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

Prishtina, on 17 March 202
Nr.ref.:AGJ1962/22

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JUDGMENT

in

Case No. KI49/20

Applicant

Shehide Muhadri

Constitutional review of Judgment Ac.no.530/2016 of the Court of Appeals of Kosovo, of 10 December 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by Shehide Muhadri, residing in the village of Babush i Muhaxherëve, municipality of Lipjan (hereinafter: the Applicant), who is represented by Sabri Kryeziu, a lawyer from Lipjan.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment Ac.no. 530/2016 of the Court of Appeals, of December 10, 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged judgment which as alleged by the Applicant has violated fundamental rights and freedoms guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law 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 10 March 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: Court).

6. On 19 May 2020, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi(presiding), Safet Hoxha and Radomir Laban(members).

7. On 28 May 2020, the Court notified the Applicant and the Court of Appeals about the registration of the Referral.

8. On 17 May 2021, on the basis of paragraph 5 of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution and Rule 12 (Election of the President and Deputy-President) of the Rules of Procedure, Judge Gresa Caka-Nimani was elected President of the Court Constitutional. Pursuant to paragraph 4 of Rule 12 of the Rules of Procedure and the Decision of the Court it was determined that Judge Gresa Caka-Nimani, shall assume the duty of President of the Court after the conclusion of the mandate of the current President of the Court Arta Rama-Hajrizi, on 25 June 2021.

9. On 25 May 2021, based on point 1.1 of paragraph 1 of Article 9 (Prior termination of the mandate) of the Law and Rule 7 (Resignation of Judges) of the Rules of Procedure, Judge Bekim Sejdiu submitted his resignation from the position of a judge at the Constitutional Court.

10. On 8 June 2021, the President of the Court Arta Rama-Hajrizi, by Decision GJR.KI49/20, appointed Judge Bajram Ljatifi as Judge Rapporteur instead of Judge Gresa Caka-Nimani, who was elected President of the Constitutional Court on 17 May 2021.

11. On the same day, the President of the Court Arta Rama-Hajrizi, by Decision KSH.KI 49/20, appointed Judge Gresa Caka Nimani as a member of the Review Panel instead of Judge Bajram Ljatifi.

12. On 26 June 2021, based on paragraph 4 of Rule 12 of the Rules of Procedure and the Decision of the Court no. KK-SP 71-2/21, Judge Gresa Caka-Nimani assumed the duty of President of the Court, while based on point 1.1 of paragraph 1 of Article 8 (Termination of mandate) of the Law, President Arta Rama-Hajrizi concluded the mandate of the President and Judge of the Constitutional Court.

13. On 25 November 2021, the Review Panel considered the report of the Judge Rapporteur and requested the supplementation of the report.

14. On 20 January 2022, the Review Panel considered the Report of the Judge Rapporteur, and unanimously made a recommendation to the Court on the admissibility of the Referral.

Summary of facts

15. At the very beginning of the review of the facts, the Court recalls that the Applicant is submitting the Referral to the Court for the second time. The first time the Applicant submitted the Referral together with the persons M.M., S.I., which the Court registered under the mark KI 145/18. In the Referral KI 145/18, the Applicants challenged the constitutionality of the Judgment Ac. no. 530/2016 of the Court of Appeals, of 18 June 2018. In this case, the Court found a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, due to the lack of a reasoned court decision, by declaring the challenged judgment invalid and remanding the case to the Court of Appeals for reconsideration purposes. This case is related to the judgment rendered by the Court of Appeals as a consequence of the judgment of the Constitutional Court in the case KI 145/18.

16. Having that in mind, and for the sake of a clearer review and understanding of the Referral KI49/20, in the following the Court will also present the facts from the Referral KI 145/18, for which it has already decided.

Summary of facts in the case KI145/18

17. The Referral we are talking about in which the Court has decided in the case KI 145/18 related to some immovable properties, namely cadastral parcels no. 173, 636, 638 and 641, all recorded in possession list no. 169 CZ Babush i Muhaxhereve, Municipality of Lipjan. The immovable properties in question were purchased from the Municipality of Lipjan by some private owners (in the 1960-ies). The funds for purchase were provided by the United Nations International Refugee Fund, based in Geneva, Switzerland, for the purpose of sheltering and integrating refugees who came from Albania in the 1960-ies. These immovable properties were thereupon, namely in 1969, given for use, in good faith, to the Applicants. However, the ownership over these immovable properties has since remained registered in the name of the Municipality of Lipjan

18. On 25 February 2009, the Applicants filed a statement of claim with the Municipal Court in Lipjan seeking confirmation of ownership over the immovable properties referred above, claiming that they had acquired it by lawful possession since 1969, from the Municipality of Lipjan, based on the contract Yr. no. 248/68, of 17June 1968.

