possession of*

their property from adverse possessors. In the United States, for example, these time limits vary widely between individual states, ranging from as low as three years to as long as 40 years"

See MERRILL V SMITH *2016 p 161* See also decision of the Supreme Court of the Philippines *CECILIA. T. JAVELOSA GR No 204361@ July 04 2018.*

72. The Court notes that the records show that up to the time of the auction, the Applicant was in possession of the disputed property and had so remained from 1963, when he claimed to have acquired the said property. There is no evidence that his quiet enjoyment was interrupted prior to the auction that was carried out in 2004. Therefore, a quick mathematic calculation shows that the Applicant had enjoyed uninterrupted enjoyment of the said property for forty-one (41) years before the auction. The question to ask is that if the property really belongs to a person named Siekhe, where was he all these years? Why did he allow an alleged trespasser to remain in uninterrupted possession of his property for forty-one (41) years only to suddenly wake up to claim ownership of the property? If indeed there was a Siekhe different from the Applicant how can this *lache* be explained?

73. Assuming but not conceding that the argument of the Respondent on statute bar holds water, the pertinent question is to whom is the property lost, to a mortgagor who has no title as against to a party in occupation for 41 years? Assuming but not conceding that the Applicant was an adverse possessor, who and where is the original owner who is contesting the occupancy of the disputed property? The Respondent, a Member State of the ECOWAS who has been waging a fierce war of defence on behalf of the invincible Siekhe is unable in this instance to stand in the gap for him. The Respondent must ensure that he is seen to do all possible to defend his case personally or by a written witness statement. A defence for the Bank will

necessarily entail proof that the property actually belongs to Siekhe as claimed, and who else is qualified to prove same other than the one who is claimed to be the owner. The Court reiterates its earlier finding that the facts before it lend credence to a conclusion that a separate Siekhe Gueye does not exist, as Siekhe and Cheikh are one and the same person.

74. Perforce, guided by the forgoing analysis and cases, a claim by the Respondent that the Applicant is not the owner of the disputed land does not avail them. Consequently, the Court holds that the ownership of the disputed land is established in favour of the Applicant.

De-facto interference with possession by the Respondent:

75. Having ruled that the Applicant's right to the disputed property has been established, the Court will proceed to examine if indeed the Applicant's peaceful enjoyment was interrupted. It is the submission of the Applicant that his building located at Fass Delorme Dakar was unlawfully auctioned to one Salamata Siama by the Islamic Bank of Senegal based on a mortgage fraudulently effected by using his property as a security for a loan it granted to one Saer Diop. That following the approval of the Regional Court in Dakar, the said Salamata Siama undertook the necessary official procedure and the title number was changed from 11766/DG to No 1823/DK. Additionally, the said Salamata Siama entered his property with the intension to evict and dispossess him. These facts remain uncontroverted by the Respondent.

76. In this regard, this Court laid an important dictum that, *"Right to property generally implies that an owner is entitled to no interference in the enjoyment of his*

property, in particular, by the government." *BENSON OLUA OKOMBA v. REPUBLIC OF BENIN, ECW/CCJ/JUD/05/17*

77. Similarly, the African Commission considered that the right to property *"Includes not only the right to have access to one's property and not to have one's property invaded or encroached upon, but also the right to undisturbed possession, use and control of such property however the owner (s) deem fit."* (Communication No. 276/2003, May 2009, *CENTRE FOR MINORITY RIGHTS DEVELOPMENT (KENYA) AND MINORITY RIGHTS GROUP INTERNATIONAL ON BEHALF OF ENDOROIS WELFARE COUNCIL V. KENYA, para 86.*

78. In addressing the nature of actual deprivation, the Court aligns itself with the opinion in *'Right to Property under the European Convention on Human Rights- Human Rights Handbook no 10'* wherein it was stated that,

> "*The essence of deprivation of property is the extinction of the legal right of the owner, however, the Court will not only take into account whether there has been a formal expropriation or transfer of ownership but will investigate to see whether there has been a de facto expropriatio*n."

79. Indeed it is not in contention that there was an auction of the disputed property by the Bank, which was approved by the Regional Court in Dakar in favor of the said Salamatu SIAMA. The auction extinguished the legal right of the Applicant, while the registration with the change in the name and a new Title No 1823/DK ascribed to the said property, finalized the extinction of the Applicant's right over his erstwhile property. From the above, the Court holds that Respondent interfered with the quiet enjoyment of the possession of the Applicant's property.

