



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, on 23 October 2018
Ref. no.: RK 1282/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI47/18

Applicant

Musa Grabanica and others

**Constitutional review of Decision Cml. No. 20/2017 of the Supreme Court,
of 30 November 2017**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge
Gresa Caka-Nimani, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Applicants are: Musa Grabanica, Isa Grabanica, Avdurrahmon Grabanica, Nazim Grabanica, Pajtim Grabanica and Labinot Grabanica from the Municipality of Vushtrri (hereinafter: the Applicants).

Challenged decision

2. The challenged decision is Decision Pml. No. 20/2017 of the Supreme Court of Kosovo of 30 November 2017, which rejected as ungrounded the request for protection of legality submitted by the State Prosecutor against Judgment Ac. No. 1053/2017 of the Court of Appeals of 28 July 2017 and Judgment C. No. 260/2016 of the Basic Court in Mitrovica, Branch in Vushtrri, of 31 January 2017. The Applicants were served with the challenged decision on 26 December 2017.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violated the Applicants' rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Articles 6 [Right to a fair trial] of the European Convention on Human Rights (hereinafter: ECHR), and 1 [Protection of Property] of Protocol No. 1 of the ECHR.

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 31 May 2018, the Court approved, in the administrative session, the amendment and supplement of the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 8 March 2018, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 7 April 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi.
8. On 14 April 2018, the Court notified the Applicants about the registration of the Referral. On the same date, the Court sent a copy of the Referral to the Supreme Court.
9. On 16 June 2018, the mandate of judges: Almiro Rodrigues and Snezhana Botusharova ended. On 26 June 2018, the mandate of judges Altay Suroy and Ivan Čukalović ended.

10. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
11. On 11 September 2018, the President of the Court appointed a new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
12. On 27 September 2018, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

Regarding the statement of claim of Musa, Isa, Avdullah, Avdurrahmon and Nazim Grabanica [the Applicants] and J.G.

13. In 2014, Musa, Isa, Avdullah, Avdurrahmon and Nazim Grabanica [the Applicants] and J.G. filed a lawsuit (C. No 472/2014) with the Basic Court against N.G., which requested to hold that the N.G. has prevented them from using the immovable property, namely a part of the cadastral parcel No. 4430, in the Municipal Zone of Vushtrri.
14. On 19 May 2016, the Basic Court in Mitrovica, Branch in Vushtrri (hereinafter: the Basic Court) by Decision C. No. 51/16 rejected as ungrounded the Applicants' statement of claim. The Basic Court found that in this legal matter, in addition to the object of the claim, which is the obstruction of possession, it does not deal with the allegation of the Applicants on confirming the right of ownership. According to the Basic Court, *"the property is a separate institute in relation to obstruction of possession, and other rules of deciding apply in that case"*. Finally, the Court found that it was not established that the respondent N.G. with its actions has obstructed the possession of a part of the immovable property of the Applicants.
15. On 10 June 2016, against the aforementioned decision of the Basic Court, the Applicants filed an appeal with the Court of Appeals.

Regarding statement of claim of N.G.

16. On 22 July 2016, N.G. filed a request with the Basic Court requesting it to find that the Applicants prevented him from using the immovable property, namely the cadastral parcel No. 4430 in the Municipal Zone of Vushtrri.
17. On 31 August 2016, the Applicants submitted a response to the lawsuit, by which, among other things, stated that they are the owners of the aforementioned parcel and have been using the same parcel with claimant N.G. since the division of the family community. The Applicants also proposed to dismiss the lawsuit, due to litispendence, reasoning that the same case is in the court proceedings under the lawsuit C. No. 472/2014, which was filed by Musa, Isa, Avdullah, Avdurrahmon and Nazim Grabanica [the Applicants] and J.G. on 17 October 2014.

