



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Pristina, 9 October 2013
Ref. No.:RK477/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 127/13

Applicant

Valdet Sutaj

**Constitutional Review
of the Decision of the Court of Appeal of Kosovo Ac. No. 3544/12 of 3 May
2013**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge and
Arta Rama-Hajrizi, Judge.

The Applicant

1. The Referral was submitted by Valdet Sutaj from Deçan, represented by Gazmend Nushi (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Decision of the Court of Appeal of Kosovo Ac. No. 3544/12 of 3 May 2013.

Subject matter

3. The Applicant alleges that the Decisions rendered by the Municipal Court in Deçan and the Court of Appeal of Kosovo violated Articles 19 [Applicability of International Law] and 121 [Property] of the Constitution, the provisions of the Law No. 02/L-33 on Foreign Investments, the provisions of the Agreement for the Promotion and Protection of Investments between the Republic of Kosovo and the Swiss Confederation of 27 October 2011, and the provisions of the Law No. 03/L-008 on Execution Procedure.
4. The aforementioned Courts, within the framework of the proposal for the execution procedure, in order to return the debt, owed by the Applicant, decided to handover the ownership of the immovable property of the Applicant to the creditor, *Compacttherm AG* with its seat in Switzerland.
5. The Applicant also requests from the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure, namely to prohibit the creditor, *Compacttherm AG* from alienating the immovable property of the Applicant until the completion of the procedure before the Constitutional Court.

Legal basis

6. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Articles 22 and 27 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law), and Rules 54, 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

7. On 20 August 2013, the Applicant submitted the Referral to the Court.
8. On 28 August 2013, the President appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu (member) and Arta Rama-Hajrizi (member).
9. On 28 August 2013, the Constitutional Court informed the Applicant on the registration of the Referral and further requested to submit to the Court the copies of the Judgment of the Municipal Court in Deçan C. No. 227/07 of 1 April 2008, the Judgment of the District Court in Peja Ac. No. 277/08 of 12 April 2010, the Decision of the Municipal Court in Deçan E. No. 251/10 of 30 April 2010, and the Decision of the District Court in Peja Ac. no. 440/2010 of 6 June 2011.

10. On 2 September 2013, the Applicant provided the Court with the copies of the Judgment of the Municipal Court in Deçan C. No. 227/07 of 1 April 2008, the Judgment of the District Court in Peja Ac. No. 277/08 of 12 April 2010 and the Decision of the Municipal Court in Deçan E. No. 251/10 of 30 April 2010.
11. On 10 September 2013, the Review Panel considered the report of the Judge Rapporteur and deliberated on the matter and made a recommendation to the full Court on the inadmissibility of the Referral.

The facts of the case

12. On 30 April 2010, the creditor "*Compactherm AG*", with its seat in Switzerland, filed a proposal for the execution of the Judgment of the Municipal Court in Deçan (C. nr. 227/2007 of 1 April 2008) and the Judgment of the District Court in Peja (Ac. nr. 277/08 of 12 April 2010), namely the payment of the debt by the Applicant.
13. The aforementioned Courts, referring to the Contracts on Loan concluded between the Applicant and *Compactherm AG*, confirmed the establishment of a contractual relationship. In addition, the Municipal Court in Deçan (C. nr. 227/2007 of 1 April 2008) imposed an interim measure, namely prohibiting the Applicant from selling, alienating and encumbering with a mortgage his immovable property, until the completion of the contested and execution procedure.
14. On 21 July 2010, the Municipal Court in Deçan (Decision E.nr. 251/2010) approved the initiation of the execution procedure. The execution procedure was also confirmed by the Decision of the District Court in Peja (Ac. nr. 440/2010 of 6 June 2011).
15. The Municipal Court in Deçan, (Decision E. nr. 251/2010 of 15 July 2011), upon the recommendation of the expertise ordered by this Court determined the value of the immovable property of the Applicant to be at the amount of 1,708,972, 00 EUR.
16. On 2 December 2012 and 6 January 2012 respectively, with the purpose of the enforcement of the execution procedures and pursuant to the Conclusions of the Municipal Court in Deçan (E.nr. 251/2010 of 26 October 2011 and E.nr. 251/2010 of 2 December 2011), two public auctions for the sale of the immovable property of the Applicant took place. In both cases, there was no interested bidder.
17. In the third public auction, held on 8 February 2012, the interested bidding parties were Hamdi Sutaj, the father of the Applicant and the creditor, *Compactherm AG*, represented by his legal representative. The immovable property of the Applicant was sold to the most bidding party, namely to Hamdi Sutaj, whereby the Court decided to set a deadline of thirty (30) days for the final payment of the amount of 1, 800,000, 00 EUR.
18. Considering the fact that the bidder, Hamdi Sutaj did not deposit the aforementioned amount within the required deadline, the Municipal Court in

