



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 3 April 2018
Ref. No.: RK 1204/18

RESOLUTION ON INADMISSIBILITY

in

Case No. KI19/17

Applicant

Fatos Dervishaj

**Request for constitutional review of
ongoing proceedings before the Court of Appeals of the Republic of
Kosovo, regarding case Ac. No. 953/14 and the Basic Court in Gjakova**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Referral was submitted by Fatos Dervishaj (hereinafter: the Applicant), residing in Prishtina.

Challenged decision

2. The Applicant does not challenge any concrete act of public authorities. He challenges the reasonability of the length of the proceedings regarding the adjudication of case Ac. No. 953/14, by the Court of Appeals of the Republic of Kosovo and the Basic Court in Gjakova.

Subject matter

3. The subject matter relates to the Applicant's request for constitutional review of the length of proceedings regarding the adjudication of the case Ac. No. 953/14 before the Court of Appeals of the Republic of Kosovo and the Basic Court in Gjakova, and as a result, the Applicant alleges violation of the fundamental rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).
4. The Applicant even after being served with Decision Ac. No. 953/14 of 28 September 2017, by the Court of Appeals, which remands the case for retrial to the first instance court, claims that this Decision will further delay and complicate his case.

Legal basis

5. The Referral is based on Article 113.7 of the Constitution, Article 47 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 29 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 February 2017, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 20 March 2017, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Gresa Caka-Nimani.
8. On 11 April 2017, the Court notified the Applicant about the registration of Referral and sent a copy of the Referral to the Court of Appeals of Kosovo, requesting it to submit comments regarding the delay of the proceedings.
9. On 27 July 2017, the Court of Appeals of Kosovo submitted its comments to the Court.
10. On 2 November 2017, the Applicant submitted a document to the Court, notifying the Court that the Court of Appeals decided on his case, and attached Decision Ac. No. 953/2014 of the Court of Appeals.

11. On 21 February 2018, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Comments submitted by the Court of Appeals of Kosovo

12. In its reply to the Court, the Court of Appeals states that the case was registered with it as case Ac. No. 953/14, on 18 March 2014, and that it was allocated to Judge M.S. on 3 July 2014. In the reply it is further emphasized that the case so far has not been completed.

Summary of facts

Summary of facts in contested procedure regarding confirmation of debt

13. On 27 January 2003, the Applicant filed a claim with the Municipal Court in Gjakova, against the respondents H.D. and SH.D. The claim pertained to the payment of a debt that the respondents (in a capacity of the purchasers) owed to the Applicant (in a capacity of the seller) as a result of a verbal contract on the sale-purchase of an immovable property in the village of Hereq, Municipality of Gjakova.
14. On 14 October 2004, the Municipal Court in Gjakova (Judgment C. No. 65/03) partially approved the statement of claim and obliged the second respondent SH.D. to pay the debt to the Applicant. The statement of claim against the first respondent was rejected as ungrounded.
15. On 15 February 2005, the Applicant filed an appeal with the District Court in Peja against Judgment C. No. 65/03 of the Municipal Court in Gjakova of 14 October 2004, alleging essential violation of the provisions of the contested procedure, erroneous determination of factual situation and erroneous application of the substantive law. The appeal against the aforementioned Judgment was also filed by SH.D., alleging essential violation of the provisions of the contested procedure and erroneous determination of factual situation.
16. On 6 March 2007, the District Court in Peja (Judgment Ac. No. 138/05) rejected the appeals of the Applicant and of the respondent SH.D. as ungrounded, considering that the Municipal Court in Gjakova, by Judgment C. No. 65/03, correctly and completely determined the factual situation and that the substantive law was correctly applied.

Summary of facts in the enforcement procedure

17. On 4 May 2007, the Applicant submitted a proposal for execution to the Municipal Court in Gjakova, of Judgment C. No. 65/03 of the Municipal Court in Gjakova, of 14 October 2004.
18. On 4 May 2007, the Municipal Court in Gjakova (Judgment 1283/07) allowed the execution of Judgment C. No. 65/03 of the Municipal Court in Gjakova, of 14 October 2004.