Interference in accordance with the provision of the appropriate laws.

80. Article 14 of the African Charter is herein reproduced and emphasizes the relevant portion, "*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." (**emphasis ours)***.

81. The import of Article 14 is three fold: 1) it places obligation on State Parties to respect and protect the right to property of all and ensure a peaceful enjoyment of this right. 2) However the right is not absolute, it accommodates the interference by the State of the peaceful enjoyment of property based on recognised law - domestic or international. 3) The right to interfere is equally not absolute as it provides two safeguards in its exercise as follows: a) The interference must be in the interest of the public or general interest of the community that is; the legitimacy of purpose and b) the interference must be *in accordance with the law*; that is the legality of the law. The application of the safeguards of legitimacy of purpose and legality of the law is cumulative, in other words, non-compliance with any of the two amounts to a violation of Article 14.

82. This Court has elaborated the abovementioned conditions in a number of decisions to the effect that, *"Even where the Applicants claim to ownership is substantiated, it is trite that the right to property in Article 14 of the ACHPR is not absolute as it may: "be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of the*

appropriate laws." See *DEXTER OIL LIMITED V. REPUBLIC OF LIBERIA* NO ECW/CCJ/JUD/03/19.

83. Even though the requirement for legality is stated as the last condition under the Article, it is imperative that interference with the right of property must first satisfy the requirement of legality. The principle of legality is inherent in the Charter as a whole and must be complied with cumulatively with other conditions of Article 14. This is imperative, as no action can survive on an illegality, which is captured in the Latin phrase: ***Ex turpi causa non oritur actio.***

84. The Court will now proceed to first address the requirement of legality of the law that is to say the interference must be in accordance with the law.

85. The purpose of the phrase "in accordance with the law" is to ensure that domestic legislative or judicial authority limits the scope for arbitrary tampering with rights by government. The Court amplified this when it held that "…the *principle of legality is a fundamental aspect of all international human rights instruments and indeed the rule of law in general. It is a basic guarantee against the state's arbitrary exercise of its powers. For this reason, any restriction on human rights must be "provided" or "prescribed" by law."* In *FESTUS A.O. OGWUCHE V. FEDERAL REPUBLIC OF NIGERIA unreported ECW/CCJ/JUD/02/18 @* pg. 23 See also *GOGITIDZE AND OTHERS v. GEORGIA* (Application no. 36862/05) *STRASBOURG* 12 May 2015.

86. The concept of "law" in this context is not confined to domestic legal processes but admits compliance with international human rights laws that impose international legal obligations on the state in question based on them being party to such instrument. The law must be accessible, sufficiently precise, as well as provide

for fair processes and appropriate procedural safeguards to ensure protection against arbitrary action by State and be in conformity with the rule of law. See *JUSTICE PAUL UUTER DERY& 0RS v. THE REPUBLIC OF LIBERIA unreported ECW/CCJ/JUD/17/19 Pages 24-25* and *JAMES V UNITED KINGDOM* (1981) *APPLICATION NO. 8793/79, JUDGMENT OF 21 FEBRUARY 1986, para. 67.*

87. In considering whether the alleged interference is in accordance with the law, the Court must first identify the law under which the Respondent acted before subjecting it to the legality test. The totality of the Respondent's testimony is dedicated to disclaiming the right of the Applicant to the disputed property with no details of the auction process. The only details of the process leading to the grant of the loan and auction is gleaned from the statement of the Applicant to the effect that one Sear Diop a staff of the Bank fraudulently presented a proxy letter purportedly issued by the Applicant to obtain a loan from the Bank which was secured with the disputed property. The default in repayment then led to the auction of the said property to one Salamata Siama. The Respondent agrees only to the fact the disputed property was auctioned to one Salamata and no more. There is no indication as the person to whom the loan was given, the value of the loan, the law under which the auction was carried out and more.

88. While the law under which the Bank acted is not disclosed, the Court takes judicial notice of the banking laws that authorizes a lending bank in the event of a default to dispose of any asset used to secure a loan. Nevertheless, there remains the unanswered question of the auction of the property without the authority of the owner. The Bank recognises that the proxy document is not able to pass a valid title, reason why the notice of the auction was pasted at the town hall ostensibly for the attention of the owner whom the Respondent claims is not the Applicant. Since the

Respondent knows or ought to know the owner of the property, why paste the notice of auction at the Town Hall?

