



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

Prishtina, on 09 August 2019
Ref. no.:RK 1405/19

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI169/18

Applicant

Private Enforcement Agent - Sefer Sh. Arifi

**Constitutional review of Article 22 paragraph 3 of Law No. 05/L-118
on Amending and Supplementing Law No. 04/L-139 on Enforcement
Procedure in conjunction with Article 247 of Law 04-L/139 on
Enforcement Procedure**

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 Sefer Sh. Arifi, the private enforcement agent appointed for the territory of the Basic Court in Gjilan (hereinafter: the Applicant).

Challenged decision

2. The subject matter is the constitutional review of Article 22 paragraph 3 of Law No. 05/L-118 on Amending and Supplementing the Law No. 04/L-139 on Enforcement Procedure (hereinafter: Law on Amending and Supplementing the Law on Enforcement Procedure), in conjunction with Article 247 of Law No. 04-L/139 on Enforcement Procedure, (hereinafter: the Law on Enforcement Procedure).
3. The Applicant alleges that Article 22 paragraph 3 of the Law on Amending and Supplementing the Law on Enforcement Procedure, which amended Article 234 of the Law on Enforcement Procedure, is in contradiction with Article 247 of the Law on Enforcement Procedure, and is discriminatory and contrary to the Constitution of the Republic of Kosovo.

Legal basis

4. The Referral is based on Article 113.8 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 51, 52 and 53 of the Law on the Constitutional Court (hereinafter: the Law) and Rule 77 of the Rules of Procedure of the Court Constitutional (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 17 September 2018, the Applicant submitted to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) a letter entitled *“Accompanying act for submission of case to the Constitutional Court of the Republic of Kosovo”* and submitted the file of an enforcement case.
6. On 19 September 2018, the Court sent a letter to the Applicant seeking to clarify his Referral and specify the legal basis for submission of his Referral.
7. On 1 November 2018, the Applicant submitted a letter informing the Court that he is filing the Referral based on Article 113, paragraph 8 of the Constitution. In this letter, the Applicant stated that his Referral, as an enforcement body, “is not an individual Referral, but it is a concrete judicial/enforcement case”.
8. On 5 November 2018, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and a Review Panel composed of Judges: Selvete Gerxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Radomir Laban (members).
9. On 30 November 2018, the Court notified the Applicant about the registration of the Referral. On the same date, the Court also notified the Supreme Court of Kosovo about the registration of the Referral and requested to inform the Court with relevant information regarding the Applicant’s Referral (case).
10. The Supreme Court did not submit any documents or information regarding the Applicant’s Referral.

11. On 22 July 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

12. According to the case file it appears that the debtors M.A. and L.A. (hereinafter: the debtors), entered into a loan agreement with the creditor, namely ProCredit Bank (hereinafter: the creditor). The debtors put into mortgage their immovable property (land parcel) located in the village of Pozhoran, Municipality of Viti.
13. As a consequence of non-payment of a part of the loan, the debtors' case was processed in the enforcement proceedings in the Basic Court in Gjilan-Branch in Viti and was registered under case number E. No. 1041/2012.
14. On 31 January 2013, the Law on Enforcement Procedure was promulgated in the Official Gazette. By this Law, the private enforcement agents were appointed competent, in addition to the courts, for implementation of the enforcement procedure.
15. On an unspecified date, the creditor requests the Basic Court in Gjilan-Branch in Viti to transfer the case to the private enforcement agent [the Applicant].
16. On 17 April 2015, the Basic Court in Gjilan-Branch in Viti issued Conclusion E. No. 1041/2012, approving the creditor's request for transfer of the case to the private enforcement agent, namely the Applicant.
17. On 24 April 2015, the Applicant submitted the conclusion P. No. 159/15 to the debtors and informed them that the enforcement case, E. No. 1041/2012, was transferred from the Court to him (as a private enforcement agent).
18. On 22 August 2017, the Applicant compiled Minutes P. No. 159/15, on the sale of the immovable property (mortgage) of the debtors, at the first verbal public auction for the sale of the immovable property. There was no bidder for the purchase of the immovable property in the I-st auction.
19. On 21 September 2017, the Applicant compiled Minutes P. no. 159/15, for the sale of immovable property at the II-nd verbal public auction. In this session, again, no one appeared for the purchase of the immovable property, and only the Applicant and the creditor were participants. Consequently, the Applicant compiled a Conclusion and Order on the same date.
20. In Conclusion, the Applicant initially found that no bid was submitted by potential buyers. The creditor said he would not bid for of the immovable property at II-nd auction, but proposed that the mortgaged properties be transferred to his ownership. Moreover, the Applicant notified the creditor that *"the provision of Article 234 paragraph 3 [Article 22 paragraph 3] of the Law on Amending and Supplementing the Law on Enforcement Procedure is in contradiction with Article 247 of the Law on Enforcement Procedure"*.

