

COMMUNITY COURT OF JUSTICE,

ECOWAS

COUR DE JUSTICE DE LA COMMUNAUTE, CEDEAO

TRIBUNAL DE JUSTIÇA DA COMUNIDADE, CEDEAO



10, DAR ES SALAAM CRESCENT,

OFF AMINU KANO CRESCENT,

WUSE II, ABUJA – NIGERIA

TEL/FAX: 234-8-8708210/09-5240781

www.ccj.net

**IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC
COMMUNITY OF WEST AFRICAN STATES (ECOWAS)**

HOLDEN AT ABUJA, NIGERIA

This 16th day of May, 2012

SUIT NO: ECW/CCJ/APP/11/10
JUDGEMENT NO: ECW/CCJ/JUD/07/12

BETWEEN

MRS. OLUWATOSIN RINU ADEWALE

- PLAINTIFF

AND

1. COUNCIL OF MINISTERS, ECOWAS
2. THE PRESIDENT OF THE ECOWAS COMMISSION
3. THE PRESIDENT OF THE COMMUNITY COURT OF JUSTICE,
ECOWAS
4. THE ACTING DIRECTOR OF ADMINISTRATION & FINANCE,
COMMUNITY COURT OF JUSTICE – ECOWAS (MR. KOFI NDRI)

- DEFENDANT

BEFORE THEIR LORDSHIPS

HON. JUSTICE M.B. RAMOS

-

PRESIDING

HON. JUSTICE C.N. MEDEGAN

-

MEMBER

HON. JUSTICE E.M. POTEY

-

MEMBER

Assisted by Tony Anene-Maidoh Esq.

-

Chief Registrar

REPRESENTATION

APPLICANT:

1. K. OLOWOKERE
2. O.OLORUNSOLA
3. C.O. HENRY
4. KSHIMBORA

DEFENDANT:

1. LAGO DANIEL

JUDGEMENT

The Applicant, Mrs. Oluwatosin Rini Adewale, is a Community citizen of Nigerian nationality. The 1st Defendant is the ECOWAS institution charged with the responsibility of the functioning and development of the Community. The 2nd Defendant is the Principal Officer of the Community and the legal representative of the ECOWAS Community. The 3rd Defendant is the Head of Institution of the Community Court of Justice, ECOWAS. The 4th Defendant is the Acting Director of Administration and Finance of the Court.

The Applicant, on the 9th of November, 2010, filed an application before this Court seeking the following reliefs:

A Declaration that the post of Personnel Officer in the Community Court of Justice, ECOWAS is vacant.

A Declaration that the re-instatement of the former Personnel Officer in the Community Court of Justice, ECOWAS after resignation is a gross violation of the ECOWAS Treaty, Staff Regulations, Legal Regime of the ECOWAS and the African Charter on Human and Peoples' Rights.

A Declaration that the Applicant's fundamental rights were grossly violated by the action of the Community Court of Justice, ECOWAS through the 4th Defendant.

A Declaration that the 4th Defendant does not have the competence and power to appoint any person into the Court except as provided for by the ECOWAS Regulation.

An Order that the action of the 4th Defendant was a clear breach of his oath of office, disrespect to constituted Authority and violation of the ECOWAS policy and vision of the ECOWAS of people and not of state, and the provisions of the African Charter on Human and Peoples' Rights.

An Order for disciplinary measures to be immediately taken against the Ag. Director of Administration and Finance.

An Order that the vacant position of the Personnel Officer in the Community Court of Justice, ECOWAS be filled as required and stipulated in accordance with the ECOWAS Staff Regulations.

An Order that the 4th Defendant cannot and must not continue to act in such or other positions.

An Order for damages in the sum of Twenty Million Naira (N20,000,000).

PRESENTATION OF FACTS AND PROCEDURE

1. The Applicant avers that pursuant to the advertisement by the Court in 2006, she had applied for the position of Personnel Officer (P4) wherein she was invited for an interview by a letter dated 28th February, 2007
2. She states that at the interview from the 2nd to the 4th of May, 2007 her working experience of eleven (11) years in administration of which seven (7) years was spent as Personnel/Administrative Officer at the Judiciary of the Federal Capital Territory, Abuja, as at the time, was brought to bear, and she performed above all other candidates.
3. The Applicant avers that despite the above, the position was given to one Miss Mariame Kone who not only applied after the expiration of the deadline, but again did not possess the requisite qualifications as advertised and lastly also failed at the interview.
4. The Applicant thus forwarded a petition dated 4th of November, 2008 to the Hon. Minister of Foreign Affairs, Federal Republic of Nigeria with a view to look into the matter with the Court in order to ensure justice be done.
5. Again, a reminder dated 14th January, 2009 was sent to the Ministry of Foreign Affairs, Nigeria, authority responsible for ECOWAS Affairs in Nigeria, which now informed her that an official communication had been opened in respect of same.
6. She states that thereafter she was informed by same Ministry that the said Miss Kone had resigned her appointment at the Court wherein the Court had even communicated same to the Ministry through a Note Verbale received on the 6th February, 2010 which officially informed same of the said resignation and return of all her diplomatic apparatus.

