

COMMUNITY COURT OF JUSTICE,  
ECOWAS



COUR DE JUSTICE DE LA COMMUNAUTE,  
CEDEAO

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

HOLDEN IN ABUJA, NIGERIA ON WEDNESDAY, ON THE 24<sup>TH</sup> DAY OF JANUARY, 2012

SUIT NO: ECW/CCJ/APP/10/07

ECW/CCJ/JUD/02/12

BETWEEN

FEMI FALANA

APPLICANTS/PLAINTIFFS

WARDI MOKISTAPHA

AND

THE 1<sup>ST</sup> DEFENDANT

THE REPUBLIC OF BENIN

THE 2<sup>ND</sup> DEFENDANT

THE FEDERAL REPUBLIC OF NIGERIA

THE 3<sup>RD</sup> DEFENDANT

THE REPUBLIC OF TOGO

BEFORE THEIR LORDSHIPS

HON. JUSTICE HANSINE N. DONU

PRESIDING JUDGE

HON. JUSTICE AWA DABOYA NANA

MEMBER

HON. JUSTICE ANTHONY A. BENIN

MEMBER

TONY ANENE MAIDOH

CHIEF REGISTRAR

COUNSELS

FUNMI FALANA MRS AND ADEDOTUN ISOLA-OSORU

And SOLA EGBEYINKA

PLAINTIFF

YEDE HIPPOLYTE-ESD

1ST DEFENDANT

F.K.BEENU AND T.A.GAZALI ESO

2ND DEFENDANT

## **JUDGMENT**

### **PARTIES**

#### **PARTIES**

1. **The first Plaintiff is Femi Falana, the former President of the West African Bar Association. The second plaintiff is Waidi Moustapha, a Vice president of the West African Bar Association. The first defendant is the Republic of Benin; the second defendant is the Federal Republic of Nigeria; the third defendant is the Republic of Togo, all Member States of ECOWAS respectively.**

#### **SUMMARY OF THE FACTS OF THE CASE**

2. **The plaintiffs who are community citizens of ECOWAS and Legal practitioners, practising as legal practitioners in the community and elected as President and Vice President of the West African Bar Association, were on the date in question, travelling from Nigeria by road to Togo on 24<sup>th</sup> April, 2004, to perform their official duties for their Association when they encountered many road blocks, Police, Customs and Immigration officials who had obstructed the road, stopped them but were identified as Legal practitioners, and exhibited their passports before they were granted passage, even at the Seme border, which connects Nigeria and Benin.**
3. **However in his evidence, the first plaintiff indicated that even though they were given access to proceed on their journey, other passengers/ travellers were harassed by the said officers who blocked the road, checking and extorting money from these travellers. They however proceeded from Nigeria to Benin and on reaching the Togolese border with Benin, the officials refused them passage/ free movement to Lome - Togo on the grounds that the Republic of Togo was holding its presidential election and the order was to close the border. They were**

kept at the border until after the election in Togo and their official assignment in Togo was not possible to be carried out.

4. Hence, the two plaintiffs filed an action before this Court claiming the following reliefs:
- a) A declaration that the defendants have no powers to close the borders and erect checkpoints and toll gates in the member states of the ECOWAS in any manner whatsoever by virtue of Protocol A/PI/S/79 relating to Free Movement of Persons, Residence and Establishment and Article 12 of the African Charter on Human and Peoples Rights.
  - b) A declaration that the defendants are under an obligation to remove all checkpoints, toll-gates and obstacles to free movement of persons and goods, services and capital in the Member States of the ECOWAS.
  - c) An order mandating the defendants to remove all checkpoints, tollgates and obstacles to free movement of persons and goods, services and capital in the member states of ECOWAS forthwith.
  - d) An order of perpetual injunction restraining the defendants from closing their border or erecting checkpoints, tollgates and other obstacles in the Member States of the ECOWAS.

