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

Pristina, 3 March 2014
Ref.no.: RK 564/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI59/13

Applicant

Ibrahim Rizvanolli

Constitutional Review of Judgment Rev. no. 105/2010 of the Supreme Court of Kosovo, dated 29 November 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge

Applicant

1. The Applicant is Mr. Ibrahim Rizvanolli, resident in Pristina.

Challenged decision

2. The Applicant challenges the Judgment Rev. no. 105/2010 of the Supreme Court, dated 15 February 2013, which was served on the Applicant on 23 March 2013.

Subject matter

3. The subject matter is the constitutional review of the challenged decision which allegedly violated Article 31 [Right to a Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution.

Legal basis

4. The Referral is based on Articles 113.7 of the Constitution of the Republic of Kosovo (hereinafter, the Constitution), Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules).

Proceedings before the Court

5. On 18 April 2013, the Applicant filed the Referral with the Court.

6. On 29 April 2013, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel consisting of Judges Altay Suroy (Presiding), Kadri Kreyziu and Arta Rama-Hajrizi.

7. On 18 November 2013, 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

8. In March 1989, the Applicant purchased a shop and would have to pay to the seller the purchase price in instalments. On 1 January 1999, the Applicant still owed the seller a certain amount of money. The seller initiated civil proceedings before the Municipal Court in Peja, after the Applicant had ignored several requests from the seller to pay the remaining debt.

9. On 28 October 2007, the Municipal Court rejected the claim as out of time.

10. The seller appealed to the District Court in Peja against the Municipal Court's decision.

11. On 5 February 2010, the District Court modified the judgment of the Municipal Court and ordered the Applicant to pay the claimant the remaining sum plus interest as well as the procedural costs.

12. Thereupon, the Applicant filed a request for revision with the Supreme Court, *"due to substantial violations of the provisions of contested procedure of erroneous implementation of substantive law"*. He requested the Supreme Court to quash the judgment of the District Court in order for the judgment of the Municipal Court to remain valid.

13. On 15 February 2012, the Supreme Court ruled that the District Court had been right in finding that the Municipal Court had assessed the factual situation correctly, but had erroneously applied the substantive law by not taking into account the amendment of Article 371 of the Law on Contracts and Torts (hereinafter, the LCT) of 25 June 1993, by which the period within which claims should be submitted had been extended from 5 to 10 years.

14. The Supreme Court concluded that the time limit of ten years had not passed and the District Court had rightly accepted the appeal by the seller as grounded. Therefore, the Supreme Court confirmed the decision of the District Court on modifying the judgment of the the Municipal Court.

Applicant's allegations

15. The Applicant alleges before the Constitutional Court that both the appeal and revision court have erroneously applied Article 371 of the LCT.

16. The Applicant concludes that the challenged decisions infringe Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and requests the Court to annul the challenged decisions.

Assessment of the admissibility of the Referral

17. The Court first examines whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules.

18. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

> *"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".*

19. The Court also refers to Article 47 and 48 of the Law.

Article 47.2 of the Law on Court provides that:

> *"The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law".*

Article 48 of the Law on Court also 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".

20. In addition, Rule 36 (1) a), b) and c), and (2) a) and d) of the Rules provides that

"(1). The Court may only deal with Referrals if:
a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted, or

b) the Referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or

c) the Referral is not manifestly ill-founded.

(2). The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

(a) the Referral is not prima facie justified, or
[...]

(d) when the Applicant does not sufficiently substantiate his claim".

21. The Court considers that the Applicant complied with the prescribed deadline of four months counted from the day upon he has been served with the judgment of the Supreme Court; justified the referral with the relevant facts and a clear reference to the supposedly alleged violations; expressly challenges the Judgment of the Supreme Court as being the concrete act of public authority subject to the review; clearly points out the relief sought; and attaches the different decisions and other supporting information and documents.

22. In fact, the Applicant filed a request for revision with the Supreme Court *"due to substantial violations of the provisions of contested procedure of erroneous implementation of substantive law".*

23. The Supreme Court found finally that the time limit of ten years had not passed and confirmed the decision of the District Court.

