



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

Pristina, 14 October 2013
Ref. No.:RK480/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 87/13

Applicant

Fatmire Azemi

**Constitutional Review of the Decision of the Supreme Court of the
Republic of Kosovo, Rev.nr.13/2010, dated 4 February 2013**

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.

The Applicant

1. The referral was filed by Ms. Fatmire Azemi resident in Podujevo. The Applicant is not represented.

Challenged decisions

2. The Applicant challenges the decision of the Supreme Court of Kosovo, Rev.nr.13/2010, dated 4 February 2013.
3. This decision was notified to the Applicant on 29 April 2013.

Subject matter

4. The Applicant complains that she received an award of one half of the joint property by the regular courts in first and second instance but that the courts refuse to execute these judicial decisions. The Referral does not mention any specific Article of the Constitution with regards to the alleged violations.

Legal basis

5. The Referral is based on Article 113.7 of Constitution, and Articles 46, 47, 48, 49 and 50 of the Law

Proceedings before the Court

6. On 18 June 2013, the Applicant submitted the Referral to the Court.
7. On 19 June 2013, the President appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Arta Rama.
8. On 9 July 2013, the Secretariat notified the Applicant and the Supreme Court of the Referral.
9. On 13 September 2013, the Review Panel considered the report of Judge Rapporteur and made a recommendation to full Court on the inadmissibility of the Referral.

Summary of facts

10. Between 1992 and 2004, the Applicant lived in a 'factual relationship' with I.G. The couple had two children. At some point in 2004 the 'factual relationship' broke down. The Applicant retained custody of the two children.
11. On 27 December 2006, the Applicant filed a claim with the Municipal Court of Prishtina against Respondent, I.G., requesting half of the joint property acquired during their 'factual relationship' from 1992 to 2004.
12. The Applicant claimed that based on her contribution to their 'factual relationship', she was entitled to one-half of the profits of the business enterprises of her husband, and one-half of the value of the immovable properties purchased during that time. The Applicant based her claim on the fact that during their relationship the Applicant took care of the parents of the respondent and of the respondent himself, while leaving the Respondent free to establish two business enterprises, "Deluxe Commerce" and "Kristal Glass".

13. On 15 November 2007, by Judgment C.nr.2787/06, the Municipal Court rendered a Judgement approving partially the Applicant's claims. The Municipal Court had conducted a hearing at which the Respondent did not appear. The Municipal Court based its Judgment on a financial expertise prepared at the behest of the Municipal Court.
14. In its Judgment, the Municipal Court awarded the Applicant "[...] *one-half of the profit acquired in the activity of the NTP "Deluxe Commerce", established by the Respondent, to the amount of 118,269.89 Euros*". The Municipal Court ordered the Respondent "*to pay the allocated amount and procedural costs of 556.60 Euros within a deadline of 15 days from rendering of judgment under the liability of forced execution*". The Municipal Court rejected as ungrounded the Applicant's claims to a one-half share of the immovable property of 50 ares (100 m²), located in the village of Doberdol, Municipality of Podujevo, one-half share of the property in Llapnaselle of 53 ares, as well as one-half share of the value of a truck, and one-half share of the value of a vehicle "Volkswagen Passat".
15. Against this Judgment of the Municipal Court, the Respondent, I.G., filed an appeal with the District Court in Prishtina, claiming that the Municipal Court Judgment had been taken on the basis of an erroneous and incomplete ascertainment of the factual situation, and an erroneous application of substantive law.
16. On 30 October 2009, the District Court, by Judgment Ac.nr.230/2008, rejected the appeal as ungrounded and confirmed the Judgment of the Municipal Court.
17. On 24 November 2009, the Applicant filed execution proceedings with the Municipal Court of Prishtina requesting it to order the Respondent, I.G., "*to pay the amount of 118,269.89 Euros, and the contested procedure costs to the amount of 556.50 Euros, and the executive procedure costs as calculated by the Court, all under the liability of forced execution*".
18. The Respondent party, I.G., submitted a request for Revision with the Supreme Court against the Judgement of the District Court. The Respondent claimed that the District Court had committed substantial violations of contested procedure provisions, and had erroneously applied the substantive law. The Respondent requested that both judgments be quashed and that the case be reopened at the first instance court.
19. On 4 February 2013, the Supreme Court, by decision Rev.nr.13/2010, "*approved the revision of the respondent and quashed the Judgement of the District Court in Prishtina, Ac.nr.230/2008, of 20 October 2009 and the Judgment of the Municipal Court in Prishtina, C.nr.2787/06, of 15 November 2007, and reopened the case at first instance*". The Supreme Court reasoned that the factual situation had not been correctly ascertained due to substantial violations of contested procedure provisions and the erroneous application of substantive law.

