



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

Pristine, 20. April 2012
Ref. No.: RK220/12

RESOLUTION ON INADMISSIBILITY

In

Case No. KI 01/10

Applicant

Gani Ibërdemaj

**Constitutional Review of the Decision of the District Court in Pristina
Ac.nr.1224/09, dated 12 November 2009**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

Applicant

1. The Applicant is Gani Ibërdemaj, of Pristina, represented by the Lawyer, Feriz Gervalla, also of Pristina.

Challenged Decision

2. The Applicant challenges Decision Ac.nr.1224/09 of the District Court of Pristine, dated of 12 November 2009 and served on him on 23 November 2009.

Subject Matter

3. The Applicant complains that his property rights granted in Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter referred to as: the Constitution) have been violated by the District Court of Pristina decision Ac.nr.1224/09 dated 12 November 2009.

Legal Basis

4. Article 113.7 of the Constitution, Article 47.2 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Law), and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as the Rules of Procedure).

Proceedings before the Court

5. On 6 January 2010 the Applicant filed a Referral with the Secretariat of the Constitutional Court. On 23 March 2010 the referral was communicated to the District Court of Pristina.
6. On 26 March 2010 the District Court replied stating that case files in civil case c.no.117/2008 were returned to the Municipal Court in Pristina
7. On 11 May 2010 the President of the Constitutional Court appointed Judge Almiro Rodrigues as Judge Rapporteur and a Review Panel composed of Judges Altay Suroy (Presiding), Kadri Kryeziu and Gjyljeta Mushkolaj.
8. On 14 December 2010 the Review Panel considered the report of the Judge Rapporteur and deliberated on the matter and made a recommendation to the full Court.

Summary of the Facts

9. On 15 June 2009 the Municipal Court in Pristina delivered decision C. nr 117/2008, by which the Municipal Court approved the claim-suit of the current Applicant, Gani Iberdemaj, finding that the respondents, Enver Aliaj and Mehmet Aliaj, obstructed the property of the Applicant and ordering the respondents to cease such obstruction now and in the future and to remove all obstacles claimed.
10. The legal representative of the respondents filed an appeal against this decision, proposing that the decision be reversed, the plaintiff's claim-suit be rejected as unfounded or quashed, and the matter be returned to the first instance court for retrial. The plaintiff filed a response to the respondent's appeal, proposing that the appeal be rejected as unfounded, and the Municipal Court decision be upheld.
11. On 12 November 2009, the District Court in Pristina delivered decision Ac.nr.1224/09 in which it decided to quash the decision of the Municipal Court in Pristina C .Nr 117/2008, dated 15 June 2009, and reject the Applicant's claim-suit as inadmissible.

12. The District Court in Pristina found that the Municipal Court erred because the issue in dispute is not one of obstruction of possession and does not fall in the Municipal Court's jurisdiction.
13. The District Court in Pristina concluded that "the plaintiff in the concrete situation does not enjoy judicial protection for obstruction of possession of the real estate which is a part of urban plan. All disputable issues in relation to the property right over the immovable property (. . .) will be settled in a contested procedure in line with the Law on Ownership and Other Real Rights."

Allegations of the Applicant

14. The Applicant alleges that the District Court decision is unlawful because it violates the contested procedure provisions and wrongly concludes that the dispute is not one of constructive possession and within the jurisdiction of the Municipal Court.
15. The Applicant argues that urban construction land enjoys judicial protection from obstruction or disturbance of the last factual possession.
16. Finally, the Applicant concludes that the above mentioned judicial decision has violated "the fundamental right to protection of property provided for by Article 46 par 1 and 2 and Article 54 (judicial protection of the right to use the property) of the Constitution of the Republic of Kosovo".

Assessment of the Admissibility of the Referral

17. In adjudicating the Applicant's Referral, the Court needs first to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.
18. The Court refers to Article 113.7 of the Constitution in conjunction with Article 47.2 of the Law, which provides:

"113.7 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."

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

19. The Applicant has not shown that he has taken any steps to resolve his claim via the contested procedure in line with the Law on Ownership and Other Real Rights, as proscribed in the judgment of the District Court of Pristina.
20. The Court applied this same reasoning on the grounds of non-exhaustion of remedies when it issued a Resolution on Inadmissibility, on 27 January 2010, in Case No. KI41-09, AAB-RIINVEST University L.L.C., Prishtina vs. Government of the Republic of Kosovo, and in its Decision of 23 March 2010, in Case No. KI73-09, Mimoza Kusari Lila vs. The Central Election Commission.
21. Previously the Court emphasized that the rationale for the exhaustion rule is to afford the authorities concerned, including the courts, 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 an effective remedy for the violation of constitutional rights. (see, mutatis mutandis, ECHR, Selmouni v. France, no. 25803194, decision of

28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, mutatis mutandis, ECHR, *Azinas v. Cyprus*, no. 56679/100, decision of 28 April 2004).

22. The Court therefore finds that the Applicant has not exhausted all legal remedies available to him provided by law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47.2 of Law, and Rule 56 (2) of the Rules of Procedure, by majority

DECIDES

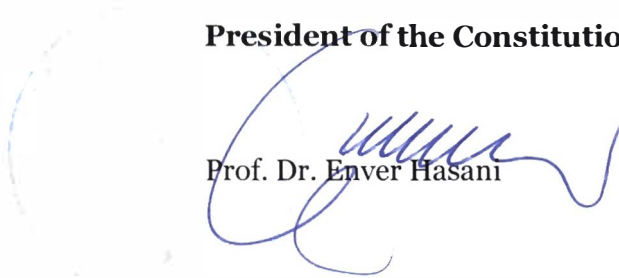
- I. TO REJECT the Referral as Inadmissible.
- II. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law.
- III. This Decision is effective immediately.

Judge Rapporteur



Almiro Rodrigues

President of the Constitutional Court



Prof. Dr. Enver Hasani