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

Prishtina, 27 January 2014
Ref. No.:RK543/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI65/13

Applicants

Rasim Hoxha and Remzije Hoxha-Prelvukaj

Constitutional review of the Judgment of the Supreme Court of the Republic of Kosovo, Rev. 291/2009 of 4 September 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

Applicants

1. The Referral is submitted by Mr. Rasim Hoxha and Mrs. Remzije Hoxha-Prelvukaj (hereinafter: Applicants), represented by Mr. Gani Asllani, practicing lawyer from Prishtina.

Challenged decisions

2. The Applicants challenge the Judgment Rev. 291/2009 of 4 September 2012 of the Supreme Court of Kosovo, which was served on them on 28 December 2012.

Legal basis

3. The Referral is based on Article 113.7 of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law) and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Subject matter

4. The subject matter is the constitutional review of the challenged Decision which allegedly is *"unfair and unconstitutional because, by rejecting the Applicants' revision as ungrounded, their rights to fair trial and right to property have been violated."*

5. In this respect, the Applicants claim that Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property], of the Constitution are violated.

Proceedings before the Constitutional Court

6. On 29 April 2013, the Applicants filed the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 29 April 2013, the President by Decision No. GJR. KI65/13, appointed Judge Altay Suroy as Judge Rapporteur. On the same day, the President by Decision No. KSH. KI65/13 appointed the Review Panel composed of Judges Ivan Čukalović (Presiding), Kadri Kryeziu and Enver Hasani.

8. On 26 June 2013, the Applicants were notified of the registration of the Referral. On the same day, the Referral was communicated to the Supreme Court of Kosovo.

9. On 3 July 2013, the Court requested from the Applicants and the Basic Court in Peja to submit additional documents.

10. On 19 July 2013, the Basic Court in Peja – Branch in Istog and the Applicants replied.

11. 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 the facts

12. On 27 May 2002, the Municipal Court in Istog, by Judgment C.no.133/01, confirmed that the Applicant Rasim Hoxha is the owner of the disputed house and user of the plot where the house was built and obliged the respondent G. M. to vacate the said immovable property for the Applicant. The Municipal Court in Istog rejected as unfounded the claim of the Applicant Remzije Hoxha-Prelvukaj for recognition of the co-ownership over the disputed immovable property.

13. On 7 November 2002, the District Court in Peja by Decision Ac. no. 163/02 quashed Judgment C. no. 133/01 of 27 May 2002 of the Municipal Court in Istog and remanded the case for retrial.

14. On 23 July 2004, the Municipal Court in Istog by Judgment C. no. 9/03 rejected as unfounded the Applicants' claim for confirmation that they are the co-owners of the disputed immovable property (plot and house) and confirmed that the counter-plaintiff G. M. is the owner of the disputed immovable property on the basis of the sale-purchase, occupancy and construction.

15. On 20 October 2004, the District Court in Peja by Decision Ac. no. 283/2004 quashed Judgment C. no. 9/03 of 23 July 2004 of the Municipal Court in Istog and remanded the case for retrial.

16. On 28 April 2005, the Municipal Court in Istog by Judgment C. no. 1794/04 rejected as unfounded the Applicants' claim to confirm that they are co-owners of the disputed immovable property and confirmed that the counter-plaintiff G. M. is the owner of the contested immovable property.

17. On 11 January 2006, the District Court in Peja by Decision Ac. no. 219/05 quashed Judgment C. no. 1794/04 of 28 April 2005 of the Municipal Court in Istog and remanded the case for retrial.

18. On 6 November 2007, the Municipal Court in Istog by Judgment C. no. 10/06 rejected as unfounded the Applicants' claim for confirmation that they are the co-owners of the disputed immovable property and confirmed that counter-plaintiff G. M. is the owner of the disputed immovable property.

19. On 19 February 2009, the District Court in Peja by Judgment Ac. no. 13/08 rejected the Applicants' appeals as unfounded and upheld the Judgment C. no. 10/06 of 6 November 2007 of the Municipal Court in Istog.

20. On 4 September 2012, the Supreme Court of Kosovo by Judgment Rev. no. 291/2009 rejected as unfounded the Applicants' revision and upheld the Judgment Ac. no. 13/2008 of 19 February 2009 of the District Court in Peja.

