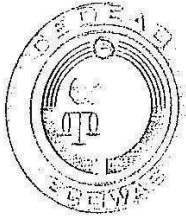


COMMUNITY COURT OF JUSTICE,
ECOWAS



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COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO
TRIBUNAL DE JUSTICA DA COMUNIDADE,
CEDEAO

IN THE COMMUNITY COURT OF JUSTICE, ECOWAS, HOLDEN IN
ABUJA, FCT.

SUIT NO. ECW/CCJ/APP/05/08

OCEAN KING NIGERIA LTD.

VS

REPUBLIC OF SENEGAL

JUDGMENT NO: ECW/CCJ/JUD/07/11

DATED FRIDAY 08 JULY 2011

BEFORE:

Hon. Justice Hansine N. Donli-----Presiding

Hon. Justice Awa Nana Daboya-----Member

Hon. Justice Anthony A. Benin-----Member

Assisted by Tony Anene-Maidoh----- Chief Registrar

JUDGMENT OF THE COURT

Parties and Representation

1. The plaintiff is a corporate entity registered under the laws of the Federal Republic of Nigeria whilst the defendant is a Member State of the Economic Community of West African States (ECOWAS). The plaintiff was represented by C.I. Igbinedion, a Nigerian lawyer, whilst the defendant was represented by Mafall Fall, a State Judicial Agent in Senegal.

Facts of the case

2. By an application filed on the 14th of July, 2008, the plaintiff claimed to have purchased a vessel from the USA. Whilst on the high seas en route to Nigeria, the vessel developed a mechanical fault off the coast of Cape Verde. The crew left the vessel and went ashore to look for parts, leaving nobody on board. It was in that state that a Spanish registered vessel M/V Maxti Corta found the plaintiff's vessel and towed it to the port of Dakar, Senegal.

3. The plaintiff negotiated with the Senegalese authorities who agreed to release the vessel upon their payment of port storage charges. However, after paying the charges, the defendant did not release the vessel to the plaintiff, claiming that Euskalduna de Pesca, owners of M/V Maxti Corta, were demanding towing fees before the vessel would be released. The plaintiff considered the amount of 40 million CFA being charged as towing fees to be on the high side. On the suggestion of the Dakar Port Commandant, the plaintiff agreed to negotiate a reduction with a representative of Euskalduna de Pesca. Consequently, the plaintiff purchased a ticket for Euskalduna's representative who travelled from Spain to Dakar. However, the ensuing meeting failed to break the deadlock.

4. Subsequently, Euskalduna approached a court in Senegal which awarded the vessel to them in lieu of the towing fees that plaintiff had failed to pay. That decision was vacated upon application by the plaintiff's lawyer. The plaintiff explored all possible avenues to secure the release of the vessel but to no avail, including a case they made to the tribunal of the Marine Merchant and diplomatic pressures. The plaintiff stated they found the defendant was determined to award the vessel to Euskalduna illegally and this has cost them a lot of loss.

5. The plaintiff accordingly sought the following reliefs against the defendant:

(i) A declaration that the seizure on the high seas by the owners of the *Mixti Corta*, detention at Dakar Port and subsequent sale of the plaintiff's vessel, *Ocean King 1* by the defendant is illegal and in contravention of internationally accepted standard of maritime intercourse, particularly the provisions of the Revised Treaty of the Economic Community of West African States (ECOWAS) and the African Charter on Human and Peoples' Rights.

(ii) A declaration that the activities of the defendant as they relate to the *Ocean King 1* amount to piracy and acts of brigandage on the high seas and acts of hostility against a Community citizen.

(iii) An order of mandatory injunction compelling the defendant to forthwith pay the plaintiff the sum of US \$ 5,804,000.00 representing the cost of the vessel and the loss suffered by the plaintiff as a result of the illegal seizure aforesaid and the interest at the rate of 21% per annum starting from 1993 until the entire sum is liquidated.

(iv) The sum of US \$ 30,000,000.00 in general and punitive damages against the defendant.

6. In their statement of defence, the defendant denied selling the vessel and yje referred to the various judicial proceedings that took place in her territory between the plaintiff and Euskalduna over the plaintiff's refusal to pay the towing charges. They stated the fact that eventually the court awarded the vessel to Euskalduna and that the defendant was never a party to those proceedings. The only role they played was to protect the vessel whilst the parties battled it out in the courts. The courts were accessible to the parties and they were given a fair hearing in accordance with the law. The defendant's officials did not take part in any of those proceedings.

Preliminary Procedure

7. After filing the defence, the defendant raised a preliminary objection to the suit on a number of grounds which were argued before the court. The plaintiff opposed

the application and set down their grounds which their counsel argued. Arguing the grounds for the preliminary objection, the defence counsel stated that the plaintiff had failed to exhaust local remedies and as such this Court should not entertain this suit. Defendant contended that plaintiff has counsel who litigated this matter on its behalf in the Senegalese Court but did not exhaust all the avenues open to it before bringing the same matter to this Court. Defendant concluded this leg of her arguments by positing that in international courts like this one, local remedies, judicial or not, ought to be exhausted before the court could assume jurisdiction and cited the European Court of Human Rights as an example.

