



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 30 January 2015
Ref. No.: RK763/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KI87/14

Applicant

Ismail Guri

**Constitutional review of the
Notification KMLC. no. 7/14 of the Office of the Chief State Prosecutor,
dated 10 February 2014**

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 Referral was submitted by Mr. Ismail Guri, from Kaçanik (hereinafter, the Applicant), who is represented by Ms. Vahide Braha, a lawyer practicing in Prishtina.

Challenged Decisions

2. The Applicant challenges the Notification (KMLC. no. 7/14 dated 10 February 2014) of the State Prosecutor, by which the Applicant's request for protection of legality was rejected. This decision was served on the Applicant on 3 March 2014.
3. The Applicant also challenges the Decision (Ca. no. 5315/2012, dated 5 November 2013) of the Court of Appeal in relation to the Decision (Ac. no. 534/09, dated 4 April 2011) of the District Court which rejected his request to repeat the proceedings regarding his claim.

Subject Matter

4. The subject matter is the constitutional review of the challenged decisions, which allegedly *"violated the Applicant's rights guaranteed by the Constitution, namely Article 31 [Right to Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter, the Constitution); Article 6 [Right to a Fair Trial] and Article 14 [Prohibition of Discrimination] of the European Convention on Human Rights (hereinafter, ECHR)"*.
5. The Applicant also requested the Court to hold a public hearing in his case.

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, in conjunction with 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 of the Republic of Kosovo (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 15 May 2014, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter, the Court).
8. On 10 June 2014, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kyeziu and Arta Rama-Hajrizi.
9. On 8 July 2014, the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Office of the Chief State Prosecutor and to the Court of Appeal.
10. On 8 December 2014 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

11. On 13 May 2004, the Applicant filed a claim with the Municipal Court in Kaçanik, requesting confirmation of his right to pre-emption as well as the annulment of the sales contract regarding an immovable property.
12. On 23 November 2004, the Municipal Court (Judgment C. no. 95/2004) rejected as ungrounded the Applicant's claim and confirmed the sales contract regarding the immovable property.
13. The Applicant appealed to the District Court in Prishtina against the Judgment of the Municipal Court.
14. On 10 December 2007, the District Court (Judgment Ac. no. 65/2005) rejected as ungrounded the appeal of the Applicant and confirmed the Judgment of the Municipal Court.
15. The Applicant filed a request for revision with the Supreme Court against the Judgments of the District Court and Municipal Court.
16. On 18 December 2008, the Supreme Court (Judgment Rev. I. no. 95/2008) rejected the Applicant's request for revision, holding that *"[...] the lower court's Judgments correctly applied the material provisions and the mentioned Judgments do not consist of essential violations of contested procedures as presented in the revision"*.
17. On 29 April 2009, the Applicant filed a request to repeat the proceedings with the District Court in Prishtina, arguing that he had found new evidence which allegedly confirmed that *"the Judge [...] was not impartial and decided in his disfavor because he is the nephew of respondent [...]"*.
18. On 4 April 2011, the District Court in Prishtina (Decision Ac. no. 534/2009) rejected as ungrounded the Applicant's request to repeat the proceedings by holding that

"[...] The allegation of the claimant that after the decision of the Supreme Court of Kosovo, he did some research and found out that the Judge of the matter at the first instance Court was not impartial and decided against him, since he was the nephew of respondent [...] is ungrounded, unproven and at the same time unsustainable and as such rejected, with the reasoning that the claimant, respectively litigants, during the first hearing of the main trial, the Presiding Judge notified them with the composition of the panel and the claimant made no objections.

[...] the claimant did not present convincing evidence on the level of closeness between the Judge and as it is said his nephew on this case, since it is not enough only to state that "he is the nephew" without providing any explanation.

Due to the fact that the claimant in his proposal to repeat the proceedings did not provide any persuasive evidence that was not presented during the

previous contested proceedings, which would impact on rendering a decision on claimant's favor, the Judge assessed that this situation does not meet the legal requirements from Article 232 paragraph 1 item g) in conjunction with Article 233 paragraph 2 of LCP for repetition of contested proceedings, which was concluded with the final Judgment of the Supreme Court of Kosovo Rev. I. no. 85/2008 on 18.12.2008."

