

*Communication 286/2004 - Dino Noca vs Democratic Republic of the Congo*

**Summary of the Facts:**

1. The complaint was brought before the African Commission on Human and Peoples' Rights (the Commission on 6 December, 2004 against the Democratic Republic of the Congo (the DRC or the Respondent State)<sup>1</sup> by Mr. Dino Noca represented by Mr. NYABIRUNGU Mwene Songa, a Lawyer at the Bar of Kinshasa (the Complainant); then by Mr. FAKATI wa LUHINDI Défi Augustin, a Lawyer at the same Bar who later continued with the proceedings.
2. The Complainant presents a dispute concerning a building located in the District of Ibanda and registered in the cadastral plan of the city of Bukavu, South Kivu Province, under number 17 R/2<sup>2</sup>, which dispute was ruled on by Judgment No. RCR/C019, on 28 November 2003 by the Supreme Court of Justice of the Democratic Republic of the Congo.
3. The Complainant alleges that the building is the property of the late Lucio NOCA, of Italian nationality, deceased on 27 May 1992, at Sordevolo, a demise which occurred in the course of the hearing.
4. He further emphasizes the fact that the complainant's rights to the building were covered by the Registration Certificate vol. F.XXX, folio 23, which constituted a title deed under the legislation of the Republic of Zaire, now the DRC.
5. The Complainant alleges that later on the State adopted Ordinance No. 74-152 of 2 July 1974 relating to abandoned or undeveloped properties and other assets acquired by the State under the law. Properties covered by this law were ceded to Congolese nationals and the relevant title deeds were nullified without intervention by any court.
6. The Complainant alleges that to circumvent the application of the said law, the late Lucio NOCA entrusted the management of his building to

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<sup>1</sup> The DRC ratified the African Charter on 20 July, 1987

<sup>2</sup> Supporting evidence No. 1

the State-owned National Insurance Company (SONAS) which had the competence to manage real estates belonging to non-resident expatriates.

7. The Complainant alleges that in spite of this state of affairs, the building was declared abandoned and allocated in turn to persons by name Matakina and Kafwa Kasongo respectively. As Mr. Matakina had not satisfied the required conditions for the aforementioned property to be allocated to him, it was instead allocated to Mr. Kafwa Kasongo, the then State Prosecutor at the Bukavu High Court, whose claim was deemed to be valid.
8. The Complainant further submits that the withdrawal of the building from the estate of Noca also followed Order No. 1440/000152/80 of 3 September 1980, which had wrongly classified the building as abandoned property<sup>3</sup>.
9. The Complainant alleges that following an appeal made by SONAS to the competent authority against this ruling declaring it abandoned property, the latter won the case by Order No. 1440/000207/82 of 20 September 1982, ceding back the building in question<sup>4</sup>.
10. The Complainant claims that the appeal filed by SONAS was initially ignored by the Head of Lands Department in Bukavu City who requested that the document in his possession be authenticated. This was done by a telephone message No. 00027/84 dated 5th July 1984. The same message was confirmed by letter No. 1.440/000748 of the same date from the Minister of Lands, who was then State Commissioner, to repeal Order n°. 1.440/000152/80.
11. The Complainant points out that without waiting for the authentication of the document, the Head of the Lands Department issued a registration certificate to Mr. Kafwa Kasongo on 9 June 1984 in defiance of the order; whereas the Judgement on the declaration of buildings as abandoned property of 3 September 1980 and Order n°74-152/74 of 2 Jul 1974 had been repealed one after the other on 20 September 1982 and 2 February 1984 by Judgement No. 1440/000207/82 and Order No. 84-026/84 respectively

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<sup>3</sup> Supporting evidence No. 17-18

<sup>4</sup> Supporting evidence No. 19

12. The Complainant further alleges that copies of the aforementioned documents were produced and copied at the same time to the Head of the Regional Department of Lands, the Curator of Title Deeds and the Governor's Office in Kivu Province.
13. The Complainant therefore concludes that the Head of the Regional Department of Lands had acted knowingly and intentionally refused to wait for the reaction of his superior.
14. The Complainant asserts that following the issuance of the registration certificate to Mr. Kafwa, the State Counsel for South Kivu was invited by the Ministries of Justice and Lands to file for an annulment of the title deed wrongfully allocated to Mr. Kafwa.

**The Complaint:**

15. The Complainant submits that in the light of the above mentioned facts, the Respondent State has violated Articles 3, 7 and 14 of the African Charter.
16. The Complainant further requests the Commission to:
  - Declare judgement No. RCR/C019 of 28th November 2003 null and void following the requested disqualification of the right of Mr. KAFWA to the disputed property; recognise the right of Mr. NOCA Lucio, and, by extension, his sole heir, Mr. Dino NOCA to the said property.
  - Award to Mr. Dino NOCA as compensation for occupation and deprivation of use of property for 28 years a minimum amount of USD 400,000, including legal fees.

**The Procedure:**

17. The Complaint was submitted on 12 February 2004 to the Secretariat of the Commission, which acknowledged receipt of it the same day.
18. At its 35<sup>th</sup> Ordinary Session held from 21 May to 4 June 2004 in Banjul, The Gambia, the Commission decided to be seized of the Communication and requested that the interested Parties be informed. The Secretariat informed the Parties of the Commission's decision and requested them to submit their written arguments on admissibility.

19. The Complainant submitted its written arguments on the admissibility of the Communication to the Secretariat of the Commission during the deliberations of the 35th Ordinary Session. The Secretariat submitted a copy of the complaint and the arguments of the Complainant to representatives of the Respondent State present at this Session.
20. By an additional submission on the admissibility of the Communication forwarded on 6 December 2004, the Complainant informed the Secretariat of the Commission about the replacement of Mr. NYABIRUNGU Mwene SONGA by Mr. FATAKI wa LUHINDI Défi Augustin, a Lawyer at the Bar of Kinshasa/Gombé to pursue his interests at the Commission.
21. The Commission considered the Communication at its 36<sup>th</sup>, 37<sup>th</sup>, 38<sup>th</sup>, 39<sup>th</sup>, 40<sup>th</sup>, 41<sup>st</sup> 42<sup>nd</sup> and 43<sup>th</sup> Ordinary Sessions and at every session deferred its decision for lack of arguments from the Respondent State on admissibility.
22. The Secretariat informed the parties to the Communication of the Commission's decision by requesting at each time that the Respondent State should submit its written observations on the admissibility of the Communication.
23. A Note Verbale as a reminder had been forwarded to the Respondent State on 23 March 2006 with a copy of the arguments of the Complainant Party attached to it.
24. In another note verbale dated 4 October 2007, the Secretariat reminded the Respondent State that the Commission's decision on deferment was firm on the submission of its written arguments within a period of one month. In this regard, the Secretariat reminded the Respondent State that if it failed to present its arguments, the Commission would proceed with the consideration of the case on the basis of the facts in the file.
25. At its 44<sup>th</sup> Ordinary Session held in Abuja, the Federal Republic of Nigeria, the Commission declared the Communication **ADMISSIBLE** on the basis of the information in its possession.
26. By note verbale and letter dated 19 December 2008, the Secretariat of the Commission informed the parties that it had declared the Communication admissible and invited them to submit on the merits

of the case before the 45<sup>th</sup> Ordinary Session scheduled for 13 to 27 May 2009 in Banjul, The Gambia.

27. By note verbale and letter dated 24th April, 2009, the Secretariat of the Commission advised the parties to file their submissions on the merits of the Communication at the 45<sup>th</sup> Ordinary Session scheduled for 13th to 27th May, 2009 in Banjul, the Gambia.

