



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

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Prishtina, 25 October 2019  
Ref. no.:RK 1457/19

*This translation is unofficial and serves for informational purposes only.*

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI143/18**

Applicant

**Bekim Mustafa**

**Constitutional review of Decision Ac. No. 3248/17 of the Court of Appeals  
of 17 July 2018**

### **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 Bekim Mustafa residing in the village Pasjak of the municipality of Gjilan (hereinafter: the Applicant), who is represented by the lawyer Halit Azemi from Gjilan.

## **Challenged decision**

2. The Applicant challenges Decision [Ac. No. 3248/17] of 17 July 2018 of the Court of Appeals.

## **Subject matter**

3. The subject matter is the request for constitutional review of the challenged Decision of the Court of Appeals, which allegedly violates the Applicant's rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] 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, Article 22 [Processing Referrals] of Law [No. 03/L-121] on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Constitutional Court**

5. On 20 September 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 9 October 2018, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha.
7. On 19 October 2018, the Court notified the Applicant about the registration of the Referral and requested him to submit to the Court the power of attorney for his lawyer, should he choose to be represented by him in the proceedings before this Court.
8. On 24 October 2018, the Applicant submitted to the Court the power of attorney for his lawyer.
9. On 13 September 2019, the Court notified the Court of Appeals about the registration of the Referral and sent a copy of it.
10. On 8 October 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

*Court proceedings initiated by the Applicant's claim and the counterclaim of the interested party E.B.*

11. On an unspecified date the Applicant filed a claim against the interested party E.B. and 12 other persons, with a request that his inheritance right over the immovable property be certified. On the other hand, E.B. also filed a statement of claim against the Applicant with the same request, namely that the right of ownership of the same immovable property be established as his belonging. [Clarification: this immovable property forms the core of the entire dispute in this case between the Applicant and E.B.].
12. On 3 July 2013, the Basic Court in Gjilan - the General Department (hereinafter: the Basic Court), by Judgment [C. No. 548/03] approved the statement of claim of the Applicant in its entirety. On that occasion, the Basic Court decided: (i) to establish that the Applicant is the owner of the immovable property; (ii) to order E.B. to vacate the Applicant's immovable property within 15 (fifteen) days the Judgment of the Court of Appeals becomes final; and, (iii) to reject the request filed by E.B. as a counterclaim to the Applicant through which E.B. requested to establish that the right of ownership of the same immovable property, in fact, belongs to him and not to the Applicant.
13. Against the abovementioned Judgment of the Basic Court, E.B. filed an appeal with the Court of Appeals on the grounds of erroneous application of substantive and procedural law and erroneous and incomplete determination of factual situation. On that occasion, E.B. requested the Court of Appeals to modify the Judgment of the Basic Court in order to reject the Applicant's statement of claim and to approve his statement of claim; or, as an alternative, to quash the Judgment of the Basic Court and remand the entire case for re-trial and reconsideration to the first instance court.
14. The Applicant filed a response to the appeal of E.B., requesting that the Court of Appeals upholds the Judgment of the Basic Court in its entirety and reject the appeal filed by E.B.
15. On 11 November 2016, the Court of Appeals, by Judgment [Ac. No. 2951/2013], approved the appeal of E.B. only as to the amount of the interest adjudicated by the Basic Court, explaining how the interest should be calculated. The Court of Appeals upheld all the rest of the Judgment of the Basic Court rejecting the appeal of E.B. on all other grounds of his appeal as ungrounded. Thus, by the Judgment of the Court of Appeals was confirmed the Applicant's ownership over the immovable property subject to dispute.
16. Against the Judgment [Ac. No. 2951/2013] of 11 November 2016 of the Court of Appeals, E.B. filed a request for revision with the Supreme Court, alleging violation of the provisions of contested procedure and erroneous application of substantive law. E.B. proposed to the Supreme Court to modify the lower courts' decisions so that the Applicant's statement of claim could be rejected as ungrounded or that those decisions be quashed and the entire case be remanded to the Basic Court for retrial.

