



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

Pristina, 8 July 2013
Ref. No.:RK445/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI137/12

Applicants

Ata Ibiši and Others

Constitutional Review of the judgment of the District Court in Prizren
GŽ.br.99/2010, of 5 June 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 and
Arta Rama-Hajrizi, Judge.

Applicants

1. The Applicants are Ata Ibiši, Šefki Ibishi, Sejdi Ibiši, Ramadan Ibiši and Ajša Sadiku from village Mlika, Municipality of Dragash.

Challenged decision

2. The Applicants challenge the judgment of the District Court in Prizren Gž.br.99/2010, of 5 June 2012, which was served to the Applicants on 28 August 2012.

Subject Matter

3. The Applicants claim that District Court in Prizren, through its judgment Gž.br.99/2010, of 5 June 2012, both procedurally and substantially violated their rights as guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: "The Constitution") in conjunction with Article 6.1 of the [Right to a Fair Trial] of the European Convention on Human Rights (hereinafter: "ECHR") in conjunction with Article 1 of Protocol 1 to the ECHR.

Legal Basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 of the Law, No. 03/L-121, on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the "Law") and Rule 56 (2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Proceedings before the Court

5. On 31 December 2012, the Applicants submitted the Referral with the Constitutional Court of the Republic of Kosovo (hereinafter: the "Court").
6. On 14 January 2013, the President of the Constitutional Court, with Decision No.GJR.KI-137/12, appointed Judge Snezhana Botusharova as Judge Rapporteur. On the same date, the President of the Constitutional Court, with Decision No.KSH.KI-137/12, appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Ivan Čukalović.
7. On 27 February 2013, the Court informed the Applicants that the referral was registered, and requested from the Applicants to fill in the official form of the referral. The Applicants did not reply on this request until the day of deliberation.
8. On 27 March 2013, the Constitutional Court sent a letter to the Municipal Court in Prizren, requesting submission of the return receipt in order to prove the date when the Applicants had received the judgment Gž.br.99/2010 of the District Court in Prizren, of 5 December 2012.

9. On 4 April 2012, the Court received a letter from the Municipal Court in Prizren, attached to which was a copy of the return receipt, which confirmed the date of service of the judgment to the Applicants.
10. On 25 June 2013 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

11. On an unspecified date the Applicants filed a lawsuit with the Municipal Court in Dragash, requesting confirmation of the ownership over an area of 4,83 m², which in May 2007 was fenced by another person R.S. , and attached to his cadastral parcel No. 632, which according to the Applicants belongs to them, respectively it is part of cadastral parcel No. 631.
12. On 12 January 2010, Municipal Court in Dragash adopted judgment P.br.43/07, which rejected the lawsuit of the Applicants as ungrounded. In the reasoning part of this judgment is stated that: *"The court in this legal matter administered the evidence and performed an onsite inspection by the court in the presence of geodesy experts eng. M.H. and X. I., read the conclusions of their findings as well as listened as witnesses the same, reviewed the sketch drafted by the hired experts, and heard the witness S.I., reviewed a copy of the plan issued by the Directorate for Cadastre and Geodesy dated 13.11.2006, so that with the full evaluation of all the administered evidence one by one and in mutual relation with the other evidence and confirmed facts, and pursuant to article 8 of the LCP decided as in the enacting clause of this judgment..."*
13. On an unspecified date, the Applicants filed an appeal with District Court in Prizren, against judgment P.br.43/07, of Municipal Court in Dragash.
14. On 5 June 2012, District Court in Prizren adopted its judgment Gž.br. 99/2010, which rejected the appeal of the Applicant as ungrounded, and confirmed the judgment P.br.43/07, of Municipal Court in Dragash, adopted on 12 January 2010.

Applicants' allegations

15. The Applicants alleges that the judgment of the District Court violated the rights as guaranteed by the Constitution and the ECHR, respectively Article 31 [right to a fair and impartial trial] of the Constitution and Article 6 paragraph 1 [right to a fair trial] of the ECHR in conjunction with Article 1 of the Protocol 1 to the ECHR.
16. According to the Applicants the *"violation of their rights is a consequence of the actions of the first instance court – Municipal Court in Dragash, which failed to preserve its impartiality during this procedure in detriment of the Applicants and also applied wrongfully the provisions of substantive law."*

17. Furthermore, the Applicants claim that *“Municipal Court refused to consider the proofs presented by the Applicants, which would prove important facts related to the property dispute in question.”*
18. In addition, the Applicants allege that District Court in Prizren did not treat their appeal in a proper manner, but *“only gave a general evaluation without real and based reasoning, without logical content on the refusal of the claimants’ appeal and approval of the first instance judgment.”*

Admissibility of the Referral

19. The Court observes that, in order to be able to adjudicate the Applicants’ complaint, it is necessary to first examine whether the Applicants have fulfilled the admissibility requirements laid down in the Constitution as further specified in the Law and the Rules of Procedure.
20. In this respect, the Court refers to Article 49 of the Law on Constitutional Court provides:

“The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force”

21. The Court notes that the referral was submitted to the Court by mail 3 (three) days after the deadline. However, taking into account that the first working day after the deadline was 31 December 2012, the date on which the referral was submitted, the Court considers that the referral was submitted in compliance with Article 49 of the Law.
22. Moreover, the Court refers to Article 113.7 of the Constitution which provides that:

“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.”

and 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.”

23. In this respect, the Court notes that the principle of subsidiary requires that the Applicants exhaust all procedural possibilities in the regular proceedings in order to prevent the violation of the constitution or, if any, to remedy such violation of a fundamental right.
24. The Court wishes to emphasize that the rationale for the exhaustion rule is to afford the authorities concerned, including the 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 will provide an effective remedy for the violation of constitutional rights. (see, *mutatis mutandis*, ECHR, *Selmouni v. France*, no. 25803/94, decision of 28 July 1999). However, it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned. As long as the issue was raised implicitly or in substance, the exhaustion of remedies is satisfied (see, *mutatis mutandis*, ECHR, *Azinas v. Cyprus*, no. 56679/00, decision of 28 April 2004).

25. In the present case, the Court notes that the Applicants in their submission, have not substantiate in whatever manner, why they consider that legal remedies mentioned in Law No. 03/L-006 on Contested Procedure, would not be available, and if available, would not be effective and, therefore, not need to be exhausted (see *mutatis mutandis* *Ahmet Arifaj v Municipality of Klina – KI23/09*, Resolution on Inadmissibility of 20 April 2010). Applicants, however, must first attempt to seek relief through available remedies before concluding that such remedies are ineffective. The abstract allegation that available remedies are ineffective does not satisfy the exhaustion requirement (see *Tmava et al. v. Ministry of Transport and Telecommunications*, KI-17/10, Resolution on Inadmissibility of 15 October 2010).
26. Therefore, the Applicants have not exhausted all legal remedies available under applicable law, as required by Article 113.7 of the Constitution and Article 47.2 of the Law.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 of the Law and the Rule 36 (1) a) of the Rules of Procedure, on 8 July 2013, unanimously

DECIDES

- I. TO REJECT the Referral as Inadmissible;
- II. TO NOTIFY this decision to the Parties
- III. TO PUBLISH the decision in the Official Gazette, in accordance with Article 20 (4) of the Law; and
- IV. This Decision is effective immediately.

Judge Rapporteur



Snezhana Botusharova

President of the Constitutional Court



Prof. Dr. Enver Hasani