8. The defendant also argued that the plaintiff was incompetent to come under the provisions of Article 4 of the Supplementary Protocol (A/SP.1/01/05) amending the provisions of Article 10 of the Protocol on the Court of Justice (A/P.1/7/91). The contention of the defendant here is that the plaintiff relied on Article 10 (d) of the Protocol as amended whereas that provision is available for the benefit of individuals in actions for the enforcement of their human rights, and not corporate bodies like plaintiff herein. Defendant stated that Article 10 (c) of the Protocol as amended avails itself to both individuals and corporate bodies wherein it is stated thus "Individuals and Corporate bodies in proceedings..." whilst Article 10 (d) limited itself to only Individuals.

9. Finally, defendant argued that it did not know how a corporate body like the plaintiff herein could be a victim of human rights violation. In any case, the issue at hand is not one of a violation of human rights but a pure civil matter.

10. In reply, learned counsel to the plaintiff stated that the exhaustion of local remedies is not a prerequisite for the institution of an action before this Honourable Court and that the plaintiff was properly before the Court and ought to be heard.

11. In respect of the allegation that the plaintiff has no locus standi before this Court in human rights violations, counsel to the plaintiff argued that under Article 9 of the 1991 Protocol as amended by Article 3 of the 2005 Supplementary Protocol, this Court has jurisdiction over any matter relating to the interpretation of the ECOWAS Revised Treaty, Protocols, Conventions and subsidiary legislation of ECOWAS. Further, counsel contended that Article 10(c) of the 1991 Protocol as amended provided right of access to individuals and corporate bodies to approach

this Court in proceedings for the determination of an act or inaction of a Community Official which violates the rights of the individual or corporate bodies. The Court also has jurisdiction over human rights violations that occur in Member States.

12. Learned counsel to the plaintiff also stated that contrary to defendant's allegations, the matter in issue is clearly one of a violation of the human and property rights of a Community Citizen and therefore one that squarely falls within the ambit of human rights. Counsel posited further that plaintiff's fundamental rights to fair hearing, right to own property and its freedom of movement and right of passage at sea, all guaranteed under the African Charter on Human and Peoples' Rights have been infringed by the defendant.

13. After careful consideration of the arguments of the parties, this Court in a Ruling dated the 27th of April, 2010 concluded that the issues in the preliminary objection are interwoven with the substantive issues and therefore made it inappropriate to resolve them without determining the substantive case. Thus, in line with Article 87(5) of its Rules of Procedure, the Court reserved its decision in the preliminary procedure until the final determination of the merits of the substantive application.

Oral phase

14. The Chief Executive Officer of the plaintiff, Mr. Olakunle Kuteyi, the sole witness in the case gave evidence in support of their case. He stated that he is the legal representative of the plaintiff by virtue of a power of attorney deposed to and executed by the Directors of the plaintiff. He testified to the facts pleaded and was extensively cross-examined. The court will refer to the relevant parts of his testimony and cross-examination in the course of this decision.

Plaintiff's address

15. Learned counsel to the plaintiff started his final address with a recount of the legal basis of the application and the reliefs sought therein.

He went on to state that the plaintiff is seeking over US\$ 5.8 Million for the loss it has suffered, being the value of its vessel, lost earnings, travelling expenses etc and

categorised the expenses thereof. Plaintiff also stated that it seeks the sum of US\$ 30 Million as general and punitive damages against the defendant.

16. Learned counsel continued by stating that whilst the plaintiff called Mr. Olakunle Kuteyi as its sole witness and led evidence to prove the averments contained in its pleadings, the defendant did not and thus effectively abandoned all the averments contained in its statement of defence. Counsel argued that it is trite law that a Court of law can only act on evidence placed before it and that averments in pleadings are no evidence. Counsel further submitted that the defence consists of mere technical objections, which objections this Honourable Court decided in its Ruling of 27th April 2010 that it would be considered together with the substantive case.

17. Learned counsel went on to recount extensively the evidence of plaintiff's witness and concluded that upon the consideration of the entire evidence before the Court, the plaintiff is entitled to the reliefs sought. Counsel to the plaintiff went on to state that the decision of the Tribunal Hors Classe which allegedly divested the plaintiff of the ownership of its vessel without the plaintiff's knowledge was a flagrant violation of the plaintiff's right to fair hearing and the right to own moveable property as guaranteed under the African Charter of Human and Peoples' Rights. Learned counsel drew this conclusion by arguing that in line with the cardinal principle of law "audi alteram partem" rule, which literally means "hear both sides" the Tribunal erred by not giving the plaintiff the opportunity to be heard before arriving at its decision.

18. Counsel stated that it is the uncontroverted evidence of the plaintiff that it was not informed of the proceedings leading up to the decision that divested it of the ownership of the vessel. According to counsel, plaintiff was not served with any court processes with respect to that trial. Counsel concluded that any legal proceedings conducted in breach of the "audi alteram partem" rule are a nullity and the aggrieved party is entitled "ex debito justitiae" to have that judgment or decision set aside.

