



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

Prishtina, on 26 April 2016
Ref. no.:RK930/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI131/15

Applicant

Selvinaz Top and others

**Request for constitutional review of Decision Rev. no. 60/2015, of the
Supreme Court of Kosovo, of 25 May 2015**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge,
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Applicants are Ms. Selvinaz Top, Mr. Hilmi Top, Mr. Bajram Top, Ms. Sevim Zaimi (maiden name Top), Mr. Hysni Top, Ms. Sehar Kitmiri (maiden name Top), Mr. Adnan Top and Ms. Sejlani Damka, all from Prizren.

Challenged decision

2. The last challenged decision is Decision Rev. no. 60/2015, of the Supreme Court, of 25 May 2015, which was served on the Applicants on 2 July 2015. The Applicants also specifically challenge Judgment Ac. no. 5045/12 of the Court of Appeal, of 4 November 2014.

Subject matter

3. The subject matter is the constitutional review of the challenged court decisions, which allegedly violated the rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), under Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property] and Article 6 of the European Convention of Human Rights (hereinafter: ECHR).

Legal basis

4. Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on 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

5. On 31 October 2015, the Applicant submitted via mail the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 8 December 2015, the President of the Court, by Decision appointed Deputy President Ivan Čukalović as Judge Rapporteur, and the Review Panel, composed of Judges: Robert Carolan, Almiro Rodrigues and Arta Rama-Hajrizi.
7. On 21 January 2016, the Court informed the Applicants about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 15 March 2016, after having considered the report of the Judge Rapporteur, the Review Panel recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 3 May 1962, the predecessor of the Applicants, A.T. signed a contract on gift with the then Municipality of Prizren (Leg. no. 190/62), by which donated to the Municipality the immovable property, which according to the cadastral data specified in the contract, was in his ownership.
10. On an unspecified date, the Applicants, in capacity of the descendants of A.T., filed a claim to the Municipal Court in Prizren for annulment of the contract on gift, with an allegation that the contract was concluded without the will of their predecessor and under the conditions of the constant pressure by the then regime.

11. On 15 October 2015, the Municipal Court in Prizren, by Judgment C. no. 133/07, approved the Applicants' statement of claim as grounded and declared NULL the contract on gift of immovable property concluded between A.T. and the Municipality of Prizren. The Court obliged the Municipality *"to return the ownership, possession and free use"* of the immovable property of their predecessor to the Applicants in capacity of co-owners, by declaring them the legitimate heirs of that property.
12. The Municipal Court, in its Judgment, stated among the other: *"Following the administration of all these pieces of evidence separately and all of them together, in the concrete case, the court, by the assessment of the statements of the witnesses heard which completely comply with each other and confirm the fact that the contract on gift of the immovable property was not concluded with the free will of the person offering it, but it was concluded under pressure made by the then power, namely the gift receiver, which was made by the then state activists, and as such this contract is absolutely null"*.
13. On 12 December 2012, the Public Attorney of the Municipality of Prizren filed an appeal against the Judgment of the Municipal Court due to essential violation of the contested procedure provisions, erroneous and incomplete determination of factual situation and erroneous application of the substantive law.
14. On 4 November 2014, the Court of Appeal of Kosovo rendered Judgment AC. No. 5045/12, by which modified the judgment of the court of first instance, by deciding that the Applicants claim is rejected as ungrounded.
15. The Court of Appeal, by referring to the stance of the first instance court regarding the contract on gift, stated: *"Such a legal stance cannot be accepted as fair and lawful due to the reason that, in accordance with the assessment of this Court, the substantive law was erroneously applied on such a factual situation...and... on the basis of the general rules of civil right, such a contract would be relatively invalid and that its annulment due to such reasons could be requested within a time limit of one year, starting from the date when the cause of jeopardy was known, the ceasing of the cause of threat (subjective time limit), whereas such a right is lost in a time limit of 3 years (objective time limit)"*.
16. The Court of Appeal, in its reasoning, further stated: *"Due to the fact that all the time limits for requesting the relative nullity of the contract have passed, the time limits which are preclusive, in the present legal-civil case, the nullity of the contract cannot be requested after the expiry of the time limit of around 40 years, as the claimants have done in the present case"*, therefore, concluded that the challenged judgment should be modified and the statement of claim be rejected as such.
17. On 20 January 2015, the Applicants filed a request for revision with the Supreme Court of Kosovo against Judgment AC. no. 5045/12, of the Court of Appeal in Prishtina, of 4 November 2014, and on the same date against this

judgment filed a proposal with the State Prosecutor of Kosovo for protection of legality.

18. On 18 February 2015, the Chief Prosecutor Office rendered notification KMLC no. 9/15, whereby informing the Applicants that he “*considers that there is no legal ground for the initiation of the request for protection of legality*”.
19. On 25 May 2015, the Supreme Court of Kosovo rendered Decision Rev. no. 60/2015, by which rejected the Applicant’s revision, because “*according to the assessment of the Supreme Court of Kosovo, the revision of the claimants filed against the second instance judgment is inadmissible due to the value of contest*”, by stating that the Applicants, at the time of filing the claim, presented the considerably lower value of the contest than the value allowed for the request for revision under the applicable law at that time, whereas they made specification of claim after expiry of deadlines provided by the law.

Applicant’s allegations

20. The Applicants allege that by challenged decisions was violated the right to fair and impartial trial (Article 31 of the Constitution and Article 6 of ECHR), because “*the Court of Appeal did not analyze correctly all the case file documents*”, which according to the Applicant, if they were completely administered, it would lead to real, fair and favourable outcome of the entire court proceedings for the Applicants.
21. According to Applicants, Article 46 of the Constitution [Protection of Property] was, violated because by judicial decisions they were arbitrarily deprived of their property rights over the immovable property which otherwise they would have enjoyed based on inheritance.

