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

Prishtina, on 22 April 2016
Ref. no.:RK924/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI163/15

Applicant

Božidarka Banović

Request for constitutional review of Decision Ac. no. 3575/13 of the Court of Appeal, of 19 October 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, and
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge

Applicant

1. The Applicant is Ms. Božidarka Banović from Prishtina (hereinafter: the Applicant), who is represented by Mr. Naser Peci, a lawyer from Prishtina.

Challenged decision

2. The Applicant challenges Decision Ac. no. 3575/13 of the Court of Appeal, of 19 October 2015.

Subject Matter

3. The subject matter of the Referral is the constitutional review of Decision of the Court of Appeal on 19 October 2015, which allegedly violated the rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] and Article 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal Basis

4. Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 31 December 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 21 January 2016, the President of the Court, by Decision GJR. KI163/15, appointed Judge Bekim Sejdiu as Judge Rapporteur. On the same date, the President of the Court, by Decision KSH. KI163/15, appointed the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

7. On 8 February 2015, the Court informed the Applicant and the Court of Appeal about the registration of the Referral.

8. On 9 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. The Applicant and M. A. are co-owners of the property consisting of cadastral parcel no. 4368/2, with a surface area of 04.74 ha, and the joint residential facility that is constructed on the said cadastral parcel, of storey P+2+Pk, and a garage.

10. On 27 June 2011, the Applicant submitted her proposal to the Basic Court in Prishtina, by which she requested the division of the property and of the use of the property with the co-owner M. A.

11. On 4 September 2013, the Basic Court rendered Decision [N. no. 185/2011], which determined that the joint property of the co-owners be divided in the

following way: *„The Applicant will use the ground floor and the first floor of the house and will use cadastral parcel no. 4368/2, the part from the main road. The second co-owner M.A will use the second floor and the attic of the house and will use cadastral parcel no. 4368/2, the part from the western side".*

12. In the conclusion of the Decision of the Basic Court is stated: *„The Court, taking into consideration the statement of the authorized person of the Proposer and the authorized person of the Counter-proposer, sketches and opinions of the construction expert and the geodesy expert, and taking care for special and joint interests of the parties, decided as in the enacting clause of this decision....."*

13. Both co-owners of the property filed appeals with the Court of Appeal against the Decision of the Basic Court, through their lawyers, alleging erroneous determination of factual situation and essential violation of the provisions of the non-contentious procedure.

14. On 19 October 2015, the Court of Appeal rendered Decision [Ac. no. 3575/2013], which rejected the appeals of the representative of the proposer [i.e. the Applicant] and of the counter-proposer and upheld the decision of the Basic Court in Prishtina [N. no. 185/2011] of 4 September 2013.

15. In the reasoning of the Decision of the Court of Appeal is stated: *„The Court of Appeal considered the appealed allegations of the authorized representative of the Proposer and of the authorized representative of the Counter-proposer and found that they are ungrounded due to the fact that if the interested parties do not reach agreement, the first instance court administers the necessary evidence and based on the result of the entire proceedings it shall render a decision whereby it regulates the way of administration and use of the joint property, taking care for their special and joint interests in terms of Article 191.1 of the Law on Non-Contentious Procedure "* (hereinafter: the LNCP).

Relevant law

Law no. 03/ L-007 on Non- Contentious Procedure

Article 193

"193.1 If the interested person does not agree the court will obtain the necessary evidence and according to the results of all the procedure will draw the act judgment with which will regulate the way of administration and exploitation of the common thing according to the respective provisions of the material right, attentively for their special and common interests.

193.2 If according to the proposal is required the arrangement of the common apartment's exploitation or of the business premises, the court especially will arrange which spaces the interested persons will exploit

separately and which in common, and how it will be paid the exploitation of the spaces."

Applicant's allegations

16. The Applicant claims in the Referral:*"The Proposer considers that the Right to Fair and Impartial Trial (Article 31) and the Protection of Property (Article 46) have been violated, because the Court did not provide equal protection of the property right of the Proposer, because it did not assess the evidence in accordance with Article 193 of LNCP".*

17. The Applicant addresses the Court with the request: *„To annul Decision Ac. no. 3575/13, dated 19.10.2015".*

Admissibility of the Referral

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

19. In this respect, Article 113, paragraph 7 of the Constitution stipulates:

"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."

20. Article 48 of the Law also 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".

21. In this case, the Court refers to Rule 36 (1) (d) and (2) (b) of the Rules of the Procedure, which provides:

(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".

