



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

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Prishtina, on 7 November 2016  
Ref. No.:RK999/16

## **RESOLUTION ON INAMDISSIBILITY**

in

**Case No. KI86/16**

Applicant

**“BENI”, Trade Company**

**Constitutional review of  
Judgment E. Rev. no. 33/2015, of the Supreme Court of Kosovo,  
of 9 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 is submitted by Gazmend Rexhepi, the owner of “BENI” Trade Company with seat in Prishtina (hereinafter: the Applicant Company), represented by the law firm “JUDEX” with office in Prishtina.

### **Challenged decision**

2. The Applicant Company challenges Judgment E. Rev. no. 33/2015, of the Supreme Court, of 9 December 2015, in conjunction with Judgment Ae. no. 87/2014, of the Court of Appeal, of 13 May 2014, and Judgment Ae. no. 25/2015, of the Court of Appeal, of 17 April 2015.
3. The Judgment of the Supreme Court was served on the Applicant Company on 5 February 2016.

### **Subject matter**

4. The subject matter is the constitutional review of the challenged Judgment E. Rev. no. 33/2015, of the Supreme Court of 9 December 2015.
5. The Applicant Company alleges violation of Article 31 [Right to Fair and Impartial Trial] and Article 119 [General Principles] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the Convention) and Article 10 of the Universal Declaration of Human Rights (hereinafter: the Universal Declaration).
6. The Applicant Company requests the imposition of the interim measure and the prohibition of the execution of the challenged decisions of the Supreme Court and the Court of Appeal.

### **Legal basis**

7. The Referral is based on Articles 21.4 and 113.7 of the Constitution, Articles 27, 47 and 48 of the Law no. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rules 55 and 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**

8. On 2 June 2016, the Applicant Company submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
9. On 17 June 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 (judges).
10. On 30 June 2016, the Court informed the representative of the Applicant Company about the registration of the Referral and requested him to submit evidence, showing the date when the challenged decision was served on him. On the same date, a copy of the Referral was sent to the Supreme Court and to the Basic Court in Prishtina.

11. On 8 July 2016, the Basic Court in Prishtina submitted the evidence (the acknowledgment of receipt), indicating the date of receipt of the challenged decision of the Supreme Court by the representative of the Applicant Company.
12. On 26 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**

13. On 8 August 2012, the claimant "Jack Daniel's Properties" filed a claim, alleging that the Applicant Company violated their trademark, because it imported 100 packages of whiskey with a mark of "Jack Daniels".
14. On 9 December 2013, the Basic Court in Prishtina, by Judgment I. C. no. 342/2012, rejected the claim of the claimant "Jack Daniel's Properties" as ungrounded, filed against the Applicant Company. The Basic Court reasoned that the claimant failed to prove that the Applicant Company violated its trademark as defined by Article 8 of the Law on Trademarks.
15. On 26 December 2013, the claimant "Jack Daniel's Properties" filed appeal with the Court of Appeal against the abovementioned judgment of the Basic Court, alleging essential violation of the procedural provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law.
16. On 13 May 2014, the Court of Appeal by Judgment, Ae. no. 87/2014, approved the appeal of the claimant as grounded, modified the appealed judgment of the Basic Court and found that: (i) the Applicant Company violated the claimant's trademark when it imported 100 packages of whiskey with a mark "Jack Daniels", without the authorization of the claimant, and (ii) the claimant is allowed destruction of the imported and retained goods at customs.
17. The Court of Appeal concluded that the Applicant Company imported goods contrary to Article 8.2, paragraph 3 of the Law on Trademarks, because with unauthorized removal of codes from goods, the claimant is disabled protection of its original goods from fake goods circulating in the market.
18. On 30 June 2014, the Applicant Company filed a request for revision with the Supreme Court against the abovementioned judgment of the Court of Appeal. The Applicant Company complained of essential violation of the procedural provisions and erroneous application of the substantive law.
19. On 16 December 2014, the Supreme Court by Decision Rev. E. no. 42/2014, approved the revision of the Applicant Company as grounded, while it quashed the appealed judgment of the Court of Appeal and remanded the case for retrial and reconsideration. The Supreme Court, among others, reasoned that the Judgment of the Court of Appeal contains violation of the procedural provisions, because it is contradictory to itself, and there are contradictions between the judgment and the content of the case file.



