



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

Prishtina, on 17 July 2020
Ref.No.:AGJ1581/20

This translation is unofficial and serves for informational purposes only.

JUDGMENT

in

Case No. KI38/19

Applicant

Avdi Mujaj

**Constitutional review of the Judgment Rev.no.285/2018 of the Supreme
Court of the Republic of Kosovo, of 1 October 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 AvdiMujaj, residing in Peja (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment [Rev. no. 285/2018], of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) of 1 October 2018, which was served on him on 29 October 2018

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which as alleged by the Applicant has violated his rights guaranteed by paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial] and paragraph 2 of Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

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), 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 25 February 2019, the Applicant submitted the Referral by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 12 March 2019, the President of the Court appointed Judge Safet Hoxha, as Judge Rapporteur and the Review Panel, composed of Judges: Bekim Sejdiu (presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
7. On 25 March 2019 the Court notified the Applicant about the registration of the Referral, by requesting from him to: (i) submit the acknowledgment of receipt proving the date when the challenged judgment of the Supreme Court was received by him; (ii) submit the power of attorney of the representative in case he has decided to be represented in the proceedings before the Court.
8. On 20 April 2019 the Applicant submitted: (i) the acknowledgment of receipt proving that he had received the challenged Judgment on 29 October 2018; and (ii) the completed referral form where he stated that in this case he has not engaged a representative and that in the proceedings before the Court he will represent himself.
9. On 23 May 2019, the Court notified the Supreme Court about the registration of the Referral and sent a copy thereof to it.

10. On 15 January 2020 the Court notified the interested party B.D. about the registration of the Referral and enabled him to submit his comments in relation to the Referral, if any, within 15 (fifteen) days from the receipt of the notification of the Court.
11. On 3 February 2020, the interested party B.D. submitted several comments to the Court.
12. On 1 July 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the admissibility of the Referral.
13. On the same day, on 1 July 2020, the Court unanimously decided that (i) the Referral is admissible, and (ii) the Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 October 2018, is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

14. On 30 April 1985, the Applicant, in the capacity of buyer, entered into a contract on sale with H.D., in the capacity of seller (hereinafter: the contract on sale). The subject of the Contract on Sale was an immovable property consisting of a house and some other adjacent facilities constructed on the cadastral parcel [no.5393 / 18], with an area of 480m².
15. On an unspecified date, H.D., who had signed the Contract on Sale as a Seller with the Applicant, passed away. Based on the case file it results that the Applicant, despite having entered into this Contract on Sale, he had not registered the property in question in his name with the relevant public authorities for registration of property rights.
16. The Applicant had requested from the heir of H.D., respectively B.D., to enable him to register the property in question at the Directorate for Cadastre, Geodesy and Property in the Municipality of Peja - but according to the statement of claim, the respondent, respectively the interested party B.D. rejected it.
17. Consequently, on 31 January 2008 the Applicant filed a claim for "confirmation of ownership" with the Municipal Court in Peja against B.D. The Applicant requested to be confirmed that he is the owner of the disputable property according to the aforementioned Contract on Sale concluded in 1985 between him and the father of B.D. He demanded to oblige B.D. to enable him to be identified as the owner of the immovable property and, in order to avoid the risk and causing of irreparable damage, the Applicant requested the imposition of an interim measure whereby the establishment of the mortgage on the property in question would be prohibited.

Decision-making in the first instance, at the Municipal Court in Peja [without the presence of Judge I.K.]

18. On 12 January 2010, the Municipal Court in Peja, through the Judgment [C.no.56/2008], upheld the Applicant's statement of claim in its entirety. On that occasion, it decided that the Applicant was the owner of the disputable cadastral parcel with a total area of 480m² and that all heirs of the first line of H.D., in total eight of them, must recognize the Applicant's right of ownership as well as allow the property in question to be registered at the Municipal Cadastral Office in Peja.
19. On 1 February 2010, B.D. filed an appeal with the District Court in Peja against the aforementioned Judgment due to violations of the provisions of the Law on Contested Procedure (hereinafter: LCP), incomplete and erroneous determination of the factual situation and erroneous application of the substantive law.
20. On 9 February 2010, the Applicant filed a response to the appeal with the District Court in Peja, stating that the respondents' allegations were unfounded and unsustainable, proposing that the appeal be rejected as unfounded and that the challenged judgment be confirmed.

