



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

Prishtina, 29 November 2019  
Ref. No.:RK1468/19

*This translation is unofficial and serves for informational purposes only.*

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI16/19**

Applicant

**“Bejta Commerce”**

**Constitutional review of Judgment[E.Rev.no.20/18] of the Supreme Court  
of Kosovo, of 31 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 filed on behalf of the company "Bejta Commerce", by Basri Kçiku and Adem Kçiku, (hereinafter: the Applicant). The Applicant's representative is Basri Kçiku from Gjilan.

## **Challenged decision**

2. The Applicant challenges the constitutionality of Judgment [E.Rev.nr.20/18] of the Supreme Court of 31 July 2014 in connection with Judgment [Ac. no. 178/2016] of the Court of Appeals, of 21 March 2018 and Judgment [IV.C. no. 570/14] of 12 July 2016 of the Basic Court in Prishtina (hereinafter: the Basic Court).
3. The Applicant has received the challenged Judgment on 24 September 2018.

## **Subject matter**

4. The subject matter is the constitutional review of the challenged decision which as alleged by the Applicant violated its rights guaranteed by Article 3 [Equality before the Law], Article 7 [Values], Article 21 [General Principles], Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial], Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights], as well as Article 119 [General Principles] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

## **Legal basis**

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Request] of the Law on the Constitutional Court of the Republic of Kosovo, No. 03 / L-121 (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**

6. On 24 January 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) by mail service.
7. On 29 January 2019, the Applicant's Referral had been received and registered in the Court's registry.
8. On 16 February 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
9. On 12 February 2019, the Court notified the Applicant about the registration of the Referral and requested from it to submit to the Court the power of attorney and a copy of acknowledgment of the receipt proving that the Applicant had received the challenged decision.

10. On 19 February 2019, the Applicant submitted the requested documents to the Court.
11. On 6 November 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

### **Summary of facts**

12. On the basis of the case file it results that the Applicant alleges that, at the request of the Municipality of Gjilan, specifically based on an unwritten (oral) contract, in agreement with the Mayor of Gjilan, from 28 December 2011, it had performed construction work, namely the paving of roads, whilst the Municipality of Gjilan failed to carry out its financial obligation for the work performed.
13. As a result of failure to have the abovementioned obligation fulfilled by the Municipality of Gjilan, the Applicant, on an unspecified date, filed a claim with the Basic Court in Gjilan, requesting from the Municipality of Gjilan to perform its financial obligation for causing material damage in the amount of 787,552.48 Euros.
14. On 12 July 2016, the Basic Court by Judgment [IV.C.no.570/14] rejected the Applicant's claim as unfounded. The Basic Court in the reasoning of the Judgment had stated that the Applicant failed to substantiate its allegation that it had entered into a contract with the Mayor of Gjilan. Moreover, in its reasoning, the Basic Court had emphasized even if there would exist an oral contract, it would not produce legal effects since the Law No.04/L-077 on Obligational Relationships, respectively its Article 630 paragraph 2, provides for the obligation that building contracts must be in writing.
15. On an unspecified date, the Applicant challenged the aforementioned Judgment of the Basic Court in the Court of Appeals by alleging: (i) a violation of the provisions of the contested procedure; (ii) erroneous or incomplete determination of the factual situation; and, (iii) erroneous application of the substantive law.
16. On 21 March 2018, the Court of Appeals by Judgment [Ac.no.178/2016] rejected the Applicant's appeal as unfounded and confirmed the Judgment of the Basic Court, reemphasizing that the Applicant had not proved any contractual relationship with the Municipality of Gjilan.
17. On 16 April 2018, the Applicant submitted a revision against the Judgment of the Court of Appeals, by alleging: (i) a violation of the provisions of the contested procedure; (ii) erroneous application of the substantive law; and (iii) exceeding of the claim.

18. On 31 July 2018, the Supreme Court, by Judgment [E. Rev. no. 20/2018] rejected the revision as unfounded and confirmed the judgments of the lower courts.
19. In its judgment on rejection of revision, the Supreme Court reasoned inter alia: *“On the basis of the fact that the claimant failed to argue that it had established an obligational relationship with the respondent, the allegation made in the revision concerning the application of Article 4 of the LOR in the present case was assessed as unfounded. Also, for the reasons mentioned above, Article 6 of the aforementioned law is not applicable; as no legal relationships have been established between the participants. Therefore, the legal position that the claimant’s statement of claim is unfounded is correct and based upon the law and for that reason is approved also by this revision Court”.*