19. On 16 August 2010, the Municipal Court in Lipjan, by Judgment C.no. 48/2009 upheld the Applicants' claim and confirmed that they had acquired the right of ownership on

the basis of lawful possession of the immovable properties no. 173, 636, 638 and 641, all registered in the possession list no. 169, CZ Babush i Muhaxhereve. By this judgment, the court obliged the respondent, the Municipality of Lipjan, to recognize the Applicants' ownership rights over the immovable properties in question and to allow their registration as Applicant's property in the Immovable Property Registry in the Municipality of Lipjan, Cadastral Zone Babush i Muhaxhereve

20. In its judgment, the first instance court reasoned as follows: *"Based on these facts the court in support of the provisions of Article 28 para.4 of the Law on Property-Legal Relations concludes that the claimants as conscientious possessors have acquired the right of ownership over the disputable immovable properties described under item I of the enacting clause, having been bona fide possessors over 20 years, despite the fact that this immovable property is registered in the books of the Cadastral Register in the name of the respondent, as by the provision of Article 16 of the Law Amending and Supplementing the Law on Basic Property Relations no. 29 promulgated in the Official Gazette of RSY no. 29/1996, Article 29 of the said Law which provides that in socially owned objects the right of ownership cannot be acquired by retention was deleted, so after the deletion of this legal provision the social and private property are equated in terms of the acquisition of the right of ownership by retention."*

21. On an unspecified date, the Municipality of Lipjan 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 the factual situation and erroneous application of substantive law

22. On 14 November 2014, the Court of Appeals by Decision Ac.no. 1855/12 quashed the judgment of the court of first instance and remanded the latter for re-trial and reconsideration, on the grounds that "*... the legal assessment of the first-instance court that the claiming party has acquired the property right on the basis of the institute of the acquisition by prescription, under Article 28 para.4 of the LBPLR, in conjunction with Article 16 of the Law on Amending and Supplementing this Law, cannot stand, because it is also a subject to the provisions of the Law* on *Associated Labour, the legal rules of civil law and Article* 29 *of the LBPLR- the right of ownership over the socially owned property cannot be acquired on the basis of the acquisition by prescription."*

23. On 11 November 2015, the Basic Court in Prishtina, Branch in Lipjan, joined two claims, that of the Applicants and of several other claimants, who also requested the confirmation of ownership over the abovementioned immovable properties, and in a single case decided to:

    1) "reject the Applicants' statement of claim seeking the confirmation of ownership over the parcels no. 173, 636, 638 and 641, all registered in CZ Babush i Muhaxhereve, in the possession list number 169, with the reasoning that *"Since in the present case the claimants Shehide Muhadri, Murat Muhadri and Sylë Ibrahimi, from the village Babush i Muhaxheriive, failed to argue with any evidence until the conclusion of the main hearing, the manner of acquiring the ownership over the immovable property described in the enacting clause of this judgment,* as *provided by the foregoing provisions, the court rejected the claimants' statement of claim* as *unfounded and decided as under item I of the enacting clause of this judgment".*

    2) reject the statement of claim of claimants A.L., M.L. and A.L, from Babush i Muhaxhereve, who also sought the confirmation of ownership over the parcels 173, 636, 638 and 641, all registered with CZ Babush i Muhaxhereve, on the basis of the sale-purchase contract of 1969, alleging that their predecessor paid the price in the

name of the deposit consisting of 1/3 of the total price in respect of the immovable property in question."

24. On 29 December 2015, the Applicants appealed to the Court of Appeals against the judgment of the first instance on the grounds of essential violations of the provisions of the contested proceedings, erroneous and incomplete determination of the factual situation and erroneous application of substantive law. The Applicants specifically requested from the court in question to treat their case similar to some of the other identical cases (of several other families), which had acquired the property right by way of the acquisition by prescription.

25. On 18 June 2018, the Court of Appeals, by Judgment Ac. No. 530/18, rejected the Applicants' appeal as ungrounded and upheld the Judgment C. no. 19/2015 of the Basic Court in Prishtina-Branch in Lipjan, of 11 November 2015, with the following reasoning::

> *"In order to acquire the property right, the two legal requirements must be fully met, to exist* a *valid basis for acquiring the property right (Article 20 of the aforementioned law), but* in *addition the property right is acquired by registering the immovable property in public books or as otherwise provided by law (Article* 33 *of the same law). It follows that in addition to the legal basis for acquiring ownership, there must also be* a *legal way of acquiring property, and in this case it does not exist due to the fact that the immovable property is still recorded* as *socially owned property in the name of Lipjan Municipality.*
>
> *The second instance court accepts the assessment of the first instance court that, pursuant to the institute of the acquisition by prescription, the first claimants could not acquire the right of ownership over the disputable immovable property, even though by the provision of Article 16 of the Law* on *Amending and Supplementing the Law LBPLRY, "Official Gazette of the SFRY, No.* 29/26, *which entered into force* on *05.07.1996, it is stipulated that Article* 29 *of this Law shall be deleted, but this provision cannot be applied in this specific legal case, but eventually it is possible to apply after the entry into force of this law, whereas in the case of the claimants this provision was not* in *force, and the principle that the law which was in force at the time of the establishment of the legal-civil relationship applies. According to these provisions, taking into account the provisions of the Law* on *Associated Labour, the right of ownership over the socially owned property in no circumstances can be acquired on the grounds of acquisition by prescription. From the reasons presented the court finds that the first claimants have not met any legal requirements to have recognized the right of ownership acquired on the basis of prescription, specifically on the basis of Article* 28 *of the LBPLRY."*

26. On 9 August 2018, the Applicants filed a proposal with the State Prosecution for filing a request for protection of legality with the Supreme Court against the Judgment of the Court of Appeals of 18 June 2018 on the grounds of erroneous application of the substantive law.