18. On 31 January 2017, the Basic Court by Decision C. No. 260/2016 approved the request of N.G., finding that the Applicants prevented N.G. in the use of the immovable property, namely the abovementioned cadastral parcel. The Basic Court also ordered the Applicants to “*refrain from acts of obstruction to possession*” and prevented them to obstruct N.G. in the future in quiet use of the parcel.
19. The Basic Court, after examining the evidence presented and the case file, found that N.G. before being prevented by the Applicants, had possessed the parcel, which had been sown with agricultural goods. The Court also found that “*the issue raised by the respondents [the Applicants] as to whose property was the parcel in question was irrelevant*”. As regards the Applicants’ proposal to reject the lawsuit of N.G. due to litispendence, the Court found that the legal criteria under Article 262.2 of the Law on Contested Procedure (hereinafter: the LCP) were not met, “*because neither the object of the request is met and the parties have contradictory allegations*”.
20. On an unspecified date, against the aforementioned decision of the Basic Court of 31 January 2017, the Applicants filed an appeal with the Court of Appeals.
21. On 28 July 2017, the Court of Appeals by Decision Ac. No. 1053/2017, rejected the Applicants’ appeal as ungrounded and upheld Decision C. No. 260/2016 of the Basic Court of 31 January 2017.
22. The Court of Appeals held that the first instance court, based on the evidence and the factual situation, has correctly found that there has been an obstruction to possession by the Applicants. In addition, the Court of Appeals also, referring to the provisions of the Law on Property and Other Real Rights confirmed that the Applicants prevented the claimant N.G. in the use of immovable property.
23. On 6 September 2017, the Applicants filed a proposal for filing a request for protection of legality with the Office of the State Prosecutor against the aforementioned Decision of the Court of Appeals of 28 July 2017.
24. In their proposal, the Applicants first alleged essential violations of the provisions of the contested procedure, because the dispute concerning the obstruction of possession of the same immovable property was pending. Secondly, the Applicants claimed that the entire cadastral parcel No. 4430 was expropriated by the Government of the Republic of Kosovo, by Decision 06/160 of 11 December 2013. Thirdly, the Applicants claimed that the first instance court rendered its decision without the participation of the geodesy expert. Finally, the Applicants alleged that they were not notified by the first instance court when the visit was made in the scene of event.
25. On 11 September 2017, the State Prosecutor's Office, through Notification KMLC. No. 104/2017, notified the Applicant's legal representative that he had approved the Applicants’ proposal and that on the same date filed a request for protection of legality with the Supreme Court against Decision Ac. No. 1053/17 of the Court of Appeals of 28 July 2017.

26. On 30 November 2017, the Supreme Court by Decision Cml. No. 20/2017 rejected as ungrounded the request for protection of legality filed by the State Prosecutor.
27. The Supreme Court found that the request for protection of legality filed by the State Prosecutor did not meet the criteria of Article 247, paragraph 1, sub paragraph a) of the LCP. In this regard, the Supreme Court reasoned that the State Prosecutor may submit a request for protection of legality because of essential violations of the provisions of the contested procedure, if the violation has to do “[...] with territorial jurisdiction, if the court rendered the judgment without a main hearing, whereas it was its duty to hold a main hearing, if it was decided on the request, about which the dispute is pending or if it is in violation of the Law, the public was excluded from the main hearing”.
28. Regarding the allegations of the Applicants of litispence, the Supreme Court regarding the identity of the parties found that in the second lawsuit appeared two other claimants, namely Rexhep Grabanica and Labinot (Musa) Grabanica, who were not involved in the first dispute. While in the second dispute, J.G. was not involved, who was a party to the first dispute. Regarding the identity of the object, the Supreme Court found that in the first dispute, the Applicants requested the confirmation of obstruction to possession of a part of the cadastral parcel by N.G. whereas in the second dispute, the subject of the review was the entire cadastral parcel No. 4430. Therefore, the Supreme Court concluded that in the present case it is not the case about litispence, as alleged by the Applicants.