Decision-making in the second instance, at the District Court in Peja [in the presence of Judge I.K., as a member of the trial panel consisting of 3 members]

21. On 16 March 2011, the District Court in Peja, by Judgment [Ac.no.101/10] decided on the partial approval of the appeal of B.D.
22. By this approval, the District Court in Peja (hereinafter: the District Court) amended the Judgment [C.no.56 / 2008] of the Municipal Court in Peja, of 12 January 2010, in a way that it recognized the already recognized ownership right of the Applicant's but not over the total area of cadastral parcel consisting of 480m² but over a total area of 455m², respectively 25m² less than the area initially recognized by the court of first instance.
23. Thus, the District Court: (i) partially approved the Applicant's claim, confirming that the Applicant was the owner of the cadastral parcel [no. 5393/18], with an area of 455m² [and not 480m²]; and (ii) obliged the respondents to recognize the Applicant's right of ownership and to allow the registration of the property at the Municipal Cadastral Office in Peja. Also the Judge I.K. was a member of the Review Panel of the District Court consisting of 3 judges.
24. On 21 April 2011 the Applicant filed a request for revision with the Supreme Court against the above-mentioned Judgment of the District Court in Peja, due to the violation of the provisions of the contested procedure and erroneous application of substantive law.
25. On 2 May 2011, in addition to the request for revision, the Applicant also submitted a request to the State Prosecutor's Office, seeking from it to file a request for protection of legality against the above-mentioned Judgment of the District Court, based on its authorizations.

26. On 3 June 2011 the State Prosecutor filed a request for protection of legality [KMLC.no.35/2011] against the Judgment [Ac.nr.101/10] of the District Court in Peja, of 16 March 2011, due to the erroneous application of the substantive law.

Decision-making in the third instance, at the Supreme Court [without the presence of Judge I.K.]

27. On 27 August 2013, the Supreme Court, by its Decision [Rev-Mlc.no.253 / 2011], decided to uphold as founded both, the request of the State Prosecutor for protection of legality and the Applicant's request for revision.
28. On this occasion, the Supreme Court ordered the quashing of the Judgment [Ac.no.101/10] of 16 March 2011 of the District Court and remanding of the case for reconsideration to the District Court [which, later, upon legal amendments would fall within the subject matter jurisdiction of the Court of Appeals].
29. According to the Supreme Court, the aforementioned Judgment of the District Court "*was rendered by substantial violation of the provisions of the contested procedure from Article 182.2 (n) in conjunction with Article 201 (c) of the LCP*". The abovementioned violation existed because the enacting clause of the Judgment of the District Court "*is incomprehensible and contradictory to the reasons of the judgment and the decisive facts have not been presented at all*". Further, the Supreme Court reasoned that the request for protection of legality submitted by the State Prosecutor and the statements in the revision are founded, hence for such reasons the Judgment of the District Court "*had to be quashed and the case to be remanded to the same court for reconsideration.*"

Second decision-making in the second instance, at the Court of Appeals [without the presence of Judge I.K.]

30. On 10 April 2017, the Court of Appeals, during reconsideration according to the order of the Supreme Court, again reviewed the appeal of B.D. of 1 February 2010 filed against the Judgment [C.no.56/2008] of the Municipal Court, of 12 January 2010.
31. Through the second decision-making, the Court of Appeals issued the Judgment [Ac.no.2749/13] whereby it again partially approved the appeal of B.D. On that occasion, the Court of Appeals: (i) confirmed that the Applicant is the owner of the cadastral parcel consisting of 0.04.55 ha (455m² but not 480m² as originally decided by the Municipal Court); (ii) obliged B.D. and other heirs of H.D. to recognize the Applicant's right of ownership and to allow him to register the property in question at the Municipal Cadastral Office in Peja; (iii) rejected the part of the Applicant's statement of claim, whereby he requested to be proved that according to the contract on sale he is also the owner of the part of the cadastral parcel [no.5393/18], in an area of 0.00,25 ha (25 m²). [Clarification: the Court of Appeals decided the same as

the District Court, by not recognizing the full ownership over 480m² according to statement of claim, but only over 455m² - namely 25 m² less].

32. On 17 May 2018, the Applicant filed a request for revision with the Supreme Court against the above-mentioned Judgment of the Court of Appeals due to the violation of the provisions of the contested procedure and erroneous application of the substantive law.

