



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

Prishtina, on 27 January 2020
Ref. no.:RK 1505/20

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RESOLUTION ON INADMISSIBILITY

in

Case No. KI174/19

Applicant

**Durije Kurshumlija,
Shpresa Kurshumlija and
Orhan Kurshumlija**

**Constitutional review of the Decision Rev. no. 127/2019 of the Supreme
Court of the Republic of Kosovo, of 22 May 2019**

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: Durije Kurshumlija, Shpresa Kurshumlija and Orhan Kurshumlija (hereinafter: the Applicants). They are represented by Mr. Sabri Kryeziu, a lawyer from Lipjan.

Challenged decision

2. The Applicants challenge the Decision [Rev. no.127/2019] of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 22 May 2019, which rejected as unfounded the Applicants' revision against the Decision [Ac. no. 218/14] of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals), of 21 November 2010, concerning the Applicants' Proposal for the repetition of the contested procedure.
3. The Applicants claim that they have received the challenged Decision on 7 June 2019.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged decision, which as alleged by the Applicants has violated the rights guaranteed by Articles 24 [Equality before the Law] and 31 [Right to Fair and Impartial Trial] 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 Human Rights and Fundamental Freedoms (hereinafter: ECHR)).

Legal basis

5. The Referral is based on paragraphs 1 and 7, of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, and 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) 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

6. On 30 September 2019, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 4 October 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gerxhaliu-Krasniqi.
8. On 10 October 2019, the Court notified the Applicants about the registration of the Referral and sent a copy thereof to the Supreme Court.
9. On 16 January 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

10. The Applicants submitted the Referral to the Court concerning their case for the second time, by challenging various decisions of the regular courts. For this reason, the Court will present the factual situation separately for each case, specifically: KI76/13 and KI174/19.

Summary of facts in relation to the Referral KI76/13

11. On 5 November 1985, the District Court of Prishtina, by Judgment C. no. 526/84, confirmed that the Applicants' father had the right to permanent use of the immovable property, which is registered as cadastral parcel no. 6177, consisting of an area of 1.67.53 hectares, at a place called "Vreshtat(Vineyards)", as per the possession list no. 1941, MA of Prishtina, and allow the registration in his name within 15 (fifteen) days from the date of issuance of the Judgment.
12. After this, the opposing party (the respondent) complained to the Supreme Court, claiming that the District Court had violated the essential provisions of the Law on Contested Procedure (hereinafter: LCP), erroneously determined the situation factually and erroneously applied the substantive law.
13. On 17 July 1986, the Supreme Court of Kosovo, by Judgment Ac. no. 125/86 quashed the Judgment of the District Court of Prishtina, stating that the allegations of the party opposing the complainant (claimant before the District Court) were justified, and ordered that the case be referred to the Municipal Court of Prishtina for review as a competent court to decide on this case. The Supreme Court further ordered that in the repeated proceedings, should be clarified all circumstances and, inter alia, requested a detailed report from the Department of Geodesy on the property dispute.
14. On an unspecified date, following the death of their father, the Applicants as legitimate heirs initiated the repetition of the procedure before the Municipal Court in Prishtina as it was ordered by Judgment Ac.no.125/86 of the Supreme Court, of 17 July 1986.
15. On 14 September 2007, the Municipal Court in Prishtina, by Judgment C.no. 180/2002, rejected the Applicants' claim as unfounded, considering the opposing party (the Respondent) as the owner of the parcel officially registered in his name at the Cadastral Office in Prishtina.
16. On 6 November 2007, the Applicants filed an appeal to the District Court of Prishtina against the Judgment of the Municipal Court, alleging that the first instance court did not act pursuant to the instructions determined in Judgment Ac. no. 125/86 of the Supreme Court, of 17 July 1986 and thus violated the Article 354. 1 in conjunction with Articles 377 and 354. 2 of the LCP, and that its Judgment was a result of erroneous and incomplete determination of the factual situation of substantive law.
17. On 24 June 2010, the District Court in Prishtina, by Judgment Ac. no. 424/2008 confirmed the Judgment of the Municipal Court and rejected as

unfounded the Applicants' appeal. The Court stated that the Municipal Court correctly and fully determined all the facts that were of crucial importance in determining the fact that the late father of the Applicants from Prishtina did not enjoy the right of ownership over the disputed immovable property. The District Court concluded that the Judgment of the Municipal Court contained a comprehensible enacting clause and that, in the reasoning of the Judgment, are provided full and comprehensible reasons in relation to all the facts relevant to the fair trial of the disputed case.