17. On 10 May 2017, the Supreme Court by Decision [Rev. No. 56/2017] upheld the request for revision of E.B. as grounded. On that occasion, the Supreme Court ordered to quash the Judgment of the Basic Court and of the Court of Appeals and remanded the case for retrial to the first instance court, namely the Basic Court.
18. More specifically, the Supreme Court reasoned the approval of the revision as grounded, stating that for the time of being the decisions of the lower instance courts cannot be approved as lawful and fair because those “*judgments were rendered in essential violation of the provisions of contested procedure under Article 182 par. 2 item (n) of the LCP, and Article 194 of the LCP, therefore both judgments had to be quashed and the case remanded to the first instance court for retrial*”. The essential violations of the contested procedure provisions, according to the Supreme Court, consisted in existence of contradictions between the enacting clause and the reasons given by the Basic Court and the contradiction between the reasons for the decisive facts. Meanwhile, according to the Supreme Court, in the second instance, the Court of Appeals was obliged to note the violations with which the Judgment of the Basic Court was rendered, and by not identifying those violations the Judgment of the Court of Appeals contained essential violations of the provisions of contested procedure.
19. It follows that the final decision on the Applicant’s statement of claim and that on the counter claim of E.B. is still pending before the Basic Court where the case is remanded for retrial through the aforementioned Decision of the Supreme Court. However, the Applicant does not challenge the Decision [Rev. No. 56/2017] of 10 May 2017 of the Supreme Court and, therefore, in assessing the admissibility of this Referral, the Court will not deal with the constitutional review of the proceedings conducted by the regular courts in respect of the Applicant’s statement of claim and counter claim of E.B. The Applicant before this Court challenges the Decision [Ac. No. 3248/17] of 17 July 2018 of the Court of Appeals and consequently the Court will assess the constitutionality of that decision. The following paragraphs will highlight the relevant facts that have occurred as a result of the enforcement proceedings initiated by the Applicant [based on the Judgments of the Basic Court and the Court of Appeals] and the counter-enforcement proceedings initiated by E.B. [based on the Decision of the Supreme Court].

*Enforcement proceedings initiated by the Applicant and those of counter-enforcement initiated by E.B. which culminate in the challenged Decision before this Court, namely Decision [Ac. No. 3248/17] of 17 July 2018 of the Court of Appeals*

20. On 2 February 2017, before the Decision of the Supreme Court, which approved the revision of the E.B. was rendered and the whole matter was remanded for retrial before the Basic Court, the Private Enforcement Agent by Order [P. No. 46/17] ordered that E.B. as a consequence of the Judgments of the Basic Court and that of the Court of Appeals [see paragraphs 12 and 15 above] to vacate the immovable property by emptying it from people and items, still subject to dispute but at that time belonging to the Applicant based on the decisions of the first and second instance courts, which became enforceable despite the fact that

the extraordinary legal remedy - the revision - was still pending before the Supreme Court. [*Clarification: The applicable law in the Republic of Kosovo permits the initiation of the enforcement proceedings through the final decisions of the Basic Court, upheld by the Court of Appeals despite the fact that a request for revision is still pending before the Supreme Court. This is due to the fact that the request for revision as an extraordinary legal remedy does not prevent the conduct of the enforcement procedure.*]

