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

Prishtina, on 5 January 2021
Ref.No.:RK 1686/21

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI144/20

Applicant

Qerim Qerimi

Request for constitutional review of Judgment Rev. No. 214/2020 of the Supreme Court of Kosovo of 13 July 2020

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 Qerim Qerimi from the village Dumnica, Municipality of Vushtrri (hereinafter: the Applicant), who is represented by Ramiz Suku, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 214/2020 of the Supreme Court of Kosovo (hereinafter: the Supreme Court) of 13 July 2020.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment of the Supreme Court which, according to the Applicant's allegation, violates his rights and freedoms guaranteed by Article 31 [Right to a Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) as well as Article 6 (Right to a Fair Trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on Article 113.7 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 30 September 2020, the Applicant submitted the Referral by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 12 October 2020, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

7. On 21 October 2020, the Court notified the Applicant's legal representative about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

8. On 10 December 2020, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. According to the case file, the subject matter of the dispute, which dates back to 1977, is cadastral parcel 3001/15, by culture residential house, 140 square meters and a yard of a surface area of 439 square meters, in a place called "Livadhet e Mëdha", in "Mehmet Pashë Zogaj Street", which was registered on behalf of the respondent E.B, and which, according to the Applicant, was acquired by the joint family contribution of the Applicant and the respondent.

10. The Applicant and two other close relatives (claimants) H.Q., F.Q., filed a statement of claim with the Basic Court in Mitrovica, Branch in Vushtrri (hereinafter the Basic Court) against the respondent E.B., requesting that they be granted ownership of the abovementioned disputed property, which they request on the basis of the division of the family property, and which, according to the Applicant, was acquired through a joint contribution during the family community, although it was registered in the name of the respondent.

11. During the hearing of the Basic Court regarding the statement of claim, the Applicant remained with the claim in its entirety, while the respondent E.B., challenged the statement of claim, stating that he acquired ownership over the disputed property. *"...by judgment C. no. 357/77 of 22 December 1977 in the Municipal Court of Vushtrri, which established co-ownership in the ideal part of ½ of the parent parcel in the area of 0.11.60 ha and as owners registered were E.B., and I. Q, in the ideal part each ½ these plots. By the agreement on physical separation between E. B., and I. Q., this parcel is divided and E.B., becomes the owner of the newly formed parcel 3001/15 and this physical separation is confirmed in the Municipal Court in Vushtrri, Ov. No. 71/85 of 8 May 1985. E.B., later terminated the family community also with his father, claimant H. Q., by the contract on termination of the family community on 24 January 1979 with Ov. No. 62/79 between H.Q., and E. B. The parties agreed to legalize the factual separation of the family community which, according to the respondent, was de facto terminated in 1978 and the father remains the owner of the immovable in Dumnica e Poshtme of Vushtrri and the families live separated".*

12. In order to determine the grounds of the statement of claim, the Basic Court hired forensic experts in the field of geodesy and construction, in order to perform on-site expertise and prepare their reports for the needs of the court, which they did.

13. On 17 June 2015, the Basic Court rendered Judgment C. No. 18/2011, whereby it approved the statement of claim of the Applicant, establishing the following;

I. ***It is confirmed*** *that the claimants H. Q., F. Q., and Q. Q., have the right of ownership in ½ of immovable property registered in cadastral parcel no. 3001/15, by culture house of 140 m2 and yard of 439 m2, a total surface area of 579 m2, in a place called "Livadhet e mëdha", which is located in the street "Mehmet Pashë Zogaj" and borders on the southern side with the property of E.H., and on the western side with the property of I. Q, CZ Vushtrri.*

II. *The respondent is* ***obliged*** *to recognize to the claimants the property right as in item I of the enacting clause of this judgment and to endure that this property is registered in the register of immovable property rights in the Directorate for Geodesy, Cadastre and Property in Vushtrri within 15 days from the receipt of this judgment.*