24. As said above, the Applicant claims that "that both the appeal and revision court have erroneously applied Article 371 of the Law on Contested procedure" and alleges that the Judgment of the Supreme Court violated his constitutional right guaranteed by Article 31 [Right to Fair and Impartial Trial].

25. The Constitutional Court notes that the grounds of appeal to the Supreme Court consist of allegations related with *"substantial violations of the provisions of contested procedure" and "erroneous implementation of substantive law".*

26. The Constitutional Court considers that those allegations pertain to the domain of legality; and further notes that no clear allegation was made on the basis of constitutionality before the Supreme Court.

27. In accordance with the principle of subsidiarity, the Applicant is under the obligation to exhaust all legal remedies provided by law, as stipulated by Article 113 (7) and the other legal provisions, as mentioned above.

28. In fact, the purpose of the exhaustion rule is, in the case, allowing to the Supreme Court the opportunity of settling an alleged violation of the Constitution. The exhaustion rule is operatively intertwined with the subsidiary character of the constitutional justice procedural frame work. (See, *mutatis mutandis,* Selmouni v. France [GC], § 74; Kudła v. Poland [GC], § 152; Andrášik and Others v. Slovakia (dec.).

29. Thus the principle of subsidiarity requires that the Applicant exhaust all procedural possibilities in the regular proceedings, in order to prevent the violation of the constitution or, if any, to remedy such violation of a fundamental right. Otherwise, the Applicant is liable to have its case declared inadmissible by the Constitutional Court, when failing to avail itself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a waiver of the right to further object the violation and complain. (See Resolution, in Case No. KI07/09, Demë Kurbogaj and Besnik Kurbogaj, Review of Supreme Court Judgment Pkl. nr. 61/07 of 24 November 2008, paragraph 18).

30. Whenever a judicial decision is challenged on the basis of some legal position that is unacceptable from the viewpoint of human rights and fundamental freedoms, the regular courts that delivered the decision must be afforded with the opportunity to reconsider the challenged decision. That means that, every time a human rights violation is alleged, such an allegation cannot as a rule arrive at the Constitutional Court without being considered firstly by the regular courts.

31. In the instant case, the Applicant should have clearly complained before the Supreme Court against the alleged violation of its right to fair trial, as the Supreme Court also "shall adjudicate based on the Constitution and the law" (Article 102 (3) of the Constitution).

32. In practice, nothing prevented the Applicant of having complained before the Supreme Court about the alleged violation of his right to fair trial. If the Supreme Court would consider the violation and would fix it, it would be over; if the Supreme Court either did not fix the violation or did not consider it, the Applicant would have met the requirement of having exhausted all remedies, in the sense that the Supreme Court was allowed the opportunity of settling the alleged violation.

33. The Constitutional Court already considered that *"The non exhaustion of remedies might encompass different situations: the referral is premature, because a decision on the same matter is still pending; the referral was filed with some appeals missing; or a complaint was filed in the last instance court proceedings and no opportunity of settling the alleged violation was given to that last instance court"* (See Resolution on Inadmissibility of 4 December 2012, in Case No. KI120/11, Applicant Ministry of Health, Constitutional Review of the Decision of the Supreme Court A. No. 551, dated 20 June 2011).

34. In fact, that analysis is in conformity with the European Court of Human Rights (hereinafter, the European Court) jurisprudence which establishes that applicants are only obliged to exhaust domestic remedies that are available in theory and in practice at the relevant time, that is to say, that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success (Sejdović v. Italy [GC], no. 56581/00, ECHR 2006-II § 46). It must be examined whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (D. H. and Others v. the Czech Republic [GC], §§ 116-22).

35. The Constitutional Court also applied this same reasoning when it issued the Resolutions on Inadmissibility on the grounds of non exhaustion of remedies, on 04 December 2012, in the Case No. KI120/11, Ministry of Health, Constitutional Review of the Decision of the Supreme Court A. No. 551 of 27 January 2010, in the Case No. KI41/09, AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo; and on 23 March 2010, in its Decision in the Case No. KI73/09, Mimoza Kusari Lila vs. the Central Election Commission.

