IN THE COMMUNITY COURT OF JUSTICE, ECOWAS

HOLDEN AT ABUJA, NIGERIA

Before: Hon. Justice H. N. Donli.... .....President
Hon. Justice S. D. Sidibe.....Member
Hon. Justice Awa Daboya Nana....Member
Hon. Justice A. A. Benin.....Member
Hon. Justice Aminata Malle.....Member

Chief Registrar: Tony Anene-Maidoh

Dated: Friday May 27, 2005

SUIT NO. ECW/CCJ/APP/01/04

Between
CHIEF FRANK UKOR ---------- PLAINTIFF
And
RACHAD AWODIOKE LALEYE---------- DEFENDANT
And
CHIEF J. I. ALINNOR ----------INTERVENER-Applicant

Judgment of the Court

1. The plaintiff, Chief Frank Ukor is a citizen of Nigeria and a businessman resident in Lagos. The defendant is a citizen of the Republic of Benin, and a Clearing and Forwarding Agent resident in Porto Novo. The Intervener-Applicant, Chief Josephat Iheangichukwu Alinnor is also a citizen of the Republic of Nigeria, and a businessman resident in Lagos. Thus all the parties are Community citizens, that is citizens of Member States of the Economic Community of West African States (ECOWAS). The defendant, even though he has been served with all the processes, has never appeared in this Court either in person or by representation. Consequently the Court proceeded in default of appearance.

2. The plaintiff and the Intervener-Applicant were both respectively represented by Lawyers namely, Mr. Wilson O. Esangbedo and Mr. Anthony Oseloka Onuora and they complied with Article 28(3) of the Court's Rules of Procedure.

Summary of the facts

3. The plaintiff claims to have engaged the services of the defendant to take delivery of certain items he had imported. He claims further that the defendant did not meet his obligations. He claims also that the defendant took an action in a Cotonou local court in Benin Republic which ordered the seizure of the goods. The plaintiff therefore complained about the violation to his fundamental human rights to free movement of goods, inter alia. As pointed out earlier, the defendant never responded to the application filed against him in this court even though there is evidence certifying that he was served.

4. The Intervener-Applicant applied to be allowed to join the proceedings on the main ground that he is in fact the owner of the goods in question and that he entrusted the plaintiff as an agent with the clearing of the goods from the Port of Cotonou. The Intervener requires damages for the losses he has incurred.

Arguments of parties

5. Counsel for the plaintiff Mr. Esangbedo said that he filed the case under the Court's Protocol of 1991. He made reference to the fact that a Supplementary Protocol has amended Article 9 of the 1991 Protocol. The Supplementary Protocol is dated 19 January 2005. According to Counsel, Articles 9 and 10 of the Supplementary Protocol have given access to the Court to individuals in as far as the issue of their fundamental Human Rights is concerned. Counsel conceded that his action was filed before the adoption of the Supplementary Protocol and posed

the question whether individuals now enjoy direct access to this Court which has been expressly provided for by the Supplementary Protocol. His answer was in the affirmative.

6. Counsel's submission was that in law the presumption against retrospective effect of statutes does not apply to matters of procedure. He cited some authorities in support particularly Halsbury's Laws of England, 4th Edition, Vol. 44(1) paragraph 1287. He contends that the Supplementary Protocol has retrospective effect, therefore by virtue of that fact the plaintiff can benefit from the Court's expanded jurisdiction.

7. Counsel's further submission was that where a statute relates to a matter of procedure only, it affects proceedings taking place after its commencement regardless of the date of the events to which the proceedings relate. He again cited Halsbury's Laws of England, 3rd Edition Vol. 32, paragraph 397-400, and R vs. Chandra Dharma (1905) 2 KB 335.

8. Counsel concluded that the former Article 9 in the 1991 Protocol which governed the Court's competence no longer existed, the same having been replaced by the new Articles 9 and 10 of the Supplementary Protocol, so the latter should govern this case. That there was nothing on the face of the Supplementary Protocol that says that it should not have a retrospective effect.