III. *Each party shall bear its own costs of the proceedings.*

14. In the reasoning of the judgment, the Basic Court stated: *„The court concluded that the immovable property (yard and house) listed in the enacting clause of this judgment is the joint property of the litigants, who with their contribution created this property even though it is recorded on behalf of the respondent E.B, a fact not denied by the claimants that it was recorded in his name, but the respondent, although claiming to be the sole owner, did not prove by convincing arguments or written agreement that he is the sole owner of this immovable property, which was created with the contribution of litigating parties, the court decided as in the enacting clause of this judgment".*

15. Against the said Judgment C. No. 18/2011, of the Basic Court, the appeal was filed within the legal deadline with the Court of Appeals of Kosovo (hereinafter the Court of Appeals) by the respondent E.B., on the grounds of violation of the provisions of the LCP, erroneous and incomplete determination of factual situation and erroneous application of substantive law, with a proposal that the challenged judgment be annulled and the case be remanded to the first instance court for re-procedure and retrial, or to be modified in accordance with the appealing allegations.

16. On 5 December 2019, the Court of Appeals, by Judgment AC. No. 3488/2015, approved the appeal of the respondent E.B. as grounded, and modified the judgment of the Basic Court in such a way that the statement of claim of the Applicant and of the other two claimants H.Q., F.Q., was rejected as ungrounded.

17. In the judgment the Court of Appeals stated: *„...The first-instance court presented all the evidence for deciding on this legal matter, but it assessed the presented evidence incorrectly and erroneously determined the factual situation and erroneously applied the substantive law".*

> *"The Court of Appeals finds that the respondent acquired the property right towards the immovable property in question on the basis of the purchase determined by the judgment C. No. 357/77 of 22.12.1977, of the Municipal Court in Vushtrri, on the basis of the receipt and, among other things, found that then the claimant E. B. and I. Q, are co-owners in the part of the ½ cadastral parcel number 3001/12... "*
>
> *"Based on the contract for physical division concluded between I.Q., (Claimant) and E.B., (Respondent) (24.01.1979), the physical division of cadastral parcel 3001/12 into these two plots was performed, so that E.B., in the property in part 1/1, the immovable property registered as nk. no. 3001/15, by culture house and yard in a place called "Livadhet e Mëdha" which consists of a house of 141 m2 and a yard of 439 m2 belonged to him. This contract was confirmed at the Municipal Court in Vushtrri on 22 May 1985 ith no. Ov. No. 559/85. By the decision of the MA of Vushtrri, Secretariat for Economy and Services 03 number 353-19 of 31.03.1978..."*
>
> *...According to the stated factual situation, the Court of Appeals finds that the respondent acquired the property right towards the immovable*

property in question on the basis of the purchase confirmed by Judgment C. No. 357/77 of 22.12.1977 and that from the beginning, and later, as in the case of physical separation, and during the construction of the house, acted as the sole and exclusive owner of the latter. The court of appeals, on the basis of the evidence contained in the case file, did not find any argument, any document confirming the existence of a joint life and economy at the time of the construction of the house in the said property. Therefore, according to the view of the Court of Appeals, there is no room for application of the provisions of the Law on Family which would determine the acquisition of property during the family community, nor for application of the provisions of the Law on Basic Property Relations, namely the Law on Obligations, because there is simply no factual basis in order to justify the application of these legal provisions".

18. The Applicant and the other two claimants H.Q., F,Q., against the judgment of the Court of Appeals, filed a revision within the legal deadline, on the grounds of essential violations of the provisions of contested procedure and erroneous application of substantive law, proposing that the judgment of the Court of Appeals be modified and the case be remanded for retrial to the first-instance court, claiming that the property in question was acquired through a joint contribution during the family community, and that the agreement on the division of property is invalid.

19. On 13 July 2020, the Supreme Court, by Judgment Rev. No. 214/2020, rejected as ungrounded the request for revision of the Applicant and of the other two claimants H.Q., F.Q., stating that:

„Considering lower court judgments and case file, the Supreme Court found that the claimants sought recognition of their ownership of the property on the basis of division of family property, and stated that it was acquired with joint contribution during the family community, which, although recorded on behalf of the respondent, was acquired with the joint family contribution of the claimants and the respondent.

