



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Pristina, 14 December 2010
Ref. No.: RK71/10

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 49/09

**Applicant
Veli Sermaxhaj**

**Constitutional Review of Decision of the Municipal Court of Gjilan,
E.no. 299/05, dated 26 May 2005
and
Decision of the Municipal Court of Gjilan, P.no. 772/05,
dated 26 March 2009
and
Decision of the Municipal Court of Gjilan, Ed.no. 44/09,
dated 25 November 2009**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Mr. Veli Sermaxhaj residing in Gjilan.

Challenged decisions

2. The challenged decisions are:
 - a. the civil case decision of the Municipal Court of Gjilan, E.no. 299/05 of 26 May 2005, which was served on the Applicant on 4 July 2005;
 - b. the criminal case decision of the Municipal Court of Gjilan, P.no. 772/05 of 26 March 2009, which was served on the Applicant on 7 April 2009; and
 - c. the execution decision of the Municipal Court of Gjilan, Ed.no. 44/09 of 25 November 2009, which was served on the Applicant on 26 November 2009.

Subject matter

3. The Applicant claim that the expert appointed by the Municipal Court of Gjilan for the evaluation of the property had abused his official duty and that he has requested the Municipal Court to apply Articles 30 [Application of General Provisions on Criminal Liability], 39.3 [Punishment of Fine], 43.2 [Suspended Sentence] of the Provisional Criminal Code of Kosovo Regulation 2003/25 (hereinafter: the "PCCK"). Further, he alleges that the Prosecutor, who is a friend of a third party had threatened him with imprisonment and liquidation if the Applicant did not pay his debt to the third party.
4. The Applicant does not invoke any Article of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution").

Legal basis

5. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Section 54(b) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 5 October 2009, the Applicant submitted a referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").
7. On 22 October 2009, the Court sent a letter to the Applicant notifying him that he had to fill out the Application form in order to file a Referral with the Court.
8. On 3 November 2009, the Applicant submitted the Referral to the Court.
9. On 15 November 2009, the Applicant filed an additional submission with the Court stating that the expert appointed by the Municipal Court of Gjilan for the evaluation of the property had abused his official duty.
10. On 18 February 2010, the Secretariat communicated the Referral to the Municipal Court of Gjilan, which submitted its reply on 9 March 2010,

providing the Court with a chronological history of the civil and criminal cases. The Municipal Court specified that, in its opinion, no rights of the Applicant had been violated and that he had participated in every court session and had had the right to appeal against each judgment.

11. On 13 December 2010, the Review Panel, consisting of Deputy President Kadri Kryeziu (Presiding), and President Enver Hasani and Judge Iliriana Islami, considered the Report of the Judge Rapporteur Snezhana Botusharova and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of the facts

12. In his Referral, the Applicant complains about courts decisions taken in two different civil cases and in one criminal case.

As to the civil proceedings

13. The first civil case concerned a debt of the Applicant's company ("NPT Vlora VS") owed to the "Banka Kreditore Sh.a." in Pristina (hereinafter: the "Creditor").
14. On 25 April 2005, the Creditor submitted to the Municipal Court of Gjilan a request for execution with sequestration and confiscation of the collateral and sale of immovable property, since the Applicant had failed to fulfill his obligations under the loan agreement concluded on 9 March 2004.
15. On 26 May 2005, the Municipal Court allowed the execution of the Creditor's request (Decision E.no. 299/05). The Applicant did not submit an appeal against this decision.
16. On 6 September 2005 the Municipal Court of Gjilan suspended the execution procedure, since the Applicant and the Creditor had entered into a court settlement.
17. On 9 May 2006, the Creditor filed a request for execution with the court, claiming that the Applicant had not fulfilled his obligation in accordance with the court settlement.
18. On 12 December 2006, the Municipal Court of Gjilan estimated the market value of the property of the Applicant, based on an evaluation made by a financial expert appointed by the court.
19. The Applicant appealed against this judgment to the District Court of Gjilan, which, on 14 February 2007, rejected the appeal as unfounded and upheld the judgment of the Municipal Court.
20. On 21 June 2007, the Municipal Court of Gjilan withdrew its decision of 28 May 2007, by which it had postponed the sale of the property for a further 6 months, at the request of the Creditor for the return to the previous state. None of the parties appealed against this Judgment.

