



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

Prishtina, on 10 Juna 2019
Ref. no.:RK 1370/19

RESOLUTION ON INADMISSIBILITY

in

case No. KI44/18

Applicant

„Mega Shop“

**Request for constitutional review of Judgment Rev. No. 125/2017 of the
Supreme Court of 15 November 2017**

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 „Mega Shop“ with seat in Gjilan (hereinafter: the Applicant), which is represented by the authorized representative Gafurr Elshani from Prishtina.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 125/2017 of the Supreme Court of 15 November 2017, in conjunction with Judgment Ac. No. 1576/ 2014 of 11 November 2016 and Judgment C. No. 96/ 2011 of the Basic Court in Gjilan of 27 January 2014.
3. The challenged judgment was served on the Applicant on 14 December 2017.

Subject matter

4. The subject matter is the constitutional review of the challenged decisions which allegedly violate the Applicant's right guaranteed by Article 3 [Equality Before the Law], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Fundamental Human Rights and Freedoms (hereinafter: ECHR).

Legal basis

5. The Referral is based on Articles 21.4 and 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 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
6. On 31 May 2018, the Court adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

7. On 27 March 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 29 March 2018, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.
9. On 23 April 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
10. On 16 June 2018, the mandate of judges: Almiro Rodrigues and Snezhana Botusharova was terminated. On 26 June 2018, the mandate of judges Altay Suroy and Ivan Čukalović was terminated.

11. On 22 August 2018, the President of the Court rendered Decision on the replacement of Judge Rapporteur Almiro Rodrigues, and instead appointed Judge Remzije Istrefi-Peci as Judge Rapporteur.
12. On 20 November 2018, the President of the Court rendered Decision on the replacement of Judge Altay Suroy, as Presiding of the Review Panel, and instead, appointed Judge Bekim Sejdiu as Presiding of the Review Panel.
13. On 20 November 2018, the President of the Court rendered Decision on the replacement of Judges: Snezhana Botusharova and Bekim Sejdiu, as members of the Review Panel, and instead appointed Judges Selvete Gërxhaliu-Krasniqi and Safet Hoxha as members of the Review Panel.
14. On 8 May 2019, the Review Panel considered the Report of the Judge Rapporteur and recommended to the Court the inadmissibility of the Referral.

Summary of facts

15. Based on the case file, it follows that the Applicant on 24 July 2007 (the mortgagee) concluded the Mortgage Agreement No. 200628355/H with Raiffeisen Bank Kosovo J. S. C (mortgagor).
16. The purpose of this Mortgage Agreement is to secure the obligations arising from the loan agreement, on the basis of which Raiffeisen Bank of Kosovo provides a certain amount of money to the Applicant under certain conditions, and the Applicant in the event of failure to fulfill obligations under the loan agreement guarantees by his immovable property under the Mortgage Agreement No. 200628355/H.
17. The Mortgage Agreement (No. 200628355/H) Article 7 provides that, in the event of the sale of property placed under mortgage, the sale shall be made based on the Law on Mortgages.

Summary of facts in the enforcement proceedings

18. On 7 May 2009, the Raiffeisen Bank of Kosovo initiated an enforcement procedure before the Municipal Court in Gjilan with a request to call for the public sale of assets under the Mortgage Agreement No. 200628355 /H, due to failure to fulfill the obligations of the Applicant from the loan agreement.
19. On two occasions on 27 January 2010 and 23 March 2010, the Municipal Court in Gjilan attempted to sell in the public auction the property that was the subject of the mortgage agreement for the established value of the real estate of 723,370 euro, but there were not any offers.
20. On 23 March 2010, the Municipal Court in Gjilan in the conclusion after the second public sale, as there were no offers, determined the third public sale, the conclusion, inter alia, states *"The public sale will take place on 24.05.2010 at 10:00 hrs at the Municipal Court in Gjilan. In this auction of the public*

sale, the immovable property may be sold at any price, regardless of the assigned value of the immovable property as stipulated by Article 218.6 of LEP. ”

