



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

Prishtina, on 13 September 2019
Ref. no.:RK 1423/19

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 39/18

Applicant

Bujar Hoti

**Constitutional Review of Decision C.no.180/08 of 19 September 2014 and
Judgment C.no.203/18 of 5 September 2018, of the Basic Court in
Prishtina – Branch in Gllgovc**

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 Bujar Hoti from village Polac, of Skenderaj Municipality (hereinafter: the Applicant).

Challenged Decision

2. The Applicant has initially challenged Decision C.no.180/08 of 19 September 2014 of the Basic Court in Prishtina-Branch in Glogoc and then in the additional documents whereby he supplemented his Referral he challenged the Judgment C.nr.203/18 of 5 September 2018 of the same court which is the last court decision which he has received.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Decision and Judgment, which as alleged by the Applicant have violated his fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law on the Constitutional Court of the Republic of Kosovo, no. 03 / L-121 (hereinafter: the Law), as well as Rule 32 [Filing Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).
5. On 31 May 2018, the Court approved in an administrative session the amendment of the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and came into effect 15 (fifteen) days after its publication. Consequently, when reviewing the Referral, the Court refers to the legal provisions of the new Regulation in force.

Proceedings in the Constitutional Court

6. On 13 March 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court). On 17 May, 13 July and 8 September 2018 the Applicant submitted additional documents to the Court, including Judgment C.nr.203/18 of 5 September 2018, of the Basic Court in Prishtina - Branch in Glogoc, as the last court decision that the Applicant received.
7. On 20 March 2018, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur. On the same date, the President of the Court appointed the Review Panel composed of Judges Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu (members).
8. On 8 May 2010, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 16 June 2018, the term of office of the Judges: Snezhana Botusharova and Almiro Rodrigues, ended. On June 26, 2018, the term of office of the judges: Altay Suroy and Ivan Čukalović ended.

10. On 9 August 2018, the President of the Republic of Kosovo appointed the following judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.
11. On 17 August 2018, the President of the Court, by Decision GJ.R. KI39/18 appointed Judge Remzije Istrefi-Peci, as Judge Rapporteur in the case.
12. On 24 April 2010, the President of the Court rendered the decision on replacement of the Review Panel and appointed the following members of the Panel: Arta Rama-Hajrizi-Presiding, Bekim Sejdiu and Safet Hoxha, members.
13. 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

14. On 1 December 1998, the Applicant, the owner of an apartment in Glogoc, entered into a sale contract with the buyer N.D., to whom he sold the apartment described in the contract. The contract was drawn up by hand and according to the case file it does not appear to have been certified at any competent court. The contract stated that the apartment that is the subject of the contract was replaced with an apartment of the same size located on the opposite side and owned by a third party (H.L.) and that the seller guarantees the buyer and bears full responsibility for any eventual dispute in that respect.
15. On 1 October 1999, in Prishtina, the Applicant entered into another sale contract for the same apartment, this time with M.K. for a higher price than in the first contract. There were no references as to the third parties involved in this contract. The contract was drawn up at the office of lawyer F.SH. It was signed by the contracting parties and certified with the lawyer's stamp. The Applicant alleges to have signed this contract under threat and against his will.
16. In the legal matter concerning the disputed apartment, there were conducted two parallel proceedings, wherein the Applicant was a party. One had started with the Housing and Property Claims Commission (HPCC) at the Directorate for Housing-Property Affairs (HPD-UN-Habitat) operating within the United Nations Interim Administration-Mission in Kosovo, as an administrative procedure and thereafter continued in the court after having been initiated by the Applicant himself and the other one before the Basic Court of Prishtina - Branch in Glogoc initiated by the buyer M.K.

Proceedings with the Housing and Property Commission (HPCC) of the HPD-UN-Habitat

17. On 29 November 2001, the Applicant filed a housing - property claim with the Housing and Property Commission (HPCC) operating under the HPD-UN-Habitat. In the claim, the Applicant requested that the sale contract entered with the second buyer M.K. be considered unlawful as it was concluded under

pressure whereas the contract entered with the first buyer either be fulfilled in its entirety or he be returned the apartment that he had already sold.

