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

Prishtina, 6 february 2017
Ref. no.:RK 1036/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI62/16

Applicant

Bekë Lajçi

Constitutional review of Decision Ac. no. 1961/2015 of the Court of Appeal, of 16 November 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 is submitted by Mr. Bekë Lajçi, lawyer from Peja (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision Ac. No. 1961/2015, of the Court of Appeal, of 16 November 2015.

3. The challenged decision was served on the Applicant on 30 December 2015.

Subject matter

4. The subject matter is the constitutional review of the challenged decision, which allegedly has violated the Applicant's rights guaranteed by Article 24 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 46 [Protection of Property], and Article 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 [Right to a fair trial], paragraph 1, and Article 1 of Protocol 1 [Protection of Property] of the European Convention of Human Rights (hereinafter: the ECHR).

5. The Applicant further requests the Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure, namely *"to order the Notary in Istog and any other notary in the Republic of Kosovo to not compile any contract on sale-purchase, renting, or modification, and not to take any legal action which is related to the immovable property which is registered in the name of SH. J. from Istog [...]."*

6. The Applicant also requests the Court to schedule public hearing *"to clarify the evidence and the alleged facts [...]."*

Legal basis

7. The Referral is based on Article 113.7 of the Constitution, Articles 27 and 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rules 29 and 54 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedures).

Proceedings before the Court

8. On 8 April 2016, the Applicant submitted the Referral to the Court.

9. On 14 and 15 April 2016, the Applicant submitted additional information and documents to the Court.

10. On 15 April 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Robert Carolan (Presiding), Almiro Rodrigues and Selvete Gërxhaliu-Krasniqi.

11. On 25 April 2016, the Court informed the Applicant about the registration of the Referral and sent a copy of the Referral to the Court of Appeal and to I.J., as an interested party in the abovementioned Referral.

12. On 20 May 2016, the Applicant submitted to the Court some clarifications regarding his Referral and several additional documents.

13. On 2 June 2016, the Court informed the Basic Court in Peja, Branch in Istog, about the registration of the Referral and requested that it submits the complete case file regarding the abovementioned case.

14. On 10 June 2016, the Basic Court in Peja, Branch in Istog, submitted the requested case file to the Court.

15. On 14 September 2016, the President of the Court appointed Judge Ivan Čukalović as a member of the Review Panel instead of Judge Robert Carolan, who resigned from the position of a judge of the Court on 9 September.

16. On 29 September 2016, the President of the Court replaced Judge Almiro Rodrigues as a member of the Review Panel instead of Judge Snezhana Botusharova, who, by age, was appointed as Presiding Judge of the Review Panel.

17. On 29 September 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

18. From 2002 to 2007, the Applicant, in a capacity of a lawyer, represented I.J. in several proceedings before the regular courts. They had entered into an agreement by which they agreed on the amount of compensation that the Applicant would receive as compensation for lawyers' services that he provided to I.J.

19. As I.J. had not fulfilled his obligations towards the Applicant, the latter filed a claim with the Municipal Court in Istog, requesting that I.J. be obliged to pay the Applicant a certain amount of money.

20. On 2 February 2011, the Municipal Court in Istog (Judgment C. No. 51/09) approved the Applicant's statement of claim and obliged I.J. to pay him a certain amount of money as a compensation for the lawyers' services he had provided to I.J.

21. On an unspecified date, I.J. filed an appeal against the abovementioned Judgment.

22. Meanwhile, I.J. submitted an additional proposal to the Municipal Court in Istog, where he requested the division of property, which until that time was in joint ownership with his mother SH.J. and with his brother Z.J.

23. On 5 April 2011, acting upon the proposal of I.J. for division of immovable property in joint ownership, the Municipal Court in Istog (Decision N. no. 23/010) decided that the property be divided between SH.J. and Z.J., so that I.J. does not take any part of that joint ownership. SH.J. [the mother of I.J.] was declared the owner of a business premise [that would later become the object of enforcement proceedings], while Z.J. [brother of I.J.] had acquired several other parcels of land. The court decided so because I.J., SH.J. and Z.J. reached an extrajudicial settlement to divide the property they had in joint ownership. With its decision, the Municipal Court in Istog had only confirmed their agreement.