89. This wise, the Respondent has spoken from both sides of their mouths so to say. The Respondent claim on one hand that the auctioned property does not belong to the Applicant and on another hand, that his claim to the property is statute barred having failed to act within time to challenge the mortgage when it came to his knowledge. In this wise the question the Respondent must answer is who really owns the property used to secure the loan? Obviously not Siekhe who is now undisputedly adjudged to be non-existent. The banking laws definitely require the existence of a land that can be linked to the mortgagor to support an auction of same. The Bank having failed to provide the owner of the auctioned property thus cannot be said to have acted lawfully. Due to the foregoing, the Court is of the opinion that the process of the grant of the loan was less than fair or transparent, and the auction was therefore arbitrary and thus not in conformity with the rule of law.

90. In this wise, the Court finds that the Respondent has not established that it acted in accordance with the law, the Court therefore holds that the Respondent is in violation of Article 14 of the Charter.

*Interference for public purpose or general interest of the community***.**

91. Even though the requirement of legality is stated as the last condition under the Article 14, the Court had earlier stated that the application of the two provisos in the Article is cumulative. This means that a violation of one is a violation of the entire provision. In this regard, the Court aligns itself with the opinion which prioritises legality of the law over the other conditions:

"Should the Court establish that interference with the property right was not in accordance with the Law, it does not need to consider legitimacy of the state objectives or the issue of proportionality. In this case, there will automatically be a violation of Article 1 of Protocol 1 of the Convention (which is in pari materia with Article 14 of the Charter) and it will be unnecessary for the Court to even consider whether such unlawful interferences pursued a legitimate purpose"

(RIGHT TO PROPERTY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS-HUMAN RIGHTS HANDBOOK NO 10 PAGE 15).

92. Based on the above, and having held that the interference by the Respondent is unlawful and thus not in accordance with the law, the Court will accordingly not proceed to examine whether it meets the requirement of public purpose or general interest.

93. From the above analysis, the Court finds that the Respondent violated the right to property of the Applicant guaranteed by Article 14 of the African Charter and Article 17 of the UDHR.

Allegation of violation of right to fair hearing.

94. The crux of the Applicant's case is that his property was auctioned and he was not accorded the opportunity to have a say in the auction proceedings and to defend his cause having not received a hearing notice to that effect.

95. The Respondent on the other hand denied the allegation and maintained that the notice of the auction proceedings was pasted at the Town Hall and that he was represented at all other proceedings in respect to this matter.

***

96. The cardinal principles of fair hearing require that a person whose interests are to be affected by a decision (whether adjudicative or administrative) shall receive a fair and unbiased hearing before the decision is made. Even scripturally, God did not pass sentence on Adam before he was called upon to make his defence. Failure to comply with the requirements of procedural fairness risk having the decision declared invalid by a court or tribunal, not because the decision itself was wrong, but because the decision-making process was wrong.

97. In capturing these fundamentals, Article 7 of the African Charter which deals with fair hearing provides,

> *"Every individual shall have the right to have his cause heard. This comprises:*
>
> > *1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
> >
> > *2. The right to be presumed innocent until proved guilty by a competent court or tribunal;*
> >
> > *3. The right to defence, including the right to be defended by counsel of his choice;*
> >
> > *4. The right to be tried within a reasonable time by an impartial court or tribunal"*

98. The totality of these provisions is to ensure that an accused person or a defendant is heard in his/her own case; that he/she is presumed innocent until otherwise established; is allowed legal representation; is able to appeal to a higher court when dissatisfied with the decision; and the hearing is concluded within a reasonable time with the overriding safeguard that the court/tribunal is impartial and competent.

99. The facts as presented by the Applicant show that of all the safeguards above listed only the opportunity to be heard is applicable. Indeed, this Court has held in a plethora of cases that the right to a fair hearing guaranteed under Article 7 of the African Charter is sacrosanct and admits no derogation. "*Article 7 (1) clearly states that every individual shall have the right to have his cause heard and this comprises among other things the right to be presumed innocent until proven guilty by a competent Court or Tribunal, the right to defense, including the right to be defended by counsel of his choice and the right to be tried within a reasonable time by an impartial Court or Tribunal*" - *(SEE CHIEF EBRIMAH MANNEH V. THE REPUBLIC OF THE GAMBIA, CCJ, RL (2004-2008),* p. 191, § 21).