5. Initially the action by the plaintiffs was against the 15 Member States of ECOWAS, namely:

The Republic of Benin;

- The Republic of Burkina Faso;
- The Republic of Cape Verde;
- The Republic of Cote D'ivoire;
- The Republic of The Gambia;
- The Republic of Ghana;
- The Republic of Guinea;
- The Republic of Guinea Bissau;

- The Republic of Liberia;
- The Republic of Mali;
- The Republic of Niger;
- The Federal Republic of Nigeria;
- The Republic of Senegal;
- The Republic of Sierra Leone;
- The Togolese Republic ;

6. The Plaintiffs raised preliminary objections to the jurisdiction of the Court and after consideration of the facts /Law relied upon, the case was discontinued against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> defendants. The court found that there was a prima facie evidence of alleged violation of Human rights pursuant to Article 9(4) of the Protocol A/P1/07/91 as amended against the 1<sup>st</sup>, 12<sup>th</sup> and 15<sup>th</sup> defendants namely Republic of Benin, The Federal Republic of Nigeria and the Togolese Republic. The Registry renumbered the latter countries as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, respectively.

7. The first Plaintiff testified and the parties filed their written submissions and adopted same and made oral address of the written submissions. Learned Counsels made oral submissions to amplify the difficult areas and rested their respective cases. Learned counsel for the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants raised these issues for determination:

- (1) Whether the court has Jurisdiction to determine the matter.
- (2) Whether from the averments of the plaintiffs and evidence before this court, the plaintiffs are entitled to the claim before the court.

#### LEGAL ARGUMENTS

8. On the first issue for determination as to whether this court has jurisdiction to determine this matter, learned counsel to the 1<sup>st</sup> and 2<sup>nd</sup> defendants reiterated that jurisdiction is the authority which a court has to decide on matters that are litigated before it or to take cognizance of matters

presented in a formal way for its decision and referred to Halbury's Laws of England 4<sup>th</sup> edition to buttress their contention. They also referred to Black's Law dictionary and the case of *Pinner v. Pinner*, 33 N.C. APP. 2004, 234 SE 2d 633; that jurisdiction is a term of comprehensive impact embracing every kind of judicial action. They also relied on the Nigerian case from the Supreme Court, namely, *Madukolu v. Nkemdilim* (1962) NSCC 374 where four conditions must be present before the court can assume jurisdiction or be competent to hear matters before it.

9. Secondly, Learned Counsel submitted that the applicable law at the time the alleged cause of action arose in 2004 was protocol A/PI/7/91 which provided individuals no direct access to the Court of the Community unless through their Member States which were required to represent them against another Member State in a dispute before the Court. On that score, he submitted that the applicant had no right to approach the Court at the time the cause of action arose or accrued. He contended that the Court lacked jurisdiction to determine a matter on account of legislation that its provisions are repealed or apply a subsequent legislation retrospectively. He referred to Protocol A/P.1/07/91 in respect of the former Protocol and Protocol A/SP.1/01/05 regarding the latter.

10. He submitted that the latter legislation cannot be applied herein because Article 11(1) & (2) of the Supplementary Protocol Number (A/SP.1/01/05) grants no retrospective application to its provisions or that it should be subsumed with the former Protocol A/PI/07/91 on the ground that its provisions appeared not to have given it such interpretation. He contended that the latter Protocol provided that, "this supplementary Protocol shall enter into force provisionally upon signature by the Heads of State and Government as at January 2005".

11. He submitted that having entered into effect in 2005, it cannot be retrospectively interpreted to apply to a cause of action that arose in 2004. In response to this point, Learned Counsel to the Plaintiff submitted that a subsequent Act does not affect the provision of a prior special or private Act, unless it is expressly provided in a subsequent Act. He submitted that the

Supplementary Protocol A/SP.1/01/05 did not repeal or amend Protocol A/PI/07/91 to the extent of extinguishing the plaintiffs' Fundamental Rights and that the violation complained of is that of Fundamental right, and he relied on Article 12 of the African Charter on Human and Peoples' Rights and Article 9(4) of the Supplementary Protocol. He referred to Article 10(d) of the Supplementary Protocol and submitted that since the case is not pending in any International court, the Court has jurisdiction over the subject matter.