19. This decision was not appealed and it has become final.
20. On 15 August 2008, the Municipal Court in Gjakova (Decision E. No. 1283/07) after the site inspection for execution of a debt, suspended the enforcement procedure decided by Decision 1283/07 of 4 May 2007 by the Municipal Court in Gjakova. The reasoning adds:

“The court conducted the site inspection for the execution of the debt in question on 27.06.2007, 17.01.2008 and 18.01.2008, but the execution was impossible since the debtor did not find funds and assets which can be alienated and the creditor would be compensated, at the same time the debtor did not have good will to fulfill the obligation [...] the creditor by any evidence did not substantiate that the debtor has created movable and immovable property after 21.01.2008 and seeks the execution on the registered immovable property [...] The court concluded that the immovable property mentioned in the creditor's claim are not registered in name of debtor Shemsedin Dervishaj, but on behalf of the third person”.

21. On 3 September 2008, the Applicant filed an appeal with the District Court in Peja against Decision E. No. 1283/07, of the Municipal Court in Gjakova, of 15 August 2008, on the grounds of violation of the enforcement provisions and erroneous determination of factual situation.
22. On 14 January 2009, the District Court in Peja (Decision Ac. No. 414/08) annulled Decision E. No. 1283/07 of the Municipal Court in Gjakova, of 15 August 2008, and remanded the case to the same court for retrial. The Decision further states that:

“The challenged decision contains essential violation of Article 354 paragraph 1 in conjunction with Article 142 of the LEP. Because the first instance court incorrectly applied these provisions, which had an impact on the lawful and regular decision, it committed essential violation of the absolute nature for which the challenged decision had to be quashed [...] The challenged decision also contains essential violation of Article 354 paragraph 1 in conjunction with Article 2 of the LCP. This consists in the fact that the creditor proposed the sale of the immovable property which is not registered in the name of the debtor, while Article 142, paragraph 2, stipulates that if the immovable property is registered in the name of another person and not in the name of the debtor, then the creditor should submit an adequate document for registering the right of the debtor”.

23. On 15 May 2012, the Municipal Court in Gjakova (Decision E. No. 91/09) obliges the Applicant to submit to the Court, within 60 days, respective documents for the registration of the property right on behalf of SH.D., and reasoned:

“The court registered the parcel, in accordance with Article 186 of the LEP, which registration has the significance after execution. This provision was applied due to the fact that the cited immovable property is not registered in the name of the debtor, while the factual situation is different from the state of the cadastral records [...] The court obliged the creditor to present

a respective document for the registration of the right in the name of the debtor within provided time limit [...] the creditor has the right to request through the claim the registration of the property right for the above-mentioned immovable property on behalf of the debtor. The decision on allowing the execution may serve to the creditor as the basis for filing the claim in this case as well as all the documents of this case”.

24. On 28 May 2012, the Applicant filed an appeal with the District Court of Peja against Decision E. No. 91/09 of the Municipal Court in Gjakova, of 15 May 2012, alleging an essential violation of the provisions of the execution procedure and erroneous determination of the substantive law.
25. On 14 November 2012, the District Court in Peja (Decision Ac. No. 395/12) rejected as ungrounded the Applicant's appeal, assessing Decision E. No. 91/09 of the Municipal Court in Gjakova, of 15 May 2012, as regular and lawful.