19. The Applicant appealed to the Supreme Court against the Judgment of the District Court due to *"erroneous and incomplete determination of the factual situation and erroneous application of the material law"*. He requested the Supreme Court *"to quash the appealed Decision or to amend it and to approve the proposal to repeat the proceedings."*
20. Following the reorganization of the judicial system in Kosovo on 2013, the Supreme Court transferred the Applicant's case for adjudication to the Court of Appeal as the competent second instance court.
21. On 5 November 2013, the Court of Appeal (Decision CA. no. 5315/2012) rejected as ungrounded the Applicant's appeal and confirmed the Decision of the District Court. The Court of Appeal reasoned its decision as follows:

"[...] While examining the allegations of the appeal that point to the erroneous determination of the factual situation, the panel of this Court found that the same are ungrounded because the first instance Court determined the same based on the provided evidence, while the burden of proof fell on the claimant [...] to justify the allegations presented in the proposal for repetition of the proceedings with respective evidence and prove the same in respective manner".

22. The Applicant filed a request for protection of legality with the State Prosecutor against the Decision of the District Court and the Decision of the Court of Appeal.
23. On 10 February 2014, the State Prosecutor (Notification KMLC. no. 7/14) rejected the Applicant's request for protection of legality, holding that *"[...] after having reviewed both Decisions as well as the case files delivered by the Court, I confirm that I did not find legal grounds in order to exercise the extraordinary legal remedy, request for protection of legality"*.

Applicant's allegations

24. The Applicant claims that *"[...] in case an impartial judge was to adjudicate on this case the evidence would have been taken into consideration and as such the claim of the Applicant would have been evidently stronger."*
25. The Applicant further claims that *"[...] the Court did not mention at all the proposed evidence as new evidence submitted to the court."*
26. Thus, the Applicant alleges that the District Court, the Court of Appeal and the State Prosecutor, by rejecting his request to repeat the proceedings, have violated his rights guaranteed by the Constitution, namely Article 31 [Right to

Fair and Impartial Trial] and Article 54 [Judicial Protection of Rights] and his rights guaranteed by the ECHR, namely Article 6 [Right to a Fair Trial] and Article 14 [Prohibition of Discrimination].

27. The Applicant further alleges that the regular courts have violated “Article 19 of the Law on Transfer of Real Estate, Articles 458, 527, 528 and Article 533 of LOR [Law on Obligations Relationship] [...]” when they rejected his request to reopen his case.
28. The Applicant concludes by requesting the Court:

“[...] to restitute the Applicant’s lost right on pre-emption due to arbitrary and unlawful application of regular court decisions, Decision Ac.no539/09 of 04.04.2011, Court of Appeal CA.no.5315/2012 of 05.11.2013 and the State Prosecution KMLC.no.7/14 of 10.02.2014 and to annul all those challenged decisions based on presented evidence.

We propose to the Court to invite the judge of the Basic Court of Kaçanik [...] in the main hearing session or beforehand, to provide a statement in regards to Applicant’s allegations [...]. The Court can then officially in written request from civil status office to provide the evidence that the maiden name of his mother [...].”

Admissibility of the Referral

29. The Court has first to examine whether the Applicant has met the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and Rules of Procedure.
30. In that respect, the Court refers to Article 113 of the Constitution which establishes

*“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 exhausting all legal remedies provided by law”.

31. In addition, Article 49 of the Law provides

“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”.

32. The Court notes that the Applicant, in regards to his request to repeat the proceedings in his case, has sought to protect his rights before the District Court, the Court of Appeal and the Office of the Chief State Prosecutor.

33. The Court also notes that the Applicant was served with the Notification of the Office of the Chief State Prosecutor on 3 March 2014 and filed his Referral with the Court on 15 May 2014.
34. Consequently, the Court considers that the Applicant is an authorized party, has exhausted all legal remedies afforded to him by the applicable law and the Referral was submitted within the four months time limit.
35. However, the Court also must take into account Article 48 of the Law and Rule 36 of the Rules of Procedure.

Article 48 of the Law

“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”.

Rule 36 of the Rules of Procedure

“(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”.