21. On 24 May 2010, the Municipal Court of Gjilan, by Decision No. 422/09 designated Raiffeisen Bank of Kosovo as a bidder. In the reasoning, the Basic Court states: *“In the session of the third public sale held on the 24.05.2010, the creditor Raiffeisen Bank in Prishtina was presented as the most favourable bidder which has offered the price of 49.213 EUR in which is an amount that besides the main debt it also includes the interest rate, the costs of procedures such as the payment of the tax, the rewarding of the expert and the publishing of the contract in the two daily newspapers, determined with a conclusion on the third public sale, according to which and pursuant to Article 218.6 of LCP at this hearing the property could have been sold at any price regardless of the determined value of the property”.*
22. On 3 August 2010, based on this Decision, Raiffeisen Bank made an entry in the cadastral registers of immovable property listed in the mortgage agreement.
23. Subsequently, this immovable property suffered several ownership changes through sales.

Summary of facts in the procedure for annulment of the public sale upon the mortgage and sales contracts made after this sale

24. On 10 May 2011, the Applicant filed a lawsuit with the Municipal Court in Gjilan against the Raiffeisen Bank of Kosovo and several other persons requesting the annulment of the public sale of immovable property from the mortgage agreement pursuant to Decision E. No. 422/09 of the Municipal Court in Gjilan of 24.05.2010, as well as to declare null and void the contracts drafted after the public sale of immovable property from the mortgage agreement, specifically, the contracts concluded on 5.11.2010 and 17.11.2010.
25. On 27 January 2014, the Basic Court in Gjilan rendered Judgment C. No. 96/2011, which rejects as an ungrounded the Applicant’s statement of claim. In the reasoning, the Basic Court states:

“The court found that between the parties in the proceedings it is disputable: the subject of the execution, the sale of the immovable properties in the third public auction as well as amount of the sale purchase in the public auction.

The court, therefore, considers that when dealing with sales in the public auction, as a special and applicable law is the Law on the Enforcement Procedure and in this case it is Article 218.6 which states that: In the case that the real assets is not sold even not in the second session, the court will determine the second session in the timeframe of 15 to 30 days. In this session the real assets can be sold with whatever price, without taking into consideration the determined value of the real assets“.

26. Against the Judgment of the Municipal Court in Gjilan, the Applicant filed an appeal with the Court of Appeals, *“on the grounds of essential violations of the provisions of the contested procedure, incorrect and incomplete determination of factual situation and incorrect application of the substantive law.”*
27. On 11 November 2016, the Court of Appeals (by Judgment Ac. No. 1576/2014) rejected as ungrounded, the Applicant's appeal, and upheld in entirety the Judgment of the Basic Court. In the reasoning, the Court of Appeals states: *“The first instance court has correctly and completely determined the factual situation and for the decisive facts it has provided sufficient reasons which this court also accepts entirely, as in the case in question, the first instance court has justly confirmed that when it comes to the sale through the public auction, the provisions of the LEP are applied as a special law and in this case the provision of the LOR are not applied, the law on circulation of the immovable property and the institute of the damage for more than half and the right to priority are not applied. This court considers that the first instance court has correctly applied the substantive law as in the case in question during the sale in the public auction, the immovable property was sold to the bidder which offered the price in the amount of 49.213, within the meaning of Article 218, paragraph 6 of the LEP. ”*
28. On an unspecified date, the Applicant against the Judgment of the Court of Appeals filed a request for revision with the Supreme Court, *“on the grounds of erroneous application of substantive law with the proposal to annul two judgments of lower instance courts and remand the case to the first instance court for retrial.”*
29. On 15 November 2017, the Supreme Court (by Judgment Ref. No. 125/2017) rejected as ungrounded the Applicant's revision, and upheld in entirety the judgments of the Court of Appeals and of the Basic Court.