12. On the other second issue, learned counsel to the 1<sup>st</sup> & 2<sup>nd</sup> defendants itemized the subject matter of this case as;

- (1) Violation of the plaintiffs' rights to free movement of persons and goods under Article 12 of the African Charter;
- (2) Violation of free movement by erection of toll gates and collection of toll fares by Police, Customs and Immigration officials.
- (3) Violation of plaintiff's right to free movement by occasional closure of borders and restriction of movement of persons and goods by the defendants pursuant to the provisions of the ECOWAS free movement of persons, residence and establishment. He submitted that the plaintiff has failed to prove his claim and that the defendants were not in breach of Article 12 of the Charter on Human and Peoples' rights and the Universal declaration of Human rights.

13. He submitted that even the evidence given by the 1<sup>st</sup> plaintiff has not established the claim. He submitted that Article 12(1) & (2) of the African Charter is not absolute freedom but there is a caveat that "provided he abides by the law" and the second caveat is that "provided by the law for the protection of National security, law and order, public health or morality." He submitted that the word 'provided' in its ordinary and legislative context means an exception. He relied on Bindra's interpretation of Statutes 10<sup>th</sup> edition and submitted that the evidence of the 1<sup>st</sup> plaintiff that there was presidential election and the border was closed fell under the proviso mentioned in Article 12 (1) of the African Charter on Human and Peoples Rights.

14. On the issue of checkpoints he submitted that the checkpoints encountered by the Plaintiffs from Badagry to Some borders are domestic affairs of the 2<sup>nd</sup> defendant aimed at enforcing municipal laws of the Federal Republic of Nigeria, and submitted that there was evidence that the 1<sup>st</sup> Plaintiff was not hindered nor restricted from free movement in the States of the 1<sup>st</sup> & 2<sup>nd</sup> defendants. He submitted on the allegation of bribery, labeled against officials of Nigeria that the allegations were not proved in terms of the concreteness of the evidence and identity of the officials, that they committed the acts. He relied on the case of *Starcres International Ltd v. President of the Commission of ECDWAS & Anor* (unreported), decided by this Court and submitted that the Plaintiff failed to prove his claim and urged the Court to dismiss it.

15. In response, Learned Counsel to the Plaintiff submitted that the claim being civil in nature, the proof shall be by preponderance of evidence as held in *Nwokerobia v. Nwogu* (2009)50 WRN 1 at 7. He submitted that the 1<sup>st</sup> plaintiff gave evidence that they encountered illegal restriction on their journey which proved their claim and that once a claim of human rights violation is proved, damages need not to be proved, as was observed in *Adigun v. AG of Oyo State* (1987) 1 NWLR 684 per Kayode Eso, JSC (as he then was) and also *Buhari v. INEC* (2009) 7 WRN 1 at 6. He further submitted that the essence of cross examination is to discredit the witness but where such witness is not discredited; the evidence stands and ought to be taken as reliable in proof of his case. He emphasized in his submissions that the free movement of the Plaintiff in the instant case was restricted without just cause and urged the Court to affirm the claim in the application.

#### CONSIDERATION OF THE COURT

16. On the first issue as to Jurisdiction, several issues fall out of the same as may be put thus:
- a. The trite meaning of jurisdiction and Lack of it and its effect;
  - b. The cause of action as prima facie shown in the application;
  - c. The cause of action relied on Protocol, A/P1/07/91 or A/SP.1/01/05 which grants

Individual access to the jurisdiction of the court;

- d. Whether Article 9(3) of Protocol A/SP.1/01/05 applied in the case to oust Jurisdiction of the Court because of the passage of the period specified therein – 3 years period.
- e. Whether Protocol A/P1/07/91 was amended or repealed or substituted and the effect of Article 9 vis a vis Protocol A/SP.1/01/05 therein;
- f. Whether Protocol, A/SP.1/01/05 is retrospective in effect, keeping the cause of action alive or dead.
- g. Whether alleged violation of human rights is affected by Statute of Limitation.

