Prishtina, on 24 August 2020
Ref.No.:AGJ 1610/20

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JUDGMENT

in

Case No. KI214/19

Applicant

Murteza Koka

Constitutional review of Decision Rev. No. 195/2019 of the Supreme Court of Kosovo, of 23 July 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 is submitted by Murteza Koka from Gjakova (hereinafter: the Applicant), who is represented by Prenk Pepaj, a lawyer from Gjakova.

Challenged law

2. The Applicant challenges Decision Rev. No. 195/2019 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 23 July 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights, guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] 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).

4. The Applicant also requests the Court to not disclose his identity.

Legal basis

5. 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

6. On 25 November 2019, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral which he submitted by mail service on 21 November 2019.

7. On 27 November 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 Gresa Caka-Nimani (members).

8. On 20 December 2019, the Court notified the Applicant's representative about the registration of the Referral and requested him to submit to the Court the Referral Form of the Court as well as the power of attorney proving that he represents the Applicant before the Court.

9. On 13 January 2020, the Court received from the Applicant's representative, by mail, the Referral Form, some documents which were submitted with the initial referral and a general power of attorney by which the Applicant authorized his representative "*to represent me in a general manner, in all court and administrative proceedings*".

10. On 27 January 2020, the Court requested again the Applicant's representative to submit to the Court the power of attorney proving that he represents the Applicant before the Court.

11. On 5 February 2020, the Court received from the Applicant's representative a power of attorney which was not valid for the Applicant's representation before the Court, as the document was a copy of the power of attorney signed by the Applicant showing the Applicant's personal number, but his identification document was not shown.

12. On 27 February 2020, the Court requested the representative of the Applicant to submit to the Court the certified power of attorney to the notary, with proves without doubt that the representative is authorized to represent the Applicant before the Court as well as a copy of an identification document of the Applicant.

13. On 16 March 2020, the Court received a valid notarized power of attorney certifying that the representative is authorized to represent the Applicant before the Court.

14. On 26 March 2020, the Court notified the Supreme Court about the registration of the Referral.

15. On the same date, the Court requested the Basic Court to notify the Court "*about the actions taken by the Basic Court in Gjakova, as the case concerning the Applicant [regarding the admissibility of the revision] was remanded to the Basic Court in Gjakova by the Court of Appeals of Kosovo, by Decision [Ac. No. 3860/18] of 12 March 2019*".

16. On 5 May 2020, the Basic Court submitted to the Court the complete case file C. No. 38/2020, which is related to the Referral KI214/20, but did not answer the question posed by the Court.

17. On 10 June 2020, the Court returned the case file to the Basic Court and again asked the latter:

> *"to notify the Constitutional Court about the actions taken by the Basic Court in Gjakova, as the case was remanded for retrial by the Court of Appeals of Kosovo by Decision [Ac. No. 3860/18] of 12 March 2019.*
> *Specifically, if after the case was remanded for retrial by the Court of Appeals of Kosovo by Decision [Ac. No. 3860/18], the Basic Court in Gjakova:*
> *1) has rendered any decision according to the findings of the Decision [Ac. No. 3860/18] of the Court of Appeals of Kosovo; or*
> *2) only proceeded the case as such for review according to the Revision in the Supreme Court of Kosovo".*

18. On the same date, the Court notified the Municipality of Gjakova about the registration of the Referral and notified the latter that it could submit comments, if any, regarding the Applicant's Referral.

19. On 2 July 2020, the Court received the comments of the Municipality of Gjakova regarding the Referral.

20. On 3 July 2020, the Court received from the Municipality of Gjakova a submission with corrections of the comments received by the Court on 2 July 2020.

21. On 7 July 2020, the Basic Court, responding to the letter of the Court of 10 June 2020, notified the Court that after the case C. No. 38/2012 was remanded by the Court of Appeals, the hearing was scheduled for 05.08.2020.

22. On 13 July 2020, the Court again requested the Basic Court to answer the questions raised by the Court in the letter of 10 June 2020, as well as to submit to the Court the complete file of the present case.

