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

Pristina, 7 March 2014
Ref. No.: RK571/14

RESOLUTION ON INADMISSIBILITY

in

Case No. KI134/12

Applicant

C.P.T.C. "CLIRIMI"

Constitutional Review of Judgment Rev. E. nr. 5/2010 of the Supreme Court of Kosovo, dated 8 November 2012

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.

Applicant

1. The Referral was filed by the Company C.P.T.C. "CLIRIMI" (hereinafter, the Applicant), represented by Mr. Sahit Bibaj, Attorney at Law in Pristina.

Challenged decision

2. The Applicant challenges the Judgment Rev. E. nr. 5/2010 of the Supreme Court, dated 8 November 2012.

Subject Matter

3. The Applicant requests the constitutional review of the challenged decision, which allegedly violated its right to a fair and impartial trial under Article 31 of the Constitution.

Legal basis

4. The Referral is based on Articles 113.7 and 21.4 of the Constitution, Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter, the Law) and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules Procedure).

Proceedings before the Court

5. On 28 December 2012, the Applicant filed a referral with the Constitutional Court.

6. On 10 January 2013, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel consisting of Judges Snezhana Botusharova (Presiding), Enver Hasani and Kadri Kryeziu.

Summary of the facts

7. On 4 October 2005, the Applicant presented a number of bills to the Municipality of Gllogoc for the performance of certain additional road works. However, the Municipality refused to pay these bills because no written contract existed between the parties. Thereupon, the Applicant appealed to the Municipality's Executive Chief.

8. On 20 December 2005, the Executive Chief of the Gllogoc Municipality Assembly approved the payment of only one of the presented bills, and ordered the Municipal Directorate of Finance to execute the ruling.

9. On 15 January 2006, the Applicant requested to the District Court in Prishtina the payment by the Municipality of Gllogoc of the outstanding bills.

10. On 16 February 2006, the District Court (Decision E. nr. 30/2006) approved the execution of the Applicant's claim. Meanwhile, the Municipality appealed that Decision before the same District Court.

11. On 25 July 2006, the District Court held a hearing and decided to assign two experts to the case for the preparation of an expertise. The experts' findings apparently supported the Applicant's claim.

12. On 17 July 2007, the District Court held a further hearing and on the same day annulled (Judgment No. II. C. nr. 49/2006) its previous decision (E. nr. 30/2006) and rejected the Applicant's claim as ungrounded, because it was mandatory for such construction contracts to be in written form, instead of in the form of an oral agreement with the Executive Chief of Gllogoc Municipality Assembly as held by the Applicant.

13. On 2 November 2007, the Applicant appealed against Judgment No. II. C. nr. 49/2006 to the Supreme Court, alleging a serious violation of provisions of civil procedure, the incomplete and wrongful determination of the factual situation and the wrongful application of the material law. The Applicant further argued that the additional works had been approved by the Municipal Committee for Politics and Finances on 11 December 2003 and that, pursuant to Article 73 of the Law on Obligations, when a contract is not in writing but is executed in full or most of it, the contract is valid.

14. On 23 June 2010, the Supreme Court (Judgment A. e. nr. 135/2007) turned down the appeal as ungrounded and confirmed the contested judgment, reasoning that the District Court had rightfully established the factual situation and implemented the material law when it ruled that the Applicant's claim was ill-founded. The Court stated further that, pursuant to Article 633 of the Law on Obligations, construction contracts must be established in written form and that for any deviation from the construction project or work the implementer must obtain the written consent of the hirer and cannot ask for any increase in the amount contracted for the work he has executed without such consent.

15. On 8 July 2010, the Applicant filed a revision with the Supreme Court, requesting it to annul the contested judgments and to approve its claim, arguing the Supreme Court had not properly justified its refusal of these claims.

16. On 8 November 2012, the Supreme Court (Judgment Rev. E. nr. 5/2010) rejected the Applicant's revision as ungrounded and confirmed the judgment of the District Court of 17 July 2007, stating that the District Court had turned down the Applicant's claim, because the latter was not authorized to change the project without the written consent for the additional works by the hirer/investor and that, therefore, the responding party's obligation to pay to the Applicant the contested amount could not stand. The Court further stated that the appealed judgment did not contain any violations of the Law on Obligations.

Applicant's allegation

17. The Applicant alleges that, contrary to Articles 24 [Equality before the Law] and 31 [Right to Fair and Impartial Trial] of the Constitution, its rights to a fair and impartial trial have been violated, since the parties in this procedure were not equally treated and that the courts did not review the evidence and facts provided by the Applicant. The Applicant further argues that the District Court as well as the Supreme Court did not provide convincing reasons for rejecting its case and wrongfully applied the material law.

