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

Pristine, 20 March 2012
Ref. No.: RK210/12

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 131/11

Applicants

Qazim Gashi, Fadil Gashi, Agim Gashi and Ali Kelmendi

Constitutional review of the Judgment of the Supreme Court of Kosovo Rev.No. 197/2010 dated 22 August 2011

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 Applicants are Qazim Gashi, Fadil Gashi, Agim Gashi, from Hajvalija, and Ali Kelmendi from Mramor, all of them from Municipality of Prishtina. They are represented before the Constitutional Court of Kosovo by Shefki Sylaj and Visar Vehapi, lawyers from Prishtina.

Challenged decision

2. The challenged decision is the Judgment of the Supreme Court of Kosovo Rev. no. 197/2010 dated 22 August 2011, by which it was upheld the Judgment of the District Court in Prishtina Ac. No. 1137/2009 dated 25 May 2010 and the Applicants were ordered to return the immovable property which they currently hold in possession to the third parties which in the court proceedings proved their ownership over the disputed immovable property.

Subject matter

3. The Applicant challenges the Judgment of the Supreme Court of Kosovo Rev. no. 197/2010 dated 22 August 2011, alleging that this Decision violated Articles 31, 46 and 54 of the Constitution of Republic of Kosovo and Articles 6 and 13 of the European Convention on Human Rights (hereinafter: ECHR).

4. Pending a final settlement of this legal property dispute between the Applicants and the third parties regarding the ownership right over the immovable property, the Applicants request from the Constitutional Court the following:

   "We request security measure –interim measure, we request that the situation on the ground in cadastral plot 528, possession list 933, cadastral zone Çaglavica not to be changed."

Legal basis

5. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 20, 22.7 and 22.8 of the Law no. 03/L-121 on the Constitutional Court of Republic of Kosovo of 16 December 2008 (hereinafter: the Law) and Rule 56 (2) of Rules of Procedure.

Proceedings before the Court

6. On 13 October 2011, the Applicant filed the Referral with Constitutional Court of Republic of Kosovo (hereinafter: the Court).

   The Applicants also request from the Constitutional Court to impose an interim measure preventing the change of the situation in the cadastral plot 528, possession list 933, cadastral zone Çaglavica.

7. On 27 January 2012, the Constitutional Court notified the Applicant, the Municipal Court in Prishtina, the District Court in Prishtina and the Supreme Court of Kosovo that a proceeding of constitutional review of their decisions has been initiated under no. KI-131-11.

8. On 20 March 2012, after considering the report of Judge Robert Carolan, the Review Panel composed of Judges Almiro Rodrigues (Presiding), Kadri Kryeziu and Enver Hasani recommended to the full Court to reject the Referral as inadmissible in its entirety.

9. At the same time, the Review Panel proposed to the full Court to reject the Applicant's request for interim measures with the reasoning that the Applicant has not submitted any convincing evidence that would justify the imposition of interim measures as being necessary for avoiding any irreparable damage or any proof that such measure is in the public interest.

Summary of the facts

10. On 10 December 2003, I. Th. and N. H. from Prishtina filed a lawsuit with the Municipal Court due to obstruction of property against the Applicants and some other third parties who are not Applicants here, requesting that the Applicants vacate and enable them peaceful enjoyment of immovable property recorded as cadastral plot no. 528, in the cadastral zone Çaglavica, type of land pasture third class, with area 6.34,97 ha.

11. Municipal Court in Prishtina by Judgment C. No. 2140/3, of 7 September 2004 rejected the claim of the plaintiffs I. Th. and N. H. and ruled in favor of the Applicants.

12. Against the above mentioned Judgment the plaintiffs I. Th. and N. H. filed an appeal on 27 December 2004.

13. On 14 March 2007, the Applicants proposed to the Municipal Court in Prishtina to impose an interim measure against the plaintiffs I. Th. and N. H. and the Municipal Court in Prishtina never decided on the interim measure and in doing so, according to Applicants' allegations it *„...prejudged the settlement of the case in favor of the opposing party ...“*

14. The District Court in Prishtina deciding upon the plaintiff's appeal by Judgment Ac. no. 119/2005 of 3 April 2007 annulled the Judgment of the Municipal Court in Prishtina C. No. 2140/3 of 7 September 2004 and remanded the case for retrial.