## **Admissibility**

### **Arguments of the Complainant on Admissibility**

28. The Complainant argues that the Communication meets all the requirements laid down by Article 56 of the African Charter. He emphasizes that the Victim is well known and that the Complaint is compatible with the Charter as it relates to alleged violations by the DRC of Articles 3, 7 and 14 of the African Charter.
29. Still according to the Complainant, the complaint filed at the Commission does not contain any disparaging remarks against Congolese authorities.
30. The Complainant notes that his Complaint is based on real facts as evidenced by the numerous documents submitted in support of the complaint.
31. The Complainant also alleges that local remedies under Congolese law have been exhausted, given that the Complainant seized the High Court of Bukavu and the Bukavu Appeals Court.
32. The Complainant declares that following a petition lodged on 12 July 1991, the Supreme Court of Justice, by ruling in judgement No. RC/1704/1705, dated 3 March 1994, had overturned judgement No. RC 1155/1180/1729 delivered on 8 April 1991 by the Bukavu Appeals Court and referred the case to the Appeals Court in Kinshasa/Matete. By Judgement No. RAC 001 delivered on 29 December 1994, the Court of Appeal in Kinshasa Matete rejected the appeals of the appellants, namely State, Noca and Kizila.
33. The complainant alleges that a second appeal for annulment of judgment No. RAC 001 rendered on 29 December 1994 by the Court of

Appeal of Kinshasa/Matete was lodged with the Supreme Court and registered under RC029/TSR.

34. The Complainant alleges having even resorted to extraordinary remedies which are vested solely in the Minister of Justice and Attorney General who had declared the remedy unavailable as confirmed by letter No.1023/mm90/CAB/MIN/J/2004, dated 23 March 2004, which was sent in response to the letter from Mr. Manzila, dated 12 December 2003 (documents attached to the file).
35. The Complainant asserts that the Complaint was lodged with the Commission for almost three months after delivery of the final judgment by the Supreme Court on 28 November 2003 and that the Commission is the only body seized of this matter.

#### **Arguments of the Respondent State on Admissibility**

36. The Respondent State made no submission on the admissibility of this communication despite numerous reminders that had been forwarded to it.

#### **Analysis of the Commission on Admissibility**

37. The admissibility of Communications submitted in accordance with Article 55 of the Charter is governed by the requirements stipulated in Article 56 of the same Charter.
38. The Commission consistently made sustained efforts to get the Respondent State to forward its written arguments and observations on admissibility since its 35<sup>th</sup> Ordinary Session held from 21 May to 4 June 2004 in Banjul, The Gambia, when the Commission was seized of the Communication.
39. The Commission therefore notes the refusal by the Respondent State to cooperate, and is obliged to consider the Communication on the basis of verifiable information provided by the Complainant.
40. Furthermore, it must be noted that during the 42<sup>nd</sup> Ordinary Session held in Brazzaville, Congo, a delegation of the Respondent State pledged to exercise due diligence in order to forward its written arguments on admissibility.

41. The Respondent State, however, did not make any submissions to dispute the arguments of the Complainant on the admissibility of the case.
42. As a result, the Commission declares the Communication admissible in accordance with Article 119 paragraph 4<sup>5</sup> of its Rules of Procedure and with its own jurisprudence.<sup>6</sup>

## **MERITS**

### **Observations of the Complainant on the Merits**

43. The Complainant alleges that the Respondent State has violated his rights guaranteed by the African Charter. In specific terms, the Complainant alleges the violation of Articles 3, 7.1c and 14 of the African Charter.

#### **On the alleged violation of Article 14**

44. The Complainant alleges that in execution of the measures referred to as economic, based on Congolese legislation adopted on 2 July 1974 in relation to abandoned or undeveloped properties and other assets acquired by the State under the law, Mr. NOCA's building covered by the registration certificate drawn up on 1<sup>st</sup> September 1952, was declared abandoned.
45. The Complainant also alleges that before leaving the DRC for his native country, Italy, Mr. Dino NOCA had taken precautions by entrusting the management of his building to SONAS, an official institution of the Congolese State. This, according to the Complainant, was one of the conditions for eluding this measure which was aimed at declaring his building as abandoned.

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<sup>5</sup> Indeed, Article 119 (4) of the old Rules of Procedure stipulates that "States parties from whom explanations or statements are sought within specified times shall be informed that if they fail to comply within those times the Commission will act on the evidence before it."

<sup>6</sup> Using as sole basis the arguments of the Complainants in the absence of arguments from the Respondent State, the African Commission proceeded to consider communications 155/96 - Social and Economic Rights Action Center, Center for Economic and Social Rights vs Nigeria and 159/96 Inter African Human Rights Union, International Federation of Human Rights Leagues, African Human Rights Encounter, National Human Rights Organization in Senegal and the Malian Human Rights Association vs Angola (11<sup>th</sup> Annual Activity Report).

46. The Complainant also asserts that despite the fact that Mr. NOCA had complied with this requirement, the greed to grab the assets of foreigners made some Congolese citizens, in collusion with some State officials, to outwit the vigilance of the authorities and declare NOCA's building as abandoned. Thanks to the intervention of SONAS, an opposition to this action was granted by the Minister of Lands and Property.
47. The Complainant alleges that Mr. NOCA is the undisputed owner of the building situated at n°17R/2 in Ibanda in the city of Bukavu and this is based on a registration certificate issued to him by the Curator of Landed Property Titles on 1<sup>st</sup> September 1952, an act which consequently recognizes the property right of the Victim under Congolese law.
48. The Complainant further argues that on the basis of Article 227 of the Congolese Land Law, the registration certificate is indisputable after two years of existence with effect from the date of its establishment, and the Complainant further argues that notwithstanding this Article 227 of the Land Law and of Article 14 of the African Charter, Mr. NOCA was deprived of his property right.
49. According to the Complainant, on the basis of Order No 74-152 of 2 July 1974 on abandoned or undeveloped properties and other assets acquired by the State under the law, a Ministerial Order n°1440/000152/80 of 3 September 1980 all the same declared residential plot n°17R/2 situated in Ibanda-Bukavu as abandoned, thus undermining the rights of the Victim.
50. The Complainant further alleges that two years after the appeal for annulment filed by SONAS, the above mentioned Order was annulled by Order n°1440/000207/82 of 20 September 1982.
51. The Complainant asserts that the Order of the Minister responsible for Landed Property and Real Estate was communicated by letter dated 20 September 1982 to the SONAS Property Manager on the same day.
52. The Complainant also alleges that two years after the annulment of the Order of 3<sup>rd</sup> September 1980, the President of the Republic pronounced the Order n°84-026 of 2<sup>nd</sup> February 1984 relating to the



repeal of the Order on abandoned or undeveloped property and other assets acquired by the State under the law of 2 July 1974.

53. The Complainant also points out that the repeal of this Order had been justified in these terms: *“unfortunately, the difficulty of determining the objective criteria of the abandonment, the insufficiency and the vagueness of those set out by this Order (of 2<sup>nd</sup> July 1974), the brevity of the opposition timeframe and the inefficiency of the publicity measures have given rise to an alarming opinion at both the national and international levels that this law is only aimed at merely confiscating the landed property of foreigners. Furthermore, its application has given rise to considerable fraud. Several unscrupulous and dishonest individuals with the complicity of the Public Service, have used it to defraud others illegally. This has resulted in the numerous cases of litigation now pending before our Courts and Tribunals and which too often undermine the responsibility of the State”*.
54. The Complainant alleges that the NOCA case is an illustration of this relation in which the complicity of the administration is evidenced in the manoeuvres of the Real Estate Curator (State Official) of the city of Bukavu who, under the guise of adherence to procedure, and by his letter dated 30<sup>th</sup> May 1984, requested from his superior, the Minister responsible for Landed Property and Real Estate, clarification regarding the authenticity of Order n°1440/000207/09/82 of 20<sup>th</sup> September 1982 which repealed Order n°1440/000152/80 of 3<sup>rd</sup> September 1980 because there was no trace of the said document in the file of the disputed property and his Department had only a photocopy.
55. The Complainant further alleges that only 8 days after forwarding his letter to the Minister for Landed Property, namely on the 9<sup>th</sup> June 1984, this official, who was bent on undermining the interests of Mr. Noca, decided to issue the registration certificate for Mr. NOCA's building to Mr. KAFWA, in violation, among others, of the provisions of Article 235 of the Land Law which stipulates that: *“except in cases where the assignment is ordered by law or in those provided for by special laws, no assignment can be effected without prior delivery to the Curator of a certificate in replacement. In all cases of assignment, the old certificate recorded in the Registration Book must be marked with an annulment stamp and with a note indicating, in the format established by Article 226, the reasons for annulment and the date and number of the new certificate”*.
56. The Complainant recalls the fact that this decision of the Curator notwithstanding, close to 25 days afterwards, namely on the 5<sup>th</sup> July 1984, the Minister for Land Matters sent a letter and a phone message

to the Curator in which he confirmed the repeal of the Order of 3rd September 1980, but this did not bother the Curator to the point of making him go back on his decision and annul the registration certificate which had been unjustly established for the benefit of Mr. KAFWA.

