23rd February – 3rd March 2011
Communication No. 306/2005

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Ninth Extra-Ordinary Session
23rd February – 3rd March 2011

SAMUEL T. MUZERENGWA & 110 OTHERS

v.

REPUBLIC OF ZIMBABWE

DECISION

Citation: Muzerengwa v. Zimbabwe, Decision, Comm. No. 306/2005 (ACmHPR, Mar. 2011)

SUMMARY OF THE COMPLAINT

1. The Complaint is filed by the Zimbabwe Lawyers for Human Rights (the Complainant) on behalf of one Samuel T. Muzerengwa and 110 families (the victims), against the Republic of Zimbabwe (the Respondent State).

2. The Complainant alleges that on 16 December 1998, the Buhera Rural District Council at a Council meeting decided that Samuel T Muzerengwa's village (hereinafter the "Wakarambwa Village") was situated in the lands of another village called Nyararai Village headed by Mungofa Gotora. In its decision the Council resolved that the Wakarambwa's village should immediately move out of the land it occupied. No alternative land was provided even though the decision to evict was reached in terms of the Rural District Act (29:13) which allows the District Councils of each district to allocate land to individuals who are resident or originate from that district, if there is an unoccupied land.

3. The Complainant avers that the dispute of ownership of the said land dates back to the colonial era, when the land had been declared a quarantine land, and was reserved for livestock grazing. Residents of Nyararai Village hail from the family of the paramount chieftaincy of Nyashanu, which is the reigning family in the Buhera area. In 1975, the head of the Nyararai Village applied to the District Administrator and the Ministry of Local Government to establish a sub chieftaincy. The request was granted and they proceeded to establish the Nyararai Village. Furthermore, the Complainant claims that during this period, families of the Wakarambwa Village had already settled in the area or as it were, they encroached on the land, which was reserved for Nyararai Village.

4. With a view to decide on the dispute that ensued between the two families over the ownership of the land, the Buhera Rural District Council held three meetings. During the first meeting the members of the Council failed to reach a decision and decided to visit the area and analyze the maps of the same. When they went to inspect the land the Wakarambwa's refused to have the land inspected, and this was found to be in violation of the procedure of the Buhera District Council. Accordingly, at the next meeting the Council after taking into consideration a number of issues ruled that the Wakarambwa Village headed by Samuel Muzerengwa had unlawfully occupied and encroached into the land of Nyararai Village. The Council also resolved to evict the petitioners and instructed the complainant to seek court orders to the same.

5. The Complainant submits that armed with the Council's resolution, the Gotora family approached the magistrate's [sic] court and obtained an eviction order. The Wakarambwa Village decided to challenge the eviction order by seeking a review of the same in the High Court and Supreme Court. In both instances the case was dismissed on technicalities and the decision to evict the Wakarambwa family stood. The Courts did not order or direct the State through the Buhera District Council to make alternative arrangements for the Wakarambwa families who were now being considered as illegal settlers. This effectively rendered the petitioners homeless.

6. The Complainant avers that the President of the Republic of Zimbabwe, under the Communal Land Act[FN1], is the guardian of the land and can intervene in land disputes, and can vary, set aside or reverse any decision or make such order he deems just. The Complainant submits that on 6 March 2003 an appeal was made to the President but no formal acknowledgement of receipt of the appeal has been received.

[FN1] Section 8(4) & (5) of the Communal Land Act Chapter 20:04.

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7. As a result of the failure of the courts and the Executive of the country to provide an effective remedy to the disputes surrounding ownership, the court orders were enforced, despite the fact that the Wakarambwa Village had not been given alternative land to settle. The Complainant alleges that the manner in which the evictions were carried was inhuman, unfair and disproportionate.

8. The Complainant claims that the evictions did not meet international standards on forced evictions; that there was no compensation or restitution for destroyed properties; and no alternative land was provided for the affected families. The Complainant submits that from 1999 to 2003 the Republic of Zimbabwe was engaged in a land reform and resettlement exercise, but despite the fact that they were literally landless and homeless in their own country, they were not considered suitable candidates or beneficiaries during this programme.