Second decision-making in the third instance, at the Supreme Court [in the presence of Judge I.K., as the presiding judge of the trial panel]

33. On 1 October 2018, the Supreme Court, by the Judgment [Rev. no. 285/2018], rejected the Applicant's request for revision as "unfounded". Part of the trial panel in this case, in the capacity of presiding judge, was also the Judge I.K.
34. The Supreme Court reasoned that the Court of Appeals "*in the factual situation determined in a correct and complete manner by the court of first instance[Municipal Court] has applied the provisions of the contested procedure and the substantive law in a correct and complete manner when deciding as in the enacting clause of the challenged Judgment. The judgment of the court of second instance contains sufficient reasons on the relevant facts for a fair adjudication of this legal matter that are admissible for this Court as well.*"

Applicant's allegations

35. The Applicant alleges that the Judgment of the Supreme Court [Rev. no. 285/2018] of 1 October 2018, whereby his request for revision was rejected, has violated his rights provided by Article 31, Article 22 of the Constitution and Article 6 of the ECHR.
36. The Applicant also considers that Article 67, item (d) (exclusion of the judge from the case) of the LCP has been violated due to the fact that the same judge (Judge I.K.) who participated in the settlement of this litigation matter at the District Court in Peja [see the Judgment Ac.no.101/10], when it was decided regarding the appeal of the respondent exercised against the Judgment of the first instance, was the presiding judge of the trial panel of the Supreme Court, which has decided on the respondent's revision [see the Judgment Rev.no.285/2018]. Consequently, according to the Applicant, disregard of this prohibition constitutes a flagrant violation of paragraphs 1 and 2 of Article 31 of the Constitution and Article 6 of the ECHR, which according to paragraph 2 of Article 22 of the Constitution applies directly in the Republic of Kosovo.
37. The Applicant states that the District Court, where also I.K. was a part of the panel of judges had recognised his "*right of ownership over the same cadastral parcel but not in an area of 480m², but in an area of 455m², which is 25m² less than the area purchased by the Applicant and according to this Judgment of this court the contract on sale – as a legal act which represents the legal basis for acquiring the right of ownership, is not the basis for the acquisition of the right of ownership [...] but it is the adverse*

possession that is the legal basis for acquiring the right of ownership and consequently, the purchased area is reduced by 25 m².” He further stated that “on the occasion of deciding on this case also the Judge I.K., at that time a judge of the District Court in Peja, has been a member of the trial panel.”

38. Subsequently, the Applicant clarifies that following the annulment of the Judgment [Ac.no.101/10] of the District Court, the case is now remanded to the Court of Appeals for reconsideration, as a competent court, after the reorganization of the judicial system according to the Law on Courts. The Court of Appeals, states the Applicant, *“by deciding on the appeal, as a court of second instance, decided on this contested matter identically with the District Court in Peja, by recognizing the Applicant's right of ownership over the disputed immovable only in an area of 455m², acquired on the basis of the adverse possession, and not over the entire purchased area of 480m², according to the Contract on sale drafted in writing, as requested by the respondent”.*
39. Further, the Applicant states that being dissatisfied with the decision-making of the Court of Appeals which was identical with that of the District Court, he submitted a request for revision to the Supreme Court where he stated that *“the remarks of the Supreme Court of Kosovo, which had annulled the Judgment of the District Court in Peja, according to the request for protection of the legality of the State Prosecutor and the revision of the Applicant, have been disregarded.”*
40. In this respect the Applicant states that, in the present case, there is a violation of his right to fair and impartial trial *“due to the fact that the same judge (I.K.) who has taken part in the settlement of this disputable matter at the Court of the District of Peja, when it was decided in relation the appeal of the respondent exercised against the judgment of the first instance, is also member of the trial panel of the Supreme Court of Kosovo, which has decided on the revision of the respondent”.*
41. In this respect, the Applicant states that since we are dealing “with a violation of the Applicant's right to a fair and impartial trial, which implies exclusion of the possibility for the same judge to take part in a trial in two instances, and even though this is expressly prohibited by the provision of Article 67 item (d) of the Law on Contested Procedure which regulates the exclusion of the judge from the trial where it is stated that the judge cannot proceed with the legal issue if: “... if in the same case he or she has taken part in rendering a decision of a lower court, or another body, or in mediation procedure. Failure to comply with this prohibition, the Applicant states, “constitutes a flagrant violation” of paragraphs 1 and 2 of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and paragraph 2 of Article 22 of the Constitution.
42. In the end, the Applicant requests from the Court to issue a Judgment whereby: (i) the referral of the Applicant is upheld as founded; and (ii) the challenged judgment of the Supreme Court is annulled and the case is remanded for reconsideration.

