



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

Pristine, 02 July 2012
Ref. No.: AGJ264/12

JUDGMENT

in

Case No. KI51/11

Applicant

Rexhep Rahimaj

Constitutional Review of the Decision of the District Court of Gjilan, Ac. no. 359/10, dated 14 December 2010.

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 Applicant is Mr. Rexhep Rahimaj, residing in Kamenice.

Challenged decision

2. The Applicant challenges the Decision of the District Court of Gjilan, Ac. no. 359/10, of 14 December 2010, which was served on him on 6 January 2011.

Subject matter

3. The Applicant claims that the challenged decision of the District Court in Gjilan violates Law No. 03/L-008 on Executive Procedure, since it postponed the execution of the *res judicata* decision of the Municipal Court of Kamenica, C. no. 74/2007 of 28 September 2007.
4. In this respect, the Applicant claims that his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the "Constitution") and Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "ECHR") have been violated.

Legal basis

5. Article 113.7 of the Constitution, Article 22 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009, (No. 03/L-121) (hereinafter: the "Law") and Rule 56 (1) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

6. On 15 April 2011, the Applicant submitted the Referral to the Court.
7. On 19 April 2011, the President, by Decision No. GJR. 51/11, appointed Judge Robert Carolan as Judge Rapporteur. On the same date the President, by Decision, No. KSH. 51/11, appointed the Review Panel consisting of Judges Snezhana Botusharova (Presiding), Enver Hasani and Gjyljeta Mushkolaj.
8. On 2 June 2011, the Applicant submitted Decision C. No. 74/2007 of the Municipal Court of Kamenica, dated 28 September 2007, as requested by the Court. The Applicant also informed the Court that the claim to terminate the contested servitude was still pending before the same court.
9. On 8 July 2011, the Municipal Court of Kamenica informed the Court that the execution proceedings had been postponed, since the respondents had filed a new claim with the Municipal Court in Kamenica to terminate the servitude.
10. On 11 April 2012, the District Court in Gjilan informed the Court that "according to the information we received from the Municipal Court in Kamenica, its Judgment E. no. 245/10 to allow the execution in case C. no. 74/2007, is still pending, because the case is still waiting for retrial by that court."
11. On 19 June 2012, the Court deliberated and voted on the case.

Summary of facts

12. In 2007, the Applicant filed a claim with the Municipal Court in Kamenica claiming that the neighbors had obstructed the Applicant in making use of his servitude, i.e. to enter and exit his property.

13. On 28 September 2007, the Municipal Court of Kamenica, by Decision C. no. 74/2007, granted the Applicant's claim and ordered the neighbors to enable the Applicant to enter and exit his property/house. The Municipal Court held that the neighbors "[...] have obstructed [...]" the Applicant "[...] to possession-co-possession of the real servitude right, namely to use the road on foot and by car, tractor and other vehicles [...]", i.e the neighbors "[...] have committed against [...]" the Applicant "[...] the act of obstruction to possession." The neighbors filed a complaint against this decision with the District Court of Gjilan.
14. On 17 December 2007, the District Court in Gjilan, by Decision Ac. no. 395/07, admitted the complaint of the neighbors and amended the decision of the Municipal Court on the ground that the latter had not adequately evaluated the factual situation and the evidence. Thereupon, the Applicant requested the Public Prosecutor to initiate a request for protection of legality with the Supreme Court. The Public Prosecutor did so on 28 February 2008, stating that the District Court's ruling "[...] contained essential violations of procedural provisions, because the claimant [the neighbors], due to an unlawful action by the court [Municipal Court], was not served with the summons and was not able to plead on the evidence [...]."
15. On 10 June 2009, the Supreme Court, by Decision Mlc.nr.11/2008, reversed the Decision Ac. no. 395 of the District Court in Gjilan of 17 December 2007 and confirmed Decision C. no. 74/2007 of the Municipal Court of Kamenica of 28 September 2007 which confirmed that the neighbors "[...] have obstructed [...]" the Applicant "[...] to possession-co-possession of the real servitude right, namely to use the road on foot and by car, tractor and other vehicles [...]", i.e the neighbors "[...] have committed against [...]" the Applicant "[...] the act of obstruction to possession.". The Supreme Court held that "Considering that the evidence, which the appealed ruling is grounded on, is insignificant evidence and has not been elaborated at all by the first instance court, whereas the second instance court ruling is grounded on the photo-documentation which was not disposed for elaboration before the second instance court and which was not considered by the Supreme Court of Kosovo as an evidence which would provide for the change of factual situation established under the first instance court ruling, the Supreme Court granted the motion for protection of legality as grounded and it reversed the appealed ruling, so that it rejected the claim file against the first instance court ruling and confirmed the first instance court ruling on grounds that the same does not contain essential violations of provisions of the contested procedure."
16. With the Supreme Court confirming the decision of the Municipal Court in Kamenica, C. no. 74/2007 of 28 September 2007, this decision becomes executable and *res judicata*.
17. On 14 September 2010, the Municipal Court, by decision E. no. 245/10, granted the request of the Applicant to execute the Municipal Court decision of Kamenica of 28 September 2007, C. no. 74/2007, which had become *res judicata*, but the neighbors immediately objected to this execution decision.
18. On 7 October 2010, the Municipal Court, by decision E. no. 245/10, rejected as unfounded the objection of the neighbors. The Municipal Court held that "Article 55 of Law on Executive Procedure (LEP) expressively indicates the grounds when an appeal can be filed, but since in the concrete case the Court could not find any legal grounds based on which an appeal can be filed, pursuant to Article 57 of LEP, the appeal was duly rejected and it was decided as in the enacting clause of this Ruling." The neighbors complained against this decision to the District Court in Gjilan.