17. On the first issue under jurisdiction, it is trite law that jurisdiction is material to the determination of a case before the court and where such is determined without jurisdiction, it goes to no issue and is rendered null and void and of no effect. See the cited case, *Madukolu v. Nkemdilim (supra)*, *Pinner v. pinner(supra)*, *Essien v. Republic of The Gambia (2009) 3 CCJLR (pt 2)* at 45. In the latter case, this Court held that:

*“the significance of the issue of jurisdiction is that where a matter is heard and determined without jurisdiction, it amounts to a nullity no matter how well conducted the case maybe.”*

18. Also in *Afolabi v Federal Republic of Nigeria (2008) 3 CCJLR (pt 1) page 1 at 15 paragraph 25*, the Court stated the seriousness of the issue of competence and that defect is disastrous and leads to the procedures becoming nullities, no matter how well conducted the trial might have been done and itemized the three conditions that must be present for the assumption of jurisdiction, namely:

- (a) The case must be properly constituted as regards numbers and qualifications of the members of the panel and no disqualification for any reason whatsoever;

purview of the Protocol of ECOWAS on Free Movement of Persons, Residence and Establishment which Article 12 of the said Charter is all about and specifically on the right of free movement. For the above reasons the claims in the application no doubt fall within the said Article 9(4) of the 1991 Protocol on the Court as amended. Article 9(4) of the said Protocol provides that;

*“The court has jurisdiction to determine cases of violation of human rights that occur in any Member State”*

22. The ipse dixit evidence of the Plaintiff shows that the Plaintiffs were travelling from Nigeria to Togo when the alleged violations occurred. Prima facie, the facts stated therein in the application are acts of violation of human rights and same hinder on the Plaintiffs free movement as envisaged in the ECOWAS Protocol on free movement. See *Falana v.FRN* (supra), Article 9 (4) of the Supplementary Protocol, and Article 12(f) of the African Charter on Human and Peoples Rights. Consequently, the applicants have shown that the subject matter falls under the jurisdiction of this Court.

23. On the third condition for the assumption of jurisdiction are the following issues raised by the Parties:

- Retrospectivity of legislation;
- Substitution of legislation;
- Protocol A/PI/7/91 and Protocol A/SP/01/05 and their effect;
- Statute of Limitation under Article 9(3) of the 1991 Protocol as amended;

24. These issues fall under the ambit of the said third condition for the assumption of jurisdiction which ought to be satisfied as stated earlier herein. The arguments of the Learned Counsel for the defendants were that the Supplementary Protocol that gave access to individuals on human rights violation was not made with retrospective effect, having been made well after the cause of action arose and when Protocol A/PI/07/91 was still in force and applicable to the case. Learned Counsel to the Plaintiff submitted that any subsequent legislation, Act, Enactment must

- (b) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and
- (c) The case comes before the court, initiated by due process of law upon fulfillment of condition precedent to the exercise of jurisdiction.

19. The above stated conditions must be fulfilled before the court may safely assume jurisdiction in a matter and a breakdown of the same will further specify the following sub conditions emanating from the main thus:

- (a) Whether the subject matter is within the competence of the court
- (b) Whether the cause of action is properly initiated by due process and no condition precedent such as the issues raised relating to the retrospectivity of legislation; substitution of legislation.

20. The subject matter in the instant case prima facie relates to an alleged violation of human right of free movement as provided pursuant to Article 12 of the African Charter on Human and Peoples' Rights. The said Article 12(1) of the said Charter provides that:

*"1. Every individual shall have the right to freedom of movement of residence within the borders of a state provided he abides by the law.*

*2. Every individual shall have the right to leave any country including his own, and to return to his country. The right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality"*

21. The second and third issues pertaining to the subject matter of the claim in respect of erection of toll gates, collection of toll fares by Police, Customs and Immigration officials of the defendants, occasional closure of border and restriction of movement of persons and goods fall under the

specifically and expressly provide that the provision of the subsequent Act, and Legislation has repealed a prior legislation or enactment and he referred to the case of *Odugbo v Abu*(2005) 49 WRN1 at 6 and 7. 25.