Comments of the interested party B.D.

43. In his comments on the case, the interested party B.D. pointed out that *"as a respondent, I have not contributed in any way, because I have not selected which of the judges will render a meritorious decision on the statement of claim in any instance that this case gone through, nor have I been aware about their career advancements as an opportunity for the eventual issue of their impartiality when deciding on the cases within their competence."*
44. Further, the interested party B.D. emphasized as follows: *"I would like to inform you that the Judgment of the District Court in Peja, AC no. 101/2010, of 23.03.2011 for which Judge I.K. has decided in this case as a member of the trial panel, has been annulled by the Judgment Rev. MLC. No. 253/2011 of the Supreme Court of Kosovo on 27.08.2013, hence as such it is null and void, the Judgment of the District Court Ac. no. 101/2010 since that moment has not produced any effect in the future nor has it been taken into account in the decisions that they have rendered, so as such it is legally non-existent for review by anyone."* In this respect, the interested party B.D. states that the Judgment AC. No. 2749/2013 of the Court of Appeals, of 10.04.2018 in which Judge I.K. *"did not take part as a member of the trial panel, was decided by other judges in the same way."*
45. The interested party B.D. requests from the Court to assess the constitutionality of this case *"on the basis of the principle of opportunity and the cost saving principle of proceedings"* thus rejecting the Applicant's referral *"as a futile attempt to impede the justice already attained."* This due to the fact that, *"as a result of the circumstances that have been on-going in judicial institutions, the promotion of I.K. [Judge whose impartiality is challenged] to a higher instance [from the Court of Appeals to the Supreme Court] and his negligence, due to the workload of many cases and the retirement age reached, we believe that this omission was accidental, and moreover it has no bearing at all on the merits of the case."*
46. Also, the interested party B.D. considers that the concrete case raised by the Applicant *"does not pertain the purpose of the lawmaker, determined by the provision of Article 67 item d of the Law on Contested Procedure, and with the automatic application of this provision you will legitimize a total uncertainty of recognition and the realization of the fundamental property rights of a citizen by judicial institutions."* Also, the interested party BD emphasized that the decision making in the case in question has lasted *"12 full years with personal and family psychological maltreatment and financial loss in order to protect the legitimate right that has finally been achieved after having gone through all court instances, for which I have now achieved at least a moral satisfaction."*
47. At the end of the comments, the interested party B.D. requested from the Court as follows: *"I would like to express with politeness my respect and trust in the Constitutional Court for resolving this case, I am convinced that you have in mind that you can guarantee to me that the negligence such as the one of Judge I.K. will not happen again in the future by any other judge, but*

by rejecting this referral I am convinced that you can eliminate this very real and undesirable possibility for you, as well, to have the same repeated."

Assessment of the admissibility of the Referral

48. 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.

49. 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".

50. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as provided by 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 determine:

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... "

51. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who is challenging an act of a public authority, namely the Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 September 2018, after exhausting all legal remedies provided by law. The Applicant has also specified the rights and freedoms which he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadline set out in Article 49 of the Law.
52. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph 1 of Rule 39 of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the conditions set out in paragraph 3 of Rule 39 of the Rules of Procedure.
53. The Court also emphasizes that the Referral cannot be declared inadmissible on any other basis. Therefore, it must be declared admissible and its merits must be assessed. (See the case of the Court: KI24/17, Applicant *Bedri Salihu*, Judgment of 19 July 2019, paragraph 33; see also the case of the ECtHR: *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144).

Merits of the Referral

54. The Court first recalls that the Applicant alleges that his rights protected by paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 [Right to a fair trial] of the ECHR, and paragraph 2 of Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, have been violated.
55. The Court notes, first of all, that the substance of the Applicant's allegations refers to the participation of the same judge [I.K.] in two court instances, on which occasion his right to fair trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, has been violated.
56. The Court recalls that in the circumstances of the present case, Judge I.K. had been a judge of the trial panel consisting of 3 members formed in the District Court in Peja, responsible for deciding on the appeal of the respondent, respectively of the interested party, which was decided by Judgment [Ac.no.101/ 10] of 16 March 2011. Further, the same judge, had thereupon participated as presiding judge in the 3 member trial panel of the Supreme Court, when by Judgment [Rev. no. 285/2018] of 1 October 2018, it was decided on the Applicant's request for revision filed against the Judgment [Ac.no.2749 / 13] of the Court of Appeals, of 10 April 2017. So, in the case before the Court, the essential question is the answer to the question of whether the impartiality of the Court has been violated or not with the participation of Judge I.K. in two different court instances where it was decided on the basis of the Applicant's statement of claim.
57. In treating the allegation of the Applicant relating to the right to fair and impartial trial, the Court shall apply the case law of the ECtHR, on the basis of

which pursuant to Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, as regards the interpretation of the allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECHR.