23. On 20 July 2020, the Basic Court submitted its response to the Court stating that *"in this case no decision has been rendered by the Basic Court in Gjakova, according to the findings of Decision AC. No. 380/18 of the Court of Appeals […], but only the court hearing was scheduled, as I informed you in the letter of 06.07.2020"*.

24. On 29 July 2020, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the admissibility of the Referral.

25. On the same date, the Court unanimously decided that the Referral is admissible and that: *i)* there has been a violation of Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the European Convention on Human Rights; *ii)* it is not necessary to examine whether there has been a violation of Article 24 and Article 46 of the Constitution of the Republic of Kosovo; *iii)* Decision Rev. No. 195/2019 of the Supreme Court of Kosovo, of 23 July 2019 and Decision Ac. No. 3860/18 of the Court of Appeals of 12 March 2019, are repealed; *iv)* Judgment AC. No. 3332/2013 of the Court of Appeals, of 26 April 2018 and Judgment C. No. 38/2012 of the Basic Court, of 30 April 2013, are final and binding, and as such *res judicata*; v) the request for non-disclosure of identity is rejected.

Summary of facts

26. On 8 March 2006, the Applicant filed a lawsuit against the Municipality in the Municipal Court in Gjakova (hereinafter: the Municipal Court), for the confirmation of the ownership right related to the immovable property with a culture house in a surface area of 0-06-92 ha, the foundations in a surface area of 0-00-090 ha and permanent user of immovable property with culture yard in a surface area of 0-06-46 ha, in a total surface area of 0-08-28 ha, part of the immovable property registered as parcel no. 4380/2, according to possession list no. 856, CZ Gjakova-J city (hereinafter: disputed property). The lawsuit stated that the value of the dispute is 200.00 euro.

27. On 16 July the Applicant extended the lawsuit by adding as a respondent the person M.U.B.

28. On 4 June 2010, the Municipal Court, by Judgment [C. No. 124/06], approved the Applicant's lawsuit in its entirety and established that the Applicant is the owner of the disputed property.

29. Against the Judgment of the Municipal Court [C. No. 124/06], the Municipality filed an appeal with the District Court in Peja due to essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

30. On 10 January 2012, the District Court in Peja, by Decision [Ac. No. 9/2011], quashed the Judgment of the Municipal Court [C. No. 124/06] and remanded the case for retrial.

31. On 30 April 2013, in the repeated procedure, the Basic Court, by Judgment [C. No. 38/12], again approved the Applicant's lawsuit and confirmed that the Applicant is the owner of the disputed property. The value of the dispute recorded in this Judgment was 200.00 euro.

32. Against the Judgment of the Basic Court in Gjakova, the Municipality filed an appeal with the Court of Appeals, on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

33. On 24 April 2018, the Court of Appeals, by Judgment [AC. No. 3332/2013], rejected the appeal of the Municipality and upheld the Judgment [C. No. 38/12] of the Basic Court. The value of the dispute recorded in this Judgment was 200.00 euro.

Procedure regarding the revision of the Municipality of Gjakova against Judgment [AC. No. 3332/2013] of the Court of Appeals and Judgment [C. No. 38/12] of the Basic Court

34. Against Judgment [AC. No. 3332/2013] of the Court of Appeals, the Municipality, through the Basic Court, filed a revision with the Supreme Court.

35. The Applicant submitted a response to the revision challenging, *inter alia*, the admissibility of the revision because according to him, the value of the dispute was 200.00 euro, while according to Article 211, paragraph 3 of the Law on Contested Procedure, revision is not allowed if the value of the object of the dispute does not exceed the amount of 3000.00 euro.

36. On 19 July 2019, the Basic Court, by Decision [C. No. 38/2012], rejected the revision of the Municipality as inadmissible on the grounds that the value of the dispute in the lawsuit and the statement of claim was set at 200.00 euro,

and not above the value provided in Article 211, paragraph 3 of the LCP, 3000.00 euro.