27. On 27 August 2018, the Office of the Chief State Prosecutor, by Notification KMLC.no.117/2018, notified the Applicants that it has not found sufficient legal basis to file a request for protection of legality with the Supreme Court.

28. On 31 August 2018, the Applicants submitted a request to the Office of the Chief State Prosecutor for reconsideration of the proposal for filing a request for protection of legality, by calling upon discrimination, namely unequal treatment.

29. On an unspecified date, the Office of the Chief State Prosecutor examined the Applicants' Referral and reasoned: *"...we inform you again that we have found that we have no legal basis for filing this extraordinary legal remedy, because this remedy can be filed by us only if the violation pertains to territorial jurisdiction, if the first instance court rendered the judgment without* a *main hearing, while it was under obligation to hold the main hearing, if it was decided on the request in an ongoing case, or if in contravention of the law the public was excluded from the main hearing or if the substantive law was violated. In the present case, on the basis of our findings none of these legal requirements for filing this extraordinary legal remedy were met."*

30. On 2 October 2018, the Applicant, together with the persons M.M., S.I., submitted a Referral to the Court, which the Court registered under the mark KI 145/18.

31. In the Referral KI145/18, the Applicants stated that the Judgment A.no. 530/2016 of the Court of Appeals, of 18 June 2018, violates their rights guaranteed by Articles 3 and 24 [Equality before the Law], Article 31 [Right to Fair and Impartial Trial] of the Constitution, as well as Article 6 [Right to a fair trial] of the ECHR.

32. More specifically, the Applicants stated as the main allegation regarding the violation of Constitutional rights that *"their rights were violated by the regular courts because in their case they rendered decisions that differed from other identical cases." The Applicants claimed that the same court (alluding to the former Municipal Court in Lipjan), recognized the ownership right of some families over the property in question acquired on the basis of prescription, while in their case the courts failed to take into consideration the same factual and legal circumstances."*

33. On 19 July 2019, the Review Panel considered the report of Judge Rapporteur and unanimously made a recommendation to the Court to declare the Referral KI145/18 admissible and have the content of the Referral assessed.

34. On the same day, the Court issued a judgment, wherein it found that the Judgment Ac.no.530/2016 of the Court of Appeals, of 18 June 2018, rejecting the Applicants' appeal, did not comply with the constitutional standard of reasoning of the court decision, which is in contradiction with Article 31 of the Constitution and Article 6 of the ECHR, and consequently the Judgment Ac. no. 530/2016 of the Court of Appeals, of 18 June 2018 was declared null and void, and was remanded for reconsideration, in accordance with the Court's judgment.

35. More specifically, in the Judgment KI 145/18, the Court concluded:

> *[...] 57. that the Applicants' allegation of unequal treatment before the courts, which was raised before the regular courts, was substantial and supported by material evidence which raised issues under Article 24 of the Constitution, namely the question of inequality of the parties before the law. The proper addressing of the allegation in question by the regular courts would strengthen the Applicants' conviction that they were properly heard, in accordance with the requirements of Article 31 of the Constitution and Article 6.1 of the Convention.*
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> *58. Had the Court of Appeals addressed the Applicant's substantive allegation of unequal treatment by the first instance court - irrespective of the response to that allegation (that is, whether this allegation would have been admissible or would be rejected as unfounded), then the condition of "the heard party" and proper administration of justice would have been met."*

Summary of facts in the case KI49/20

36. On 10 December 2019, the Court of Appeals, having taken into account the judgment of the Constitutional Court in the case KI 145/18, held a retrial in the Referral in question, and accordingly issued the Judgment Ac. no. 530/2016, whereby it rejected the Applicant's appeal as unfounded, while the Judgment C.no.19/2015 of the Basic Court in Prishtina-Branch in Lipjan-General Department, on 11 November 2015, was confirmed in its entirety.

37. In a separate part of the reasoning of the Judgment Ac. no. 530/2016, the Court of Appeals addressed, in particular, the issues raised and the findings of the Constitutional Court, which were the basis for the Court to render the Judgment KI145/18 of 13 August 2019. Bearing that in mind, the Court of Appeals concluded:

> *"With the above judgment, the Constitutional Court found only procedural violations committed by the Court of Appeals, however, it did not provide any reasoning and did not provide any solution in relation to the substantive law that is applied and should be applied in such cases when it comes to the referrals of the parties concerning the acquisition of social property on the basis of the prescription.*
>
> *[...] judgment C.no.164/2003, which the claimants referred to as a deviation from the previous practice, it is true that we are speaking about the same factual and legal circumstances, but these actions do not represent a source of rights, that is, deciding differently from these decisions does not mean that there are deviations from the case law. Such decisions did not build the case law for the issue of acquisition of social property by prescription, and this is because these decisions did not go through all court instances, that is, they did not go to the Supreme Court. They did not go to the Supreme Court because the claimants determined the lowest value of the disputed object, which presented a legal obstacle for this court to treat these cases.*
>
> *The case law is indirectly presented as a source of rights in cases where several court instances, for a longer period of time, in the same or identical cases, render the same decisions. In the case of the claimants, but also in other cases concerning the acquisition of social property by prescription, so far there is not a single decision of the Supreme Court that has been decided in his favour. The Supreme Court has clearly stated that the right of ownership over the social property cannot be acquired by prescription, while as regards the changes of the law that were made in 1996, the deadline of prescription of social property begins to run only once the changes in 1996 enter into force. In addition, the Supreme Court of Kosovo is the one that has the legal authority to determine principled positions, issue legal instructions for the uniform application of laws by the courts on the territory of Kosovo and not the courts of lower instances.*
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> *In this case, the Court of Appeals assesses that until now, not only in the case of the claimant, but also in other cases, in which ownership is sought based on the acquisition of the ownership over the social property by prescription, the opinion expressed in the decisions of the Supreme Court is that the right of ownership over the social property cannot be acquired through the occurrence of prescription. In those circumstances, it results that deciding in this way does not represent a change in the legal standpoint or a deviation from the practice so far, but rather respect for the decisions of a higher court instance and legal norms that regulate the issue of acquisition of social property by prescription."*

38. In addition, the Court of Appeals in its judgment Ac. no. 530/2016 has dealt with the assessment of the appeal claims of the Applicant's representative, which related to the issue of acquiring rights by prescription, and concluded that:

> *„In order to acquire the property right, the two legal requirements must be fully met, to exist* a *valid basis for acquiring the property right (Article 20 of the aforementioned law), but* in *addition the property right is acquired by registering the immovable property in public books or as otherwise provided by law (Article* 33 *of the same law). It follows that in addition to the legal basis for acquiring ownership, there must also be* a *legal way of acquiring property, and in this case it does not exist due to the fact that the immovable property is still recorded* as *socially owned property in the name of Lipjan Municipality.*
>
> *The second instance court accepts the assessment of the first instance court that, pursuant to the institute of the acquisition by prescription, the first claimants could not acquire the right of ownership over the disputable immovable property, even though by the provision of Article 16 of the Law* on *Amending and Supplementing the Law LBPLRY, "Official Gazette of the SFRY, No.* 29/26, *which entered into force* on *05.07.1996, it is stipulated that Article* 29 *of this Law shall be deleted, but this provision cannot be applied in this specific legal case, but eventually it is possible to apply after the entry into force of this law, whereas in the case of the claimants this provision was not in force, and the principle that the law which was in force at the time of the establishment of the legal-civil relationship applies. According to these provisions, taking into account the provisions of the Law* on *Associated Labour, the right of ownership over the socially owned property in no circumstances can be acquired on the grounds of acquisition by prescription. From the reasons presented the court finds that the first claimants have not met any legal requirements to have recognized the right of ownership acquired on the basis of prescription, specifically on the basis of Article* 28 *of the LBPLRY."*

39. On 24 January 2020, the Applicant filed a request for the protection of legality with the State Prosecution against Judgment Ac.no. 530/2016 of the Court of Appeals, of 10 December 2019.

40. On 5 February 2020, the State Prosecution sent the notification KMLC.no.18/2020 to the Applicant's representative, wherein it stated: *"Having considered your proposal and the case file, the State Prosecution informs you that your proposal has not been approved because there is no sufficient legal basis in this matter for submitting a request for the protection of legality pursuant to Article 247, paragraph 247.1, item b) of the Law on Contested Procedure."*

Applicants' allegations in the case KI49/20

41. Also, in the Referral KI49/20, the Applicant raises partially the same allegations as in the Referral KI145/18. More specifically, the Applicant alleged that *"This decision of the first-instance court and the second-instance court violated the Constitution of the Republic of Kosovo, namely the Right to Fair and Impartial Trial from Article 31.1 and Equality before the Law from Article 24 of the Constitution as well as Article 6 of the European Convention on Human Rights and Article 2, paragraph 1, item a) of the Law against Discrimination because the claimants are Ashkali - minority, while, at the same time on the grounds of the same legal basis-* as *refugees of the Republic of Albania, the latter were given for use the immovable property (house and land); the same court recognized property right to the family F.I. from the village of Babush i Muhaxhereve; on the same basis the property right was recognized by the Court also to the families E.M., A.M., A.M., A.M. and F.D, all from the village of Bregu i Zi,*

Municipality of Lipjan, then the right to property on the grounds of same legal basis was recognized to Bresa family from the village of Grackë e *Vogël, Municipality of Lipjan; on the grounds of the same legal basis as regards the factual and legal situation by a final judgment was recognized the property right to the claimant Xh.H., from the village of Babush i Muhaxherëve, judgments that have been enclosed to the previous referral submitted to the Court(case no. KI145/18, ref.no. AGJ1408/14, Prishtina, on 13 August 2019) and will be enclosed to the present referral, hence the question arises as to whether the legal and other provisions apply to all in the same way, or whether they must be interpreted differently in relation to someone and differently in relation to someone else."*