General principles for impartiality of the Court, according to the case law of the ECtHR and the Constitutional Court

58. The impartiality of a court according to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, based on the consolidated case law of the ECHR, should be determined according to (i) *a subjective test*, that is on the basis of personal conviction and conduct of a judge, implying that a judge may have had personal prejudices or bias in a particular case; and (ii) *an objective test*, that is ascertaining whether the court itself, inter alia, its composition, has provided sufficient guarantees to exclude any legitimate doubt in this respect. (See, inter alia, ECtHR cases, *Miracle Europe KFT v. Hungary*, Judgment of 12 April 2015, paragraphs 54 and 55; *Gautrin and Others v. France*, Judgment of 20 May 1998, paragraph 58; *San Leonard Band Club v. Malta*, Judgment of 29 July 2004, paragraph 58; *Thomann v. Switzerland*, Judgment of 10 June 1996, paragraph 30; *Wettstein v. Switzerland*, Judgment of 21 December 2000, paragraph 42; , and Court cases: KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 26 August 2019, paragraph 50; KI24/17, Applicant *Bedri Salihu*, Judgment of 19 July 2019, paragraph 44; KI06/12, Applicant *Bajrush Gashi*, Judgment of 9 May 2012, paragraph 45).
59. More specifically, as regards the subjective test, based on the ECtHR case law, personal impartiality of a judge must be presumed until there is proof to the contrary. (See, inter alia, ECtHR cases, *Meznaric v. Croatia*, Judgment of 30 November 2005, paragraph 30; *Padovani v. Italy*, Judgment of 26 February 1993, para.26; *Morel v. France*, paragraph 41; *San Leonard Band Club v. Malta*, cited above, paragraph 59; *Hauschildt v. Denmark*, Judgment of 24 May 1989, paragraph 47; *Driza v. Albania*, Judgment of 13 November 2007, paragraph 75; and *Korzeniak v. Poland*, Application No.56134/08, Judgment of 10 January 2017, paragraph 47).
60. As regards the type of proof required to prove the personal impartiality of a judge , the ECtHR, has strived to ascertain whether a judge has displayed hostility or ill will for personal reasons. The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the ECtHR. (See, ECtHR cases, *Kyprianou v. Cyprus*, cited above, paragraph 119; *Micallef v. Malta*, Judgment of 15 October 2009, paragraphs 93-94; and *Tozicka v. Poland*, Judgment of 24 July 2012, paragraph 33).
61. According to the case law of the ECHR, while in some cases it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a

further important guarantee for an impartial trial. (See, the case of ECtHR *Micallef v. Malta*, cited above, paragraphs 95 and 101). It must be noted, that in the vast majority of cases raising impartiality issues the ECtHR has focused and found violations in the aspect of the objective test. (see also the case of ECtHR, *Ramos Nunes de Carvalho and Sa v. Portugal*, Judgment of 6 November 2018, paragraph 146; and *Korzeniak v. Poland*, cited above, paragraph 48).

62. As to the objective test, the Court notes that on the basis of the ECtHR case law, when such a test is applied on a trial panel, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to impartiality of the court. In this respect even the appearance/perception may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done". (In this context, see, inter alia, ECtHR cases, *De Cubber v. Belgium*, Judgment of 26 October 1984, paragraph 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Therefore, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. (See, the ECtHR case, *Micallef v. Malta*, cited above, paragraph 98).
63. Moreover, based on the case law of the ECtHR, the situations within which issues may arise regarding the lack of impartiality may be of (i) functional and (ii) personal nature.
64. The first one relates to the exercise of various functions within a judicial proceeding by the same person or hierarchical or other nature between the judge and other actors in the particular judicial process. With regard to the latter, the level and nature of this connection should be examined. These situations of a functional nature may include examples of cases in which were carried out (i) advisory and judicial functions (in this context, see, inter alia, cases of ECtHR *Procola v. Luxembourg*, Judgment of 8 September 1995 , paragraph 45, *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraph 200; *Sacilor Lormines v. France*, Judgment of 9 November 2006, paragraph 74); (ii) judicial and extra-judicial (in this context, see, inter alia, the ECtHR case, *McGonnell v. the United Kingdom*, Judgment of 8 February 2000, paras. 52-57); and (iii) various court cases(see, inter alia, the EctHR case *Pasuqini v. San Marino*, Judgment of 2 May 2009, paragraph 148.) In this context, the ECtHR emphasizes that the assessment of whether the participation of the same judge at different stages of the trial may have resulted in a violation of the requirements related to the impartiality of the court, should be assessed case by case and depending on the circumstances of each case.
65. The second issue to be dealt with in respect of the absence of impartiality, respectively issues of a personal nature, is mainly related to the conduct of a judge in a case or the existence of connections with one of his/her parties or his/her representatives in a case. (See further in this context the ECHR Guide of 31 August 2019, on Article 6 of the ECHR, Right to a fair trial (civil limb), Part III. Institutional requirements, C. Independence and Impartiality, 3. An