Deçan, pursuant to its Conclusion E. Nr. 251/2010 of 31 May 2012 declared the sale of the immovable property of 18 April 2012 null and void.

19. On 31 May 2012, the Municipal Court in Deçan, pursuant to its Conclusion, decided to handover the immovable property of the Applicant to the creditor as the second and only bidder for the amount of the debt owed to the creditor, namely 1,723,904,53 EUR.
20. On 15 June 2012, the Municipal Court in Deçan (Decision E. No. 251/2010) confirmed the sale of the immovable property of the Applicant to the creditor. Pursuant to this Decision, the Directorate for Municipal Geodesy in Deçan was further obliged to transfer the ownership rights of the immovable property in the name of the Creditor, *Compacttherm AG* in Switzerland.
21. Against the Decision of the Municipal Court (E. No. 251/2010 of 15 June 2012), the Applicant filed an appeal with the Court of Appeal of Kosovo, alleging essential violation of the provisions of the execution procedures and erroneous and wrong determination of factual situation.
22. On 3 May 2013, the Court of Appeal of Kosovo (Decision AC. No. 3544/12) rejected the appeal of the Applicant as ungrounded and upheld the Decision of the Municipal Court in Deçan.
23. The Court of Appeal of Kosovo, held that the *“first instance court has correctly applied the provision of article 231, paragraph 1 of the Law on Execution Procedure, whereby by the appealed Decision decided to handover the immovable property, property of the Debtor, to the creditor, who although is a foreign legal person, according to Articles 3 and 4 of the Law on Foreign Investments, enjoys the rights, without discrimination, to the same extent as the national investors with regards to the right of acquisition of the property rights on the assets of the national persons”*.
24. On 4 July 2013, the Applicant submitted a proposal for the request for the Protection of Legality to the State Prosecutor.
25. On 8 July 2013, the State Prosecutor notified the Applicant that there was no legal basis to proceed with a Request for Protection of Legality.

Applicant's Allegation

26. The Applicant alleges that the Decisions rendered by the Municipal Court in Deçan and the Court of Appeal of Kosovo violated Articles 19 and 121 of the Constitution, the provisions of the Law No. 02/L-33 on Foreign Investments, the provisions of the Agreement for the Promotion and Protection of Investments between the Republic of Kosovo and the Swiss Confederation of 27 October 2011, and the provisions of the Law No. 03/L-008 on Execution Procedure.
27. With reference to Article 121, paragraph 2 of the Constitution and Article 4, paragraph 1, of the Law on Foreign Investments, the Applicant argues that [...] *“Since the creditor did not have any legal presence in the territory of the*

Republic of Kosovo, the latter could not gain in any case the status of the “foreign investor” since it has not met any of requirements, provided by Article 2 of the Law on Foreign Investments - the definition of the “foreign investor”. Consequently, the creditor did not have and does not have the legal right to be the holder of the property right over the property in the territory of Kosovo [...].

28. Article 121, paragraph 2, of the Constitution states:

“Foreign natural persons and foreign organizations may acquire ownership rights over immovable property in accordance with such reasonable conditions as may be established by law or international agreement.”