37. Against Decision [C. No. 38/2012] of the Basic Court, of 19 July 2019, the Municipality filed an appeal with the Court of Appeals on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

38. On 12 March 2019, the Court of Appeals, by Decision [Ac. No. 3860/18], approved as grounded the complaint of the Municipality and remanded the case for retrial and reconsideration. The Court of Appeals reasoned that the of first instance court should have applied Article 36 of the LCP *ex officio* to verify the value of the dispute indicated in the lawsuit and then make a decision on determining the value of the dispute. In the present case, the value of the dispute, claimed according to the lawsuit and the statement of claim, is much lower than it really is. The Court of Appeals further reasoned that the first instance court, contrary to Article 36 of the LCP, continued the procedure with a small amount of dispute, compared to the real amount, while the Municipality was unable to present the extraordinary legal remedy, the revision. The Court of Appeals noted that *"the first instance court in the repeated procedure is instructed to act in accordance with Article 219 of the LCP and then forward the revision together with the case file within the legal deadline to the Supreme Court [...]"*.

39. From the original case file there is no evidence that the Basic Court acted according to the order of the Court of Appeals "*to issue a decision on the value of the dispute*" or that it rendered a decision after the Decision [Ac. No. 3860/18], but forwarded the case file to the Supreme Court to decide on the revision.

40. On 23 July 2019, the Supreme Court by Decision Rev. No. 195/2019 approved the revision as grounded, annulled Judgment AC. No. 3332/2013, of 26 April 2018 of the Court of Appeals and Judgment C. No. 38/2012 of 30 April 2013, of the Basic Court and remanded the case for retrial, *inter alia*, *"for the reason that the enacting clause of the Judgment is contrary to the reasoning of the Judgment and that the reasoning does not contain sufficient convincing, factual and legal reasons on the decisive facts to decide on this legal matter. Also, due to the irregular investigation, the first instance court has erroneously applied the substantive law"*. The Supreme Court did not address the Applicant's allegation raised in his response to the revision regarding the unlawfulness of the revision due to the set amount of the lawsuit from 200,00 euro.

Applicant's allegations

41. The Applicant alleges that by the challenged decision the Supreme Court has violated his right to fair and impartial trial, guaranteed by Articles 31 of the Constitution and Article 6 of the ECHR, the right to equality before the law and

the right to protection of property guaranteed by Articles 24 and 46 of the Constitution.

42. The Applicant states that *"The Court of Appeals [...], by the [challenged decision], approves as grounded the appeal of [the Municipality] and remands the case to the [Basic] Court for reconsideration and retrial. [...] The Basic Court [...], sends the case file to the Supreme Court [...], as it could not act according to the suggestions of the Court of Appeals, as the same decision was contrary to legal provisions, since any action of the Basic Court in Gjakova , according to the Decision of the Court of Appeals would be unlawful"*.

43. Therefore, the Applicant alleges that *"Decision of the Supreme Court of Kosovo is unlawful, since [...] it was taken in violation of Article 211.3 of the Law on Contested Procedure, as in this case the value of the dispute was 200.00 (Two hundred) euro, therefore based on Article 211.3 of the LCP is decisively provided that: Revision is not permitted in the property-judicial contests, in which the charge request doesn't involve money requests, handing items or fulfillment of other proposal, if the value of the object of contest shown in the charge doesn't exceed 3000 €"*

44. In this regard, the Applicant alleges that the Supreme Court had no right to deal with the revision as it was inadmissible and did not substantiate his allegation presented in the response to revision regarding the value of the dispute, stating that "*The Supreme Court of Kosovo by the challenged Decision does not declare itself regarding the allegations [of the Applicant] in response to the revision, of 11 June 2018"*.

45. Finally, the Applicant requests the Court to find that his right to a fair trial, the right to equality before the law and the right to protection of property have been violated by the Supreme Court and to annul the challenged decision.

Comments of the Municipality of Gjakova

46. The Municipality of Gjakova in its response regarding the Referral states that according to the challenged Decision, the Applicant's case was remanded to the Basic Court and that so far the latter has not decided according to the suggestions of the Supreme Court, therefore, the Applicant's Referral is premature.

47. Regarding the amount of the dispute, the Municipality of Gjakova states that the prohibition to file a revision due to the small amount is unlawful as this was done due to the unfair actions of the Applicant, as in this case it is about a total surface area of 8 area, then it is suspected that the courts have allowed the court proceedings to take place with this small value of the dispute. According to the Municipality of Gjakova, the regular courts were obliged *ex officio* to not allow the procedure to take place until the claimant makes a specification - increasing the value of the dispute. Therefore, the Municipality alleges that due to the actions of the Applicant the Municipality cannot be harmed, and lose the right to revision.

