

21 May - 4th June 2004
Communication No. 197/97

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Thirty-Fifth Ordinary Session
21 May - 4th June 2004

BAH OULD RABAH
v.
MAURITANIA

DECISION

BEFORE: CHAIRPERSON: Salimata Sawadogo
VICE CHAIRPERSON: Yassir Sid Ahmed El Hassan
COMMISSIONERS: Mohammed Abdulahi Ould Babana, Andrew R Chigovera, Vera M Chirwa, E.V.O. Dankwa, Angela Melo, Jainaba Johm, Sanji Mmasenono Monageng, Bahame Tom Mukirya Nyanduga, M. Kamel Rezag-Bara

Citation: Bah Ould Rabah v. Mauritania, Comm. 197/97, 17th ACHPR AAR Annex VI (2003-2003)

Publications: Documents of the African Commission on Human and Peoples' Rights, Vol. 2, at 574 (Malcolm D. Evans & Rachel Murray eds., 2009); (2004) AHRLR 78 (ACHPR 2004)

RAPPORTEUR

22nd session: Commissioner Ondziel-Gnelenga

23rd session: Commissioner Ondziel-Gnelenga

24th session: Commissioner Ondziel-Gnelenga

25th session: Commissioner Ondziel-Gnelenga

26th session: Commissioner Rezag-Bara

27th session: Commissioner Rezag-Bara

28th session: Commissioner Rezag-Bara

29th session: Commissioner Rezag-Bara

30th session: Commissioner Rezag-Bara

31st session: Commissioner Rezag-Bara

32nd session: Commissioner Rezag-Bara

33rd session: Commissioner Rezag-Bara

34th session: Commissioner Rezag-Bara

35th session: Commissioner Rezag-Bara

SUMMARY OF FACTS

1. In November 1975, four years after the death of his mother, Mr. Bah Ould Rabah, a Mauritanian national (the plaintiff) and his family were forcefully expelled from their ancestral domicile by the man named Mohamed O. Bah on the grounds that the mother of the plaintiff, the late Aichetou Valle, was his slave and that subsequently, the house bequeathed to her descendants and the whole estate around it became legally the property of Mohamed O. Bah, the alleged "owner" of the deceased.

2. When the plaintiff approached them, the local authorities and the courts decided in favour of his opponent and the Supreme Court upheld this decision. The plaintiff wrote to the highest authorities, including the President of the Republic, to contest this decision which he qualifies as "flagrant support of the Government to the illegal institution of slavery". To date, however, he has received no reply.

COMPLAINT

3. The Communication alleges violation of Articles 2, 3, 4, 5, 6, 7, 9 and 11 of the African Charter.

PROCEDURE

4. Communication 197/97 is dated 11th April 1997.

5. The African Commission assumed jurisdiction in the case during its 21st ordinary session held in Nouakchott, Mauritania, in April 1997.

6. On 7th July 1997, a note verbale of notification was sent to the Government concerned urging it to reply to the allegations contained in the Communication.

7. On 7th July 1997, the plaintiff was informed of the decision of seizure.

8. During the 22nd ordinary session, the Commission deferred any decision on this Communication pending the reception of the comments from the Government of Mauritania on the report of the mission undertaken to that country.

9. The African Commission continued the process of exchanging information between the parties.

10. The African Commission considered this communication at its 35th Ordinary Session held in Banjul, The Gambia and decided to deliver its decision on the merits.

LAW

ADMISSIBILITY

11. Article 56(5) of the African Charter on Human and Peoples' Rights requires that Communications received within the context of the provisions of Article 55 should be submitted "after exhaustion of all local remedies, if they exist, unless it is clear to the Commission that this procedure is being unduly prolonged".

12. In the case under consideration, the plaintiff filed court decisions attesting that he used and exhausted the remedies before the competent national courts with a view to obtaining compensation for the alleged violation of his rights.