"...according to the assessment of the Supreme Court, the allegation in the revision that the property was acquired through a joint contribution has not been proven. All the evidence presented, such as the building permit, the loan agreements and finally the cadastral records, clearly state that in addition to E. B., who was registered as the owner of cadastral parcel 3001/15, according to the 1989 update [...].

On the other hand, the responding party proved that he acquired ownership in accordance with the law in force, specifically on the basis of Article 33 of the Law on Basic Property Relations (Official Gazette of the SFRY, No. 6/80) and Article 13 of the Law on Transfer of Immovable Property (Official Gazette RD No. 45/81), which was in force at the time, stipulating that in order to acquire ownership of the property in question, a written contract with certified signatures by the competent authority is required and that acquisition of property must be entered in the cadastral

books, the contract is certified in the competent court and is not disputed until the moment of initiating the procedure for determining ownership."

Applicant's allegations

20. The Applicant alleges *„that the Supreme Court [...], in its judgment rejecting the request for revision, drastically violated his right to fair and impartial trial".*

21. More specifically, the Applicant alleges that the Supreme Court, by Judgment Rev. No. 214/2020 of 13 July 2020, rejected his revision with an excuse that the respondent E. B., and the claimant H. Q., (son and father), concluded a contract on termination of the family community, which was certified under Ov no. 62/79 of 24 January 1979, and which was allegedly upheld by the Municipal Court in Vushtrri.

22. The Applicant further alleges that one of the claimants H. Q., challenged the alleged contract, *"and that he therefore sought subsequent expertise to determine the validity of the contract, but that the Court of Appeals and the Supreme Court rejected ".*

23. The Applicant also alleges that the court Judgment C. No. 357/77 of 22 December 1977, on the basis of which the Court of Appeals and the Supreme Court based their decisions, *"cannot be evidence because it is not a public "document". Therefore, the judgments of the Court of Appeals and the Supreme Court are undoubtedly contrary to positive law ".*

24. The Applicant addresses the Court with a request to hold that there has been a violation of the right to fair and impartial trial, therefore, that Judgment Rev. No. 214/2020 of the Supreme Court, be declared inadmissible and unconstitutional.

Admissibility of the Referral

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

26. 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."*

27. Moreover, the Court also refers to the admissibility requirements, as prescribed by law. In this regard, 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...".

28. As regards the fulfillment of these requirements, the Court finds that the Applicant submitted the referral in the capacity of an authorized party, challenging the act of the public authority, namely Judgment Rev. No. 214/2020 of the Supreme Court of 13 July 2020, after exhaustion of all legal remedies. The Applicant has also clarified the rights and freedoms that he claims to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadline established in Article 49 of the Law.

29. In addition, the Court refers to Rule 39 [Admissibility Criteria], paragraph (2) of Rule 39 of the Rules of Procedure, which establishes:

"(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim".

30. The Court initially notes that the abovementioned rule, based on the case law of the European Court of Human Rights (hereinafter: the ECtHR) and of the Court, enables the latter to declare inadmissible referrals for reasons related to the merits of a case. More precisely, based on this rule, the Court may declare a referral inadmissible based on and after assessing its merits, namely if it deems

that the content of the referral is manifestly ill-founded on constitutional basis, as defined in paragraph 2 of Rule 39 of the Rules of Procedure.

31. Based on the case law of the ECtHR but also of the Court, a referral may be declared inadmissible as "manifestly ill-founded" in its entirety or only with respect to any specific claim that a referral may constitute. In this regard, it is more accurate to refer to the same as "manifestly ill-founded claims". The latter, based on the case law of the ECtHR, can be categorized into four separate groups: (i) claims that qualify as claims of "fourth instance"; (ii) claims that are categorized as "clear or apparent absence of a violation"; (iii) "unsubstantiated or unsupported" claims; and finally, (iv) "confused or far-fetched" claims. (See, more precisely, the concept of inadmissibility on the basis of a referral assessed as "manifestly ill-founded", and the specifics of the four above-mentioned categories of claims qualified as "manifestly ill-founded", The Practical Guide to the ECtHR on Admissibility Criteria of 31 August 2019; part III. Inadmissibility Based on Merit; A. Manifestly ill-founded applications, paragraphs 255 to 284).