Summary of facts in contested procedure regarding confirmation of ownership

26. On 24 December 2012, the Applicant filed a claim with the Basic Court in Gjakova, for confirmation of ownership over the property which is the subject of the dispute in the name of the Applicant and has also required that SH.D be obliged to pay the costs to the Applicant up to the final execution.
27. On 9 January 2014, the Basic Court in Gjakova (Decision C. No. 433/12) rejected the Applicant's claim reasoning that the value of the dispute was not specified in the claim as well as the cadastral parcel number.
28. On 20 January 2014, the Applicant filed an objection against Decision C. No. 433/12 of the Basic Court in Gjakova, of 9 January 2014.
29. On 24 January 2014, the Basic Court in Gjakova (Decision C. No. 433/12) returned the objection to the Applicant in order for the same to be completed. The reasoning further states that *“The objection” submitted on 20.01.2014 is returned to the claimant Fatos (Sadik) Dervishaj [...] for supplement and specification, so that it must be supplemented and specified by entitling it as appeal addressed to the Basic Court in Gjakova [...] stating the reasons of the appeal with the relevant reasoning [...] “.*
30. On 27 January 2014, the Applicant filed an appeal with the Court of Appeals of Kosovo against Decision C. No. 433/12 of the Basic Court in Gjakova, of 24 January 2014, alleging violation of the rules of the contested procedure, erroneous determination of factual situation and erroneous application of the substantive law.
31. On 4 March and 13 September 2016, the Applicant addressed the Office of the Disciplinary Counsel with a submission in which he expressed dissatisfaction with the delay in deciding on his case to the Court of Appeals of Kosovo.
32. On 14 April and 11 July 2016, the Office of the Disciplinary Counsel, by letter ZPD/16/zp/317, notified the Applicant that based on the investigations they

conducted, they found that the case was delayed for objective reasons and that there was no sufficient basis to open a disciplinary investigation.

33. On 25 January 2017, the Applicant addressed the Court of Appeals of Kosovo with a proposal for the urgency of the case.
34. On 28 September 2017, the Court of Appeals of Kosovo rendered Decision Ac. No. 953/2014, annulling the Decision of the Basic Court in Gjakova, C. No. 433/2012 of 9 January 2014, and remanded the case for retrial to the first instance. The Decision further states that *"the logical conclusion and legal position of the first instance court is not fair and based on law. This is due to the fact that it has erroneously applied Article 102.3 of the LCP, rejecting as irregular the claim of the claimant in this legal matter - without fulfilling the legal requirements for this and makes the challenged decision affected by essential violation of Article 182 par.1 of LCP"*.

Applicant's allegations

35. The Court recalls that the Applicant requires the constitutional review of the length of proceedings regarding the adjudication of the case Ac. No. 953/14, in the Court of Appeals of the Republic of Kosovo, and the Basic Court in Gjakova, which allegedly violated the rights guaranteed by Article 31 [Right to Fair and Impartial Trial] Article 32 [Right to Legal Remedies] Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution.
36. The Applicant alleges *"Although this case has an enforcement title, and that now the case is in the Court of Appeals, Ac. No. 953/14, because the court cannot successfully complete it, or better to say that the court itself even after many judgments and the decisions of the first and second instance courts this property issue was delayed and even more complicated"*.
37. The Applicant further alleges that *"since 2003 when the court proceedings have started up to date, the case is found sometimes before the first instance court, and some times before the second instance court, in proceedings which seem to be unable to be completed"*.
38. The Applicant further claims that *"being tired with lengthy court proceedings, he does not see any other choice and he is obliged to address, in accordance with the competence and the highest authority, the Constitutional Court"*.
39. The Applicant after being served with Decision Ac. No. 953/2014, of the Court of Appeals, of 28 September 2017, claims that *"The Decision of the Court of Appeals (slapdash) does not find anything and it is very clear that not only there is no final decision, but it gives no advice or guidance as to how the first instance court must act, and by this it seems that the case will be even more delayed and complicated."*
40. The Applicant now requests that *"the Constitutional Court must act without delay and that by clear advice and guidance tells the court how to act [...]"*.

Admissibility of the Referral

41. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and the Rules of Procedure.

42. Firstly, the Court refers to provisions of Article 113 (7) of the Constitution which establish:

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”.

43. The Court also refers to Article 48 of the Law, which foresees:

“7. 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”.

44. In addition, Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, provides:

“(1) The Court may consider a referral if:

[...]

(d) the referral is prima facie justified or not manifestly ill-founded”.

“(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

[...]

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights;

[...]

(d) the Applicant does not sufficiently substantiate his claim”.

45. In this case, the Court notes that the Applicant has fulfilled the procedural requirements stipulated by Article 113.7 of the Constitution, as well as Articles 48 and 49 of the Law.