19. Finally, learned counsel submitted that the deprivation of the plaintiff of its vessel in the way and manner disclosed by the evidence before the Court is a violation of its right to own property and to traverse freely within the ECOWAS

sub-region as enshrined in the ECOWAS Treaty and the African Charter on Human and Peoples' Rights.

Defendant's address

20. Learned counsel to the defendant divided his written address into two parts, arguments intended to disprove plaintiff's arguments and those to buttress its own in these proceedings.

21. With respect to arguments seeking to disprove plaintiff's allegations, learned counsel started by saying that plaintiff's pleadings and conclusions are not based on case law or on Community legislation. He continued that even the principles of law articulated by plaintiff are without reference to specific articles of the legislations it sought to rely on.

22. Learned counsel argued that in plaintiff's introduction, it relied on everything except on human rights violation, the foundation of this suit. Further, learned counsel stated that from the plaintiff's own case, the dispute is exclusively one between three private companies, Ocean King, Sogemar and Euskalduna de Pesca and had nothing to do with the defendant.

23. Further, learned counsel disputed plaintiff's assertion that it was not informed of the proceedings which eventually led to the award of its vessel to some other entity and therefore amounted to a flagrant violation of its right to property as guaranteed under the African Charter on Human and Peoples' Right.

24. Learned counsel contends that the order made by Tribunal Regional Hors Classe de Dakar which divested plaintiff of the ownership of its vessel contained the expression "in the presence of parties involved" and therefore indicates that the plaintiff and its lawyer Mr. Sall participated in the hearing which they are now challenging. Further, learned counsel contends that if the order was made in default, plaintiff had the option of approaching the court in order to present its case.

25. Again, learned counsel argued that plaintiff's ownership of the vessel, the subject matter of this suit is in dispute. He posited that plaintiff failed to explain to

the Court how the name of the vessel was changed from “Elizabeth Rose” to “Ocean King”. Further, counsel noted that plaintiff failed to satisfactorily explain the discrepancy between the date of purchase and that on which the name was changed, alleging that Nigerian Law allows it without pinpointing any specific legislation within Nigeria that permits that.

26. Again, the deed of sale presented by the plaintiff is made in the name of one Mohammed Jibril but this person was not invited by plaintiff to testify on its behalf. The deed of sale also lacked important characteristics such as name and home port, major dimension, place and date of construction, numbers of crew and passenger capacity, nature, type and brand of propulsive devices among others.

27. Counsel also submitted that after evaluating all the evidence before the Court, the plaintiff’s application ought to fail as it has not established the violation of any human right which is based on any specific human rights text. He continued that plaintiff vaguely made reference to the African Charter, Revised Treaty of ECOWAS and the Protocols relating thereto without stating the relevant provisions that are breached in these legislations. Also, the Tribunal Regional Hors Classe de Dakar that made the decision divesting plaintiff of the ownership of the vessel in dispute was properly seised of the case and made its decision after hearing the parties involved. The Certificate on Non Appeal (Annexure A) attached to defendant’s defence and issued by the Tribunal Regional Hors Classe clearly indicated that the plaintiff was a party to the proceedings. The decision is therefore valid.

28. With respect to the arguments in support of the defendant’s case, learned counsel stated that the plaintiff’s application ought to fail on technical grounds based on this Court’s own jurisprudence. Learned counsel to the defendant stated that it is only individuals who can directly come to the Court on matters of human rights. Counsel continued that this Court, after making reference to Articles 9 (4) and 10 (d) of the Protocol as amended, affirmed in the cases of *Chief Ebrimah Manneh v. Republic of The Gambia* (Suit No. ECW/CCJ/APP/04/07, judgment delivered on 5th June 2008) and *Hadijatou Mani Koraou v. Republic of Niger* (Suit No. ECW/APP/08/07, judgment delivered on 27th October 2008) that it is only individuals who can approach this Court in matters of human rights.

Corporate entities like the plaintiff herein are therefore excluded. Learned Counsel stated that in the *Hadijatou Mani Koraou Case* (supra), this Court stated thus “*it should be pointed out that human rights are inherent rights of the human person*”.

29. Learned counsel continued that the position of this Court on the subject of human rights is supported by the doctrine of human rights in international law. Counsel quoted extensively from various international legal instruments which has defined human rights as rights belonging to individual human beings. For example, the “*Dictionnaire de droit international public*”, published in 2001 (under the direction of Professor Jean Salmon), Brussels, Bruyant stated that “*human rights*” are “*all rights and fundamental freedoms of the human person and concern all human beings*”. Similarly, the “*Dictionnaire des Communautés européennes*”, published in 1993, Paris noted that “*fundamental rights*” are “*a core of essential and inalienable rights of the human person, valid in all circumstances, no possibility of derogation...*”

30. Further, counsel contends that the African Charter on Human and Peoples’ Rights on which plaintiff’s claim is based, is available for the benefit of only individuals. Counsel noted that even by definition, the Charter provisions inure to the benefit of only individuals. Again, the preamble speaks of the “attributes of the human person” whilst various articles including Articles 2, 4, 6, 7 and 13 all make reference to words and phrases such as “the inviolability of the human person, any individual, citizens, right to dignity, freedom of assembly and movement etc” which all denote that the provisions thereof are exercisable by human beings and not artificial persons including corporate bodies. Counsel concludes that the plaintiff, not being a human being, cannot benefit from the human right provisions enshrined in the African Charter on Human and Peoples’ Rights.