21. On 17 March 2017, the Basic Court by Decision [CPK. 31/2017] upheld the abovementioned Order of Private Enforcement Agent.
22. On 6 April 2017, the Private Enforcement Agent rendered the Conclusion [P. No. 46/2017] by which he ordered that on 20 July 2017, at 11:00 am, E.B. must be present and prepared with the necessary manpower and means of transportation in order to vacate the immovable property and to terminate the enforcement proceedings in favor of the Applicant.
23. It follows from the case file that the immovable property was vacated by E.B. in favor of the Applicant.
24. In the meantime, namely on 10 May 2017, the Supreme Court by Judgment [Rev. No. 56/2017], as explained above, approved the revision of the E.B. as grounded and quashed the Judgments of the Basic Court and of the Court of Appeals, by which was initiated the aforementioned enforcement procedure and through which E.B. vacated the immovable property to the Applicant.
25. On 13 June 2017, namely, following the decision of the Supreme Court, E.B. filed a proposal for counter-enforcement with the Basic Court against the Applicant, requesting that the immovable property that was the subject of the dispute together with the premises and business premises that were built on that property be vacated. E.B. based his proposal for counter-enforcement exactly on the Decision of the Supreme Court.
26. On 7 July 2017, the Basic Court, by Decision [CP. No. 34/2017], approved as grounded the proposal for counter-enforcement of E.B. and obliged the Applicant that within 7 (seven) days to enable E.B. to return the business premises and business objects built on the immovable property subject to dispute. The Basic Court reasoned its decision as follows:

*“Based on Article 54, item 1, paragraph 1.1 of the LEP, the court finds that the enforcement document on the basis of which the execution was allowed and the execution was completed with the vacation of immovable property [...] was quashed and thus the legal basis of forced enforcement ceased, so that the proposal for counter-enforcement is based on law and the debtor E.B. now the creditor of the counter-enforcement has the legal right of the request to order the counter-enforcement debtor Bekim Mustafa [the Applicant] to return all the items he received under the Enforcement Proposal and the Enforcement Order P. No. 46/17 of the Private Enforcement Agent. [...]*

*Therefore, based on the fact that the enforcement document on the basis of which the Enforcement Order - Judgment C. No. 548/03 of the Basic Court in Gjilan of 03.07.2013 was rendered and which became effective on 27.12.2016 is quashed and the case was remanded for retrial [by the Decision of the Supreme Court], the court finds that the legal requirements of Article 54 item 1 sub item 1.1 of the LEP to initiate the counter-enforcement procedure, have been met.”*

27. Against the aforementioned Decision of the Basic Court, the Applicant filed an appeal with the Court of Appeals alleging a violation of the LEP provisions. The Applicant requested the Court of Appeals to declare the abovementioned Decision of the Basic Court as unlawful and to decide that the counter-enforcement is not permitted without a final judgment.
28. E. B. filed a response to the Applicant's appeal, proposing that it be rejected as ungrounded or as out of time.
29. On 17 July 2018, the Court of Appeals by Decision [Ac. No. 3 248/17] rejected the Applicant's appeal as ungrounded and upheld the Decision of the Basic Court. According to the assessment of the Court of Appeals, the first instance court rendered its decision without essential violation of the provisions of the contested and enforcement proceedings and that neither *ex officio* nor based on the Applicant's appeal could be found violations which would result in quashing the decision.
30. On 15 August 2018, the Applicant proposed to the State Prosecutor to initiate a request for protection of legality against the aforementioned Decision of the Court of Appeals.
31. On 3 September 2018, the State Prosecutor by Notification [KMLC. No. 118/2018] notified the Applicant that his proposal was not approved as in his case it was not found that there was sufficient legal basis for filing such a request.
32. Before the Constitutional Court, the Applicant challenges Decision [Ac. No. 3248/17] of 17 July 2018 of the Court of Appeals alleging that the latter was taken in violation of his rights guaranteed by Articles 31 and 54 of the Constitution.

### **Applicant's allegations**

33. The Applicant alleges that the regular courts violated his right to fair and impartial trial guaranteed by Article 31 of the Constitution and his right to judicial protection of rights guaranteed by Article 54 of the Constitution.
34. As to these allegations, the Applicant states that he has acquired the property right by Judgment [C. No. 548/03] of 3 July 2013 of the Basic Court and that the same right was confirmed by Judgment [Ac. No. 2951/13] of 11 November 2016 of the Court of Appeals. After submitting a request for revision by the responding party, the Supreme Court quashed the decisions of the Basic Court and of the Court of Appeals and remanded the case for retrial. Subsequently, the Applicant states that the opposing party requested through counter-enforcement to return

the possession and use of the disputed object. However, according to the Applicant, *“no counter-enforcement may be required without a final decision under Article 54 par. 1.1 and par. 2 of the Law on Enforcement Procedure.”*