Applicant's allegations

30. The Applicant alleges that the challenged Decision violated his rights guaranteed by Article 3 [Equality Before the Law], Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of the Property] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR.
31. Furthermore, the Applicant alleges that by the challenged decisions *“the right to a fair and impartial trial was violated as well as their right to the principle of proportionality, because the parties in the procedure were not treated equally, and that the courts have not considered the evidence and the facts provided by the appellants”*.
32. In fact, the Applicant considers that, *„immovable properties were taken into legal possession unlawfully, in violation of the legal procedures in force, and in a counter-proportional manner, because the complainants' wealth of over one million euro was legally transferred to a third party for a loan of about 40,000 EUR, despite the fact that this obligation could have been fulfilled*

even with movable property or only by a share of the property, not as it was acted in case in question by taking all the property of the appellants by using their unfavorable situation.”

33. In the end, the Applicant requests the Court to declare the challenged decision null and void, to remand the case for retrial and to return the immovable property to his property.

Applicable legal provisions

Law on Mortgages No. 2002/4, 17 October 2002

[...]

Chapter 4

Judicial Foreclosure

Section 9

Procedure for Judicial Foreclosure

The process and requirements for foreclosing the collateral of a mortgage shall be governed by the applicable law on execution procedures, unless a valid business authorization is granted by a business organization to a financial institution to sell the collateral of a mortgage in accordance with Chapter 5 of this Law.

[...]

Law on Executive Procedure No. 03/L-008, 16 May 2008

[...]

Article 218

The price of a real state purchase

218.1 In the first session of a purchase auction, real assets cannot be sold with the price that is lower than half of the determined value. The starting offers for the first session, that are lower than half of the determined value will not be reviewed.

218.2 Without agreement of persons who has a right in the executive procedure to realize their credits before purchaser of execution, the real assets in the auction session can not be sold for the price that can not cover even partly the amount of a purchaser of execution's credit.

218.3 In the case that the real assets could not be sold in the first session, the court will determined the second session in the timeframe of 30 days

218.4 The court will assign the second session in the timeframe of 30 days even when three convenient purchasers did not pay the bill in the first session within the foreseen time limit.

218.5 In the second session the real assets can not be sold for the price that is a smaller than one third of the assigned value with the selling conclusion. The starting offer in the second session can not be smaller than one third of the determined value

218.6 In the case that the real assets is not sold even not in the second session, the court will determine the second session in the timeframe of 15 to 30 days. In this session the real assets can be sold with whatever price, without taking into consideration the determined value of the real assets.

218.7 in the case that do not exists persons with the right of pre-purchase or contractual right, than person who according to the law has right of realization with priority of his credit from selling price, won the right of pre-purchase of the real assets by the price reached in the third session

[...]

Law of Contract and Torts of the SFRY No. 29/78, 01 October 1978

[...]

VI Excessive Loss

Obvious Disproportion of Mutual Commitment

Article 139

[...]

(5) Such disproportion shall give no ground for avoiding a contract relating to games of chance, to auction sales, as well as where a higher price for the property has been paid out of particular favour.

Assessment of admissibility of Referral

34. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and the Rules of Procedure.
35. In this respect, the Court refers to Articles 21. 4 and 113 .7 of the Constitution, which establish:

Article 21

“[...]

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

[...]“

Article 113

„(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.“

36. The Court also refers to Article 49 [Deadlines] of the Law, which stipulates:

„ 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.“

37. The Court further refers to Article 48 of the Law, which foresees:

„ 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.“

38. Regarding the fulfillment of these requirements, the Court finds that the Applicant is authorized party who challenges an act of a public authority, namely Judgment (Rev. No. 125/2017) of the Supreme Court, after exhaustion of all legal remedies provided by law. The Applicant has also specified the rights and freedoms which have allegedly been violated in accordance with Article 48 of the Law and submitted the Referral in accordance with the deadline set out in Article 49 of the Law.