18. On 5 August 2010, the Applicants submitted a revision to the Supreme Court of Kosovo due to violation of the provisions of the LCP and the erroneous application of substantive law, proposing to the Supreme Court to amend the decisions of the lower instance courts by approving the Applicants' Referral as grounded, or alternatively these judgments to be annulled and the case be remanded for retrial.
19. On 7 February 2013, the Supreme Court of Kosovo, by Judgment Rev. no. 218/2013 rejected the appeal as unfounded and upheld all the factual and legal findings issued by the lower instance courts, stating that the challenged judgments were clear and did not contain contradictions in their content or reasoning.
20. On 29 May 2013, the Applicants submitted the Referral KI76/13 to the Court seeking a constitutional review of the Judgment [Rev. no. 218/2010] of the Supreme Court.
21. On 28 March 2014, the Constitutional Court rendered the Resolution on Inadmissibility in Case KI76/13, thus rejecting the Applicants' Referral in its entirety, by declaring a part of the Referral as manifestly ill-founded, and dismissing the other part of the Referral which concerned the length of the proceedings due to non-exhaustion of legal remedies.

Summary of facts in relation to the Referral KI174/19

22. On 3 April 2013, the Applicant Shpresa Kurshumlija filed a request with the Basic Court for the repetition of the contested procedure (subject of review in case KI76/13), alleging, inter alia, that they had new facts, and that on that occasion the requirements for repetition of the procedure had been fulfilled.
23. On 11 October 2013, the Court of Appeals, deciding in the first instance, by Decision [CN. no. 16/13], rejected as ungrounded the Applicants' proposal for repetition of the procedure, arguing, inter alia, that there do not exist legal grounds which are referred to in the proposal. On this basis, the Court of Appeals decided that the legal conditions for allowing the repetition of the procedure in relation to the Applicant's case had not been met.
24. The Applicant Shpresa Kurshumlija filed an appeal against the Decision of the Court of Appeals [CN. no. 16/13], due to essential violations of the provisions of contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of substantive law.

25. On 21 November 2018, the Court of Appeals, deciding in a second instance, by Decision [Ac.no.218/2014] rejected the Applicant's appeal against the Decision of the Court of Appeals [CN. no. 16/13].
26. On 24 December 2018 the Applicant Shpresa Kurshumlija filed a revision with the Supreme Court against the Decision of the Court of Appeals [Ac.no.218/2014], due to essential violations of the provisions of the contested procedure, and erroneous application of the substantive law.
27. On 22 May 2019, the Supreme Court by Decision [Rev.no.127/2019] rejected the Applicant's appeal as unfounded and confirmed the Decision of the Court of Appeals [Ac. no. 218/2014] of 21 November 2018.

