



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE

УСТАВНИ СУД

CONSTITUTIONAL COURT

Prishtina, on 10 March 2017

Ref. No.: RK 1048/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI50/16

Applicant

Veli Berisha and others

**Request for constitutional review of Judgment Rev. no. 276/2015, of the
Supreme Court of Kosovo, of 14 October 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 Applicants are Veli Berisha, Muhamet Berisha and Adem Berisha (hereinafter: the Applicants) all from Suhareka, represented before the Court by lawyer Mr. Zef Delhysa.

Challenged decision

2. The challenged decision is Judgment Rev. no. 276/2015, of the Supreme Court of Kosovo, of 14 October 2015, which was served on the Applicants on 14 November 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged judgment, which allegedly violated the Applicants' rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 46 (Protection of Property), of the Constitution of the Republic of Kosovo (hereinafter Constitution) and by Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: ECHR) and Article 1 of Protocol no. 1 of the ECHR.
4. The Applicant requested that his identity is not disclosed without explaining the reasons for that request.

Legal basis

5. 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

6. On 8 March 2016, the Applicants submitted the Referral by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 13 April 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel, composed of Judges: Robert Carolan, Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
8. On 3 May 2016, the Court informed the Applicants about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
9. On 11 July 2016, the President of the Court by a decision changed the Review Panel, replacing Judge Robert Carolan with Judge Snezhana Botusharova as Presiding Judge.
10. On 14 July 2016, the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

11. On 11 May 1953, to the Applicants' predecessor Rr. N. (father of the Applicants) by decision of the National District of Suhareka, was expropriated an area of land for the construction needs of a public kindergarten.

12. On an unspecified date, the Applicants in capacity of descendants of Rr. N. filed a claim with the Municipal Court in Suhareka, with a request that the Court certifies the ownership over the cadastral plots mentioned in a lawsuit, requesting that they be declared the co-owners of the 1/3 of immovable property.
13. On 30 October 2012, the Municipal Court in Suhareka by Judgment C. no. 302/12 rejected the statement of claim.
14. The Municipal Court in its Judgment stated among the other: *"From the geodesy expertise is proven the fact that land parcel expropriated from Rrustem Berisha described in the judgment on expropriation, with the establishment of the new cadastral operation in 1959, which came into force in 1965 is evidenced pursuant to possession lists 409 and 410 as cadastral parcel 1992, 1992, 1993, 1994, 1995, 1996 and 1998 as socially-owned property of the Municipality of Suhareka, respectively the Health House CZ Suhareka..."* and later *"Since the decision on expropriation and the decision on compensation for immovable property obtained under possession exist, the Court considered that the respondent is the owner pursuant to decision of the state body under Article 20 paragraph 2 of the Law on Basic Property Relations, for what it decided as in the enacting clause of the judgment."*
15. On 27 November 2012, the Applicants filed an appeal with the District Court in Prizren due to essential violation of the civil procedure, incomplete and erroneous determination of factual situation, and erroneous application of the substantive law.
16. On 1 June 2015, the Court of Appeal of Kosovo rendered Judgment Ac. no. /12 4973/2012, which rejected as ungrounded the Applicant's appeal and upheld Judgment C. no. 302/2012 of the Municipal Court in Suhareka, of 30 October 2012.
17. The Court of Appeal in its Judgment reasoned: *"This Court considering the conclusion and the decision of the first instance court found that it is fair and grounded, and it is based on legal provisions and that the case file that have been provided in the meantime justified the reasons which have been admitted by this court."* Regarding the Applicant's allegations, the court reasoned: *"Appealing allegations of the claimants are considered by this court as ungrounded, since the court of the first instance did not commit the breaches of the provisions of the contested procedure, neither has erroneously applied the substantive law, which are observed by this court, ex-officio."*
18. On 14 October 2015, the Supreme Court of Kosovo by Judgment Rev. no. 276/2015, rejected as ungrounded the Applicants' request for revision filed against Judgment of the Court of Appeal, stating, *inter alia*, that *"The Supreme Court of Kosovo found that the courts of lower instances, based on correct and complete determination of factual situation applied correctly the provisions of the contested procedure and the substantive law, that the challenged judgment and the judgment of the first instance court do not contain essential breaches of contested procedure that are observed ex-officio by this Court, that the courts of lower instance have provided sufficient*

reasons on crucial facts for a fair adjudication of this legal matter, which are approved also by this Court.”

Applicant’s allegations

19. The Applicants allege that the procedure of expropriation of the immovable property of their predecessor was in full contradiction with the law and had many irregularities, that against the deceased Applicants’ predecessor was applied violence by police, and that he never received any compensation of the property expropriated, while the regular courts by rejecting the claim to his descendants (the Applicants), denied them the right to fair and impartial and deprived them of the right to property which if they had a fair trial, they would enjoy based on inheritance.

