



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

Prishtina, 28 March 2014
Ref.no.: RK 582/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI76/13

Applicants

**Durije Kurshumlja,
Shpresa Kurshumlja and
Orhan Kurshumlja**

**Constitutional Review of Judgment Rev. nr. 218/2010 of the Supreme
Court of the Republic of Kosovo, dated 7 February 2013**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Cukalovic, 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 Applicants are Mrs. Durije Kurshumlja, Mrs. Shpresa Kurshumlja and Mr. Orhan Kurshumlja. They are represented by Mr. Teki Bokshi, a lawyer from Gjakova.

Challenged decisions

2. The Applicants challenge Judgment Rev.nr.218/2010 of the Supreme Court of the Republic of Kosovo, dated 7 February 2013, Judgment Ac. nr. 424/2008 of the District Court of Prishtina, dated 23 June 2010 and Judgment C. no. 180/2002 of the Municipal Court of Prishtina, dated 14 September 2007.
3. The judgment of the Supreme Court of Kosovo was served on the Applicants on 6 April 2013.

Subject matter

4. The subject matter is the constitutional review of the challenged court decisions which, allegedly, violated Article 7 [Values]; Article 21 [General Principles on Fundamental Rights and Freedoms]; Article 22 [Direct Applicability of International Agreements and Instruments]; Article 31 [Right to Fair and Impartial Trial]; Article 46 [Protection of Property]; Article 53 [Interpretation of Human Rights Provisions] of the Constitution; and Article 6 of the European Convention on Human Rights (hereinafter, ECHR) [Right to a Fair Trial]; and Article 1 of the Additional Protocol of the ECHR [Protection of Property].

Legal basis

5. Article 113.7 of the Constitution; Article 47 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 56 (2) of the Rules of Procedure (hereinafter, the Rules).

Proceedings before the Court

6. On 29 May 2013, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
7. On the same date, the President appointed Judge Kadri Kryeziu as Judge Rapporteur and the Review Panel composed of Judges Robert Carolan (Presiding), Almiro Rodrigues and Ivan Čukalović.
8. On 10 June 2013, the Court notified the Applicants and the Supreme Court of the registration of the Referral.
9. Also on 10 June 2013, the Court requested the Applicants' lawyer to submit all documents listed in the Referral.
10. On 18 June 2013, the Applicants submitted some of the documents requested by the Court.
11. On 16 October 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

12. On 5 November 1985, the District Court in Prishtina, by Judgment C. no. 526/84, confirmed that the father of the Applicants was entitled to the right of permanent use of a plot of land, recorded as cadastral parcel n. 6177 of 1.67,53 ha in "Vreshtat" as per the possession list no. 1941 CZ Prishtina, and to allow the registration of this property in the cadastral register in his name within a deadline of 15 days from the rendering of the judgment.
13. Thereupon, the respondent appealed to the Supreme Court, complaining that the District Court had violated substantial provisions of the Law on Contested Procedure (hereinafter, LCP), had erroneously ascertained the factual situation and erroneously applied material law.
14. On 17 July 1986, the Supreme Court of Kosovo, by Judgment Ac. no. 125/86, quashed the judgment of the District Court in Pristina, stating that the allegations by the complainant (the respondent before the District Court) were justified, and ordered the case file to be submitted for review to the Municipal Court in Prishtina as the competent court to decide on the case. The Supreme Court further ruled that, in the repeated procedure, all circumstances should be clarified, inter alia, by demanding a detailed report from the Geodesy Department on the property dispute.
15. When the complainant died in 1987, the son joined all his rights and inherited the property concerned.
16. On 25 April 1994, an expertise was prepared by expert P. G. providing the full history of the property dispute, as later confirmed by a further expert Q. H.
17. On an unknown date, the Applicants, after the death of their father, initiated the repeated procedure before the Municipal Court in Prishtina as ordered by Judgment Ac. no. 125/86 of the Supreme Court, dated 17 July 1986.
18. On 14 September 2007, the Municipal Court in Prishtina, by Judgment C.nr.180/2002, rejected the claim of the Applicants as ill-founded, considering the respondent as the owner of the plot officially registered in his name at the Cadastral Office Prishtina.
19. On 6 November 2007, the Applicants filed an appeal against the Judgment of the Municipal Court with the District Court of Prishtina, claiming that the first instance court had not acted upon the instructions laid down in Judgment Ac. no. 125/86 of the Supreme Court, dated 17 July 1986 and had breached Article 354(1) in conjunction with Articles 377 and 354 (2) LCP, in that its judgment was the result of the erroneous and incomplete determination of the factual situation and the erroneous application of substantive law.
20. On 24 June 2010, the District Court of Prishtina, by Judgment Ac.nr.424/2008 upheld the Judgment of the Municipal Court and rejected as ill-founded the appeal of the Applicants. The Court stated that the Municipal Court had correctly and completely determined all facts that were of decisive importance to determine the fact that the Applicants' late father from Pristina did not enjoy