46. The Court notes that the essence of the Referral relates to the allegation of a violation of the right to a fair trial, namely a violation of the right to a final judgment within a reasonable time by the regular judiciary, emphasizing that *“since 2003 when a court proceeding has begun until now, the case is found sometimes before the first instance court, and sometimes before the second instance court, in proceedings that appear to unable to be completed.”*

47. In this respect, the Court refers to Article 31, paragraph (2) of the Constitution, in conjunction with Article 6 (1) of the European Convention of Human Rights (hereinafter: the ECHR), which establishes:

Article 31 (2) of the Constitution

2) “Everyone is entitled to a fair and impartial public hearing as to the determination of one’s rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.”

[...]

Article 6 (1) of the Convention

1) “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

[...]

48. Initially, the Court recalls that Article 6 (1) of the Convention provides that it is for the Contracting States to organize their legal systems in such a way that the competent authorities can meet the requirements of the abovementioned Article of the Convention, including the obligation to hear cases within a reasonable time and, where necessary, join them, suspend them or reject the further institution of new proceedings (In addition: see the ECtHR's Judgment in case *Luli and others v. Albania*, of 1 April 2014 complaints no. 64480/09, 64482/09, 12874/10, 56935/10, 3129/12 and 31355/09, paragraph 91).
49. Regarding the length of the proceedings, the Court takes into account the established in the Judgment of the European Court of Human Rights (hereinafter: the ECtHR) in *Tomazic v. Slovenia*, of 2 June 2008); appeal 38350/02, paragraph 54, which defines the following: “As to the reasonableness of the length of proceedings, the ECtHR states that this should be assessed in the light of the circumstances of the case and having regard to the following criteria: the complexity of the case, the conduct of the Applicant and the relevant authorities as well as what was at stake for the Applicant in this dispute”.
50. The Court referring to the case law of the ECtHR and its case law, assessed the calculation of the process and the length of the proceedings, starts to run when the parties file request with the competent court for the establishment of a right or a legitimate interest claimed (see, case, *Erkner and Hofauer v. Austria* ECtHR, 23 April 1987, paragraph 64; see also ECtHR case *Poiss v. Austria*, 23 April 1987, paragraph 50, and the case of the Constitutional Court no. KI127/15, *Mile Vasovič*, Resolution on Inadmissibility of 15 June 2015, paragraph 43, KI 81/16, *Valdet Nikqi*, Judgment of 31 May 2017). This process is considered completed with the issuance of a final decision by a competent court of the last instance (see case *Eckle v. the Federal Republic of Germany*, ECtHR, of 15 July 1982, paragraph 74).
51. In the present case, the Court notes that there are three types of proceedings, namely, the proceedings followed in the contested procedure regarding the confirmation of the debt, then the enforcement procedure and the contested procedure for confirmation of ownership in which there is still no final decision.

52. In this regard, the Court considers that the first proceedings relating to the confirmation of the debt and the second proceedings, namely the enforcement procedure, should not be taken into account, since the Applicant expressly in his request for extension refers to the procedure for confirmation of ownership which has not been completed yet by a final decision.
53. Regarding the contested procedure for the confirmation of ownership, initiated by the Applicant by filing the claim on 24 December 2012, the first instance decision was rendered on 9 January 2014. The Court notes that the Applicant addressed the Court of Appeals with the appeal on 27 January 2014. The Applicant on 2 November 2017 notified the Court that the Court of Appeals on 28 September 2017 rendered Decision Ac. No. 953/2014 by remanding the case to the first instance court for retrial.
54. The Court notes that the same allegations of delay of the proceedings were also filed by the Applicant with the Office of the Disciplinary Counsel, who through a letter informed the Applicant that based on the investigations they conducted they found that there is no sufficient basis for the opening of a disciplinary investigation.
55. Therefore, based on the above, the Court notes that the period to be considered in respect of the Applicant's allegations of a violation of Article 31.2 of the Constitution in conjunction with Article 6.1 of the ECHR is 4 (four) years and 10 (ten) months.
56. The Court notes that the complexity of a proceeding must be considered within the factual and legal aspect of the dispute in question.
57. Moreover in this case, as noted in the case file, the issue of the property right holder has still not been resolved despite many court decisions.
58. Accordingly, the Court emphasizes that based on the above, the Applicant's case can be regarded as a reasonably complex in terms of legal and factual situation.
59. The Court emphasizes that the effectiveness of the proceedings depends on the conduct of the parties involved in the proceedings (see *mutatis mutandis* Decision No. 11541/85 of the former European Commission of Human Rights of 12 April 1989, O.I. 70).
60. Regarding the Applicant's conduct, the Court notes that the Applicant has been very active following all the procedural steps made available by the applicable laws, and furthermore has initiated three types of proceedings in this court procedure. The Court notes that the Applicant initiated the court proceeding for the confirmation of ownership in his name on 27 January 2014, although this procedure may have been initiated by the Applicant earlier. In addition, the Applicant has been instructed by many court decisions to file a document confirming ownership on behalf of SH.D. and the Court notes that such a thing was not done by the Applicant.