42. In this regard, the Applicant adds that despite the judgment of the Constitutional Court in case KI145/18, where it found that there have been violations of human rights, guaranteed by the Constitution, the Court of Appeals failed to properly address the main findings of the Court in the repeated proceedings. More specifically, the Court of Appeals did not respond to the findings of the Constitutional Court related to *"deviations from the previous case law/practice concerning decision-making in the same factual and legal circumstances in identical cases."*

43. In addition, the Applicant adds that the assessment of the Court of Appeals in judgment Ac. no. 530/2016, is wrong and contrary to the conclusions of the Constitutional Court in the Judgment KI 145/18, where the Constitutional Court found *"that the same court (the Court of Appeals) in its previous decisions on cases with identical factual and legal situation decided in a different way, that is, by recognizing the property right to the claimants in those disputes."*

44. The Applicant claims that the Court of Appeals has incorrectly assessed in the new judgment that the previous decisions do not represent case law only due to the fact that also the Supreme Court did not decide, and that such an assessment is wrong, due to the fact that those decisions are final and the final decision represents case law/practice regardless of the court instance which rendered the decision and regardless of whether the legality was assessed by the Supreme Court or not, in other words, the Court of Appeals disputed the assessment of the Constitutional Court, by assessing whether the cited decisions of the Constitutional Court represent case law or not. It seems that the Court of Appeals has confused the case law with legal opinions issued by the Supreme Court.

45. At the end, the Applicant addresses the court with a request to declare the Referral admissible and find violations of the Constitution of the Republic of Kosovo, namely the Right to a Fair and Impartial Trial from Article 31.1, Equality before the Law from Article 24 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights. As well as to approve the statement claim as founded and modify the Judgment C. no. 19/2015 of the Basic Court in Pristina - Branch in Lipjan, of 11.11.20150 and the Judgment Ac. no.530/2016 of the Court of Appeals in Prishtina, of 10.12.2019, or alternatively remand the case for reconsideration purposes.

Relevant Constitutional and Legal Provisions

Relevant Constitutional Provisions

Constitution of the Republic of Kosovo

Article 31
[Right to fair and Impartial Trial]

"1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[…]"

European Convention on Human Rights

Article 6
(Right to a fair trial)

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Relevant Constitutional Provisions

LAW ON BASIC PROPERTY RELATIONS (applicable from 8 February 1980 to 26 June 1996)

„[…]

"2. Acquisition of the property right

Article 20

The property right can be acquired by law itself, based on legal affairs and by inheritance. The ownership right can also be acquired by decision of the government authorities in a way and under conditions determined by law.

Article 28

The conscientious and legal holder of the private property, over which somebody else holds the property right, shall acquire the property right over such object through adverse possession after expiration of three years.
The conscientious and legal holder of the real estate, over which somebody else disposes of the property right, shall acquire the property right over such object through adverse possession after expiration often years.

The conscientious holder of the private property, over which somebody else has the property right, shall acquire the property right by adverse possession after expiration of ten years.
The conscientious holder of the real estate, over which somebody else disposes of the property right, shall acquire the property right over such an object by adverse possession after expiration of 20 years.
The heir shall become the conscientious holder from the moment of opening the inheritance even in the case when the testator was non-conscientious holder, and the heir didn't know nor could have known for that, and the time for adverse possession start to run from the moment of opening the inheritance.

Article 29
[Deleted]

Article 33

On the basis of the legal work the property right over a real estate shall be acquired by registration into the "public notary book"(cadastral books) or in some other appropriate way that is prescribed by law."

Assessment of the admissibility of Referral

46. The Court first examines whether there are fulfilled the admissibility requirements established in the Constitution, foreseen in the Law and further specified in the Rules of Procedure.

47. 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."

48. The Court also refers to the admissibility criteria, as provided by Law. In this respect, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

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 [...]"

49. As to the fulfilment of these requirements, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment Ac.no.530/2016 of the Court of Appeals, of 10 December 2019, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms which she alleges to have been violated pursuant to the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines established in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure.

50. In addition, the Court also examines whether the Applicant's Referral has fulfilled the admissibility criteria set out in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the criteria set out in paragraph (3) of Rule 39 of the Rules of Procedure.

51. And finally, the Court assesses that this Referral is not manifestly ill-founded, as stipulated in paragraph (2) of Rule 39 of the Rules of Procedure, and consequently, it should be declared admissible and have its merits considered.

Merits of the Referral

52. The Court first recalls that it has already decided once in case KI145/18 regarding the same allegations of the Applicant, on which occasion it found a violation and sent the case back to the Court of Appeals for retrial. In the repeated proceedings, the Court of Appeals rendered a new judgment, Ac. no. 530/2016, which the Applicant again considers to be in violation of the rights guaranteed by Article 24 [Equality before the Law] and Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, which she exclusively relates to the non-enforcement of the judgment of the Constitutional Court in case KI145/18.

