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

Prishtina, on 14 Juna 2019
Ref. no.:RK 1373/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI206/18

Applicant

Fatos Deva

Constitutional review of Decision Ac. No. 3464/2018 of the Court of Appeals of 9 November 2018

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 Referral was submitted by Fatos Deva, residing in Gjakova (hereinafter: the Applicant), represented by authorized representative Yll Xhiha, a lawyer.

Challenged decision

2. The Applicant challenges the constitutionality of Decision Ac. No. 3464/2018 of the Court of Appeals of Kosovo of 9 November 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, allegedly violated the Applicant's rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 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 of Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 28 December 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 8 January 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

7. On 29 January 2019, the Court notified the Applicant about the registration of the Referral and requested him to submit the power of attorney for his representative.

8. On 6 February 2019, the Applicant submitted the power of attorney for his representative.

9. On 7 February 2019, the Court sent a copy of the Referral to the Court of Appeals.

10. On 28 May 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 7 April 2010, the Applicant concluded a Loan Agreement with Raiffaisen Bank (hereinafter: the lender), which included an Annex to the Flexi Loan, which included as a guarantee the Pledge Annex Agreement. In the Flexi Loan Agreement it was foreseen that the lender would approve to the Applicant (in the capacity of the borrower), the Flexi Loan in the amount of € 2000 in his current individual account, which will be paid with his personal income. As a guarantee that this

amount would be returned by the Pledge Agreement, the Applicant offered as a pledge the house appliances at a certain value. The loan agreement was also registered at the Pledge Recording Office, under the Flexi Loan Agreement.

12. On 06 October 2011, the lender filed a Proposal for Enforcement with the Municipal Court, because the debtor did not respect the Flexi Loan Agreement.

13. On 12 January 2012, the Municipal Court in Gjakova by Decision Ekz. No. 18/12 on allowing the enforcement: (i) obliged the Applicant to repay the debt together with the procedural costs set forth within a period of 7 (seven) days from the date of service of the decision; (ii) assigned the proposed enforcement; and (iii) set the creditor's expenses in the amount of € 25.00.

14. On 9 March 2018, the Applicant filed an objection with the Basic Court in Gjakova against Decision Ex. No. 18/12 on allowing the enforcement of the Municipal Court in Gjakova, pointing out that the enforcement proposal is unclear and incomplete and claiming that the list of items which are required to be seized does not contain the specifications as type, serial no. and other notes.

15. On 23 March 2018, the lender submits a response to the objection, stating, *inter alia*, that the Applicant's objection was not based on evidence as required by Article 69, paragraph 4 of the Law on Enforcement Procedure (hereinafter: LEP) with the proposal that the Basic Court in Gjakova rejects the debtor's objection as invalid or completely reject it as ungrounded..

16. On 7 May 2018, the Basic Court in Gjakova (hereinafter: the Basic Court) by Decision E. No. 18/12, rejected the Applicant's objection as ungrounded. The Basic Court initially emphasized that the lender has requested the approval of the enforcement proposal according to the enforcement document, namely the Loan and Pledge Agreement.

17. The Basic Court further reasoned that according to Article 22 paragraph 1.7 a of the LEP, the enforcement document is also the mortgage agreement registered in the public registry. The Basic Court also reasoned that the Applicant's objection claims did not include other grounds under Article 71 of the LEP, and noted that the Applicant did not attach evidence for the stated declarations in the objection.

18. On 30 May 2018, the Applicant filed an appeal with the Court of Appeals of Kosovo against Decision E. No. 18/12 of the Basic Court of 7 May 2018. The lender also submitted a response to the appeal.

19. On 9 November 2018, the Court of Appeals of Kosovo, by Resolution Ac. No. 3464/2018 rejected as ungrounded the Applicant's appeal and approved in entirety the legal assessment of the first instance court, taking into account the fact that the Applicant did not provide evidence to substantiate his arguments. The Court of Appeals reasoned that *"As the legal requirements of Article 27 and 22 of the LEP have been met, the contract based on which the first instance court issued an order for assigning the enforcement, is an enforcement document and at the same time suitable for enforcement [...]".*

20. On an unspecified date, the Applicant filed a proposal to initiate a request for protection of legality against Decision E. No. 18/12 of the Basic Court and against Decision Ac. No. 3464/18 of the Court of Appeals of Kosovo in Prishtina.

21. On 13 December 2018, the Office of the State Prosecutor notified the Applicant that after having reviewed the cases by the Basic Court in Gjakova, it found no sufficient legal basis to submit a request for protection of legality.