61. In this regard, the Court recalls that Applicants are entitled to make use of all relevant domestic procedural steps available by applicable laws. However, the Applicants should also take into account the consequences in case the legal remedies used can affect the delay (See case, *McFarlane v. Ireland* ECtHR, of 10 September 2010, application No. 31333/06, paragraph 148).
62. Moreover, the Court considers that the conduct of the Applicants constitutes an objective fact which cannot be attributed to the courts and must be taken into account in the finding whether the proceedings continued beyond the reasonable timeframe required by the provisions of Article 31 of the Constitution and Article 6 of the Convention (See case *Eckle v. Germany*, ECtHR, Application 8130/78, Judgment of 15 July 1982, paragraph 82).
63. With regard to the conduct of the competent authorities in the abovementioned procedure, the Court notes that the regular courts had been active in the adjudication of the case, since the moment of initiation, where nine judicial decisions were rendered throughout the procedure and the final decision is Decision AC. No. 953/2014 of the Court of Appeals of 28 September 2017, which remands the case for retrial to the first instance.
64. The Court, in the light of the complex circumstances of the case, given the complex legal basis, the conduct of the parties to the proceedings, their legitimate interests and the legal remedies used by the parties, as well as the special procedural obligations that the regular courts have been obliged to apply with regard to this particular case, given that the issue of the property right holder is still not regulated and, furthermore a total of nine court decisions in all proceedings before the regular courts, it reaches the conclusion that the respective courts since the moment of initiation of proceedings have not been passive.
65. In addition, based on the case file and in the light of the circumstances of the case, the Court notes that the regular courts had been active in the adjudication of the case since the initiation of the proceedings, and, accordingly, did not cause any unreasonable delay of the proceedings.
66. As to other allegations of the Applicant of violation of Articles 32 [Right to Legal Remedies] Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution, the Court does not consider it necessary to review them one by one, as long as the essence of the complaint relates to the allegation of violation of Article 31 (2) of the Constitution, in conjunction with Article 6 (1) of the Convention, namely the right to a final decision, within a reasonable time.
67. Based on the foregoing, the Court concludes that the Applicant has not sufficiently substantiated his allegation of a violation of the fundamental rights guaranteed by the Constitution and the ECHR, namely the right to a fair trial, within a reasonable time limit, because the facts presented by him do not in any way show that the regular courts have denied him this constitutional right.
68. Therefore, the Referral is manifestly ill-founded on constitutional basis, in accordance with Rule 36 (2) (b) and (d) of the Rules of Procedure.

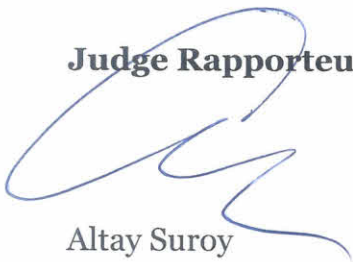
FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 48 of the Law and Rule 36 (2) (b) and (d) of the Rules of Procedure, on 20 February 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. TO DECLARE this Decision effective immediately;

Judge Rapporteur



Altay Suroy



President of the Constitutional Court



Arta Rama-Hajrizi