7. The Applicant avers that to her utmost surprise, she was later informed by the Ministry of Foreign Affairs – Nigeria that Miss Mariame Kone had been illegally brought back to her employment by the 4th Defendant who is charged with the responsibility of recruitment and administration, because they are both from the same Member State, Cote d'Ivoire.
8. She contends that the reinstatement of Miss Kone despite her resignation from the service for a period of three (3) months was of high level disobedience by the 3rd and 4th Defendants to constituted authorities and willful violation of regulations.
9. Finally, the Applicant states that the action of the 3rd and 4th Defendants is not only a clear violation of the legal regime of the ECOWAS, in the very institution conferred with powers as to interpret and apply Community texts as well as adjudicate on the issues of Human Rights violation, as in the instant case.
10. The Applicant's alleged Human Rights violations are summed up as follows:
 - i. The right to be equal before the law;
 - ii. The right to have one's case heard;
 - iii. The right to equal access to the public service;
 - iv. The right to equality and equal opportunity;
 - v. The right to be free from discrimination;
 - vi. The right of every individual to serve his Community and contribute to the best of his abilities at all times and at all levels;
 - vii. Violations of the legal regime of the ECOWAS, Staff Regulations.

11. To lodge her complaint, the Applicant relies on the African Charter on Human and Peoples' Rights, the Revised Treaty of the ECOWAS, the Supplementary Protocol (A/SP.1/01/05) and the Rules of the Court.
12. Upon service of the originating Application on the 1st, 2nd, 3rd and 4th Defendants, they all lodged together a Defense dated 13th December, 2010 raising objections to the Application on the following grounds:
 - a) Lack of legal capacity to undertake the said action.
 - b) Lack of interest to undertake this action.
13. The Defendants on the 1st ground of objection submit that the Application should be dismissed for lack of legal capacity as she is not a staff.
14. They cite Article 73 of the ECOWAS Staff Regulations and Articles 9(2) and 10(c) of the Supplementary Protocol (A/SP.1/01/05) to submit that the Court would recognize the right of recourse of staff of ECOWAS institutions, agencies or persons who enter into contractual relationship with ECOWAS Institutions resulting into violations.
15. They state that the Applicant is not a staff of any ECOWAS Institution, and had failed at the said interview four (4) years before, thus a real third party to the administration of the ECOWAS Court of Justice and therefore does not have any locus standi to institute the present application.
16. Finally, on this note, the Defendants raise the 2nd objection being the lack of interest to undertake this action on the following grounds:
 - a) The Applicant failed at the interview.

b) She instituted this action against the Community three (3) years after the said interview, even when the Community had accepted back the staff who had resigned her office.

c) That her application is just criticizing alleged malfunctioning of the administration of the Court of Justice, ECOWAS.

17. The Defendants submit that the act of reinstatement is an administrative act which would have been wrongful or caused prejudice to the right of the Applicant if she had the status of an aspirant to this position as a staff of the Court of Justice.

18. They state that the Applicant being a Civil Servant in Nigeria cannot therefore prove that the act of reinstatement of Personnel Officer within the Court of Justice is related to her own administrative career and has wrongfully infringed her right.

19. The Defendants in conclusion submit that her case must be rejected for lack of legal grounds as stated above even on the one of African Charter on Human and Peoples' Rights which is not applicable in this suit.

20. Consequently, they urge the Court to declare the Application inadmissible and also baseless for lack of capacity and legal protected interest which is wrongful damage.

21. Responding to the objection by the Defendants, the Applicant then filed a reply on the 8th February, 2012 stating as follows:

i. That the legal basis for her application contrary to the Defendants objection, is based on the Articles 9(1)g, 2 & 4 of the Supplementary Protocol (A/SP.1/01/05) of the Community Court of Justice, ECOWAS;

- ii. Article 10(c) and (d) of the Supplementary Protocol (supra);
- iii. Article 20 of the Protocol (A/P1/7/91) of the Community Court of Justice, ECOWAS;
- iv. Articles 1, 2, 3, 7, 13(2), 19,26,27,28, and 29 of the African Charter on Human and Peoples' Rights.
- v. Articles 33(2) a, 4 and 15 of the Revised Treaty of the ECOWAS;
- vi. Article 23 of the Rules of the Community Court of Justice.

