



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

Prishtina, on 17 August 2020
Ref.No.:RK 1603/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI210/19

Applicant

Sabri Ismajli

**Constitutional review of Judgment KPA-A-051-2016 of the Supreme
Court of Kosovo of 23 October 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 Sabri Ismajli, residing in the village of Sadovina e Qerkezëve, Municipality of Viti, who is represented by Sahit Musa, a lawyer in Viti (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment GSK-KPA-A-051-2016 of the Supreme Court of Kosovo of 23 October 2019.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights and freedoms guaranteed by Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraph 7, of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] 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 22 November 2019, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), accepted the Referral of the Applicant, which he sent by mail service on 20 November 2019.
6. On 27 November 2019, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).
7. On 11 December 2019, the Court notified the Applicant about the registration of the Referral and requested him to complete the referral form and attach additional documents. The Court sent a copy of the Referral to the Supreme Court of Kosovo on the same date.
8. On 26 December 2019, the Applicant sent to the Court a copy of the form and additional documents.
9. On 15 April 2020, after having considered the Report of the Judge Rapporteur, the Review Panel decided to adjourn the decision on the Applicant's Referral for one of the following sessions.
10. On 15 July 2020, after having considered the Report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 14 December 2006, the person R.K., filed a claim with the Kosovo Property Agency (hereinafter: the KPA) requesting the return of possession of cadastral parcel no. 856 in Sojeva-Ferizaj in the place called "Kurkulica" [hereinafter: the contested parcel]. Person R.K., stated that *"the property was lost due to the 1998/99 conflict and stated 12 June 1999 as the date of the loss"*.
12. On an unspecified date, the Applicant and four (4) other persons also filed a claim with the KPA regarding the disputed parcel. The Applicant stated that on 21 June 2007 he purchased 5/7 of the ideal part of the disputed parcel in the surface area of 3,87.34 ha.
13. On 21 October 2014, the Kosovo Property Claims Commission (hereinafter: the KPCC) by decision KPCC/D/A/260/2014, rejected the abovementioned claims on the grounds that this dispute fell outside the jurisdiction of the KPCC- as possession of the disputed parcel had not been lost as a result of the 1998/99 conflict.
14. Two appeals were filed with the Supreme Court against the aforementioned decision of the KPCC.
15. On 20 March 2015, the person R.K. filed an appeal against the decision KPCC/D/A/260/2014 of the KPCC with the Supreme Court.
16. On 21 March 2016, the Applicant also filed an appeal with the Supreme Court, against decision KPCC/D/A/260/2014 of the KPCC requesting to be allowed to use in a peaceful and unhindered way the ideal part of 5/7 of the disputed parcel.
17. On 24 January 2019, the Supreme Court by Judgment GSK-KPA-A-266/2015 (in which decision as the responding party were the Applicant and the person Q.R.), rejected the appeal of the person R.K. and upheld the decision of KPCC, on the grounds that the position of the KPCC is fair and based on law, because the KPCC according to Article 3.1 of Law No. 03/L-079 amending Regulation No. 2006/50 on the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property (hereinafter: Law No. 03/L-079), has the competence to resolve property claims related to the conflict that occurred in 1998/1999. The Supreme Court, further reasoning that the property in question was not lost due to the conflict, stated that:

"This means that the scope of the KPA review is to verify the following elements: who was in possession of the claimed property before 27 February 1998, who is in possession of it now, when and for what reason the possession was lost during the period between 27 February 1998 and 20 June 1999.

If the Commission finds that the possession of the claimed property was lost before or after the dates mentioned above, or that the loss of possession was not related to the conflict, it shall reject the claim under Article 11.4 (b) of Law No. 03/L-079."

18. On 23 October 2019, the Supreme Court by Judgment GSK-KPA-A-051-2016, dismisses the Applicant's appeal filed against decision KPCC/D/A/260/2014, of 21 October 2014 as out of time. The Supreme Court reasoned as follows:

"The appeal is out of time. Article 12.1 of Law no. 03/L-079 "On the resolution of claims relating to private immovable property, including agricultural and commercial property" (hereinafter "Law No. 03/L-079") provides as follows: "Within thirty (30) days of the notification to the parties by the Kosovo Property Agency of a decision of the Commission on a claim, a party may submit through the Executive Secretariat of the Kosovo Property Agency to the Supreme Court of Kosovo an appeal against such decision.

The appellant personally accepted the decision of the KPCC on 11 February 2015, he filed an appeal on 21 March 2016. This means that the appeal was filed out of the deadline set by law".