21. By Judgment Rev. no. 291/2009 of 4 September 2009, the Supreme Court, among others, reasoned:

> *"... From the case files, it may be derived that the claimants/counter-respondents (Applicants) are brother and sister, while the*

respondent/counter-claimant G. M. is brother-in-law to them. The claimant/counter-respondent Rasim (Applicant) is owner of the parcel 5/1, an ownership right acquired by contract on division of family property, certified with the Municipal Court in Gjurakoc, Vr.no. 467/72, of 06.09.1972. Based on such a contract, the claimant/counter-respondent Rasim (Applicant) was issued a deed (Tapi). Based on the construction permit issued by the competent municipal authority, the claimant/counter-respondent Rasim (Applicant) started constructing the family house, together with the second claimant/counter-respondent Remzije (Applicant), pursuant to a contract on joint construction. Since the claimant/counter-respondent Rasim had decided to live in Prishtina, and purchase a house in Prishtina, an agreement was made between him and the respondent/counter-claimant G. M., for the latter to sell his own home in Banja of Peja, and give the claimant/counter-respondent Rasim (Applicant) the money from such a sale. In 1979, the respondent/counter-claimant G. M. sold his house in Banja to a person S. Z., for the amount of 120 Million Dinars of that time, and as per agreement, gave such money to claimant/counter-respondent Rasim (Applicant). Based on the agreement, the Rasim was bound to build or purchase another house in Banja, Prishtina or Gjakova to the respondent/counter-claimant G. M., within a deadline of 5-6 years. The claimant/counter-respondent decided that the respondent/counter-claimant G.M. inhabit the house in dispute. These facts were undisputed by the litigants.

Since the claimant/counter-respondent Rasim (Applicant) could not perform on his obligation from the agreement, to purchase or build another house in Banja, Prishtina or Gjakova to the respondent/counter-claimant G. M., he invested in the house, to adapt it for housing, thereby installing water and electricity mains, and other items, with his own money, and moved in the disputed house in 1980. Since the claimant/counter-respondent (Applicant) could not perform on his obligation, he congratulated to the wife of the respondent/counter-claimant G. M., who is his sister, and to his own nephews, in 1986 for acquiring the house in question...

The respondent/counter-claimant G. M. has invested in the house, considering that he was doing this for his own home, and there was no objection from the respondent/counter-claimant (Applicant) to such investments. There were later efforts to have an agreement between the litigating parties for the house in dispute, but to no avail...

Setting from such a factual situation, the court of revision finds that the conclusion of the second instance court that the respondent/counter-claimant G. M. has acquired ownership rights as per Article 24, paragraph 1 of the LBPR, since as a conscious builder, he had knowledge of building on his own building, is correct. With the investment made by the respondent/counter-claimant G.M. in the object, the ownership rights are acquired if the conscious builder has made considerable investments, while the owner of the property had knowledge of such investments, and made no objections within the meaning of Article 24, paragraph 1 of the LBPR. Setting from the factual situation ascertained by the first instance court, it

may be derived that the respondent/counter-claimant G. M. moved in the house in dispute in 1980, based on a prior agreement with the claimant/counter-respondent (Applicant), and that since the moving into the house, the respondent/counter-claimant G.M. has made considerable investments, which according to the civil engineering expert amount to 81.822,95 €...

The respondent/counter-claimant G. M. was conscious that he was building in his own home, since according to the agreement with the claimant/counter-respondent (Applicant), he moved to the house in 1980, and invested in the building, thereby bringing the object to the current condition, while the claimant/counter-respondent (Applicant) never objected until the filing of the claim..."

Applicants' allegations

22. The Applicants allege that the regular courts have not rendered fair and impartial decisions, thereby violating legal, constitutional provisions and the European Convention on Human Rights (hereinafter: ECHR).

23. The Applicants allege that their right to property as guaranteed by Article 46 [Protection of Property] of the Constitution and Article 1 [Protection of Property] of Protocol No. 1 of ECHR has been violated. The Applicants also allege that Article 36 of the Law No. 03/L-154 on Property and Other Real Rights has been violated.