99. Similarly the European Court of Human Rights further expatiated as follows,

> "*A fair trial shall be one in which the parties to the case have the same conditions or mechanisms to protect their legal positions and legally protected interests, that is, one in which the parties to the case have the right to present all the observations they deem relevant for the assessment of the plea, which must be properly analyzed by the Court, which in turn has the duty to carry out a careful and diligent examination of the claims, arguments and evidence, presented by the parties*

and that fairness of the administration of justice, in addition to being substantive, should be apparent (justice must not only be done, it must also be seen to be done)"

See, DOMBO BEHEER B. V. NETHERLANDS, ECHR No. 14448/88 OF 10/27/1999, PAR. 33).

100. The main contention of the Applicant is that he was not notified of the auction proceedings to enable him defend his cause. The Respondent maintained he was put on notice as a notice was posted on the Town Hall. Indeed a case cannot be said to be fairly heard when an interested party claims not to be aware and is adversely affected by the outcome of the proceeding. The requirement and importance of notice was underscored by the Court when it held that,

"... the principle of fair hearing as encapsulated in Article 7 of the African Charter on Human and Peoples Rights is based on the rule that an individual should not be penalised by decisions affecting his rights or legitimate expectations without being ***given prior notice of the case*** *(Emphasis provided**)**, a fair opportunity to answer and/or opportunity to present their own case"*

See MOHAMMED EL TAYYIB BAH v. THE RBLIC OF SIERRA LEONE JUDGMENT NO ECW/CCJ/JUD/11/15.

101. While the Respondent contended that the Applicant was notified of the case by pasting the notice of hearing on the Town Hall, the pertinent question to ask is why the Town Hall, why not on the disputed property considering that it is located within the same town as the Bank and the Regional Court of Dakar, that heard the case. Since the Respondent claims that the Applicant is not the owner of the disputed property, it can be presumed that they do not know his residence however, a notice

ought to have been pasted on the disputed property whereby it will get to the attention of the owner wherever he resides. The Town Hall is not a site of regular visit by residents of a town and peradventure the Applicant has no business in the Town Hall (which turns out to be so) how is he expected to be acquainted with the notice and prepare for his defence?

102. The Court finds that service on the wall of the Town Hall is not service on the Applicant. As earlier stated the Court reiterates its concern on the integrity of both the mortgage and auction processes. The Applicant having not been given prior notice of the case wherein his interest is implicated, the Court holds that the Respondent is in violation of the right to fair hearing of the Applicant as guaranteed in Article 7 of the African Charter and Article 10 of UDHR.

REPARATION.

103. The Applicant prayed the Court to grant the following remedies and reparations.

a) To adjudge and declare that Senegal has violated Articles 9, 15 and 91 of its constitution;
b) To adjudge and declare that Senegal breached Articles 7 and 14 of the African Charter on Human and Peoples' Rights;
c) To hold that Senegal has violated, Articles 10 and 17 of the Universal Declaration of Human Rights;
d) To order Senegal to pay the Applicant 80 million FCFA for pecuniary damages
e) To order Senegal to pay 30 million FCFA as moral damages

104. The Respondent prayed the Court for the following:

a. Declare the application inadmissible for failure of Applicant's counsel to provide an address for service and lack of competence to act for him
b. Decline jurisdiction to examine the decision delivered by the national court of Senegal.

…….

105. It is trite international law that any violation of human rights attracts reparation that should as much as possible put the victim in the situation he/she would have been had his right not been violated. This was reiterated by this Court when it held that, *"the Court … asserts that reparation should as much as possible restore the Applicants to the position they were before the violation of their rights and it should be proportionate to the violations found depending on the circumstances of each case."* See also *LA SOCIETE BEDIR SARL V. REPUBLIC OF NIGER, unreported ECW/CCJ/JUD/11/20.*

106. The Permanent Court of International Justice (PCIJ) similarly held that a State found responsible for a violation must take all measures *"to wipe out all the consequences of the illegal act and re-establish the situation which would, in all possibility, have existed if that act had not been committed.*" See *L'USINE DE CHORZÓW (THE FACTORY AT CHORZÓW) (Merits) JUDGMENT OF 13 SEPTEMBER 1928, SERIES A, No 17, pg. 47*