Applicant's allegations

22. The Applicant alleges that the challenged decision violated his right guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and Article 54 [Judicial Protection of Rights] of the Constitution, but does not reason them further.

23. The Applicant initially alleges that *"The loan in question contains mortgage loan contracts which are the basis or principal for disbursement of the loan, not legalized at that time to the Court, or even to the Notary, ungrounded legal acts based on Article 21 of the current Law on Enforcement Procedure or 24 of the previous law on enforcement procedure for more enforcement titles ..., and that the legal bases for the assignment of enforcement the Court then and now the enforcement body assigns, namely implements the enforcement only on the basis of the enforcement document (titulus executionis) and the credible document, unless otherwise provided for by this Law, as well as Article 22 enforcement Document 1.3. notarized document enforceable according to the law on notary; so that from the view of the case file it appears that the contract is not legalized in the Court but also not notarized;".*

24. The Applicant also alleges that "*The interest ceases to run when the amount of interest earned for payment reaches the amount of the main debt*".

25. The Applicant alleges that *"the enforcement proposal for the blocking of bank accounts is an unlawful action, self-justice and unlawfulness, to allow the proposal for blocking the bank accounts in 7 Commercial Banks, while only the bank account of Raiffaisen Bank is included in the contract, is only unsupported legal action"*.

26. Finally, the Applicant requests the Court to reject: *"the proposal for enforcement as unlawful due to the non-notarized mortgage contract, as the Law on Amending and Supplementing the Law on Enforcement Procedure 05/L-118, Article 5, paragraph 2 obliges the creditor that the contract for the pledge registered in the official pledge register as an executive title, or to remand the procedure at the initial stage, however, about the debt we have an articulating doubt about the increase of the debt, and that the financial expertise was more than necessary to eliminate doubts about the composition of the penalty"*.

Relevant legal provisions

LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE, AND LAW NO. 05/L-118 ON AMENDMENT AND SUPPLEMENTATION OF LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE

TITLE III
ENFORCEMENT DOCUMENT (ENFORCEMENT TITLE) AND AUTHENTIC DOCUMENT

Article 21
Legal basis for awarding enforcement

The enforcement authority shall award, respectively perform enforcement only on the basis of enforcement document (titulus executions) and authentic document unless otherwise foreseen by this law.

Article 22
Enforcement Document

1. Enforcement documents are:

1.7a. mortgage agreements certified by the competent body and registered in the public registry. (supplemented by Article 5, paragraph 2 of Law no. 05/L-118 on Amending and Supplementing the basic law)

Admissibility of the Referral

27. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

28. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

"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".

29. In addition, the Court refers to the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Article 47 [Individual Requests], Article 48 [Accuracy of the Referral] and Article 49 [Deadlines] of the Law, which establish:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

"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".

Article 49
[Deadlines]

"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...".

30. Regarding the fulfillment of these requirements, the Court notes that the Applicant is an authorized party, challenging an act of a public authority, after exhaustion of all legal remedies. The Applicant also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines of Article 49 of the Law.

31. However, the Court refers also to Rule 39 [Admissibility Criteria] paragraph 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".

32. The Court notes that the Applicant alleges that his right to fair and impartial trial has been violated because, according to him (i) the regular courts have unlawfully accepted the Pledge Agreement as an enforcement document because, according to him, this contract is not notarized and does not meet the requirements for being an enforcement document; (ii) the interest starts to run when the amount of interest earned for payment reaches the level of the principal debt; and (iii) the enforcement proposal for blocking the bank accounts is an ungrounded legal action.

33. In the present case, the Court notes that the Applicant's main allegation is that Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 of the ECHR have been violated, as regular courts have erroneously determined the factual situation, and on erroneously determined factual situation have erroneously applied the substantive and procedural law.

34. In this regard, the Court reiterates that it is not the role of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts, when assessing evidence or applying the law (legality), unless and insofar they may have violated the rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of the regular courts to interpret and apply relevant rules of procedural and substantive law. (See: *mutatis mutandis,* case of the European Court of Human Rights (hereinafter: ECtHR), *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, paragraph 28).

35. As to the first Applicant's allegation, the Court recalls that the Basic Court reasoned that in accordance with Article 22 paragraph 1.7a of the LEP the enforcement document is the pledge agreement, registered in the public pledge register. Furthermore, the Basic Court also reasoned that the Applicants' objection claims did not include other causes under Article 71 of the LEP, and stated that the Applicant did not attach any evidence for the allegations stated in the objection.