Regarding the alleged contradiction between these articles, the Applicant stated that the Chamber of Private Enforcement Agents of the Republic of Kosovo will submit to the Supreme Court a request for legal opinion as to what provision applies in cases dealing with the creditor's request for the transfer of immovable property to the creditor.

21. Following this Conclusion, the Applicant issued a four-point Order, which: (1) *Rejects the request of the creditor's representative for the surrender of immovable property, pursuant to paragraph 3 of Article 234 of Law No. 05/L-118, on Amending and Supplementing the Law No. 04/L-139 on Enforcement Procedure, is in contradiction with the provision of Article 247 of the Basic Law on the Enforcement Procedure No. 04/L-139, and the same paragraph is a discriminatory provision against the debtor, as it greatly damages the debtor in material terms and as such this provision cannot be enforced since it [is] contrary to the Constitution [...]* Through item (2) of the Order the Applicant stated that the rejection of the debtor's claim under paragraph (1) is in accordance with Article 9 paragraph 1 of the Law on Enforcement Procedure which obliges the enforcement authority to protect the debtor's dignity. In item (3) of the said Order, the Applicant decided that *"[...] the matter of constitutional compliance of the law on enforcement proceedings be referred to the Constitutional Court [...] in accordance with Article 113 paragraph 8 of the Constitution [..], and in item (4) the Applicant stated that "[...] after the decision of the Constitutional Court is taken [...] on the question of compatibility of the legal provision, namely paragraph 3 of Article 234 of Law No. 05/L-118 on Amending and Supplementing Law No. 04/L-139 on Enforcement procedure, shall notify all parties to the proceedings about a decision of the Constitutional Court [...]"*.

Applicant's allegations

22. The essence of the Applicant's allegations relates to the constitutionality of Article 22 paragraph 3 of the Law on Amending and Supplementing the Law on Enforcement Procedure (which amended Article 234 of the Law on Enforcement Procedure), in conjunction with Article 247 of the Law on Enforcement Procedure. According to the Applicant's allegations, these articles are contradictory, discriminatory and harm the debtor.
23. The Applicant states that he is submitting a *"[...] court-enforcement matter for a concrete case"*. According to the Applicant, this case is *"[...] elaborated in the Minutes of session number P. No. 159 /15, of 21.09.2017"*.
24. The Applicant further argues that *"The court/enforcement case Ex. No. 1041/2012, was transferred from the Basic Court in Gjilan- Branch in Viti to the Office of the Enforcement Authority pursuant to Article 397, paragraph 4 of the Law on Enforcement Procedure, which stipulates that the actions in the enforcement procedure taken by the Court are legally valid as if they were taken by the enforcement agent who continues the enforcement"*.
25. The Applicant alleges that based on Minutes P. No. 159/15, dated 21 September 2017, he ascertained that Article 22 paragraph 3 of the Law on Amending and

Supplementing the Law on Enforcement Procedure is in contradiction with Article 247 of the Law on Enforcement Procedure and these articles discriminate against the debtor as a party to the proceedings because he is greatly damaged materially. Moreover, the Applicant alleges that [...] *“he is not certain about the compatibility of the challenged law with the Constitution”*.