19. On 14 December 2010, the District Court of Gjilan granted the neighbors complaint and postponed the execution decision of the Municipal Court of 7 October 2010, until that court would have taken a decision on the neighbors' requests of 25 August and 17 September 2010 to **terminate** the Applicant's servitude. The District Court reasoned that, since the neighbors' claims of 25 August and 17 September 2010 to **terminate** the servitude were put in the same case file, the decision of the Municipal Court to reject the neighbors' appeal against the execution of the decision confirming the servitude was incorrect and that the Applicant and the neighbors, therefore, needed to wait for the outcome of the proceedings regarding the **termination** of the servitude. The District Court referred thereby to Article 68 of the Law on Executive Procedure, providing that the court, at the debtor's request, may postpone the execution in such cases, where there are particularly reasonable grounds that the debtor, if he provides reliable facts, would sustain considerable damage due to the enforcement of the execution.

Applicant's allegations

20. The Applicant alleges that the Decision of the District Court of Gjilan, AC.nr.359/10, of 14 December 2010, deprived him of his right to possession, which was recognized and confirmed through the final court decision of the Municipal Court in Kamenica, C.nr.74/2007 dated 28 September 2007, which had become *res judicata*. The Applicant states that the denial of such right is an essential violation of the right to property, guaranteed by Article 46 [Right to Property] of the Constitution and Article 1 of Protocol 1 of ECHR which provides that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions".
21. Further, the Applicant alleges that failure to comply with a final court decision makes the rule of law in Kosovo and the principle of citizens' legal certainty vulnerable. Hence, this is in violation of Articles 6 and 13 of ECHR.
22. In this connection, the Applicant referred to the Court's Judgment in Case KI 08/09 of 17 December 2010, where the Court found that "The rule of law is one of the fundamental principles of a democratic society; it presumes the respect of the principle of legal certainty, especially in relation to judicial decisions which have a *res judicata* form. No party is entitled to request the revision of a final and valid court decision with the mere intention of being granted a revision and fresh review of the case [...]. If this was not the case, then reversing the final decisions would lead to a general uncertain legal climate, diminishing thereby the public trust in the judicial system.
23. Therefore, the competent authorities have a positive obligation to establish a decision enforcement system, which is effective both in legal and practical terms, and which ensures their enforcement without undue delay [...]. [...]. The execution of a judgment rendered by a court should be considered as a constituent part of the right to a fair trial, guaranteed under the abovementioned articles [Articles 6 and 13 ECHR]. [...] the claimants should not have been denied a benefit from the decision, which had taken the final *res judicata* form in their favor".
24. Finally, the Applicant requests the Court to grant his claim, by finding as unconstitutional Decision AC.nr.359 of the District Court of Gjilan of 14 December 2010 and ordering the execution of Decision C.nr.74/2007 of the Municipal Court of 28 September 2007.