Applicant's allegations

28. The Applicants allege that the challenged decision of the Supreme Court has violated the equality before the law guaranteed by Article 24 and the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of ECHR.
29. In relation to the alleged violations of Article 31 of the Constitution and Article 6 of the ECHR, the Applicants claim that the Court of Appeals and the Supreme Court did not properly assess the Applicants' proposal for repetition of the procedure, moreover, by the statements of the descendants of FS there would be proved a different factual situation which would have legal consequences in the court's decision.
30. The Applicants further reiterate that the irregular review of their allegations by the Court of Appeals and the Supreme Court, which is argued in the statements of the heir F.S. strengthens the Applicants' conviction that there has been no enforcement of Article 31 of the Constitution or the application of Article 6 of the ECHR.
31. In relation to the alleged violations of Article 24 of the Constitution, the Applicants claim that the Court of Appeals and the Supreme Court have violated Article 24 [Equality before the Law] of the Constitution because, as they point out in another case, "*the same court (Court of Appeals of the Republic of Kosovo), by decision Ca.nr.2108 / 15 of 27.06.2019*", acting upon a same request for repetition of the procedure, upheld the appeal and quashed the decision of the Basic Court.
32. Finally, the Applicants request from the Court to annul the Decision of the Court of Appeals [CN.no.16 / 2013], of 11 October 2013, the Decision of the Court of Appeals [Ac.no.218/2014], of 21 November 2018, as well as the Decision of the Supreme Court [Rev.no.127 / 2019], of 22 May 2019.

Admissibility of the Referral

33. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and Rules of Procedure.
34. The Court recalls that the Applicants have submitted two Referrals to the Constitutional Court. The first Referral, which concerned the contested procedure of the Applicants, was declared inadmissible by the Resolution on Inadmissibility in Case KI76/13.
35. In the present Referral KI174/19, the Applicants challenge before the Court the decisions of the regular courts relating to their proposal for the repetition of the procedure which was concluded by Decision [Rev.no.127/2019] of the Supreme Court. Accordingly, the Court will limit itself only to the assessment of decisions of regular courts which concern the repetition of the procedure, as this is the subject of Referral KI174/19.
36. In this respect, the Court refers to paragraphs 1 and 7 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.

[...]

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”.

37. Further, 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], 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.

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. [...]”

38. As to the fulfillment of these criteria, the Court finds that the Applicants are an authorized party challenging an act of a public authority, namely the Decision [Rev.no.127/2019], of the Supreme Court, of 22 May 2019.
39. In addition, the Court examines whether the Applicants have fulfilled the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. In this respect, the Court refers to paragraphs 2 and 3 (b) of Rule 39 [Admissibility Criteria] of the Rules of Procedure, which provide:

“(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”.

“(3) The Court may also consider a referral inadmissible if any of the following conditions are present:

[...]

(b) the Referral is incompatible ratione materiae with the Constitution;

[...]

40. The Court further notes that the Applicants allege a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR as well as a violation of Article 24 of the Constitution, and therefore the Court will respond separately to these Applicants' allegations.

The Court's assessment of the Applicants' allegations for a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR which concern the repetition of the procedure.

41. The Court also reiterates 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”.*
42. As to the Applicants' allegation for a violation of their right to fair and impartial trial, the Court, referring to the case law of the ECtHR and its case law, reiterates that Article 31 of the Constitution and Article 6 of the ECHR do not apply to requests for repetition of the procedure (see, in analogical manner,

the cases of the Constitutional Court: KI80/15, KI81/15 and KI82/15, Applicant *Rrahim Hoxha*, Resolution on Inadmissibility of 6 December 2016, paragraph 31; see also, ECtHR cases, *inter alia*, *Oberschlick v. Austria*, no. 23727/94, Decision on Inadmissibility, of 21 March 1994, *Dowsett v. the United Kingdom*, no. 8559/08, Decision on Inadmissibility, of 4 January 2011, *Sablon v. Belgium*, no. 36445/97, Judgment of 10 April 2001, paragraph 86).

