



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

Prishtina, on 9 June 2017
Ref. No.: AGJ 1083/17

JUDGMENT

in

Case No. KI22/16

Applicant

Naser Husaj

**Constitutional review of Judgment Rev. No. 335/2015 of the Supreme
Court of Kosovo, of 14 December 2015**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

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

Applicant

1. The Referral was submitted by Naser Husaj, a lawyer from Peja (hereinafter, the Applicant).

Challenged decision

2. The Applicant challenges Judgment Rev. No. 335/2015 of the Supreme Court of 14 December 2015, in conjunction with Judgment AC. No. 2740 of the Court of Appeal of 30 October 2015, and Judgment C. No. 21/10 of the Basic Court in Peja of 19 June 2013.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly have violated the Applicant's rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), namely Article 21 [Fundamental Rights and Freedoms - General Principles] and Article 31 [Right to Fair and Impartial Trial].

Legal basis

4. The Referral is based on 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 1 February 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 14 March 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges Almiro Rodrigues (Presiding), Snezhana Botusharova and Ivan Čukalović.
7. On 8 April 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 2 May 2017, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court for the admissibility of the Referral.

Summary of facts

9. On 20 January 2010, the Applicant filed a claim with the Basic Court in Peja against M. J., requesting that the ownership over the parcels of land with a total surface area of 5.40.91 ha be confirmed. He claimed that the ownership over these parcels of land belongs to him based on a sale-purchase contract concluded with the deceased S. J. (the descendent of the respondent M.J.), as well as on the basis of adverse possession. The Applicant later specified the claim and added to it other respondents (involved in various ways of transactions with the same parcels of land).

10. The Applicant filed the claim because, according to him, the right of ownership was not legally transferred to him, although since 2000 he had entered into a sale-purchase agreement with S.J.
11. According to the Applicant, his son U. H was initially the purchaser; and later, with the modification of the contract, the Applicant himself appears as a buyer. He claims to have paid about 90% of the contracted amount and also that he uses the immovable property for over 13 years.
12. On 19 June 2013, the Basic Court in Peja (Judgment C. No. 21/10) rejected the claim as ungrounded.
13. On 27 July 2013, the Applicant filed an appeal with the Court of Appeal in Prishtina, claiming the existence of violations of the contested procedure provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law.
14. On 30 October 2015, the Court of Appeal of Kosovo (Judgment AC. No. 2740/2013) rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court in Peja.
15. On 20 November 2015, the Applicant filed with the Supreme Court a request for revision on the grounds of serious violation of the contested procedure provisions and erroneous application of the substantive law.
16. In the "grounds for revision" the Applicant emphasized that by the Judgment of the Court of Appeal it was committed *"a serious violation of the provisions of the contested procedure, because in the panel of the Court of Appeal has participated judge Q. A., who is currently being investigated on the basis of my criminal report of 26 November 2014, submitted by mail to the State Prosecution for the criminal offence of Abusing official position and authorizations, or two criminal offences. The case against him exists at the Basic Prosecution in Prishtina, according to the information of the State Prosecutor (J. M.), of 04 December 2014, PPN. No. 404/14. The latter had no right to take part in the panel and decide upon the appeal because here we are dealing with a conflict of interest, and this is foreseen by the CCK, by Article 424/1-3-4, therefore he decided in order to take revenge against me."*
17. On 14 December 2015, the Supreme Court (Judgment Rev. No. 335/2015) rejected as ungrounded the request for revision of the Applicant filed against the Judgment of the Court of Appeal.
18. In the relevant part of the Judgment of the Supreme Court it was reasoned that *"[...] the judgments of the lower instance courts do not contain essential violations of the provisions of the contested procedure, for which this court acts ex officio, or other violations of the LCP, filed in the revision"*.

Applicant's allegations

19. The Applicant alleges that the challenged Judgment violated his rights guaranteed by Articles 21 and 31 of the Constitution, because it has been biased on personal grounds against him.
20. The Applicant raises as a key allegation the participation of Judge Q. A. in the Review Panel of the Court of Appeal, even though he had a conflict of interest because of the criminal complain the Applicant had filed against Judge Q.A..
21. In this regard, the Applicant states that *"Judge Q. A. should not have participated in the panel as there was a conflict of interest"*.
22. In addition, the Applicant emphasizes that *"to my surprise, [...] the Supreme Court rejects the revision that is without one month having passed since I have submitted the revision; and it does not refer to the circumstance that Judge Q. A. should not have participated in the panel of the Court of Appeal."*
23. The Applicant requests the Court that the challenged decision is *"declared as unconstitutional, because my human rights and freedoms were violated, as well as the right to fair trial and the right to a fair decision."*

Admissibility of Referral

24. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and the Law, and as further specified in the Rules of Procedure.
25. In this regard, the Court recalls Article 113.7 of the Constitution which establishes:

"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. In addition, the Court takes into account Article 48 of the Law, which stipulates that:

"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. The Court also refers to Rule 36 of the Rules of Procedure, which foresees:

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

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

28. The Court finds that the Applicant is an authorized party, that he exhausted all legal remedies and that the Referral was submitted within the legal time limit.