### **Applicant’s allegations**

20. The Applicant alleges that the Judgment [E.REV.no.20/2018] of the Supreme Court, of 31 July 2018 has violated its rights guaranteed by Article 3 [Equality before the Law], Article 7 [Values], Article 21 [General Principles], Article 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial], Article 53 [Interpretation of Human Rights Provisions], Article 54 [Judicial Protection of Rights], as well as Article 119 [General Principles] of the Constitution.
21. The Applicant alleges that the decisions of the regular courts *“were issued with serious violations of the applicable law and to the detriment of the Applicant and in violation of their fundamental human rights guaranteed by the Constitution of the Republic of Kosovo and The International Convention [...] that both aforementioned courts have failed to decide fairly and impartially in the legal case of the Applicant”.*
22. The Applicant further alleges that *“On the basis of the evidence enclosed to this Referral it is confirmed that the Applicant has performed the said works in the name and in the account of the Municipality of Gjilan which amount to 678,898.69 Euros, and which were accepted without remarks by the Supervisory Authority of the Municipality of Gjilan, but, this fact was overlooked to the detriment of the Applicant by the aforementioned court judgments and as such violated the human rights as the courts did not approve the Applicant’s statement of claim, even though it has proved that it has performed the work specified in the aforementioned Report.*
23. The Applicant also alleges that he had carried out construction work for the Municipality of Gjilan on the basis of an oral contract concluded with the Mayor of Gjilan. Moreover, the Applicant also refers to a Report of the Municipality Commission of 28 December 2018, which as alleged by the Applicant confirms that it has carried out construction works for the Municipality of Gjilan. In this regard, the Applicant alleges that *“this fact has been overlooked by the three above-mentioned courts, which by their judgments have violated Applicant’s fundamental human rights guaranteed by the Constitution of the Republic of*

*Kosovo and International Conventions, as the Applicant's statement of claim has not been approved, even though it has proved that the Applicant has completed the work specified in the aforementioned Report amounting to the value of 678,898.69 Euros".*

24. Finally, the Applicant requests from the Court to invalidate the challenged Judgment of the Supreme Court and remand the case for reconsideration and re-adjudication.

### **Relevant legal provisions**

#### **LAW NO. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS VI. FORM OF CONTRACT**

##### **Article 55 Sanction for lack of necessary form**

- 1. A contract not concluded in the prescribed form has no legal effect, unless it follows otherwise from the purpose of provision by which the form is specified.*
- 2. A contract not concluded in the agreed form has no legal effect if the parties agreed that the special form would be a condition for the validity thereof.*

#### **BUILDING CONTRACT**

##### **CHAPTER 1 GENERAL PROVISIONS**

##### **Article 645 Definition**

- 1. A building contract is a contract for work through which the contractor undertakes to build a specific structure on specific land according to a specific plan by a specific deadline or to carry out any other construction work on such land or on an existing structure, and the ordering party undertakes to pay the contractor a specific fee for the work.*
- 2. A building contract must be concluded in written form.*

##### **Article 646 Building**

*The term "building" in this part means buildings, dams, bridges, tunnels, water pipes, sewage ducts, roads, railways, wells and other built structures that require major and more complex work.*

## Admissibility of the Referral

25. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and Rules of Procedure.
26. 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.*

27. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which provides:

*“4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.”*

28. In this respect, the Court notes that the Applicant is entitled to file a constitutional complaint, invoking violations of its fundamental rights and freedoms, which apply to individuals and legal entities (see, the Constitutional Court case no. KI41/09, Applicant *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).
29. In addition, the Court also examines whether the Applicant has fulfilled the admissibility criteria, as required by Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines], which provide:

### 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. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party challenging an act of a public authority, namely the Judgment [E.REV.no.20/2018], of the Supreme Court of 31 July 2018, after having exhausted all the legal remedies provided by the law. The Applicant has also stated the rights and freedoms he claims to have been violated, in accordance with Article 48 of the Law, and also has submitted the Referral in accordance with the deadline provided for by Article 49 of the Law.
31. However, the Court also examines whether the Applicant has met the admissibility criteria provided for by paragraph (2) of Rule 39[ Admissibility Criteria] of the Rules of Procedure, which provides as follows:

*“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 recalls that the Applicant alleges that the Judgment of the Supreme Court violated his rights guaranteed by Articles 3, 7, 21, 24, 31, 53, 54 and 119 of the Constitution. The Court notes that the Applicant did not justify his allegations for violations of Articles 3, 7, 21, 24, 53 and 119 of the Constitution, while the allegations for violation of Articles 31 and 54 of the Constitution the Applicant builds on the basis that the Supreme Court failed to treat the case evidence correctly when rejecting as unfounded its request for revision.
33. The Court notes that, in accordance with the requirements of Article 53 [Interpretation of Human Rights Provisions] of the Constitution and on the basis of its case-law, when reviewing and considering the Applicant's allegations, it will apply the standards of the case law of the European Court of Human Rights (hereinafter: ECtHR).
34. The Court notes that the case law of the ECtHR establishes the fundamental principle that the fairness of a judicial proceeding is considered on the basis of the proceedings as a whole (see the ECtHR Judgment of 6 December 1988, *Barbera*,

*Messeque and Jabardo v. Spain*, paragraph 68). Consequently, when considering the Applicant's allegations, the Court will also adhere to this principle (see, inter alia, the cases of Court K1104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017, paragraph 38; and K1143/16, Applicant *Muharrem Blaku and others*, resolution on Inadmissibility, of 13 June 2018, paragraph 31).