25. He submitted that the Supplementary Protocol A/SP.1/01/05 did not repeal Protocol A/PI/7/91 to the extent of extinguishing the plaintiffs' Fundamental Rights. However, learned counsel to the defendant dwelt on the fact that where the subsequent Protocol is capable of being read retrospectively to confer right on the Plaintiffs to approach the court for redress, it should be so read. After considering the arguments of Counsel on these constituents points for the third condition, the Court holds that Article 9 (3) of the Protocol on the Court as amended is a statute of limitation and applicable in this case. In the said Article 9(3) the word "shall" was used to mean that a cause of action which arose more than 3 years before the application for reliefs regarding a violation is sought is statute barred thereby making the relief non justiciable. The cause of action in the instant case arose on the 24<sup>th</sup> of April 2004 and the case was lodged into the docket of the Courts Registry on the 26<sup>th</sup> of October 2007, exceeding the prescribed period by 6 months.

26. It is trite law that where a statute is made with retrospective effect which may concern the whole provisions of the statute or a part thereof, the court shall construe the statute in such a manner as to give effect to the intention expressed in the statutes. It is well settled also that when the words of a statutes are themselves precise and unambiguous, then no more is necessary than to expound the words in their natural and ordinary meaning. This was the interpretation this Court maintained and adopted in *Afolabi v. FRN* (supra); These authorities from the National Court are on the same manner of interpretation decided that words should be given their natural and ordinary meaning- see *Ahmad V. Kessim*(1958) SCNLR 58; *Nabhan v. Nabhan*(1967)1 All NLR 47 and 54. Also a statute can be passed for the purpose of supplying an obvious omission in a former statute and the subsequent statute may have relation back to the

time when the prior statute was passed. In the instant case Article 3 of the Supplementary Protocol A/SP/01/05 states:

*“Article 9 of Protocol on Community Court of Justice substituted.  
Article 9 of the Protocol relating to the Community Court of  
Justice is hereby deleted and substituted by the following new  
provisions.”*

27. Under the said Article 3, there is a new Article 9 on the jurisdiction of the Court including the said Articles 9(3), 9(4) and 10(d) on the limitation of action, violation of human rights that occur in any Member State and access by individuals to the Court, respectively. The effect of the deletion of the provisions of Article 9 of Protocol A/PI/7/91 and substitution of new Articles 9 and 10 in Protocol A/SP.1/01/05 to Protocol A/PI/07/91 means that as stated in the Nigerian case of Ibrahim v. Barde (1996)9 NWLR (pt 477) at 577 paragraphs B-C, where the Supreme Court state, inter alia, that the legislature is competent to make retrospective legislation and that the nature of a statute may concern the whole provisions of the statute, as where the commencement date so indicates or may concern only a section of the statute, thereby making it a retrospective legislation is apt and relevant in this case.

28. Article 9 of the Protocol A/PI/7/91 was repealed and substituted by new Articles 9 and 10 in Protocol A/SP.1/01/05. There were other amendments and additions to the said Protocol A/PI/7/91 in the said Supplementary Protocol. As stated earlier, where a statute is passed for the purpose of supplying provisions in the former statute, the subsequent or latter statute is returned back to the time when the prior statute was passed. On the basis of the above opinion of this Court, as it applies to this case, the new Article 9(3) and (4) would be construed as if it was made in 1991 in Protocol A/PI/7/91. In the light of the expression of the opinion of the Court above, Learned Counsel for the Plaintiffs was correct in lodging his application under Article 9(4) as individuals even though the cause of action had arisen on the 24<sup>th</sup> of April 2004. Having

stated that, the provisions of Article 9(4) was correctly relied upon, by extension, Article 9(3) of the said Protocol is also applicable.