48. Therefore, the Municipality requests that the Applicant's Referral be declared inadmissible.

Relevant Legal Provisions

Law No. 03/L-006 on Contested Procedure, Amended and Supplemented by Law No. 04/L-118

"Article 36

If the claimant did not specify the value of the disputed facility in the claim filed to the court, or the amount is much higher or lower than the actual value, the court shall, according to its official duty or objections of the defendant, at the preliminary hearing at latest, or if there was no preliminary hearing held, at the principal hearing session of the legal matter but before the start of the principal proceeding, promptly and appropriately determine or verify accurately the value claimed by the claimant. In such a case, the decision of the court is not subject to appeal.
[...]

Article 211

[...]
211.3 Revision is not permitted in the property-judicial contests, in which the charge request doesn't involve money requests, handing items or fulfillment of other proposal, if the value of the object of contest shown in the charge doesn't exceed 3,000 €.
[...]

Article 218

1. A belated, impermissible or incomplete revision shall be dismissed by a ruling of the court of first instance without conducting a main hearing.
2. The revision is not permissible:
a) if it is presented by an unauthorized person;
b) a person who has withdrawn it;
c) a person who has no legal interest or is against a judgment;
d) not subject to revision according to the law.

Article 219

219.1 A sample of a timely presented revision, a complete revision and allowed will be sent within period of seven days to the opposing party by the court of first instance.
219.2 The opposing party owns the right that within seven days starting from the day receiving the revision, answer the revision by presenting the answer to the court of first instance.
219.3 When the answer to revision was presented, or the deadline for answer to revision has passed, and the answer, if presented will be sent to the court of revision by the court of the first instance, through a judge of the second instance court within the period of seven days.
[...]

Article 221

A later revision, an incomplete or not allowed one will be rejected by the court of revision, if it wasn't done by the court of the first instance within its authorizing boundaries (article 218 of this law).
[...]"

Admissibility of the Referral

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

50. In this respect, the Court initially 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."

51. In addition, the Court also examines whether the Applicant has met the admissibility requirements as defined by 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 [...]."

52. With regard to the fulfillment of the abovementioned criteria, the Court finds that the Applicant is an authorized party, has clarified the act of public authority, which constitutionality he challenges, namely Decision Rev. No. 195/2019, of the Supreme Court of Kosovo, of 23 July 2019 and has specified the constitutional rights which he claims to have been violated by the challenged decision, and has submitted the request within the prescribed time limit.

53. With regard to the exhaustion of legal remedies, the Court recalls that the Municipality of Gjakova states that the Applicant's case was remanded to the Basic Court and that so far the latter has not decided according the suggestions of the Supreme Court, therefore the Applicant's Referral is premature. .

54. However, the Court notes that in relation to the substantive issue complained of by the Applicant which concerns the admissibility of the revision as a result of the value of the dispute, the Applicant has no other remedy to appeal against the decision of the Supreme Court.

55. This is due to the fact that after the Supreme Court by Decision [Rev. No. 195/2019] remanded the case for retrial to the Basic Court, the Basic Court has the obligation to reconsider the case regarding the ownership right regarding the disputed property and cannot review the admissibility of the revision submitted by the Municipality to the Court of Appeals, the Basic Court is no longer competent to address the Applicant's allegations regarding the admissibility of the revision submitted in his response to the revision.

56. The Basic Court was able to make such an assessment as the case was remanded for retrial by the Kosovo Court of Appeals by Decision [Ac. No. 3860/18] of 12 March 2019. However, in that case, the Basic Court decided to forward the revision to the Supreme Court and not to decide on its admissibility, as suggested by the Court of Appeals by Decision [Ac. No. 3860/18]. Also, the Supreme Court has not decided on the admissibility of the revision submitted by the Applicant in his response to the revision.

57. Consequently, the Court finds that the Applicant has exhausted the legal remedies provided by law in relation to his Referral.