31. Moreover, counsel contends that the plaintiff has failed to establish the violation of any fundamental right and therefore its application ought to be dismissed. In *Moussa Leo Keita v. Republic of Mali* (Suit No. ECW/CCJ/APP/05/06, judgment delivered on 22nd March 2007), this Court rejected the application and stated thus “the Applicant’s counsel has not indicated any proof of a characteristic violation of a fundamental Human Right; and in the absence of any such violation, the Application must be declared inadmissible”.

Counsel contends that plaintiff alleges the violation of the “spirit and principle” of the African Charter as well as the Revised Treaty and the Protocols of ECOWAS without citing a single text which has been violated. Based on the decision in the *Moussa Leo Keita Case* (supra), the Court ought to dismiss this application.

32. Counsel also argued that this Court cannot operate as an appellate court to the courts of Member States or rule on their decisions. Counsel argued that in the *Moussa Leo Keita Case* (supra), this Court stated inter alia that “*in this context, the Court of Justice of the Community is incompetent, “it cannot rule on the decisions of national courts”*”. Further, counsel stated that in the case of *Alhaji Hammani Tidjani v. Federal Republic of Nigeria and Ors* (Suit No. ECW/CCJ/APP/01/06, judgment delivered on 28th June, 2007) this Court stressed that the plaintiff “*had the opportunity to defend himself in accordance with Nigerian Laws. Admitting this application will mean interfering with the jurisdiction of Nigerian courts in criminal matters without justification*”. According to counsel, plaintiff had every opportunity to defend the action instituted against it by Euskalduna de Pesca in accordance with Senegalese laws and was ably represented by Malick Sall, a lawyer of plaintiff’s own choice. Counsel therefore urged the Court to refrain from admitting this application as it may lead to reviewing the decisions of the Senegalese courts.

33. Moreover, counsel urged the Court to dismiss plaintiff’s application because it is full of inconsistencies and fraught with the production of false documents. First, counsel stated that in Annexure A15, the plaintiff claimed that it addressed a letter to Ambassador Saliou Cisse in Lagos in 2007. However, the Ambassador was not at that post in 2007. Besides, the Embassy of Senegal had already moved from Lagos to Abuja in 2007. Again, Annexure 17 contradicts Annexure 15 in the sense that it was addressed to the defendant’s Embassy in Abuja in 2005 whilst Annexure 15 was addressed to defendant’s Embassy in Lagos in 2007. Interestingly, the Embassy of Senegal in 2005 was still at Lagos.

34. Finally, counsel urged the Court to declare the application filed by plaintiff inadmissible or hold that it lacks the jurisdiction to entertain same pursuant to Article 87 of the Court’s Rules and its own jurisprudence. Further, counsel urged the Court to also hold that plaintiff’s application fails on the merits. Counsel also

urged the Court to order plaintiff to bear the costs incurred in these proceedings, including travel expenses of defendant's delegation since 2008 and asked for One Hundred Million CFA Francs (100,000,000 FCFA) pursuant to Article 66 of the Court's Rules.

Issues

35. Relying on Article 87(5) of its Rules, the court reserved its decision in the preliminary application for the final judgment. The court will accordingly decide the preliminary issues first and then decide on the merits of the only issues raised by the application, those of denial of a right to fair hearing before the courts of Senegal and defendant's alleged sale or role in the sale of the vessel.

Analysis by the court

36. The defendant argued that the Court should not entertain the plaintiff's application because it had not exhausted the local remedies available to it before approaching it. Plaintiff responded by saying that under the laws setting up this Court and its Rules, the exhaustion of local remedies is not a condition precedent for initiating actions before it and therefore the application was properly filed.

37. The court thinks a brief historical perspective into the issue of the exhaustion of local remedies will help in setting the record straight once and for all. The original Protocol on the Court of Justice (A/P1/7/91) did not grant individuals direct access to this Court. However, the Protocol on Democracy and Good Governance (A/SP1/12/01) by its Article 39 indicated that the Protocol on the Court of Justice (A/P1/7/91) would be amended to give the Court jurisdiction over human rights violations claims after exhaustion of local remedies. Article 39 of the Protocol on Democracy and Good Governance states thus:

Protocol A/P1/7/91 adopted in Abuja on 6 July, 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter alia, cases relating to violations of human rights, after all attempts to settle the matter at the national level have failed.

38. The Protocol on the Court was amended by the Supplementary Protocol (A/SP.1/01/05) whereby the Court was granted human rights jurisdiction by Article

9(4). And Article 10(d) of the 1991 Protocol as amended by the Supplementary Protocol of 2005, granted access to individuals, subject to certain conditions. Another provision in the 1991 Protocol, as amended, which grants access to the court to individuals is Article 10(c). It granted direct access to the court to individuals and corporate bodies against the Community in certain specific matters. All these provisions do not require, directly or even indirectly, the exhaustion of local remedies before an action could be brought before this court. So what is the basis of this submission that a plaintiff should exhaust local remedies before recourse to this court?