impartial tribunal, b. Situations in which the question of a lack of judicial impartiality may arise, ii. Situations of a personal nature).

66. The Court also notes, that based on the ECtHR case law, the assessment of court's impartiality under a subjective and objective test implies that, it must be determined whether in a given case there is a legitimate reason to fear that a particular trial panel lacks impartiality. However, to decide whether in a concrete case there are sufficient grounds to determine that a certain judge is not impartial, the standpoint of the Applicant is important, but not decisive. What matters is the court's assessment whether such a fear can be held to be objectively justified. (See, *inter alia*, the ECtHR cases *Mežnarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangel v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; *San Leonard Band Club v. Malta*, cited above, paragraph 60; *Korzeniak v. Poland*, cited above, paragraph 49, and *Tozicka v. Poland*, cited above, paragraph 33).

Application of the general principles of impartiality of the Court in the circumstances of the concrete case

67. In applying these general principles in the circumstances of the present case, the Court first recalls that the Applicant alleges precisely the exercise of the different functions of a judge within the same judicial process, namely the fact that Judge I.K. had participated as a member of the trial panel in: (i) the issuance of the Judgment [Ac.no.101/10] of the District Court in Peja, of 16 March 2011; as well as in: (ii) the issuance of Judgment [Rev.nr.285 /2018], of the Supreme Court, of 1 October 2018 in the capacity of Presiding Judge. According to the Applicant, the participation of Judge I.K. in these two court instances where his claim for confirmation of ownership was dealt with has resulted in a violation of his right to a fair and impartial trial.
68. Based on the aforementioned case law of the ECtHR, the Court will first examine the Applicant's allegations regarding the impartiality of the court under the criteria of the subjective test.
69. The Court reiterates that as to the subjective test, the personal impartiality of Judge I.K. should be presumed until proven otherwise. The Applicant has not submitted any evidence which could call into question the impartiality of Judge I.K. Consequently, the Court finds that in the issuance of Judgment [Rev.no.285/2018] of the Supreme Court, of 1 October 2018 no facts can substantiate the finding that the Supreme Court was not impartial in terms of the subjective test.
70. In the following, in accordance with the principles of the above-mentioned case law of the ECHR, the Court will proceed with the examination of the Applicant's allegations under the criteria of the objective test. Initially, the Court will consider (i) whether the circumstances of the present case may raise legitimate doubts on the part of the Applicant regarding the impartiality of the Supreme Court, and whether this is the case (ii) whether these doubts are objectively justifiable.