20. The Supreme Court reasoned that:

“Pursuant to Article 307, paragraphs 1 and 2 of the Law on Marriage and Family Relations, the property and assets acquired by work during the marriage, and the incomes from such assets and properties, are joint property of both members. Joint property is composed of all real rights and liabilities. Article 325 of the Law provides that legal provisions related to joint property of spouses in a marriage equally apply to factual relations. According to these provisions, two conditions must be met for the existence of joint property of spouses: (a) labour, and (b) marriage. The labour may be joint and individual, and it can also be direct and indirect. In ascertaining the contribution of spouses, all circumstances must be considered, such as personal incomes, assistance of one spouse to the other, managing home works, care for the children and maintenance of assets. The first instance court has assessed that the contribution to the joint property was equal between spouses, and not by contribution. In assessing the contribution of the spouses, all circumstances must be considered, such as personal incomes, assistance of one spouse to the other, managing home works, care for the children and maintenance of assets, and these are not assessed comprehensively by the lower instance court, why is the contribution of the plaintiff equal. In this sense, the first instance court does not evaluate, and fails to provide any convincing reason on what it has considered to be the contribution of the plaintiff in the profits of the business lead by the respondent, but it finds that the contribution is equal, and not by the contribution itself. Therefore, the lower instance court must assess all circumstances in defining the contribution of the plaintiff in the profits of the business registered and lead by the respondent, in a repeated procedure for the case, and it must take into account the fact that the respondent had lead the business of “Deluxe Commerce”, and how much has the plaintiff assisted in acquiring the revenues from the business, what was the contribution of the plaintiff on the incomes of the company, house works, care for the children and maintenance of the assets, and then designate the contribution of the plaintiff based on her work.”

Applicants’ allegations

21. The Applicant alleges that, although the Municipal Court in Prishtina rendered its Judgment (C.nr.2787/06) on 15 November 2007 approving partially her claims, and although this judgment was confirmed on 20 October 2009 (Ac.nr.230/2008) by the District Court in Prishtina, the execution never took place despite her consistent requests for information from the court.
22. The Applicant further alleges that the Supreme Court quashed the Judgments of the Municipal Court (C.nr.2787/06) and of the District Court (Ac.nr.230/2008), respectively, 5 years after the original Judgment.
23. The Applicant complains that: *“Against me and two minor girls, physical and psychological violence has been inflicted, we have no food or home to live in, and our basic rights were violated, the human right to live was violated, and the part that belonged to me, as a wife, and two of my daughters, was taken.”*

Assessment of the Admissibility of the Referral

24. In order to be able to adjudicate the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules.

25. Article 113 (1) and (7) of the Constitution determine the general framework in order for the Referral to be deemed admissible:

"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."

26. Article 47 (2) of the Law also provides that:

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

27. Furthermore, Rule 36 (1) of the Rules provides that:

"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

28. The Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human Rights (see Article 53 of the Constitution) is to afford the authorities concerned, including the Court, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide effective remedy of the violation of constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see case KI 41/09, Applicant AAB-RIINVEST University L.L.C., Prishtina, Resolution of 27 January 2010; also, *mutatis mutandis*, Selmouni v. France, no. 25803/94, ECtHR Judgment of 28 July 1999).

29. As to the present case, the Applicant submitted her Referral challenging the failure to execute the Judgment of the Municipal Court in Prishtina (C.nr.2787/06), arguing that her right to live and to benefit from one-half share in the joint property that belonged to her and her two daughters was taken. The Applicant has not invoked any Article of the Constitution or of the ECHR.

30. The Court notes that the decision of the Supreme Court (Rev.nr.13/2010) found defects in the application of law and the identification of the facts in the Judgments of the first and second instance courts. The Supreme Court sent the entire case back to the first instance court for a complete re-hearing.

31. In these circumstances, the Court finds that the matter is still in progress in the regular courts. The Applicant's claims remain to be addressed in this re-opened proceeding before the regular courts.
32. It follows that the Applicant has not exhausted all legal remedies in compliance with the Rule 36 (1) (a) of the Rules, and the Referral must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law, and Rules 36.1 (a) and 56.2 of the Rules of Procedure, on 13 September 2013, unanimously:

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law; and
- IV. This Decision is effective immediately.

Judge Rapporteur

Snezhana Botusharova



President of the Constitutional Court

Prof. dr. Enver Hasani