53. In this respect, the Applicant claims *"despite the judgment of the Constitutional Court in case KI145/18, where it found that there have been violations of human rights, guaranteed by the Constitution, the Court of Appeals failed to properly address the main findings of the Court in the repeated proceedings." More specifically, the Court of Appeals did not respond to the findings of the Constitutional Court related to "deviations from the previous case law/practice concerning decision-making in the same factual and legal circumstances in identical cases."*

54. Having that in mind, in the concrete case the Court should examine the Applicant's allegations in the circumstances of the new judgment Ac.no. 530/2016 of the Court of Appeals, which it issued as a result of the judgment of the Constitutional Court in case KI145/18. In this regard, the Court should first recall what the conclusions of the Constitutional Court were in relation to the allegations of the Applicant when it assessed the judgment of the Court of Appeals in the Referral KI145/18 in which it found a violation.

55. In this regard, the Court recalls that in the judgment KI 145/18, it had found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, focusing on the principle of a non-reasoned court decision, for the reason that the Court of Appeals confirmed the judgment C. no. 19/2015 of the Basic Court in Pristina-Branch in Lipjan, of 11 November 2015, while it did not address at all the Applicant's allegation regarding the claims "*that the first-instance court deviated from its earlier case law/practice when it decided on the cases of other families in identical circumstances.*"

56. Consequently, the Constitutional Court in the judgment KI145/18 concluded that *"the Applicants' allegations about unequal treatment by the first-instance court - irrespective of the response to that allegation (that is, whether this allegation would have been admissible or would be rejected as unfounded), then the condition of "the heard party" and proper administration of justice would have been met"* (paragraph 58 of the judgment KI145/18).

57. Therefore, bearing that in mind, it can be concluded that the obligation of the Court of Appeals in the repeated proceedings was to provide an adequate response that would substantively explain and clarify *"whether the Basic Court deviated from its earlier case law/practice when it decided on the cases of other families in identical circumstances."*

58. In the concrete case, the Court will, particularly in that respect, examine the judgment Ac. no. 530/2016, of the Court of Appeals, rendered in the repeated proceedings, in order to determine whether the latter accepted the findings of the Constitutional Court, and whether it provided an adequate reasoning that would meet the principles of a reasoned court decision.

59. The Court reiterates that the right to a reasoned decision is guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and its application, and is interpreted by the ECtHR in accordance with its case law. On the basis of Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret human rights and fundamental freedoms guaranteed by the Constitution consistent with the case law of the ECtHR. Consequently, as regards the interpretation of the allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECtHR.

General principles on the right to a reasoned decision developed by the case law of the ECtHR

60. The Court recalls that the right to a fair trial includes the right to a reasoned decision. The ECtHR has reiterated that, according to the established case law which reflects the principle related to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (See: the cases of ECtHR *Tatishvili v. Russia*, application no. 1509/02, judgment of 22 February 2007, paragraph 58; *Hiro Balani v. Spain*, ECtHR, application no. 18064/91, Judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, ECtHR, application no. 134/1996 /753/952, judgment of 19 February 1998, paragraph 42).

61. In addition, while the ECtHR also held that authorities enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6.1 of the ECHR, their courts should "indicate with sufficient clarity the grounds on which they based their decision" (see: the ECtHR case *Hadjianastassiou v. Greece*, application no.12945/87, judgment of 16 December 1992, paragraph 33).

62. The case law of the ECtHR emphasizes that the basic function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice (See: *mutatis mutandis*, the ECtHR case *Hirvisaari v. Finland*, application no. 49684/99, paragraph 30, 27 September 2001; *Tatishvili v. Russia*, application no. 1509/02, judgment of 22 February 2007, paragraph 58; and *Suominen v. Finland*, ECtHR, application no.37801/97, judgment of 1 July 2003, paragraph 37).

63. However, while the ECtHR maintains that Article 6, paragraph 1 obliges courts to give reasons for their decisions, it also held that this cannot be understood as requiring a detailed answer to every argument (See: the ECtHR cases *Van de Hurk v. Netherlands*, judgment of 19 April 1994, page 61; *Higgins and Others v. France*, application no. 134/1996/753/952, judgment of 19 February 1998, paragraph 42).

64. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in light of the circumstances of the case (See: the ECtHR cases *Garcia Ruiz v. Spain*, application no. 30544/96, judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, judgment of 9 December 1994, paragraph 27; and *Higgins and Others v. France*, Ibidem, paragraph 42).

65. For example, in dismissing an appeal, the appellate court may, in principle, simply endorse the reasons for the lower court's decision (See: the ECtHR cases *Garcia Ruiz v. Spain*, judgment of 21 January 1999, paragraph 26; and *Helle v. Finland*, judgment of 19 of December 1997, paragraphs 59 and 60). The lower instance court or authority in turn must give such reasons as to enable the parties to make effective use of any existing right of appeal (See, the ECtHR case: *Hirvisaari v. Finland*, application no.49684/99, judgment of 27 September 2001, paragraph 30).

66. However, the ECtHR also noted that, even though a domestic has a certain margin of appreciation when choosing arguments in a particular case and admitting evidence in support of the parties' submissions, the domestic court is obliged to justify its actions by giving reasons for its decisions (See, the ECtHR Case *Suominen v. Finland*, Application No. 37801/97, judgment of 1 July 2003, paragraph 36).