35. The Court recalls that the Supreme Court rejected the Applicant's revision submitted against the decisions of lower courts for procedural reasons, as the Applicant failed to prove the fact that there has existed a written contract with the Mayor of Gjilan, whereas the written form of this contract is expressly required under Article 55 [Sanction for lack of necessary form] and Article 645 [Building Contract] of the Law No. 04 / L-077 on Obligational Relationships.
36. In this respect, the Court refers to the relevant part of the reasoning of the Judgment of the Supreme Court, which states that: *"The Supreme Court of Kosovo has assessed that the revision claims concerning the erroneous application of substantive law are unfounded; because, on the basis of the established factual situation, it results that the claimant has not entered into a written contract with the respondent as envisaged by Article 630.2 of the LCP which stipulates that the building contract must be entered into in writing, while Article 70.1 of the law mentioned above has provided that the contract which is not concluded in the foreseen form has no legal effect. The second instance court has correctly ascertained that no contract has been signed between the parties on the construction whereby would have been determined the rights and obligations of the parties, hence the finding that there is no valid legal basis for the realization of the compensation for these works, is assessed as correct and based on the law also by this Revision Court. In view of the fact that the claimant has failed to argue that it had established an obligational relationship with the respondent, the allegation made in the revision concerning the application of Article 4 of the LOR in the present case was considered to be unfounded. On the basis of the above-mentioned reasons, also the Article 6 of the aforementioned law is not applicable, as the legal relations between the participants have not been established. Therefore, the legal position that the claimant's statement of claim is unfounded is approved also by this Revision Court"*.
37. The Court notes that the revision was rejected by the Supreme Court on the ground that the Applicant had failed to prove that it was in an obligational relationship with the Municipality of Gjilan as stipulated by the Law No.04/ L-077 on Obligational Relationships.
38. The Court considers that the Supreme Court's conclusions have been reached after a thorough examination of all the arguments put forward by the Applicant. Thereby, the Applicant was given the opportunity, at all stages of the proceedings, to present arguments and evidence which it has considered relevant for its case.
39. As regards the Applicant's allegation for a violation of the right to a fair and impartial trial, the Court notes that the Applicant's dissatisfaction with the

outcome of the proceedings before the regular courts cannot by itself raise an argumentative allegation for a violation of the right to a fair and impartial trial (see, *mutatis mutandis*, the ECtHR Case *Mezotur - Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21; and see also the Case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 42).

40. The Court notes that the Applicant has been allowed to pursue proceedings based on the principle of contradiction; that he was able, during various stages of the proceedings, to present arguments and evidence that he considered relevant to his case; that he has been given the opportunity to effectively contest the arguments and evidence presented by the opposing party; that all arguments, objectively looked at, that were relevant to the resolution of his case have been heard and properly examined by the courts; that the factual and legal reasons for the decisions struck were detailed and that, according to the circumstances of the case, the proceedings, in their entirety, were fair.
41. In this respect, the Court notes that it is not its duty to deal with the errors of law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which has led a regular court to adopt one decision rather than another. Otherwise, the Court would be acting as a court of "*fourth instance*", which would result in exceeding the limits set by its jurisdiction. If it were otherwise, the Court would act as a "fourth instance" court, which would result in exceeding the limits established in its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law. (See, the ECHR case, *García Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see also, inter alia, the Court case: KI70/11, Applicants *Faik Hima, Magbule Hima and Besart Hima*, Ruling on Inadmissibility, of 16 December 2011).
42. Regarding the Applicant's allegation for a violation of Article 7 [Values] and Article 119 [General Principles] of the Constitution, the Court recalls that it is a general principle that Articles of the Constitution which do not directly regulate fundamental rights and freedoms do not have an independent effect, as their effect applies solely to the "*enjoyment of rights and freedoms*" guaranteed by the provisions of Chapters II and III of the Constitution. Therefore, these articles cannot be applied independently unless the facts of the case fall within the scope of at least one or more of the provisions of the Constitution relating to "*the enjoyment of human rights and freedoms*" (see, the Case of the Constitutional Court, KI67/16, Applicant *Lumturije Voca*, Resolution on Inadmissibility, of 23 January 2017, paragraph 128).
43. Consequently, based on the foregoing, as well as on the basis of the standards established in its own case-law in similar cases and the ECtHR case-law the Court finds that the allegations raised by the Applicant and the facts presented by it, have not sufficiently proved and substantiated his allegations that the proceedings

before the regular courts were in any way unfair or arbitrary or that the challenged Judgment violated its rights and freedoms guaranteed by the Constitution and the ECHR.

44. Therefore, the Referral is manifestly ill-founded on constitutional grounds, and as such is declared inadmissible pursuant to Article 113.7 of the Constitution and as further specified in Rule 39 (2) of the Rules of Procedure.

### **FOR THESE REASONS**

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rule 39 (2) of the Rules of Procedure, in the session held on 6 November 2019, unanimously

### **DECIDES**

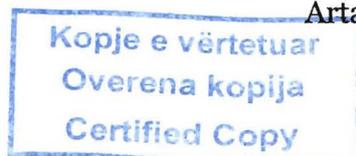
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Nexhmi Rexhepi

Arta Rama-Hajrizi



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