Applicant's allegations

19. The Applicant alleges that Judgment GSK-KPA-A-051-2016 of the Supreme Court violated his rights guaranteed by Article 46 [Protection of Property] of the Constitution.
20. The Applicant states that he has compiled a contract for the sale-purchase of the property with the person T.S. In connection with this contract with the person T.S. the Applicant alleges that the parcel "no. 856 and 5/7 [...] of the ideal part in the place called Kurkulica with culture field of class 6 on the surface area of 54.22,83 ha, [person T.S.] sold it to [the Applicant], which immovable property he bought with the sale-purchase price in the amount of 4950 euro which the buyer paid the price at the time of reaching the agreement and the buyer was brought in possession, use and ownership of it and the same contractor have agreed among themselves that this contract should not be terminated on any legal basis".
21. The Applicant states that "Recently some citizens namely R.K., [...] alleges that this is his property". Regarding the person R.K., the Applicant claims that he has information that the latter is no longer alive and the actions that are being taken on behalf of R.K., as considered by the Applicant as ungrounded.
22. The Applicant considers that the disputed property was not lost during the conflict in 1998/1999, but he bought the property based on the contract of 26 June 2007 from the owner T.S., this contract was certified on 6 July 2007 in the Municipal Court in Ferizaj.
23. Consequently, the Applicant alleges that his right to protection of property has been violated because he purchased this property from the "legitimate owner T.S."
24. Finally, the Applicant requests the Court to assess the constitutionality of the Judgment of the Supreme Court, considering that the latter has violated the Applicant's right to protection of property under Article 46 of the Constitution.

Admissibility of the Referral

25. The Court first examines whether the admissibility criteria, established in the Constitution and further specified in the Law and the Rules of Procedure have been met.
26. In this regard, 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.”

27. The Court also refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. [...].”

28. The Court also takes into account Rule 39 (1) (b) [Admissibility Criteria] of the Rules of Procedure, which specifies:

Rule 39
[Admissibility Criteria]

“1. The Court may consider a referral as admissible if:

[...]

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

29. As regards the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, challenging an act of a public authority namely Judgment [GSK-KPA-A-051-2016] of 23 October 2019 of the Supreme Court.
30. The Court will further assess whether the Applicant has exhausted the legal remedies as required by the Constitution, Law and Rules of Procedure.
31. The Court recalls that the rule for exhaustion of legal remedies under Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, obliges those who wish to bring their case before the Constitutional Court, that they must first use the effective legal remedies available to them in accordance with law, against a challenged judgment or decision.
32. In that way, the regular courts must be afforded the opportunity to correct their errors through a regular judicial proceeding before the case arrives to the Constitutional Court. The rule is based on the assumption, reflected in Article 32 of the Constitution and Article 13 of ECHR that under the domestic legislation there are available legal remedies to be used before the regular courts in respect of an alleged breach regardless whether or not the provisions of the ECHR are incorporated in national law. (See, *inter alia*, case *Aksoy v. Turkey*, Judgment of 18 December 1996, paragraph 51, Judgment of ECtHR of 18 December 1996).
33. The principle is that that the protection mechanism established by the Constitutional Court is subsidiary to the regular system of judiciary safeguarding human rights (see, *inter alia*, *Handyside v. United Kingdom*, paragraph 48, ECtHR Judgment of 7 December 1976).
34. However, according to the case law of the ECtHR, the rule of exhaustion of legal remedies must be applied with some degree of flexibility and without excessive formalism, this rule normally requires also that the complaints and allegations intended to be made subsequently at the ECtHR, *a)* should have been aired before the regular courts, at least in substance; and *b)* in compliance with the formal requirements and time-limits laid down through the applicable law (see, *mutatis mutandis*, the case of the ECtHR: *Gäfgen v. Germany*, Judgment of 1 June 2010, paragraph 142; *Kunert v. Poland*, Judgment of 4 July 2019, paragraph 42; and *Gadd v. the United Kingdom*, Judgment of 28 September 2017, paragraph 54).

35. With regard to point a) above, that the Applicant has raised the same allegations before the regular courts, at least in substance before addressing the Court, the Court notes that the principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. Thus, the Applicant is liable to have his case declared inadmissible by the Constitutional Court, when failing to avail himself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a giving up of the right to further object the violation and complain. (See, the cases of Court KI68/16, *Fadil Rashiti*, Resolution on Inadmissibility of 31 March 2017, paragraph 38, and KI139/12, *Besnik Asllani*, Resolution on Inadmissibility of 30 November 2012, paragraph 45; see also the case of the ECtHR *Kudla v. Poland*, Judgment of 26 October 2000, paragraph 152).
36. As regards criterion b) that the Applicant has complied with the formal requirements and deadlines provided by the legislation in force before addressing the Court, the case law of the ECtHR emphasized that the legal remedies have not been exhausted in cases where the complaint has not been accepted for review by the regular courts due to the Applicant's procedural flaws (see in this context, the ECtHR cases: *Gäfgen v. Germany*, cited above, paragraph 143; *Kunert v. Poland*, cited above, paragraph 42 and *Gadd v. the United Kingdom*, cited above, para 54).
37. Furthermore, with regard to point b) cited above, the ECtHR stated that the rules governing the procedural steps to be taken and the time-limits to be complied with in lodging an appeal are designed to ensure the proper administration of justice and compliance, in particular, with the principle of legal certainty (see case of ECtHR, *Ben Salah Adraqui and Dhaima v. Spain*, Decision of 27 April 2000).
38. In this context, in the case of *Ben Salah Adraqui and Dhaima v. Spain*, cited above, the ECtHR found that the Applicant had not exhausted legal remedies available to the domestic institutions due to the filing of the complaint before the Constitutional Court of Spain, after the deadline provided by law. Therefore, the ECtHR declared his Referral inadmissible for non-exhaustion of legal remedies under Article 35 of the ECHR.
39. In the case *Kunert v. Poland*, cited above, the Applicant filed a civil lawsuit seeking compensation for his detention on remand in detention centers which were overcrowded. After his request was rejected, he had appealed against the decision of the District Court. This appeal was rejected as he submitted only a copy of the appeal and did not submit a second copy of it, despite the request of the court having the case under consideration. Therefore, the ECtHR, after addressing the Applicant's specific request regarding the violation of the right of access to justice as ungrounded, he rejected the Applicant's request alleging a violation of Article 3 (Prohibition of torture) due to non-exhaustion of legal remedies, as the Applicant, although formally followed the court proceedings through the complaint regarding the compensation for his detention in overcrowded centers, his appeal was rejected by the regular courts as he failed to meet the procedural requirements, namely to submit the second copy of a