15. On 17 October 2007, the Applicants filed a counterclaim against the plaintiffs I. T. and N. H. and requested that "*their ownership over the cadastral plot no. 528, possession list no. 933, cadastral zone Çaglavica with area 6.34.97 ha be confirmed by virtue of prescription.*"

16. The Municipal Court in Prishtina by Judgment C. No. 713/07 of 29 April 2009 partially approved the claim of the plaintiffs I. Th. and N. H., both from Prishtina, and ordered the Applicants to hand over to the plaintiffs parts of the immovable property as indicated in the enacting clause of the Judgment, at the same time the Applicants' counterclaim is rejected as inadmissible in the part which relates to the request for confirmation of the right of ownership over the cadastral plot no. 528 at the place called Hajvalija, type of land pasture third class, cadastral area Çaglavica, with area of 6.34.97 ha.

17. Against the Judgment of the Municipal Court in Prishtina C. no. 713/07 of 29 April 2009 the Applicants filed an appeal on 31 July 2009 with the proposal that the District Court in Prishtina annul the Judgment of the Municipal Court in Prishtina C. no. 713/07 of 29 April 2009 and remand the matter to the first instance court for retrial or to alter the said Judgment and to approve the claim of the Applicants as per the counterclaim.

18. The District Court in Prishtina by Judgment Ac. no. 1137/2009, dated 25 May 2010, rejected the appeal of the Applicants and partially changed the Judgment of the Municipal Court in Prishtina C. no. 713/07 dated 29 April 2009 and ordered the Applicants to hand over parts of the immovable property as indicated in the enacting clause of the Judgment. At the same time the Applicants' counterclaim was rejected as inadmissible in the part relating to the request for confirmation of the right of ownership over the cadastral plot no. 528 at place called Hajvalija, type of land pasture third class, cadastral zone Çaglavica, with area of 6.34.97 ha.

19. Against the Judgment of the District Court in Prishtina Ac. no. 1137/2009, dated 25 May 2010, the Applicants filed a revision within the legal time limit and at the same time the Public Prosecution of Kosovo filed a request for protection of legality, both requesting from the Supreme Court of Kosovo to quash the said Judgments as unlawful.

20. The Supreme Court of Kosovo by Judgment Rev. br. 197/2010 dated 22 August 2011 rejected as unfounded the Applicants' revision and the request for protection of legality filed by State Prosecutor of Kosovo against the Judgment of the District Court in Prishtina Ac. No. 1137/2009 dated 25 May 2010, in **part I under 1, 3 and 4** and in parts **II and III**, in relation to the Applicants Qazim Gashi, Fadil Gashi and Selim Gashi.

21. The revision of respondents – counterclaimants and the request of State Prosecutor of Kosovo for protection of legality are partially approved as grounded and the Judgment of District Court in Prishtina Ac. No. 1137/2009 of 25 May 2010 and Judgment of Municipal Court in Prishtina C. No. 713/2007 of 29 April 2009 are quashed in part I under 2 of the enacting clause of Judgment only in relation to the Applicant Ali Kelmendi and this part of the case is remanded to the first instance court for retrial.

Applicant's allegations

22. The Applicant challenges the Judgment of the Supreme Court of Kosovo Rev. no. 197/2010 of 22 October 2011, alleging the following violations:

"The respondents (Applicants) – counterclaimants have proposed interim measure on 14/03/2007 and the Municipal Court in Prishtina never decided on the interim measure and in doing so the court prejudged the settlement of the case in favor of plaintiffs, which is a continuous violation of Articles 31, 46 and 54 of the Constitution of Republic of Kosovo and consequently a violation of Articles 6 and 13 of ECHR (European Convention on Human Rights) and all their beneficial effect."