9. Counsel for the Intervener-Applicant associated himself with all the submissions made by his learned friend. He stated that a cardinal principle of law is to actualize the intention of the lawmaker. He also said that in the area of substantive law there was presumption against retrospectivity. He referred to the definition of 'substantive law' and 'procedural law' as contained in Black's Law Dictionary, 6th Edition at page 1429. He drew attention to the fact that "the only platform on which to determine whether a statute will be interpreted to have retrospective effect is by determining to which area of law it belongs – substantive or procedural."

10. He submitted that a close examination of the Supplementary Protocol shows that it merely seeks to regulate the proceedings of this Court. There is no place in the Protocol where any relief is provided for, nor does it regulate any rights and obligations. It merely spells out steps to be followed in actions before the Court. That those steps which belong to the area of procedural law must have retrospective effect.

Consideration of arguments of parties.

11. Mr. Esangbedo argued that the Supplementary Protocol should have retrospective effect, as nothing prima facie is indicative of a converse construction.

12. It is undeniable that the principles of law as stated by both Counsel regarding retrospectivity of laws are correct. These have been applied in national courts for a long, long while. They have also been accepted in international courts and tribunals.

13. In the Ambatielos case decided by the International Court of Justice (ICJ) on 1st July 1952, see page 40 of the ICJ law reports of 1952, the principle of non-retrospective-effect of statutes was accepted. This principle had earlier been recognized by the Permanent Court of International Justice (PCIJ) in the Mavromatis Palestine Concession case of August 1924, PCIJ Series A number 2, page 34, where it was stated that the Treaty of Lausanne had expressly provided for it to have retroactive effect in Protocol number 12.

14. One of the issues that came up for determination in the Ambatielos case was on jurisdiction. Two Treaties were concluded between Greece and the United Kingdom of Great Britain and Northern Ireland. One was in 1886 and the other in 1926. Ambatielos' claim was that he had suffered considerable loss as a result of a contractual arrangement he had with the Government of the United Kingdom (UK) in 1919, and also in consequence of certain judicial decisions in the English Courts

in connection with the said contract. His government, the Hellenic Government on his behalf he being one of its nationals, as was required by the Treaty establishing the PCIJ, took up Ambatielos' case. The Hellenic Government's claim was that in accordance with the 1826 and 1926 Treaties, the matter should be referred to arbitration. The UK government, in a preliminary objection, argued that the Court lacked jurisdiction to decide on that question. But the Court rejected the preliminary objection by holding that it had jurisdiction to decide whether the UK was under an obligation to submit to arbitration the difference as to the validity of the Ambatielos' claim in so far as it was based on the Anglo-Hellenic Treaty of 1886.

15. On the applicability of the 1926 Treaty, the Court stated that it was not given retroactive effect. Under Article 29 of the 1926 Treaty, either party could submit to the Court any dispute as to interpretation or application of any of the provisions of that Treaty. The Court rejected the Hellenic Government's argument that in the 1926 Treaty there were substantive provisions similar to substantive provisions of the 1886 Treaty, so by Article 29 of the 1926 Treaty the Court could adjudicate upon the validity of a claim based on an alleged breach of any of these similar provisions, even if the alleged breach took place wholly before the new Treaty came into force. The Court, having decided that the 1926 Treaty was not given retrospective effect, concluded that it was impossible to hold that any of its provisions were deemed to have been in force earlier.

16. The European Commission on Human Rights also recognized that this principle of non-retrospectivity of statutes and treaties is generally applicable to all international jurisdictions. This was in the case of De Becker, case No. 214/56 decided on 9 June 1958, see Annual Index Vol. II p. 231.

17. In the instant case Counsel did not say how the Supplementary Protocol, expressly or impliedly, was given retrospective effect. The thrust of their argument

is that the Supplementary Protocol is procedural in nature and effect and for that reason it has retrospective effect in law.

18. In the case of Barbieri vs Morris, Mo; 315 S.W. 2d 711 at page 714, it was said that retroactive laws are generally defined from a legal viewpoint as those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty or attach a new disability in respect to the transactions or considerations already past. In other words it is a law that is intended to act on things, which are past.