13. The Complainant furnished the African Commission with the judgement of the Boutilimitt District Court of 26th December 1998, the decision of the Rosso Regional Court of 11th March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott of 11th November 1990.

14. The African Commission contacted the Respondent State demanding for information with respect to exhaustion of local remedies and the Respondent State responded by stating that local remedies had been exhausted.

15. It is therefore unquestionable that the Complainant had met the provisions of Article 56(5) of the African Charter.

16. On these grounds, the African Commission declares the Communication admissible.

MERITS

17. The Complainant alleges a violation of the following Articles of the African Charter:

a) Article 2: right to enjoyment of the rights and freedoms recognized and guaranteed in the Charter, such as the right to property, without any distinction;

b) Article 3: right to equality and to equal protection of the law;

c) Article 4: inviolability of the human being, the right to physical and moral integrity;

d) Article 5: right to human dignity, recognition of his legal status, prohibition of all forms of exploitation and degradation, particularly slavery;

e) Article 6: right to liberty and security;

f) Article 7: right to have his cause heard (particularly paragraph 1(d), impartiality of the courts);
g) Article 8: freedom of conscience;

h) Article 9: right to information, freedom of opinion;

i) Article 11: right to assemble freely with others.

18. The Complainant states that in particular that his sisters, brothers and himself have been deprived of the inheritance of their parents, 4 years after the death of his mother, by Mr. Bah Ould Mohamed, on the grounds that their late mother was his slave.

19. In order to get round the ban on slavery in force in Mauritania, Mohamed Moustapha made mention of a donation supposedly given to him by the late mother of the plaintiff.

20. In a letter of 7th April 1990 addressed to the Head of State by Bah Ould Rabah (the Complainant) and copied to the case file, it is stated that to support his claims on the property of his late mother, Mohamed Moustapha (his opponent) had produced the certificate of occupancy No. 453 dated 24th November 1972.

21. This permit produced by Mohamed Moustapha had been prepared by the Cadi on the basis of evidence relating to the donation made by the late mother of the plaintiff to Mohamed Moustapha, his opponent.

22. The donation to Mohamed Moustapha was supposedly meant to render freedom to Lady Merien, daughter of the plaintiff's mother, his slave, but Mohamed Moustapha's submissions show no tangible evidence of the reason for his being the beneficiary of this donation.

23. The Complainant alleges that some of the witnesses who supported the argument of donation to his opponent later retracted, and he made mention of names such as Imam Mohamed Hamed and others in the letter addressed to the Head of State.

24. The Complainant further alleges, in the same letter, that in opposition to the certificate of occupancy produced by opponent, he had produced a certificate occupancy No. 66 of 24th April 1971, issued in the name of his mother a few months before her death; that the said document dates before that produced by his opponent.

25. The Complainant also pointed out serious procedural irregularities in the processing of the case in that he had requested the competent legal Authorities in vain, to order an investigation which would have proved Mohamed Moustapha's allegations baseless and proved as a result, the pertinence of the said violations of Article 14 of the African Charter relating to the guarantee of his and his family's right to property.

26. The Government of the Islamic Republic of Mauritania provided an explanation, through the statement made by its delegation at the 29th Ordinary Session of the African Commission; this statement was confirmed and supplemented by a document dated 19th June 2001 filed in court. From these documents it would appear that where the Respondent State is concerned:

j) The Communication 197/97 introduced against the State of Mauritania by Mr. Bah Ould Rabah is based on a dispute relating to the ownership of a real estate which opposes two Mauritania citizens, Mr. Bah Ould Rabah (the Complainant) and Mr. Mohamed Moustapha Ould Bah;

k) This case is simply a classical dispute about real estate property between members of the same family in which the intervention of the Cadi is in keeping with the existing law and practice in Mauritania;

l) It was on the request of Mr. Bah Ould Rabah that the Mauritanian Courts, had, within a reasonable period, passed judgement through the District Court of Boutilimitt on the 26th December 1998, the decision of the Regional Court of Rosso on the 11th March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott on 11th November 1990;