Admissibility of the Referral

22. In order to be able to adjudicate the Applicants’ Referral, the Court needs to first examine whether they have fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and Rules of Procedure of the Court.
23. In that respect, the Court refers to Article 113.7 of the Constitution, which provides:

“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”.
24. The Court further takes into account Article 48 of the Law (Accuracy of the Referral) 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.”.

25. The Court also takes into account Rule 36 of the Rules of Procedures, which foresees:

“(1) The Court may consider a referral if:

[...]

(d) the referral is prima facie justified or not manifestly ill-founded.

(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

[...]

(b) the presented facts do not in any way justify the allegation of a violation of the constitutional rights”.

26. When assessing the allegations raised by Applicant, the Court notes that Decision Rev. no. 60/2015, of 25 May 2015, and Judgment Ac. no. 5045/12, of the Court of Appeal, of 4 November 2014, are challenged.

Relevant constitutional provisions regarding the case

Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

[...]

Article 46 [Protection of Property]

1. The right to own property is guaranteed.

2. Use of property is regulated by law in accordance with the public interest.

3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.

[...]

27. Having assessed the constitutionality of the challenged decision in the light of the allegations of the constitutional violations and facts presented by the

Applicants, by comparing these facts with the content of the provisions above, the Court finds that these allegations are based on erroneous and incomplete determination of factual situation, namely on the erroneous assessment of the evidence presented by the Applicants by the regular courts.

28. The Court has consistently emphasized that it is not under its jurisdiction to replace by its own assessment of facts the assessment made by the regular courts, because under the general rules it is the duty of those courts to assess the facts presented before them (see case KI47-48/15, constitutional review of the Judgment of the Special Chamber of the Supreme Court, AC-II-14-0057, of 12 March 2015, the Applicants *Beqir Koskoviku* and *Mustafë Lutolli*) and that it is the duty of this Court to assess whether the court proceeding viewed in its entirety was fair and impartial, as required by Article 6 of the ECHR (see, among other, *Edwards v. United Kingdom*, 16 December 1992, p. 34, Series A, no. 247 and *Vidal v. Belgium*, 22 April 1992, p. 33, Series A, no. 235).
29. It is essential for the Court the issues on which existence depend the assessment of possible violations of the constitutional rights and not clearly legal issues, which were mainly the facts presented by the Applicants (see, *mutatis mutandis, i.a., Akdivar vs. Turkey*, 16 September 1996, R.J.D, 1996-IV, para. 65).
30. Based on the principle of subsidiarity, the Court cannot take the role of the fourth instance court and it does not adjudicate on the final outcome of the court decisions (see *Fc Metrebi v. Georgia*, par. 31, Judgment of ECHR, of 31 July 2007), while judging by the circumstances of this case, the Applicants' primary goal seems to have been precisely the challenging of the outcome of the court proceedings.
31. Nothing in the case presented by the Applicants does not indicate that the court proceedings in the present case viewed in entirety were unfair or arbitrary in order that the Constitutional Court is satisfied that the very essence of the right to fair and impartial trial was violated.
32. Based on the above, it is the duty of the regular courts to assess whether the challenged contract on gift should have been examined from the perspective of the relative or absolute nullity and not of this Court. The Court was not provided any evidence that the request of the court to the parties for translation of an authorization for one of the Applicants to another official language violated the equal treatment of the parties and placed them at a substantial disadvantage *vis-à-vis* the opponent party to the extent that the judicial process is degraded substantially in its entirety (see *Dombo Beheer vs. Netherland*, Judgment of 27 October 1993, Series A, no. 274), therefore, in these circumstances, the Court does not find that in the challenged decisions there is violation of Article 31 of the Constitution and of Article 6 of ECHR.
33. The Court further concludes that the Supreme Court reasoned entirely its decision regarding the revision, explaining in a detailed manner why the request for revision is inadmissible, by clearly substantiating the legal basis for inadmissibility and based on the Law on Contested Procedure at the time when the Applicants' claim was filed, therefore, there is no element of arbitrariness

in the decision mentioned above and, consequently, no violation of Article 31 of the Constitution or Article 6 of the ECHR.

34. As to the other allegation of the Applicants for violation of Article 46 of the Constitution [Protection of Property], the Court notes that the Court of Appeal reasoned broadly and thoroughly its decision and this Court cannot conclude that there has been a violation of paragraph 3, Article 46 of the Constitution, because the disputable issue of ownership was confirmed by the court decision and is not arbitrary.
35. In these circumstances, the Court holds that the facts presented by the Applicants do not in any way justify the allegation of violation of the constitutional right or the right guaranteed by the ECHR, therefore, it cannot be concluded that there is a violation of human rights in the challenged decision, and in accordance with Rule 36, paragraph 2, item b, finds that the Referral is to be declared inadmissible as manifestly ill-founded.

FOR THESE REASONS

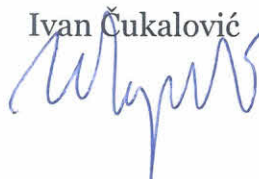
The Constitutional Court of Kosovo, pursuant to Article 48 of the Law and Rule 36 (2) (b) and (d) of the Rules of Procedure, on 15 March 2016, with majority of votes

DECIDES

- I. TO DECLARE the Referral 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; and
- IV. This Decision is effective immediately.

Judge Rapporteur

Ivan Čukalović



President of the Constitutional Court

Arta Rama-Hajrizi