32. In this context of the assessment of the admissibility of the referral, respectively, in the circumstances of this case, the assessment of whether the Referral is manifestly ill-founded on constitutional basis, the Court will first recall the merits of the case that this referral entails and the relevant claims of the Applicant, in the assessment of which the Court will apply the standards of case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

33. With regard to the present case, the Court notes that the substance of the allegations of a violation of the Applicant's right to fair and impartial trial are based on the view that the Court of Appeals and the Supreme Court have erroneously determined the factual situation regarding parcel no. 3001/15, and that they applied the erroneous substantive law, when they concluded that they do not own ½ of the subject parcel acquired during the family community.

34. In fact, the Applicant considers that the Court of Appeals and the Supreme Court should not have based their conclusions on Judgment C. No. 357/77, of the Municipal Court in Vushtrri of 22 December 1977 on the division of property, because that contract was challenged during the court proceedings by the claimant H. Q., as one of the parties in that proceedings.

35. The Court notes that the Court of Appeals, by Judgment AC. No. 3488/2015, approved the appeal of the respondent E.B. as grounded, and explained in detail the manner of acquiring ownership over the disputed property, emphasizing that;

> *"...According to the stated factual situation, the Court of Appeals finds that the respondent acquired the property right towards the immovable property in question on the basis of the purchase confirmed by Judgment C. No. 357/77 of 22.12.1977 and that from the beginning, and later, as in*

the case of physical separation, and during the construction of the house, acted as the sole and exclusive owner of the latter. The court of appeals, on the basis of the evidence contained in the case file, did not find any argument, any document confirming the existence of a joint life and economy at the time of the construction of the house in the said property. Therefore, according to the view of the Court of Appeals, there is no room for application of the provisions of the Law on Family which would determine the acquisition of property during the family community, nor for application of the provisions of the Law on Basic Property Relations, namely the Law on Obligations, because there is simply no factual basis in order to justify the application of these legal provisions".

36. The Supreme Court, by Judgment Rev. No. 214/2020, rejected the request for revision of the Applicant and the other two claimants H.Q., F.Q. as ungrounded, stating that:

"...according to the assessment of the Supreme Court, the allegation in the revision that the property was acquired through a joint contribution has not been proven. All the evidence presented, such as the building permit, the loan agreements and finally the cadastral records, clearly state that in addition to E. B., who was registered as the owner of cadastral parcel 3001/15, according to the 1989 update [...].

On the other hand, the responding party proved that he acquired ownership in accordance with the law in force, specifically on the basis of Article 33 of the Law on Basic Property Relations (Official Gazette of the SFRY, No. 6/80) and Article 13 of the Law on Transfer of Immovable Property (Official Gazette RD No. 45/81), which was in force at the time, stipulating that in order to acquire ownership of the property in question, a written contract with certified signatures by the competent authority is required and that acquisition of property must be entered in the cadastral books, the contract is certified in the competent court and is not disputed until the moment of initiating the procedure for determining ownership".

37. In this respect, the Court should reiterate that the Applicant, in essence presents before it, the allegations of erroneous determination of facts and erroneous application of law, applied by the regular courts, claims which the Court, in its consolidated case-law, considers "the fourth instance claims".