22. She submits that contrary to the position of the Defendants in paragraph 1 of page 5 of their application, the legal qualification and nature of action of her Application is based and derived as stated above.
23. The Applicant submits that by the said provisions of the Supplementary Protocol (supra) she is adequately empowered to file this action which is therefore not merely administrative or based on the abuse of power by a staff but an issue that goes to the root and foundation of violations of the legal regime of the ECOWAS, the Staff Regulations, the fundamental principles and vision of ECOWAS.
24. She argues that the analysis of the facts as enumerated by the Defendants in paragraph II at page 6 of their objection with due respect is deliberately couched in order to mislead this Honourable Court, and thus referred the Court to Article 10 of the Supplementary Protocol (supra) which clearly provides the category and condition for those who may have access to the Court.
25. The Applicant states that in line with the objection of the Defendants that she lacked legal capacity as a staff, she submits that with utmost respect the Defendants were blind to Article 10(c) and (d) of the Supplementary Protocol (supra).

this Court. The case before this Court, may we be guided by the reliefs of the applicant because the first thing is to ask the applicant "what do you want"? If your lordships look at the prayers which encapsulates the orders sought that is on page 8 of the application sir, prayer A says, a declaration that the post of personnel officer in the Community Court of Justice is vacant. Prayer B my lord, a declaration that the reinstatement of the former Personnel Officer in the Community Court of Justice after resignation is a gross violation of ECOWAS Treaty, the Staff Regulation, the Legal Regime of ECOWAS and African Charter on Human and Peoples' Right. C my lord is the declaration that the fundamental right of the applicant has been grossly violated by this action. The case of the applicant is that the Applicant as a citizen of the community has seen the wrong that is perpetrated by an organ of the community. She owes the duty, not just to herself, not just to her country, but the entire community to seek a redress"

32. Consequently, there is no request to the Court to assess the legality or otherwise of the said selection process with a view to render it null, if it be the case. Rather, what the Applicant is seeking is just a declaration that the act of reinstatement of the employee, without a prior public selection process, is a violation of Community texts and her own fundamental rights.
33. The Applicant is, in essence, seeking that the position currently held by the employee Koné be declared vacant so it can later be filled through a public and competitive process in which the Applicant herself and other Community citizens, who feel they are qualified, can take part.
34. However, the fundamental question that must be examined and resolved, as raised in the preliminary objection, is whether the Applicant, as an individual who is not an employee of the Community, has the legal capacity to address the Court seeking the annulment of an act by the Head of an Institution who, without open selection process, decides to reinstate an employee after having accepted the termination of her contract.

26. She relies once again on all the facts as earlier stated in her Application dealing with the alleged violations, while including that after exhausting all necessary avenues from the time she became aware of the illegality and breach of her fundamental rights, brought this action.
27. She goes further to state that the action complaint occurred in March, 2010 and the action was lodged in 2010, and therefore within the time limit as allowed by law.
28. The Applicant finally concludes by submitting that her case is competent and thus has merit while urging the Honourable Court to dismiss the objection of the Defendants.
29. On the 8th day of February, 2012, Counsels on behalf of parties joined issues and arguments were taken.

ANALYSIS OF THE COURT

30. The analysis of the Court in examining the arguments put forward by both Parties shall be guided by the redresses sought by the Plaintiff with the present lawsuit filed against the Defendants.
31. Contrary to the first impression that flows from the narration of her participation in the recruitment process that led to the employment of Mrs. Mariam Kone and her feeling of being cheated, the Applicant is however not praying the said process to be nullified. Her statement of claims and the observations made by her own Counsel during the hearing of the preliminary objection are very clear on that point. He said:

"The case before this Court is not a case where the applicant is seeking to be employed because she had attended an interview. That is not the case before

35. To answer this question, it is important to start by referring to the general principle governing the actions of Community Institutions and their officials.
36. The actions of ECOWAS institutions and their officials are subject to the principle of legality. This means that when acting on behalf of the Community, these institutions and their officials must comply with the law governing the operations of ECOWAS, namely the Revised Treaty and other Community texts approved by the competent organs.
37. With the same purpose of ensuring compliance with that foundational principle of ECOWAS Community, Article 9 of the Protocol on the Court, as amended by Supplementary Protocol (A/SP.1/01/05), empowers the Court with jurisdiction to adjudicate on “any dispute relating to the legality of regulations, directives, decisions or subsidiary instruments adopted by ECOWAS” and “on the actions for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions”.
38. But for the jurisdiction of the Court to be set in motion for the adjudication of a dispute arising from an alleged violation of Community laws by ECOWAS Institutions or their officials, it is necessary that a lawsuit be lodged by an entity or individual to who is attributed, by the Court Protocol or other Community texts, the necessary capacity to do so.
39. According to Article 10 of the same Protocol, an individual can only have access to the Court in the following situations:
 - 1) to react against an act or inaction of the Community or its agents who have violated the individual’s rights, Article 10(c);
 - 2) to seek relief of violation of the human rights the individual has been the victim of, Article 10(d); and

3) if a Staff of any Community Institutions, after having exhausted all avenues of administrative appeal.

