



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

Prishtina, 2 June 2017
Ref. No.:RK 1077/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI145/16

Applicants

Kujtim Shabani, Lulëzim Shabani, Luljeta Shabani and Alije Shabani

**Constitutional review of
Judgment Rev. no. 263/2016 of
Supreme Court of Kosovo of
9 November 2016**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Kujtim Shabani, Lulëzim Shabani, Luljeta Shabani and Alije Shabani, from Prishtina (hereinafter, the Applicants).

Challenged decision

2. The Applicants challenge the Judgment Rev. no. 263/2016 of the Supreme Court of Kosovo (hereinafter, the Supreme Court) of 9 November 2016 which rejected as ungrounded the Applicants' Revision filed against the Judgment (Ac.no. 1219/2015) of the Court of Appeals of Kosovo (hereinafter, the Court of Appeals) of 28 June 2016. The challenged Judgment was served on the Applicants on 18 November 2016.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment which allegedly violated the Applicants' rights guaranteed by Articles 31 [Right to a Fair and Impartial Trial], 46 [Protection of Property] and 24 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), in conjunction with Article 6 [Right to a Fair Trial] and Article 1 [Protection of Property] of Protocol No 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the ECHR).

Legal basis

4. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Court

5. On 12 December 2016, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
6. On 16 January 2017, the President of the Court appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of the Judges Snezhana Botusharova (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.
7. On 27 January 2017, the Court notified the Applicants of the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 8 May 2017, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 4 July 2000, Ejup Bajrami died, leaving behind immovable property composed of three (3) cadastral parcels located in Prishtina. Mr. Bajrami left behind a Last Will and Testament, registered under No. 207/97 of 11 December 1997 deposited in Municipal Court (hereinafter, the Testament). In his

Testament, he named Myrvete Bajrami, Fatmire Bajrami, Kadrije Bajrami, Vildane Bajrami, Fakete Bajrami and Veton Bajrami as inheritors of his immovable property.

10. The Testament specified in Article 7 that Isak Shabani, son of the Ejup Bajrami, did not receive anything by the Testament because Ejup Bajrami had provided Isak Shabani with money for building two houses and a business premise in Prishtina.

The non-contested Procedure

11. On 19 March 2002, the Municipal Court in Prishtina (hereinafter, the Municipal Court) confirmed (Decision on Inheritance T. No. 113/00) the names of the inheritors based on the Testament. The Municipal Court also recognized Feride Bajrami, the wife of the deceased, as inheritor based on the Law.
12. On 16 March 2008, Isak Shabani died, leaving behind immovable property located in the Cadastral Zone of Prishtina, registered under number UL-71914059-05809.
13. On 16 November 2009, the Municipal Court through Decision (T. no. 176/09) recognized the Applicants as legal inheritors of the deceased Isak Shabani. The Applicant Alije Shabani, the wife of the deceased Isak Shabani, inherited the entire property, because the rest of the Applicants declared that they do not accept the inheritance.

The Contested Procedure

14. On 30 July 2008, some of the Applicants filed a Claim with the Municipal Court against Mirvete Ejupi-Sopjani, Fatmire Bajrami, Kadrie Bajrami-Mujevci, Vildane Bajrami-Blakqori, Fakete Bajrami-Mexhuani, Feride Bajrami and Veton Bajrami (hereinafter, the Respondents) requesting confirmation of ownership regarding the property inherited by the Respondents from the deceased Ejup Bajrami.
15. On 7 October 2011, the Claim was amended to include all of the Applicants.
16. On 22 November 2013, the Applicants supplemented the Claim to include the annulment of the Testament.
17. On 10 October 2014, the Applicants amended the Claim to require only partial annulment of the Testament and to confirm that the Applicants, as inheritors of the deceased, Isak Shabani, are co-owners of the property inherited by the Respondents from the deceased Ejup Bajrami.
18. On 31 October 2014, the Basic Court in Prishtina (Judgment C.nr.1477/2008) rejected as ungrounded the claim of the Applicants.
19. The Applicants appealed against the Judgment of the Basic Court due to "*Essential violations of the provisions of the contested procedure; Erroneous*

and incomplete ascertainment of the factual situation; and, Erroneous application of the substantive law.”