58. 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 latter cannot be declared inadmissible on the basis of the requirements set out in paragraph 3 of Rule 39 of the Rules of Procedure.

59. Furthermore, the Court also considers that this Referral is not manifestly ill-founded in accordance with paragraph 2 of Rule 39 of its Rules of Procedure and should therefore be declared admissible (see, also, the case of the European Court of Human Rights, *Alimuçaj v. Albania*, application No. 20134/05, Judgment of 9 July 2012, paragraph 144).

Merits of the Referral

60. The Court recalls that the Applicant complains that the Supreme Court, by the challenged decision deciding upon the revision submitted by the Municipality of Gjakova, annulled Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals and Judgment [C. No. 38/2012] of 30 April 2013, of the Basic Court which confirmed the right of ownership over the disputed property and remanded the case for retrial. However, he alleges that against Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals, the revision was not allowed given that the value of the dispute according to the court decisions of the regular courts was 200.00 euro, namely below the amount of 3000.00 euro provided in Article 211, paragraph 3 of the LCP.

61. Therefore, he alleges that the challenged decision of the Supreme Court in which the case decided by Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court which has become final by Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals, was remanded again for decision on merits in the Basic Court without a reasoning on the admissibility of the revision according to the allegations presented in the Applicant's response to the revision, and hereby alleges violation of his right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, as well as the right to equality before the law and the right to protection of property guaranteed by Articles 24 and 46 of the Constitution.

62. The Court notes that according to its case-law and the case-law of the European Court of Human Rights (hereinafter: the ECtHR), based on Article 53 [Interpretation of Human Rights Provisions], the Court is obliged to interpret human rights, it is master of the characterization to be given in law to the facts of the case *vis-a-vis* constitutional norms, and that it does not consider itself bound by the characterization given by an applicant (see the case of Court KO171/18, Applicant*, The Ombudsperson*, Constitutional review of articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3), 18, 19 (paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on Independent Oversight Board for Civil Service in Kosovo, Judgment of 25 April 2019, paragraph 148; see also, case of the ECtHR, *Guerra and others v. Italy,* Judgment of 19 February 1998, paragraph 44).

63. In this context, the Court notes that the Applicant essentially complains that the Supreme Court, by the challenged decision, reopened the Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court which had become final – *res judicata*, by Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals, as he was not allowed to submit a revision due to the fact that the amount of the dispute presented in the court decisions was 200.00 euro, while the revision in accordance with Article 211, paragraph 3 of the LCP is not allowed if the amount of the dispute is in the amount of 3000.00 euro, and has not given any justification for this.

64. While the Municipality of Gjakova on the other hand, as a party affected by the challenged decision, holds the position that in this case it is about the contested property with a total surface area of 8 are, and it is indisputable that

the value of the contested property is over the amount of 3000.00 euro, and this made the revision permissible. The Municipality does not question the fact that during the whole procedure the amount of the dispute that appeared in the court decisions was 200.00 euro, but emphasizes that the regular courts had an *ex-officio* obligation to improve the amount of the dispute and the Municipality cannot be penalized to use the legal remedy due to the actions of the Applicant who filed in the lawsuit the unreal value of the disputed property and the regular courts which have not improved *ex-officio* the amount of the dispute during the proceedings before them.

65. In this respect, the Court will continue to assess whether the Supreme Court, by the challenged decision, has violated the Applicant's right to fair and impartial trial regarding legal certainty and compliance with a final and binding court decision, and who has become *res judicata*.

(i) General principles regarding the right to legal certainty and respect for a final judgment, as developed by the case law of the Court and the ECtHR

66. The Court recalls that the right to a fair trial requires that a matter which has become *res judicata* is to be considered irreversible, in accordance with the principle of legal certainty (see case of the Court KO122/17, Applicant, *Česká Exportní Banka A.S*, Constitutional review of Decision Ae. No. 185/2017 of the Court of Appeals, of 11 August 2017, and Decision IV. EK. C. No. 273/2016 of the Basic Court in Prishtina, of 14 June 2017, Judgment of 18 April 2018, paragraph 149; see also the case of the ECtHR: *Brumărescu v. Rumania*, application no. 28342/95, Judgment of 28 October 1999).