107. Such reparation can *inter alia* be via *restituto integrum*, monetary compensation as special or general damages or just satisfaction. Where the Court contemplates a monetary award, it is important to state that the object of award is

not to enrich the party whose right was violated. This Court has clearly put this straight when it held that, *"...its principal object of an award in human rights violation is to vindicate the injured feelings of the victim and to restore his rights* See *EBERE ANTHONIA AMADI & 3 ORS v. THE FEDERAL GOVERNMENT OF NIGERIA ECW/CCJ/JUD/22/19 @ Pg. 14.*

108. Before an award for reparation is made, it is important that the harm, loss or prejudice emanating from the said violation must be established to enable the award of the appropriate reparation. Furthermore even where there is an established violation as in the instant case, it is still paramount to link the violation to the harm or alleged prejudice/harm, in other words there must be a proof of a causative link. Causation encompasses the immediate impact of the injury e.g. death leads to funeral expenses, dismissal results in loss of income etc. In expatiating this, The Court held '*that reparation of harm may only be ordered upon the condition that the harm in question is established to have really occurred, and that there is found to have existed a link of cause and effect between the offence committed and the harm caused'. In KARIM MEISSA WADE V. REPUBLIC OF SENEGAL ECW/CCJ/JUD/19/13 @ pg.28.*

109. The African Court has further expatiated on this when it held *that "The Court considers that for reparation to be granted, the Respondent should first be internationally responsible for the wrongful act. Secondly, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where granted, reparation should cover the full damaged suffered. See JAMES WANJARA & 4 ORS V UNITED REPUBLIC OF TANZANIA APPLICATION No 033-2015 #85*

110. The Court had earlier found the Respondent in violation of the Applicant's rights to property and fair hearing, it is then no gainsaying that the respondent has been found responsible for the wrongful act which obviously was linked to them. Therefore the Applicant is entitled to an appropriate reparation.

Pecuniary reparation.

111. In this wise the Applicant has claimed the sum of 80 million FCFA for pecuniary damages and 30 million FCFA for moral damages for pain and suffering arising from the violation of his rights as alleged.

Material prejudice.

112. The Applicant claim 80 million FCFA for pecuniary damages for the deprivation of his property.

……

113. The Court has held *ibid* that the right of property of the Applicant has been violated by dispossessing him of his building located at Fass in Dakar, Senegal and consequent upon which he is entitled to reparation of compensation for the loss. The Court however notes that he did not support same with a report of an expert valuation of the said property. With unsupported evidentiary proof of its value, the Applicant is asking the Court to award a compensation in vacuity. As with the proof of violation of human rights, the Applicant has the duty to provide evidence to support any claim for reparation. As aptly put by The African Court, "*It is clear that it is always the Applicant that bears the onus of justifying the claims made". See ZONGO & ORS VBURKINA FASO 1 AFCLR 258#20-31*

114. In the instant case, as earlier indicated, a report of an expert valuation of the said property is essential. While this duty has not been discharge, the Court has the obligation to identify and analyse all facts claimed and documents annexed that are placed before it to reach a fair, equitable and just finding as to whether a claimed fact has been proved

115. The Court notes that the Applicant has put in evidence the fact that on the 9th of March 2004, the Dakar Regional Court approved the auction and awarded the forced sale of the property to one Madame Salimata Siama in the sum of 14,000,000 CFA Francs (14 Million) for payment default on a loan of 3,250 000 CFA Francs (three million, two hundred and fifty thousand) without interest. Below is an extract from judgement of the Court approving the said auction which was annexed by the Applicant. (Exhibit 2)

116. *"FOR THESE REASONS"*

The Tribunal

- *Sitting in a public hearing, in a civil matter, and in last resort,*
- *Having regard to the bidding period, as prescribed by law;*
- *Adjudges the bidding process on the afore - mentioned plot of land registered under Title no. 11766/DG as won by Salimata SIAMA, at the price of fourteen million (14,000,000) cfa francs, subject to the…*
- *Orders that notification of the judgment be done on all who are in possession of any document relating to the said plot of land, to relinquish same to Salimata SIAMA, failing which they will be constrained to quit, by all legal means, including expulsion."*

117. Flowing from above judgement, it is uncontroverted that the forced sale value of the property is 14 million FCFA. This amount provides the Court with a base to assess an amount approximate to the value of the said property which was auctioned in 2004. In carrying out this task, the court will be guided by the ordinary indices of a projected value increase from 2004-2016 when the application was lodged at the Court – a period spanning about 12 years.