Assessment of admissibility of the Referral

25. In order to be able to adjudicate the Applicant's Referral, the Court has to assess beforehand whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution, the Law and the Rules of Procedure.
26. The Court needs to determine first whether the Applicant is an authorized party within the meaning of Article 113.7 of the Constitution, stating that "*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.*" In this respect, the Referral was submitted with the Court by an individual. Therefore, the Applicant is an authorized party, entitled to refer this case to the Court under Article 113.7 of the Constitution.
27. Furthermore, an Applicant, in accordance with Article 49 of the Law, must submit the Referral within 4 months after the final court decision. On 14 December 2010, the District Court took the Decision AC. no. 359/10, whereas the Applicant received the Decision on 6 January 2011. The Applicant submitted the Referral to the Court on 15 April 2011. Therefore, the Applicant has met the necessary deadline for filing a referral to the Constitutional Court.
28. In addition, pursuant to Article 12 and 14 of LEP, the District Court of Gjilan is considered "as a last instance court to adjudicate execution related matters". As a result, the Applicant has exhausted all the legal remedies available to him under Kosovo law. *See APPENDIX to this JUDGMENT.*
29. Finally, Article 48 of the Law establishes: "*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.*" In this respect, the Court notes that the Applicant challenges the District Court Decision, AC. no. 359/10, whereby, allegedly, his rights his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Article 1 of Protocol 1 of the ECHR, since by that Decision the execution of the *res judicata* Decision C.no. 74/2007 of the Municipal Court in Kamenica of 28 September 2007 was postponed. Therefore, the Applicant has also fulfilled that requirement.
30. Since the Applicant is an authorized party, has met the necessary deadlines to file a referral with the Court, has exhausted all the legal remedies, and accurately clarified the allegedly violated rights and freedoms, including the decision subject to challenge, the Court determines that the Applicant has complied with all requirements of admissibility.

Constitutional Assessment of the Referral

31. Since the Applicant has fulfilled the procedural requirements for admissibility, the Court needs to examine the merits of the Applicant's complaint.
32. With reference to the submissions of the Applicant, the Court observes that the Applicant contest the decision of the District Court in Gjilan, Ac. no. 359/10 of 14 December 2010, by which it pursuant to Article 68 of LEP postponed the execution decision of the Municipal Court of 7 October 2010.
33. As to the Applicant's complaint, the Court notes that, on 14 September 2010, the Municipal Court allowed the execution of its *res judicata* decision of 28 September 2007, as requested by the Applicant, but that, as mentioned above, the District Court in Gjilan postponed the execution for the reason that, on 25 August and 17 September 2010, the Applicant's neighbors/respondents had initiated new proceedings with the

Municipal Court in Kamenica, requesting it this time to terminate the Applicant's servitude.

34. This was confirmed by the President of the Municipal Court of Kamenica in his communication to this Court of 8 July 2011, stating that the execution proceedings regarding the *res judicata* decision had been postponed, since the respondents [the Applicant's neighbors] had filed a new claim to have the Applicant's servitude terminated.
35. In this respect, the Applicant alleges that his rights as guaranteed by Articles 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Article 1 of Protocol 1 of the ECHR have been violated because the *res judicata* decision of the Municipal Court of Kamenica, Decision C. no. 74/2007 of 28 September 2007, was not executed.
36. The Court must, therefore, adjudicate whether the District Court, when postponing the execution of the *res judicata* decision of the Municipal Court, could have done so for the reason that the Applicant's neighbors/opponents had initiated new proceedings with the Municipal Court to terminate the Applicant's servitude.
37. In this respect, the Court would like to reiterate its finding in Case KI 08/09 of 17 December 2010, in which it determined that "The rule of law is one of the fundamental principles of a democratic society; it presumes the respect of the principle of legal certainty, especially in relation to judicial decisions which have a *res judicata* form. No party is entitled to request the revision of a final and valid court decision with the mere intention of being granted a revision and fresh review of the case (see, *mutatis mutandis*, *Sovtransavto Holding v. Ukraine*, no 48553/99, ECHR 2002-VII) [...]. Were that not the case, then reversing the final decisions would lead to a general uncertain legal climate, diminishing thereby the public trust in the judicial system".
38. The Court further held that: "Therefore, the competent authorities have a positive obligation to establish a decision enforcement system, which is effective both in legal and practical terms, and which ensures their enforcement without undue delay [...]". [...] The execution of a judgment rendered by a court should be considered as a constituent part of the right to a fair trial, guaranteed under the abovementioned articles [Articles 6 and 13 ECHR]. [...] the claimants should not have been denied a benefit from the decision, which had taken the final *res judicata* form in their favor".
39. The Court further notes that pursuant to Article 68 of LEP, adjournment of the execution can be made only upon the request of the creditor and not upon the request of the debtor as was stated by the District Court in Gjilan in its decision Ac. no. 359/10 of 14 December 2010. *See APPENDIX to this Judgment.*
40. As to the present Referral, the Court considers that the District Court in Gjilan has acted contrary to Article 31 of the Constitution by postponing the decision on the execution of the Municipal Court's *res judicata* decision.
41. In these circumstances, the Court concludes that the Applicant's rights to a fair and effective trial, as guaranteed by Article 31 of the Constitution has been violated and that the *res judicata* decision of the Municipal Court of Kamenica, Decision C. no. 74/2007 of 28 September 2007, must be executed.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 20 of the Law, and Rule 56 (1) of the Rules of Procedure, at its session held on 19 June 2012,