24. The Applicants allege that their rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of Constitution, under paragraphs 1 and 3, have been violated because they: "*...objected the assessment of the house based on the expertise conducted by the expert who was appointed by the court, with a view to having an expertise conducted by construction experts from the faculty of construction in Prishtina, or a super expertise to be conducted, this right was denied by the court categorically, so that our request was not even entered in the court's records...*".

25. Finally, the Applicants request from the Court to assess the legality and constitutionality of the decisions of regular courts and to restore their right to property which was allegedly denied to them by the regular courts in an arbitrary manner.

Assessment of the admissibility of Referral

26. The Court notes that in order to be able to adjudicate the Applicants' Referral, it is necessary to first examine whether all admissibility requirements laid down in the Constitution, the Law and further specified in the Rules of Procedure have been met.

27. With regard to the Applicants' Referral, the Court refers to Article 113.7 of the Constitution, which establishes:

"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".

28. In the present case, the Court notes that the Applicants have exhausted all legal remedies, as required by Article 113.7 of the Constitution.

29. The Court also refers to Article 49 of the Law, which stipulates:

"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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force".

30. The Court takes into account Rule 36 (1) b) of the Rules of Procedure, which provides:

"The Court may only deal with Referrals if:

[...]

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...".

31. In this respect, the Court also refers to Rule 27 (6) of the Rules of Procedure, which establishes:

"A time period prescribed by the Constitution, the law or these Rules shall be calculated as follows:

[...]

(4) when a period is expressed in months and days, the period shall be first calculated in whole months and then in days;

(5) when a period is to be calculated, periods shall include Saturdays, Sundays and official holidays;

(6) when a time period would otherwise end on a Saturday, Sunday or official holiday, the period shall be extended until the end of the first following working day".

32. The Court notes that the Referral has been submitted on 29 April 2013, whereas the Judgment of the Supreme Court was served on them on 28 December 2012.

33. In the concrete case, the Court notes that the Applicants have failed to submit their Referral on 28 April 2013, because it was Sunday, and according to the Rule 27 (6) of the Rules of Procedure, in such cases, the Referral must be

submitted in the first working day following the Sunday, and actually the Applicants did so.

34. It results that the Referral is within the time limit, because it is submitted within the deadline of four (4) months as prescribed by the Law and the Rules of Procedure.

35. Regarding the allegation raised in the Referral, the Court refers to Rule 36 (1) c) of the Rules of Procedure, which provides:

"(1) The Court may only deal with Referrals if:

[...]

c) the Referral is manifestly ill-founded".

36. The Court considers that Applicants have not provided any *prima facie* evidence indicating that the proceedings conducted before the regular courts were biased or tainted by arbitrariness; in addition Applicants' allegations raise issues of facts and law which are full jurisdiction of the regular courts.

37. The Constitutional Court reiterates that it is not a fact finding court. The Constitutional Court wishes to emphasize that the correct and complete determination of the factual situation is full jurisdiction of the regular courts and the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" (see case Akdivar v. Turkey, No.21893/93, ECtHR, Judgment of 16 September 1996, para.65, also see case KI86/11, Applicant Milaim Berisha, Resolution on Inadmissibility of 5 April 2012).

38. In addition, the Referral does not show that the regular courts have acted in an arbitrary or unfair manner. It is not the task of the Constitutional Court to substitute its own assessment of the facts for that of the regular courts and, as a general rule, it is the duty of the regular courts to assess the evidence made available to them. The Constitutional Court's task is to ascertain whether the regular courts' proceedings were fair in their entirety, including the way evidence was taken, (see case Edwards v. United Kingdom, No.13071/87, Report of the European Commission of Human Rights of 10 July 1991).

39. The fact that the Applicants do not agree with the outcome of the case cannot of itself raise an arguable claim for breach of Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution (See Case Mezotur-Tiszazugi Tarsulat vs. Hungary, No.5503/02, ECtHR, Judgment of 26 July 2005).

40. Under these circumstances, the Applicants have not substantiated their allegation of the violation of Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution, because the presented facts do not in any way show that the regular courts have denied their constitutionally guaranteed rights.

41. Consequently, the Referral is manifestly ill-founded and it must be rejected as inadmissible in accordance with Rule 36 (1) c) of the Rules of Procedure.

FOR THESE REASONS

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

DECIDES

I. TO REJECT 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**

Altay Suroy Prof. Dr. Enver Hasani