39. The rule on exhaustion of local remedies is derived from customary international law which requires the exhaustion of local remedies before a claim may be brought before an international tribunal. However, it is not an inflexible rule. For instance, the International Court of Justice held in the case titled *Electronica Sicula Sp.4, (ELSI Case), (Second Phase)*, ICJ Rep. 1989, that exhaustion of local remedies may be waived by express provision in a treaty. Thus by Article XI(1) of the Convention on International Liability for Damage caused by Space Objects, 1972, the requirement of the exhaustion of local remedies was dispensed with.

40. Under Article 10 of the Supplementary Protocol of 2005, any provision of a prior Protocol which is inconsistent with the provisions of the 2005 Supplementary Protocol is to the extent of the inconsistency null and void. Thus, Article 39 of the Protocol on Democracy and Good Governance, which is clearly in conflict with the provisions of Article 4 (d) of the Supplementary Protocol of 2005 with respect to the exhaustion of local remedies as a condition precedent to the institution of an action in human rights is null and void to that extent. The 1991 Protocol, as amended by the Supplementary Protocol, forms an integral part of the Treaty and thus the exclusion of exhaustion of local remedies under the Protocol is perfectly valid in international law.

41. That being the position of the law, this Court has decided in a plethora of cases including *Prof. Etim Moses Essien v. Republic of The Gambia & Anor* (Suit No. ECW/CCJ/APP/05/05, judgment delivered on 29th October, 2007), *Musa Saidykhan v. Republic of The Gambia* (Suit No. ECW/CCJ/APP/11/07, judgment

delivered on 16th December, 2010) and *Hadijatou Mani Koraou v. Republic of Niger* (supra) that the exhaustion of local remedies is not a condition precedent for the institution of an action for the relief of violation of human rights before it. Therefore, a plaintiff is not obliged to exhaust local remedies in order to have access to this Court.

42. Finally, defendant argued that plaintiff cannot come to this Court for the relief of human rights violations under Article 10 (d) of the 1991 Protocol as amended by the 2005 Supplementary Protocol since the provisions thereof inure to the benefit of individuals only, to the exclusion of corporate bodies like the plaintiff. Defendant continued that it is Article 10 (c) which avails itself to both individuals and corporate bodies but that is only in proceedings against Community Officials for the determination of an act or inaction which violates the rights of the individuals or corporate bodies concerned.

43. In response, the plaintiff argued that under Article 9 of the 1991 Protocol as amended, this Court has jurisdiction over any matter relating to the interpretation of the ECOWAS Revised Treaty, Protocols, Conventions and subsidiary legislation of ECOWAS. Further, counsel contended that Article 10(c) of the 1991 Protocol as amended provided right of access to individuals and corporate bodies to approach this Court in proceedings for the determination of an act or inaction of a Community Official which violates the rights of the individual or corporate bodies. The Court also has jurisdiction over human rights violations that occur in Member States.-

44. It is trite learning that jurisdiction is conferred by statute. This Court was created by the Revised Treaty of ECOWAS. The jurisdiction of this Court and its competence in various spheres are clearly spelt out in the Protocols on this Court. Article 9 deals with the jurisdiction of the Court. Under Article 9(4) the Court has jurisdiction to determine cases of human rights abuse that occur in any Member State. Article 10 governs the right of access to the Court. It prescribes clearly who can access the Court and the relevant causes that they can prosecute before it. A careful reading of Article 10 reveals that access to the Court is open to the following:

1. Member States

2. The Executive Secretary (now President of the ECOWAS Commission)
3. The Council of Ministers
4. Community Institutions
5. Individuals
6. Corporate Bodies
7. Staff of any Community Institution
8. National Courts of ECOWAS Member States

45. Though these distinct legal personalities have access to the Court, the issues that they can present to the Court for adjudication are laid down by Article 10 of the Protocol, as amended. Thus, an applicant will lack the requisite standing to bring a claim to the Court for determination if the issue raised does not fall within those over which they have been granted the right of access.

46. The plaintiff herein is a corporate body. It is only under Articles 9 (6) and 10 (c) of the Protocol as amended by the Supplementary Protocol that corporate bodies have direct access to the Court.

Article 9 (6) provides that

The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement.

Article 10 reads in part that

Access to the Court is open to the following:

(c) individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;

47. From the above provisions, corporate bodies such as the plaintiff herein can access the Court only where there is a prior agreement between the parties to a

particular transaction that disputes arising out of that transaction shall be settled by the Court, or alternatively, in proceedings for the determination of an act or omission of a Community official which violates their rights and no more. In the instant case, plaintiff is trying to access the Court for the determination of an alleged breach of fundamental human rights. This is not an action against any Community official. The defendant is a member state, and officials and agents working for her are not Community officials within the meaning of Article 10(c) of the amended Protocol. For the same reason, the defendant could not be brought under Article 10(c) in respect of the allegation that the actions of the defendant's agents, including the Port Commandant, led to the loss of the vessel.