57. The Complainant underscores that the right to property guaranteed by the Charter is fully recognized by the Constitution of the DRC and conveyed by the Congolese doctrine. Indeed, Article 36 of the Constitution stipulates that “private property is sacred. The State guarantees individual or collective property rights acquired pursuant to law or custom.” These rights may be undermined only by virtue of a law and for reasons of general interest, subject to prior and fair compensation payable to the person being deprived of his rights<sup>7</sup>. Finally, according to Article 37 paragraph 2 of the Constitution “No one shall be dispossessed of his property except by virtue of a decision taken by a competent judicial authority.”
58. The Complainant considers that all these constitutional provisions establish the constitutional bases and value of property in general and, in particular ownership, in the DRC.
59. The Complainant points out that the decision of the Curator is confiscatory and devoid of any legal basis considering that the Order declaring the NOCA building abandoned and the Ordinance on abandoned property had been repealed.
60. The Complainant argues that the repeal of the Order of 3<sup>rd</sup> September 1980 and the Order of 2<sup>nd</sup> July 1974 have amply buttressed Mr. NOCA’s right to ownership of the aforementioned building.
61. The Complainant concludes that despite the two repeals and the constitutional guarantees of property rights, the State, through its agent the Curator of Landed Property, has wrongfully dispossessed Mr. NOCA of his property. Hence it may safely be concluded that Article 14 of the Charter has been violated.

### **On the violation of Articles 3 and 7. 1. c**

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<sup>7</sup> Article 37 paragraph 1 of the Transitional Constitution of 4 April 2003. See also Section 21 of Law No. 93-001 of 2 April 1993 relating to the Harmonized Constitutional Act for the transitional period).

62. The Complainant alleges that despite the formal decision taken by the aforementioned Minister to remove the NOCA building from the category of abandoned assets, Mr. Kafwa, then State Prosecutor at the Bukavu High Court in South Kivu, used his position of authority and his relations with the South Kivu provincial authorities to obtain a Title Deed for the NOCA building.
63. Alerted by SONAS, the Ministers of Justice and Land Matters instructed the State Counsel for Kivu Province to seize the Court for the annulment of the Title Deed illegally issued to the former Public Prosecutor Mr. Kafwa.
64. The Complainant submits that on the basis of the observation that the State Commissioner for Land Affairs had annulled the letter allocating the disputed property in favour of citizen KAFWA through letter No. 1440/OOO7/48/84 of 5<sup>th</sup> July 1984, the Congolese State had instituted proceedings under RC 1443 against KAFWA for the annulment of the Certificate issued to the latter to the detriment of the late NOCA. Contrary to all expectations, the Bukavu Tribunal had rejected the request of the State for non justification through its Judgement of 10<sup>th</sup> June 1985 which was to be served on the State of DRC on the 17 July 1985 represented by the Governor of the Kivu Region in Bukavu.
65. The Complainant goes on to say that curiously, the same Governor of the Region who had issued an illegal order to the Curator to issue the registration certificate to Mr. KAFWA, even though the Judgement had quite rightly been served on him, refrained from seizing the competent authorities to appeal against this ruling.
66. Nonetheless, according to the Complainant, the Appeals Court was seized by special powers of the Minister of Justice to the State Attorney against this decision considered illegal. Thus, the Government of the DRC, through its Secretary of State for Justice filed an appeal under RCA 1180 against the Judgement of 10 June 1985. For his part, against this same ruling, the successors of the late NOCA instituted a third-party opposition under RC 1729 before the Bukavu High Court, but the Appeals Judge confirmed his colleague's first proof ruling.

67. The Complainant further states that the Minister gave a second instruction to his Counsel in the Supreme Court to seize this Court to set aside the Judgement rendered by the Bukavu Appeals Court. This judgement was annulled and the case returned to the Kinshasa/Matete Appeals Court.
68. The Complainant alleges that the State did not win the case before this Court and again through the intermediary of the Minister of Justice introduced a second petition for annulment against the judgement RAC 001 of 29/12/1994 issued by the Kinshasa/Matete Appeals Court. The Supreme Court, seized once again, did not give in to the State's request and the case was dismissed.
69. The Complainant notes that the demise of Mr. Lucio Noca in Sorvedolo, Italy in 1992, occurred subsequent to the institution of the first annulment proceedings initiated in 1991 and the Supreme Court deemed it necessary to call the Noca successor to the case to enable the latter to present his case and defend his interests just like Mr. Kafwa.
70. According to the Complainant, the ruling of the Supreme Court under Judgement No RCR/C 019 of 14 July 2000 ordered the successors in title of the late NOCA to continue the suit in the following terms: *"Start proceedings to allow perfecting of the case. Give instructions for the notification of dates to be issued collectively to the successors in title of the late NOCA LUCIO to the elected Domicile during his lifetime ».*<sup>8</sup>
71. The Complainant further alleges that, on the subject of the pursuance of the lawsuit, this Judgement puts forward the following reasons: *"the Court indicates that the combination of Articles 19 and 20 of the procedure applicable before it, the timeframe appoints beforehand the 6 months set out collectively to the successors in title at the last elected domicile. This formality was not fulfilled in this case. In consequence, since Mr. NOCA's successors in title were not informed of the current proceedings, they cannot be presumed to have withdrawn from the pursuance of the lawsuit".*

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<sup>8</sup> Supporting evidence No. 77-79

72. The Complainant contends that afterwards the Dino Noca party was summoned to pursue the lawsuit by a writ served by a bailiff<sup>9</sup> under the terms of Judgment No RCR/C 019 of 14 July 2002.
73. The Complainant states that as the sole heir to Lucio Noca's estate, Mr. Dino Noca responded to the summons of the Supreme Court to resume the suit during which he became a constrained party, a position which is clarified by an author as follows: "where a party has just died when a case is pending, a voluntary or constrained resumption of the suit may be resorted to by the heirs in order to continue the proceedings"<sup>10</sup>.
74. The Complainant also alleges that it is surprising to note that in spite of the decision by the Supreme Court to resume the case pending before it, the latter surprisingly prohibited the NOCA Party, under judgement RCR/C019 delivered on the merit on 28th November 2003, from submitting the case for the defence by rejecting the right of the Noca succession's pursuance of the suit that it had itself decided and a allow a third-party opposition. According to that Judgement, the following was stipulated: "*regarding the third-party opposition and the pursuance of the suit, the Court rules that the Judgement RC029/TSR having been declared inadmissible, the joint appeal of 3<sup>rd</sup> May 1995 as emanating from Mr. NOCA Lucio who had passed away on the 27<sup>th</sup> May 1992, the issue is definitively settled since Judgement No RAC/001 of 29 December 1994 of the Kinshasa/Matete Appeals Court which had acquired competence of the case had irrevocably judged against the NOCA Lucio successors. Consequently, the pursuance of the suit should not have been ordered*".<sup>11</sup>
75. The Complainant regrets that in spite of his determination to continue the suit, the Supreme Court did not give him that opportunity because it rescinded its decision to allow the suit to continue by nullifying it, whereas in such circumstances, if the Supreme Court had thought it had made a mistake by forcing Dino Noca to continue the suit, it should have reopened proceedings for the purposes of notifying Dino Noca of this fact.

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<sup>9</sup> Supporting evidence No. 77-79

<sup>10</sup> A. Rubbens : le droit judiciaire zaïrois .T.II, n°237, presse universitaires du zaïre, Kinshasa 1978.