71. The determination of these issues and the decision in their respect is made in each case individually at the level of the ECtHR, and also at the level of this Court. (See, in this context, the ECtHR cases, *Meznarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; and *San Leonard Band Club v. Malta*, cited above, paragraph 60; *Korzeniak v. Poland*, cited above, paragraph 49; and *Tozicka v. Poland*, cited above, paragraph 33).
72. In this respect, as noted above, the exercise of different functions within the same judicial process by the same judge and which relates to the circumstances of the present case, represents a category of issues of a functional nature and which are relevant in the assessment of impartiality of a court. In such cases, the ECtHR has in principle held that there are legitimate doubts about the impartiality of the court. (See, *inter alia*, the ECtHR case, *Korzeniak v. Poland*, cited above, paragraphs 51 and 52). Also this Court takes the same position on such circumstances of the cases. This is due to the fact that the exercise of different functions of Judge I.K., before and after his promotion to the Supreme Court, took place within the same judicial process when deciding on the Applicant's claim. Initially, Judge I.K. decided on the Applicant's appeal when he was a judge in the District Court in Peja and later on, when Judge I.K. has been transferred to the Supreme Court, he has decided on the Applicant's request for revision **concerning the same court case** of the Applicant.
73. Consequently, on the basis of the ECtHR case law, the Court will, in the following, assess whether such doubts in the circumstances of the concrete case, which have already been ascertained, can be objectively justifiable.
74. In terms of assessing *legitimate doubts* in the context of circumstances in which a judge has exercised more than one function in the same court case, two categories of cases are important.
75. Firstly, special attention should be paid to the characteristics of the law and the rules that are applicable in a particular case. (See, *inter alia*, the ECtHR cases *Warsicka v. Poland*, Judgment of 16 January 2007, paragraph 40; *Toziczka v. Poland*, Judgment of 24 July 2012, paragraph 36; and *Korzeniak v. Poland*, cited above, paragraph 50). In this context, the ECtHR has emphasized that organizational issues are also important. (See, *inter alia*, the case of the ECHR, *Piersack v. Belgium*, Judgment of 1 October 1982, paragraph 30). For example, the existence of procedures that ensure impartiality, namely the rules and procedures that govern also the withdrawal/exclusion of a judge, is a relevant factor. (See ECtHR cases, *Pfeifer and Plankl v. Austria*, Judgment of 25 February 1992, paragraph 6; *Oberschlick v. Austria (no. 1)*, Judgment of 23 May 1991, paragraph 50; and *Pescador Valero v. Spain*, Judgment of 24 September 2003, paragraphs 24-29).
76. Secondly, it is necessary to assess whether the link between the substantive issues considered by the same judge at different stages of the proceedings is so close/obvious that it casts doubt on the impartiality of the judge who took part in the decision-making throughout these stages. This assessment is also to be

made from case to case; regard being had to the characteristics and circumstances of the individual case. (See, *inter alia*, the ECtHR cases *Warsicka v. Poland*, cited above, paragraph 40; *Toziczka v. Poland*, cited above, paragraph 36; and *Korzeniak v. Poland*, cited above, paragraph 50).

77. In this respect, the Court, based on the ECtHR case law elaborated above, should first elaborate on legal and regulatory issues. The Court recalls that the procedures governing the withdrawal of a judge from decision-making are of special importance.
78. In this context, the Court notes that in the Applicant's case in the proceedings relating to the request for revision, the Supreme Court has applied the provisions of the LCP. The latter, in Article 67 paragraph (d) (Exclusion of the Judge from the Trial), specifically regulates the case and the circumstances in which judges are excluded from the respective decision-making. The Court notes that paragraph (d) of Article 67 of the LCP, the violation of which is alleged by the Applicant, stipulates that:

"A judge may be excluded from the legal matter:

[...]

d) if in the same case he or she has taken part in rendering a decision of a lower court or any other body or has taken part in mediation procedure; [...]"

79. The Court should also note that in the circumstances of the present case, between the participation of Judge I.K. in the trial panel of the District Court in Peja, respectively the issuance of the Judgment [Ac.nr.101/10] of 16 March 2011 and his participation in the Panel of the Supreme Court in the capacity of the presiding judge, respectively, the issuance of the Judgment [Rev. no. 285/2018] of 1 October 2018, by Decision [Rev-Mlc.no.253/2011] of the Supreme Court, of 27 August 2013, the Applicant's case was remanded for retrial. In the new trial, Judge I.K. had participated in the capacity of the presiding judge of the Supreme Court trial panel that has reviewed the request for revision filed against the Judgment [Ac.no.2749/13] of the Court of Appeals, of 10 April 2017. However, the Court notes that the content of paragraph (d) of Article 67 of the LCP, respectively "*if in the same case he or she has taken part in rendering a decision of a lower court [...]"*, and applicable in the circumstances of the present case because this norm is comprehensive and has obliged the Judge I.K. to be excluded from decision-making in the respective trial panel of the Supreme Court.
80. The Court also emphasizes that in such circumstances the exclusion of a judge is not necessarily dependent on the request of the parties to the proceedings. On the basis of the provisions of the LCP, a judge cannot proceed with a legal matter "*if in the same case he or she has taken part in rendering a decision of a lower court*". This is stipulated in Article 67 of the LCP and is also supported by the ECtHR case law, which, emphasizing the importance of the perception and confidence that courts should reflect in public in a democratic society, has

consistently stated that any judge who believes that his or her participation in a court case may raise doubts about the impartiality of the trial should be excluded from the decision-making.