48. Article 10 (d) of the Protocol on the Court specifically governs the right of access to the Court in human right violation applications. Article 10 (d) reads in part thus:

Access to the Court is open to the following:

(d) individuals on application for relief for violation of their human rights;

It is noteworthy that whilst Article 10 (c) gave a right of access to individuals and corporate bodies, Article 10 (d) gave the right of access in human rights violation causes to only individuals.

49. That leads the Court to find out the meaning of individuals within the context of Article 10 of the Protocol. The court thinks 'individuals' within the context of Article 10 of the Protocol refers to only human beings and no more. This is so because Article 10 (c) mentioned individuals and corporate bodies. What that means is that the legislation sought to distinguish between human beings and other legal entities.

50. Thus, by expressly giving access to only individuals, the Supplementary Protocol sought to give that right exclusively to individual human beings who are victims of human rights abuse to the exclusion of all others. The fact that human rights, by its very nomenclature, is human centred, finds expression from the Preamble to the 1948 Universal Declaration of Human Rights as well as Black's Law Dictionary, 9th Edition at page 809. The defence counsel's submissions on this point set out in paragraphs 28, 29 and 30 above, are apt and germane and are

accordingly upheld by the court. The plaintiff is a body corporate and cannot therefore rely on the provisions of Article 10(d).

51. The Court must place it on record that even a cursory reading of the application would indicate that the plaintiff was complaining, *inter alia*, of a denial of the right to fair hearing which is a fundamental right, open to any party who is affected by a tribunal's decision. That right is not dependent on human rights, and for that reason a party who has such a complaint of denial of fair hearing should not be thrown out of a court without first being heard. That was sufficient justification for this Court to embark upon hearing this application in the first place. Being a Member State of the Community, the defendant owes an obligation to every ECOWAS citizen or entity to ensure fair hearing within its territory, failing which this Court will have the right to entertain an application by an aggrieved party, even if it is based on the Court's inherent jurisdiction.

52. The court, having determined that the plaintiff has no locus in human rights and, having decided that the defendant could not be brought before this court for acts of her officials under Article 10(c) of the amended Protocol, the only issues remaining to be determined on merit are whether the plaintiff was denied the right to hearing or fair hearing in the defendant's territory; and whether the defendant sold the vessel or played any role in its sale.

53. The court considers it expedient to rule on the issue of ownership of the vessel in dispute before moving on to the analysis of the merits of the application before us. Learned counsel to the defendant in his cross-examination of the plaintiff's witness as well as in his final address to the Court sought to dispute plaintiff's ownership of the vessel, the subject matter of the present proceedings. However, plaintiff's ownership of the vessel has never been in dispute right from the outset of the events leading up to this suit. Defendant's agents admitted that plaintiff is the legitimate owner of the vessel and dealt with plaintiff as such in all proceedings that took place in defendant's territory. Indeed, the record of proceedings clearly shows that defendant's agent, the Port Commandant asked plaintiff to pay the Port charges and then its vessel would be released to it. There has been no adverse claim to this vessel. The Court therefore finds as a fact that the plaintiff was the true owner of the vessel MV Ocean King.

54. The court considers a brief recount of the facts leading to this action as necessary. It is not in dispute that plaintiff's vessel was towed to defendant's port by a vessel named M/V Maxti Corta belonging to Euskalduna de Pesca of Spain. After plaintiff had concluded negotiations with the defendant for the release of the vessel, Euskalduna de Pesca asked the plaintiff to pay it for the costs it incurred in bringing plaintiff's vessel to defendant's port. Plaintiff agreed in principle to pay Euskalduna de Pesca for the rescue service but the parties were unable to settle on the quantum of money to be paid, ensuing in a legal battle between them. Finally, plaintiff's vessel was awarded to Euskalduna de Pesca upon the orders of a court of Senegal, defendant herein.

55. A critical appraisal of the pleadings and evidence before this Court reveals that the main issue in this matter is whether defendant is liable for the sale or award of plaintiff's vessel to some entity other than the plaintiff. The answer to this issue could be ascertained by carefully assessing the various judicial processes that took place and eventually led to a decision which divested plaintiff of the ownership of the vessel, and the role played by the defendant in determining whether defendant is culpable or not.

56. The evidence before the Court indicates that there have been three judicial proceedings in the defendant's country in respect of the subject matter of the present case. The first judicial proceedings arose when Euskalduna de Pesca commenced an action before a Senegalese court asking for plaintiff's vessel to be awarded to it as compensation for the amount it spent on towing the vessel to defendant's port. The court obliged and awarded plaintiff's vessel to Euskalduna de Pesca.

57. However, upon an application by the plaintiff, that decision was reversed. Upon the advice of the Nigerian Ambassador to Senegal, plaintiff approached the Tribunal of the Marine Merchant, culminating in the second judicial proceedings. This Tribunal decided that the plaintiff should deposit CFA 30.5 Million to secure the release of its vessel. Plaintiff refused to pay the CFA 30.5 million unless given an undertaking by the Director of Marine Merchant that the vessel would be released to it after the payment. The Director of the Marine Merchant refused to give any such undertaking and referred the plaintiff to the Port Commandant, who

also refused to give the undertaking plaintiff was requesting for. Plaintiff refused to pay the amount and decided to explore diplomatic channels in resolving the dispute.

