



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

**GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT**

Prishtina, on 6 April 2016
Ref. no.:RK916/16

RESOLUTION ON INADMISSIBILITY

in

Case No. KI59/15

Applicant

Ljutfi Kačka

**Constitutional review of Judgment P. no. 78/12, of the Basic Court in
Prizren, of 25 June 2013**

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 Referral was submitted by Mr. Ljutfi Kačka from village Restelica, Municipality of Dragash (hereinafter: the Applicant), who is represented by Mr. Rexhep Kabashi, a lawyer in Prizren.

2. The challenged decision is Judgment P. no. 78/12, of the Basic Court in Prizren, Branch in Dragash (hereinafter: the Basic Court) of 25 June 2013.
3. The challenged Judgment was served on the Applicant on an unspecified date.

Subject matter

4. The subject matter is the constitutional review of the aforementioned Judgment of the Basic Court, which allegedly violated the Applicant's rights as guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 46 [Protection of Property] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 [Right to a fair trial] and Article 13 [Right to an effective remedy] of the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and Article 7 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

Legal basis

5. 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 Rules 56 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 12 May 2015, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
7. On 29 June 2016, the President of the Court, by Decision GJR. KI59/15, appointed Judge Altay Suroy as Judge Rapporteur. On the same date, the President of the Court, by Decision KSH. KI59/15, appointed the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Arta Rama-Hajrizi.
8. On 14 August 2015, the Court informed the Applicant about the registration of the Referral. On the same date, the Court sent a copy of the Referral to the Basic Court.
9. On 18 August 2015, the Applicant submitted to the Court the additional documents.
10. On 1 September 2015, the Applicant submitted again to the Court the additional documents.
11. On 15 March 2016, after having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

Summary of Facts

12. On 25 June 2013, the Basic Court in Prizren (Judgment P. No. 78/12) in the contested procedure approved the claim of three claimants and confirmed that the latter are the co-owners of an immovable property in the village of Restelica.
13. By this Judgment, the Applicant, who in these proceedings was in a capacity of a respondent, was obliged to recognize the Applicants' right of ownership.
14. The Applicant authorized a lawyer to represent him in the proceedings before the Basic Court and other courts.
15. Against the Judgment of the Basic Court (Judgment P. No. 78/12, of 25 June 2013), the Applicant did not file the appeal. As a result, the Judgment became final.
16. Based on the case file, on an unspecified date the Applicant filed a request for protection of legality with the Office of the Chief State Prosecutor against the abovementioned Judgment of the Basic Court.
17. On 8 August 2014, the Office of the Chief State Prosecutor (Notification KMLC. No. 70/14) through its lawyer informed the Applicant that it had found no legal basis for filing a request for protection of legality against the final judgment of the Basic Court in Prizren.
18. On 23 January 2015, the Applicant against the aforementioned lawyer filed a request for initiation of disciplinary proceedings with the Disciplinary Counsel of the Chamber of Advocates.
19. On 23 January 2015, the Applicant against the aforementioned Judgment of the Basic Court filed again a request for protection of legality with the Chief State Prosecutor's Office. In his request for protection of legality, the Applicant claimed that his lawyer who he had authorized to represent him in the aforementioned contested matter missed the deadline for submitting the request.
20. In his request for protection of legality, alleging violation of the essential provisions of contested procedure and erroneous application of the substantive law, the Applicant requested that the Judgment of the Basic Court be annulled and the case be remanded to the first instance court for retrial. In addition, the Applicant in his request claims that he was denied the right to a fair trial as the lawyer authorized by him, missed the deadline for appeal, and therefore he had lost the right to property.
21. On 28 January 2015, the Office of the Chief State Prosecutor (Notification KMLC No. 70/14) informed the Applicant that "[...] *carefully read this second submission (considered as a proposal for filing the request for protection of legality), and found that there is no legal basis to file against the above mentioned judgment the request for protection of legality, and in this respect,*

has remained completely with the act of the Office of KMLC. no. 70/14, of 05.08.2014”.