In addition, the Court considers that the Referral raises a justified *prima facie* constitutional claim, while it is not manifestly ill-founded.

29. Accordingly, the Court will assess the merits of the case, by reviewing the allegations as they are presented in the Referral.

Assessment of the merits of the case

30. At the outset, the Court recalls that Article 53 of the Constitution obliges the Constitutional Court that the “*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*”
31. The Court notes that the Applicant challenges Judgment Rev. No. 335/2015 of the Supreme Court but also the lower instance judgments, claiming that they have violated his constitutional rights guaranteed by Articles 21 and 31 of the Constitution.
32. However, the Court also notes that the Applicant has not clarified the allegation of a violation of Article 21 (Fundamental Rights and Freedoms - General Principles) but has only mentioned it in the Referral and as such the Court will not deal with it. While, the essence of the allegation relates to the allegation of violation of Article 31 (Right to a Fair and Impartial Trial), which has the following content:

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.

[...]

33. When reviewing the allegations of a violation of the right to fair and impartial trial, the Court assesses whether the proceedings in its entirety were fair and impartial, as required by Article 31 of the Constitution (see, *inter alia*, *mutatis mutandis*, *Edwards v. United Kingdom*, 16 December 1992, p 34, Series A No. 247, and *B. Vidal v. Belgium*, 22 April 1992, p. 33, Series A no 235).
34. The Court notes that the Basic Court (Judgment C. no. 21/10), based on the determined factual situation, rejected as ungrounded the Applicant's (claimant) statement of claim for confirmation of the property right. The Basic Court reasoned that the Applicant (claimant) did not prove that he had acquired the right of ownership on any legal ground or valid legal title.

35. The Court of Appeal (Judgment AC. No. 2740/2013 found that the Basic Court correctly determined the factual situation and that it correctly applied the law in the present case. Accordingly, the Court of Appeal rejected the Applicant's appeal, upholding the Judgment of the Basic Court in entirety.
36. From the content of the Judgment of the Court of Appeals, the Court finds that this Judgment was rendered in the "*session of the Panel*" whereby "*the Panel of the Court of Appeals has reviewed the case files, the challenged Judgment, the allegations appeal and following their assessment in the meaning of Article 194 of the LCP, found that...*". Consequently, from the case file and the general practice it results that the Applicant had no opportunity to challenge the composition of the Judicial Panel in the appealing proceedings before the Court of Appeals.
37. The Court notes that the Applicant filed a request for revision, where the Applicant's main appealing ground was the participation of a judge in the Court of Appeal composition who, according to the Applicant, had a conflict of interest in his case and against whom the Applicant filed a criminal report.
38. The Court notes that the Supreme Court rejected the request for revision, reasoning that "*The Supreme Court of Kosovo, in this situation of the case, notes that the judgments of the lower instance courts do not contain essential violations of the provisions of the contested procedure, for which this court acts ex officio, or other violations of the LCP, filed in the revision. The enacting clause of the judgment is clear, in full accordance with the reasoning [...]*".
39. However, the Court notes that in its reasoning the Supreme Court did not consider the Applicant's allegations of participation of the Judge Q.A. in the composition of the Court of Appeal, although in the request for revision the Applicant raised an allegation regarding the participation of this Judge in the panel of the Court of Appeal.
40. In this regard, the Court emphasizes that the right to a fair and impartial trial guaranteed by Article 31 of the Constitution also includes the right to have a reasoned decision. The reasoning of decisions is an essential element of a fair decision. A further function of a reasoned decision is to demonstrate to the parties that they have been heard, and to afford a party with the possibility to appeal against. In addition, only by giving a reasoned decision there can be a public scrutiny of the administration of justice. (See judgments of the Constitutional Court, case KI72/12 of 17 December 2012).
41. In the light of the claims made by the Applicant and the reasoning given by the regular courts, the Court considers that in principle it is not its task to deal with errors of fact or law committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (see ECtHR case *Garcia Ruiz v Spain*, No. 30544/96, Judgment of 21 January 1999, para. 28). Therefore, in this respect, the constitutional control over the court decisions is limited only to protect the constitutional rights of an individual.