29. The next point is the caveat to Article 9(3) of the Protocol and the fact that the action accrued in the instant case, in April 2004 and the case was lodged in October 2007, six months after the limitation period of 3 years as stated therein. The Court holds that where the issue is as to limitation of time for taking a step as contained in the Rules of the Court, the court has the power to extend time within which to do any such thing required to be done. However, where the limitation of time is imposed in the statute like it is in Article 9(3) of the said Protocol, the subject matter of jurisdiction is called to question and unless the statute makes provision for the extension of time, the court cannot extend time. See *Akinuoye v. Mil. Administrator Ondo State*, (1997) INWLR (pt) 483 p 564 at 572 paragraphs E-H.

30. However, the salient point arising from the above is on the question of human rights, and whether such alleged violation can be subject to statute of limitation of action/ time. The research on the point produced the finding that the Statute of Limitation would apply to Human rights cases except in respect of gross violation of rights which the violation in the instant case cannot be so characterized. This Court made reference to the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law which was adopted and proclaimed by the General Assembly Resolution 60/147 of 16 December 2005 that the Statutes of Limitation, shall not apply to gross violations of international human rights law and/or serious violations of international humanitarian Law.

31. The Court is in no doubt as stated above, in the instant case, that, the violation of free movement as alleged in this application, if proved cannot fall within the realm of gross violations of human rights as described in Resolution 60/147 of 16 December 2005, mentioned above. On the above analysis the Court finds that the applicant even though alleged the violation of human rights, is caught by the provision of Article 9(3) of the Protocol on the Court which is applicable in this

case because if the period when the cause of action arose and the date the case was lodged in the Registry of the Court are computed, the period would have fallen beyond 3years contrary to the three year period stipulated by Article 9(3) of Protocol A/P1/7/91 as amended.

32. Freedom of Movement according to Postema Gerald (1997) Racism and the Law by Plessy Springer p.48, "is a human right that asserts that a citizen of a state in which that citizen is present has the liberty to travel, reside in, and/or work in any part of the State where one pleases within the limits and in respect for the liberty and rights of others and to leave that state and return at any time". The word, 'State' used in Article 12 if be read in conjunction with Article 3 (iii) of the Protocol to the Community of ECOWAS would bring out the meaning of the State clearer. In that circumstance, from the above statement, another recurring word to note is "Liberty" which is used to denote Freedom of movement.

33. The opposite of this word 'Liberty' would be the word, "restraint," which denotes violation of the Freedom of movement as guaranteed by the African Charter. The above section is clear therefore that the right conferred on every individual is not absolute but qualified, that is to say the right to freedom of movement though guaranteed is subject to the laws, national security, public health and morality of that state or country in question. The Court holds that from the facts averred by the plaintiffs in their application and their oral testimony before this Court there is nothing to show that their movement as they travelled from the Federal Republic of Nigeria to Republic of Benin and then to the Republic of Togo was restrained by the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Since there was no form of restraint, then inferably there was no violation of the right to freedom of movement committed against the Plaintiffs.

#### **BURDEN OF PROOF**

34. For further expatiation on the issues raised by the parties, the question of onus of proof came into focus as to whether the plaintiffs did prove the case as required by Law. As always, the onus of

proof is on the party who asserts a fact and who will fail if that fact failed to attain the standard of proof that would persuade the court to believe the statement of the claim. Furthermore even as in this case where the defendants rested their respective positions on the evidence of the plaintiffs, the plaintiff is required to still prove his claim. It must be mentioned that a party is free to choose whether to adduce evidence in support of his pleadings or not and the court has no power to interfere with the exercise of that right. See the Nigerian case of Mobil oil (Nig) Ltd v. FBIR (1997) 3 SC 1, which this Court can look at under Article 38(1) of the Statute of International Court of Justice.

35. It must be stated that where the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants rested their cases on the plaintiff's evidence, the onus of proof was still the on the plaintiff to prove the case. The argument by the defendants was that by the presentation of the plaintiff's claim and his evidence, the Plaintiffs had failed to discharge the onus of proof and particularly, whether the plaintiff has attained this onus of proof by the standard required in International law.