<sup>11</sup> Supporting evidence No. 38-92

76. The Complainant believes that the parties should therefore take the written conclusions and present arguments on the position of the Supreme Court with regard to the resumption of the suit by the heirs of late Noca which is presumed to have been wrongly ordered.
77. The Complainant asserts that the final decision RCR/C019 of 28 November 2003 pretends to be unaware of the existence of the previous decision RCR/C 019 of 14 July 2002, which provides the above reasons as justification for the pursuance of the suit by the Noca claimants.
78. The Complainant is outraged at the possibility that the composition of the Court, which is the author of the decision of 28 November 2003, should have a real problem of interpretation of these two decisions which it was required to reconcile in light of the judgment delivered by all sections put together.
79. The Complainant further alleges that the final judgment RCR/CO19 of 28 November 2003 which dismissed the obligation to reopen the proceedings for hearings on the position of Dino Noca, thus deprived the latter of the **“right to have his case heard”**, which right would have provided the Noca party the possibility of appearing for hearing at the Court to prove its claims to the building under litigation<sup>12</sup>.
80. The Complainant further alleges that this attitude of the Court violates in consequence Article 7. 1c and Article 3 of the African Charter. On the one hand, the Noca Lucio successors represented by their legal liquidator Mr. Dino Noca had not had the opportunity to adequately prepare their case for the defense, the evidence and submission of arguments to counter the claims and evidence of the adverse party. On the other hand, the principle of equality before the law stipulated in Article 3 of the Charter was violated since only the case of the opposing party, in this instance Mr. Kafwa, had been taken into account.
81. According to the Complainant, in light of the foregoing, there is no shadow of doubt that the provisions of Articles 7. 1c and 3 of the Charter were violated by the Supreme Court, an institution run by officials of State of the Democratic Republic of the Congo.

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<sup>12</sup> Supporting evidence No. 80-87

### **Arguments of the Respondent State on the Merits**

82. The Respondent State claims that following a request for land ownership signed on 30 January 1984 by Mr. Kafwa, then Public Prosecutor in Bukavu, the Curator of Real Estate of Bukavu by letter n°2448.5/820/84 of 27 March 1984, had proposed to the State Commissioner responsible for Land Issues that he be allocated the building situated on plot 17R/2 in Ibanda, formerly owned by NOCA and declared abandoned by Order n°1440/000152/80 of 3 September 1980 and allocated the same day to a certain MATAKINA who up to the date of the proposal had not paid for the cost to the Public Treasury.
83. The Respondent State argues that at the time the Curator of Title Deeds was making this proposal, he was unaware that the abandonment order had already been repealed by Order No. 1440/000207/82 of 20 September 1982
84. The Respondent State alleges that in response to the letter from the Curator of Title Deeds, the State Commissioner allocated the disputed building to the party per letter n° 1445/21/000605/84 of 23 May 1984. However, at the time that the registrar was getting ready to issue the title deeds to give effect to the allocation made by the State Commissioner, he was informed about the existence of the repeal order.
85. The Respondent State further indicates that by a letter dated 30 May 1984, it requested the State Commissioner to confirm the authenticity of the said Order of which he had only been provided with an ordinary photocopy. On 2<sup>nd</sup> June 1984, the Governor of the Region requested the Curator to prepare the Title Deed in favour of Mr. KAFWA in view of the former owner's lack of interest in recovering his property.
86. The Respondent State in its memorandum states that on the 9<sup>th</sup> June 1984, the Curator of Real Estate signed a lifetime lease with the applicant in favour of whom he prepared the registration certificate volume F 82-folio3, sequel to the receipt by the Authorities of the costs relating to the valuation of the building as well as the related

expenses, so that following the annulment of the Order that had declared the property abandoned, the concerned parties could no longer make a claim to the legal authorities for the building for which the ownership had been finally and legally allocated to the applicant pursuant to Section 227 of the Land Law which stipulates that the registration certificate was final and constituted evidence as of right of the ownership of the building.

87. The Respondent State further says that on the 18<sup>th</sup> July 1984, the DRC, on the signing by the State Commissioner in charge of Landed Property, instructed his Counsel in the following terms: *“the Curator has issued a registration certificate to Citizen KAFWA KASONGO BIN KASENDE. This certificate, having no legal basis, I ask you to institute legal proceedings for its annulment”*.
88. It would appear from the arguments of the Respondent State that using as basis the Report of the State Commissioner for Landed Property, the DRC had instituted a lawsuit against Mr. KAFWA under RC 1443 requesting the annulment of Mr. KAFWA’s registration certificate. The outcome was a Judgement on the 10<sup>th</sup> June 1985, the terms of which declared the demurrer groundless for want of qualification raised by the Respondent; the suit of the original plaintiff and dismissed it in consequence; the suit of the Respondent on reconversion; and condemned each of the Parties to pay half of the taxed costs.
89. The Respondent State shows further that the Republic of Zaïre (currently DRC) was notified of the Judgement on the 17<sup>th</sup> July 1985 represented by the Regional President of the MPR and the Governor of the Kivu Region in Bukavu who was in the latter’s office discussing it with Mr. BALAGIZI, official of the Governorate who signed for receipt of the notification, in conformity with Article 8 of the Civil Procedure Code.
90. The Respondent State further indicates that the DRC having refrained from filing an appeal within the timeframe laid down by law, the Chief Registrar of the Kivu Appeals Court in Bukavu issued to Mr. KAFWA on the 19<sup>th</sup> August 1985, a certificate reporting the absence of any appeal on the part of the DRC against ruling No RC.1443.
91. In order to fully enjoy his right of ownership, Mr. KAFWA filed a writ for eviction under RC 1683 on 22 November 1985 against Mr. KIZILA wa TUBULWA who according to the Respondent State was



occupying the disputed building with neither Title Deed nor right under RC 1683.

92. The case having been adjourned on two successive occasions, it eventually took place with Mr. NOCA Lucio and Mr. KASILEMBO KAKIENGNE through a subpoena for intervention of 3 January 1986.
93. The Respondent State asserts that during the proceedings Mr. KASILEMBO had placed his withdrawal on record following a letter of 8 January 1986.
94. The Respondent State continues by saying that the case (RC 1683) of the 19th February 1986 led to Mr. KIZILA and his family being condemned to eviction and to the payment of an amount of fifty thousand (50,000) zaire to Mr. KAFWA; and also condemned Messrs NOCA Lucio, KAZILA, KASILEMBO to pay a third each of the costs.
95. The Respondent State still in its memorandum declared that the DRC, sequel to the acquisition of a special proxy provided by the Secretary of State for Justice on behalf of DRC filed an appeal on the 12<sup>th</sup> February 1986 under RCA.1180 against the Judgement RC.1443.
96. Mr. KIZILA also filed for appeal under RCA 1155 against RC 1683 of 19 February 1986. Mr. NOCA Lucio also instituted proceedings under RC 1729 before the Bukavu High Court supposedly in third-party opposition against Judgement No RC 1443.
97. The Respondent State further declares that by a ruling of the 7<sup>th</sup> July 1986, the Bukavu High Court referred the case in third-party opposition on the express request of the third opponent NOCA Lucio to the Court of Appeal for it to be joined to that of RCA 1155 which was pending on the appeal of KIZILA and RCA.1180 pending on the appeal of the Republic.
98. A single and only Judgement was delivered by the Bukavu Court of Appeal after having ruled on the entire litigation after combination of the different cases under RCA 1180/1155 and RC 1729, declaring them inadmissible for violation of the law of Mr. NOCA's third party opposition under RC 1729 and the appeal of the Republic under RCA 1180 and the unjustified appeal of Mr. KIZILA under RCA.1155.
99. The Respondent State further declares that the first appeal for annulment of judgement No. RCA1155/1180/1729 of 9 April 1991

was filed through the requests of 31<sup>st</sup> May and 25<sup>th</sup> June 1991 by the parties NOCA Lucio, KIZILA and the DRC under RC1704/1705. The outcome was a Judgement of the 3<sup>rd</sup> March 1994 delivered by the Supreme Court referring the case to the Kinshasa/Matete Appeals Court and stated the law that: *“the jurisdiction of discharge should not take into account the notification of the first proof ruling served to the Governor of the Region in lieu and on behalf of the Ministry of Justice or of his delegate to decree the inadmissibility of the appeal by the Republic of Zaïre for lateness”*.