67. Therefore, as it is not necessary for the court to deal with every point raised in the argument (see also: *Van de Hurk v. the Netherlands*, Ibidem, paragraph 61), the main arguments of the Applicant must be addressed (ECtHR cases: *Buzescu v. Romania*, application no 61302/00, judgment of 24 May 2005, paragraph 63; *Pronina v. Ukraine*, application no. 63566/00, judgment of 18 July 2006, paragraph 25). Likewise, giving a reason for a decision that is not a good reason in law will not meet the requirements of Article 6.

68. Finally, the Court also refers to its case law where it establishes that the reasoning of the decision should state the relationship between the merit findings and reflections when considering the proposed evidence on the one hand, and the legal conclusions of the court, on the other. A judgment of a court will violate the constitutional principle of a ban of arbitrariness in decision-making, if the justification given fails to contain the established facts, the legal provisions and the logical relationship between them (Constitutional Court, cases: No. KI72/12, *Veton Berisha and Ilfete Haziri*, judgment of 17 December 2012, paragraph 61; and no. KI135/14, *IKK Classic*, judgment of 9 February 2016, paragraph 58).

Application of the aforementioned principles in the present case

69. The Applicant claims that, despite the judgment of the Constitutional Court rendered in case KI145/18, where it found that there have been violations of human rights, guaranteed by the Constitution, the Court of Appeals failed to properly address the main findings of the Court in the repeated proceedings. More specifically, the Court of Appeals did not respond to the findings of the Constitutional Court related to *"deviations from the previous case law/practice concerning decision-making in the same factual and legal circumstances in identical cases ".*

70. In order for the Court to establish the merits of the Applicant's allegations, it should first of all recall the essence of its findings from the judgment KI 145/18 and then analyse the response of the Court of Appeals from part of the judgment Ac.no. 530/2016, which it rendered in the repeated proceedings.

71. Consequently, the Court recalls paragraphs 57 and 58 of the judgment KI145/18, which contain the main findings of the court regarding the essence of the violation of the applicant's rights from the Referral KI145/18.

> *"57. The Court considers that the Applicants' allegation of unequal treatment before the courts, which was raised before the regular courts, was substantial and supported by material evidence which raised issues under Article 24 of the Constitution, namely the question of inequality of the parties before the law. The proper addressing of the allegation in question by the regular courts would strengthen the Applicants' conviction that they were properly heard, in accordance with the requirements of Article 31 of the Constitution and Article 6.1 of the Convention.*
>
> *58. Had the Court of Appeals addressed the Applicant's substantive allegation of unequal treatment by the first instance court - irrespective of the response to that allegation (that is, whether this allegation would have been admissible or would be rejected as unfounded), then the condition of "the heard party" and proper administration of justice would have been met."*

72. Based on the mentioned paragraph 57 of the judgment KI145/18, it is obvious that the Court found that the essence of the violation derives from the fact that the Court of Appeals failed to address the Applicant's allegation and provide an answer to the appeal claim, which was: that the Basic Court deviated from its previous practice in cases involving same legal and factual circumstances, and that it rendered a different judgment in her case. In the opinion of this Court, precisely that appeal claim was essential and important for the Applicant, and its non-treatment by the Court of Appeals was the basis for finding a violation.

73. Accordingly, the obligation of the Court of Appeals in the repeated proceedings was to examine in detail and provide an answer, whether the Basic Court in its case deviated from its previous practice when deciding in identical cases.

74. However, in order for the Court to establish whether the Court of Appeals in the repeated proceedings took into account the findings of the Constitutional Court from the judgment KI145/18, it will look into a part of the reasoning of the judgment Ac. no. 530/2016, of the Court of Appeals, which it rendered in response to the findings of the Constitutional Court from the judgment KI 145/18.

> *„[...] judgment C.no.164/2003, which the claimants referred to as a deviation from the previous practice, it is true that we are speaking about the same factual and*

legal circumstances, but these actions do not represent a source of rights, that is, deciding differently from these decisions does not mean that there are deviations from the case law. Such decisions did not build the case law for the issue of acquisition of social property by prescription, and this is because these decisions did not go through all court instances, that is, they did not go to the Supreme Court. They did not go to the Supreme Court because the claimants determined the lowest value of the disputed object, which presented a legal obstacle for this court to treat these cases.

The case law is indirectly presented as a source of rights in cases where several court instances, for a longer period of time, in the same or identical cases, render the same decisions. In the case of the claimants, but also in other cases concerning the acquisition of social property by prescription, so far there is not a single decision of the Supreme Court that has been decided in his favour. The Supreme Court has clearly stated that the right of ownership over the social property cannot be acquired by prescription, while as regards the changes of the law that were made in 1996, the deadline of prescription of social property begins to run only once the changes in 1996 enter into force. In addition, the Supreme Court of Kosovo is the one that has the legal authority to determine principled positions, issue legal instructions for the uniform application of laws by the courts on the territory of Kosovo and not the courts of lower instances.

In this case, the Court of Appeals assesses that until now, not only in the case of the claimant, but also in other cases, in which ownership is sought based on the acquisition of the ownership over the social property by prescription, the opinion expressed in the decisions of the Supreme Court is that the right of ownership over the social property cannot be acquired through the occurrence of prescription. In those circumstances, it results that deciding in this way does not represent a change in the legal standpoint or a deviation from the practice so far, but rather respect for the decisions of a higher court instance and legal norms that regulate the issue of acquisition of social property by prescription."