complaint previously filed by him, as requested by the regular courts. Therefore, the ECtHR rejected the Applicant's request under Article 3 (Prohibition of torture) as it considered that the Applicant's appeal was rejected by the regular courts for procedural reasons caused as a result of the Applicant's own errors and consequently he has not exhausted legal remedies under Article 35 of the ECHR.

Regarding the exhaustion of legal remedies in this case

40. The Court will further assess whether the Applicant has met the criteria for exhaustion of legal remedies, according to the standards set out above, namely whether he has complied with the procedural requirements so that the competent institutions and regular courts can handle his claims regarding the property right for the disputed parcel, namely the assessment of the sale-purchase contract regarding the disputed property by the KPCC and the Supreme Court.
41. In this regard, the Court notes that the Applicant does not challenge before the Court the procedure followed by the Supreme Court regarding Judgment GSK-KPA-A-051-2016 of 23 October 2019, as to the time limit of the appeal filed before the Supreme Court, but he challenges the fact that the Supreme Court did not take into account the contract of sale-purchase of property, namely the fact that the Applicant purchased this property from the "legitimate owner", namely the person T.S. Related to this, the Applicant states that as the result of this, his constitutional right to protection of property, as guaranteed by Article 46 of the Constitution has been violated.
42. The Applicant, despite the fact that the Supreme Court did not address his appeal against the KPCC decision, as the appeal was filed out of the legal deadline, requests the Court to assess the sale-purchase contract with the person T.S. and find that he enjoys the right to property under Article 46 of the Constitution in respect of such a property.
43. In this case, the Court recalls that the Supreme Court, by Judgment [GSK-KPA-A-051-2016] of 23 October 2019, dismissed the Applicant's appeal against the decision of the KPCC [KPCC/D/A/260/2014], of 21 October 2014 as out of time. The Supreme Court, in this case clarified to the Applicant that Article 12 paragraph 1 of Law no. 03/L-079, provides for a period of thirty (30) days for filing an appeal with the Supreme Court. Therefore, the Supreme Court stated that the Applicant filed the request out of time, because he received the decision of the KPCC [KPCC/D/A/260/2014] on 11 February 2015 and the appeal was filed on 21 March 2016.
44. In fact, the Court reiterates that neither the Supreme Court nor the KPCC entred the assessment of the sale-purchase contract between the Applicant and T.S., because the KPCC dismissed the request on the grounds that it fell outside the jurisdiction of the KPCC under Article 3.1 of Law No. 03/L-079, while the Supreme Court decided that the Applicant's request was out of time. These findings of the Supreme Court are not challenged by the Applicant at all before the Court.

45. The Court notes that the Supreme Court did not have the opportunity to deal with the Applicant's allegation that he purchased the disputed property from the "*legitimate owner*", namely the person T.S. and as a result, his constitutional right to protection of property as guaranteed by Article 46 of the Constitution, has been violated due to non-compliance with the procedural steps as provided by law, namely due to filing a complaint out of the legal deadline. In this case, the Applicant, although he raised this allegation, he lost his procedural opportunities to prove through this procedure his allegations of ownership of the disputed parcel.
46. Therefore, based on the above and taking into account the allegations raised by the Applicant of violation of Article 46 [Protection of Property] of the Constitution and the facts presented by him, the Court also based on the standards set in the case law of the ECtHR, finds that the Applicant's Referral, even though he has formally followed the court proceedings to challenge the KPCC decision, does not meet the admissibility criteria before the Court, as the Applicant has not exhausted the legal remedies regarding the alleged violations of the right to property, due to his procedural flaws, initially before the KCCP and then before the Supreme Court.
47. In conclusion, the Court finds that the Applicant's Referral regarding the allegation of violation of the right to protection of property does not meet the admissibility criteria before the Court, due to non-exhaustion of the legal remedies established in paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure, and as such, the Referral is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 39 (1) (b), of the Rules of Procedure, on 15 July 2020, 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;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Selvete Gërxhaliu-Krasniqi

Arta Rama-Hajrizi



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