ARTICLES ALLEGED TO HAVE BEEN VIOLATED

9. The Complainant alleges violations of Articles 1, 2, 3, 5, 10(1), 13(1) and (3), 14, 16, 17, 18(1) and (4), 21 and 22 of the African Charter on Human and Peoples' Rights.

PROCEDURE

10. The Complaint dated 22 August 2005 was received at the Secretariat of the African Commission on 29 August 2005.

11. On 27 September 2005, the Secretariat received amicus curiae brief from the Centre on Housing Rights and Evictions in support of the Complaint.

12. At its 38th Ordinary Session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the communication and decided to be seized thereof.

13. On 15 December 2005, the Secretariat of the African Commission notified the Respondent State of this decision and requested it to forward its written submissions on the admissibility of the matter. The Secretariat also enclosed a copy of the above mentioned amicus curiae brief from the Centre on Housing Rights and Evictions which was submitted in support of the present Complaint.

14. On 30 January 2006, a similar notice was sent to the Complainant requesting them to forward their written submission on admissibility.

15. On 1 May 2006, the Secretariat received the written submissions of the Complainant on admissibility.

16. At its 39th Ordinary Session, the African Commission considered the communication and decided to defer it to its 40th Ordinary Session pending additional information from both parties. The parties were notified accordingly.

17. At its 40th Ordinary Session the African Commission considered this communication and deferred consideration of the matter to the 41st Ordinary Session.

18. On 24 November 2006 the Respondent State submitted supplementary information on the admissibility of the communication.

19. At its 41st Ordinary Session, the Commission deferred consideration of the communication to its 42nd Ordinary Session. During this Session the parties made their oral submissions before the Commission.

20. By Note Verbale and letter dated 8 July 2007 the Secretariat notified the Respondent State and the Complainant of the deferment of the communication and further invited the parties to forward additional submissions on admissibility, if any.

21. During its 42nd Ordinary Session held in Brazzaville, Republic of Congo, the Commission decided to defer the case to the 43rd Ordinary Session.

22. By Note Verbale of 19 December 2007 and letter of the same date, the Secretariat notified both parties of the Commission's decision.

23. During its 43rd Ordinary Session the Commission considered the communication and decided to defer the decision on admissibility to its 44th Ordinary Session which was scheduled to be held in Abuja, Nigeria from 10 – 24 November 2008.

24. By a Note Verbale and letter dated 22 October 2008 the Secretariat notified the parties of the decision of the Commission.

25. During its 44th, 45th, and 46th, Ordinary Sessions the Commission decided to defer its decision on admissibility and the parties were accordingly notified of the decisions.

26. During its 47th, Ordinary Session held in Banjul, The Gambia from 12 to 26 May 2010, the African commission decided to defer its decision on admissibility to its 48th, Ordinary Session.

27. In Note Verbale and letter dated 16 June 2010 the Respondent State and the Complainants respectively were informed of the above decision of the African Commission.

28. During its 48th, Ordinary Session the African Commission considered and deferred its decision on admissibility of the communication to its 49th Ordinary Session to allow the Secretariat incorporate the comments made by the Commission.

29. By Note Verbale and letter dated 13 December 2010 the Respondent State and the Complainant were informed of the abovementioned decision of the Commission.

THE LAW ON ADMISSIBILITY

COMPLAINANT'S SUBMISSION ON ADMISSIBILITY

30. The Complainant submits that the Complaint fulfils the requirements of Article 56 of the African Charter.

31. The Complainant submits that Articles 56(1) and (2) of the Charter are complied with as the authors of the communication are identified and do not seek anonymity and as the Complaint alleges infringement of provisions of the Charter by a State Party thereto.

32. Regarding Articles 56(3) and (4) of the Charter, the Complainant avers that the Complaint is not written in disparaging or insulting language and is not based on news disseminated in the mass media, as the information provided is based on court and council records.