Applicant’s allegations

29. The Applicants allege that the challenged Decision of the Supreme Court violated their rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution, in conjunction with Articles 6 [Right to a fair trial] of the ECHR and 1 [Protection of Property] of Protocol No. 1 of the ECHR.
30. The Applicants in particular claim that the statement of claim filed by them in 2014 regarding the obstruction to possession of the same immovable property is in the proceedings before the Court of Appeals.
31. In this regard, the Applicants allege that the finding of the Supreme Court that in the present case the criteria set out in the LCP regarding the litispence are not met, is unfair. Regarding the identity of the parties, the Applicants claim that “[...] in the second lawsuit we are not claimants but the respondents and that Rexhep Grabanica died on 13.02.2010 and was our father while Labinot (Musa) Grabanica is our child who helped with work. Therefore, this finding of the Supreme Court does not stand”. As to the identity of the object, the Applicants claim that in the present case we are dealing with the same immovable property, and “The surface area of the dispute is the same and the same place in both cases, but in the first one it was ascertained by the expert”.
32. Secondly, the Applicants disagree with the determination of the factual situation, stating that it is not true that the claimant, namely N. G. possessed the immovable property “[...] which was planted with grain”. According to the allegations of the

Applicants “[...] we have to do with oats (50 are upper part of parcel) and not grain as the claimant says [N. G]”.

33. Thirdly, the Applicants also claim again that they were not notified by the first instance court, namely the Basic Court, when the visit on the scene of event was made.
34. Finally, the Applicants state that their property, namely the aforementioned parcel, was expropriated by the Decision of the Government of the Republic of Kosovo, No. 06/160, of 11 December 2013 “[...] for the construction needs of the national road N2 segment Prishtina-Mitrovica”.

Relevant legal provisions

Existence of Litispendence **Article 262**

262.1 Litispendence is created at the moment when the charged party was handed the charge. 262.2 With regard to the request presented by the party during the proceedings, the litispence is created at the moment when the opposing party is informed for a request of the kind.

262.3 During the existence of litispence for the same claim charge a new trial between the same parties cannot be initiated. And in case it happens than the court will reject the charge.

262.4 The court during the procedure will look into the existence of a trial on the same claim charge between the same parties, as required by the official role.

Article 263

263.1 If one of the parties during the procedure alienates the item or the right requested by the claim, the act will not obstruct the proceeding to end between the same parties.

263.2 The person that gains an item or the right during the trial can enter the procedure, instead of the plaintiff or charged party only with consent from both parties.

263.3 In the case of the parag.1 of this article, the decision produces effects toward the winner of the good or the right during the trial process.

Admissibility of the Referral

35. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and as further specified by the Law and foreseen by the Rules of Procedure.
36. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes:

“1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law”.

37. The Court notes that the Applicants are authorized party in accordance with the Constitution, have exhausted all necessary legal remedies and have submitted their Referral within a period of 4 (four) months after the receipt of the Decision.

38. However, the Court refers to Article 48 [Accuracy of Referral] of the Law, which provides:

“In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge”.

39. The Court also recalls Rule 39 (2) of the Rules of Procedure, which establishes:

“(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim”.

40. Initially, the Court notes that the dispute over the obstruction to possession of the immovable property, initiated in 2014 by Musa, Isa, Avdullah, Avdurrahmon and Nazim Grabanica [the Applicants] and J.G., according to the case file, is in the proceedings before the Court of Appeals. However, this procedure is not part of the subject matter of the Applicants’ Referral.

41. The subject matter of this Referral is the challenged Judgment of the Supreme Court, which rejected the request for protection of legality against Judgment Ac. No. 1053/2017 of the Court of Appeals of 28 July 2017, and Judgment C. No. 260/2016 of the Basic Court of 31 January 2017.

42. The Court recalls that the Applicants allege that the challenged decision of the Supreme Court violated their rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution in conjunction with Articles 6 [Right to a fair trial] of the ECHR and 1 [Protection of Property] of Protocol No. 1 of the ECHR.

43. In this regard, the Court notes that the Applicants allege that the regular courts have ruled on this case while, according to them, before the Court of Appeals is ongoing the court proceedings under their lawsuit filed in 2014. Specifically, the Applicants claim that in the present case we are dealing with the same parties and the same object of dispute.

44. In this regard, the Court notes that the Basic Court by its Decision, C. No. 260/2016 of 31 January 2017, found:

“As to the proposal for the court to dismiss the lawsuit due to litispendence, such a claim was found by the court as ungrounded because the legal criteria

for such a thing foreseen in Article 262 of the LCP were not met because neither the object of the claim is met and the parties have contradictory allegations”.