100. The Respondent State also intimates that in view of Mr. NOCA's demise on the 27<sup>th</sup> May 1992 in Sorvedolo in Italy, since no haste was made to direct the case to the Matete Appeals Court which had been duly seized by the ruling on referral by the Supreme Court, Mr. KAFWA took charge of it by sending to the different parties the notifications for appeals and subpoenas and the notifications for the dates of the common hearings. The Court of Appeal, satisfied that it had been duly seized of the said acts, ruled on the case and pronounced on 20 December 1994, under RCA.001, a ruling confirming the appealed Judgment in all its provisions.
101. The Respondent State asserts that the Judgement delivered paved the way for an appeal for annulment initiated under RC. 029/TSR by way of an application filed on 3<sup>rd</sup> May 1995 at the Registry of the Supreme Court by the Democratic Republic of Congo, Mr. Noca Lucio and KIZILA WATUMBULWA respectively.
102. The Supreme Court ruled by Judgement of the 21<sup>st</sup> January 2000. It declared inadmissible the appeal for annulment emanating from NOCA Lucio, but received the joint appeal by the DRC and KIZILA WATUMBULWA, the said counsel and referred the case to the Judicial Division for ruling on the merits.
103. The Respondent State further indicates that the case referred by the ruling of the Appeals Court to the Judicial Division of the Supreme Court had had two major highlights, namely the pursuance of the suit by the successors of NOCA Lucio, deceased on 27 December 1992, and then the testimony of the said successors under the terms of which the late NOCA Lucio, during his lifetime, had already sold the disputed building to Mr. KASILEMO, with the consequence that his successors could no longer lay any claim to the disputed building.

104. For the Respondent State, a reproduction of the testimony of the successors and the Deed of pursuance of the suit was done so as to establish the futility of the lawsuit instituted by Mr. NOCA Dino before the Commission.
105. Following reading of the terms of the late NOCA Lucio's will, the Respondent State declares that NOCA Dino admitted that his father had sold the disputed building to Mr. KASILEMBO. Therefore, the only logical conclusion to be drawn was that the said building had long ago ceased to be part of Mr. NOCA Lucio's inheritance and estate. According to the State, it was with good reason that the Supreme Court had dismissed all of Mr. NOCA Dino's claims. Consequently, it is up to Mr. KASILEMBO to claim his landed property.
106. The Respondent State in its conclusion asserts that according to the history of the facts and background of the case, Mr. KASILEMBO, having been subpoenaed to the suit RC1683 in voluntary intervention of 3<sup>rd</sup> January 1986, he also voluntarily withdrew his suit and in any case did not file any appeal against the Judgement of the 19<sup>th</sup> February 1986 which had declared his suit inadmissible for non payment of deposit. Thus, the real property rights on which Mr. NOCA Dino based his appeal having been transmitted at the time to Mr. KASILEMBO, or at least since 1986, Mr. NOCA Dino should have his appeal dismissed for want of qualification due to the absence of his own claimed right to the property.
107. The Respondent State in its memorandum is of the view that since Mr. NOCA, Father, could not take advantage of a right to property which he had already assigned to a third Party; his successor had wrongfully pleaded the violation of Article 14 of the Charter to which he is a stranger.
108. With regard to the violation of Article 7 of the African Charter, the Respondent State submits that Mr. NOCA Dino is taking advantage of his own wrongdoing or more specifically of the fraud in his claim.
109. The Respondent State in fact further indicates that as the case referred by the ruling of the Appeals Court to the Judicial Division of the Supreme Court for the determination of the merits was the result of the filing of the second appeal which the Supreme Court considered as justified that brought about the second appeal, it was

only natural for it to be quashed in respect of Mr. NOCA Lucio, once it was revealed at the Judicial Division of the Supreme Court that the second appeal which was based on this second appeal was fraudulent as it was filed on 3 May 1995 on behalf of Mr. NOCA Lucio whose demise had occurred on 27 May,1992.

110. The Respondent State concludes by saying that it was therefore natural that the successor of the deceased who claimed to have filed an appeal should be kept out of the proceedings.
111. The Respondent State claims that the Supreme Court's action, the reasoning of which is irreproachable in law, cannot at all be considered as a violation of Article 7 of the Charter.

### **Complainant's rebuttal on the Merits**

112. The Complainant contends that while looking at the facts, the Respondent State has itself outlined the process of putting the late NOCA at a disadvantage by its officials.
113. The Complainant points out that following a request for land on the 30<sup>th</sup> January 1984 submitted by Mr. KAFWA, then Public Prosecutor in Bukavu, the Curator, who had all the same been informed of the abrogation of Order n°1440/000152/80 of 3 September 1980 by Order n°1440/000207/82 of 20 September 1982 restoring the rights of Mr. Noca.
114. He notes that the Curator, by complying with an order that is palpably illegal, later on 9 June 1984, established a registration certificate volume F 82-folio 3, in the form of a title deed in favour of Mr. KAFWA.
115. The Complainant points out the decision smacks of complicity between the Governor of the region, the Curator of title deeds and KAFWA. But he later indicates that later, the Minister of State in charge of Landed Property instructed his Counsel Mr. MAMBOLEO in the following terms: "*... the Curator has issued a registration certificate to citizen KAFWA KASONGO BIN KASENDE. As this registration certificate has no legal basis, I request you to institute proceedings to have it annulled*".

116. Then began the proceedings of the DRC against KAFWA joined by the NOCA party for the triumph of justice and truth.
117. The Complainant first of all underlines the fact that all the legal actions to which the late NOCA had been a party or had had to initiate, in the final analysis, had been to defend his interests and that of his estate. He points out that at no time in the proceedings did any court sitting on the merits or cassation find it necessary to raise objection, which in principle cannot happen at this stage. No court has ever dismissed the case of the late NOCA for want of quality, an argument which cannot be brought up for the first time before the Commission by the DRC.
118. The Complainant further indicates that in view of the legal proceedings that the Respondent State had had to institute instead of trying to defend itself against the violation of the African Charter by its officials, for which reason it finds itself before the Commission, it should have taken the lead and humbly acknowledged the injury suffered by the petitioner and in addition propose means of arriving at an amicable settlement of this dispute.
119. The Complainant alleges that concerning the sole argument seeking the dismissal of NOCA's appeal on the grounds that the building is no longer the property of the late Mr NOCA and, therefore, of his successor; we think it would be useful to have recourse to constant jurisprudence in that contracts can only give rise to actual obligations and cannot affect by themselves the transfer of real rights, even between the contracting parties, and that the conveyance of property can only stem from an entry into the registration record<sup>13</sup>. This ruling by the Court of First Instance was upheld by the Supreme Court<sup>14</sup>.
120. The Complainant, in addition, underscored that this jurisprudence has remained constant to this day, in spite of the divergence in opinion with regard to the doctrine. On the grounds of this jurisprudence, it was decided that only the holder of a registration certificate can claim ownership of a building and the property shall be deemed to belong to him as long as the transfer has not taken place. In this particular case, the matter referred to the Commission by NOCA

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<sup>13</sup> 1<sup>st</sup> inst. Elisabethville, 13 August 1926, in *Droit et Jurispr. du Katanga*, 2<sup>e</sup> année, p.282

<sup>14</sup> CSJ, RC 100, 3April 1976, Bull. Arr., p. 64

Dino, son and sole heir to the late NOCA Lucio, can only be admissible because of the position of this jurisprudence.

121. Moreover, the Complainant argues, as indicated in the memorandum on admissibility, that the African Commission does not make legal formalism its pet subject; but that the most important thing is to know whether the African Charter has been violated; which has amply been demonstrated and recognized by the Respondent State itself.
122. The Complainant concludes by praying the Commission, in view of the foregoing, to do justice to the Complainant's request and to his subsequent requests.

### **The Commission's Analysis on the Merits**

123. In the present Communication, the Commission seeks to determine if the assignment of the Noca building to Mr. Kafwa Kasongo constitutes a violation of Articles 3, 7.1(c) and 14 of the African Charter.
124. The violation of Article 14 of the African Charter will first be examined, given that this provision is the source of the other violations.
125. Articles 3 and 7.1(c) will be examined together, given that both articles were violated in the same circumstances of time and place.