33. The Complainant also submits that the communication clearly lays down the processes through which the petitioners sought necessary remedies locally but failed to obtain them. After being served with the initial eviction order from the Magistrates Court [sic] the Wakarambwa Village took the case on review to the High Court and on appeal to the Supreme Court, where they lost in both courts on technicalities, thereby the decision to evict was upheld.

34. The Complainant further submits that the petitioners have tried to appeal to the President to reverse the decision under Section 8(4) and (5) of the Communal Land Act.

35. The Complainant avers that the petitioners made the application to the President on 6 March 2003 but no formal acknowledgment of receipt or response thereto has ever been received. The Complainant submits that since the President has chosen not to respond to the

"plea" by the petitioners, they have no option than to turn to regional institutions such as the Commission.

36. Accordingly, the Complainant submits that local remedies have been exhausted as per Article 56(5) of the African Charter.

37. Concerning Article 56(6), the Complainants are of the view that the Complaint was filed within a reasonable time after exhaustion of local remedies.

38. On Article 56(7) the Complainant argues that the requirement has been satisfied as the matter has not been dealt with by, nor is it pending before any other international body.

39. Based on the above submission the Complainant urges the Commission to declare the communication admissible.

RESPONDENT STATE'S SUBMISSION ON ADMISSIBILITY

40. The Respondent State submits that the petitioners, in 1993, moved into the area in dispute without authority, effectively invading the said land. It further alleges that subsequent to the petitioning by the Nyararai village against the invasion, the Community Court, the District Court, and the High Court decided in favour of Nyararai village. The Supreme Court, on the other hand, made it clear that although the Buhera District Council had erred in proceeding to determine the dispute, "it is common cause that the First Respondent (Buhera District Council) has jurisdiction to determine land disputes in terms of the Communal Land Act." It further held that if the petitioners had been aggrieved by the Council resolution, they could appeal against the decision to the President of Zimbabwe in terms of Section 8(4) of the Communal Lands Act.

41. Although the Complainant's letter of appeal to the President indicates that the appeal was also lodged at the Ministry of Local Government and National Housing, the Ministry contends that the appeal cannot be traced.

42. According to the Respondent State the communication does not reveal any prima-facie violation of the rights and freedoms other than general averments of violations of the African Charter.

43. The Respondent State submits that the land dispute is entirely between two private persons or group of persons and that it suspects that the submission of the communication to the Commission is nothing more than a ploy to portray the petitioners as victims of the clean-up operation "Murambatsvina" undertaken by the Government in June 2005, as nowhere in the Complaint has it been shown that the Government had a hand in the alleged "impoverishment" of the Complainants.

44. The Respondent State holds that the evictions are not "forced evictions" effected by the state but rather "legal evictions" carried out after following due process of law.

45. According to the Respondent State, the evictions were carried out in terms of the Communal Land Acts read with the Regional, Town and Council Planning Act, and that the Buhera District Council is an autonomous body corporate with a distinct locus standi from the State of Zimbabwe and does not fall under the direction and control of the Government.

This according to the Respondent State explains why in all the civil suits between the parties the Complainant never cited any Government Minister or Government Organ.

46. The Respondent State further argues that the Complainants have not exhausted local remedies as they have appealed to the President in terms of Section 8(4) of the Communal Land Act, which is an administrative (not Executive) procedure to be exercised by the President, and from which, if still aggrieved, they could approach the High Court for judicial review of the President's decision. The Respondent State further avers that the Supreme Court could have been approached for relief on the basis of Section 24(2) of the Constitution.

47. The Respondent State further submits that the Complainant portrays a picture of the President who is not bound by anything but his unfettered discretion in deciding the dispute, while the President like any other administrative body, would be bound to follow the rules of natural justice. If these rules were not followed, then the petitioners could always approach the courts for judicial review. The State submits that the President's powers in this instance are not judicial but administrative and hence cannot undermine the powers of the judiciary.