20. The Respondents filed a Response to the appeal, proposing that the Court of Appeals of Kosovo (hereinafter, the Court of Appeals) “[...] *rejects the Appeal of the [Applicants] as ungrounded, and confirms the challenged Judgment*”.
21. On 28 June 2016, the Court of Appeals (Judgment AC.nr.1219/2015) rejected the appeal of the Applicants as ungrounded.
22. The Applicants filed a Revision with the Supreme Court against the Judgment of the Court of Appeals due to “*violation of the provisions of contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of substantive law*”.
23. The Respondents filed a response to the Revision, with a proposal that the Supreme Court rejects “*the Revision of the [Applicants] as ungrounded and to uphold the judgments of the Basic Court and the Court of Appeals*”.
24. On 4 August 2008, the Applicants submitted to the Office of the Chief State Prosecutor a Proposal to file a Request for protection of legality against Judgment of the Court of Appeals.
25. On 11 August 2016, the State Prosecutor (Notice KMLC.no.59/2016) informed the Applicants that, since the Applicants have filed the Revision with the Supreme Court, “*the Office of the Chief State Prosecutor considers that, in the present case, the Revision is sufficient as an extraordinary legal remedy and that it is not necessary to also file a Request for Protection of Legality with the same court.*”
26. On 9 November 2016, the Supreme Court (Judgment Rev. no.263/2016) rejected the Revision of the Applicants’ as ungrounded.

Applicant’s allegations

27. The Applicants claim a violation of their rights to a fair and impartial trial, to protection of property and to equality before the law.
28. The Applicants state that the Supreme Court did not take into account that the respondents, as legal inheritors of the deceased Ejup Bajrami, have, “*without the knowledge of [Applicants’] predecessor [...] Isak Shabani, conducted the inheritance proceedings before [the Municipal] court, without presenting Isak Shabani as inheritor, who is the son of now deceased Ejup Bajrami and was alive when the inheritance was under review. The Respondents, by means of not including the Applicants’ predecessor as the legal inheritor in the certificate of death have committed a criminal offence, thereby violating the law on inheritance to the detriment of the [Applicants]*”.
29. The Applicants allege that the regular courts have only partially dealt with their claim since “*they decided only on the request for annulment of the Testament, which they rejected because the request was time-barred, but this stance is*

ungrounded because (by the provision of Article 54, paragraph 3, of LMT of SAPK, applicable at the time when the legal-inheritance relation was established), the deadline for annulling the testament for the person acting in bad faith is 20 years after the testament is proclaimed, while it is genuinely known that the Respondents have, in the given case, acted in bad faith”.

30. In this regard, the Applicants consider that the regular courts did not address their claim and did not provide justification for their decisions regarding the right of Applicants to inherit property of the deceased Ejup Bajrami, as legal inheritors of Isak Shabani. Thus, *“the failure of the Supreme Court to provide clear and complete responses regarding [...] the Applicants’ right to inheritance as legal inheritors, which was denied to them without any legal grounds, constitutes a violation of the right to be heard and the right to reasoned decision, as constituent parts of the right to fair and impartial trial, guaranteed by the Constitution and the ECHR.”*
31. The Applicants further consider that the Supreme Court of Kosovo, by refusing their Revision, violated their right to property *“due to the fact that the right of their now– predecessor, as a legal inheritor, to inheritance was unlawfully”* denied, while the right to property is guaranteed by the Constitution and its enjoyment is defined by law, thus *“no one shall be arbitrary denied the property.”*
32. The Applicants also allege that the Basic Court has not fulfilled its legal obligations deriving from Article 76 and 78 of the Law on Contested Procedure regarding the active legitimacy when it allowed Alije Shabani (wife of the deceased Isak Shabani) to be included as a party in the proceedings although according to the law on inheritance she *“lacks the real active legitimacy to be considered as a party in this contest because [...] she cannot inherit the property of the father of her spouse”*.
33. Finally, the Applicants request the Court to conclude that their rights have been violated and to declare null and void the judgments of the regular courts.