19. Another important definition is to be found in the case of Bear Val Mutual Water Co. vs. San Bernardino County, 242 Cal. App. 2d, 68, where it was stated that a retrospective law is one which looks backward or contemplates the past, one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One which relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred.

20. Counsel submitted that the intention of ECOWAS was to make the Supplementary Protocol have retrospective effect. Rather unfortunate to recall, Counsel did not refer to even a single word in the entire Supplementary Protocol from which the remotest implication could be made that it should have retrospective effect. Counsel did not say in what way it was procedural. From Counsels' own submission, the Supplementary Protocol is a law that creates rights, albeit the right of access to the Court to individuals, thus it is substantive law. By implication too, since there is nothing on the face of the Supplementary Protocol that it should be retrospective, it should not be given that effect.

Competence.

21. The Revised Treaty of 1993 is the supreme law of ECOWAS, and it may be called its Constitution. By Article 89 of the Revised Treaty, Protocols made pursuant thereto shall form an integral part thereof.

22. The Community Court of Justice (CCJ) was established by virtue of Article 15 (1) of the Revised Treaty. The status, composition, power, procedure and other issues concerning the Court are contained in its 1991 Protocol. The competence of the Court is set out in Articles 9 and 10. By Article 32 of the 1991 Protocol, the Court was empowered to establish its own Rules of Procedure.

23. The 1991 Protocol and the Supplementary Protocol both set out what jurisdictional competence the Court shall have. The difference in the two is that the competence is more expansive in the Supplementary Protocol than in the 1991 Protocol. The Supplementary Protocol did not touch any of the processes set out in the Court's Rules of Procedure in invoking the Court's competence.

24. Mr. Onuora rightly set out the distinction between substantive and procedural laws when he said that "as a general rule, laws which fix duties, establish rights and responsibilities among and for persons natural or otherwise are substantive laws in character while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a Court are procedural law."

25. Thus a distinction is to be drawn between the Protocol that establishes the Court and defines its competence which is substantive and the Rules of Procedure which is procedural.

Concerning the application for voluntary intervention

26. On 30 November 2004 J. I. Alinnor, represented by his Counsel, filed an application to be allowed to intervene in the instant case. The ground for the application was that he is the owner of the seized goods. The party was heard on 8

February 2005 in support of his application. The plaintiff's Counsel argued that the application was filed out of time in view of the Court's Rules.

27. Article 13(6) of the Court's Rules stipulates that 'Notice shall be given in the Official Journal of the Community of the date of registration of an application initiating proceedings.....'

28. And Article 89(1) of the Rules of Court requires an application for intervention to be made within six weeks from the date of publication of the notice referred to in Article 13(6).

29. The plaintiff's application was filed on 19 April 2004 and was published in the May 2004 edition of the Official Journal. It is thus clear that the application for intervention that was filed on 30 November 2004 was out of time.

DECISION OF THE COURT

30. On these grounds The Community Court of Justice, in applying the legal provisions cited above;

31. In delivering this Judgment publicly, as addressed against Chief Frank Ukor and Rachad Laleye and Chief J.I. Alinnor, and by default with regard to Rachad Laleye, in first and last resorts.

32. In the form, the Court adjudges and declares the main application of Chief Frank Ukor inadmissible for lack of merit.

33. Adjudges and declares the voluntary application for intervention from J. I. Alinnor as inadmissible, for lack of merit and non-observance of time-limit.

34. Parties are to bear their own costs.

35. Thus pronounced as judgment in this public sitting at Abuja the 27th day of May 2005.

JUSTICE HANSINE N. DONLI
PRESIDENT OF THE COURT

TONY ANENE-MAIDOH
CHIEF REGISTRAR

C T C
CERTIFIED TRUE COPY

Chief Registrar — Date 27.5.2005.

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2. The plaintiff and the Intervener-Applicant were both respectively represented by Lawyers namely, Mr. Wilson O. Esangbedo and Mr. Anthony Oseloka Onuora and they complied with Article 28(3) of the Court's Rules of Procedure.