48. The Respondent State avers that at no point did the High Court and the Supreme Court made a final determination on the merits of the case other than being confined to the technical points that had been raised by either party. In this case, the High Court ruled that the Buhera District was the proper forum to deal with the dispute in terms of Section 8 of the Communal Land Act and that an appeal from the Council would lie with the President in terms of Section 8(4) of the Act.

49. Although an appeal against the Council's decision is claimed to have been filed to the President, through the Ministry of Local Government, the Respondent State submits that the said Ministry does not have the appeal.

50. Based on the above submission, the Respondent State avers that the communication is inadmissible.

THE COMMISSION'S ANALYSIS ON ADMISSIBILITY

51. Article 56 of the African Charter provides seven requirements based on which the African Commission assesses the admissibility or otherwise of communications submitted to it.

52. Even though the Respondent State contests the admissibility of the communication on the basis of only three provisions of the Charter, namely; Articles 56(2), (5) and (6), the Commission will proceed to analyse all the seven admissibility requirements provided under Article 56 of the Charter.

53. Article 56(1) of the Charter states that communications received by the Commission should 'indicate their authors even if the latter requests anonymity'. In the present case the alleged victims are Samuel T. Muserengwa and 110 families, and the author of the communication is Zimbabwe Lawyers for Human Rights whose address is disclosed in the communication. Neither the alleged victims nor the author of the communication has requested anonymity. The Respondent State has not contested this fact. Thus, the

Commission holds that the communication fulfils the requirement under Article 56(1) of the Charter.

54. The second requirement under Article 56(2) of the Charter requires communications to be compatible with the Constitutive Act of the African Union or with the African Charter. The Complainant in the present communication catalogues a number of rights guaranteed in the Charter alleged to have been violated by the Respondent State. The Respondent State on the other hand argues that the Complaint has failed to meet the requirement as it does not establish a prima facie violation of rights and freedoms, or the basic principles of the Constitutive Act of AU such as 'freedom, equality, justice and dignity'. The Respondent State submits that there is no prima facie case because the dispute in question is between two private parties and does not involve the State at all, and that the eviction was carried out by a non-state organ, in execution of a court order.

55. It is important to explain what prima facie violation of rights and freedoms entail. The term 'prima facie' means "on the face of it"; "so far as can be judged from the first disclosure" ; "a fact presumed to be true unless disproved by some evidence to the contrary"[FN2]. So, prima facie is a decision or conclusion that could be reached from preliminary observation of an issue or a case without deeply scrutinizing or investigating into its validity or soundness.

[FN2] Henry Campbell Black et al, Black's Law Dictionary, 6th ed. (1990) 1189.
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56. Therefore, one is presumed to have presented a prima facie case or shown a prima facie violation of rights and freedoms under the Charter, when the facts presented in the Complaint show that a human rights violation has likely occurred. The Complaint should be one that compels the conclusion that a human rights violation has occurred if not contradicted or rebutted by the Respondent State.

57. In the case at hand the Complaint alleges a violation of Articles 1, 2, 3, 5, 10(1), 13(1) and (3), 14, 16, 17, 18(1) and (4), 21 and 22 of the African Charter supported by court orders and other pertinent documents. The allegations in this communication are specific enough to establish a prima facie case. Therefore, the present communication is based on alleged violations of the Charter and hence fulfills the ratione materiae requirement.

58. The ratione personae and ratio temporis requirements have also been met. The Complainants, as indicated above in paragraph 51, have the standing to bring the case before the Commission and hence meet the ratione personae requirement, and the alleged human rights violations occurred within the period of the Charter's application to the State, which is also a fact that is uncontested by the Respondent State confirming that the ratio temporis requirement is also complied with. The last requirement under this provision is the ratione loci, which provides that States Parties to the African Charter are responsible for violations that occur within their territory. While whether the alleged violations were committed by state actors directly or by private individuals is something that would be looked into at the Merits stage, at this stage it suffice to proof that the alleged violation occurred within the territorial jurisdiction of the Respondent State, which according to the Commission the Complainant satisfactorily did.