21. On 10 August 2007, the Municipal Court decided on the best offer made for the property. The Applicant appealed against the judgment to the District Court of Gjilan, which, on 2 October 2007, declared the appeal unfounded and upheld the judgment of the Municipal Court of Gjilan.
22. Thereupon, the Applicant submitted a request for revision against the District Court's ruling to the Municipal Court of Gjilan, which, on 14 November 2007, dismissed the request as inadmissible. The Applicant did not appeal against this Judgment.
23. The Applicant then challenged the decision on execution and evaluation of the property before the Municipal Court, which, on 17 December 2007, rejected also this claim as unfounded.
24. On 25 February 2009, the Applicant submitted a request for retrial to the Municipal Court of Gjilan, which, however, rejected it. The Applicant did not appeal this decision.
25. On 8 May 2009, the Municipal Court of Gjilan ruled that the sale of the property is invalid because the buyer did not pay the amount within the legal time limit. This decision was not appealed.
26. On 26 August 2009, the Municipal Court of Gjilan issued decision E.no. 299/05, 651/06 and 920/2007 to determine the expertise in evaluating the mortgaged immovable property, while in accordance with the Court Conclusion of 1 February 2010, the mortgaged property value was determined through a decision acknowledged by all parties in procedure and now awaits the publication of the auction for selling the mortgaged property in order of meeting the creditor's request for debt repayment.
27. In the second civil case concerning the payment by the Applicant of a debt to a third person, the Municipal Court of Gjilan ruled, on 5 October 2005, that the Applicant had to pay this debt to that person. The Applicant did not appeal against this decision.

As to the criminal proceedings

28. On 12 June 2003, the Applicant entered into a loan agreement.
29. On 3 February 2009, the Applicant was summoned to appear at a hearing on 10 March 2009, being accused of having committed fraud, pursuant to Article 261 (1) of the Criminal Code of Kosovo.
30. However, without informing the court, the Applicant did not attend the hearing, which was then postponed until 26 March 2009.
31. At the hearing of 26 March 2009 the Applicant admitted his guilt and was, consequently, convicted for fraud and sentenced to three months imprisonment which would not be executed if within one year does not committ a criminal act (Decision P.no. 772/05).

32. Thereupon the Prosecutor appealed against this judgment to the District Court of Gjilan, stating that the Municipal Court should have imposed a harsher sentence.
33. On 16 June 2009, the District Court of Gjilan sentenced the Applicant to three months of imprisonment.

As to the execution of decision P.no. 772/05

34. On 27 July 2009, the Municipal Court of Gjilan approved the request of the Applicant to postpone the sentence.
35. On 23 October 2009, the Municipal Court of Gjilan rejected a further request of the Applicant to postpone the carrying out of the sentence as unfounded. The Applicant appealed this decision to the District Court of which rejected the appeal as unfounded.
36. On 25 November 2009, the Municipal Court rejected the Applicant's request to replace the sentence by a fine as unfounded (Decision Ed.no. 44/09).
37. The Applicant appealed the decision of the Municipal Court of Gjilan to the District Court of Gjilan, which, on 10 December 2009 rejected the appeal as unfounded.

Applicant's allegations

38. The Applicant alleges that the decisions of the regular courts were not consistent and that the appointed expert as well as the prosecutor were biased. Moreover, the courts did not allow him to properly present his case at the oral hearings, nor to be represented by a lawyer.
39. Finally, he complains that all cases before the Municipal Court in Gjilan were handled by the same judge.

Assessment of the admissibility of the Referral

40. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.
41. Article 113.7 of the Constitution states:

"Individual persons 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."
42. The Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution, invoked by the Applicant before those instances. The rule is based on the assumption that the

Kosovo legal order will provide an effective remedy for the violation of constitutional rights. (*see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803/94, decision of 28 July 1999*). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (*see, mutatis mutandis, ECHR, Azinas v. Cyprus, no. 56679/00, decision of 28 April 2004*).

43. This Court applied the same reasoning when it issued Resolution on Inadmissibility in the case of AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Case KI 41/09 of 27 January 2010, and in the Resolution on Inadmissibility in the case of Mimoza Kusari-Lila vs. The Central Election Commission, Case No. KI 73/09 of 23 March 2010.
44. It is clear from the Applicant's submissions that he never raised or pursued the alleged violations before the higher instance courts, including the Supreme Court of the Republic of Kosovo.
45. It follows that the Applicant has in the civil, criminal and execution proceedings not exhausted all legal remedies available to him under applicable law as required by Article 113.7 of the Constitution.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, 47 of the Law, and Section 54 (b) of the Rules of Procedure, unanimously,

DECIDES

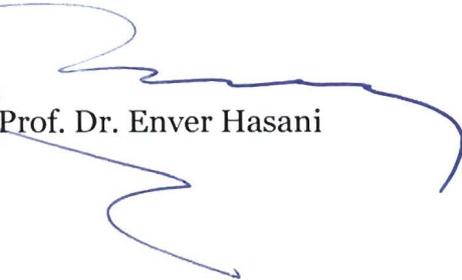
- I. TO REJECT the Referral as Inadmissible.
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.
- III. This Decision is effective immediately.

Judge Rapporteur


Snezhana Botusharova



President of the Constitutional Court


Prof. Dr. Enver Hasani