



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

Prishtina, on 22 July 2019
Ref. no.: RK 1399/19

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI173/18

Applicant

Nijazi Pasoma

**Constitutional review
of Decision Ac. No. 1614/2016 of the Court of Appeals of 27 July 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 Nijazi Pasoma, residing in Vushtrri (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Decision Ac. No. 1614/2016 of the Court of Appeals of 27 July 2018.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights guaranteed by Articles: 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution.

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 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).

Proceedings before the Constitutional Court

5. On 7 November 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 13 November 2018, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding) Remzije Istrefi-Peci and Nexhmi Rexhepi, members.
7. On 20 November 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeals.
8. On 24 December 2018, the Applicant submitted the additional documents.
9. On 6 June 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

10. On 20 October 2012, the creditor TEB Bank j.s.c., the Applicant and other debtors signed the loan agreement no. 23563, in the amount of € 75,000 and on 18 August 2011 the overdraft agreement no. 14974, in the amount of € 8,000 for the needs of the company Kotex j.s.c. with the business number 70700913, based in Vushtrri.
11. On 5 July 2015, the creditor TEB Bank j.s.c. submitted to the private enforcement agent a proposal for enforcement, namely for the sale of mortgaged immovable property because of non-payment of obligations against it, with the following proposal: *"The proposal for enforcement of the Creditor TEB Bank*

J.S.C. is approved in entirety, and ordered the enforcement for payment of the debt in the amount of 50,397.93 euro”.

12. On 8 July 2015, the private enforcement agent by Decision P. No. 529/15, allows the proposal for enforcement, exercised by the creditor TEB Bank j.s.c. namely, the sale of mortgaged immovable properties.
13. On 30 November 2015, the conclusion of the sale of mortgaged immovable property, namely the property of the Applicant registered with no. 011-953-5732/2012, cadastral plot No. P-71914075-00296-8, with a surface area of 374 m2, and the property of debtor R.H. registered in the certificate of property UL-70202018-00197 of 21 August 2012, the cadastral plot no. P-70202018-00911-5, with a surface area of 425 m2.
14. On 5 January 2015, the first public auction is held and in this case no bid for the purchase of mortgaged immovable property was offered, as well as in the second auction, held on 3 February 2015, there was no bid for the purchase of the immovable properties concerned.
15. On 1 March 2016, the third public auction was held and the creditor TEB Bank j.s.c. was announced the buyer of the mortgaged immovable properties.
16. On 8 March 2016, the private enforcement agent, through the enforcement order P. No. 529/15, assigns as the purchaser the creditor TEB Bank j.s.c., which offered the amount of € 20,668.00 for the purchase of the mortgaged immovable property. For the remaining debt of 28.116, 03, euro, the creditor was instructed to realize it in another procedure.
17. Against this order, the Applicant filed an appeal with the Court of Appeals, alleging that the value of the collateral pledged had the full power to perform the loan obligation, but the same was ignored by the creditor, by committing essential violations of some provisions arising from the loan agreement as well as violation regarding the immovable property P-71914075-00269-8, which is located in Prishtina, referring to a violation of territorial jurisdiction, as provided by Article 177 of the Law on Enforcement Procedure.
18. On 27 July 2018, the Court of Appeals, by Decision Ac. No. 1614/2016, rejected as ungrounded the Applicant's appeal, regarding the enforcement order of 8 March 2016, with the reasoning: *“The appealing allegations of the debtors are considered by this court as ungrounded, as the first instance court has correctly applied the provisions of the substantive law mentioned in the reasoning of the challenged order - the provision of Article 234 paragraph 6 of the LEP in the case of sale of the immovable property at the third public auction”.*
19. On 3 October 2018, the Applicant filed a request for protection of legality with the Office of the Chief State Prosecutor against the Decision of the Court of Appeals of 27 July 2018.

20. On 23 October 2018, the Office of the Chief State Prosecutor notified the Applicant that his request has insufficient legal basis to be approved based on Article 247.1 a) and item b) of the Law on Contested Procedure.

Applicant's allegations

21. The Applicant alleges that the decisions of the regular courts have violated his rights as follows:

Equality Before the Law

Because: *"...in the enforcement case he was in the capacity of the debtor, although the borrowers had sufficient means to pay their obligation through their pledged collateral, the competent authorities did not respect the procedure in the order of the debtors, namely pursuant to Article 39 of the Law on Enforcement Procedure Law No. 04/L-139, and this action of the competent authorities, violated the equality before the law, protected by the Constitution of the Republic of Kosovo, because other debtors were privileged and their property was not affected, although the latter had enough collateral pledged to settle the obligation."*

Right to Fair and Impartial Trial

Because he: *"... was not given the opportunity to file his allegations, the presentation of evidence and facts, where all the proceedings concerning this case were unfair and partial, since no other measure was taken against other debtors, which is enclosed in the Application Form with Protocol No. 1742, of 07.11.2018, under which the Private Enforcement Agent, without the Applicant's knowledge, permits the sale of pledged items by other debtors, and those funds are not transferred to the creditor to settle the obligation but sells them to other persons, while the funds go to the accounts of other debtors, whereas the Private Enforcement Agent renders a decision ordering the sale of the immovable property of the last applicant in the order, and the funds from the sale of the collateral of the main debtors which has exceeded the value of the debt gives to the debtors, thereby causing irreparable damage to the Applicant, since it is contrary to Article 1016 of the LOR."*

Protection of Property

With allegation that *"...he was arbitrarily deprived of the property right, protected by the Constitution, because the violation of the aforementioned Articles of the Constitution, has resulted in the deprivation of the property right without any legal basis."*

22. Moreover, the Applicant requests the Court to render the decision on merits on his case.

Admissibility of the Referral

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

24. 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.*

[...].”