the right of ownership of the contested immovable property. The District Court concluded that the judgment of the Municipal Court contained an understandable enacting clause and that, in the reasoning of the judgment, full and understandable reasons were presented about all facts which were relevant for the right adjudication of the contested matter.

21. On 5 August 2010, the Applicants filed a revision with the Supreme Court of Kosovo due to substantial violations of the provisions of the LCP and erroneous implementation of the material law, proposing to the Supreme Court that the lower instance courts' judgments be amended so that the Applicants' claim is accepted as grounded or that these judgments are annulled and the matter is returned for retrial.
22. On 7 February 2013, the Supreme Court of Kosovo, by Judgment Rev. nr. 218/2010, rejected the revision as ill-founded and accepted all the factual and legal findings given by the lower instance courts, stating that the challenged Judgments were clear and did not contain contradictions in their content or reasoning.

Applicants' allegations

23. The Applicants allege that the Municipal and District Courts did not make a real and meaningful analysis of the testimonies of both the witnesses for the Applicants as well as of the witnesses for the respondent and of the respondent himself. In particular, these courts did not provide proper grounds for rejecting the evidence which the Applicants had presented. Furthermore, in their opinion, the Supreme Court did not consider the witness statements which they had obtained.
24. The Applicants request the Court to find that the Supreme Court, the District Court and the Municipal Court violated their fundamental human rights guaranteed by the Constitution, in particular, Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 46 [Protection of Property] and 53 [Interpretation of Human Rights Provisions] of the Constitution as well as Article 6 [Right to Fair Trial] ECHR and Article 1 [Protection of Property] of the Additional Protocol to the ECHR.
25. They also claim that, when calculating the time limits from the date that the court proceedings were initiated until the judgment of the Supreme Court was rendered, the requirement that the case must be decided within a reasonable time limit as guaranteed by Article 31 of the Constitution in conjunction with Article 6 ECHR, was not respected.
26. The Applicants propose to the Court to annul all Judgments rendered in the case and to decide that the case be returned for retrial.

Assessment of the Admissibility of the Referral

27. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution and as further specified in the Law and the Rules.

28. In this connection, the Court refers to Article 113.7 of the Constitution, which provides:

"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".

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

"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 (...)".

30. In the instant case, the Court notes that the Applicants have sought recourse to protect their rights before the Municipal and District Courts and, finally, before the Supreme Court of Kosovo. The Court also notes that the Applicants were served with the judgment of the Supreme Court on 6 April 2013 and filed their Referral with the Court on 29 May 2013.

31. Thus, the Court considers that the Applicants are authorized parties, have exhausted all legal remedies available to them under applicable law and have submitted the Referral within the four months time limit.

32. The Court further refers to Article 48 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".

33. In addition, Rule 36 (1) (c) and 36 (2) (a) and (d) of the Rules, foresees that:

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

[...]

(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) the Applicant does not sufficiently substantiate his claim.

34. In the present case, the Applicants allege that they disagree with the rulings of the Municipal and District Courts in the repeated procedure ordered by Judgment Ac. no. 125/86 of the Supreme Court dated 17 July 1986, because both courts completely ignored the recommendations contained in that

Judgment. Furthermore, in their opinion, also Judgment Rev.no.218/2010 of the Supreme Court of 7 February 2013 infringed the right of access to justice, in that it did not consider the entire matter.