m) It would appear from his own submission that the plaintiff recognized that the Courts seized had arrived at a final decision on the basis of facts derived from the documents presented by himself and his opponent (namely the certificates of occupancy), which is in conformity with the rules within their competence and thereby indicates that the dispute relates to the right to ownership of property and that the conflicting parties have enjoyed the conditions of a fair trial, with the participation of their lawyers in the proceedings and in the hearings;

n) His allegations relative to slavery and the violation of his rights were baseless;

o) The Government of Mauritania admits that undoubtedly the consequences of slavery, against which it continues to fight, still linger on in the country. But this is not sufficient to justify the allegations of Rabah Ould Bah (the Complainant) relative to the issue of slavery raised by Mohamed Bah (his opponent) before the Mauritanian Courts, in violation of the African Charter and its provisions as mentioned above;

p) Accordingly, Bah Ould Rabah (the Complainant) should have all his claims dismissed.

27. The African Commission has noted that no document exists in the case file which clearly delineates the reason for the donation made to Mohamed Moustapha by the late mother of the Complainant and also that there is no opposing statement to the effect that the witnesses named by the plaintiff had retracted their statements after having given evidence before the Cadi in support of Mohamed Moustapha.

28. The African Commission realises that Mr. Bah Ould Rabah had enjoyed all the conditions of a fair trial and had thus exhausted all the local remedies. The fact that he had lost the case after exhausting the procedures he had initiated was due to a weak judicial system and not on the basis of the practice of slavery or slave like practices. In fact, slavery had been abolished (order No. 81.234 of 9th June 1981 and 1991 Constitution).

29. The African Commission further noted that from the information in its possession (report of the mission to Mauritania, statements made by NGOs and the delegates from Mauritania during the various Sessions of the African Commission as well as from diverse documents from the Government of the Republic of Mauritania), that the consequences of slavery still persist in Mauritania and that, for people to act as Mohamed Moustapha Ould Bah has done has become common practice in the country.

30. Furthermore in the African Commission's view, to accept that someone, and a mother for that matter, can deprive her own children of their inheritance for the benefit of a third party, with no specific reason as in this case, is not in conformity with the protection of the right to property (Article 14 of the African Charter).

31. The African Commission thus calls upon all the public institutions in the Islamic Republic of Mauritania to persevere in their efforts so as to control and eliminate all the offshoots of slavery.

FOR THESE REASONS

a) The African Commission considers that the dispossession of the plaintiff of part of his mother's heritage, through a donation without well-substantiated reasons, constitutes a violation of Article 14 of the African Charter on Human and Peoples' Rights.

b) The African Commission recommends to the Government of the Islamic Republic of Mauritania to take the appropriate steps to restore the plaintiff his rights.

DISSENTING OPINION BY COMMISSIONER YASIR SID AHMAD EL HASSAN, VICE-CHAIRPERSON OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

1. This is a dissenting opinion from the one that was adopted by a simple majority [FN1] of the members of the Commission on communication 197/1997 during the 35th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21st May to 4th June 2004. The present dissenting opinion is based on facts and arguments derived from the original documents [FN2] contained in the communication file.

[FN1] The decision on merits of the communication was taken in the absence of two Commissioners including the one who was the second rapporteur on the case. A third Commissioner abstained from the process because he is a national of the respondent state. Two other Commissioners did not take part in the deliberations made in Pretoria, South Africa upon and which the decision in this communication was taken by the Commission.

[FN2] The decision on this communication was taken on the basis of the deliberations that took place during the 31st session of the Commission in Pretoria, South Africa in May 2002. The Secretariat of the Commission was requested to provide the Commissioners with transcripts of the oral statements by Commissioners. However, the Secretariat failed to make available the transcripts of the deliberations made in Arabic because of its inability to address the matter in Arabic due to the fact that no staff of the Secretariat can work in Arabic.