36. With regard to the proceedings followed by the Applicant, the Basic Court and the Court of Appeals clarified that the Applicant has not submitted any evidence which would support his statements in the use of legal remedies; while regarding the main allegation of the Applicant, they clarify that Article 22, paragraph 1.7a of the LEP defines as an enforcement document the pledge agreement registered in the public pledge register.

37. The Court notes that Decision Ac. No. 3464/2018 of the Court of Appeals, which is the final decision deciding on the merits, is reasoned in detail, "*as the legal requirements of Article 27 and 22 of the LEP have been met, the contract based on which the first instance court issued an order for assigning the enforcement, is an enforcement document and at the same time suitable for enforcement [...]*".

38. The Court first states that it is not its function to deal with the errors of the factual situation or the erroneous application of the law allegedly committed by the regular courts, unless the errors and the erroneous application of the law are not such as to violate the rights and freedoms protected by the Constitution (see case of ECtHR, *Garcia Ruiz v. Spain*, cited above, paragraph 28) .

39. However, it is the role of the regular courts to resolve the issues of interpretation of the domestic legal rules. This applies in particular to the interpretation of substantive and procedural law by the courts (see ECHR case, *Pekinel v. Turkey*, No. 9939/02, 18 March 2008, paragraph 53). The role of the Court is only to determine whether the effects of such interpretation are in accordance with the Constitution in entirety and with the principle of legal certainty, in particular those guaranteed by Article 6 of the ECHR.

40. The Court reiterates that Article 6 of the ECHR and Article 31 of the Constitution oblige the courts to give reasons for their decisions, but this cannot be understood as an obligation of the court to give a detailed answer to any arguments of the Applicant. (See case of ECtHR, *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994, Series A. No. 288, p. 20, para. 61). The extent to which the duty to give reasons applies may vary according to the nature of the decision. It should also take into account, *inter alia*, the variety of submissions submitted by a party to

proceedings that may make the courts give various legal opinions and conclusions when rendering decisions. Therefore, the question whether the court has fulfilled the obligation to explain the reasons for its decision, stemming from Article 6 of the ECHR, can only be determined in the light of the circumstances of each individual case.

41. The Court notes that, although the regular courts have a certain margin of appreciation in the selection of evidence in a particular case and in accepting evidence in support of the submissions of the parties, the courts are obliged to justify their activities by giving reasons for their decisions. The Constitutional Court states that it is not its duty to consider whether the refusal by the regular courts to accept the evidence submitted by the Applicant has been grounded, it is within the jurisdiction of the regular courts to decide on the matters of this kind (see ECtHR case *Suominen v. Finland*, application No. 37801/97, Judgment of 24 July 2003, paragraph 36).

42. Although the Applicant alleges that his rights were violated with erroneous determination of facts and erroneous application of laws by the regular courts, the Applicant did not show how the abovementioned decisions violated his constitutional rights.

43. Accordingly, the Court notes that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle; that he was able to adduce the arguments and evidence he considered relevant to his case at the various stages of those proceedings; he was given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, relevant for the resolution of his case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were examined in detail; and therefore, the proceedings, viewed in entirety, were fair (see, *mutatis mutandis, Garcia Ruiz v. Spain*, cited above, paragraphs 29 and 30).

44. The Court recalls that the mere fact that the Applicant does not agree with the outcome of the decisions of the Supreme Court, as well as mentioning of articles of the Constitution, are not sufficient to build a reasoned allegation of constitutional violations. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (See, *mutatis mutandis*, case of the Constitutional Court, Resolution on Inadmissibility of 10 February 2015, *Abdullah Bajqinca*, KI136/14, paragraph 33).

45. The Court also recalls that the Applicant alleges the violation of his rights guaranteed by Article 54 of the Constitution, however, he merely referred to this Article but did not provide further arguments in relation to this allegation.

46. In sum, the Court considers that the Applicant has not presented evidence, facts or arguments that show that the proceedings before the regular have constituted in a way a constitutional violation of his rights guaranteed by the Constitution, namely the right to fair and impartial trial and the right to judicial protection of rights.

47. Therefore, the Court concludes that the Applicant's Referral is manifestly ill-founded on constitutional basis and, is to be declared inadmissible in accordance

with Article 113, paragraph 7 of the Constitution and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, and Rule 39 (2) of the Rules of Procedure, on 28 May 2019, 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**

Radomir Laban | Arta Rama-Hajrizi

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