35. The Applicants further allege that these courts did not make a real and meaningful analysis of the witnesses for the Applicants and that no proper explanation was given for each piece of evidence presented to them.
36. They claim that the entire matter was decided by the courts in violation of Articles 7 [Values], 21 [General principles], 22 [Direct applicability of International Agreements and Instruments] and Article 31 [Right to Fair and Impartial Trial] of the Constitution as well as Article 6 [Right to Fair Trial] ECHR and 1 Article [Protection of Property] of Protocol No. 1 to the ECHR.
37. As to the Applicants' complaints, the Court observes that under the Constitution, it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the lower instance courts and the Supreme Court, unless and so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality). Thus the Court is not to act as a court of fourth instance, when considering the decisions taken by the regular courts. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, Garcia Ruiz v. Spain [GC], no. 30544/96, para. 28, European Court of Human Rights [ECtHR] 1999-I). The simple dissatisfaction with the contested court decisions cannot be a constitutional ground for submitting a referral to the Constitutional Court.
38. The Constitutional Court can only consider whether 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).
39. As to the present case, the Court notes that Applicants merely complain that the Supreme Court, in its Judgment Rev. No. 218/2010 of 7 February 2013,, rejected their revision against the judgment of the District Court of Prishtina as ill-founded for the reasons that it completely accepted the factual and legal findings given by the Municipal and District Courts and that these findings were clear and did not contain any contradictions as to their contents or reasoning.
40. In this respect, after having examined the Applicants' complaint, the Court finds that the relevant proceedings were in no way unfair or tainted by arbitrariness. (see, *mutatis mutandis*, Shub v. Lithuania, ECtHR Decision on Admissibility of Appl. No. 17064/06 of 31 May 2009).
41. Moreover, the Court considers that the Applicants have neither build a case on a violation of the rights invoked by them, nor have they submitted *prima facie* evidence on such violations (see, Vanek v. Slovak Republic, ECtHR Decision on Admissibility of Appl. No. 53363/99 of 31 May 2005, and Case KI 70/11, Faik Hima, Magbule Hima, Bestar Hima, constitutional Review of the Judgment of

the Supreme Court No. 983/08, dated 07 February 2011, Resolution on Inadmissibility of 13 December 2011).

42. It follows that this part of the Referral is manifestly ill-founded, pursuant to Rules 36 (1) c) and 36 (2) a) and d) of the Rules of Procedure.
43. The Applicants further complain that, when calculating the time limits from the date that the court proceedings were initiated until the judgment of the Supreme Court was rendered, the requirement that the case must be decided within a reasonable time limit as guaranteed by Article 31 of the Constitution in conjunction with Article 6 ECHR, was not respected.
44. However, the Court notes that it appears from the documents submitted that the Applicants have not raised this complaint either before the Municipal and District Courts, or in highest instance before the Supreme Court.
45. In this respect, the Court observes that, before submitting a referral to the Court, the exhaustion rule does not only require an applicant, to exhaust all legal remedies available under Kosovo law, including the highest instance court, but also to have raised the alleged violations of fundamental rights in the proceedings before these instances.
46. The Court emphasizes that the rationale for the exhaustion rule, as interpreted by the European Court of Human Rights (hereinafter: ECtHR) is to afford the public authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of fundamental rights guaranteed by the Constitution and/or international instruments directly applicable in Kosovo. The rule is based on the assumption that the Kosovo legal order will provide for an effective remedy to deal with an alleged violation of such fundamental rights. This is an important aspect of the subsidiary character of the proceedings before the Constitutional Court (see, *mutatis mutandis*, Selmouni v. France, ECtHR, no 25803/94, Judgment of 28 July 1999).
47. Thus, in the present case, the Applicants have not shown that, in respect of their claim that their case had not been decided within a reasonable time limit in violation of Article 31 of the Constitution and Article 6 ECHR, they have exhausted all legal remedies available to them under Kosovo law as they were required to do, pursuant to Article 113.7 of the Constitution and Article 47.2 of the Law.
48. It follows that this part of the Referral must be rejected on the ground that the Applicants have not exhausted all legal remedies available to them under Kosovo law.
49. In these circumstances, the Court concludes that 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 16 October 2013, unanimously,


DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. TO NOTIFY the Party 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


Kadri Kryeziu


Prof. Dr. Enver Hasani