43. In this context, the Court recalls that in all cases in which the review or repetition of procedures (civil, criminal, enforcement) concluded by final decisions has been requested by extraordinary legal remedies, and where regular courts have dealt solely with the admissibility criteria of the claims, and not with the merits of the case, the Court, in compliance with the jurisprudence of the ECtHR, has held that Article 31 of the Constitution and Article 6 of the ECHR are not applicable. (see, the Constitutional Court cases: KI159 /15, *Sabri Ferati*, Resolution on Inadmissibility, of 13 June 2016, KI07/17, *Pashk Mirashi*, Resolution on Inadmissibility, of 29 May 2017, and KI06 / 18, *Shkumbin Mehmeti*, Resolution on inadmissibility, of 14 February 2019).
44. The Court emphasizes that the *ratione materiae* compatibility of the Referral with the Constitution stems from the Court's substantive jurisdiction. The right which is referred to by the Applicant must be protected by the Constitution in order for a constitutional complaint to be *ratione materiae* compatible with the Constitution. However, the Constitution does not guarantee to the Applicant the right to review and repetition of the procedures (see, in analogical manner, the Constitutional Court cases: KI80/15, 81/15 and 82/15, *Rrahim Hoxha*, Resolution on Inadmissibility, of 27 December 2016, paragraph 33 and KI07/ 17/15, *Pashk Mirashi*, Resolution on Inadmissibility, of 12 June 2017, paragraph 66;).
45. Consequently, the Court considers that the Applicants' Referral concerning the refusal by the regular courts of the repetition of the procedure is not in *ratione materiae* compatible with Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

The Court's assessment of the Applicants' allegation for a violation of Article 24 [Equality before the Law] of the Constitution.

46. As regards the Applicants' allegation for violation of equality before the law guaranteed by Article 24 of the Constitution, the Court recalls that the Applicants allege that the Court of Appeals and the Supreme Court did not carry out a equivalent assessment because in other cases that are similar to their case, the Court of Appeals has decided differently.
47. The Court will next consider this specific allegation, where the Applicants refer to a decision of the Court of Appeals (CA.nr.2108 / 2015, of 27 June 2019), in which the Court of Appeals remanded the case for retrial on the ground that it had found that the evidence presented by the party had not been taken into account by the first instance court.
48. The Court refers to the case law of the ECtHR in relation to Article 24 of the Constitution, which states that "discrimination constitutes a different

treatment, without objective and reasonable justification, of persons in relevantly similar situations" (see: *Willis v. United Kingdom*, paragraph 48, ECtHR judgment of 11 September 2002; *Bekos and Koutropoulos v. Greece*, paragraph 63, ECtHR judgment of 13 March 2006).

49. In order for the Applicants' allegations of discrimination to be successful, the Applicants must prove, *inter alia*, that their situation may be considered similar to that of another person who has been treated better (see: *Fredin v. Sweden* (no. 1), paragraph 60, ECtHR judgment of 18 February 1991).
50. The Court notes that in the present case the Applicants did not in any way attempt to "*prove that their situation could be considered similar to that of another person who has been treated better*".
51. The Court notes that the Applicants merely refer to a decision of the Court of Appeal allowing the repetition of the procedures, without explaining the similarities between their case and the case which they have referred to, also without explaining what was "the different treatment, without objective and reasonable justification, of persons in relevantly similar situations".
52. In the light of all what was stated above, the Court finds that the Applicants' allegations for a violation of Article 24 [Equality before the Law] of the Constitution are manifestly ill-founded pursuant to Rule 39 (2), because the Applicants have not sufficiently proved and substantiated their allegation.

Conclusion

53. The Court concludes that the Applicants' allegations for a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in the proceedings pursuant to the request for repetition of the procedure are not *ratione materiae* compatible with the Constitution. Therefore, these allegations should be rejected as incompatible *ratione materiae* with the Constitution, in accordance with Rule 39 (3) (b) of the Rules of Procedure.
54. While as regards the second allegation, the Court concludes that the Applicants' allegations for a violation of Article 24 [Equality before the Law] of the Constitution are unfounded. Therefore, these claims must be rejected as manifestly ill-founded, in accordance with Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and pursuant to the Rule 39 (2), (3) (b) and 59 (2) of the Rules of Procedure, on 16 January 2019, unanimously

DECIDES

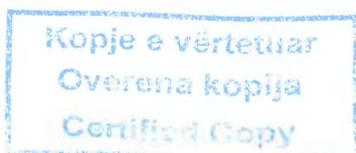
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Radomir Laban

Arta Rama-Hajrizi



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