45. This finding of the Basic Court was upheld by the Court of Appeals and the Supreme Court, which in detail reasoned and also addressed the Applicants’ allegations regarding the litispence presented in their proposal for filing a request for protection of legality. In this regard, the Supreme Court states that *“The establishment of a litispence as a legal procedural consequence is foreseen by the provision of Article 262, par. 3 of the LCP. If an issue or not in the sense of this rule is adjudicated depends on two circumstances: if the parties and the subject matter of the dispute in the preliminary procedure are identical with the parties and the object of the dispute in the pre-trial procedure. These two requirements must be met in a cumulative way, in order that the application of the provision of Article 262 par. 3 of the LCP is considered. The identity of the parties exists when the same parties appear in the new process as well, whereas the objective identity exists when the object of the dispute is the same in both lawsuits”.*
46. In this respect, the Supreme Court regarding the identity of the parties found that in the second lawsuit as claimants appeared two other claimants, namely Rexhep Grabanica and Labinot (Musa) Grabanica, who were not involved in the first dispute. While in the second dispute J.G. was not involved, who was a party to the first dispute. According to the identity of the object, the Supreme Court found that in the first dispute, the Applicants requested the confirmation of the obstruction of a part of the cadastral parcel by N.G., whereas in the second dispute, the subject of the review was the entire cadastral parcel No. 4430. Consequently, the Supreme Court concluded *“[...] in this case it is not the identity of the parties and the object of the dispute we are dealing with, this means that in the present case we do not have litispence as it is stated without any basis in the request for protection of legality”.*
47. Furthermore, the Court notes that the Applicants disagree with the determination of factual situation and application of law by the regular courts, in particular the Basic Court.
48. In this respect, the Court reiterates that it is not the role of the Constitutional Court to deal with errors of facts or law (legality), allegedly committed by the regular courts, unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality). If it were different, the Court would act as a *“fourth instance court”*, which would result in exceeding the limitations provided for by its jurisdiction. In fact, it is the role of regular courts to interpret and apply the relevant rules of procedural and substantive law. (See case *Garcia Ruiz v. Spain*, ECtHR, no. 30544/96, of 21 January 1999, paragraph 28; and see also case: KI70/11, Applicants: *Faik Hima, Magbule Hima dhe Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
49. The Court further notes that the Applicants claim that the immovable property, which is the subject of the case in the challenged decisions, was expropriated by a Decision of the Government of 11 December 2013. With respect to this claim, the Applicants do not justify or support that the expropriation issue affects the

challenged decisions of the regular courts, which found the obstruction to possession on the part of the Applicants.

50. In sum, The Court recalls that the mere fact that the Applicants are not satisfied with the outcome of the decisions of the regular courts, or the mere mentioning of articles of the Constitution, without elaborating their alleged violation, is not sufficient to build a grounded allegation of constitutional violation. When alleging such violations of the Constitution, the Applicants must provide a reasoned allegation and a compelling argument (See: case of the Constitutional Court KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33).
51. In addition, the Court considers that the Applicants have not proved and substantiated their claims that the proceedings completed before the regular courts were unfair or arbitrary, or that their fundamental rights and freedoms protected by the Constitution were violated as a result of the decisions of these courts.
52. For the foregoing reasons, the Court concludes that the Applicants do not prove and do not sufficiently substantiate their allegation of a violation of their right to fair and impartial trial and their right to property guaranteed by Articles 31 and 46 of The Constitution and Article 6 of the ECHR, as well as Article 1 of Protocol No. 1 of the ECHR.
53. Therefore, pursuant to Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, the Applicants' Referral is manifestly ill-founded on constitutional basis and, accordingly, inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 39 (2) of the Rules of Procedure, on 27 September 2018, unanimously

DECIDES

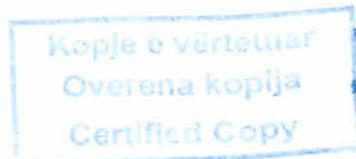
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bekim Sejdiu

Arta Rama-Hajrizi



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