81. Moreover, the Court also recalls that in the proceedings relating to the request for revision, it is decided only on the basis of the documents contained in the case file. Therefore, due to the written nature of the proceedings, neither the Applicant nor his defence counsel could have been aware, prior to having received the decision of the Supreme Court, that the same judge who was a part of the trial panel in the District Court has taken part also in the trial panel of the Supreme Court that decided on his request for revision. Therefore, the responsibility for the exclusion of the respective judge cannot be attributed to the Applicant and it can be concluded that he has waived the right for his case to be decided by an impartial court. (See, in this context also the cases of the Court: KI187/18 and KI11/19, Applicant: *Muhamet Idrizi*, Judgment of 26 August 2019, paragraph 67; KIo6/12, Applicant: *Bajrush Gashi*, cited above, paragraph 36; see also the ECtHT case, *Oberschlick v. Austria*, cited above, paragraph 51).
82. The Court recalls that the question of whether or not there is a sufficient number of judges to decide on the requests for revision is a matter entirely within the jurisdiction of and for discussion, if necessary, between the judiciary and other responsible authorities. The primary responsibility for proper administration of justice pertains to the relevant institutions and organizational matters cannot be used as an excuse for not adhering to the Constitution and the ECHR. (In this context, see the cases of the Court: KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, cited above, paragraph 68; KIo6/12, Applicant: *Bajrush Gashi*, cited above, paragraph 51; and the case KO4/11 Applicant: The Supreme Court of Kosovo, Constitutional review of articles 35, 36, 37 and 38 of the Law on Expropriation of Immovable Property, No.03/L-139, Judgment of 1 March 2012).
83. Consequently and in such circumstances, the Court finds that the “*legitimate doubts*” about the impartiality of the court arising as a result of the exercise of the different functions by Judge I.K. within the same court proceeding are objectively justifiable. In this respect, the Court finds that in issuing the Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 October 2018, the court, which in the present case is the Supreme Court, was not impartial in terms of the objective test and that consequently, the Applicant's right to fair and impartial trial by an impartial tribunal, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.
84. The Court, as stated above, recalls that in the context of assessment of the impartiality of the Court, beyond legal and regulatory matters, the interrelationship between substantive matters examined by the same judge at different stages of the proceedings is also relevant. However, given that the Court has already found that in the circumstances of the present case, the legitimate doubts of bias are objectively justifiable; it is considered not necessary to examine other aspects relating to the impartiality of the court in terms of objective test.

85. The Court notes that this conclusion concerns exclusively the challenged Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 October 2018, from the standpoint of the impartiality of the court in terms of the objective test and in no way interrelates or in any way prejudices the outcome of the merits of the case regarding the issue of ownership that has been the subject of review by the regular courts.

Conclusions

86. In the circumstances of the present case, the Court found that Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 October 2018, was issued in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because it was rendered by the composition of a Panel, in which contrary to the relevant provisions of the LCP and the case law of the ECHR and the Court, has taken part the Judge I.K., who has been also part of the decision-making in the earlier stages of the same case, respectively has participated as a member of the trial panel in the District Court in Peja when it was decided on the Applicant's claim and also as the presiding judge of the of the Supreme Court when it was decided on the Applicant's request for revision. In such circumstances, the Court found that the legitimate doubts about the court's lack of impartiality are objectively justifiable.
87. In the circumstances of the present case, the Constitutional Court has dealt exclusively and solely with the allegation for impartiality of the court due to the participation of Judge I.K. in the same trial in two court instances. Consequently, this Judgment of the Court is without any prejudice to the final merits for decision-making in this case, once the case is remanded to the Supreme Court for retrial.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law on the Constitutional Court and Rule 59 (a) of the Rules of Procedure, on 1 July 2020, unanimously:

DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the European Convention on Human Rights;
- III. TO DECLARE INVALID the Judgment Rev.no.285/2018 of the Supreme Court of Kosovo, of 1 October 2018;
- IV. TO REMAND the case for reconsideration to the Supreme Court in accordance with the Judgment of this Court;
- V. TO ORDER the Supreme Court, to notify the Court, in accordance with Rule 66 (4) of the Rules of Procedure, about the measures taken for the implementation of the Judgment of this Court, no later than 30 November 2020;
- VI. TO REMAIN seized of the matter pending the compliance with this order;
- VII. TO ORDER that this Judgment be notified to the Parties, and in accordance with Article 20.4 of the Law to be published in the Official Gazette;
- VIII. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Safet Hoxha



Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.