20. On 17 April 2015, the Court of Appeal by Judgment Ae. no. 25/2015, held again that the Applicant Company violated the claimant's trademark by importing 100 packages of whiskey with a mark "Jack Daniels" without authorization and by erasing the production codes. The Court of Appeal emphasized, among other, that the Applicant Company erased codes from the goods in an unauthorized manner, so that the claimant's right to protect its original goods from the fake goods in circulation in the market was violated.
21. On 24 June 2015, the Applicant Company filed again a request for revision with the Supreme Court against the abovementioned Judgment of the Court of Appeal. The Applicant Company mainly complained about the violations of essential procedural provisions and erroneous application of the substantive law, by disregarding the decisive facts and evidence and incorrect authorization of the claimant.
22. On 9 December 2015, the Supreme Court by Judgment E. Rev. no. 33/2015, rejected as ungrounded, the revision of the Applicant Company filed against the Judgment of the Court of Appeal.
23. With regard to the consideration of the evidence and decisive facts, the relevant part of the Judgment of the Supreme Court reads:
- "[...] no specific allegation is presented in the revision as to what evidence that is found in the case file was not reviewed by the Court. The allegation mentioned in the revision that the enacting clause of the Judgment of the second instance court is in contradiction with the reasons provided, due to the reason that the decisive facts were ignored as to what is the violation of the trademark, only referring to the code (which is absent in the bottles imported by the respondent), was considered as ungrounded by the Supreme Court of Kosovo, due to the reason that the enacting clause of the challenged Judgment is in compliance with the reasoning of the Judgment and existing evidence in the case."*
24. As regards the application of the substantive law, the relevant part of the Judgment of the Supreme Court states:
- "The fact that the claimant did not present any evidence that the codes have been removed, [...] was reviewed by the Supreme Court, however the same did not have any impact in rendering a different decision, because by reviewing the case, the fact that the bottles of alcoholic beverage were missing the code was not contested, however, whether the absence of the code in bottles of the trademark foreseen pursuant to the legislation in our country, was contentious between the parties."*
25. As to the allegations of the Applicant Company regarding the laboratory analysis of the goods and legitimacy of the claimant, the relevant part of the Judgment of the Supreme Court reads:

*“The Supreme Court of Kosovo has also reviewed other allegations of the revision, that based on the report of the customs after the lab analysis, the analyzed samples of the product–alcoholic beverage Jack Daniel’s, corresponds with the quality specifications pursuant to Regulation 16/88 and 63/88, that no differences are noticed between the bottles, that the challenged product contains the labels, however these facts have to do with the determination of the factual situation, for which, pursuant to Article 214, paragraph 2 of LCP, a revision cannot be filed.*

*In relation to the allegation that the authorization of the claimant is not valid, due to the reason that it is an official document, and as such it is notarized before the public body – Notary, was considered ungrounded by the Supreme Court of Kosovo, as the authorization of the claimant exists in the case file, which meets the criteria pursuant to Chapter V – authorized representatives, of the Law on Contested Procedure.”*

### **Applicant’s allegations**

26. The Applicant Company alleges violation of Article 31 [Right to Fair and Impartial Trial] and Article 119 [General Principles] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the Convention and Article 10 of the Universal Declaration.