Admissibility of the Referral

34. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution and as further provided by the Law and foreseen by the Rules of Procedure.
35. 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.*

36. The Court considers that the Applicants are authorized parties, have exhausted the legal remedies available and submitted the Referral in due time.
37. However, the Court refers to Article 48 [Accuracy of the Referral] of the Law, which provides:
- “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”.*
38. In addition, the Court also refers to paragraphs (1)(d) and (2)(d) of Rule 36 [Admissibility Criteria] of the Rules of Procedure, which foresee:
- (1) *The Court may consider a referral if:*
 [...]
 (d) *the referral is prima facie justified or not manifestly ill-founded.”*
- (2) *The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*
 [...]
 d) *the Applicant does not sufficiently substantiate his claim.*
39. In that respect the Court recalls that the Applicants claim a violation of their rights to a fair and impartial trial, to protection of property and to equality before the law.
40. The Court notes that, with regard to the alleged violation of their right to fair and impartial trial, under Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants claim that:
- (i) the regular court unlawfully decided that their request for partial/annulment of the Testament was time-barred;
- (ii) the regular court failed to address and to provide clear and complete responses regarding the Applicants’ right to inheritance as successors of Isak Shabani; and,
- (iii) the regular courts violated the legislation when they allowed Alije Shabani to be included as a party in the proceedings although she lacks the real active legitimacy to be considered as a party in this contest because she cannot inherit the property of the father of her spouse.
41. Regarding allegation (i), the Court observes that the Supreme Court (Judgment Rev. nr.263/2016) confirmed the judgments of the Basic Court and Court of Appeals.
42. In fact, the Basic Court considered that “[...] the provision of Article 54 of the Law on Inheritance (1974), among others, provides that only a person with a legal interest shall be entitled to require the annulment of a testament [...] within one year from the day when such person obtained actual knowledge about the existence of grounds for invalidity [...].”

43. In addition, the Supreme Court further specified that the Applicants “*have requested the annulment [of the Testament] by the submission dated 22.11.2013, namely by the submission dated 10.10.2014, when they requested partial annulment of the Testament [...]. Based on this, it results that, if not earlier, then at least on 07.10.2011, the [Applicants] knew about the Testament [...], but the abovementioned relevant actions have been undertaken by the [Applicants] on the abovementioned dates, [...] i.e. after the foreseen legal time limits*”.
44. Regarding allegation (ii), the Court also observes that the Basic Court (Judgment C.nr.1477/08) stated that “*the predecessor of the [Applicants], Ejup Shabani, made the factual division of the property, Isak [Shabani] received his part of inheritance by using money and the above mentioned parcels to build two houses and a business premise, he also took, in the name of his inheritance part, cadastral parcel 7161 measuring an area of 23 ar*”.
45. The Basic Court further stated that “*Based on Article 40 of the Law on Inheritance, Official Gazette of SAPK No. 43/74, [...] everything an heir has received as a gift from the decedent in whatsoever manner shall be taken into account for the calculation of the inheritance share*”.
46. Moreover, the Basic Court concluded that “*the testator Ejup, as he noted in the Testament, gave to the predecessor of the [Applicants], the deceased Isak Shabani his part of inheritance*”.
47. The considerations of the Basic Court were confirmed by the Court of Appeal (Judgment AC.nr.1219/2015) and the Supreme Court (Judgment Rev. nr.263/2016), as it follows.
48. In fact, the Court of Appeals “*accepted the entire factual findings and the legal stance of the [Basic Court] by considering that it has determined the factual situation correctly and has applied the substantive law fairly when has found that the statement of claim of the [Applicant] is ungrounded and has upheld the [Basic Court] Judgment*”.
49. Furthermore, the Supreme Court considered that “*the judgments of lower instance courts do not include essential violations of the contested procedure provisions, of which this court acts ex officio, nor other violations of the [Law on Contested Procedure], as alleged in the Revision. The enacting clause of the Judgment is clear, in full compliance with the reasoning, while sufficient reasons for all the relevant facts, valid for the fair trial of this legal matter, have been given in the reasoning*”.
50. Regarding allegation (iii), the Basic Court (Judgment C.nr.1477/08) stated that “*the [Applicants, including Alije Shabani] are successors of the late Isak Shabani and being his successors gives them real active legitimacy over this matter*”. That conclusion was found to be lawful by the Court of Appeals and the Supreme Court.
51. The Court notes that the regular courts assessed the facts and interpreted and applied the procedural and substantive law provisions regarding their claim.

Their conclusions were reached after detailed examination of all the arguments presented by the Applicants and the Respondents.