"Municipal Court in Prishtina by Judgment C. no. 713/07 has made essential violations of the provisions of Contested Procedure, Article 182 paragraph 1 and 2 item n. paragraph 2 of LCP because the enacting clause of the Judgment is in contradiction with the reasoning of the Judgment and the case file documents."

"The above mentioned Judgment contains violation of the nature of Article 182.2 item n because the Judgment has shortcomings as a result of which it cannot be reviewed as the enacting clause of the Judgment is incomprehensible and in contradiction with itself and the reasons of the Judgment. The Judgment also does not have any reason for the decisive facts, whereas the reasons it contains are unclear and contradictory."

"The essential violation of the provisions of contested procedure consists in the fact that the said Judgment has such shortcomings that it is legally unsustainable. Essential violation of the contested procedure lies in the fact that the challenged Judgment with regard to the counterclaim of the respondents-counterclaimants contains no reasoning. The respondent's counterclaim in one part in the enacting clause III is rejected, whereas in the enacting clause under IV partially is rejected as inadmissible."

"Since a Court may reject a counterclaim as inadmissible only after the preliminary review of the claim and no later than the preparatory session and namely if the requirements of the abovementioned Article have been met, in the present case during the preliminary proceeding the counterclaim could not have been rejected by Judgment not even by a Resolution as inadmissible because none of the requirements of Article 391 of LCP has been met."

"The same essential violation has been made also by the District Court in Prishtina as second instance court when it rejected the appeal of the respondents-counterclaimants by Judgment Ac. No. 1137/2010/."

"The District Court in Prishtina made essential violations of the provisions of the contested procedure when it accepted as evidence the report of examination on the scene conducted by the Municipal Court in Prishtina by which it was ascertained that IAC "Kosovo Export" has been cultivating the disputed cadastral plot because in that proceeding the respondents-counterclaimants had not been party to proceedings and were not able to challenge this property. Therefore that report from a different proceeding cannot be taken as evidence, if the parties to proceedings were not given opportunity to challenge it – oppose it and that witnesses heard by the District Court in Prishtina confirmed that the said cadastral plot was used in good faith by the respondents – counterclaimants since 1956."

"The District Court in Prishtina acting as first instance Court has erroneously applied the substantive law when it rejected the claim of the respondents/counterclaimants as unfounded because the plaintiffs have won the right of ownership over the cadastral plot no. 528 on the basis of positive prescription, therefore Article 28 of the Law on basic property relations as an applicable law and Article 40 of the Law on ownership and other real rights in Kosovo."

"The same procedural and substantive violations of the abovementioned provisions were made by the Supreme Court of Kosovo when it estimated the period of statute of limitations and it did not take into consideration that the respondents-counterclaimants on the basis of a internal contract were continuously and are in possession of the contested immovable property because they have their residence premises and other accompanying premises built on it since 1950s."

"Committing drastic violations of the procedural and substantive provisions resulted in violation of Articles 31, 46 and 54 of the Constitution of Republic of Kosovo and in violation of the ECHR."

23. The Applicant challenges the Judgment of the Supreme Court of Kosovo Rev. no. 197/2010 of 22 October 2011, requesting from the Constitutional Court of Kosovo the following:

"We request security measure –interim measure, we request that the situation on the ground in cadastral plot 528, possession list 933, cadastral zone Çaglavica not to be changed."

"We request that the Judgment of the Supreme Court of Kosovo Rev. no. 197/2010/ dated 22/08/2011, be declared null and void, the Judgment of the District Court in Prishtina Ac. no. 1137/2009 dated 25/05/2010/ and the Judgment of the Municipal Court in Prishtina C. no. 713/07 dated 29/04/2009/ be quashed and the case be remanded for retrial."

Assessment of admissibility of Referral in relation to the Applicants Qazim Gashi, Fadil Gashi i Agim Gashi

24. The Applicants claim that Articles 31, 46 and 54 (Right to Fair and Impartial Trial, Protection of Property and Judicial Protection of Rights) of the Constitution and Articles 6 and 13 of the ECHR (Right to a fair trial and Right to an effective remedy) are the basis of their Referral.

25. The admissibility requirements are laid down in the Constitution, and further specified in the Law on Constitutional Court and the Rules of Procedure.