67. The Court recalls that the ECtHR has provided a definition of the concept of *res judicata* stating that: "*According to the explanatory report to Protocol NO.7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final 'if, according to the traditional expression, it has acquired the force of resjudicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them"* (see case of the Court KO122/17, cited above, paragraph 150; see also case *Nikitin v. Russia*, application no. 50178/99, ECtHR, Judgment of 15 December 2004, paragraph 37).

68. The Court and the ECtHR emphasized that the principle of legal certainty presupposes respect for the principle of *res judicata "[...] the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of res judicata that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh*

determination of the case. […] A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character." (see case of the Court KO122/17, cited above, paragraph 151; see also the case ECtHR *Ponomaryov v. Ukraine*, application no. 3236/03, Judgment of 3 April 2008, paragraph 40).

69. The ECtHR has elaborated on the principle of legal certainty in relation to the right to a fair trial in other cases as well. In the case *Ryabykh v. Russia*, Judgment of 24 July 2003, the ECtHR stated the following: *"Legal certainty presupposes respect for the principle of res judicata (ibid., §62), that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of afinal and 25 binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character. […].The Court considers that the right of a litigant to a court would be equally illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official."* (see case of the Court KO122/17, cited above, paragraph 153; also the case ECtHR *Ryabykh v. Russia,* application no. 52854/99, Judgment of 24 July 2003, paragraphs 52 and 56).

70. The Constitutional Court also refers to the Judgment of 17 December 2010 in case No. KI08/09, The Independent Union of Workers of IMK Steel Factory in Ferizaj, the Court stated: "*The rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata. No party is entitled to seek for a review of a final and binding judgment merely for tlle purpose of obtaining a rehearing and a fresh determination of the case (see, for example Sovtransavto Holding v. Ukraine, no. 48553/99, § 72, ECHR 2002 VII). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law. […] (*see case of the Court KI08/09, *The Independent Union of Workers of IMK Steel Factory in Ferizaj*, Judgment of 17 December 2010 paragraph 62).

71. Furthermore, in the Judgment of 12 February 2016 in case No. KI132/15, Applicant *Visoki Decani Monastery*, the Court stated that *"the Court considers that the Applicant had a legitimate expectation that its case had been decided in final instance by the Ownership Panel and that it could not be re-opened before the Appellate Panel. As such, the Applicant should have seen the Judgments of the Ownership Panel executed.*
[…]
Based on these considerations and its previous case law, as well as that of the ECtHR, the Court concludes that the Judgments of the Ownership Panel of 27 December 2012 (No. SCC-08-0226 and No. SCC-08-0227) had become res

judicata on the basis of the earlier final and binding decision of the Appellate Panel of 24 July 2010 regarding the authorized parties.
[…]
By using the appeal procedure to overturn these Judgments of the Ownership Panel and to refer the original property dispute back to the regular courts, the Court finds that by its Decisions of 12June 2015 (Nos. AC-I-13-0008 and AC-I13-0009) the Appellate Panel infringed the principle of legal certainty and denied the Applicant a fair and impartial hearing on its rights and obligations within the meaning of Article 31,paragraph 2, of the Constitution and of Article 6, paragraph 1,of the ECHR" (see case of the Court KI132/15, Applicant *Visoki Decani Monastery*, Judgment of 12 February 2016, paragraphs 95-97).

72. In this regard, the Court notes that its case law as well as the case law of the ECtHR mentioned above, clearly and explicitly emphasize that the right to a fair trial under Article 6 of the ECHR and Article 31 of the Constitution includes the principle of legal certainty, which includes the principle that final court decisions which have become *res judicata* must be respected and cannot be reopened or appealed.

(ii) Application of the abovementioned principles in the present case

73. In the Applicant's Referral the main issue to be assessed is whether the Supreme Court by Decision [Rev. No. 195/2019] reopened the Applicant's case decided by Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals which upheld the Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court, which approved the Applicant's claim and it was confirmed that the Applicant is the owner of the disputed property.