36. As a matter of principle and of fact, the Applicant cannot as a rule complain directly before the Constitutional Court about a human rights and fundamental freedoms violation. The Applicant should have decisively complained first before the Supreme Court of a constitutional violation. The absence to complain before the Supreme Court against the alleged violation of his right to fair trial shows that all the remedies provided by the regular legal system have not been exhausted.

37. However, the Constitutional Court considers that the facts of the case do not allow a compelling conclusion that the grounds of appeal *"substantial violations of the provisions of contested procedure" and "erroneous implementation of substantive law"*, alleged before the Supreme Court, meet the test of the European Court.

38. In any way, even if the Applicant would have raised clearly the constitutional allegations before the Supreme Court, the Constitutional Court further considers that the Applicant has not substantiated and supported with evidence a violation of his rights by the Supreme Court.

39. In fact, the Applicant's allegation of the violation of his constitutional rights do not present *prima facie* sufficient ground for filing the case in the Court; the Applicant's dissatisfaction with the decision of the Supreme Court cannot be a constitutional ground to complain before the Constitutional Court.

40. The Court recalls that the Applicant alleges that the challenged decision violates his right to a fair trial and protection of property, as guaranteed by Articles 31 and 46 of the Constitution.

41. However, the Court considers that the Applicant has not accurately clarified why and how his constitutional rights were infringed by the challenged decision when it concluded that the time limit of ten years had not passed. It appears

that the Applicant merely does not agree with the outcome of the challenged decisions.

42. In fact, no allegation on the ground of constitutionality was made by the Applicant, either implicitly or in substance, which would substantiate the alleged violation of his rights to fair and impartial trial and protection of his property.

43. Moreover, the Court again notes that the Applicant complains on the grounds "of erroneously application of Article 371 of the Law on Contracts and Torts" and further concludes that the challenged decisions infringe his constitutional rights.

44. The Court considers that the Applicant's complaint falls under the scope of legality, which, as a rule, is the jurisdiction of the regular courts. The mere reference to a violation of his rights to fair trial and protection of his property does not constitute in itself a constitutional ground for his complaint.

45. Furthermore, the Applicant does not substantiate a *prima facie* allegation on constitutional grounds and does not provide evidence showing that his rights and freedoms guaranteed by Article 31 and 46 of Constitution have been violated by the decisions of District and Supreme Courts.

46. Moreover, the Constitutional Court recalls that it is not the task of the Constitutional Court to deal with errors of law (legality) allegedly committed by the District and Supreme Courts, unless they may have infringed rights and freedoms protected by the Constitution (constitutionality).

47. Thus, the Court cannot act as a court of fourth instance, when considering the decisions rendered by these courts. It is the task of the regular courts to interpret and apply the pertinent procedural and substantive law *(*See, *mutatis mutandis,* Garcia Ruiz v. Spain, no. 30544/96, § 28, European Court on Human Rights [ECHR] 1999-1).

48. Furthermore, the Constitutional Court cannot consider that the pertinent proceedings before the District Court and Supreme Courts were in any way unfair or arbitrary *(*See, *mutatis mutandis,* Shub v. Lithuania, ECtHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).

49. On the contrary, the Court considers that the proceedings, viewed in their entirety, have been conducted in such a way that the Applicant has had a fair trial (See, *mutatis mutandis,* Report of the EComHR in case Edwards v. UK, Appl. No. 13071/87, 10 July 1991).

50. In addition, the Court considers that both the decisions of the District and Supreme Courts are well reasoned and justified in accordance with their jurisdiction.

51. In sum, the Court concludes that the Applicant's Referral, pursuant to the combined provisions of Article 113 (7) of the Constitution, Article 48 of the Law

and Rule 36 (1) a), b) and c), and (2) a) and d) of the Rules, is manifestly ill-founded.

52. Therefore, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 47 and 48 of the Law and Rule 36 (1) c) and Rule 56 (2) of the Rules, on 18 November 2013, unanimously,

DECIDES

I. TO DECLARE the Referral as 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;

IV. TO DECLARE this Decision immediately effective.

Judge Rapporteur **President of the Constitutional Court**

Almiro Rodrigues Prof. Dr. Enver Hasani