### **Alleged Violation of Article 14**

126. The Complainant argues that the decision taken by the Curator of Title Deeds to issue the registration certificate of Mr. NOCA's building to Mr. KAFWA was a violation of Article 14 of the African Charter.
127. Article 14 of the African Charter states that: *"The right to property shall be guaranteed. It may only be encroached upon in the interest of public*

*need or in the general interest of the community and in accordance with the provisions of appropriate laws".<sup>15</sup>*

128. Before the Commission determines whether Article 14 was violated in this present Communication, there is the need to ascertain who can be the holder of a property right. Article 14 of the Charter does not specify who the holder of the right of ownership is<sup>16</sup>. However, its interpretation in the light of Article 2 of the African Charter<sup>17</sup>, and the jurisprudence of the Commission<sup>18</sup> clearly show, beyond reasonable doubt, that every individual has the right to property under the Charter.
129. In the present Communication, the victim, Mr. Noca, an Italian national, alleges that his property was stolen under the pretext of the execution of presidential measures referred to as economic measures based on the Congolese law of 2 July 1974 relative to abandoned or undeveloped property and other assets acquired by the State under the law.
130. The Complainant affirms that in order to avoid the likelihood of his building being declared as abandoned, thereby paving the way for its transfer to Congolese nationals; his client had taken all the necessary precaution by entrusting his building to SONAS before leaving the DRC.
131. Notwithstanding this precaution taken by Mr. Noca, the Complainant said the greed to grab the assets of foreigners motivated some Congolese, in collusion with some State officials, to deceive the authorities and declare NOCA's building as abandoned through Order No. 1440/000152/80 of 3<sup>rd</sup> September 1980.
132. The Complainant argues, however, that following the intervention of SONAS which formulated favourable opposition in this regard and which was accepted by the Minister responsible for landed property and real estate matters, a decision was taken to formally exclude NOCA's building from the category of abandoned buildings as per Order n°1440/000207/82 of 20<sup>th</sup> September 1982.

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<sup>15</sup> African Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc.CAB/LEG/67/3 rev. 5, 21, I.L.M. 58 (1982), effective from 21 October 1986

<sup>16</sup> Communication 225/98 Huri - Laws vs Nigeria, par 53

<sup>17</sup> Article 2 of the African Charter stipulates that "every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter [...]".

<sup>18</sup> Communication no 97/93, 2000-John K. Modise vs Botswana, par. 94

133. The Complainant further indicates that two years after the annulment of the Order of 3<sup>rd</sup> September 1980, the President of the Republic issued Ordinance No. 84-026 of 2 February 1984 repealing the Ordinance relating to abandoned or undeveloped property and other assets acquired by the State under the law.
134. The Complainant argues that, in spite of these repeals, the Registrar of Land Titles took on the heavy responsibility of issuing to Mr. KAFWA the registration certificate for Mr. NOCA's building.
135. The Respondent State argues that following a land application by Mr. KAFWA, then State Prosecutor at the Bukavu High Court, the Registrar of property titles proposed he should be allocated the property formerly owned by Mr. NOCA, which was declared abandoned on 3<sup>rd</sup> September 1980 and allocated on the same day to a certain MATAKINA who, until the date of the proposal had not made any payment into the public treasury.
136. In its response, the Respondent State claimed that at the time the Registrar made the proposal, he was unaware that the 1980 Abandonment Order had been repealed by Order n°1440/000207/82 of 20 September 1982<sup>19</sup>.
137. The Commission notes that though it is true that the administration was unaware of the repeal and the opposition raised during the procedure for registration and issuance of the title deed and issued a title deed for a piece of land which already had a title deed, it means that the State failed in its obligation to protect the rights of foreigners living in its territory, and that the State could have demonstrated good faith by reinstating the rights of the victim.
138. In any case, the Commission notes that the Head of the Lands Department in the city of Bukavu received a copy of the annulment of the Order declaring the NOCA building as abandoned, given that he even requested the authentication of the document in his possession. This request was made through telephone message No. 00027/84 of 5 July 1984 and letter No. 1.440/000748 of the same 5 July 1984, from the Minister of Lands, then State Commissioner, confirming the repeal of Order No. 1.440/000152/80.

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<sup>19</sup> See conclusion on the merits of Democratic Republic of Congo on this Communication, p2



139. The Commission also notes that even though the Head of the Lands Department had requested authentication of the document, he did not wait for the aforementioned responses, but proceeded with the issuance of the registration certificate to Mr. Kafwa Kasongo.
140. The Commission deplors the lack of diligence and goodwill on the part of the Head of Division, who before the assignment of the Noca plot of land, could have waited for the response of the Minister of Lands in respect of the authenticity of the copy relating to the annulment of the Order declaring the building as abandoned property.
141. It is quite right that the Complainant cites jurisprudence according to which only the holder of a registration certificate can lay claim to the ownership of a building and the property is deemed to belong to him as long as the transfer of property ownership has not been made.
142. On the argument of the Respondent State that due to the lack of interest by the former owner to recover his property, the Commission believes that for the owner to entrust the management of his building to SONAS before leaving Zaire (now DRC) was a means for Mr. NOCA to maintain his property a link with his property which excludes lack of interest to recover his property as claimed by the Respondent State.
143. The Commission notes that the right to ownership embodies two key principles. The first is a general one which focuses on the principle of the right of ownership and the peaceful enjoyment of property. The second principle focuses on the possibility and condition of deprivation of the right to property<sup>20</sup>. Article 14 of the African Charter recognizes that States are authorized to violate it under certain circumstances, particularly, to control the use of the property in the public or general interest by administering laws which are deemed necessary towards that end.

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<sup>20</sup> Communication 373/09: INTERIGHTS, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme vs. Mauritania, par 44

144. In Communication 276/2003 - Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya (**Endorois case**), of May 2009, the Commission dealt at length with the right to ownership and established a two-pronged criterion which sets out that this right cannot be violated except "*in the interest of the public or in the general interest of the community*" and "*in conformity with the provisions of the appropriate laws*"<sup>21</sup>; this latter aspect referring to domestic and international laws<sup>22</sup>.
145. At the same time, the Commission has indicated that the limitations to the right to property should be determined in the light of the principle of proportionality, meaning that interference in the right to property must be "*proportional to a legitimate need, and should represent the least restrictive measure possible*"<sup>23</sup>. That is not the case for the Communication under review.
146. Moreover, in the situation depicted in the present Communication, the Commission notes that the State has not demonstrated that the Complainant's building was confiscated in the interest of public need or general interest. The deprivation was done without any legal basis as the Respondent State itself had taken so many decisions on the same building in the interest of the Complainant.
147. Without such a justification and adequate compensation determined by an impartial court of competent jurisdiction, the African Commission believes that the actions of the Respondent State are in violation of the right to property guaranteed by Article 14 of the African Charter<sup>24</sup>.
148. On the defence of the Respondent State that it was no longer admissible for the interested parties to claim before the court property whose ownership was finally and legally vested in the applicant under Article 227 of the Land Law which provides that the registration certificate is an absolute proof of ownership of buildings, the Commission believes that it is never too late to stop any violation and make reparation for its consequences.

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<sup>21</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya, Communication no 276/2003, May 2009, par. 211.

<sup>22</sup> Ibid., par. 219.

<sup>23</sup> Ibid., par. 214

<sup>24</sup> Cf *Huri-Laws vs. Nigeria*, above para 53

149. The Commission notes that the Respondent State is not contesting the repeal of the Order of 3rd September 1980 as well as the Ordinance of 2<sup>nd</sup> July, 1974, texts which are the basis for the withdrawal of the disputed building from the inheritance of Mr. Noca.
150. The Commission believes these two repeals fully consolidated the ownership right of Mr. NOCA to the above mentioned building; given that after the repeal, the Order declaring the Noca building an abandoned property became null and void.
151. The Commission, from a legal standpoint, further believes the annulment of the two Orders ought to result either in the annulment of the Title Deed issued on the basis of these two repealed texts, therefore dubiously obtained or the restoration of a duly obtained Title Deed by Mr. Noca.
152. The Commission further argues that the fundamental rights guaranteed by the Charter are based on procedural rules for their effective enjoyment. The application of these procedural rules giving effect to the enjoyment of those rights should be followed in that, in the present case, their misapplication can deny the fundamental rights, thus leading to the limitation or deprivation thereof.
153. The Commission, based on the two repeals, concludes that there was culpable negligence or a wilful misconduct on the part of the Curator of Title Deeds.
154. The Commission believes that the Title Deed issued on the basis of repealed texts, therefore non-existent, is itself non-existent, and without any effect.
155. The Commission recalls the principle enshrined in Article 1 of the Charter, according to which States Parties not only recognize the rights, obligations and freedoms proclaimed in the Charter, but also undertake to respect them and to take steps for their implementation. In other words, if a State Party cannot ensure respect

of the rights contained in the African Charter, this constitutes a violation of the Charter<sup>25</sup>.