36. The practice in the National Court is that the burden of proof is on the Plaintiffs to prove his claim and this onus does not lie with the Plaintiff throughout as same may shift to the defendant. In *William A. Parker (USA) V. United Mexican States*, (1926) 4 UNRIAA 39, it was observed that the Tribunal in dealing with the presentation of pleadings and evidence should be governed by municipal law, as international tribunal has no clear rules of evidence.

37. In view of the flexibility of this procedure the international courts have developed their systems of procedural evidence that would ensure that justice is done to parties in all manner of cases before them. This has been applied in several cases where an International tribunal considered the method of burden of proof and burden of persuasion on the evidence was equated to the procedure that obtains in the National Courts. However, it was stated that there is a slight difference but that the combined effect is higher in standard than preponderance of evidence which is the standard in the National Court in civil cases. How does it work, this, this burden of persuasion? The

International tribunal in *ELSI* case in *R Lilich New York*, (1992) 77 stated on burden of proof that Applicant's case must be objectively and realistically seen crossing a 'bright line' of proof. Its case must be made by a preponderance of evidence and should be able to persuade the Court to tilt in their favour. Therefore the burden of proof is weightier and is recognized as the twin burdens of proof and persuasion.

38. The point above is further explained that whilst pleadings and evidence must necessarily be presented in order to discharge the burden of proof, pleadings and evidence are distinct concepts. While the former is merely a step towards the latter, and may be insufficient to discharge the burden the latter is necessary to discharge the burden of proof with an added concept of burden of persuasion. This burden of persuasion should be seen as a separable element of the burden of proof which is applicable in this Court. The General Principles of Law was applied by International Courts and Tribunals OUP, London, (1953) 329, where Cheng, noted thus: 'the burden of proof, however closely related to the duty to produce evidence, implies something more. It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, of sufficiency, or proof'.

39. Also, the maxim *actori incumbit onus probandi* connotes that the claimant carries the burden of proof which may be explained in a plainer manner for understanding that the claimant has the responsibility for adducing evidence on every point necessary to prove his case. As earlier stated above, however, in practical terms, the burden does not always lie on the claimant, for example, where a defence is put forward, the defendant bears the burden of proving the elements necessary to establish the defence. The maxim has manifested itself in both common law and civil law traditions. For example Cross, on Evidence, noted that the legal burden of proving facts lie on him who asserts them, and the French *Nouveau Code de Procedure Civile*, adopted in 1981, states in Article 9 that 'Il incombe a chaque partie de prouver conformement a la loi les faits necessaries au success de sa pretention.

40. This is a well accepted principle of national law and could therefore be concluded to be a source of international law in accordance with Article 38 of the Statute of International Court of Justice as this Court is enjoined to apply same, pursuant to Article 19 (1) of Protocol A/PI/7/91 on the Court of Justice, ECOWAS.

41. After considering the case and the evidence herein, this Court finds that the Plaintiffs have not made out any case for the defendants to answer, and that even though the defendants admitted the facts of the case as stated by the Plaintiff or that the defendants have no complete answer in law to the Plaintiffs' case, the evidence is still not sufficiently proved that there was violation of human rights in respect of the plaintiffs rights of free movement either under Article 12 of the African Charter on Human and Peoples' Rights and or under Article 3 of the Protocol on Free Movement.

42. For the import of Article 12 of the Charter on Human and Peoples Rights, the argument of Legal counsel to the 1<sup>st</sup> and 2<sup>nd</sup> defendants are material and apt, that reference to free movement under Article 12 of the said Charter is not akin to freedom of movement under the Protocol of ECOWAS. In the former the act of right to free movement is an act within a particular State and not the Community and that as far as the 1<sup>st</sup> and 2<sup>nd</sup> defendants were concerned, there was no restraint to the movement in Nigeria and Benin, based on the evidence of the plaintiff. Even at the Togolese border, where there was restraint, the evidence was abundantly sufficient to the effect that the closure of the border, was due to the Presidential Election and within the confines of the Protocol on free movement.