27. The Applicant Company alleges that:

*“By decision E. Rev. No. 33/2015 of the Supreme Court of Kosovo and by Judgment AE. No. 25/2015 of the Court of Appeal of Kosovo, the right of “Jack Daniel’s Properties Inc.” to request trademark protection is not confirmed anywhere, or whether the Applicant has committed a violation of the trademark, and where these violations consist. Also, the Supreme Court of Kosovo has accepted a decision that is not based on the legal provisions which are clear enough, but decides based on its own opinion, as fair.”*

28. The Applicant Company proposes to the Court to: *“(i) grant an interim measure, (ii) to grant an interim measure until the Constitutional Court decides on the request for constitutional review of Judgment Rev. E. no. 33/2015 of the Supreme Court of Kosovo of 9 December 2015, and Judgment Ae. no. 25/2015 of the Court of Appeal of Kosovo, of 17 April 2015, and (iii) to immediately suspend the execution procedure of the Judgment E. no. 33/2015 of the Supreme Court, of 9 December 2015, and Judgment Ae. no. 25/2015 of the Court of Appeal of Kosovo, of 17 April 2015.”*

29. As to the request for imposition of interim measure, the Applicant Company added that by the decision of the Supreme Court, the imported beverage in a value 12,840.00 euro are in the process of destruction and that the Applicant Company would suffer irreparable damage if an interim measure is not imposed.



## Admissibility of the Referral

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

31. 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.”*

32. The Court also refers to Article 48 of the Law, which provides:

### *Article 48 Accuracy of the Referral*

*“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.”*

33. The Court further takes into account Rule 36 (2) (d) of the Rules of Procedure, which specifies:

### *Rule 36 Admissibility Criteria*

*“(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:*

*...*

*(d) the Applicant does not sufficiently substantiate his claim.”*

34. In the present case, the Court notes that the Applicant Company mainly is not satisfied with the outcome of the case in the proceedings conducted before the regular courts.

35. The Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law allegedly committed by the regular courts when assessing evidence or applying the law (legality), unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).

36. The Constitutional Court recalls that it is not a fact-finding Court and thus the correct and complete determination of the factual situation is within the full jurisdiction of the regular courts. The role of the Constitutional Court is to ensure compliance with the constitutional standards during the court proceedings before the regular courts and cannot, therefore, act as a “fourth instance court” (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment

of 16 September 1996, para. 65, also *mutatis mutandis* see case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012).

37. The Court notes that the Applicant Company has had the benefit of adversarial proceedings; that it was able, at the various stages of those proceedings, to adduce the arguments and evidence it considered relevant to its case; that it had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; that all its arguments which were relevant to the resolution of the case were duly heard and examined by the courts; that the factual and legal reasons for the impugned decision were set out at length. Accordingly, it results that the proceedings taken as a whole were fair (See the Case of *García Ruiz v. Spain*, [GC], application no. 30544/96, Judgment of 21 January 1999, paragraph 29).
38. In addition, the Court considers that the Applicant Company only cites the provisions of the Constitution, without substantiating how these constitutional norms were violated to its detriment, in accordance with Article 48 of the Law.
39. As a conclusion, the Court considers that the Applicant Company has not substantiated the allegations of a violation of fundamental human rights guaranteed by the Constitution.

#### **Request for interim measure**

40. The Applicant Company requested the imposition of the interim measure because: *“the destruction of these products would cause irreparable damage to the Applicant.”*
41. The Court refers to Article 27 which provides:

#### *Article 27 Interim Measures*

*“The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.”*

42. The Court also refers to Rule 55 (4) of the Rules of Procedure, which specifies:

*The Review Panel shall recommend whether the request for interim measures be granted, it must find 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.”*

43. As mentioned above, the Applicant Company has not shown *prima facie* case on the admissibility of the Referral. Accordingly, the request for interim measure must be rejected as ungrounded.

### **FOR THESE REASONS**

The Constitutional Court of Kosovo, pursuant to Article 113.7 of the Constitution, Articles 27 and 48 of the Law, and Rule 36 (2) (d) and 55 (4) and 56 of the Rules of Procedure, on 26 September 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;
- IV. TO DECLARE this Decision effective immediately.

 <b>Judge Rapporteur</b> Bekim Sejdiu		 <b>President of the Constitutional Court</b> Arta Rama-Hajrizi
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