18. On 18 June 2005, the HPCC, by a group decision HPCC/D/204/2005/C, rejected the application and decided that the claim should be referred to the competent local court.
19. On 7 August 2008, the Kosovo Property Agency (KPA) as a successor of the HPD referred the case to the Basic Court in Prishtinë - Branch in Gllgovc (hereinafter: the Basic Court).
20. On 19 September 2014, the Basic Court by Decision C.no.180/08 dismissed the KPA's submission on the ground that within the meaning of Article 152 of the Law on Contested Procedure (LCP), the submission did not meet the criteria of the claim or statement of claim in the written form.
21. On 24 December 2014, the Applicant filed with the Court of Appeals of Kosovo a submission in the form of complaint against the Decision of the First Instance Court C. No. 180/08.
22. On 23 January 2018, the Court of Appeals by submission no. AC.nr.557/2015 returned the case file to the Basic Court on the ground that the submission of the claimant did not meet the criteria of complaint provided for in Article 178 LCP.
23. On 23 February 2018, the Basic Court based upon the submission of the Court of Appeals no. AC.no.557/2015 called upon the Applicant to supplement his submission of 24 December 2014, within 7 days.
24. On 2 March 2018, the Applicant filed the requested supplement in the form of the complaint with the Court of First Instance for the Court of Appeals.
25. On 22 March 2018, the Basic Court, by Decision C.no.180/08, dismissed as inadmissible the appeal filed by the Applicant, declaring the legal matter for which the appeal was filed as already adjudicated (*res judicata*) according to the claim filed by the opposing party (MK).
26. On an unspecified date, the Applicant filed an appeal against the abovementioned Decision of the Basic Court.
27. On 18 June 2018, the Court of Appeal, by Decision Ac.no.557/2015, approved the Applicant's appeal as partially grounded, quashed the challenged Decision of the Basic Court C.nr.180/08 dated March 2018, and remanded the case to the first instance court. The Court justified the Decision by the fact that *"It has not been the duty of the court in this case to assess whether we are dealing with an adjudicated matter but only to assess whether the appeal filed contains the elements -the conditions to proceed according to it. In such circumstanced the court was supposed to refer the appeal to the higher court for assessing it, since the appeal met the requirements of Article 178 of the LCP to proceed further."*
28. On 3 July 2018, the Court of First Instance acting pursuant to the Decision of the Court of Appeals in the re-trial proceedings, by Judgment C.nr.203/2018

decided that: I. the claim submitted to the court does not meet the requirements to be treated as a claim hence it is returned to the claimant in order to supplement it within a term of 3 days; II. The claimant is ordered to pay court fees within 15 days of the receipt of this Decision in accordance with the provisions of the Administrative Instruction of the Kosovo Judicial Council (KJC).

29. In the enacting clause of the judgment, the Basic Court warned the claimant that in the event that the court's requests regarding the supplementation of the submission are not met or the court fee is not paid, the court will consider that the Claimant has withdrawn from the claim.
30. On 11 July 2018, the claimant submitted to the Basic Court the submission on supplementing and specifying the claim as requested by the same court in the Judgment C.no.203/18.
31. On 5 September 2018, acting on the basis of the claim supplemented on the basis of Judgment C.nr.203/18, the Basic Court decided the case based on its merits and rejected the claim as unfounded.
32. On 26 September 2018, the Applicant filed an appeal against the Judgment of the Basic Court with the Court of Appeals of Kosovo.
33. Based on the documents of the Referral, the Court cannot ascertain that any judicial decision has been taken on the appeal.

Proceedings conducted by the opposing party (Buyer M.K.)

34. On 7 March 2005, M.K. acting in the capacity of the buyer of the apartment, had submitted a proposal for certification of the contract on sale of the apartment which was the subject of a contract between him and the Applicant.
35. On 13 April 2005, the Municipal Court in Glogovc, by Decision No. 19/2005, suspended the proceedings concerning the proposal and instructed the proposer (M.K.) to pursue the realization of his right, in a civil litigation.
36. On 20 April 2005, M.K., filed a claim with the Municipal Court in Glogovc for confirmation of the agreement on the sale of apartment.
37. On 6 June 2005, the Municipal Court in Glogovc issued the Judgment C.no.80/2005 whereby it approved the claim of M.K. and established that based on the contract on sale the claimant is the owner of the apartment.
38. On an unspecified date, the Applicant filed an appeal against the aforementioned Judgment with the District Court of Prishtina.
39. On 3 July 2006, the District Court of Prishtina by Judgment Ac.no.771/2005 rejected the appeal and confirmed the Judgment of the Municipal Court in Glogovc C.no.80/2005 of 6 June 2005.