Admissibility of the Referral

20. In order to adjudicate the Applicants’ Referral, the Court first examines whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.

21. In this 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.”

22. The Court further refers to Article 48 of the Law 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”.

23. 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.

(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”.

24. The Court concludes that the Applicants allege that by the challenged decision were violated the following rights guaranteed by the Constitution:

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.

[.....]

25. Assessing the Applicants' allegations of constitutional violation, the Court holds that they are based on *"erroneous and incomplete determination of factual situation, namely erroneous assessment of evidence presented by the Applicants, by the regular courts."*
26. The Court has constantly reiterated that it is not its jurisdiction to substitute by its own assessment of the facts the assessment of the regular courts and, as a general rule, it is the duty of the regular courts to assess the evidence before them (See Case KI47-48/15, constitutional review of Judgment AC-II-14-0057, of the Special Chamber of the Supreme Court of Kosovo, of 12 March 2015, Applicants *Beqir Kosokoviku and Mustafë Lutolli*), whereas the duty of this Court is to find whether the court proceedings were fair and impartial in its entirety, as it is required by Article 6 (See among other, *Edwards v. United Kingdom*, 16 December 1992, Series A, no. 247 and *B. Vidal v. Belgium*, 22 April 1992, 33, Series A, no. 235)
27. Based on the principle of subsidiarity, the Court cannot act as a fourth instance court by calling into question the final outcome of the court proceedings (See case *FcMetrebi vs. Georgia*, par. 31, ECtHR Judgment, of 31 July 2007), and judging by the circumstances of the case, the primary goal of the Applicants was precisely to challenge the outcome of the court proceedings.

28. Nothing in the case presented by the Applicants proves that court proceedings in this case, in entirety, were unfair or arbitrary so that the Constitutional Court can find that the very essence of the right to fair and impartial trial has been violated.
29. Based on above, it is not for the regular courts to assess if the expropriation of the challenged immovable property was done in accordance with the law, and moreover, this issue was addressed in three court instances, and was completed with the Judgment of the Supreme Court.
30. The Court further finds that the Supreme Court had fully reasoned its decision regarding the revision, by explaining in detail why the request for revision is ungrounded, by clearly reasoning the application of the applicable law and determination of the factual situation, and by assessing at the same time the decision of lower instance courts within the allegations raised by the Applicants.
31. As regards the other Applicant's allegation for violation of Article 46 of the Constitution [Protection of Property], the Court finds that in paragraph 1 of Article 46, in a general way the Constitution guarantees it, in paragraph 2, the Constitution defines the method of use of the property, by clearly specifying that it is provided by the law and in paragraph 3, it has determined the way of deprivation of property.
32. As stated above, it is quite clear that the Constitution refers to an existing property and does not provide in Article 46 (challenged by the Applicants) the right of acquisition of the property.
33. The Court hereby notes that under Article 53 [Interpretation of Human Rights Provisions] "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Rights*" therefore, given that "*the Constitutional Court is the final authority in Kosovo for the interpretation of the Constitution*" (Article 112 of the Constitution) even when the Court decides on the requests having as subject of review a possible violation of human rights, it necessarily refers to the case law of the ECHR.
34. In this regard, the Court points out that in the case *Marckx v. Belgium* regarding the right to property, the ECHR in its judgment, *inter alia*, stated that the Court holds that Article 1 of Protocol 1 "*does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions*" (See *Marckx v. Belgium*, Application no. 6833/74, 13 June 1979), therefore, it is quite clear that the European Convention for the Protection of Human Rights (ECHR) Article 1 of Protocol 1 thereof when referring the property rights, does not guarantee the right to acquisition of property (assets), because the acquisition of ownership is regulated by the law and potential disputes are resolved in the regular courts.
35. In these circumstances, the Court cannot find violation of Article 46 of the Constitution, namely Article 1 of Protocol 1 of the ECHR [Property rights]

because the Applicants had no existing property, did not use it and were not deprived unlawfully from the property, which was clearly found by the regular courts in three instances.

36. The Court also rejects the request not to disclose his identity because the Applicant did not present a single reason or fact that would support this request.
37. Based on the above, the Court finds that the facts presented by the Applicants do not in way justify the allegation of violation of the right to fair and impartial trial and the right to property, therefore, in accordance with Rule 36, paragraph 2, item (b) and (d) finds that the Referral is to be declared inadmissible as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 48 of the Law and in compliance with Rule 36 (2) (b) and (d) of the Rules of Procedure, on 14 July 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; and
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur

Altay Suroy



President of the Constitutional Court

Arta Rama-Hajrizi

For J. Cubur