24. On 5 March 2012, the District Court in Peja (Judgment Ac. No. 146/2011) rejected the appeal of I.J. [See paragraph 21] as ungrounded and upheld the Judgment (C. No. 51/09, of 2 February 2011) of the Municipal Court in Istog.

25. Given that the aforementioned judgment of the Municipal Court in Istog became final and since I.J. did not fulfill his obligation voluntarily, the Applicant, in his capacity as a creditor, filed a request with the Municipal Court in Istog for initiation of the enforcement proceedings against I.J., in a capacity of a debtor.

26. On 18 May 2012, the Municipal Court in Istog (Decision E. No. 150/012) set the enforcement in favor of the Applicant.

27. I.J. filed an objection against the abovementioned decision and requested that the latter be annulled and the Applicant's proposal for execution be rejected.

28. On 16 November 2012, the Municipal Court in Istog (Decision E. No. 150/012) rejected the objection of I.J. and confirmed the enforcement as lawful and permissible.

29. On 2 October 2013, now the Basic Court in Peja, Branch in Istog (hereinafter: the Basic Court), through Decision E. No. 150/12 held that *"the execution procedure reached the stage of preparing the public auction"* and that *"the court is obliged to determine the market value of the immovable property"*. By this decision and based on the expertise of the expert appointed for the purpose of determining the market price, the Basic Court in Istog set a price for the business premise referred to above, which was assessed as the object of the enforcement in this case.

30. Against this decision, I.J. filed an appeal with the Court of Appeal on the grounds of erroneous and incomplete determination of factual situation and erroneous application of the substantive law. I.J. challenged in this case the

proposal for execution of the Applicant, on the grounds that the Basic Court in Istog allowed the execution *"in the property which is not his."*

31. On 4 April 2014, the Court of Appeal (Decision Ac. No. 3432/2013) approved the appeal of I.J. as grounded, annulled the Decision of the Basic Court (E. no. 150/12, of 2 October 2013) and decided to remand the case of the latter for reconsideration. The Court of Appeal found that: a) the market price of the object of execution is taken in violation of legal provisions; b) the Basic Court had decided with a decision and it should have decided with a conclusion; and, c) the Basic Court did not take into consideration the remarks of I.J. It is worth mentioning that the Court of Appeal did not make any statement related to whether the enforcement was permitted in the property of I.J. or in the property that was not in his name.

32. In parallel with these proceedings that were being conducted before the regular courts, the Applicant transferred his enforcement case against I.J. to the Private Enforcement Agent appointed for the territory of Gjakova.

33. On 18 August 2014, SH.J. filed an objection with the Basic Court, alleging that she is the owner of the business premise which was designated as the object of the enforcement. In her objection, SH.J. reiterated that *"this premise cannot be object of execution"* as it is her property and not of her sons', I.J.

34. On 9 September 2014, the Basic Court (Conclusion P. No. 1/2014) instructed in regular civil contest the third person, SH.J., because the latter and the Applicant have different allegations regarding the ownership of the business premise and as such the issue should be regulated by a new civil contest. According to the case file, the civil contest instructed by the Basic Court has not yet been completed.

35. On 16 September 2014, the Private Enforcement Agent, despite the aforementioned Conclusion, organized a public auction for the sale of the immovable property [the business premise] which he qualified as the property of I.J. After completion of the public auction, the Applicant who appeared as bidder alongside another person was announced as the winner of the auction. Through the procedures conducted by the Private Enforcement Agent, the Applicant was announced the purchaser of the business premise in question. In this case, the Applicant was ordered to deposit the difference of funds to I.J., since he had received the part that I.J. owed him for the provided lawyers' services.

36. On 26 September 2014, the Private Enforcement Agent (Order P. no. 33/14) assigned the execution of the enforcement against the debtor I.J. As the object of enforcement was determined the business premise which was transferred to the ownership of SH.J. in 2011.