58. The third and final judicial proceeding is the one that divested plaintiff of its ownership of the vessel. Plaintiff says it was not approached by the court to enable it defend its interest before judgment was given divesting it of its ownership of the vessel and did not know anything about the proceedings until the defence filed by defendant herein in this action revealed that a court revisited the earlier decision of the Marine Merchant and awarded same to some other entity.

59. It is important to carefully appraise the role of the defendant in the judicial proceedings that took place in order to determine whether she is liable to the plaintiff for its vessel or not. It is not in dispute that defendant assured plaintiff that she would release its vessel to it after paying the CFA 2.5 Million port charges that had accrued from plaintiff's vessel docking at her port. When plaintiff made the said payment, defendant informed it of the fact that Euskalduna de Pesca that towed the vessel to her port had requested to be paid for the costs it incurred in towing plaintiff's vessel. It is noteworthy that plaintiff agreed to pay Euskalduna de Pesca for its services and paid the airfare of its representative, Mr. Moriyo to travel to Dakar from Spain for negotiation after plaintiff had been billed CFA 40 Million by Euskalduna de Pesca. Thus, plaintiff acknowledged in principle that it owed Euskalduna de Pesca, the only issue was the quantum.

60. The parties, Euskalduna de Pesca and the plaintiff, could not agree on the amount of money to be paid to the former. Plaintiff's sole witness in the proceedings admitted in cross examination that the defendant was not responsible for the parties' inability to arrive at a compromise on the quantum. Plaintiff therefore did not make the payment and subsequently left Dakar. Euskalduna then approached a Senegalese court and asked that the vessel be awarded to it in order to enable it defray the costs it incurred in towing the vessel to defendant's port. The court obliged and awarded the vessel to Euskalduna. However, upon an appeal by the plaintiff that decision was reversed. Plaintiff invoked the jurisdiction of the Tribunal of the Marine Merchant, wherein plaintiff was asked to pay CFA 30.5 Million in order to secure the release of its vessel.

61. Had defendant committed or omitted to do anything in order to make it liable to the plaintiff at this stage? Our answer to this question is no. Plaintiff had successfully procured counsel of its own choice and had been given every opportunity to prosecute its case. It had been offered the legal right to appeal and had successfully appealed against the earlier decision given against it. For all intents and purposes, plaintiff had been offered a fair trial by defendant's domestic courts. It is significant to note that plaintiff had no complaints against the defendant at this stage.

62. The plaintiff, however, refused to respect the judgment that had been delivered by the court that he had voluntarily approached by asking for an undertaking before paying the sum of money that it had been directed to pay. Plaintiff by so doing was seeking a modification to the judgment that had been rendered by the court before it would comply with it. A judgment delivered by a court of competent jurisdiction ought to be fully respected and implemented without any conditions. Thus when the Tribunal refused to modify its decision, the plaintiff was bound in law to comply with it. Therefore, the rejection of plaintiff's demand for an undertaking by the defendant's authorities did not make defendant liable in any way to the plaintiff.

63. The court will now consider the third judicial process that took place within defendant's jurisdiction and assess if that makes defendant liable to the plaintiff for the loss of its vessel. Whilst plaintiff contends that it was not informed of this proceeding, defendant avers that plaintiff was a party to it. Whilst plaintiff offered no evidence in support of its position, the defendant provided "the Certificate of Non Appeal" issued by the Tribunal Regional Hors Classe which explicitly stated that the plaintiff was the defendant in that proceeding. The Chief Registrar of the Tribunal stated thus in the Certificate of Non Appeal

"Aware of the Ruling No. 735/96 of 5 August 1996 given by The Regional Tribunal "Hors Class" of Dakar given in public and after hearing both parties, Considering the Application filed by Messrs Doudou & Yerim THIAM (Esq.), Counsels to Euskalduna De Pesca in the "Euskalduna De Pesca v. Ocean King"

Considering the verification done on the Judgement Register, according to Article 107 and following ... of Code of Civil Procedure:

Certify and attest that no mention was made in the said Register, of any Appeal against the aforementioned Ruling No. 735 / 96. ”

64. This document was attached to defendant's statement of defence and duly served on the plaintiff. During the cross-examination of plaintiff's witness, this document issue came up and the witness said it was in this court he became aware of it for the first time. He did not challenge its authenticity. It is an official record and is thus presumed to be regular and authentic until the contrary is established. It thus behoved on the plaintiff to adduce evidence in order to contest the authenticity of this document. The document speaks for itself. Thus in the absence of contrary evidence, the Court accepts that plaintiff was indeed heard in those proceeding which divested it of its ownership of the vessel.

65. On this same issue, the plaintiff stated they did not know that the vessel had been divested until the defendant herein filed their defence. This again was false. The very first relief sought by the plaintiff accused the defendant of having sold their vessel. Indeed the plaintiff pleaded that they got the information the defendant had sold the vessel on 23rd July, 2007. The reliefs and pleadings were formulated and filed before the defence was filed, so it is plainly false for the plaintiff's witness to say on oath that the first time they became aware of the sale of the vessel was when the defence was filed. The plaintiff was aware they had been divested of the ownership of the vessel on the order of a Senegalese court in civil proceedings yet they chose not to contest it. The issue of the ownership of the vessel was conclusively determined by the Senegalese courts as far back as 1996, in an action between the appropriate parties and this court must respect it. The defendant was not a party to that action and was not a beneficiary of the award made by the court.