DECIDES

- I. Unanimously, to DECLARE the Referral Admissible;
- II. By majorit, to DECLARE invalid the Decision, Ac. no. 359/10, of the District Court in Gjilan 14 December 2010, which violates Article 31 of the Constitution;
- III. REMAND the Decision, Ac. no. 359/10, of the District Court of 14 December 2010 to the District Court in Gjilan for reconsideration in conformity with the Judgment of this Court, pursuant to Rule 74 (1) of the Rules of Procedure;
- IV. Pursuant to Rule 63 (5) of the Rules of Procedure, the District Court in Gjilan shall submit information to the Constitutional Court about the measures taken to enforce this Judgment of the Constitutional Court;
- V. 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;
- VI. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court



Robert Carolan



Prof. dr. Enver Hasani

APPENDIX

Relevant legal provisions concerning execution of judicial decisions:

Law 2008/03-LO08 on Executive Procedure

In the Republic of Kosovo, the legal rules, procedures of execution and security of judicial decisions is regulated by the Law on Executive Procedure (Law No. 2008/03-LO08).

Article 12 [Remedies for attacking decisions]

“...

12.1 In the executive procedure, regular legal remedies are objection and appeal, if these are not excluded by this law.

12.2 Against the decision of first instance decision might be filed an objection, while appeal might be filed only in the cases foreseen by this law.

12.3 The objection is presented to the court which has issued the decision in the timeframe of 7 days from the day of delivery of decision, unless otherwise foreseen by this law. About the objection decides the court which has issued the decision.

12.4 Against the issued decision regarding the objection might be filed an appeal within time-frame of 7 days from the day of delivery of decision.

12.5 For the filed appeal is competent to decide the court of second instances.

12.6 The objection and appeal does not halt the executive procedure, but fulfillment of the request of proposer for execution is adjourned until the first instance court decides on presented objection. Exceptionally, when with the executive title is assigned obligation on legal nutrition, or if the execution is conducted through transfer of money from transaction account of legal person in the account of the same type of the proposer of execution, but also in other cases foreseen by this law, the credit might be realized even before the decision for objection of debtor.

12.7 Against the conclusion, as type of decision, in principle is not permitted a legal remedy.

...”

Article 13 [Enactment and executability]

“...

13.1 The decision against which the objection is not filed in foreseen time-limit becomes final and executable.

13.2 The decision against which is refused the objection becomes executable, and if against it is not permitted an appeal, then it becomes also final.

13.3 *The decision in which the objection is refused becomes final if against it is not filed an appeal in foreseen legal time-limit, or if the filed appeal is refused as ungrounded.*

13.4 *If by this law is foreseen that against the first instance decision might be filed an appeal instead of objection, then such a decision becomes executable, but it becomes final if there is no appeal filed within legal time-limit, or if filed appeal is refused as ungrounded.*

...”

Article 14 [Extra-ordinary legal remedies]

“...

14.1 *Against the final decision issued in executive and security procedure is not permitted the revision and repetition of the procedure.*

14.2 *Restitution into previous state is permitted only in case of non-preservation of timelimit for filing an objection and appeal against the executable decision for compulsory execution.*

...”

Chapter VII, Adjournment, Suspension and Conclusion of the Execution

Article 68 [Adjournment of the execution upon the creditor’s request]

“...

68.1 *If by the law is not foreseen otherwise, the execution might be adjourned partially or entirely only upon the request by the execution proposer, but only if the application of the execution decision has not started yet. If in the execution procedure participates more execution proposers and only any of them requires adjournment, then the court adjourns execution only in regard to such an execution proposer.*

68.2 *If the application of the execution has started whilst the debtor within, by the court assigned time-limit, is declared against the adjournment, then the court will decide about the reasonableness of the request for adjournment.*

68.3 *If by the law is foreseen that the execution might be proposed only within assigned time-limit, then the execution proposer might present request for adjournment of execution only within such time-limit.*

...”

Article 69 [Time for which the execution is adjourned]

“...

69.1 *The court adjourns the execution for time assigned by the execution proposer or for time it considers reasonable bearing in mind the circumstances of the concrete case.*

69.2 *If by the law is foreseen the time-limit within which might be proposed execution, then its adjournment cannot be done out of such time-limit.*

...”

Article 70 [Continuation of the adjourned procedure]

“...

Adjourned execution continues upon request by the execution proposer even before the expiration of time for which it is adjourned. If the execution proposer does not require the continuation of procedure even after 15 days from the day of expiration of time-limit for which the execution is adjourned, then the court will conclude the adjourned executive procedure by a decision, by which it is assumed that the execution proposal is withdrawn.