22. On 28 May 2015, the Disciplinary Panel of Kosovo Chamber of Advocates by Decision, R. DK-No.17-3 / 15 declared responsible the aforementioned lawyer for disciplinary violation in the exercise of his duty as a lawyer and sentenced him to a certain monetary fine.
23. Based on the case file submitted by the Applicant on 18 August 2015, the Basic Prosecutor's Office in Prizren against the same lawyer filed indictment on the grounds that the lawyer in the exercise of his duties as an authorized representative, by not filing appeal against the judgment of Basic Court did not fulfill his official duties, and, therefore, deliberately violated the rights of another person.

Applicant's Allegations

24. As mentioned above, the Applicant in his Referral alleges that the Basic Court in Prizren had violated his rights to a fair trial, the right to remedy and the right to property as guaranteed by the Constitution, UDHR and the ECHR.
25. The Applicant further alleges violation of the right to appeal by the Basic Court on the grounds that this Court did not personally submit a copy of the challenged judgment.
26. Finally, the Applicant requests the Court to annul the Judgment of the Basic Court of 25 June 2013 and the case be remanded to the first instance court for retrial.

Admissibility of the Referral

27. The Court first examines whether the Referral meets the admissibility requirements laid down in the Constitution, and further specified in the Law and the Rules of Procedure.
28. 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.”

29. The Court also refers to Article 47.2 of the Law, which provides that:

“The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law“.

30. Furthermore, the Court takes into account Rule 36 (1) (b) of the Rules of Procedure, which states that:

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

[...] (b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted”.

31. The Court notes that the challenged judgment is the decision of the first instance in the proceedings before the Basic Court and against it was allowed appeal, which would be reviewed by the Court of Appeal.
32. Based on the case file, the Court notes that no appeal was filed against the Judgment of the Basic Court.
33. In this regard, the Applicant alleges that the Basic Court violated the right to appeal on the grounds that this Court did not serve on him a copy of the judgment. The Applicant further alleges that the abovementioned Judgment was served only on his lawyer, who had not informed him in time about the Judgment of the Basic Court and as a result of his failure to appeal in time, the Judgment of the Basic Court became final.
34. In this case, the Court notes that the Applicant authorized the aforementioned lawyer to represent him in the proceedings before the Basic Court and other courts. The Court considers that the procedural actions taken by the legal representative of the party, under the power of attorney, are considered to be the party's own actions. In this case, such actions also include the receipt of the court decisions (see case KI46/13, KI47/13, KI48/13 and KI68/13, Applicant *Naim Morina, Bukurije Drançolli, Avdi Imeri and Genc Shala*, the Constitutional Court, Resolution on Inadmissibility of 5 July 2013).
35. Furthermore, the Court refers to the case law of the European Court of Human Rights, which concluded that "*a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes*" (See *Kamasinski v. Austria*, No. 9783/82, ECHR, Judgment of 19 December 1989, A. no. 168). In analogous fashion, the Court considers that public authorities cannot be held responsible for the actions of the lawyer, moreover when the lawyer is authorized by the party itself, in this case the Applicant.
36. Therefore, based on the fact that against the Judgment the Basic Court no appeal was filed, the Court finds that the Applicant has not exhausted effective legal remedies.
37. The Court reiterates that the principle of subsidiarity requires that before addressing the Constitutional Court, the Applicants should exhaust all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violations of rights guaranteed by the Constitution. The rule is based on the assumption that the legal order of Kosovo shall provide an effective remedy for the violation of constitutional rights (See case *Selmouni v. France*, ECHR, no. 25803/94, Judgment of the Constitutional Court, of 30 October 2010).
38. Accordingly, the Court considers that the Applicant's Referral is inadmissible, due to non-exhaustion of all available legal remedies, in accordance with

Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 36 (1) (b) of the Rules of Procedure.

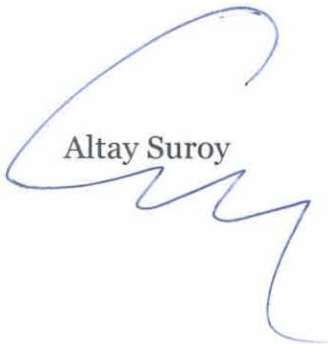
FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 47.2 of the Law and Rule 36 (1) (b) of the Rules of Procedure, on 15 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; and
- IV. This Decision is effective immediately.

Judge Rapporteur



Altay Suroy

President of the Constitutional Court



Arta Rama-Hajrizi