37. I.J. filed an objection against the aforementioned Order before the Basic Court.

38. On 6 November 2014, the Basic Court (Decision P. no. 3/014) approved the objection of I.J. and annulled the aforementioned Order of the Private Enforcement Agent with the following reasoning:

> *"[...] The Court assessed the challenged order regarding the allegations in the appeal – objection and finds that the appeal – objection is grounded, and as such it is approved. This is assessed as such based on the fact that as the situation in the case file was ascertained regarding the Decision AC. No. 3432/013, of the Court of Appeal as the second instance court, the Decision E. no. 150/012, of the Basic Court – Branch in Istog, of 2 October 2013 was quashed, and the case was remanded for reconsideration with the remarks and suggestions determined in that Decision.*
> *Within the meaning of this, as determined by the case file, the suggestion of that Decision in the hereinafter execution procedure, was not accomplished, therefore the preliminary condition for determining the price of the object [...]. Whereas regarding the matter of challenged order, within the meaning that the local business which is object of execution, is not property of the debtor, but it is the property of Shahe Jahaj, within the meaning of this, the Court by Conclusion E. no. 1/2014, of 9 September 2014, instructed the third person in regular civil contest for realization of the claimed right."*

39. The Applicant filed an appeal with the Court of Appeal against the aforementioned decision of the Basic Court on the grounds of essential violation of procedural provisions and erroneous application of the substantive law, requesting to uphold the decisions taken by the Private Enforcement Agent, which announced him the winner of the public auction for the sale of the business premise.

40. On 16 November 2015, the Court of Appeal (Decision Ac. No. 1961/2015) [the challenged decision] rejected the Applicant's appeal as ungrounded and decided to remand the case for reconsideration to the Private Enforcement Agent. On this occasion, the Court of Appeal reasoned:

> *"In the present case, initially, by filing the proposal for execution, the Private Enforcement Agent did not consider the fact which was the ownership of the Debtor by any certificate of possession.*
>
> *It is a fact that the Private Enforcement Agent acted in accordance with the suggestions of the Court of Appeal, but he did not determine that basic fact for this execution procedure; the fact that in the moment of filing the proposal for execution, who was the owner of the local business – the immovable property which is now subject of execution, because in the case file it does not seem that it was acted in that direction. Such thing is requested by the Court of Appeal also based on the answer in the appeal, which was filed by the Debtor himself. Because there cannot be any execution if the object of execution does not belong to the Debtor, because as it is known, the object of execution in order to be executed shall be*

exclusively property of the Debtor. According to the Court of Appeal, if this fact would be ascertained in the beginning, the situation would not be as it is now, and there would not be delays for this procedure [...]. It would be okay, if the property – local business which was sold to the Creditor during the execution procedure of the Private Enforcement Agent, would be evidenced by Certification of Ownership which proves that it is the property of the Debtor. But, by the case file, still it is not certain the ownership of this local business, therefore, this reason and the challenged Decision had to be upheld, because this case should have been sent for reconsideration with the Private Enforcement Agent which initially should ascertain the property of the Debtor and then to allow its sale if the determined legal conditions are met [...]."

Applicant's allegations

41. The Applicant alleges that the decisions of the regular courts violated his right to equality before the law, to fair and impartial trial, right to protection of property and general principles of the judicial system guaranteed by the Constitution and the ECHR.

42. Regarding the right to equality before the law, the Applicant alleges that *"the violation of equality in the present case becomes evident due to the fact that the Court of Appeal favors and rewards the debtor, to the detriment of the creditor – herein the Applicant, ignoring the existence of the uncontested property of the debtor, violating and ignoring all the procedural rights of the Applicant [...]."*

43. As regards the right to fair and impartial trial, the Applicant alleges that the Court of Appeal violated his right through *"arbitrariness in decision-making, namely the decision is not reasoned."* According to him, the Court of Appeal *"rendered a decision in contradiction to the evidence and the case file and has not rendered a decision in a rightful, independent and impartial way".*

44. Regarding this allegation, the Applicant further emphasizes that the Court of Appeal in the reasoning of its decision *"explicitly requires from PE* [Private Enforcement Agent] *that upon rendering a decision [...] to reject the proposal of the creditor – herein the proposer [...] with the reasoning that the facility that is subject to execution – the business premise [...], is not a property of I. J. but rather is a property of the third person Sh. J. (the mother of the debtor)."* In this way, he considers that the Court of Appeal has foreseen the end-result of the case, by not leaving any enforcement options to the Private Enforcement Agent.