Summary of the facts

3. The plaintiff claims to have engaged the services of the defendant to take delivery of certain items he had imported. He claims further that the defendant did not meet his obligations. He claims also that the defendant took an action in a Cotonou local court in Benin Republic which ordered the seizure of the goods. The plaintiff therefore complained about the violation to his fundamental human rights to free inovement of goods, inter alia. As pointed out earlier, the defendant never responded to the application filed against him in this court even though there is evidence certifying that he was served.

4. The Intervener-Applicant applied to be allowed to join the proceedings on the main ground that he is in fact the owner of the goods in question and that he entrusted the plaintiff as an agent with the clearing of the goods from the Port of Cotonou. The Intervener requires damages for the losses he has incurred.

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34. Parties are to bear their own costs.

35. Thus pronounced as judgment in this public sitting at Abuja the 27th day of May 2005.

36. The following Honourable Members of the Court were present for the delivery of this final judgment:

1. Justice Hansine Donli, President
2. Justice Soumana D. Sidibe, Member
3. Justice Hadja Awa Nana, Member
4. Justice Anthony A. Benin, Member
5. Justice Aminata Malle, Member

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JUSTICE HANSINE N. DONLI
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23. The 1991 Protocol and the Supplementary Protocol both set out what jurisdictional competence the Court shall have. The difference in the two is that the competence is more expansive in the Supplementary Protocol than in the 1991 Protocol. The Supplementary Protocol did not touch any of the

processes set out in the Court's Rules of Procedure in invoking the Court's competence.

24. Mr. Onuora rightly set out the distinction between substantive and procedural laws when he said that "as a general rule, laws which fix duties, establish rights and responsibilities among and for persons natural or otherwise are substantive laws in character while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a Court are procedural law."

25. Thus a distinction is to be drawn between the Protocol that establishes the Court and defines its competence which is substantive and the Rules of Procedure which is procedural.

Concerning the application for voluntary intervention

26. On 30 November 2004 J. I. Alinnor, represented by his Counsel, filed an application to be allowed to intervene in the instant case. The ground for the application was that he is the owner of the seized goods. The party was heard on 8 February 2005 in support of his application. The plaintiff's Counsel argued that the application was filed out of time in view of the Court's Rules.

27. Article 13(6) of the Court's Rules stipulates that 'Notice shall be given in the Official Journal of the Community of the date of registration of an application initiating proceedings.....'

28. And Article 89(1) of the Rules of Court requires an application for intervention to be made within six weeks from the date of publication of the notice referred to in Article 13(6).

29. The plaintiff's application was filed on 19 April 2004 and was published in the May 2004 edition of the Official Journal. It is thus clear that the

application for intervention that was filed on 30 November 2004 was out of time.

DECISION OF THE COURT

30. On these grounds The Community Court of Justice, in applying the legal provisions cited above;

31. In delivering this Judgment publicly, as addressed against Chief Frank Ukor and Rachad Laleye and Chief J.I. Alinnor, and by default with regard to Rachad Laleye, in first and last resorts.

32. In the form, the Court adjudges and declares the main application of Chief Frank Ukor inadmissible for lack of merit.

33. Adjudges and declares the voluntary application for intervention from J. I. Alinnor as inadmissible, for lack of merit and non-observance of time-limit.

34. Parties are to bear their own costs.

35. Thus pronounced as judgment in this public sitting at Abuja the 27th day of May 2005.

36. The following Honourable Members of the Court were present for the delivery of this final judgment:

1. Justice Hansine Donli, President
2. Justice Soumana D. Sidibe, Member
3. Justice Hadja Awa Nana, Member
4. Justice Anthony A. Benin, Member
5. Justice Aminata Malle, Member

The Chief Registrar is Tony Anene-Maidoh

JUSTICE HANSINE N. DONLI
PRESIDENT OF THE COURT

TONY ANENE-MAIDOH
CHIEF REGISTRAR