118. The court notes that while the property would have appreciated in value over a period of 12 years, without an expert report, its decision on the quantum must be taken in fairness and considering the circumstances of the case. Based on the above analysis, while benchmarking its assessment on the forced sale of 14 million FCFA the court hasten to add that it is common knowledge that a forced sale of a property is usually not reflective of its true value as more often than not, it is a discounted and fetches far less than the actual value.

118. The Court, in consideration of above, asses the value of the property at 70 million FCFA and consequently award same to the Applicant as compensation for the loss of his property. The Respondent is therefore ordered to pay to the Applicant the sum of 70 million FCFA being pecuniary damages for violation of his right to property.

Moral prejudice.

119. The Applicant claim the sum of 30 million FCFA for moral prejudiced suffered as a result of the violations aforementioned.

……..

120. Moral prejudice involved the emotional suffering, anguish and changes in living condition of an Applicant and his family which is attributable to the acts of the Respondent. Where moral loss is claimed, there is no need to prove same as the prejudice is presumed from the character of the abuse. While the damages cannot be calculated mathematically by the use of a precise formula, nonetheless the victim should receive an amount approximate to the loss if possible. In essence, the assessment of the quantum must be undertaken in fairness looking at the circumstanced of the case. In such circumstance a lump sum for moral loss will be award. See the Inter-American Court on Human Rights judgment in *GOIBURU AND OTHERS v PARAGUAY (MERITS, REPARATIONS AND COSTS) JUDGMENT OF 22 SEPTEMBER 2006,* para 143. See also *ZONGO & ORS V BURKINA FASO 1 AFCLR (Ibid*

121. The Applicant who has endured a fight for his property from 2004 when it was auctioned to 2016, when this application was filed, the court is inclined to believe that he has suffered some form of emotional and obviously financial distress. In this wise, the Respondent is ordered to pay the applicant the sum of 15 million FCFA for moral prejudiced suffered due to the violation of the Applicant's rights.

COST

122. The Applicant prays the Court to grant the cost in defending his interest in the sum of FCFA 5,000,000.

123. Respondent also prays the Court to grant the sum of FCFA100, 000,000 for the reparation of the prejudices suffered owing to the vexatious and frustrating procedure, pursuant to Article 66.5 of the Rules of the Court.

…….

124. Article 66 (2) of the Rules of Court provides that where cost has been claimed by the successful party, the court shall order the unsuccessful party to pay. Consequently the court dismisses the claim of the Respondent as to cost and directs the Chief Registrar to access any cost payable to the Applicant.

OPERATIVE CLAUSE.

125. For the reasons stated above, the Court sitting in public after hearing the parties:

As to jurisdiction:

a. Declares that it has jurisdiction.

As to Admissibility:

b. Declares the application is admissible.

As to compliance with Rules of the Court.

c. Finds compliance by the Applicant with Article 28(3) of the Rules of the Court.
d. Finds compliance by the Applicant with Article33 (2) of the Rules of the Court.

On Merits of the case.

e. Finds a violation of the Applicant's right to property by the Respondent.
f. Finds a violation of the Applicant's right to fair hearing by the Respondent.
g. Dismisses all claims of the Respondent.

ON REPARATION.

On pecuniary damages

h. Orders the Respondent to pay the applicant the sum of 70 million FCFA as fair compensation for the violation of his right to property. On moral damages.

i. Orders the Respondent to pay the Applicant the sum of 15 million FCFA as reparation for moral prejudiced suffered for the violation of his rights.

ON COMPLIANCE AND REPORTING.

Orders the Respondent to submit to the Court within six months from the date of notification of this judgment, a report on the measure taken to implement the orders set forth herein.

ON COST

Orders the Chief Registrar to assess any cost payable to the Applicant.

Signed:

Hon Justice Gberi- Be OUATTARA - Presiding
Hon. Justice Dupe ATOKI - Presiding /Judge Rapporteur
Hon. Justice Keikura BANGURA - Member

Assisted by
Tony ANENE-MAIDOH - Chief Registrar

Done in Abuja, this 26th of Day of October 2020 in English and translated into French and Portuguese