43. To further fortify the above, let the Court examine Article 8 of the said Protocol in respect of the conditionality to free movement of persons etc. on restrictions, as provided for by law, for the protection of National Security, Law order, public health or mortality. Article 8 of the Supplementary Protocol (A/SP.2/7/85) on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons provides;

*“Whenever a problem of internal security shall lead to the imposition of measures restricting the implementation of the provisions of the Protocol on Free movement of persons, the right of residence and establishment, the Member States concerned shall inform the Executive Secretariat and other member States within a reasonable period of time. Whenever, for reasons of internal security, a Member State shall deem it necessary to close its borders, the Member States concerned shall inform the Executive Secretariat, and the other Member State, if necessary even after the act, regardless of the reasons justifying such measures.”*

44. On this note and in the final analysis, the Court agrees with the defendants that the evidence adduced to prove the infringement of the rights of the plaintiffs in this case is insufficient to influence the Court to make the orders sought therein by the plaintiffs.

#### **47. DECISION**

1. Whereas the plaintiffs who are Community citizens and Legal Practitioners were in the process of travelling to Togo to perform their professional duties claimed to have encountered many road blocks, tollgates, checkpoints and closure of border and whereas they lodged this application for A declaration that the defendants have no powers to close the borders and erect checkpoints and toll gates in the member states of the ECOWAS in any manner whatsoever by virtue of Protocol A/P1/S/79 relating to Free Movement of Persons, Residence and Establishment and Article 12 of the African Charter on Human and Peoples Rights.

2. Whereas the plaintiffs relied on the provisions of the Revised Treaty, Article 12 of African Charter on Human and Peoples Rights and the violation of the Protocol on Free Movement to sought for A declaration that the defendants are under an obligation to remove all checkpoints, toll-gates and obstacles to free movement of persons and goods services and capital in the member states of the ECOWAS.

3. Whereas the defendants in their summations indicated that no rights of the plaintiffs were violated upon based on the said Article 12 of the African Charter on Human and Peoples Rights and that there was no restraint of the plaintiffs within Nigeria and Benin and that the Protocol on Free Movement was not absolute as the Borders of Member States may be closed on reasonable cause and that Article 9(3) of Protocol A/P1/7/91 as amended is applicable as to make the cause of action statute barred.

4. Whereas the plaintiffs with regards to the jurisdiction of the Court submitted that, by virtue of Article 9(4) of the Supplementary Protocol and Article 12(1) of the ACPHR, the Court has jurisdiction to determine the cases of alleged violations of human rights that occur in any member state and that the Supplementary Protocol (A/SP.1/01/05) did substitute some provisions including Article 9 of Protocol (A/P1/7/91) and such substitution could not extinguish the plaintiffs' fundamental rights.

5. Whereas the Court affirmed that there was substitution of Article 9 of Protocol A/SP1/01/05 with that of Article 9 of Protocol A/P1/7/91 of the Court to make the application justiciable for violation of human rights; Whereas the plaintiffs failed to prove that the claim was justiciable by the operation of Article 9(3) of Protocol A/P1/7/91 as amended and whereas the said Protocol was amended and substituted to the effect that the amended Protocol shall apply to cases that commenced in 2004;

6. Whereas the onus of proof was not discharged by the plaintiff in this case, and where such proof failed to attain sufficiency of evidence, the plaintiff would have failed to prove his claim and as such the reliefs must be dismissed and are hereby dismissed accordingly.

**COSTS**

48. Whereas the Plaintiffs applied for costs but failed to substantiate the claim and where the claim is unproven, no order as to cost shall be made thereof. In the circumstance, no order as to cost shall be made herein.

THIS RULING IS READ IN PUBLIC IN ACCORDANCE WITH THE RULES OF THIS COURT DATED JULY 24<sup>TH</sup> 2012.

**CORAM**

HON. JUSTICE HANSINE N. DONLI

PRESIDING JUDGE .....

HON. JUSTICE AWA DABOYA NANA

MEMBER.....

HON. JUSTICE ANTHONY A. BENIN

MEMBER.....

JUSTICE HANSINE N. DONLI,

TONY ANENE-MAIDOH

PRESIDING JUDGE

CHIEF REGISTRAR