52. The Court further notes that the Applicants repeat before the Court the same arguments as they had filed in the proceedings before the regular courts, in particular, regarding the establishment of the factual situation and the legality of the regular courts' decisions.
53. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing the evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). In fact, the role of regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. See, *mutatis mutandis*, the European Court of Human Rights (hereinafter: ECtHR) case *Garcia Ruiz v. Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28.
54. The role of the Constitutional Court is to ensure compliance with the rights guaranteed by the Constitution and other legal instruments. Therefore, the Constitutional Court cannot act as "fourth instance court". See ECtHR case *Akdivar v. Turkey*, No. 21893/93, Judgment of 16 September 1996, para. 65; see also, *mutatis mutandis*, Constitutional Court case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012.
55. In other words, the complete determination of the factual situation and the correct application of the law is within the full jurisdiction of the regular courts (matter of legality).
56. The mere fact that the Applicants do not agree with the outcome of the proceedings in their case do not give rise to an arguable claim of a violation of his rights as protected by the Constitution.
57. The Constitutional Court can only consider whether the evidence has been presented in a correct manner and whether the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial. See, *inter alia*, case *Edwards v. United Kingdom*, No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991.
58. In that respect, the Court considers that the reasoning provided by the regular courts when referring to Applicants' allegations of violations of procedural and material law is justified and that the proceedings before the regular courts have not been unfair or arbitrary. See ECtHR case *Shub vs. Lithuania*, No. 17064/06, Judgment of 30 June 2009.
59. With regard to Applicants' alleged violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of ECHR, the Court recalls that the right to property applies only to a person's existing possessions and does not guarantee the right to acquire property. See, *mutatis mutandis*, ECtHR case *Marckx v. Belgium*, No. 6633/74, Judgment of 13 June 1979, paragraph 50.

60. In certain circumstances a “legitimate expectation” of obtaining an asset may also enjoy the protection of Article 46 of the Constitution and Article 1 of Protocol No. 1 to the ECHR. See, *mutatis mutandis*, ECtHR case *Bélané Nagy v. Hungary*, no. 53080/13, Judgment of 13 December 2016, para.74.
61. However, the Court recalls that no “legitimate expectation” can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant’s submissions are subsequently rejected by the national courts. See *Bélané Nagy v. Hungary*, *Ibidem*, para. 75.
62. The Court considers that the circumstances of the case did not confer on the Applicants a title to a substantive interest protected by Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR.
63. The Court recalls that the Applicants also alleged that the regular court violated their right to equality before the law guaranteed by Article 24 of the Constitution
64. In that respect, the Court recalls that a treatment is discriminatory if an individual is treated differently to others in similar positions or situations, and if that difference in treatment has no objective and reasonable justification.
65. The Court reiterates that the different treatment must pursue a legitimate aim in order to be justified and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized. See ECHR case *Marckx v. Belgium*, Application No. 6833/74, Judgment of 13 June 1979, paragraph 33.
66. The Court notes that the Applicants have not submitted any *prima facie* evidence nor have they substantiated an allegation indicating that they were discriminated against in the the regular court’s proceedings.
67. In sum, the Court further considers that the Applicants have not presented facts showing that the proceedings before the regular courts were in any way a constitutional violation of their rights to a fair and impartial trial, to protection of property and to equality before the law.
68. Consequently, the Court finds that the Referral is manifestly ill-founded on a constitutional basis and therefore it is inadmissible pursuant to Rules 36 (1) (d) and 36 (2) (d) 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 48 of the Law and Rules 36 (1) (d), 36 (2) (d) and 56 of the Rules of Procedure, in the session held on 8 May 2017, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY the Parties of this Decision;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law; and
- IV. TO DECLARE this Decision effective immediately;

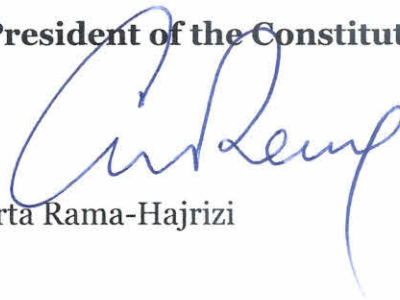
Judge Rapporteur



Almiro Rodrigues



President of the Constitutional Court



Arta Rama-Hajrizi