African Court on Human and Peoples' Rights

Fidèle Mulindahabi v. Republic of Rwanda

Application No. 006/2017

Dissenting opinion to the Judgement of 4 July 2019

1- I share the opinion of the majority of the Judges regarding the jurisdiction of the Court and the inadmissibility of the Application.

2- On the other hand, I think that the way the Court treated "the default" is at variance with:
- the provisions of Rule 55 of the Rules of Court;
- Article 28(6) of the Protocol;
- its jurisprudence and comparative law.

3- Indeed, Rule 55 of the Rules states:

I. In Paragraph 1 that:

4- "Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, render a judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertaining to the proceedings".

It is clear from the foregoing Paragraph 1 that a decision to render a judgement in default must meet certain criteria:

- absence of one of the parties or;
- failure to defend its case;
- rendered on the application of the other party;
- service of the application on the defaulting party;
- service of the other documents pertaining to the proceedings.

5- And that the key element in this paragraph is that the default must be pronounced "on the **application of the other party**".

Therefore, making a decision in default can be a mere issue of form no doubt, but not of procedure that requires a substantive discussion regarding the elements of appreciation and a legal basis.

However, neither the case file nor the Applicant's application reveals that he prayed the Court to hand down a judgement in default.

6- And that the Court not only inserted its decision to render the judgement in default in the chapter on **Proceedings before the Court,** but also did not give any legal basis to this decision to render the judgement in default without the application of the other party, contenting itself with declaring in paragraph 15(iii), Summary of the proceedings before the Court that, "On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final 45 days extension and that, after that deadline, it would enter a **ruling in default in accordance with Rule 55 of its Rules in the interest of justice..."** and concluding in paragraph 17 on the same grounds that, "Consequently, the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules".

7- No reference to the basis of this "interest of justice" or how rendering a judgement in default was fundamental to the Court, especially since such judgements are not subject to opposition or appeal, and how such a decision taken on the basis of its discretionary power could refer to Rule 55 of the Rules, which does not apply to discretion.

8- Moreover, reference to the Ingabiré Judgement is in no way a basis for the decision in default because in that Judgement, at no point in the body of the Judgement or in its operative part is there mention of a judgement in default, as no party had requested for it and the chapter 17 cited in this reference states as follows: "Consequently, in the interest of justice, the Court will examine the instant brief for reparation **in the absence of any response from the Respondent State**".

9- To render a judgement in the absence of the respondent is in no way the legal definition of default which, under the provisions of the aforementioned Rule 55, meets conditions which must be controlled by the Court.

10- It is clear and, as mentioned above, that the default judgement must meet certain conditions and that the Court is under the obligation to give reasons for any decision it makes, even more so when it is **at variance with the** clear **provisions** of a rule of the Rules.

By ruling in this way, the Court breached the provisions of Article 28(6) of the Protocol which obliges it to give reasons for its judgements.

II. **In comparative law**, there is a wealth of case law supporting this reasoning, such as the Judgement of 30 November 1987, *H. v. Belgium,* where the European Court of Human Rights recognised, for the first time, the right to give reasons in judicial decisions in these terms: "…this very lack of precision made it all the more necessary to give sufficient reasons for the two impugned decisions on the issue in question. Yet in the event the decisions merely noted that there were no such circumstances, without explaining why the circumstances relied on by the applicant

were not to be regarded as exceptional" (§53) and in the Judgement of 16 December 1992, *Hadjianastassiou v. Greece*, the Court noted that “the obligation to state reasons constitutes a minimum guarantee which is limited to the requirement of sufficient clarity of the grounds on which the judges base their decisions”. [*Translation by Registry*]

III. Rule 55(2) of the Rules makes it clear that "Before a**cceding to the application of the party before it**, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law."

It is indisputable that this Paragraph 2 introduces other conditions which guide the Court on the form and substance of the judgement in default it will issue.

The Court must and before anything:

- satisfy itself that it has jurisdiction;
- and that the application is admissible;
- or founded in fact and in law.

It is therefore unquestionable that taking the decision to render a judgment in default requires a clear reasoning and may in no way suffice in one line of the chapter “Procedure before the Court”, thus ignoring the conditions required by the aforementioned Rule 55.

In my humble opinion, it is evident from a reading of Rule 55(2) that the judgement in default cannot be rendered where the Court:

- declares lack of jurisdiction;
- finds the application inadmissible;
- or finds that the requests are unfounded.

It is clear from reading the aforementioned Rule that default is not part of the procedure and that it is still a matter of form to which the Court must respond in relation to its jurisdiction, the admissibility and basis of the Applicant's claims.

And that even if the Court chooses to use its discretionary power to hear the case ex officio and rule by default, it cannot do so by considering this point of law as one of the elements of the procedure and simply base its decision on the interest of justice without specifying and explaining how making a judgement in default is in the interest of justice.

IV. **In comparative law,** many human rights courts treat the default decision as a formal decision that comes well after jurisdiction and admissibility.

To quote just one rendered by the Court of Justice of the Economic Community of West Africa States on 16 February 2016, Judgement No. ECW/CCJ/JUGG/03/16, the Court, in Chapter III: Reasons for the decision: On the form, after dealing with the admissibility of the application and jurisdiction, addressed the issue of default

against the Republic of Guinea and later, on the merits, handled the allegations of human rights violations.

And thereafter, in its operative part, it stated that "the Court ruling publicly, by **default** against the Republic of Guinea, in the matter of human rights violations, in the first and last resort:

On the form, …" [*Translation by Registry*]

In adjudicating as it did, the Court delivered a judgement devoid of any legal basis and contrary to the provisions of the aforementioned Rules and Articles regarding default, especially as this provision of default does not appear in its operative part either.

Bensaoula Chafika
Judge at the African Court on Human and Peoples' Rights

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