2. Furthermore, most of the documents submitted by the parties to the communication were originally in Arabic and were never translated into English or French, the languages of the Commissioner, who was the first rapporteur or the legal officer working on the file at the Secretariat of the Commission. These documents contained the ruling of different local courts of the respondent state. So the Commissioners made a decision relying only on the short and inaccurate summary of file that was given to them.

3. The essence of facts of this communication as extracted from the file shows that it was a normal civil litigation between two members of the same family over a plot of land. The complainant, a banker born in 1949, filed in 1986, a lawsuit in local courts in which he claimed the full title over this real estate.

4. The complainant originally argued before courts that the disputed land belongs to his father, and that his mother has no separate title to dispose of the land. The respondent [FN3] claimed that the mother of the complainant has a separate property and transferred to himself and his sisters by the way of donation, this plot of land which constitutes part of her property. He further claimed that he was de facto in peaceful, continuous and uninterrupted possession of that land for 27 years consecutive before the claim of the complainant, which was brought before the courts only in 1986.

[FN3] Mohamed bin Mohamed Almustaffa

5. A decision of the District Court of Boutilimitt, the Court of Rosso, dated 26/12/1988, a decision of the Court of Appeal of Nouakchott dated 11/3/1990, and a decision of the Supreme Court dated 5/11/1990, ruled all in favour of the respondent on the grounds that the failure of the complainant to refute the strong evidence composes of antiquity of deeds and testimonies of reliable and credible witnesses as well as de facto possession of the disputed land. The Final ruling from the Supreme Court was delivered on 5/11/1990.

6. On April 11, 1997, the complainant filed this communication 97/1997 against the Islamic Republic of Mauritania.

7. The complainant claimed before the commission that in November 1975, that is four years after the death of his mother, he himself and his family were forcefully expelled from their ancestral home by Mohamed Ould Bah (his opponent) on the grounds that the complainant's mother, Aichetou Valle had been his slave and that, the house and the surrounding land therefore rightfully belonged to him.

8. The complainant further claimed that the courts of his country, which are State institutions, deprived him from his property and since then he wrote to the highest governmental authorities including the President of the Republic, protesting against this blatant governmental support for the illegal institution of slavery, but has received no reply as of this date.

9. Article 56 paragraph 6 of the African Charter on Human and Peoples' Rights requires that communication should be submitted within a reasonable period from the time when local remedies have been exhausted or from the date the Commission is seized with the matter

10. The complainant resorted to local courts only in 1986 whereas he alleged that he had been forcefully expelled from his home in 1975. And again he took more than six years after the Supreme Court delivered its final decision to submit his communication to the Commission in April 1997. In my view, this can be considered as unreasonable period in term of Article 56 paragraph 6 of the African Charter, and accordingly the Commission ought to declare this communication inadmissible.

11. From the documents in the file, which contains the rulings of the Mauritanian courts at all levels and which were submitted to the Commission by both parties, it was not indicated anywhere that the recipient of the donation had claimed that the complainant's mother had donated the land because she was the slave of the recipient. On the contrary, the recipient indicated clearly that the complainant's mother donated the land to him because of the existence of good ties and relationship between the two of them. The complainant himself stated in his memo to the Court of Appeal of Nouakchott that his family is well-known for its good reputation and generosity.

12. The documents from the communication file also show that the claimant had neither raised these matters before the District Court of Boutilimitt, nor before the Court of Rosso or before the Court of Appeal.

13. The claimant has come up before the Commission with new arguments that he did not advance before the courts in Mauritania in the process of his case. Consequently, by bringing new elements which are neither raised nor disputed before national courts he wanted to use this Commission as a court of first instance. In my view, this is another reason for declaring this communication inadmissible.