Applicant's allegations

40. The Applicant alleges that the challenged court decisions violate his fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution.
41. The Applicant builds his Referral upon the fact that he had entered the contract on the sale of apartment with M.K. under pressure and that on that occasion he was financially damaged. The Applicant also alleges that the courts were not objective when examining his submissions and complaints/appeals.
42. According to the Applicant *“the trial is based upon a forcible contract, Decision 180/08; it is made up, decision of Habitat dated 28.07.2005 is a camouflage.*
43. The Applicant also states that *“I was not offered the possibility of having a defence counsel, and there are many facts that have been hidden to me, and also the time limit for the resolution of the case 1999-2018 was exceeded.”*
44. The Applicant requests from the Court to be paid *“the amount of EUR 20,000 in the name of the damage as well as the amount of EUR 5,000 in the name of the maltreatment, time spent and court expenses.”* In the end, the Applicant requests that the apartment be returned to him and the judges who have decided in his case be punished.

Admissibility of the Referral

45. The Court first examined whether the admissibility criteria laid down in the Constitution and further specified in the Law and the Rules of Procedure have been fulfilled.
46. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provide:
 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 the exhaustion of all legal remedies provided by law.”*
47. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as further specified in the Law. In this respect, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

Article 47 [Individual Requests]

“1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.”

Article 48
[Accuracy of the Referral]

“In his /her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.”

48. As to the fulfillment of these criteria, the Court finds that the Applicant is an authorized party challenging the acts of a public authority. The Applicant has also clarified the rights and freedoms which he alleges to have been violated by concrete judicial decisions, pursuant to the conditions required by Article 48 of the Law. Further he has also submitted the Referral in accordance with the time limit set out in Article 49 of the Law. However, the Court must further examine whether the criteria foreseen for the exhaustion of legal remedies (Article 113.7 of the Constitution) as well as the criteria set out in Article 47, para.2 of the Law [Individual Referral], and Rule 39 (1) (b) [Admissibility Criteria] of the Rules of Procedure have been met, and which, inter alia, specify:

Article 47
[Individual Requests]

2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provide by the law.

Rule 39
[Admissibility Criteria]

(1) The Court may consider a referral as admissible if:

(b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted, [...].

49. In this regard, the Court recalls that the Applicant's fundamental allegation is the violation of the right to fair and impartial trial and a violation of the right to protection of property, both of which are individual rights protected by Article 31 respectively 46 of the Constitution of Kosovo, and have the following content:

Article 31 [Right to Fair and Impartial Trial]

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

1. 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 46 [Protection of Property]

1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

[...]

50. The Court recalls that pursuant to 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”* (hereinafter: ECtHR), therefore, in individual cases where the Court deals with alleged human rights violations it takes into account the legal practice of the ECtHR, and consequently when dealing with the alleged violation of the right to fair and impartial trial, the Court also refers to Article 6 of the European Convention on the Human Rights [ECHR] which provides:

Article 6.1 of the ECHR [Right to a fair Trial]

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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Consequently, the Court also refers to Article 1 of Protocol 1 of the ECHR which protects the right to property which provides:

Article 1 [Protection of Property] of Protocol 1 of the European Convention on Human Rights (ECHR)