26. Article 48 of the Law on Constitutional Court of Republic of Kosovo 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"

27. Under the Constitution the Constitutional Court is not a court of appeal, when reviewing the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, Garcia Ruiz v. Spain [GC), no. 30544/96, § 28, European Court on Human Rights [ECHRJ1999-1).

28. The Applicants have not substantiated their allegations nor have they provided any *prima facie* evidence which would point out a violation of their constitutional rights (see, Vanek vs. Slovak Republic, ECHR Court on admissibility, Application no. 53363/99 of 31 May 2005). The Applicants do not state in what manner Articles 31, 46 and 54 of the Constitution and Articles 6 and 13 of the ECHR support their Referral, as it is stipulated in Article 113.7 of the Constitution and Article 48 of the Law.

29. The Applicants allege that their rights have been violated as a result of the erroneous determination of facts and application of law by ordinary courts without clearly stating in what manner those decisions violated their constitutional rights.

30. In the present case, the Applicants have been provided numerous opportunities to present their case and challenge the interpretation of the law, which they consider to be as incorrect, before the Municipal Court, the District Court and the Supreme Court. After having examined the proceedings in their entirety, the Constitutional Court should not find that the pertinent proceedings were in any way unfair or arbitrary (see *mutatis mutandis*, Shub v. Lithuania, ECtHR Decision as to the Admissibility of Application no. 17064/06 of 30 June 2009).

31. It follows the Referral in the part that relates to the Applicants Qazim Gashi, Fadil Gashi and Agim Gashi is manifestly ill-founded in accordance with Rule 36 (2b) of the Rules of Procedure which provides that *"The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that: b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights".*

Assessment of the admissibility of Referral in relation to the Applicant Ali Kelmendi

32. In order to be able to adjudicate the Applicants' Referral, the Court needs first to examine whether the Applicant has fulfilled all admissibility requirements laid down in the Constitution. In this respect, the Court refers to Article 113.7 of the Constitution which stipulates the following:

"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."

33. The Court wishes to emphasize that the rationale for the exhaustion rule, as interpreted by the European Court of Human of Rights (see Article 53 of the Constitution), 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. 25803/94, 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. 56679/00, decision of28 April 2004).

34. This Court applied the same reasoning when it rendered Decision of 27. January 2010 on inadmissibility on the basis of non-exhaustion of legal remedies in case AAB-RIINVEST University L.L.C., Prishtina against the Government of Republic of Kosovo, case no. KI. 41/09 and the Decision of 23 March 2010 in the case Mimoza Kusari-Lila against the Central Election Commission, case no. KI 73/09.

35. Having in mind that based on the documentation submitted to the Constitutional Court by the Applicants the Supreme Court of Kosovo by Judgment Rev. no. 197/2010 of 22 August 2011 partially approved as grounded the revision of the respondents-counterclaimants and the request of State Prosecutor of Kosovo for protection of legality and that the Judgment of the District Court in Ac. no. 1137/2009 of 25 May 2010 and Judgment of Municipal Court in Prishtina C. no. 713/2007 of 29 April 2009 in part **I under item 2** of the enacting clause of the Judgment and this part of the case is remanded to the first-instance court for re-trial, and the re-trial proceeding is still pending. Therefore, the Applicant has not exhausted all legal remedies provided by law in order to be able to file a Referral with the Constitutional Court.

36. Therefore the Referral in the part that relates to the Applicant Ali Kelmendi is inadmissible for consideration pursuant to Article 113.7 and Rule 36. (1a) of the Rules of Procedure which stipulates that "*1. 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...*".

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 (2) of the Law and Rule 36 (1a) and 36 (2b) of the Rules of Procedure, in its session held on 20 March 2012, unanimously

DECIDES

I. TO REJECT the Referral as Inadmissible in its entirety;

II. TO REJECT the request for imposition of interim measures.

III. 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.

IV. This Decision is effective immediately.

Judge Rapporteur

Robert Carolan

President of the Constitutional Court

Prof. Dr. Enver Hasani