26. With regard to the protection of the debtor in the proceedings, the Applicant refers to Article 9 paragraph 1 of the Law on Enforcement Procedure, according to which the enforcement authority is obliged to *“[...] upon carrying out enforcement procedure, care shall be paid to protect the dignity of the debtor, and to ensure that the enforcement is as little detrimental as possible on debtors”*.
27. Finally, the Applicant requests the Court that *“[...] due to existence of a grounded suspicion that there may be a violation of the Constitution in the present case, as well as any future cases that may follow as a result of applying this discriminatory legal provision, initiate the procedure of constitutional review”*.

Relevant constitutional and legal provisions

i) Articles concerning the authorized party

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 102

[General Principles of the Judicial System]

1. *Judicial power in the Republic of Kosovo is exercised by the courts.*
2. *The judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts.*

LAW No. 03/L-199 ON COURTS

Article 3

[Independence and Impartiality of the Courts]

1. *The Courts established by this Law shall adjudicate in accordance with the Constitution and the Law.*
2. *Judges during exercising function and taking decisions shall be independent, impartial, uninfluenced in any way by no natural or legal person, including public bodies.*

Article 4

[The Exercise of Judicial Power]

Judicial power in the Republic of Kosovo shall be exercised by the courts established by this Law. The Courts established by this Law are: Basic Courts, the Court of Appeals, and the Supreme Court.

LAW NO. 06/L - 054 ON COURTS (Adopted in Assembly on 28 November 2018 and published in the Official Gazette on 18 December 2018)

Article 3
Exercise of Judicial Power

1. Judicial power in the Republic of Kosovo shall be exercised by the courts established by this Law.
2. Judicial power in the Republic of Kosovo shall be unique, independent, fair, apolitical, impartial, and shall provide equal access to the courts.

Article 8
[Organizational structure]

1. The court system of the Republic of Kosovo consists of: the Basic Courts, the Court of Appeals, and the Supreme Court.
2. Court branches shall be established within the territory of a Basic Court. The establishment of new branches and departments, or the merger thereof, not defined in this law, shall be made in accordance with the law.

LAW No. 04/L-139 ON ENFORCEMENT PROCEDURE

Article 2
[Definitions]

[...]

- 1.11. Private Enforcement agent - the natural person appointed by the Minister of Justice in accordance with the provisions of the present law, who in the performance of public authorizations entrusted to him/her as provided by the present law, decides on the actions arising from his/her competency in the enforcement of allowed enforcement, and undertakes enforcement actions.

Article 323
[Status and competencies of the private enforcement agent]

1. The private enforcement agent, in the performance of authorizations entrusted to him/her by this law, shall be appointed by the Minister of Justice (hereinafter: the Minister) in the territory of the basic court.
2. The private enforcement agent is competent to undertake all actions defined by Article 341 of this Law and other actions permitted or assigned to him under the law, except where expressly forbidden under the law.

Article 341
[Duties of the private enforcement agent]

1. The private enforcement agent in the procedure of assigning and implementing enforcement, in line with provisions and restrictions foreseen with this Law:

- 1.1. issues and implements the enforcement order in line with his/her authorizations;
- 1.2. receives and acts according to enforcement proposals based on claims and proposals for implementing enforcement of claims and assigns the method of enforcement if the creditor has not provided the proposal;
- 1.3. to serve acts and writs;
- 1.4. to identify the parties and participants in the enforcement procedure;
- 1.5. to collect the data for the property situation of the debtor;
- 1.6. to draw conclusions, draft transcripts, requests and other official data in accordance with authorizations as provided by this law;
- 1.7. to perform registration, property evaluation, sequestration and sale of movable property, and real estate rights;
- 1.8. to accept and preserve the registered and insured property of the debtor, order the transfer of ownership and perform the division of property and other monetary means realized by the property sale;
- 1.9. to perform the eviction and other enforcement actions for the purpose of enforcement of enforcement in accordance with this law and bylaws;
- 1.10. to mediate between debtor and creditor for purpose of reaching a settlement between them, following the request of the debtor or creditor;
- 1.11. to receive and transfer the monetary means in accordance with this law;
- 1.12. to maintain the records of cases in which he/she acts according to the form determined by the Minister;
- 1.13. to undertake other actions as provided for by this law, or the bylaws of the Chamber.