45. The Applicant further reiterates that although the enforcement should be treated with urgency, the regular courts have prolonged the case and thus making impossible the execution by *"remanding the case with no reasons to the reopened procedure – sending the case from one to the other, once to the first instance court and the other time to the second instance court – for at*

least three times until now, remanding it again to the Private Enforcement [...]." He also emphasized that there have been *"6 years after the decision – res judicata – and 5 years after the decision on execution"* whereas *"the judgment has not been executed yet."*

46. As regards the right to protection of property, the Applicant alleges that the Court of Appeal has violated this right by not allowing him to be compensated for the amount of money that I.J. owes to him and that this was a result of *"an erroneous decision, alleging that allegedly the facility which is subject to enforcement is not a property of the debtor."*

47. Finally, the Applicant addresses the Court with the following request:

> *"I. TO DECLARE the Referral [...] of the Applicant [...] admissible;*
> *II. TO HOLD that there has been a violation of Article 31 of the Constitution [...] in conjunction with Article 6.1 of the European Convention on Human Rights;*
> *III. TO HOLD that there has been a violation of Article 46 of the Constitution [...];*
> *IV. TO HOLD that there has been a violation of Article 24 of the Constitution [...];*
> *V. TO DECLARE INVALID the following:*
> *1. Decision Ac. No. 1961/15, of the Court of Appeal of Kosovo, of 16 November 2015 and*
> *2. Decision PPP. No. 3/014, of the Basic Court in Peja – Branch in Istog, of 17 April 2015.*
> *VI. To UPHOLD ORDER P. no. 33/14, of the Private Enforcement Agent [...], of 24.09.2014 [...]*
> *VII. To ORDER the transfer of the ownership in the cadastral registers [...] based on ORDER [...] of the Private Enforcement Agent within the time limit: immediately after receiving this judgment.*
> *VIII. TO ORDER the Basic Court in Peja – Branch in Istog and the Private Enforcement Agent to [...] submit to the Constitutional Court the information about the measures taken for the enforcement of the Judgment of the Constitutional Court.*
>
> *P.S. Regarding the Applicant's request for imposition of interim measure [...] to render this DECISION*
> *I. The Constitutional Court GRANTS Interim Measure [...] so that:*
> *II. The Court ORDERS the Notary in Istog and any other notary in the Republic of Kosovo to not compile any contract on sale-purchase, renting, or modification, or not to take any action [...].*"

Admissibility of Referral

48. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution and as further specified in the Law and Rules of Procedure.

49. In this respect, the Court refers to 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."*

50. The Court also refers to Article 47.2 [Individual Requests] of the Law, which foresees:

> *"[...] 2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*

51. The Court further refers to Rule 36 (1) (b) of the Rules of Procedure which provides:

> *"(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,*
> > *[...]."*

52. In this regard, the Court recalls that the Applicant challenges the Decision (Ac. No. 1961/2015 of 16 November 2015) of the Court of Appeal which upheld the Decision (P. no. 3/014, of 24 September 2014) of the Basic Court. In that case, the Court of Appeal confirmed that the Order (P. no. 33/14, of 24 September 2014) of the Private Enforcement Agent should be remanded for reconsideration given that the issue of the object of enforcement has not been clarified yet.

53. The Court also recalls the Applicant's allegations that the decision of the Court of Appeal violates his rights guaranteed by Articles 24, 31, 46 and 102 of the Constitution and the rights guaranteed by Article 6, paragraph 1, of the ECHR and by Article 1 of Protocol 1 of the ECHR.

54. In this regard, the Court notes that all of Applicant's allegations are directed to the decision of the Court of Appeal, a decision which in itself is not final with respect to the issue of enforcement. This decision does not deny to the Applicant the right to receive compensation for the lawyers' services provided to I.J., a right which was confirmed by the court decisions of the first and the second instance [see paragraphs 21 and 25]. In other words, the Court notes and does not challenge the fact that the Applicant has already acquired his

right to compensation and that decisions regarding his right to compensation became final. Accordingly, the Applicant should receive the granted compensation.