40. Being those provisions that allow the access to the Court by individuals, the Applicant, as an individual, must prove that her case falls into one of the situations listed in 1, 2, and 3.
41. It is clear and without great difficulty that the Applicant is not an employee of any Community institution. In fact, she's nowhere near even to claim that status. Therefore, this excludes the application of the situation referred to in (3) which corresponds to sub-paragraph (e) of Article 10 of the Protocol.
42. Thus, the remaining possibilities that are left to the Applicant to have access to the Court are only two: to justify her complaint based on the provision of Article 10(c); or to present her lawsuit as a complaint for violation of human rights in accordance with Article 10(d).
43. These two alternatives, invoked by the Applicant in her arguments, should be analyzed in order for the Court to determine whether the Applicant's situation falls at least into one of them.
44. Under Article 10(c) of the Protocol 2005, access to the Court is open to *"individuals in proceedings for the determination of an act or inaction of a Community official which violates the rights of individuals ..."*
45. The wording of Article 10(c) leaves clear from the outset that the main requirement for an individual to have access to the Court under that provision is that he or she should be the bearer of the right allegedly violated by the act or inaction of the Community or its official that is

being challenged. An individual holder of such right, in the sense required by this provision, is the person whose interest is directly and immediately affected by the act or inaction that is being contested. This means that if the person is not directly or immediately affected by the act he/she seeks for annulment, such person cannot be accepted to submit a case under Article 10(c) of the Protocol on the Court of Justice, and therefore the complaint should be rejected.

46. In applying these principles to the situation described in the present case, it is easy to see that the Applicant cannot be considered directly and immediately affected or harmed by the act of the President of the Court who decided, even without following a competitive selection process, to reinstate an employee whose resignation had been previously accepted.
47. The Applicant was not in any situation where she was directly affected by the decision of the Head of that institution. Her situation is exactly the same as that of other Community citizens that would be qualified to apply for the position if a competitive recruitment process to fill this vacancy were to be opened. Contrary to the averments by the Plaintiff, the mere fact of being a Community citizen qualified to attend or with expectation to participate in any contest which however was not opened, does not place the person in a legal position to file a complaint for non opening of the selection process.
48. In line with its previous decision, the Court holds that the status of Community citizen does not by itself afford the capacity to challenge the act of an institution that did not cause any direct damage to the person concerned (JUDGEMENT NO: ECW/CCJ/JUD/01/08, 2004-2009 CCJELR, pag. 167).

49. From the foregoing, it can be concluded that because she was not directly affected by the act of the President of the Court, the Applicant cannot be permitted to file a complaint against the same act pursuant to Article 10(c) of the Protocol of the Court.
50. The same reasoning developed above to show the lack of legal capacity or locus standi of the Plaintiff to challenge an act of an ECOWAS Official that did not directly violate her rights or cause any harm to her, also applies if her case is analyzed as being filed under article 10(d) of the Protocol on the Court, the provision that allows individuals to lodge complaints for human rights violations.
51. In fact, as emphatically explained above, the Plaintiff was not in a situation in which her fundamental rights could have in any way been affected or harmed by the administrative decision of the President of the Court.
52. It is true that she invokes the violation of a set of rights enshrined in the African Charter of Human and Peoples' Rights. But the mere invocation of violation on those rights unaccompanied by any nexus between the act allegedly infringing them and the situation of the person claiming such violation is not sufficient to give the necessary capacity to lodge a complaint under article 10(d) of the Protocol on the Court.

CONSEQUENTLY

53. Whereas the access to the Court is governed by the requirements laid down in Article 10 of the Protocol on the Court, as amended by the Supplementary Protocol A/SP/1/01/05.
54. Whereas Community citizens, as individuals, in accessing the Court against Community Institutions or their Officials have to show that their

own rights or interests have been violated or affected by an act or omission of those Institutions or Officials.

55. Whereas the Applicant has failed to demonstrate that the act she is contesting has directly violated any of her rights or caused her any harm.

56. FOR THESE REASONS

The Court, in public sitting, after hearing both Parties in respect to the objection on the lack of legal capacity and interest of the applicant to lodge the lawsuit, upholds that objection and, consequently, dismisses the application.

COSTS

Pursuant to Article 66/11 of the Rules, each Party shall bear its own cost.

Judgement Read in Public in accordance with Article 100 of the Rules of this Court and dated this 16th May, 2012.

HON. JUSTICE M. B. RAMOS

Presiding Judge

HON. JUSTICE C. N. MEDEGAN

Member

HON. JUSTICE E. M. POTTEY

Member

Presiding Judge

Hon. Justice M. B. RAMOS

Chief Registrar

Tony Anene-Maidoh