ii) Articles of the law challenged by the Applicant

LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE

Article 247

[Settlement of the credit through hand over of real estate to the creditor]

1. In case the real estate is not sold even in the third session of the public auction, or by direct settlement within the foreseen time frame by the enforcement body, upon request of the enforcement proposer, the enforcement body through a decision may hand over the real estate to the enforcement proposer.
2. On cases from paragraph 1 of this Article, it is considered that credit of creditor is settled in the amount that responds to two thirds of the determined value of the real estate.

LAW NO. 05/L-118 ON AMENDING AND SUPPLEMENTING THE LAW NO. 04/L-139 ON ENFORCEMENT PROCEDURE

Article 22

Article 234 of the basic Law is reworded with the following text:

[...]

3. *In case real estate is not sold in the second auction, the enforcement body shall, by proposal of creditor, render a decision to hand over the real estate to the ownership of creditor, in which case the claim against the debtor is considered fully covered.*

[...]

Article 25

Article 247 of the basic Law, paragraph 1., the word “third” shall be replaced with the word “second”.

Admissibility of the Referral

28. The Court must first examine whether the admissibility requirements of the Referral established in the Constitution and further specified in the Law and the Rules of Procedure have been met.

29. In this respect, the Court first refers to paragraphs 1 and 8 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.

[...]

8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.

30. The Court further refers to Articles 51, 52, 53 of the Law, which foresee:

Article 51 [Accuracy of referral]

1. A referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

2. A referral shall specify which provisions of the law are considered incompatible with the Constitution.

Article 52 [Procedure before a court]

After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered.

Article 53 [Decision]

The Constitutional Court shall decide only about the compliance of the legal provision with the Constitution and shall not decide on other factual or legal matters related to the dispute before the referring court.

31. The Court also refers to Rule 77 of the Rules of Procedure, which provides:

*Rule 77 [Referral pursuant to Article 113.8 of the Constitution
and Articles 51, 52 and 53 of the Law]*

- (1) A referral filed under this Rule must fulfill the criteria established under Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law.*
- (2) Any Court of the Republic of Kosovo may submit a referral under this Rule provided that:*
 - (a) the contested law is to be directly applied by the court with regard to the pending case; and*
 - (b) the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.*
- (3) The referral under this Rule must specify which provisions of the contested law are considered incompatible with the Consitution. The casefile under consideration by the court shall be attached to the referral.*
- (4) The referring court may file the referral ex officio or upon the request of one of the parties to the case and regardless of whether a party in the case has disputed the constitutionality of the respective legal provision.*
- (5) After the filing of the referral, the Court shall order the referring court to suspend the procedure related to the case in question until a decision of the Constitutional Court is rendered.*

32. Referring to the abovementioned provisions, the Court must first examine whether the Applicant is an authorized party to file a Referral, namely, whether the Referral was submitted by the “court” within the meaning of Article 113.8 of the Constitution.
33. The Court first refers to its case law and notes that so far there have been five (5) cases where the referrals were filed pursuant to paragraph 8 of Article 113 of the Constitution (see cases of the Constitutional Court: KO04/11, Applicant *the Supreme Court of Kosovo* Judgment of 1 March 2012; Case KO59/14 Applicant *Hilmi Hoxha*, Resolution on Inadmissibility of 14 July 2014; Case KO126/16, referring court *Specialized Panel of the Special Chamber of the*

Supreme Court on the Privatization Agency of Kosovo Related Matters Resolution on Inadmissibility of 27 March 2017, case KO 142/16, referring court *Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters* Judgment of 9 May 2017, and case KO157/18, referring court *The Supreme Court of the Republic of Kosovo*, Judgment of 13 March 2018).