156. The Commission, in Communication n°155/96 on the *Ogoni* case, adopted an integral approach, notably pertaining to the correlative obligations of the State. The Commission has insisted on the responsibility of States to protect their citizens *“not only by enacting appropriate legislation and by applying them effectively, but also by protecting the said citizens from prejudicial activities which may be perpetrated by private parties”*<sup>26</sup>.
157. The Commission points out that from its jurisprudence: [...] *All rights, civil, political, social and economic, create at least four levels of obligations for a State which undertakes to adopt a system of rights, in particular the responsibility of respecting, protecting, promoting and fulfilling these rights. These obligations are universally applied to all the rights and impose a combination of negative and positive responsibilities*<sup>27</sup>.
158. The Commission further considers that it is the duty of States to investigate and remedy violations under the general obligations incumbent on them pursuant to Article 1 of the African Charter on Human and Peoples’ Rights which provides that States must adopt legislative or other measures to implement the rights, duties and freedoms enshrined in the Charter. *“They need to prevent acts that violate any right recognized by international human rights law, investigate such acts or punish the perpetrators”*.<sup>28</sup>
159. The Commission further believes that it is the obligation of the Respondent State to respect the right to property. For the African Commission, the right to property set out in Article 14 of the Charter relating to land and housing, implies in particular, the protection from arbitrary deprivation of the enjoyment of property rights, adequate compensation for public acquisition, nationalisation or expropriation,

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<sup>25</sup> Communication 74/92 National Commission on Human Rights and Freedoms vs. Chad, para. 35

<sup>26</sup> Communication no 155/96 - Social and Economic Rights Action Center, Center for Economic and Social Rights vs. Nigeria, par. 57

<sup>27</sup> Malawi African Association and Others vs. Mauritania, Communications nos 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 2000

<sup>28</sup> Communication° 155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) vs. Nigeria, § 44 - 48

peaceful enjoyment of property and protection from arbitrary eviction<sup>29</sup>.

160. This obligation prohibits States from interfering arbitrarily in the enjoyment of property rights. Expropriation without legal grounds or which is not performed in the public interest is an example of breach of the obligation to respect the right to property.
161. It is also noteworthy that the Commission has an independent and broad conception of the right to property, particularly in Communication n° 276/03, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) vs. Kenya -the *Ogoni* case, where it held that “the right to property includes not only the right of access to one’s property and freedom from violation of the enjoyment of such property or injury to it, but also the free possession and utilization and control of such property, in a manner the owner deems adequate”<sup>30</sup>.
162. The Commission feels that the State is obliged to protect the holders of rights against other subjects, by legislation and the provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interference. Protection generally entails the creation and maintenance of an atmosphere or a framework through an effective interplay of laws and regulations, so that individuals can freely exercise their rights and freedoms. This is inextricably linked to one of the obligations of the State which consists in promoting the enjoyment of all human rights<sup>31</sup>.
163. The Commission further believes that by adopting laws on abandoned properties, the State should have taken all the necessary measures to ensure that there would be no misapplications whatsoever of these laws to the extent of arbitrarily and unjustly depriving an individual for the benefit of another.
164. On the argument advanced by the Respondent State that Mr Noca’s successor cannot lay claim to a property which no longer belonged to his father, the Complainant in his reply points out that the purpose of

<sup>29</sup> Declaration of Pretoria on Economic, Social and Cultural Rights in Africa, item 5

<sup>30</sup> Communication n° 276/03, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) vs. Kenya, §186

<sup>31</sup> Communication° 155/96, par 46

all legal actions, in which the late NOCA was involved or initiated, were to defend his interests and that of his successors, and that at no time of the procedure did the Congolese State raise such an exception, which in principle cannot be done at this stage.

165. The Commission should seek to know, considering the argument advanced by the Respondent State, whether or not the Complainant is the holder of the disputed property in order to claim ownership thereof.
166. The Commission notes that, based on the provisions of Section 235 of the said Congolese Land Law which provides that: *"Except in cases where the transfer is ordered by the courts or in cases based on specific legislation no transfer may be made until after delivery to the Curator of the certificate in replacement. In all cases of transfer, the old certificate entered in the registration book shall be marked with a cancellation stamp and a notation indicating, in the form established by Article 226, the reasons for the cancellation and the date and number of the new certificate"*, only the holder of a registration certificate duly established can lay claim to property in the form of a building and the property is expected to belong to him for as long as possible that the transfer would not have occurred.
167. Except for the presentation of a certificate which would have been drafted by the NOCA succession, the Respondent State, has not proved the existence of the sales contract or proved that the transfer of ownership had indeed taken place.
168. The Commission further reminds the Congolese State that at no time during the proceedings was Dino Noca's lack of interest raised. Neither the lower courts nor those of appeal had ever rejected the late NOCA or the State of DRC for lack of interest.
169. The Commission takes note that Mr. Noca has brought several actions in real estate to claim his right to property without winning his case.
170. The Commission, based on the property management agreement concluded in due and proper form between Mr. Lucio Noca, owner of the building, and SONAS, before Mr. Lucio Noca left the DRC to prevent it from being considered abandoned property, including all steps taken by him before he died and by his son after the death of

the owner for the return of the property in the Noca heritage, are a proof of the interest that Mr. NOCA had in the building.

171. Furthermore, as far as the Commission is concerned, to admit that a person, in this case the son of the deceased, would recognize the sale of his father's plot of land to a third party and still continue to bear the expenses and transportation costs of his counsel to pursue the case, in the absence of any grounds in this particular case, is an inconceivable fact.
172. The Commission further notes that there was no reaction from the alleged purchaser, and that the argument of the Respondent State that the building had long ceased to be part of the estate of Mr. Noca, who may have sold it to Mr. KASILEMBO, who himself withdrew from the case, is not admissible given that the administration had at the same time recognized the property right of Mr. Noca to the disputed property.
173. The Commission ultimately concludes that given the proven misconduct of the administration, resulting in particular from an irregularity committed in the procedure for granting the title deed that was still in the inheritance of Mr. Dino Noca, the Respondent State has indisputably violated Article 14 of the African Charter.

#### **Alleged violation of Articles 3 and 7 1.c**

174. The Complainant alleged that the decision taken by the Supreme Court in Judgment RC029/TSR prohibiting the NOCA party from presenting its defence and the decision by the latter Court rejecting the resumption of proceedings by the Noca succession and the third-party opposition violated the principle of Articles 3 and 7.1c of the Charter.
175. Article 3 stipulates that: "Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law".

176. Article 7.1c for its part provides that "Every individual shall have the right to have his cause heard. This right includes the right to defence and the right to be defended by counsel of one's choice".
177. The Complainant alleges that the disputed decision was motivated in these terms: *"regarding the third-party opposition and the pursuance of the suit, the Court rules that the Judgement RC029/TSR having been declared inadmissible, the joint appeal of 3<sup>rd</sup> May 1995 as emanating from Mr. NOCA Lucio who passed away on the 27<sup>th</sup> May 1992, the issue is definitively settled since the Judgement RAC/001 of 29 December 1994 of the Kinshasa/Matete Appeals Court which had acquired competence of the case had irrevocably judged against the NOCA Lucio successors. Consequently, the pursuance of the suit should not have been prescribed"*.<sup>32</sup>
178. In this communication, the victim complained of not having had the opportunity to present his defence. After the death of Mr. Lucio NOCA, biological father of Dino NOCA, the Supreme Court found it necessary to call the Noca succession to the trial to allow him to present his defence so that his rights in the disputed property are protected in the same way as those claimed by Mr. Kafwa on the same property.
179. The Complainant emphasizes that by Judgment No. RCR/C 019 of 14 July 2000, the Supreme Court summoned the entitled beneficiaries of the late NOCA to continue the proceedings.
180. Moreover, the Complainant adds that the pursuance of this lawsuit was decided on the following grounds: *"since Mr. NOCA's successors in title were not informed of the current proceedings, they cannot be presumed to have withdrawn from pursuing the lawsuit"*.
181. The Complainant argues that despite his determination to pursue the proceedings, the Supreme Court did not give him that opportunity because it reversed its decision on the continuation of the lawsuit, by nullifying it for the reason that the issue is definitively settled since the Judgement RAC/001 of 29 December 1994 of the Kinshasa/Matete Appeals Court which had acquired competence of the case had irrevocably judged against the NOCA Lucio successors.
182. The Complainant alleges that the right to equality before the courts guaranteed by the Charter was violated by the Supreme Court, given

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<sup>32</sup> Supporting evidence No. 38-92



that only the arguments of Mr Kafwa, the other party, were considered as opposed to those of Mr Noca who was refused from pursuing the case.