“(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

“(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

As to the right to fair and impartial trial

51. The Court emphasizes that the substance of the Applicant's claim consists of a dispute over an apartment which was the subject of two sales contracts. The claimant started the dispute at the HPCC of the HPD-UN-Habitat and then proceeded to the regular domestic courts with two basic claims: a) restitution of property rights over the apartment, and b) compensation for material damage caused as result of the conclusion of a forcible contract.
52. The Court also finds that from the moment when the dispute was initiated by the Applicant with the HPCC-UN-Habitat on 29 November 2001 until 3 July 2018, none of the competent institutions (HPCC-HPD-UN-Habitat and the regular courts) did not issue a decision on the merits of the dispute but always issued decision on procedural issues regarding the admissibility of the submitted claim –statement of claim or complaints/appeals.
53. The Court also finds that it was the Judgment of the Basic Court C.no.203/18 of 5 September 2018 that decided on the merits of the claim, on the basis of the Applicant's supplemented statement of claim.
54. The Basic Court in the aforementioned Judgment stated that the claim was unfounded because the issue of ownership of the apartment subject to dispute was settled by a final court decision (Judgment C. no. 80/05 of the Municipal Court in Glogovc of 6.06.2005), whilst as regards the issue of the claim for compensation of material damage, the Basic Court found that this claim was prescribed.
55. The Court further finds that the Judgment of the Basic Court in Prishtina-Branch in Glogovc rejecting the Applicant's claim in the part which concerns the compensation of material damage found that the request was prescribed by justifying that *“The provision of Article 376, para.1 of the old LOR that was in force states that a claim for damages for loss caused shall expire three years after the party sustaining the injury or loss became aware of the injury and loss and of the tort-feasor, whilst according to para.2 of the same Article in any event, such claim shall expire five years after the occurrence of the injury or loss.”*

56. In this regard, the Court also finds that it was the Applicant himself who attached the Judgment of the Municipal Court in Glogovc C.no.80/05 of 6 June 2005 and the Judgment of the District Court in Pristina AC.no.771/2005, of 3 July 2006 to the case file, which clearly shows that the ownership issue regarding the disputable apartment was resolved by a final court decision. The aforementioned judgments were rendered by the courts according to the claim of M.K., where the responding party was the Applicant and based on the case file it is ascertained that the Applicant has personally participated in the examination of the claim and presented his evidence.
57. However, the Court finds that, despite the aforementioned facts, the Basic Court in Prishtina Branch in Glogovc solely on the basis of Decision C.no.180/08 of 22 March 2018 had qualified the case as a “adjudicated matter” (res judicata) but the decision on the basis of the Applicant's appeal was annulled by the Court of Appeals for procedural reasons.
58. Subsequent judicial decisions had not suspended further proceedings based on the principle of '*adjudicated matter*'. In fact, in its Judgment, when deciding on the merits of the claim, the Basic Court instructed the Applicant on the legal remedy and the latter exercised this right on 26 September 2018, by submitting an appeal to the Court of Appeals.
59. Moreover, the Court finds that the Applicant has filed an appeal with the Court of Appeals but has yet not received a response, hence in these circumstances the Referral is premature and that is, the conditions provided for in Article 113.7 of the Constitution with respect to the exhaustion of all legal remedies in individual requests have not been met.
60. The Court reiterates that the purpose of the rule on exhaustion of legal remedies is to provide the relevant authorities, above all the regular courts, with an opportunity to prevent or correct the alleged violations of the Constitution.
61. This rule is based upon the assumption reflected in Article 32 of the Constitution and Article 13 of the ECHR that the legal order of Kosovo provides an effective remedy for addressing violations of constitutional rights. This is an important aspect of the subsidiary character of the constitutional justice system (see ECtHR case, *Civet v. France*, Judgment of 28 September 1990, paragraphs 42-44, inter alia, Constitutional Court cases, KI158/18, Applicant *Ajet Ajeti*, Resolution on Inadmissibility, of 13 April 2019, paragraphs 40-42; KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility, of 8 December 2016, paragraph 61).
62. Therefore, for the reasons indicated above, the Court finds that the Applicant's Referral does not meet the admissibility criteria since the Applicant has not exhausted the legal remedies under Article 113.7 of the Constitution, Article 47, paragraph 2 of the Law and Rule 39 (1) (b) of the Rules of Procedure.
63. In the circumstances of the case, when the Applicant's Referral is premature, the Court cannot examine a claim for violation of the right to property all the more when the property case is a subject of review in the Court of Appeals of Kosovo.

64. In conclusion, pursuant to Rule 39 (1) (b), the Referral must be declared inadmissible on the ground of non-exhaustion of legal remedies provided by law.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law on the Constitutional Court, and Rule 39 (1) (b) of the Rules of Procedures, 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

Remzije Istrefi -Peci

Arta Rama-Hajrizi



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