42. The Court reiterates that the regular courts are not obliged to address all the allegations put forward by the Applicant. However, they must address the allegations that are relevant to the matter under consideration, moreover if they are raised at different stages of the proceedings, as it happened in the present referral (see Constitutional Court, case KI135/14, Judgment of 8 February 2016).
43. The Court reiterates that the constitutional right to fair and impartial trial includes the obligation for the courts to provide sufficient reasons for their decisions, at both procedural and substantive level (see Constitutional Court Judgment in case KI135/14).
44. The application of this principle is assessed by the Court, case by case, depending on the particular circumstances of the case, analyzing whether the challenged court decisions have adequately fulfilled the obligation to reason their decisions. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *Hirvisaari v. Finland*, ECtHR Judgment, 27 September 2001, par. 30).
45. The Court notes that the Applicant complains that the challenged Judgment of the Supreme Court did not address at all one of his main allegations in the request for revision, related to the participation of a judge at a trial in the second instance court, in relation to the impartiality about which the Applicant had raised serious doubts. Accordingly, the Applicant alleges that the challenged Judgment is contrary to the guarantees of Article 31 of the Constitution and Article 6 of the ECHR.
46. The Court considers that this issue is of essential significance to the case because its clarification would avoid the Applicant's fear regarding the impartiality of the trial panel in the adjudication of his case and would strengthen the conviction that the Applicant's allegations were properly heard.
47. Had the Supreme Court addressed the Applicant's substantive allegation, regarding the impartiality of the panel of the Court of Appeal, regardless of the response on that allegation (i.e., irrespective of whether this allegation could have been accepted as justified or rejected as groundless) then the requirement of the "heard party" and the proper administration of justice would be met. It is not the Court's role to examine to what extent the allegations of the applicants in the procedures in the regular courts is reasonable. However, the procedural fairness requires that the essential allegations that parties raise in the regular courts should be answered properly – particularly if they pertain to important issues such as the impartiality of the courts.
48. In this respect, the Court notes that the impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways (*Wettstein v. Switzerland*, No. 33958/96, § 44, CEDH 2000-XII and *Micallef v. Malta*, ECtHR No. 17056/06, §§ 93/2009).

49. The Court further notes that the appearance of impartiality is important in the light of the legal postulate that “justice must not only be done, it must also be seen to be done”. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see, *Volkov v. Ukraine*, par. 106, ECtHR Judgment of 2013 and see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86)
50. Having assessed the proceeding in its entirety, and particularly based on the reading of the Judgment of the Supreme Court, the Court finds that the failure to address, namely the lack of presentation of clear legal arguments on the Applicant's allegations related to the essential issues of the proceedings, constitute an insurmountable flaw of the judgment.
51. Based on the arguments above, and in accordance with the case law of the Constitutional Court (see namely cases KI72/12, KI135/14), the Court finds that the Judgment of the Supreme Court which rejected the revision did not respect the constitutional standard of the reasoning of a court decision. Accordingly, the Court finds that there has been a violation of Article 31 of the Constitution (Right to Fair and Impartial Trial) and of Article 6.1 of the ECHR (Right to a fair trial).

FOR THESE REASONS

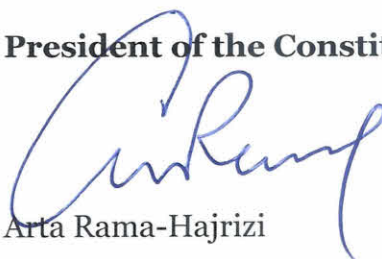
The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and Rules 56 (1) and 74 (1) of the Rules of Procedure in the session held on 2 May 2017

DECIDES

- I. TO DECLARE unanimously the Referral admissible;
- II. TO HOLD by majority that there has been violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;
- III. TO DECLARE invalid the Judgment Rev. No. 335/2015 of the Supreme Court of Kosovo of 14 December 2015;
- IV. TO REMAND the Judgment of the Supreme Court for reconsideration in conformity with the judgment of this Court;
- V. TO REQUEST from the Supreme Court, pursuant to Rule 63 (5) of the Rules of Procedure, to submit information to the Constitutional Court about the measures taken to enforce this Judgment of the Court;
- VI. TO REMAIN seized of the matter pending the implementation of this Judgment;
- VII. TO NOTIFY this Judgment to the Parties;
- VIII. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20.4 of the Law; and
- IX. TO DECLARE this Judgment effective immediately


Judge Rapporteur
Bekim Sejdiu




President of the Constitutional Court
Arta Rama-Hajrizi