183. The Respondent State states for its part that the approach of the Supreme Court whose reasoning is impeccable in law can in no way be regarded as a violation of Article 7 of the Charter.
184. For the Respondent State, the referral of the case to the Judicial Division of the Supreme Court for the determination of the merits was only the consequence of the second appeal, which having been deemed to have grounds by the Supreme Court, had recognized a second referral; and it was only natural for it to be invalidated in respect of Mr. NOCA Lucio, since it became clear before the Judicial Division of the Supreme Court that the second appeal which necessitated the second referral was fraudulent given that it was filed on 3rd May, 1995 on behalf of Mr. NOCA Lucio who passed away on 27 May 1992.
185. The Commission recalls that though the complainants decided to pursue the lawsuit, they only used the opportunity offered them by the Congolese State which had observed many irregularities in the administration of justice in the Noca case.
186. The right to a fair hearing is based on key elements including in particular the principle of equality of arms for the parties to the case, whether administrative, civil, criminal or military<sup>33</sup>, the opportunity to properly prepare the defence, to present arguments and evidence and to respond to the arguments and evidence of the prosecution or the defendant<sup>34</sup>.
187. Pursuant to Article 7.1.c of the Charter, anyone who feels that his rights have been violated has the right to bring his case before the relevant national courts. Thus, the position or status of the victim or those of the alleged perpetrator do not matter. This means that any person, whose rights have been violated, including by persons acting in their official capacity, should be entitled to an effective remedy

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<sup>33</sup> Directives and principles of the African Commission on the right to a fair trial and legal assistance in Africa, Item A.2(a).

<sup>34</sup> *Idem*, Item A.2(e)

before a competent and impartial judicial body and enjoy the right to have his case heard without any discrimination.

188. The States Parties to the African Charter thus have a duty to ensure that the judicial organs are accessible to all and that all parties have the opportunity to present their defence in a fair manner.
189. The Commission notes that the title deed is an administrative act likely to be brought before the Judge and can constitute the object of an appeal against abuse of power if it has been fraudulently established other than as a result of a flaw which happened during the registration procedure.
190. The right to be heard requires that the Complainant has unfettered access to a court having jurisdiction to hear his case. It also requires that the matter be brought before a court having jurisdiction to hear the case. A competent court to hear a case in law is so empowered by the law.
191. The Commission provided clarification on Article 7 in the *Kenneth Good vs. Republic of Botswana* case, in which it asserted that the right to be heard requires that the Complainant should enjoy unrestricted access to a court of competent jurisdiction to have his case heard<sup>35</sup>.
192. The Commission believes that when the authorities put impediments in the way to prevent victims from having access to competent courts, they deprive victims of their right to have their case heard.
193. In the case of the *Zimbabwe Human Rights NGO Forum vs. Zimbabwe*<sup>36</sup>, the Commission noted that the protection afforded by Article 7 is not limited to the protection of the rights of persons arrested and detained but it includes the right of everyone to have access to relevant judicial bodies with jurisdiction to hear their case and grant them adequate compensation.
194. The Commission regrets that after having taken the right decision to reopen the proceedings, the Supreme Court reversed its decision by prohibiting the NOCA party from presenting its defence and rejecting

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<sup>35</sup> Communication 313/05 - *Kenneth Good vs. Republic of Botswana*, par 169

<sup>36</sup> Communication 245/2002 - *Zimbabwe Human Rights NGO Forum vs. Zimbabwe*

the resumption of proceedings by the Noca succession decided by itself and the third-party opposition.

195. The Commission believes that though the Respondent State noted that the second appeal which prompted the second referral was fraudulent, the Supreme Court should not have rejected the pursuance of the lawsuit, the only remedy available to the victim to claim his building.
196. The Commission also believes that in such circumstances, if the Court thought it had erred in allowing the NOCA party to pursue the lawsuit whereas there was an existing ruling that had acquired the force of a judgement delivered, and also that the second appeal was granted on the basis of a fraudulent act, it was obliged to re-open the proceedings in order to notify the Noca party about the facts.
197. The Commission believes that the final judgment which rejected an obligation to reopen the proceedings to hear the position of Dino Noca therefore deprived him of the right to have his case heard.
198. The Commission moreover believes that the Supreme Court did not offer the basic procedural safeguards. Its decision cannot have legitimacy when both sides have not been heard with due respect for the principle of equality of arms, which would have allowed the parties to discuss the issue of continuing with the proceedings.
199. In such circumstances, the Commission can only endorse the claims of the Complainant according to which the decision of the Supreme Court to exclude the NOCA party from the proceedings without giving him the opportunity to present his defence and without examining the consequences of such action on his request does not comply with the requirements of the African Charter and the general principles of law.
200. The Commission considers that the argument advanced by the Respondent State to justify the position taken by its own courts is inconsistent with the obligations of the Respondent State to comply with Article 7 of the Charter.
201. The Complainant also alleges a violation of Article 3 of the Charter which deals with the right to equal protection of the law and equality before the law. For the parties to a case, these rights entail access to equal opportunity in the preparation and presentation of their

arguments. In other words, they must be able to defend their case before the court on an equal footing.

202. In the Communication *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa vs. Republic of Zimbabwe*<sup>37</sup>, the African Commission relied on the decision of the Supreme Court in the case *Brown vs. Board of Education of Topeka*<sup>38</sup>, in which Chief Justice Earl Warren of the United States of America argued that “equal protection by law refers to the right of everyone to have equal access to courts of justice and to be treated the same way by the courts, both for procedures and for the essence of the law. It is akin to the right to due process of law, but applies in particular to equal treatment as an element of fundamental equity”.
203. The Commission considers that this attitude of the Supreme Court is in contradiction with the principles of the right to equality before the law and the right to defence and thus infringes Articles 3 and 7.1.c of the African Charter on Human and Peoples' Rights in the sense that firstly the succession of Noca Lucio represented by its legal liquidator Mr. Dino Noca could not present its defence and secondly the principle of equality of litigants was not respected since only the defence of the opposing party, in this case Mr Kafwa, was taken into account.
204. In its analysis of the situation in the light of the arguments presented by the parties, the Commission considers that Articles 3, 7.1 (c) and 14 of the African Charter have been violated.
205. The Complainant finally prays the Commission to prescribe to the Respondent State to grant him, as compensation for damages suffered, the minimum sum of USD 400 000, including fees paid to lawyers.
206. The Commission, while acknowledging that the Complainant has certainly suffered damages relating to his right of ownership of the disputed building for several years (28 years), however notes that it is not in possession of sufficient facts to quantify the damages suffered.

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<sup>37</sup>Communication 294/04 - Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) vs. Zimbabwe, para 104

<sup>38</sup> Idem

207. Therefore, in the name of fairness and in light of its jurisprudence<sup>39</sup>, the Commission recommends that the amount of compensation should be determined by the laws of the Democratic Republic of the Congo.

### **Decision of the Commission**

The Commission:

- Notes that the Democratic Republic of the Congo has violated the provisions of Article 3, Article 7.1 (c) and Article 14 of the Charter;
- Declares that the transfer of the Noca family building to a third party by the State on the basis of repealed texts is in violation of Article 14 of the African Charter;
- Thus declares that Judgment RCR/C019 of 28 November 2003 is in violation of Articles 3, 7.1 (c) of the African Charter;
- Enjoins the DRC to restore the right to property of the beneficiaries of the late Mr Noca by reinstating their title deed of the disputed building, or failing that, pay them expeditious, just and fair compensation;
- Finds that the DRC should compensate without delay for the damages suffered by the Dino Noca family in accordance with the DRC laws in force;
- Declares that the Respondent State should present within a period of 180 days, with effect from the notification of this decision, a detailed report on the measures taken to implement this decision.

**Done in Yamoussoukro, Côte d'Ivoire, at the 52<sup>nd</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held from 9 to 22 October 2012.**

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<sup>39</sup> Communication 253/02 Antoine Bissangou vs. Republic of Congo, para 83

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