59. The Commission thus holds that the communication establishes a prima facie violation of rights and freedoms in the Charter and thus complies with Article 56(2) of the Charter.

60. Article 56(3) provides that communications should not be written in disparaging or insulting language directed against the State concerned and its institutions or to the African Union. The Complainant claims that the communication is not written in disparaging or insulting language, which the Respondent State has not challenged. So, the Commission holds that the communication fulfils the requirement under Article 56(3) of the Charter.

61. Article 56(4) provides that communications should not be based exclusively on news disseminated through the mass media. The Complainant submits that the communication is based on courts and council records, not on news disseminated by the mass media. The Respondent State does not deny the Complainant's assertion. Accordingly, the Commission is of the view that the communication complies with Article 56(4) of the Charter.

62. Article 56(5) of the Charter stipulates that communications should be 'sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

63. In human rights law it is important for a person whose rights have been violated to make use of domestic remedies to right the wrong, rather than address the issue to an international body[FN3].

[FN3] Nsongurua J. Udombana So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights (2003) 97 The American Journal of International Law (2003) 9.
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64. "The rule is founded on the premise that the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level "and this is supplemented by the fact that "local remedies are normally quicker, cheaper, and more effective than international ones"[FN4].

[FN4] n 4 above, 9.
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65. The rationale behind the exhaustion of local remedies is that states should be given the opportunity to address the issue before the matter is brought before international treaty bodies. In the African human rights system, the Commission has confirmed and reconfirmed this position in its decisions. In Free Legal Assistance Group and Others v Zaire[FN5] and Recontre Africaine pour la Defense des Droits de l'Homme v Zambia[FN6] the Commission stated that the requirement of exhaustion of local remedies is founded on the principle that a government should have notice of human rights violation in order to have the opportunity to remedy such violations before being called before an international body.

[FN5] Communication 25/89-47/90-56/91-100/93 – Free Legal Assistance Group and Others v Zaire (1995) para 36.
[FN6] Communication 71/92 – Recontre Africaine pour la Defense des Droits de l'Homme v. Zambia (1997) para 10.
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66. Accordingly, the submissions of the parties in this case would be assessed in light of the above.

67. The Complainant submits that after the eviction order the petitioners appealed against the order in the High Court and then the Supreme Court, and both courts dismissed the appeal. They later appealed to the President of the Republic and received no response. The Complainant further submits that even though they have appealed to the President, they were not required to, as executive remedies are discretionary and non-judicial in nature. The Complainant accordingly submits that all local remedies have been exhausted.

68. The Respondent State in response argues that the Complainant has not exhausted local remedies as they have both administrative and judicial remedies left to pursue. According to the Respondent State, the petitioners could appeal to the President in terms of Section 8 of the Regional, Town and Country Planning Act (Chapter 29:12) which according to the Supreme Court had nothing to do with what transpired in this case.

69. In the present communication after the eviction order from the Magistrate Court the petitioners' took their case to the High Court contending that the decision of the Council should be reviewed. [FN7] This was dismissed by Justice Ziyambi who did not find any conduct which was reviewable on the part of the Council. The petitioners appealed against the decision of the High Court to the Supreme Court and the latter also dismissed the appeal. The Supreme Court stated that the appeal was argued by the appellant (petitioners) on the wrong basis. The appeal was argued on the basis that the first respondent's (the Council's) decision of 19 August 1998 was made in terms of Section 32 of the Regional, Town and Country Planning Act (Chapter 29:12) which according to the Supreme Court had nothing to do with what transpired in this case.

[FN7] Mungofa Gotora v Nditra Muzerengwa and 32 Others (Zimbabwean Magistrate Court for the Province of Manicaland) Annexure C.
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70. Based on the above, the Supreme Court adjudged that the appeal before the court a quo to have the decision of the Buhera Rural District Council set aside on review on the basis of non-compliance with the provisions of the Regional, Town and County Planning Act was misconceived.[FN8] The judgment of the Supreme Court also indicates that even the counsel of the appellants conceded that the appeal has no merit, which is also obvious from the reading of the judgment.