29. The Applicant further states that [...] *“the foreign legal person, previously should be registered in the Kosovo Businesses Registration Agency (KBRA) to meet essential requirement to gain the right to be the holder of the property right over the immovable property in the territory of the Republic of Kosovo.”*

30. The Applicant also requests from the Court to impose an interim measure, namely to prohibit the creditor, *Compactherm AG* from selling, alienating or encumbering with a mortgage the immovable property of the Applicant until the completion of the procedure before the Constitutional Court.

31. The Applicant concludes requesting the Constitutional Court:

“TO DECLARE the Referral of Applicant Valdet Sutaj ADMISSIBLE.

TO HOLD that the Decision of the Municipal Court in Decan, E.no. 251/2010 of 15.06.2012 and the Decision of the Court of Appeal of Kosovo AC.no. 3544/12 of 03.05.2013, are not in compliance with Article 19 [Applicability of International Law] and Article 121 [Property] of the Constitution of the Republic of Kosovo.

TO HOLD that the Decision of the Municipal Court in Decan, E.no. 251/2010 of 15.06.2012 and the Decision of the Court of Appeal of Kosovo AC.no. 3544/12 of 03.05.2013, are invalid.

TO DECLARE this Judgment effective immediately.”

The provisions of the Law on Foreign Investments No. 02/L-33, as referred to by the Applicant

Article 2, paragraph 1 of the Law on Foreign Investments provides:

“Foreign Investor” means a foreign person that has made an investment in Kosovo.

“Foreign Person” means and includes any of the following:

a. a physical person who is a citizen of, or who has legal permanent resident status in, a foreign state or geographic territory outside Kosovo;

- b. a business or other organization, entity or association - with or without legal personality - that has been established under the law of a foreign state or geographic territory outside Kosovo;*
- c. a governmental or public-administrative unit or agency of a foreign state or geographic territory outside Kosovo; and*
- d. an organization, entity or other association - with or without legal personality – that is established by treaty or other agreement between or among states or that is otherwise a subject of international law.*

“Investment” and “investment in Kosovo” mean any asset that has (i) been contributed to a Kosovo business organization in return for an ownership interest in that business organization; (ii) been leased, loaned or otherwise temporarily provided under contract to a Kosovo business organization for use in its business activities in Kosovo; or (iii) been contributed to, or leased or otherwise temporarily provided under contract to, any other type of organization lawfully established in Kosovo for use in such organization’s business or other activities in Kosovo”

Article 4.1 of the Law provides:

“Kosovo shall accord to foreign investors and their investments treatment no less favorable than the treatment it accords to any domestic investor and/or domestic investment, including - but not limited to - treatment with respect to: (i) the provision of protection and security, (ii) the establishment of an investment, (iii) the economic and other activities in which an investment may be made, and (iv) the acquisition, expansion, management and disposal of an investment.”

Assessment of the admissibility of the Referral

- 32. First of all, the Court examines whether the Applicant has fulfilled the Referral admissibility requirements.

- 33. Article 113.1 of the Constitution provides:

“The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties”.

- 34. Article 113.7 of the Constitution provides:

“Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhausting all legal remedies provided by law”.

- 35. In the instant case, the Court notes that the Applicant has sought recourse to protect his rights before the Municipal and finally before the Court of Appeal of Kosovo. In addition, he also made use of the extra-ordinary legal remedy, by submitting a proposal to the State Prosecutor to request Protection of Legality.
- 36. Thus, the Applicant is an authorized party and has exhausted all legal remedies afforded to them by the applicable law in Kosovo.

37. Consequently, the Court concludes that the Applicant meets the admissibility requirement set up by Article 113.1 and 113.7 of the Constitution.
38. The Applicant must also prove that he has fulfilled the requirements of Article 49 of the Law in relation to submission of Referral within the legal time limit. It can be seen from the case file that the Applicant was served with the Decision of the Court of Appeal of Kosovo on 28 June 2013, and filed his Referral with the Court on 20 August 2013. The Referral was submitted within the four month time limit, as prescribed by the Law and the Rules of Procedure.
39. However, the Court must also take into account Rule 36 of the Rules of Procedure, which provides:

“(1) The Court may review referrals only if: (c) The referral is not manifestly ill- founded.”