74. Following Judgment [AC. No. 3332/2013] of the Court of Appeals, the Municipality, by the Basic Court, filed a revision with the Supreme Court. While the Applicant had submitted a response to the revision challenging the admissibility of the revision, because according to him, the value of the dispute was 200.00 euro while according to Article 211, paragraph 3 of the Law on Contested Procedure, the revision is not allowed if the value of the object of dispute does not exceed the amount of 3000.00 euro. The Basic Court by Decision [C. No. 38/2012], rejected the revision of the Municipality as inadmissible on the grounds that the value of the dispute of the lawsuit and the statement of claim was below the amount of 3000.00 euro.

75. The Court of Appeals, by Decision [Ac. No. 3860/18], after the appeal of the Municipality, remanded the case for retrial and reconsideration after assessing that the first instance court pursuant to Article 36 of the LCP should have *ex officio* verified the value of the dispute indicated in the lawsuit and then make a decision on determining the value of the dispute. In the present case, according to the Court of Appeals, the Municipality was not able to file the extraordinary legal remedy, the revision. The Court of Appeals noted that *"the first instance court in the repeated procedure is instructed to act in accordance with Article 219 of the LCP and then to forward the revision*

together with the case file within the legal deadline to the Supreme Court. […]".

76. From the case file it is noted that the Basic Court after the Decision [Ac. No. 3860/18] of the Court of Appeals, forwards the case to the Supreme Court to decide on the revision. Whereas, the Supreme Court by the Decision [Rev. No. 195/2019] approved the revision as grounded, annulled the Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals and the Judgment [C. No. 38/2012] of 30 April 2013, of the Basic Court, which confirmed the right of ownership of the Applicant over the disputed property, and remanded the case for retrial.

77. The Court notes that neither the Basic Court, after remanding the case from the Court of Appeals by Decision [Ac. No. 3860/18] regarding the admissibility of the revision, nor the Supreme Court addressed the Applicant's allegation regarding the unlawfulness of revision due to the set amount of the lawsuit of 200.00 euro and justifies its decision based on the content of the challenged claims.

78. In this context, it is not disputed that if the value of the dispute is below the amount of 3000.00 euro, according to paragraph 3 of Article 211 of the Law on Contested Procedure, when the revision is not allowed. Also, the Court will not enter the issue of what is the real value of the dispute in the procedure. The main question before the Court is to what extent it is possible to challenge the value of the dispute during the proceedings.

79. The Court notes that it is disputable if the value of the dispute which was presented in the court decisions until the Applicant's case was decided by the Court of Appeals by Judgment [AC. No. 3332/2013] was accurate and whether this was to be corrected during the court proceedings. It is also disputable that regardless of the amount stated in the lawsuit and court decisions, what is important when assessing the admissibility of the revision is the real value of the object of the dispute or the value presented in lawsuits and court decisions.

80. In this regard, the Court recalls Article 36 of the Law on Contested Procedure which stipulates that "

> *[I]f the claimant […]the value of the disputed facility in the claim filed to the court, […] is much higher or lower than the actual value, the court shall, according to its official duty or objections of the defendant, at the preliminary hearing at latest, or if there was no preliminary hearing held, at the principal hearing session of the legal matter but before the start of the principal proceeding, promptly and appropriately determine or verify accurately the value claimed by the claimant."*

81. In this regard, the Court notes that regarding the amount of the dispute, and if the amount of the object of the dispute is not correct, the court either "*ex officio"* or *"according to the objection of the respondent"* but *"before considering the main issue"* will verify the accuracy of the value shown in the lawsuit by the claimant. In the present case, during the entire procedure, the

amount of the object of the dispute was 200.00 euro. This amount was not challenged either *ex-officio* by the court and the Municipality did not challenge that this amount was not correct in order for the Basic Court to decide before the main trial regarding the exact amount of the object of the dispute.

82. Therefore, the Court notes that based on the clear language of Article 36 of the Law on Contested Procedure, the issue of the amount of the dispute, regardless of how much it was in reality, should have been corrected by the beginning of the main trial. The Court notes that this possible correction of the value of the dispute was not made during the court hearing.