18. The Applicant also claims that there is a violation of Article 6 of the ECHR and Article 10 of the Universal Declaration.

Admissibility of the Referral

19. The Court notes that the Applicant, in its revision submitted to the Supreme Court, alleges that the first instance as well as the second instance courts have wrongly applied the material law and it describes in detail how the courts should have properly applied the pertinent articles of the Law on Obligations and the Law on Public Procurement.

20. 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 remedies provided by law".*

21. The same principle is laid down in Article 47.2 of the Law on the Constitutional Court.

22. The Court also refers to Article 21.4 of the Constitution, which provides:

> *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

Consequently, the Company C.P.T.C. "CLIRIMI" is entitled to submit a constitutional complaint to this Court, invoking a violation of constitutional rights and freedoms in the same way, albeit "to the extent possible" as individuals. This means that the Applicant is also under the obligation to exhaust all legal remedies as individuals are required to do as stipulated by the above Article 113.7 of the Constitution and Article 47.2 of the Law on the Constitutional Court.

23. The Court further stresses that the exhaustion rule does not only require an applicant, before submitting a referral to the Court, to exhaust all legal remedies available under Kosovo law, including the highest instance court, but also to have raised the alleged violations of fundamental rights in the proceedings before these instances.

24. The rationale for the exhaustion rule, as interpreted by the European Court of Human Rights (see Article 53 of the Constitution), is to afford the authorities concerned, including the courts, the opportunity of preventing or putting right the violation of the Constitution alleged against them before those allegations are submitted to this Constitutional Court (see, *mutatis mutandis*, ECtHR, Selmouni v. France, no. 25803/94, judgment of 28 July 1999).

25. Consequently, the bodies concerned, including the relevant courts, are dispensed from answering for their acts before the Constitutional Court, before they have had an opportunity to put matters right through their own procedures. The rule is based on the assumption that the Kosovo legal order

will provide an effective remedy in respect of the alleged breach(es) of constitutional rights. In this way, it is an important aspect of the principle that the protection machinery of the Constitutional Court established by the Constitution is subsidiary to the court systems safeguarding human rights.

26. Thus, the complaint which the Applicant has filed with this Court, must first have been submitted – at least in substance – to the appropriate body(ies), including the competent courts, and in compliance with the procedural requirements, including the time limits to be observed, laid down in Kosovo law (see, *mutatis mutandis,* Handyside v. the United Kingdom, ECtHR Judgment of 7 December 1976, Series A no. 24, p.22, para 48 and Cardot v. France, HCtHR Judgment of 19 March 1991, Series A no. 200, p. 18, para. 34 as well as Case No. KI41/09, AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Resolution of the Constitutional Court of 27 January 2010).

27. In accordance with the above ECtHR case law which the Court needs to apply consistently when interpreting human rights and freedoms guaranteed by the Constitution, as provided by Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is not necessary for an applicant to have mentioned the exact Articles of the Constitution or applicable international instruments in the proceedings before the authorities concerned, including the courts. As long as the violation of fundamental rights, which an applicant is raising before this Court, has been raised implicitly or in substance in the proceedings concerned, the exhaustion rule is satisfied (see, *mutatis mutandis,* ECtHR, Azianas v. Cyprus, no. 56679/00, Judgment of 28 April 2004).

28. In this connection, the Court also recalls that applicants are only required to exhaust remedies that are available and effective (see, *mutatis mutandis,* ECtHR, Cinar v. Turkey, no. 28602/95, Judgment of 13 November 2003).

29. However, as to the complaints raised before the Constitutional Court, it has to be concluded that the Applicant has not submitted any evidence whatsoever, showing that, in the proceedings before the District Court and the Supreme Court in last instance, he has invoked a violation of Articles 21.4 and 31 of the Constitution as well as of Article 6 ECHR and Article 10 of the Universal Declaration, not even implicitly or in substance.

30. The Court, therefore, considers that, contrary to the requirements of Article 113.7 of the Constitution and Article 47.2 of the Law, the Applicant has not exhausted all legal remedies provided by law.

31. It follows that the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution and Article 47(2) of the Law, and Rule 36 (1)(c) and Rule 56 (2) of the Rules of Procedure, in its session held on 13 May 2013,

DECIDES

I. TO DECLARE the Referral as 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.

Judge Rapporteur **President of the Constitutional Court**

Almiro Rodrigues Prof. Dr. Enver Hasani