55. The Court notes that by the challenged decision, the Court of Appeal has only confirmed the statements of the Basic Court that the issue of the object of enforcement, which could be used for the accomplishment of the monetary request of the Applicant is still a disputable matter and, therefore, the Private Enforcement Agent should have this fact in mind when dealing with re-processing of the case.

56. In this respect, the Court recalls the reasoning of the Court of Appeal when rejecting the Applicant's appeal as ungrounded. It stated:

> *"[...] Private Enforcement Agent [...] did not consider the fact of which was the ownership of the Debtor by any certificate of possession [...] there cannot be any execution if the object of execution does not belong to the Debtor [...].*
> *It is a fact that provisions of Article 205, paragraph 1 and 2 of the LEP determine the situation of changing the owner of the real estate during the executive procedure... But, in this present case, the executive procedure started on 18 May 2012, whereas by Decision N. no. 23/010, of the Court of the first instance in Istog, of 5 April 2011, which became final on 3 May 2011, the owner of the local business is Sh. J. and not the debtor, this was as such before the executive procedure began and not during the executive procedure. This situation should be clarified by the Private Enforcement Agent and the parties in this procedure in the reconsideration with the Private Enforcement Agent."*

57. The Court notes that the reasoning of the Court of Appeal clearly shows that the procedure for the determination of the enforcement object is disputable, which still has not been resolved as the parties to the case have different claims on this matter. The Private Enforcement Agent was instructed on how to act in the reconsideration of this enforcement case.

58. In light of these facts, the Court notes that it is not its role to intervene in the issue of determination of the facts by the regular courts, as they have jurisdiction to decide on determination of the facts and the interpretation of laws related to a specific case.

59. The Court reiterates that this approach is in full compliance with the principle of subsidiarity, which requires that before addressing the Constitutional Court, the Applicants must exhaust all procedural possibilities in the regular proceedings, in order to prevent any violation of human rights and freedoms guaranteed by the Constitution or, if any, to remedy such a violation of rights guaranteed by the Constitution.

60. The rationale for the exhaustion rule is to afford the competent authorities, including the regular courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order shall provide an effective legal remedy for the violation of the constitutional rights. This is an important aspect of the subsidiary character of the Constitution (see Resolution on Inadmissibility, *AAB-RIINVEST University L.L.C. Prishtina v. the Government of the Republic of Kosovo,* case KI41/09, of 21 January 2010, and see *mutatis mutandis*, ECHR *Selmouni vs. France*, No. 25803/94, decision of 29 July 1999).

61. In sum, the Court finds that in this case there is no final decision of the competent authority, which in this stage could be subject of review before the Constitutional Court. Therefore, the Court concludes that the Applicants' Referral is premature, 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.

Request for hearing

62. The Applicant also requested the Court to schedule a public hearing *"to clarify the evidence and the alleged facts [...]."*

63. The Court recalls that in accordance with Article 24 of the Law in conjunction with Rule 39 (2) of the Rules of Procedure, it is not obliged to hold a hearing. It may order the holding of a hearing if it considers necessary to clarify the evidence. Given that the present case is premature, the Court does not consider that the holding of the hearing is necessary and, therefore, the Applicant's request is rejected.

Request for interim measure

64. The Applicant requests the Court to impose interim measure, namely *"to order the Notary in Istog and any other notary in the Republic of Kosovo to not compile any contract on sale-purchase, renting or modification and not to take any legal action which is related to the immovable property which is registered in the name of SH. J. from Istog [...]."*

65. In order for the Court to impose an interim measure, in accordance with Rule 55 (4) and (5) of the Rules of Procedure, the Court must determine that

> *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
>
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and [...]*

If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application."

66. As mentioned above, the Applicant has not shown *a prima facie* case on the admissibility of the Referral. Therefore, the request for imposition of an interim measure is to be rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rules 36 (1) (b), 55 (4), 56 (2) and 56 (3) of the Rules of Procedure, on 6 february 2017, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY the Parties of this Decision;

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 | **President of the Constitutional Court**

Bekim Sejdiu | Arta Rama-Hajrizi