36. The Applicant, as said above, challenges the Notification of the State Prosecutor (KMLC. no. 7/14, dated 10 February 2014), the Decision (CA. no. 5315/2012, dated 5 November 2013) of the Court of Appeal, as well as the Decision (Ac. no. 534/2009, dated 4 April 2011) of the District Court alleging a violation of his right to fair and impartial trial as guaranteed by the Constitution and the ECHR.
37. In fact, the Applicant argues that the District Court, the Court of Appeal and the Office of the Chief State Prosecutor rejected his request to repeat the proceedings *“even though the evidence provided by him was a strong basis to order the repeat of the proceedings”*.
38. In that respect, the Court notes that both the District Court and the Court of Appeal reasoned their decisions in respect to the allegations of the Applicant, whereas the State Prosecutor notified him that there was no legal ground for a request for protection of legality to be filed.
39. In this regard, the Court refers to the reasoning of the District Court which addresses the allegations raised by the Applicant before the Constitutional Court. The District Court held that:

“[...] Proposal for repetition of proceedings due to receiving new facts may be requested only if a party, not by his fault, was unable to submit these circumstances before the conclusion of the previous proceedings with a final Court decision, which on this case we do not have such a situation. Furthermore, during the repetition of proceedings the Court does not examine the already determined factual situation by a final Court decision, since they are definite, but only determines new facts and evidence, if they

exist and are may impact the taken decision, in which case the repetition of proceedings would be admissible, but in this case the proposal submitted by the claimant do not meet the legal requirements, since they do not specify circumstances that would lead to a conclusion that there are legal grounds for the Judge to be excluded, as provided for by Article 68.4 of the LCP [Law on Contested Procedure].”

40. Furthermore, the Court also refers to the reasoning of the Court of Appeal, stating that “[...] *the claimant did not provide and did not deliver to the first instance Court any evidence that would justify the allegations presented in the proposal for repetition of proceedings, which would present grounds for this proposal. The claimant simply presents his allegations, claims few of his acknowledgments but does not justify the same with any evidence that would present grounds for such allegation.*”
41. Finally, the Court refers to the response of the State Prosecutor stating that “[...] *I did not find legal grounds in order to exercise the [...] request for protection of legality.*”
42. Moreover, the Applicant has neither accurately clarified how and why the challenged decisions which rejected his request to repeat the proceedings entailed a violation of his individual rights and freedoms guaranteed by the Constitution nor has he presented evidence justifying the allegation of such a violation.
43. In this respect, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the public authorities, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
44. The Constitutional Court also reiterates that it does not act as a court of fourth instance, in respect of the decisions taken by the regular courts or other public authorities. It is the role of the regular courts or other public authorities, when applicable; to interpret and apply the pertinent rules of both procedural and substantive law. (See, *mutatis mutandis*, *García Ruiz v. Spain*, No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28. See also Constitutional Court case No. KI70/11, *Applicants Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
45. The Constitutional Court can only consider whether the proceedings in general and viewed in its entirety have been conducted in such a way that the Applicants had a fair trial (See, *inter alia*, *Edwards v. United Kingdom*, No. 13071/87, Report of European Commission of Human Rights of 10 July 1991).
46. The Court considers that the proceedings before the District Court, the Court of Appeal and the rejection of his proposal to submit a request for protection of legality by the Office of the Chief State Prosecutor have been fair and reasoned (See, *mutatis mutandis*, *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).

47. In the present case, the Court also notes that the Applicant has not submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (See *Vanek v. Slovak Republic*, No. 53363/99, ECtHR, Decision of 31 May 2005) and did not specify how the referred articles of the Constitution support his claim, as required by Article 113 (7) of the Constitution and Article 48 of the Law.
48. Lastly, the Court notes that the Applicant requests the Court to hold a public hearing in his case. The Court considers that there is no matter of fact or of law related with his constitutional complaint to be clarified. Therefore, the Court concludes that the request does not meet the conditions foreseen by Rule 39 [Right to hearing and waiver] of the Rules of Procedure and thus it is rejected.
49. In sum, the Applicant's allegations of a violation of his rights and freedoms under the Constitution and the ECHR are unsubstantiated and not proven and, thus, are manifestly ill-founded.
50. For the foregoing reasons, the Court considers that, in accordance with Article 48 of the Law and Rule 36 (2) d), the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 48 of the Law, Rules 36 (2) d) and 56 (b) of the Rules of Procedure, on 8 December 2014, unanimously:

DECIDES

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

Judge Rapporteur



Almiro Rodrigues



President of the Constitutional Court



Prof. Dr. Enver Hasani