39. In addition, the Court examines whether the Applicant meets the admissibility requirement foreseen in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure prescribes the criteria under which the Court may consider a referral, including the criterion that the referral is not manifestly ill-founded. Rule 39 (2), specifies in particular:

“(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.“

40. The Court considers that the Applicant's allegations can be reduced to:

- (i) violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR;
- (ii) violation of Article 46 of the Constitution; and
- (iii) violation of Article 24 of the Constitution.

(i) As to allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR

41. The Court notes that the Applicant basically initiates an allegation for a violation of the right to fair and impartial trial, stating, *“the courts did not consider the evidence and the facts provided by the appellants”*.
42. The Court notes that the Applicant also raised the same allegation in the appeals filed before the Court of Appeals and the Supreme Court.
43. The Court recalls that the right to a fair trial is protected by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the ECHR.
44. The Court recalls Article 31 of the Constitution, which establishes:

“1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

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.”
45. The Court also refers to Article 6.1 of the ECHR, which provides:

„In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing [...] by a tribunal.”
46. The Court takes into account Article 53 [Interpretation of Human Rights Provisions] of the Constitution: *“human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”*
47. In this respect, the Court recalls the case law of the ECtHR, which has established *mutatis mutandis* *“that the jurisdiction of the Court to verify that domestic law has been correctly interpreted and applied is limited and that it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable”*. (see: case of the European Court of Human Rights (hereinafter: ECtHR), *Anheuser-Busch Inc. v. Portugal*, application no. 73049/01, judgment of 11 January 2007, paragraph 83).
48. The Court therefore reiterates that the allegations that substantially raise issues of legality and which require the Court to interpret the facts, as in this particular case, are, as a rule, falling within the jurisdiction of the regular courts. In fact, it is not the task of the Constitutional Court to deal with the claims and interpretations of relevant legislation (see, *mutatis mutandis*, the case of the Constitutional Court, KI27/17, Applicant *Maliq Zeqiri*, Resolution on Inadmissibility of 13 November 2017, paragraph 24).

49. The role of the Constitutional Court is to ensure 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 of 16 September 1996, *Akdivar v. Turkey*, No. 21893/93, para. 65, and see also *mutatis mutandis*, case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).
50. In light of the above, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of facts or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, it is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law. (see: *mutatis mutandis*, ECtHR case *García Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28).
51. The Court notes that the Basic Court in Gjilan reasoned in its judgment: “*the claimant’s statement of claim is ungrounded because in accordance with these legal provisions it follows that In the case in question, based on Article 139 paragraph 5 of the Law on Contracts and Torts (Official Gazette of SFRY No. 29/78) which was in force at the time of creation of legal report, namely when at the time it was sold in public auction, it has been established that because of the gross damage, the annulment cannot be sought including the sale in the public auction. It means that the statement of claim of the claimants is not based on the legal provisions*”.
52. The Court also recalls that the position of the Basic Court in Gjilan regarding the lack of grounds of the lawsuit submitted by the Applicant was upheld in entirety by the Court of Appeals and the Supreme Court.
53. In addition, as to the Applicant's allegations that the sale at a public auction, the Supreme Court reasoned, “*In the case in question, based on Article 139 paragraph 5 of the Law on Contracts and Torts (Official Gazette of SFRY No. 29/78) which was in force at the time of creation of legal report, namely when at the time it was sold in public auction, it has been established that because of the gross damage, the annulment cannot be sought including the sale in the public auction. It means that the statement of claim of the claimants is not based on the legal provisions*”.
54. In these circumstances, the Court considers that the reasoning provided by the Basic Court, Court of Appeals and the Supreme Court when deciding on the Applicant's requests is clear, comprehensive and coherent, and that the proceedings before the regular courts were not unfair or arbitrary (see: the ECtHR Judgment of 30 June 2009, *Shub v. Lithuania*, No. 17064/06).
55. Therefore, the Court concludes that the Applicant did not substantiate the allegation of violation of the right to fair and impartial trial as provided for in Article 31 of the Constitution and Article 6.1 of the ECHR.