25. The Court also examines whether the Applicant has met the admissibility requirements required by Articles: 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

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...”.

26. As to the fulfillment of the abovementioned criteria, the Court finds that the Applicant is an authorized party; has exhausted available effective legal remedies; has specified the act of the public authority that he challenges before the Court and has submitted the Referral on time.

27. However, the Court examines whether the Applicant has met the admissibility requirements set out in Rule 39 (2) of the Rules of Procedure, which foresees:

“(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.”

Regarding the allegation of violation of “equality before the law”

28. The Court notes that the Applicant alleges that the competent authorities did not respect the procedure in the order of the debtors, namely in accordance with Article 39 of the Law on Enforcement Procedure Law No. 04/L-139 and that other debtors were privileged and their property was not affected, alluding to the fact that the latter had sufficient collateral pledged to settle the obligation.
29. In this regard, the Court refers to Article 24 of the Constitution, which establishes:

Article 24 [Equality Before the Law] of the Constitution

“1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.

*2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.
(...).”*

30. The Court first of all wishes to recall that, as a general rule, equality before the law means the equality of individuals who are on equal terms and their right to equal protection of the law without discrimination. However, equality before the law does not mean that for an individual or a category of persons who are in objectively different conditions there should be same treatment and solutions.
31. In addition, the case law of the European Court on Human Rights (ECtHR), clarifies that, within the meaning of Article 14 of the European Convention on Human Rights (ECHR), a difference of treatment is considered discriminatory, only if “it has no objective and reasonable justification”, in other words, if it does not pursue a “legitimate aim’ or if there is not a reasonable relationship of proportionality “between the means employed and the aim sought to be realized” (see, for example the judgment of 28 May 1985 in case *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Series A, No. 94, para. 78).
32. In this regard, the Court considers that the decisions of the regular courts do not contain elements of a breach of equality before the law, or elements of unequal treatment, as the Applicant alleges. Moreover, none of the grounds of Article 24 of the Constitution, when this article is interpreted in the light of Article 14 of the Convention, does not justify the Applicant's allegation of a violation of this fundamental right because, he does not prove and substantiate in any way that

the regular courts treated him in an unequal way, for any of the forms of discrimination provided by Article 24 of the Constitution.

Regarding the allegation of violation of the right to "fair and impartial trial"

33. In this respect, the Court notes that the Applicant alleges that the regular courts did not give him the opportunity to file allegations, evidence and facts and that no measure was taken against other debtors, but only against him.
34. In fact, the Court notes that the Applicant failed to support this allegation on constitutional basis and to show how and why there has been a violation of this right by the regular courts or why their decisions were arbitrary. In addition, the Applicant relates the violation of this right with violation of Article 1016 of the Law on Obligations.
35. In that respect, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). The Court may not itself assess the facts which have led the regular courts to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would be to disregard the limits imposed on its jurisdiction.
36. In fact, the role of regular courts is to interpret and apply the relevant rules of procedural and substantive law (see: the ECtHR case *Perlala v. Greece*, No. 17721/04, of 22 February 2007, paragraph 25 and *Khan v. the United Kingdom*, paragraph 34, and see also cases: KI70/11, Applicants *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011; and KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, para. 41).
37. The role of the Constitutional Court is to ensure the compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as a "fourth instance court" (see: ECtHR case, *Akdivar v. Turkey*, No. 21893/93, paragraph 65, see also: *mutatis mutandis*, Resolution on Inadmissibility 2012).
38. For the reasons elaborated above, the Court notes that the Applicant merely does not agree with the outcome of the proceedings before the regular courts, namely with the fact that he was denied an appeal against the enforcement order. However, the dissatisfaction of the Applicants with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim of violation of the constitutional rights. (see: *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; see also: Resolution on Inadmissibility of the Constitutional Court in Case KI25/11, Applicant *Shaban Gojnovci*, of 28 May 2012, paragraph 28; see also case KI56/17, Applicant *Lumturije Murtezaj*, Resolution of Inadmissibility of 18 December 2017, paragraph 42).

Regarding the allegation of violation of Article 46 [Protection of Property]

39. Moreover, the Court notes that the Applicant also alleges violation of Article 46 [Protection of Property]. In this regard, the Court recalls that the Applicant relates this allegation with the violation of the right to equality before the law and the fair trial. However, he specifically does not further substantiate how and why there has been a deprivation of his right to property, namely the violation of Article 46 of the Constitution by regular courts. Therefore, the Court considers also this allegation of the Applicant to be manifestly ill-founded on constitutional basis.
40. In conclusion, the Court finds that the Applicant's Referral is to be declared manifestly ill-founded, on constitutional basis, because the arguments raised in the Referral do not in any way justify his allegations of violation of Articles 24, 31 and 46 of the Constitution.
41. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and, in accordance with Rule 39 (2) of the Rules of Procedure, it is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and Rules 39 (2) and 59 (b) of the Rules of Procedure, on 6 June 2019, unanimously

DECIDES

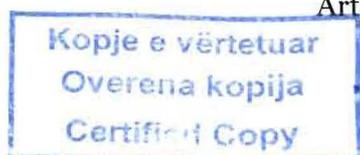
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Safet Hoxha

Arta Rama-Hajrizi



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