35. The Court of Appeals, the Applicant states, rejected the appeal by the challenged Decision and upheld the Conclusion of the first instance court. The State Prosecutor also, following the Applicant’s request, rejected the proposal to file the request for protection of legality. For this reason, the Applicant states, *“we address the Constitutional Court for judicial protection of rights and for a fair trial.”*

36. Finally, the Applicant addresses the Court with the following request:

*“We request the quashing of the Decision of the Basic Court in Gjilan CP. No. 34/17 and of the Court of Appeals Ac. No. 3248 [/ 17] as unlawful as the counter-enforcement cannot be requested and approved without final or effective decision under Article 54 par. 1.1 and 1.2 of the Law on Enforcement Procedure, we consider that the judicial protection of rights of the claimant Bekim was seriously violated, as well as the right to render fair and impartial decisions by the courts have been violated.”*

### **Admissibility of the Referral**

37. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and in the Rules of Procedure.

38. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

#### Article 113 of the Constitution [Jurisdiction and Authorized Parties]

*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.*

39. In addition, the Court also refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

#### 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.*

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

*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”.*

*Article 49  
[Deadlines]*

*“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 [...].*

40. Initially, as regards the fulfillment of these criteria, the Court notes that the Applicant is an authorized party challenging an act of a public authority, namely Decision [Ac. No. 3248/17] of 17 July 2018 of the Court of the Appeals, after having exhausted all legal remedies provided by law. The Applicant has also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set forth in Article 49 of the Law.
41. However, in addition, the Court should also examine whether the Applicant met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Paragraph 2 of Rule 39 of the Rules of Procedure establishes the requirements based on which the Court may consider a referral, including the requirement that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) of the Rules of Procedure provides that:

*“(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”.*
42. The Court recalls that, throughout his referral to the Court by the official referral form, the Applicant, in fact, only briefly listed the facts of the case but did not substantiate his allegations on how the Court of Appeals had in fact violated his right to fair and impartial trial guaranteed by Article 31 of the Constitution and the right to judicial protection of rights guaranteed by Article 54 of the Constitution.
43. The Court notes that the Applicant has merely provided a brief description of the facts and his request that the Court itself should find how his rights guaranteed by Articles 31 and 54 of the Constitution could potentially be violated. This is

made clear by his own request addressed to the Court, which states that after the rejection of his requests by the Basic Court, the Court of Appeals and the State Prosecutor, we “*address the Constitutional Court for judicial protection of rights and for a fair trial.*”

44. The Court places particular emphasis on the fact that it is not its duty to find unsubstantiated violations by the Applicants. It is precisely a duty of the latter to explain to the Court, at least in essence and substantially, how the alleged violations of the Constitution have occurred and what are the concrete acts or failure to act of the public authorities that led to violation of their rights and freedoms guaranteed by the Constitution. The Court itself cannot review the entire file and find *ex officio* violations without the Applicants’ request. It is the latter who should direct the Court to find a possible violation and this principle is consistent with the legal doctrine that a court should not build a case for the Applicant but that he himself has an obligation to build his case, with relevant constitutional arguments.
45. In this regard, the Court recalls that the only allegation of the Applicant in support of his claim that Articles 31 and 54 of the Constitution were violated is that “*no counter-enforcement may be requested without a final decision under Article 54 par. 1.1 and par. 2 of the Law on Enforcement Procedure.*”
46. Regarding this allegation, the Court reiterates that, in principle, the interpretation of the law is a competence of the regular courts, and that the “*fairness*” required by Article 31 of the Constitution, is not “*substantive*” fairness, but “*procedural*” fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (See, in this regard, the case of the Court No. KI42/16 Applicant: *Valdet Sutaj*, Resolution on Inadmissibility of 7 November 2016, paragraph 41 and other references therein).
47. In addition, the Court recalls the reasoning given by the Court of Appeals in its Decision which is challenged before this Court, where the Applicant’s allegation for interpretation of the Law on Enforcement Procedure was addressed. More specifically, with regard to the issue of counter-enforcement and the times when it is allowed, the Court of Appeals reasoned:

*“It follows from the case file that the counter-enforcement creditor [E.B.] filed a proposal for counter-enforcement, stating that the final judgment has been executed, but by Decision Rev. No. 56/2017 of 10.05.2017 of the Supreme Court of Kosovo, both the first instance and the second instance judgments were annulled, and therefore he requested that the proposal for counter-enforcement be approved [...]*

*According to the assessment of the Court of Appeals of Kosovo, the impugned decision does not contain essential violation of the provisions of the contested and enforcement proceedings which this court notes ex officio, nor those which the appeal invokes.*

*The appealing allegation of violation of the provisions of the LEP, specifically of Article 54 par. 1.1 is ungrounded, because within the meaning of this provision, the debtor has the right that in the same enforcement procedure, even after the enforcement is completed, to request the court to render a decision ordering the creditor to return what he took based on the enforcement procedure if the enforcement document by a final decision was quashed, modified, annulled, abrogated or otherwise found to have no legal effect.*

*The purpose of counter-enforcement is, in fact, to oblige the creditor without initiating a dispute to return to the debtor what he obtained by forced enforcement, when any of the reasons stated in Article 54 of the LEP appear”.*

48. In this regard, the Court notes that the Applicant built his entire case on the basis of legality and on a single allegation, namely, on interpretation and erroneous application of the above-mentioned specific articles of the Law on Enforcement Procedure. The Court recalls that these allegations relate to the scope of legality and as such do not fall under the jurisdiction of the Court, and therefore cannot, in principle, be examined by the Court. (See, *inter alia*, the case of Court KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 35).
49. The Court has consistently reiterated that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (*legality*), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (*constitutionality*). It may not itself assess the law which has led a regular court to adopt one decision rather than another. Otherwise, the Court would be acting as a court of “*fourth instance*”, which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law (See ECtHR case *García Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also cases of the Court KI70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, paragraph 29; KI06/17, Applicant: *L.G. and five others*, Resolution on Inadmissibility of 20 December 2017, paragraph 37; and KI122/16, Applicant *Riza Dembogaj*, Resolution on Inadmissibility of 19 June 2018, paragraph 57).
50. The Court has consistently held this view based on the ECtHR case law, which clearly states that it is not the role of this Court to review the findings of the regular courts as to the factual state and the application of substantive law (see ECtHR case *Pronina v. Russia*, Judgment of 30 June 2005, paragraph 24; and the Court cases KI06/17, Applicant: *L.G. and five others*, cited above, paragraph 38; and KI122/16, cited above, paragraph 58).
51. In this regard, the Court notes that the Applicant did not substantiate that this interpretation of the law by the Court of Appeals is manifestly erroneous or arbitrary and to have resulted in “*arbitrary conclusions*” or “*manifestly unreasoned*”.

52. The Court finally notes that the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts cannot of itself raise an arguable claim for the violation of the constitutional right to fair and impartial trial or for violation of judicial protection of rights. (See, ECtHR case, *Mezotur - Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21; and, among others, KI56/17, cited above, paragraph 42).
53. Therefore, in these circumstances, based on the foregoing, the Court relying also on the standards established in its case law in similar cases and the case law of the ECtHR, finds that the Applicant does not prove and does not sufficiently substantiate his allegation of a violation of his fundamental rights and freedoms guaranteed by Article 31 of the Constitution and Article 54 of the Constitution.
54. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and is declared inadmissible, in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure.

## FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Article 20 of the Law, and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 8 October 2019, unanimously

### DECIDES

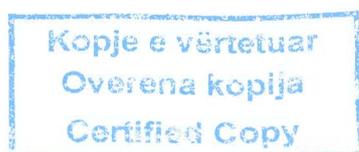
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and
- IV. This Decision is effective immediately.

**Judge Rapporteur**

**President of the Constitutional Court**

Remzije Istrefi-Peci

Arta Rama-Hajrizi



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