[FN8] SC 72/2001 Nditira Muzerengwa Chuma v Buhera Rural District Council & Mungofa Gotora (Judgment No SC 75/2001 Civil Appeal No 325/2000) Annexure F.
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71. The Commission agrees with the Respondent State on the point that the domestic courts were not given the opportunity to remedy the merits or substance of the complaint. As indicated above the purpose of the rule of exhaustion of local remedies is to enable states address alleged violations of human rights before international bodies. In assessing whether states have been given this opportunity it is of prime importance to make sure that they have been addressed on all the substantive issues complained of and that the domestic procedures as provided by the laws of the country have been properly pursued, unless they are apparently unjust or prolonged.

72. In this communication the issue for determination before the Commission is the alleged unlawful eviction of the Muzerngwa's and the human rights violations they suffered as the result of such evictions. However, as the reading of the facts of the case clearly indicate the local courts of the Respondent State were never approached to rule on the issue of eviction and other human rights violations that are allegedly caused by the evictions. The African Commission is convinced by the Respondent State's argument, which is not contested by the Complainant, that the latter could have approached the Supreme Court on the basis of Section 24(2) of the Constitution to get redress for the alleged human rights violations.

73. It is true that the High Court and Supreme Court have been approached and both of them ruled against the petitioners. It should however, be noted that the Courts did not rule on the merits of the case but on both instances dismissed the case on technicalities. The reason the courts were not able to deal with the merits is because the courts were approached to rule on procedural matters and thus failed to raise the substantive issues before the domestic courts.

74. The African Commission is in agreement with the Complainant that appealing to the President is not a judicial remedy as it is discretionary in nature and therefore they are not expected to pursue it. Notwithstanding this fact the Commission is of the opinion that the issue before it, that is, the eviction of residents of the Wakarambwa village, has not been decided upon by the domestic courts of the Respondent State. What the High Court and Supreme Court were called upon to do was to review the decision of the Buhera District Council and not to rule on the substance of the case.

75. For the aforementioned reasons the Commission finds that this communication does not comply with Article 56(5) of the Charter.

76. From the above ruling it follows that the filing of the communication by the Complainant is premature and has not observed the requirement under Article 56(6) of the Charter.

77. Regarding the requirement that a communication must not be considered if it has already been settled before other international bodies, the Complainant claims that the present communication has neither been dealt with nor is it pending before any other international body. The Respondent has also not challenged this assertion. Consequently, the Commission holds that the Complainants have satisfied the requirement under Article 56(7).

78. Obiter dictum: in line with its well established jurisprudence the African Commission considered the amicus curiae brief submitted by the Centre on Housing Rights and Evictions[FN9] in support of the Complainants submissions. However, the Commission

notes that the amicus curiae brief submitted by the Centre on Housing Rights and Evictions does not address itself on admissibility.

[FN9] See Article 56 Communication 276/03 – Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois Welfare Council) v. Kenya and Communication 313/05 – Kenneth Good v Botswana (2010) and also Rule 99 (16) of the New Rules of Procedure of the African Commission.

DECISION OF THE COMMISSION ON ADMISSIBILITY

79. In view of the above the African Commission on Human and Peoples' Rights decides:

1. To declare the communication inadmissible because it does not comply with the requirements of Article 56(5) and (6) of the African Charter;

2. To give notice of this decision to the parties in accordance with Rule 107(3) of the New Rules of Procedure (RoPs);

3. To inform the Complainants of their right to resubmit the communication before the Commission after exhausting local remedies in accordance with Rule 107(4) of the RoPs;

4. To include this decision in its Report on Communications.

Done in Banjul, The Gambia, during the 9th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights held from 23 February to 3 March 2011.