(ii) As to the allegation of violation of Article 46 of the Constitution

56. The Applicant further alleges that “*immovable properties were taken into legal possession unlawfully, in violation of the legal procedures in force*”. In this respect, the Applicant tries to make an allegation of violation of Article 46 of the Constitution.
57. The Court recalls Article 46 of the Constitution which establishes:
 1. *The right to own property is guaranteed.*
 2. *Use of property is regulated by law in accordance with the public interest.*
 3. *No one shall be arbitrarily deprived of property. [...]*
58. As regards the Applicant's alleged violation of the right to protection of property, the Court notes that the Applicant lost the contested property due to the failure to fulfill the obligations under the mortgage agreement and that, pursuant to this contract and subsequent legal procedure, Raiffeisen Bank became the legal owner of the disputed real estate.
59. The Court recalls that the right to protection of property applies only to a person's existing possessions and that it does not guarantee the right to acquire possessions (see: *mutatis mutandis*, case of ECtHR *Marckx v. Belgium*, No. 6633/74, Judgment of 13 June 1979, paragraph 50).
60. In certain circumstances a “*legitimate expectation*” of obtaining an asset may also enjoy the protection of Article 46 of the Constitution and Article 1 of Protocol No. 1 of ECHR (see, *mutatis mutandis*, *Bélané Nagy v. Hungary*, No. 53080/13, Judgment of 13 December 2016, para. 74).
61. However, the Court recalls that a “*legitimate expectation*” must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. No “*legitimate expectation*” can be said to arise where there is a dispute as to the correct interpretation and application of law and the applicant's submissions are subsequently rejected by the regular courts (see, *mutatis mutandis*, *Bélané Nagy v. Hungary*, Ibidem, paragraph 75).
62. Accordingly, the Court considers that the circumstances of the case did not give the Applicant the right to a material interest protected by Article 46 of the Constitution and Article 1 of Protocol No. 1 of the ECHR.

(iii) As to the allegation of violation of Article 24 of the Constitution

63. Finally, the Court recalls that the Applicant alleges that he was denied “*the principle of proportionality because the parties to the proceedings were not treated equally*”. He considers that this denial represents a violation of the right to equality of citizens. Therefore, he also claims that the regular courts violated his right to equality before the law guaranteed by Article 24 of the Constitution.

64. In this regard, the Court recalls that treatment is discriminatory if the individual is treated differently in relation to others in similar positions or situations, and if that difference in treatment does not have an objective and reasonable justification.
65. The Court also reiterates that the different treatment must pursue a legitimate aim to be justified and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. (see: the ECtHR case *Marckx v. Belgium*, application No. 6833/74, Judgment of 13 June 1979, paragraph 33).
66. The Court considers that the Applicant did not present any *prima facie* evidence, and he did not substantiate his allegation, which would show that there has been a discrimination in relation to him in the proceedings before the Supreme Court.
67. In sum, the Court concludes that the facts presented by the Applicant do not justify his allegation of a violation of his right to fair and impartial trial, the right to protection of property and the right to equality before the law. In fact, the Applicant did not prove or substantiate his allegation that the conducted proceedings before the Basic Court, Court of Appeals and the Supreme Court were unfair or arbitrary.
68. Therefore, in accordance with Rule 39 (2) of the Rules of Procedure, the Applicant's Referral is manifestly ill-founded, on constitutional basis, and therefore, inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Articles 21.4 and 113.1 and 7 of the Constitution, and Rule 39 (2) of the Rules of Procedure, in the session held on 8 May 2019, unanimously

DECIDES

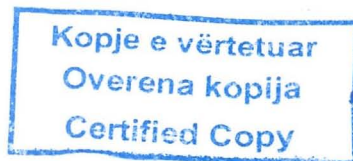
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and
- IV. This Decision is effective immediately

Judge Rapporteur

President of the Constitutional Court

Remzije Istrefi-Peci

Arta Rama-Hajrizi



This translation is unofficial and serves for informational purposes only.