38. In this regard, the Court, based on the case law of the ECtHR, but also taking into account its characteristics, as defined through the ECHR (see: in this context, the explanation in the ECtHR Practical Guide of 30 April 2019 on Admissibility Criteria; Part I. Inadmissibility Based on Merit; A. Manifestly ill-founded claims; 2."Fourth instance", paragraphs 262 and 263), the principle of subsidiarity and the fourth instance doctrine, has consistently emphasized the difference between "constitutionality" and "legality" and emphasized that it is not its duty to deal with errors of facts or erroneous interpretation and erroneous applications of law allegedly committed by a regular court, unless and insofar such errors may violate the rights and freedoms protected by the Constitution and/or the ECHR (See: in this regard, *inter alia*, the cases of the

Court KI128/18, Applicant: *Joint stock company Limak Kosovo International Airport J.S.C., "Adem Jashari"*, Resolution of 28 June 2019, paragraph 55; KI62/19, Applicant: *Gani Gashi*, Resolution on Inadmissibility of 19 December 2019, paras. 56-57; KI110/19, Applicant: *Fisnik Baftijari*, Resolution on Inadmissibility of 07 November 2019, paragraph 40).

39. The Court has also consistently stated that it is not the role of this Court to review the conclusions of the regular courts regarding the factual situation and the application of substantive law and that it may not itself assess the facts which have led a regular court to adopt one decision rather than another. Otherwise, the Court would be acting as a court of "fourth instance", which would result in exceeding the limits imposed on its jurisdiction (see, in this context, the ECtHR case *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28 and the references therein; and see also the cases of the Court, KI128/18, cited above, paragraph 56; and KI62/19, cited above, paragraph 58).

40. The Court also emphasizes the fact that in the assessment of claims of "the fourth instance" which are related to alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, it has also consistently stated that "justice" requested by the aforementioned articles is not "substantial" justice but "procedural" justice. This concept mainly in practical terms, in principle, implies (i) the possibility of adversarial proceedings; (ii) the possibility for the parties at various stages of these proceedings to bring arguments and evidence that they consider relevant to the relevant case; (iii) the ability to effectively challenge arguments and evidence presented by the opposing party; and (iv) the right that their arguments, which, objectively, are relevant to the resolution of the case, be properly heard and examined by the courts; and that, consequently, the procedure, taken as a whole, would turn out to be fair (see, also ECtHR Practical Guide of 30 April 2019 on Admissibility Criteria; Part I. Inadmissibility Based on Merit; A. Manifestly ill-founded claims; 2. "Fourth instance", paragraph 264 and the references mentioned therein). Moreover, the assessment of the fairness of a procedure in its entirety is one of the main premises of case law of the Court and that of ECtHR (see, in this context, the case of the ECtHR *Barbera, Messeque and Jabardo v. Spain*, Judgment of 6 December 1988, paragraph 68; and cases of the Court KI128/19, cited above paragraph 58; and KI22/19, Applicant: *Sabit Ilazi*, Resolution on Inadmissibility of 07 June 2019, paragraph 42).

41. In the circumstances of the present case, the Court points out that, in addition to the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as a result of erroneous determination of facts and erroneous interpretation of law, does not substantiate in a sufficient manner nor does it argue before the Court how this interpretation of the applicable law by the regular courts could have been "manifestly erroneous", resulting in "arbitrary conclusions" or "manifestly unreasonable" for the applicant, or how the proceedings before the regular courts, as a whole, may not have been fair or even arbitrary. In addition, the Court finds that the regular courts have taken into account all the facts and circumstances of the case, the allegations of the Applicant filed in the claim, the appeal and the revision, and reasoned the latter (see, in this regard, case of the Court KI64/20, Applicant: *Asllan Meka*,

Resolution on Inadmissibility of 3 August 2020, paragraph 41 and KI22/19, cited above paragraph 43).

42. Therefore, the Applicant's allegations of erroneous determination of facts and erroneous interpretation and application of the applicable law regarding the determination of ownership over the disputed parcels qualify as allegations falling into the "fourth instance" category and as such, reflect allegations at the level of "legality", and are not substantiated at the level of "constitutionality". Therefore, the latter are manifestly ill-founded on constitutional basis, as established in paragraph (2) of Rule 39 of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 20 of the Law and Rule 39 (2) of the Rules of Procedure, in the session held on 10 December 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 in accordance with Article 20.4 of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur | **President of the Constitutional Court**

Radomir Laban | Arta Rama-Hajrizi

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