66. Be that as it may, granted that the plaintiff was not notified of the process that led to its vessel being awarded to some other entity, the courts in Senegal were available for plaintiff to seek redress. Learned counsel to the plaintiff rightly stated in his final address that plaintiff is entitled to have the judgment set aside "ex debito justitiae". However, it is trite learning that when a court of competent

jurisdiction makes a decision or an order, it is that court or an appellate court that can be approached to set it aside. This Court, not being an appellate court to the Senegalese court that made the order cannot be approached to set it aside.

67. This court, in appropriate cases, may reach a different conclusion from that arrived at by a domestic court, but it must be over a subject-matter where it has cognate jurisdiction with the domestic court. However, the subject-matter before the Senegalese courts was purely civil between two private companies, one of whom is not before this court. It is thus not an appropriate case where this court can give a decision that has the effect of vacating the order made by the Senegalese court.

68. Further, the judicial processes that took place in defendant's territory were between two private parties as admitted by plaintiff's witness in cross examination who added that the defendant was never a party to the dispute. Plaintiff's sole witness stated under cross examination that the defendant became a party to the dispute because plaintiff had never had the opportunity of dealing directly with Euskalduna de Pesca right from the outset and was only dealing with agents of the defendant such as the Port Authority, the Marine Merchant and the Judiciary.

69. However, plaintiff witness admitted that he paid the air ticket of Mr. Moriyo, an agent of Euskalduna to travel to Dakar from Spain and also held a meeting with him upon the advice of the Port Commandant. This evidence provided by plaintiff witness is contradictory in terms. On the one hand he stated that he had not had any opportunity to deal directly with Euskalduna but on the other hand he admitted paying the airfare of Euskalduna's agent as well as having a meeting with him in order to negotiate the bill sent to plaintiff by Euskalduna. If plaintiff claims that the defendant became a party because it had no opportunity to deal directly with Euskalduna but with defendant's agents, that assertion is unsupported by the evidence before this Court and therefore unacceptable. Be that as it may, defendant could not become a party to a private litigation between two private companies only because the subject matter of the dispute was situated within its territory and had to facilitate the resolution of the conflict through its agents.

70. Plaintiff also sought to establish that defendant's refusal to heed to various diplomatic overtures made defendant liable as it exhibited the intention of the

defendant to collaborate with Euskalduna and award the vessel to same. With respect, that position is untenable at law. The defendant was not under any legal obligation to try and resolve a matter that had been decided by a court of competent jurisdiction, through diplomatic channels. In any case, the dispute at hand was one between plaintiff and Euskalduna and not between plaintiff and the defendant.

71. The plaintiff pleaded that it was the defendant who sold their vessel, but defendant denied it. Thus the plaintiff assumed the burden of producing evidence since they asserted the affirmative of the issue. However, there was no evidence adduced at the hearing that the defendant sold the vessel. The fact that a court in defendant's territory awarded the vessel to Euskalduna did not per se make the defendant culpable. It was an order made in proceedings regularly conducted between two private companies to which the defendant was not a party before a court of competent jurisdiction.

DECISION

72. On the preliminary procedure, the Court concludes that it is not a requirement of its texts to exhaust local remedies before an application could be filed before it in human rights cases. The court also decides that the acts of officials of the defendant are not subject to Article 10(c) of the amended Protocol. The court further decides that Article 10(d) of the 1991 Protocol, as amended, is not open to corporate bodies as victims of human rights abuse; that is open to only human beings.

73. In respect of the substantive issues,

Whereas the Court has found that the plaintiff and Euskalduna de Pesca were the parties that contested all the proceedings before the Senegalese courts;

Whereas the vessel was not awarded to the defendant herein;

Whereas it was the plaintiff's failure to respect the decision of the Marine Merchant that eventually led to the final decision depriving them of the ownership of the vessel;

Whereas the plaintiff was heard in the last proceedings;

Whereas the plaintiff, even if they were not heard in the last proceedings, upon becoming aware of this final decision could have taken steps to set it aside;

And whereas the plaintiff failed to do so;

And whereas there is no evidence to decide that the defendant sold the vessel;

And whereas there is no evidence of any adverse role played by the defendant's agents in the loss of the vessel to the plaintiff;

the Court decides that the defendant bears no liability for the loss of the vessel.

CONCLUSION

74. In view of foregoing reasons, the plaintiff's action has not been sustained and it is accordingly dismissed.

COSTS

75. The parties are to bear their own costs.

This decision has been rendered in public sitting of the Community Court of Justice, ECOWAS, before

Hon. Justice Hansine Donli-----Presiding

Hon. Justice Awa Nana Daboya-----Member

Hon. Justice Anthony A. Benin-----Member

Assisted by Tony Anene-Maidoh-----Chief Registrar