22. The Court, by analyzing the arguments of the Applicant in terms of violation of the rights and freedoms guaranteed by the Constitution and the European Convention on Human Rights (hereinafter: the ECHR), notes that the Applicant has built her constitutional complaint on the allegations that: *"the rights guaranteed by the Constitution were violated because the regular*

courts rendered decisions in violation of Article 193 of LNCP, because they did not assess all circumstances, facts and evidence".

23. In the present case, the Court notes that the Court of Appeal dealt with these allegations of the Applicant in the challenged Decision, providing specific and clear responses, namely that,"*the conclusion of the first instance court is entirely approved also by this court, this due to the fact that the Proposer and the Counter-proposer are co-owners of the parcel in question and that the construction expert gave his expert report regarding the best functionality of the house..." [...] taking into account also the expert report of the geodesy expert regarding the field factual situation and taking into account the special and joint interests of the parties, this court also considers that it has been decided correctly..."*

24. As to the allegation that the regular courts have not assessed all the evidence, the Court recalls that the assessment of evidence is the competence provided by the law, which have the regular courts, with an obligation to reason that assessment clearly and properly. The Court notes that the challenged decision of the Court of Appeal contains all the necessary reasons on which it is based, in accordance with the requirements of Article 31 of the Constitution and Article 6 ECHR.

25. Moreover, the Court notes that the Court of Appeal provided a specific explanation on the application of the relevant legal provisions of Article 193 of the LNCP, which application according to the Applicant's allegation resulted in violation:

> *„... if the interested parties do not reach agreement, the first instance court administers the necessary evidence and based on the result of the entire proceedings it shall render a decision whereby it regulates the way of administration and use of the joint property, taking care for their special and joint interests..."*

26. As to the allegation of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court recalls that the fairness of a proceeding is assessed on the basis of the proceedings as a whole (European Court of Human Rights, *Barbera, Messegue and Jabardo against Spain*, Judgment of 6 December 1988, nos. 10588/83, 10589/83, 10590/83, paragraph 68). A flaw in one stage of the proceedings, including suspicion of erroneous assessment of the evidence and the application of the substantive law, a party may challenge at the next stage of the regular court procedure, which the Applicant did when she challenged the decision of the Basic Court to the Court of Appeal.

27. Having assessed the reasons for the constitutional complaint in relation to the violation of the rights under Article 46 of the Constitution and Article 1 of Protocol 1 of the ECHR, the Court finds them as ungrounded. The mere fact that the division of joint ownership of property has not been made according to the Applicant's expectations in the way that she specified in the proposal to the Basic Court, and which she considers legitimate, does not of itself constitute a valid basis to justify the allegations of violation.

28. According to the case law of the European Court of Human Rights, pursuant to Article 1 of Protocol 1, only the existing possessions are protected, but not the right to acquire property in the future. The legitimate expectation of any "property", "asset" or "compensation", according to this view must be based on a legal provision or a legal act, which has a valid legal basis and that affects the property rights (*Peter Gratzinger and Eva Gratzingerova v. the Czech Republic Republic*, Decision of the European Court of 10 July 2002, no. 39794/98, § 69).

29. The Court emphasizes that the mere fact that the Applicant is dissatisfied with the outcome of the proceedings, cannot of itself raise an arguable claim for breach of the Constitution (see *mutatis mutandis* case *Mezotur-Tiszazugi Tarsulat vs. Hungary*, No. 5503/02, ECHR, Judgment of 26 July 2005

30. The Court considers that the Applicant has not substantiated her allegations, nor she has submitted any *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see case no. KI19/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Syla*, Constitutional Court of the Republic of Kosovo, Constitutional Review of Decision of the Court of Appeal of Kosovo, CA. no. 2129/2013, of 5 December 2013 and Decision of the Court of Appeal of Kosovo, CA. no. 1947/2013, of 5 December 2013).

31. The Constitutional Court further reiterates that it is not its duty under the Constitution to act as a court of fourth instance, in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law (See case: *Garcia Ruiz v. Spain*, No. 30544/96, ECHR, Judgment of 21 January 1999; see also case: KI70/11 of the Applicants: *Faik Hima, Magbule Hima and Bestar Hima*, Constitutional Court, Resolution on Inadmissibility of 16 December 2011).

32. Finally, the court finds that the Applicant's Referral does not meet the admissibility requirements, because the Applicant did not substantiate that the challenged decision violates her rights guaranteed by the Constitution or the ECHR.

33. Accordingly, the Referral is manifestly ill-founded and is to be declared inadmissible, in accordance with Rule 36 (1) (d) and (2) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Rules 36 (1) (d) and (2) (b) of the Rules of Procedure, in the session held on 9 March 2016, unanimously

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;

IV. This Decision effective immediately;

Judge Rapporteur

Bekim Sejdiu

President of the Constitutional Court

Arta Rama-Hajrizi