14. The inability of the Secretariat of the Commission to work in Arabic whereas the original documents of the communication file are in this language, do inhibited the Commissioners ability to have first hand information. This made the Commission to act only on the translated summary of part of the documents of the communication, which in my view, was not built on facts but on the mere allegations of the complainant. Allegations, which were neither raised before National Courts nor well substantiated before the Commission.

15. The Commission in acting upon the assumption that those allegations are facts, wrongly decided that the Islamic Republic of Mauritania has violated Article 14 of the African Charter on Human and peoples` Rights.

16. The date of claim of donation (by opponent to the complainant) goes back to 1959 - according to complainant - or to 1975 when the complainant claims that the forceful eviction from disputed land took place.

17. One must note that the practice of slavery was legal in 1959 and 1975. Slavery was banned by the Mauritanian authorities in 1980. The recipient could therefore have easily based his claim of property over the disputed land on slavery. However, he did not do that. Instead, he claimed that the land was donated to him because the good relationship he had with the mother of the complainant.

18. The events in question took place by any way before 1986 when Mauritania became a party to the African Charter on Human and Peoples' Rights; the admissibility of such a communication raises the question of the principle of retroactivity of laws which was not discussed by the commission in this very case.

19. The erection of building permissions No.453 dated 24th November, 1972, and No.66 of 24th April, 1971, (and not certificate of occupancy as mentioned in paragraphs 46 and 50 of the commission ruling) both discussed by Courts and ruled over that the later does not relate to the same plot of land.

20. I do agree with the Commission's conclusion that there is no evidence brought before the Commission that the witnesses retracted from their statements made before the Cadi in support of donation as stated in the last part of paragraph 53 the communication decision. This part of the above-mentioned mentioned paragraph negates the complainant's allegations as stated in paragraph 49 of the same document, and contradicts the final findings of the Commission.

21. Paragraphs 51 of the decision of the Commission states that the plaintiffs (complainant) requested an investigation to prove as a result, the pertinence of the said violations of article 14 of the African Charter on Human and peoples` Rights. This paragraph does not reflect the accuracy that the complainant claimed the violation of Article 14 of the Charter. The lengthy discussions by Commissioners, on whether the Commission could invoke article 14 of the charter that was not mentioned by the complainant prove this. Moreover, paragraphs 3 and 43 of the decision did not mention article 14 of the Charter.

22. The Mauritanian courts cannot restrain the right or freedom of the claimant's mother to dispose part of her property by way of donation to a member of her family without a legal basis, neither do they have the right to compel the claimant's mother to explain the reasons why she donated such property to one of her family members, while she is sane, mature and not restrained from disposing her property by a court order.

23. Had the Mauritanian courts prevented the claimant's mother from disposing of part of her property by donating it to a relative and deprived her son of that portion of property, they would have violated Article 14 of the African Charter on Human and Peoples' Rights, which related to the right to property and also embodies the rights to freely dispose of one's property.

24. The Mauritanian courts, by confirming the right of ownership of the claimant's mother and confirming her right to dispose of part of her property by the way of donation, confirmed that the claimant's mother's freedom to own her property and to dispose of it. By doing so, Mauritanian Courts furthermore, proved that she was neither a slave nor a servant.

25. The Commission, by deciding that the Islamic Republic of Mauritania had contravened Article 14 of the African Charter on Human and Peoples' Rights and recommending that the government should return the property to the claimant, had deprived the recipient from a property that was donated to him. The Commission has also, without a legal basis, restrained, the right and freedom of the claimant's mother to freely dispose of a part of her property in a manner she deemed fit. The Commission wanted to protect what it considered to be the right of a citizen (the complainant). However, in doing so it advised the government to do what constitutes a violation of the rights of two citizens: the mother of the complainant and the recipient.

26. For all the foregoing reasons, I believe that the Commission had erred in this communication, by deciding that the Islamic Republic of Mauritania had violated the provisions of Article 14 of the African Charter on Human and Peoples' Rights.

Done at the 35th Ordinary Session held in Banjul, The Gambia from 21st May to 4th June 2004.