83. The Municipality states that the Basic Court had obligation *ex-officio* to verify the value of the object of the dispute and that the Municipality as a party cannot bear the consequences of the errors of the courts. However, the Court notes that the Municipality was legally entitled to raise this issue before the Basic Court but did not do so. Furthermore, this was not done either by the Basic Court as the Applicant's case regarding the admissibility of the revision was remanded for retrial by the Court of Appeals by Decision [Ac. No. 3860/18] nor by the Supreme Court, which had reviewed the revision of the Municipality and the response to the revision submitted by the Applicant and where he raised the issue of the admissibility of the revision.

84. In this regard, the Court also refers to Article 221 of the Contested Procedure which stipulates that "*A later revision [...] not allowed one will be rejected by the court of revision, if it wasn't done by the court of the first instance within its authorizing boundaries (article 218 of this law*).
[...]."

85. Therefore, it was the obligation of the Supreme Court, as a final instance, that before assessing the revision regarding the object of the disputed issue, to assess whether the revision is allowed, based on the legal provisions mentioned above by the Court.

86. Consequently, and based on these assessments as well as on its previous case law, and that of the ECtHR, the Court concludes that the Supreme Court by the challenged decision reopened the Applicant's case decided by Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals which upheld Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court, and which became *res-judicata*, given the value of the dispute which according to court decisions was below the amount for which revision is allowed, while the value of the object of the dispute was not contested and corrected by any decision of the regular courts.

87. Consequently, quashing Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals, which upheld the Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court, without assessing the admissibility of the revision, the Supreme Court violated the principle of legal certainty and denied the Applicant a fair and impartial trial regarding his rights and obligations within the meaning of Article 31, paragraph 2 of the Constitution and Article 6, paragraph 1 of the ECHR.

88. The Court therefore concludes that there has been a violation of the Applicant's right to fair and impartial trial protected by Article 31 paragraph 2 of the Constitution in conjunction with Article 6 paragraph 1 of the ECHR.

89. With regard to the Applicant's allegation of violation of the right to protection of property and the right to equality before the law guaranteed by Articles 46 and 24 of the Constitution, taking into account that the Court has just concluded that the challenged Decision has violated the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, and declares invalid Decision Rev. No. 195/2019, of the Supreme Court of Kosovo, of 23 July 2019, the Court does not consider it necessary to address separately the allegations of violation of the right to protection of property and the right to equality before the law guaranteed by Articles 46 and 24 of the Constitution.

Request for non-disclosure of identity

90. The Court recalls that the Applicant also requested that his identity be not disclosed.

91. In this respect, the Court refers Rule 32 (6) of the Rules of Procedure, which provides:

> *" Parties to a referral who do not wish their identity to be disclosed to the public shall so indicate and shall state the reasons justifying such a departure from the rule of public access to information in the proceedings before the Court. [...]".*

92. However, the Court notes that the Applicant has not shown or presented any evidence to justify his request for non-disclosure of his identity, and consequently, this Applicant's request is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 29 July 2020, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD THAT there has been a violation of Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the European Convention on Human Rights;

III. TO HOLD THAT it is not necessary to examine whether there has been a violation of Article 24 and Article 46 of the Constitution of the Republic of Kosovo;

IV. TO HOLD that Decision Rev. No. 195/2019 of the Supreme Court of Kosovo, of 23 July 2019 and Decision Ac. no. 3860/18 of the Court of Appeals of 12 March 2019, are repealed;

V. TO HOLD THAT Judgment AC. No. 3332/2013 of the Court of Appeals, of 26 April 2018 and Judgment C. No. 38/2012 of the Basic Court, of 30 April 2013, are final and binding, and as such *res judicata*;

VI. TO REJECT the request for non-disclosure of identity;

VII. TO ORDER the Supreme Court to inform the Constitutional Court as soon as possible, but not later than 23 December 2020, about the measures taken to implement the Judgment of this Court, in accordance with Rule 66 (4) of the Rules of Procedure;

VIII. TO REMAIN seized of the matter, pending compliance with that order;

IX. TO ORDER that this Judgment be notified to the parties, and in accordance with Article 20.4 of the Law, be published in the Official Gazette;

X. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Radomir Laban Arta Rama-Hajrizi

This translation is unofficial and serves for informational purposes only.