75. By analysing the findings from the judgment KI145/18, with the content of part of the reasoning from the Judgment Ac.no.530/2016 of the Court of Appeals, the Court can conclude that the reasoning of the Court of Appeals essentially supports the allegation for deviation from the practise regarding the acquisition of rights by prescription, which the Court certainly does not consider less important. However, in the given circumstances, it is not of crucial importance as such in terms of eliminating the identified violations, which the Court has stated in the judgement KI 145/18. What cannot be seen in the given reasoning is the treatment of the main finding of the Court from paragraph 57 of the judgement KI 145/18 in connection with the rendering of *"different decisions by the Basic Court in identical factual and legal circumstances."*

76. More specifically, from the part of the reasoning of the judgment of the Court of Appeals, it can be unequivocally concluded that the Court of Appeals did not deal with the main appeal allegation of the Applicant's Referral even in the repeated proceedings, and thus it failed to provide an answer to it, which consequently means that it did not even consider the findings of the Court from judgment KI 145/18.

77. Thus, the Court considers that the Court of Appeals in the Judgment Ac. no. 530/2016, once again completely ignored the main issue on which it should have provided reasoning, although it was specific, relevant and important for the Applicant. In the given circumstances, it can be said that this kind of reasoning, as drafted in the new judgment, was not drafted primarily in accordance with the findings from the Judgment KI145/18, and therefore, as such, it is not in accordance with the obligations from

Article 6, paragraph 1 of the ECHR in terms of the right to a reasoned court decision (See: the ECtHR case *Pronina v. Ukraine*, application no. 63566/00, judgment of 18 July 2006, paragraph 25).

78. Moreover, looking into the very essence of the reasoning of the Judgment Ac. no. 530/2016 of the Court of Appeals in relation to the findings of the Court from the Judgement KI145/18, one gets the impression that the Court of Appeals either was not clear in which direction the reasoning of the new judgment should go in relation to the findings of the Constitutional Court or that the Constitutional Court in the Judgment KI145/18 did not explain in a sufficiently clear way the guidelines that the Court of Appeals should have followed.

79. Consequently, in this judgment, the Court will use the opportunity to clarify its findings from the previous judgment KI145/18 and thereby give the Court of Appeals the opportunity to reason them more clearly in the new judgment. In support of this, the Court adds that the reasoning of the Court of Appeals in the repeated proceedings should follow the very essence of the Applicant's Referral on the issue, which refers to "*deviations from the previous case law/court practice concerning decision-making in the same factual and legal circumstances in identical cases.*"

80. More specifically, in the repeated proceedings, the Court of Appeals should elaborate in greater detail on the court's findings regarding the deviation from the previous case law/practice of the Basic Court, in identical factual and legal circumstances, that is, to provide a more detailed reasoning on the issue, including: **i)** whether there was a different procedure and decision-making of the Basic Court in identical factual and legal circumstances; **ii)** whether there are reasonable justifications for such decision-making, if it was the case; and **iii)** what was intended to be achieved with such different decisions, if eventually rendered by the Basic Court, **iv)** why did the Basic Court deviate from its previous case law/practice in Applicant's case, if it was the case.

81. In view of all what is stated above, it must be concluded that the Court of Appeals with the Judgment Ac.no. 530/2016 failed to meet the condition that guarantees a "fair trial" in accordance with Article 31 of the Constitution in conjunction with Article 6, paragraph 1 of the ECHR because there is a lack of a reasoned decision in relation to the findings of the Court in judgment KI 145/18.

82. In this regard, the Court reiterates that this conclusion refers to the challenged Judgment Ac.no.530/2016 of the Court of Appeals, exclusively from the perspective of its level of reasoning, which concerns the essential claims of the Applicant, and in no way does it prejudice the outcome of the merits of the case.

83. Finally, the Court considers that, under the given circumstances, it is not necessary to examine the claims of the Applicant under Article 24 [Equality before the Law] of the Constitution, because the Court, for the second time, found a violation of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR.

Conclusion

84. The Court finds that by the fact that the Court of Appeals, in the second Judgment Ac. no. 530/2016, of December 10, 2019, did not deal with the findings of the Court from the judgment in case no. KI145/18, hence the Applicant's right to fair and impartial trial, which is guaranteed by Article 31 of the Constitution in conjunction with Article 6, paragraph 1 of the ECHR, is directly violated. As a consequence of this violation, the Applicant was denied her right to a reasoned decision for the second time.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, on 20 January 2022, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to fair and Impartial Trial] of the Constitution in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE Judgment Ac.no. 530/2016 of the Court of Appeals, of 10 December 2019, NULL AND VOID;

IV. TO REMAND Judgment Ac.no. 530/2016 of the Court of Appeals, of 10 December 2019, for reconsideration, in accordance with the judgment of this Court;

V. TO ORDER the Court of Appeals to inform the Court, pursuant to Rule 66 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court no later than on 1 July 2022 ;

VI. TO REMAIN seized of the matter pending the compliance with this order;

VII. TO NOTIFY this Decision to the Parties;

VIII. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;

IX. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.