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

[...], or

(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

[...], or

(d) when the Applicant does not sufficiently substantiate his claim;”

40. The Applicant challenged the Decision of the Municipal Court in Deçan (E. No. 251/2010 of 15 June 2012) because of *“essential violation of the provisions of the execution procedures and erroneous and wrong determination of factual situation”*.
41. The Court notes that, for a *prima facie* case on the merits of the request on interim measures and on the admissibility of the Referral, the Applicant must show that the proceedings in the regular courts, viewed in their entirety, have not been conducted in such a way that the Applicant has had a fair trial or other violations have been committed by the regular courts.
42. The Court further notes that, the Court of Appeal of Kosovo reasoned its Decision holding that the challenged Decision of the Municipal Court is fair and that the applied execution procedure is in accordance with the Law.
43. In this connection, the Constitutional Court reiterates that it is not its task under the Constitution to act as a court of fourth instance, in respect of the decisions taken by the regular courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (See, *mutatis mutandis*, *García Ruiz v. Spain*, No. 30544/96, ECtHR, Judgment of 21 January 1999, para. 28, see also case No. KI 70/11, *Applicants Faik Hima*,

Magbule Hima and Bestar Hima, Resolution on Inadmissibility of 16 December 2011).

44. The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in the entirety, have been conducted in such a way that the Applicants had a fair trial (See, *inter alia*, *Edwards v. United Kingdom*, No. 13071/87, Report of European Commission of Human Rights of 10 July 1991).
45. The Court considers that the proceedings before the regular courts, including before the Court of Appeal of Kosovo, have been fair and reasoned (See, *mutatis mutandis*, *Shub v. Lithuania*, No. 17064/06, ECtHR, Decision of 30 June 2009).
46. Thus, the Applicant has not submitted any *prima facie* evidence indicating a violation of his rights under the Constitution (See *Vanek v. Slovak Republic*, No. 53363/99, ECtHR, Decision of 31 May 2005), and did not specify how Articles 19 and 121, paragraph 2, of the Constitution support his claim, as required by Article 113.7 of the Constitution and Article 48 of the Law.
47. For all the aforementioned reasons, the Court concludes that the facts presented by the Applicant did not in any way justify the allegation of a violation of the constitutional rights and the Applicant did not sufficiently substantiate his claims.
48. Thus, in accordance with Rule 36. 1 (c) and 2 (b) and (d), the Referral is inadmissible.

Request for Interim Measures

49. The Applicant requests from the Court to impose an interim measure, namely to prohibit the creditor, *Compactterm AG* from alienating the immovable property of the Applicant until the completion of the procedure before the Constitutional Court.
50. The Applicant argues that [...]“*since there is real risk that the Creditor Compactterm AG with seat in Switzerland, will alienate the immovable property, which was object of the executive procedure and will change the existing situation.*”
51. Article 27 of the Law and, in particular, Rule 54 (1) of the Rules of Procedure, provide that “*when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, a party may request interim measures.*”
52. In addition, in order for the Court to grant interim measure pursuant to Rule 55 (4) of the Rules of Procedure, it must find, namely, 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

53. As concluded above, the Referral is inadmissible, and therefore there is no *prima facie* case for the purpose of imposing interim measures and thus the request for interim measures is manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113, paragraphs 1 and 7 of the Constitution, Article 20 and 27 of the Law and Rules 36.2, 54, 55 and 56 of the Rules of Procedure, on 10 September 2013, unanimously:

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. TO REJECT the Request for Interim Measures;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- V. TO DECLARE this Decision effective immediately

Judge Rapporteur



Robert Carolan



President of the Constitutional Court



Prof. Dr. Enver Hasani