34. In its practice, the Court has determined that the right of regular courts to refer a request for constitutional review of legal norms stems from Article 113, paragraph 8, of the Constitution, but that in accordance with this Article, an authorized party is considered “*the court*” (see Constitutional Court case KO59/14, cited above p. 55). The Court justified this position by referring to the distinction made by the Constitution and the Law on Courts between “the courts” and “the judges”.
35. Further, in its Resolution in Case KO126/16, the Court held that any composition of the regular court which has jurisdiction to adjudicate the specific case is an authorized party to file a referral in accordance with Article 113.8 of the Constitution and the Court concluded this also in Judgment KO142/16.
36. In the present case, the Court notes that the Referral was filed by the Applicant in the capacity of an enforcement authority, namely a private enforcement agent. The Applicant alleges that the case before us is a concrete “judicial/enforcement” case and as such should be examined based on Article 113.8 of the Constitution.
37. The Court recalls that the Applicant alleges that the application of Article 22 paragraph 3 of the Law Amending and Supplementing the the Law on Enforcement Procedure is in contradiction with Article 247 of the Law on Enforcement Procedure. This contradiction of articles, according to the Applicant: i) discriminates against the debtor as a party to the proceedings because the debtor is substantially materially damaged; and ii) as a consequence of this discrimination, it is unconstitutional.
38. Referring to the Applicant's allegations, the Court recalls that the primary purpose of Article 113.8 of the Constitution, namely the so-called “incidental control of constitutionality”, is to avoid ambiguous situations regarding the observance of the principle of constitutionality, as one of the fundamental principles of the legal order, which imposes full and complete compliance of laws (and other normative acts) with the Constitution. However, as a basic condition for admissibility of a request for “incidental constitutional control” is that the request be filed by an authorized party, namely a “court”.
39. In the present case, the Applicant is a private enforcement agent who is appointed by the Minister of Justice and has the competence to perform authorizations under the Law on Enforcement Procedure. The Court recalls that paragraph 1 of Article 102 [General Principles of the Judicial System] of the Constitution states that “*Judicial power in the Republic of Kosovo is exercised by the courts.*” Moreover, the new Law on Courts (Law No. 06/L -

054 on Courts), provides in its Article 3 that the judicial power “[...] *shall be exercised by the courts established by this Law*” and Article 8 of this Law establishes that “*The court system of the Republic of Kosovo consists of: the Basic Courts, the Court of Appeals, and the Supreme Court*”.

40. The Court also notes that the Applicant carries out authorizations set out in the relevant Law on Enforcement Procedure and the Applicant’s reasoning that pursuant to Article 397, paragraph 4 of the Law on Enforcement Procedure, “*the enforcement actions undertaken by the court are legally valid as if they were undertaken by the private enforcement agent who continues the enforcement*”, do not mean that the Applicant is part of the judicial system.
41. In addition, the Court also in its case-law, referring to comparative law, has stated that a large number of the European states provide that “the regular courts” are authorized to submit requests to the constitutional court for the so-called “incidental constitutional control” (See case KO126/16, cited above, paragraphs 46-48).
42. Therefore, in the light of the foregoing, the Court considers that the present Referral was not submitted by the “court” within the meaning of Article 113.8 of the Constitution.
43. In conclusion, the Court finds that the Applicant is not an authorized party to submit the Referral and, therefore, the Court declares the Referral inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.8 of the Constitution, Article 20 of the Law, and Rule 59 (b) of the Rules of Procedure, on 22 July 2019, unanimously

DECIDES

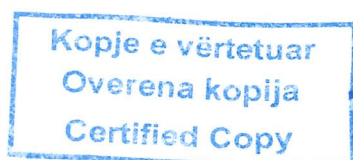
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bekim Sejdiu

Arta Rama-Hajrizi



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